

**DESIGNATED PORT AREAS**

**A MANUAL FOR LAWYERS**

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**New England Law Center for Law & Social Responsibility  
2009**

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## **Executive Summary**

The purpose of this Manual is to educate those who wish to better understand the legal and historical bases for Designated Port Area (DPA) designations. In addition, this Manual addresses the various constraints that DPA designation places on development. Finally, this Manual addresses various means through which communities and landowners may seek to improve compatibility between DPA and non-DPA land uses and activities within a single community.

The federal Coastal Zone Management Act establishes a national policy to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone.” In keeping with this policy, the Massachusetts Coastal Zone Management (CZM) office works to ensure that coastal development of water-dependent uses is accommodated and protected.

CZM takes the position that the maintenance of a healthy maritime industry requires three basic components: (1) a waterway and associated waterfront that have been developed for commercial navigation; (2) a land area adjoining the water's edge that is conducive in both physical configuration and use character to the siting of industrial operations; and (3) land-based transportation and public utility service appropriate for general industrial purposes. Because there are relatively few water and land areas that possess all three components, CZM considers the protection and maintenance of such areas for maritime industry an important duty. As one means of meeting this duty, in 1978 CZM established the DPA program.

Overall guidelines for how the Commonwealth operates within DPAs may be found in Massachusetts General Laws Chapter 91, in general EEA policies, and in a series of written CZM policies. The operating presumption that can be elicited from these sources is that DPAs are unique and important to the state's maritime industry, and therefore the preservation of DPAs as coastal areas available for maritime industrial operations takes precedence over other activities and interests in the coastal zone. Laws and policies generally considered to protect the public's access rights to the shoreline, such as the public trust doctrine, have been interpreted to accommodate the presumption favoring DPAs. See Manual sections II and III for further discussion regarding Chapter 91 and these policies.

The DPA regulations protect and preserve DPAs for water-dependent industrial uses and collateral uses associated with industrial uses. The flexibility found in the DPA regulations does not extend to non-commercial or commercial recreational uses that would encourage members of the public to enter DPAs for purposes other than accessing a water-dependent industrial or collateral operation. See Manual section IV for further discussion of the DPA regulations.

Land and water areas that are part of a DPA are often subject to additional federal, state, and local regulatory programs. A lawyer seeking to impact development or encourage redevelopment within a DPA should be aware of such regulatory programs. Manual section V identifies other regulatory programs that can impact land and water development within a DPA.

Municipal Harbor Plans (MHP) and DPA Boundary Reviews are means through which some communities and landowners seek to alter or work with a DPA. MHPs are planning devices that

allow a municipality to develop their waterfronts, establishing the community's objectives, standards, and policies for guiding utilization of land and water within Chapter 91 jurisdiction. MHPs offer an opportunity for a community to develop a comprehensive plan for the waterfront that brings the goals of DPA designation into some level of harmony with the goals of the greater community. Often, an MHP will contain a DPA Master Plan which, while reflecting the use limitations inherent in DPA status, tend to introduce some flexibility into DPA planning so that it may work better with the community's waterfront plan. MHP are covered in section VI of this Manual.

Boundary reviews allow a DPA's boundaries to be analyzed and possibly modified if a parcel does not meet certain suitability criteria set forth in the regulations. Most parcels within a DPA are presumptively ineligible for a boundary review. However, if a parcel does not fall into one of the ineligibility categories, then it shall be included or remain in a DPA only if CZM finds that the parcel is in substantial conformance with certain regulatory criteria developed to gauge the parcel's suitability for water-dependent industrial use. Boundary reviews examine parcels individually, but the suitability criteria that guide whether a parcel remains within a DPA are applied in the context of surrounding parcels.

The Manual summarizes a number of boundary reviews that have occurred, and offers guidance on the facts and circumstances that appear promising for communities or landowners seeking to change the boundary of a DPA so as to benefit the community. This discussion is contained in Manual section VII.

## **I. Overview**

In 1972, Congress passed the Coastal Zone Management Act (CZMA), which established a national policy to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”<sup>1</sup> In keeping with the federal program, Massachusetts established the Massachusetts Coastal Zone Management (CZM) office and authorized it to ensure that coastal development of water-dependent uses would be accommodated.<sup>2</sup> The Massachusetts coastal management program is implemented through several agencies within the Executive Office of Energy and Environmental Affairs (EEA), with CZM serving as the primary agency among these in the development of both technical standards and policies.<sup>3</sup> CZM’s mission is “to balance the impact of human activities with the protection of coastal and marine resources through planning, public involvement, education, research, and sound resource management.”<sup>4</sup>

Due in part to Massachusetts’s history as a seafaring state with a working waterfront, coastal facilities for commercial fishing operations, the shipping industry activities, passenger ferry services, and other port operations tend to be perceived as an indispensable elements of the intermodal network linking maritime commerce with those who occupy the land.<sup>5</sup> Operating from this perspective, CZM takes the position that the maintenance of a healthy maritime industry requires three basis components: (1) a waterway and associated waterfront that have been developed for commercial navigation; (2) a land area adjoining the water’s edge that is conducive in both physical configuration and use character to the siting of industrial operations; and (3) land-based transportation and public utility service appropriate for general industrial purposes.<sup>6</sup> Because of the relatively few water and land areas that possess all three components, CZM considers the protection and maintenance of such areas important.<sup>7</sup> As one means of affording such areas protection, in 1978 CZM established the Designated Port Area (DPA) program.

CZM launched the DPA program by identifying eleven DPA sites. The goal of this program was to satisfy “both the foreseeable and [] unanticipated space needs of industrial use that depend on proximity to a waterway, either for the transportation of the good/passengers or the withdrawal/discharge of large volumes of process water.”<sup>8</sup>

The eleven DPAs are located in Gloucester, Salem, Beverly, Lynn, Mystic River, Chelsea Creek, East Boston, South Boston, Weymouth/Fore River, New Bedford-Fairhaven, and Fall River/Mt. Hope Bay. There have been no further additions to the DPA program since its inception.<sup>9</sup> Three DPAs have Master Plans, developed as part of Municipal Harbor Plan (MPH) (East Boston, New Bedford-Fairhaven and Salem). In addition, Gloucester is currently in the process of developing a DPA Master Plan.<sup>10</sup>

## **II. EEA and CZM Policies Impacting DPAs**

In 1994, the EEA (then called the Executive Office of Environmental Affairs)<sup>11</sup> published regulations addressing DPAs, and included with those an introduction identifying the state’s overarching policies on DPAs. It is worth noting that this introductory language, although informative as to the EEA’s views on DPAs, is not identified as a statement of policy as that

term is sometimes used in administrative law. According to the introductory statement, water-dependent industries “have never been treated as pure land banks in which space not presently utilized for water-dependent industry is off-limits to other productive enterprise.”<sup>12</sup> To the contrary, the introductory statement indicates that both CZM and the Massachusetts Department of Environmental Protection (DEP) accept that in appropriate circumstances a substantial amount of non-maritime development may take place within a DPA, as long as such development avoids long-term exclusion of maritime industry and provides economical operational support for the industrial water-dependent uses on what EEA terms an “interim basis.”<sup>13</sup>

Furthermore, the EEA statement sets forth the idea that DPAs should not be viewed as cutting off a community from its waterfront, and that communities should not be forced to tolerate undue side effects of a DPA designation.<sup>14</sup> The EEA statement anticipates that those regulating within DPAs will exercise “judicious planning” of the use mix in the DPA together with “compatible incorporation of public access facilities into the design of individual projects” which could advance the “quality-of-life objectives of the surrounding community without significant interference with maritime activities at or near the waterfront.”<sup>15</sup>

In addition to the general EEA policies expressed in the introductory statement to the DPA regulations, state policies on DPAs can be found in some CZM policies. The CZM Program Plan contains policies which embody the priorities and goals of the Commonwealth in connection with its coastal areas.<sup>16</sup> These policies have been formalized in a Memorandum of Understanding between CZM and other Massachusetts environmental agencies.<sup>17</sup> Projects that implicate these policies must be consistent with them, and they are enforced through existing statutes and regulations.<sup>18</sup>

The following policies, set forth in the *Port and Harbor Infrastructure* section of CZM’s Program Plan, address DPAs:

- Ports Policy #3: Preserve and enhance the capacity of Designated Port Areas (DPAs) to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands over which a state agency exerts control by virtue of ownership, regulatory authority or other legal jurisdiction.
- Ports Management Principle #1: Encourage, through technical and financial assistance, expansion of water-dependent uses in designated ports and developed harbors, re-development of urban waterfronts, and expansion of visual access.<sup>19</sup>

These policies make clear that, where a DPA exists, CZM expects industrial water-dependent uses to be encouraged. It is worth noting, however, that other CZM Policies may be read to encourage the agency to favor non-industrial uses of the coastline. These policies include, but are not limited to:

- Habitat Policy #1. Protect wetland areas including salt marshes, shellfish beds, dunes, beaches, barrier beaches, salt ponds, eel grass beds, and freshwater wetlands for their role as natural habitats.

- Habitat Policy #2. Promote the restoration of degraded or former wetland resources in coastal areas and ensure that activities in coastal areas do not further wetland degradation but instead take advantage of opportunities to engage in wetland restoration.
- Protected Areas Policy #3. Review proposed developments in or near designated or registered historic districts or sites to ensure that the preservation intent is respected by federal, state, and private activities and that potential adverse effects are minimized.
- Coastal Hazard Policy #2. Ensure construction in water bodies and contiguous land areas will minimize interference with water circulation and sediment transport. Approve permits for flood or erosion control projects only when it has been determined that there will be no significant adverse effects on the project site or adjacent or downcoast areas.
- Coastal Hazard Policy #4. Prioritize public funds for acquisition of hazardous coastal areas for conservation or recreation use, and relocation of structures out of coastal high hazard areas, giving due consideration to the effects of coastal hazards at the location to the use and manageability of the area.
- Ports Policy #1 - Ensure that dredging and disposal of dredged material minimize adverse effects on water quality, physical processes, marine productivity and public health.
- Ports Policy #2. Promote the widest possible public benefit from channel dredging, ensuring that designated ports and developed harbors are given highest priority in the allocation of federal and state dredging funds. Ensure that this dredging is consistent with marine environment policies.
- Public Access Management Principle #1. Improve public access to coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation. Link existing coastal recreation sites to each other or to nearby coastal inland facilities via trails for bicyclists, hikers, and equestrians, and via rivers for boaters.
- Public Access Management Principle #2. Increase capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance and public support facilities. Resolve conflicting uses whenever possible through improved management rather than through exclusion of uses.
- Public Access Management Principle #3. Provide technical assistance to developers of private recreational facilities and sites that increase public access to the shoreline.
- Public Access Management Principle #4. Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities. Give highest priority to expansions or new acquisitions in regions of high need or limited site availability. Assure that both transportation access and the recreational facilities are compatible with social and environmental characteristics of surrounding communities.

The policies set forth above could help form a framework for how a community could work to better address the needs of the public and the environment vis a vis the community's waterfront where the waterfront is within a DPA. For example, the Protected Area Policy addresses the need to protect historic districts. Since the DPA status is supposed to reflect and preserve a waterfront area's history as an industrial port, it's likely that many DPAs contain sites or structures that are also within historic districts. They should, therefore, be preserved and enhanced in such a manner as to allow the public to enjoy them as historical resources. Indeed, many of the Municipal Harbor Plans, discussed below in section VI, suggest that the public should have access to these historic districts as long as there is no interference with the working port. Such Municipal Harbor Plans, including those containing DPA Master Plans, could provide a means to introduce some flexibility into how DPAs may be developed, cleaned up, or otherwise improved.

The Public Access Management Principles all may be read to acknowledge that coastal areas should support some amount of recreational facilities. These principles could help bolster an argument that all waterfront areas, even those subject to DPA status, should have some amount of recreational facilities for the general public to enjoy. Again, any strategy to successfully utilize these principles to introduce non-industrial activities in or near a DPA must include emphasis on the idea that recreation encouraged in the vicinity of a DPA would not interfere with the working port. Thus, the analysis of where to place these facilities would necessarily be made on a case-by-case basis.

### **III. Chapter 91 and the Massachusetts Public Trust Doctrine**

Two sources of public rights to access the shoreline are Massachusetts General Laws c. 91 (Chapter 91) and the public trust doctrine. Although these bodies of law might be presumed to conflict with the state policies favoring DPAs, discussed above, in actuality both have been made to accommodate the DPA policy favoring industrial uses of the Massachusetts shoreline in locations where a DPA has been designated.

The public trust doctrine is based upon two principles: that the public has a fundamental right and interest in the state's natural resources such as its shoreline, and that the state, as trustee of the public's interest, has a duty to preserve and enhance these natural resources and the public's right to use them.<sup>20</sup> In keeping with this doctrine, Chapter 91, entitled "Waterways," identifies as its overarching goal the preservation of the public's rights in connection with the shoreline, and thus sets forth a policy that private uses of tidelands and waterways must serve a public purpose.<sup>21</sup>

To meet this overarching goal, Chapter 91 charges the state with the following duties:

- Preservation of pedestrian access along the water's edge for fowling, navigation, etc. and to provide facilities to enhance public use and enjoyment of the water.
- Protection and extension of public strolling rights.
- Protection and promotion of tidelands as a workplace for commercial fishing, shipping, etc. which proximity to the water is either essential or highly advantageous.

- Protection of areas of critical environmental concern.
- Protection of the rights of waterfront property owners to approach their property from the water.
- Encouragement of development of city and town harbor plans so as to dovetail local waterfront land use interests with statewide concerns.
- Assurance of the removal or repair of unsafe or hazardous structures.
- Protection of traditional maritime industries, such as fishing and shipping, from displacement by commercial or residential development.<sup>22</sup>

Although several of these duties, such as the duty to preserve pedestrian access, strolling rights, and public enjoyment of the water, appear to clash with the policies and principles underlying the designation and maintenance of DPAs, most of the duties listed above may be read to be compatible with a scheme that bans public access from coastal areas designated as appropriate for industrial uses.

Since 1979, the Waterways regulations have included provisions that prevent development in a DPA that would have an exclusionary effect on the water-dependent industrial uses for which DPAs are reserved.<sup>23</sup> Originally, these restrictions applied only to waterways themselves because the state's Chapter 91 jurisdiction ended at the high water mark.<sup>24</sup> The licensing authority of DEP under Chapter 91 was expanded in 1984 to include filled tidelands and this allowed Chapter 91 policies and regulations to be enforced on land as well as in contiguous waters.<sup>25</sup> Furthermore, in 1990, modifications to the Chapter 91 regulations imposed limits on the nonwater-dependent industrial uses that the state was authorized to license within DPAs.<sup>26</sup> This amendment to the Chapter 91 regulations sought to "protect and promote tidelands for water dependent uses ... [and] ... provide greater control over private development of waterways and filled tidelands to ensure that appropriate areas are available for public use and enjoyment."<sup>27</sup>

Chapter 91 accommodates the DPA program, including the notion that some coastal areas may be designated as off limits to all non-industrial uses because of the need for the industrial activities located in those areas to be adjacent to a water body. Further, Chapter 91 addresses the compatibility of industry uses and other neighboring land uses in two ways. First, Chapter 91 prohibits the construction of residential buildings on DPA property.<sup>28</sup> Second, Chapter 91 requires that language in a deed or lease for non-DPA property that falls under Chapter 91 jurisdiction must reference the nearby DPA in order to alert residents to potentially incompatible use issues that might arise.<sup>29</sup>

Similarly, the Massachusetts public trust doctrine accommodates the exclusionary nature of DPAs. In *Boston Waterfront Development Corp. v. Commonwealth*, the Massachusetts Supreme Judicial Court stated that the state's legislature has broad powers to dictate how land is to be used as long as the land was used in conformity with the public trust doctrine.<sup>30</sup> The *Boston Waterfront Development* court's conclusion was based upon its analysis of how the

Massachusetts shoreline had been used historically. The court stated that the public was vested with some rights to shoreline access guaranteed by public ownership in Roman times, yet the Legislature had the power to interfere with public right of passage as long as it was for the greater public good.<sup>31</sup> Accordingly, land below the low water mark cannot be used in a manner that materially impairs navigation, and such land can only be granted to a private party to fulfill a public purpose (and thus is a grant of law in fee simple subject to conditions subsequent).<sup>32</sup> According to the court, “public purpose” means that the “use or service must be of such a nature that in essence it affects [inhabitants] as a community and not merely as individuals,” even if only a few partake in the benefits.<sup>33</sup>

Although the definition of “public purpose” may sound promising for those seeking to promote public access to DPA land, in *Boston Waterfront Development* the public purposes was defined as “promot[ing] trade and commerce by enabling and encouraging the owners of flats to build wharfs, warehouses and other structures thereon for the use and convenience of those having occasion to resort to the ports and harbors.”<sup>34</sup>

#### *Capsule Summary of Sections II and III*

In sum, Chapter 91, general EEA policies, and the written CZM policies form the overall guidelines for how the Commonwealth of Massachusetts operates in connection with DPAs. The general presumption elicited from these sources is that DPAs are unique and important to the state’s maritime industry, and therefore should be preserved and protected. Other laws and policies which are generally considered to protect the general public’s access rights to the shoreline, such as the public trust doctrine, accommodate this presumption favoring DPAs.

#### **IV. Regulations**

The primary regulations addressing DPAs are codified at 301 CMR 25.00. Other regulations also play a role in defining the scope and use of DPAs, including the Waterways regulations (301 CMR 9.00) and the Municipal Harbor Plans regulations (301 CMR 23.00). Thus, the following discussion on how DPAs are regulated primarily focuses on 301 CMR 25.00, but also includes some information from the other regulations.

#### *Authority, Purpose and Definitions*

The EEA adopted the DPA regulations pursuant to the authority of Massachusetts General Laws c. 21A §§2 and 4A.<sup>35</sup> These regulations implement the Massachusetts Coastal Zone Management Program for the purpose of securing the objectives and benefits of the Federal Coastal Zone Management Act (16 U.S.C. 1451) for the Commonwealth’s inhabitants. The Federal Coastal Zone Management Act established a national policy to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”<sup>36</sup> Further, the federal Act encourages and will assist states in “exercise[ing] effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone.”<sup>37</sup>

The DPA program works to ensure that water-dependent industrial uses are encouraged in areas recognized as suitable for such uses.<sup>38</sup> Although water-dependent industrial uses vary in scale and intensity, they share a need for infrastructure with three essential components: waterways and developed waterfronts, backlands (the land situated behind these waterways and waterfronts) of supporting industrial facilities and operations, and transportation and public utilities appropriate to service industrial operations.<sup>39</sup>

As stated in the regulations, areas with the above-listed attributes are in a “very limited and diminishing portion of the coastal zone” so that the “industrialized coast should be preserved to the maximum extent practicable in order to meet the long term, cumulative space needs of the water-dependent industries” that these areas “are so well-suited to accommodate.”<sup>40</sup> It has become a matter of state policy to not allow these “scarce and non-renewable resources ... to be irretrievably committed to, or otherwise significantly impair[ed] by, non-industrial or nonwater-dependent types of development” which have a greater range of location options.<sup>41</sup>

The DPA regulations “encourage water-dependent industrial use and...prohibit, on tidelands subject to the jurisdiction of M.G.L. c. 91, other uses except for compatible public access and certain industrial, commercial, and transportation activities that can occur on an interim basis without significant detriment to the capacity of DPAs to accommodate water-dependent industrial use in the future.”<sup>42</sup> In short, the DPA regulations subvert the usual thrust of Chapter 91 by excluding almost all non-industrial activities from shoreline areas designated as DPAs.

In the DPA regulations, water-dependent industrial use is defined as any use that is in accordance with 310 CMR 9.12(2)(b) of the Waterways regulations. The Waterways regulations list examples of water-dependent industrial uses, including marine terminals, commercial fishing facilities, marine repair and construction facilities, manufacturing facilities that rely primarily on bulk receipt, or facilities accommodating the shipment of goods by water.<sup>43</sup> The Waterways regulations also define these uses more broadly, as: “industrial uses or infrastructure facilities which cannot be reasonably located at an inland site as determined by 310 CMR 9.12(c) or (d).<sup>44</sup> Any project that does not fit within one of these two definitions of the regulations will be “classified as a nonwater-dependent use project.”<sup>45</sup>

### *Temporary and Supporting Uses*

The Waterways regulations also provide for “Temporary Uses” and “Supporting Uses” within a DPA. Temporary Uses are described as: “warehousing, trucking, parking and other industrial and transportation uses which occupy vacant space or facilities within a [DPA], for a maximum of ten years.”<sup>46</sup> Supporting Uses are described as: “industrial or commercial use within a [DPA] that provides water-dependent industrial uses within the DPA with direct economic or operational support, to an extent that adequately compensates for the reduced amount of tidelands ... [that] will be available for water-dependent industrial use during the term of the license of that Supporting Use.”<sup>47</sup>

The regulations identify certain Supporting Uses as presumptively compatible with DPA uses. These include storefront retail and service facilities, shops operated by self-employed tradespersons, eating and drinking establishments and small-scale administrative offices.<sup>48</sup>

Certain uses are deemed presumptively incompatible with a DPA. These include residential units, hotels and motels, recreational boating facilities, and large sport/amusement complexes.<sup>49</sup> Supporting Uses are limited to 25% of the total DPA area.<sup>50</sup> It should be noted that some incompatible uses may exist in particular DPAs because they pre-date the DPA's designation, and that such incompatible uses are "grandfathered" and are not subject to the regulatory restrictions unless and until the landowner applies for a change of use or to develop his or her land further.<sup>51</sup>

### *Accessory Uses*

Another type of use allowed in DPAs is an "Accessory Use." A use will be deemed an Accessory Use if it is found to be an "accessory to a water-dependent use upon a finding [by DEP] that said use is customarily associated with and necessary to accommodate a principal water-dependent use."<sup>52</sup> This finding will only be made if the proposed use is "integral in function to the construction or operation of the water-dependent use ... or provides related goods and services primarily to persons engaged in such use and commensurate in scale with the operation of the water-dependent use in question."<sup>53</sup> Examples include, but are not limited to: access and interior roadways, parking facilities, administrative offices, restaurants and retail facilities.<sup>54</sup>

### *Capsule Summary of Regulations*

In sum, the DPA regulations protect and preserve DPAs for water-dependent industrial uses and collateral uses associated with such industrial uses. Such flexibility as can be found in the regulations does not extend to non-commercial or commercial recreational uses that would encourage members of the public to enter DPAs for purposes other than accessing a water-dependent industrial or collateral operation.

### *DPA Master Plans*

DPA Master Plans are only present when the area covered by the DPA is subject to a Municipal Harbor Plan (MHP). The DPA Master Plan is the "component of a municipal harbor plan pertaining to lands and waters of a DPA within the municipality."<sup>55</sup> Such DPAs "may be segmented for purposes of phasing in the development of a master plan over time."<sup>56</sup> There are two primary functions of a DPA Master Plan: "to identify a joint state/local strategy for stimulating water-dependent industrial development ... [and] ... to ensure that state and local regulatory programs are coordinated effectively to control non-maritime uses, in order to avoid excessive consumption of prime port space and incompatibilities that discourage marine enterprise."<sup>57</sup> "A DPA Master Plan should serve as a guide for intergovernmental actions to both promote development that is appropriate for a working harbor and prevent that which is not."<sup>58</sup>

More information on MHPs and their relation to DPAs is set forth below in section VI.

### *Boundary Review and Designation Standards*

The DPA regulations provide for boundary review of DPAs. These reviews may be conducted “from time to time” by CZM or at the written request of the municipal official, planning board, City Council or other municipal body with authority to enact zoning in the municipality containing a DPA; any port authority or other state or regional agency with planning, regulatory or development authority over the area proposed for review; the owner of the area proposed for review; or any ten citizens of the Commonwealth.<sup>59</sup>

On the basis of location, configuration and/or current use, certain parcels within a DPA are presumptively exempt from boundary reviews. Four examples of such areas include:

- (1) Any area that has been subject to a DPA designation by the Director of CZM within the previous five years. However, a party requesting review may attempt to demonstrate that “substantial and rapid change [has] occurred in the circumstances” which has impacted the suitability of the area for accommodating water-dependent industrial uses. The question of whether a “substantial and rapid change has occurred in circumstances affecting the suitability of the area to accommodate water-dependent industrial use” is governed by 301 CMR 25.04 discussed further below.
- (2) An area that has been subject to water-dependent industrial use within the previous five years, unless the use was not on a continuous basis for a substantial period of that time or has been voluntarily discontinued.
- (3) An area within a DPA that has been recommended for exclusion from review by the City Council or other municipal body with authority to enact zoning, unless the area is the site of a proposed project which is exempt by law from compliance with zoning or has been granted relief from the use restrictions that are applicable under zoning.
- (4) Any land area within a DPA that is entirely bounded by existing DPA lands and/or by water.<sup>60</sup>

If a parcel of land or water area within a DPA does not fit in one of the four above-mentioned categories of areas that are presumptively ineligible for a boundary review, then the designation of the land or water as part of a DPA will continue. According to the regulations addressing boundary reviews, an area shall be included or remain in a DPA only if CZM finds that the area is “in substantial conformance” with certain criteria that address the area’s “suitability to accommodate water-dependent industrial use” appropriate for the DPA in question.<sup>61</sup>

Boundary reviews are guided by the Commentary section of 301 CMR 25.04. This section states that although boundary reviews will examine individual characteristics of the particular parcel under review, the “suitability criteria” should be applied in the context of the “groups of parcels that form coherent planning units.”<sup>62</sup> This is the case because DPA-related attributes will vary from parcel to parcel, making a study of just one parcel within a DPA likely to generate an inaccurate or incomplete impression of the parcel’s usefulness to the DPA.<sup>63</sup> Therefore, it is the

state's policy that boundary reviews will consider the geographic area as a whole when applying the designation standards of a particular area of water and/or land.<sup>64</sup>

The designation standards, which are referred to as suitability criteria in 301 CMR 25.04, aid decision-makers in determining whether an area of water and/or land will be "included or remain in a DPA."

The designation standards for water areas are as follows:

The water area must include or be contiguous with other DPA waters that include: a navigable entrance or main channel with a design depth of at least twenty feet and a shoreline that has been substantially developed with piers, wharves, bulkheads, or other structures that establish a functional connection with a land area that is included within a DPA.<sup>65</sup> In addition, the water area must be of a configuration, size, and location appropriate for the maneuvering or berthing of vessels, the placement of intake/outfall structures, or other activities involving direct utilization of the water.<sup>66</sup> DPA waters also shall include all channels, mooring and turnaround areas within or serving as access channels to land or water areas meeting the designation standards and any water area lying between an entrance or main channel and any land or water areas meeting the designation standards, extending channelward from such areas.<sup>67</sup>

The designation standards for land areas are as follows:

The land area must include, or be contiguous with other DPA lands that include shoreline which has been substantially developed with piers, wharves, bulkheads, or other structures that establish a functional connection with a water area that meets the designation criteria.<sup>68</sup> The land must also lie in reasonable proximity to established road or rail links leading to major truck or arterial routes and water/sewer facilities capable of supporting general industrial use.<sup>69</sup> The land must exhibit topography that is generally conducive to industrial use or is reasonably capable of becoming so in terms of technology, cost, and other appropriate factors governing engineering feasibility and it must exhibit a use character that is predominately industrial, or reasonably capable of becoming so.<sup>70</sup> Land will be deemed "reasonab[ly] capable of becoming [industrial]" if it does not contain a dense concentration of non-industrial buildings that cannot be removed or converted, with relative ease, to industrial use and/or if the land area does not contain residential, commercial, recreational, or other uses that unavoidably would be destabilized if commingled with industrial activity.<sup>71</sup>

Boundaries delineated for DPAs should follow, to the maximum extent practicable, legal landmarks, property lines, roadways or other physical landmarks that are generally permanent and can be asserted easily.<sup>72</sup> CZM can make minor adjustment to an existing DPA boundary to facilitate its identification in relation to legal or physical landmarks so long as there is not a general net reduction in the total area of the DPA.<sup>73</sup>

Particular boundary reviews are discussed in section VII.

*Gypsum v. Executive Office of Environmental Affairs*

As noted above, 301 CMR 25.04 authorizes the CZM director to conduct boundary reviews that follow certain suitability criteria focusing on the harbor in question. The 2006 case *Gypsum v. EOE* examined the CZM director's discretion in exercising the authority to include or keep a parcel in a DPA.<sup>74</sup> The Massachusetts Appeals Court found that the director has no discretion to remove a parcel from a DPA if the parcel under review keeps the designation standards.

The *Gypsum* court determined that nothing in the regulations indicates that the director of CZM has any discretion to remove an area from a DPA that falls within DPA designation criteria.<sup>75</sup> The court conceded that the director was authorized to make minor adjustments to DPAs, stating: "the admonition in sec. 25.05(2) authorizes the [Office of] CZM to 'make minor adjustments of an existing DPA boundary ... [but] such adjustment[s] generally should not result in a net reduction of the total are of the DPA.'" <sup>76</sup> Prior to the *Gypsum* case, the director based his ability to modify a DPA on language found in 301 CMR 25.03(5) which states: "[t]he [d]irector may qualify, limit, or otherwise condition the designation decision in any manner that serves the purposes of these regulations."<sup>77</sup>

The *Gypsum* court emphasized that the language of the regulations states that "[a]n area of land reviewed under [the regulation] shall be included or remain in a DPA ... if CZM finds that the area is in substantial conformance with the ... criteria governing suitability to accommodate water-dependent industrial uses, as appropriate to the harbor in question."<sup>78</sup> The court stressed that, under its reading of the regulations, the language "[does] not event hint that the director has any discretion to *exclude* an area that otherwise falls within designation criteria."<sup>79</sup>

In *Gypsum*, the properties in question undisputedly met the designation standards to remain in the DPA, but the director argued that the properties could be excluded based upon his discretion that he argued was set forth in 301 CMR 25.03(5).<sup>80</sup> The court disagreed, stating that the Commentary language in question, "read alone or in the context of the DPA regulations, anticipates and facilitates the inclusion of properties that would not meet the criteria unless considered in conjunction with other parcels."<sup>81</sup> The court continued and said that to read the Commentary section as allowing the director the discretion to exclude otherwise includable properties from a DPA would "contravene not only the explicit purposes of the regulations, but also the rest of the Commentary, which expressly supports the encouragement of water-dependent industrial uses."<sup>82</sup> In its discussion, the court appears to focus on the fact that DPAs are meant to encourage the development of water-dependent industrial uses, and that any discretion afforded the CZM director would be a means of fostering such encouragement.

The court emphasized that the director's discretion did not extend to the exclusion of qualifying property from a DPA: "To transform the discretion ... to do precisely the reverse, i.e. to exclude other includable property, entirely and forever, from the regulatory framework intended to further the fundamental goal of protection scare coastal zone resources, with a result that tends to minimize, not maximize, the shrinking industrialized coast and undermines, not serves, the explicit purpose of the DPA regulations."<sup>83</sup>

## V. Other Regulatory Programs

Land and water areas that are part of a DPA are often subject to other federal, state, and local regulatory programs, and a lawyer seeking to impact development or encourage redevelopment within a DPA should be aware of other such regulatory programs. The following list is not meant to be exhaustive. It identifies some regulatory programs that will commonly apply to shoreline land in Massachusetts.

### *Local Zoning Laws*

Land and water located within a DPA is invariably within a local zoning districts and thus subject to local zoning law. For example, in Chelsea where a DPA is located, the waterfront and most of the waterfront land falls within the Waterfront District. This District was created to “provide an area for uses which are water-related and/or which benefit from proximity to the airport or the harbor, and to encourage public access to the waterfront.”<sup>84</sup> Hotels, multi-family residences, retails uses are allowed within the District, although they conflict with the allowable DPAs uses.

Chelsea is also subject to the Waterfront Industry Overlay District (WIOD) and the Airport Related Overlay District (AROD).<sup>85</sup> The WIOD is smaller than the Waterfront District and has a variety of purposes, including: promoting economic development in the Waterfront and AROD; enhancing the working waterfront and preserving adequate deep-water shipping and other water-dependent industrial uses; allowing compatible commercial and general industry supporting uses in the Waterfront District that are consistent with the state DPA policy; providing continuous access along the water’s edge and where appropriate to and from and with the Chelsea Creek DPA; preventing soil and groundwater pollution; and allowing certain commercial, general industrial and water-dependent industrial uses by special permit to assure more effective environmental protection.<sup>86</sup>

The purpose of the AROD is to “provide for airport related uses in location with suitable access to the airport and where such activities can occur without adverse impact upon residential areas.”<sup>87</sup>

Another example is the Maritime Economy Reserve (MER) zoning, which impacts much of the land within DPAs in Boston.<sup>88</sup> In MER zones, water-dependent industrial uses and supporting uses are allowed.<sup>89</sup> As with Chapter 91 and the public trust doctrine, local zoning tends to take an accommodating stance when it comes to DPAs and the allowed uses within a DPA.

### *Wetlands Regulations (310 CMR 10.00)*

Under the Code of Massachusetts Regulations, the state protects wetlands for numerous purposes including: protection of public and private water supplies; protection of groundwater supplies; flood control; strum damage prevention; prevention of pollution; protection of land containing shellfish; protection of fishers; and protection of wildlife habitat.<sup>90</sup> The state’s wetlands are delineated on maps that are part of the Massachusetts Geographic Information System (GIS).<sup>91</sup> If

a project appears as if it may impact a designated wetland, a Determination of Applicability must be submitted to the local Conversation Commission, which may rule negatively or positively on the application based on the purposes of the Wetlands Protection Act.<sup>92</sup>

With regard to a DPA that may contain or be contiguous to a delineated wetland area, if a project within the DPA involves dredging, filling, removing, or altering the land under the ocean, the movement of the water could detrimentally impact fisheries, storm water prevention and/flood control, all of which are among the protected interests under the Wetlands Protection Act.<sup>93</sup> The party responsible for the project within the DPA would have to submit an application and show that no harm to the above mentioned things would occur.<sup>94</sup>

#### *Chapter 40A of the M.G.L.: Zoning Act*

Chapter 40A allows local cities and town to grant special permits, variances and site plan approvals, all of which are additional ways in which cities and towns require additional review to occur prior to certain projects taking place. Under this program, zoning by-laws or ordinances “regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.”<sup>95</sup> Chapter 40A tends to be useful when working within a MHP and seeking changes to development limitations such as set-back or heights of buildings. Chapter 40A does not affect what may be located in a DPA in such as way as to allow a special permit to be issued for construction of, say, a residential unit. Therefore, the Zoning Act is useful for those seeking to work with existing structures within a DPA to make them more accommodating, but it does not expand the scope of uses permitted within a DPA.

#### *Section 404 of the Clean Water Act*

Under Clean Water Act section 404, the Army Corps of Engineers issues permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>96</sup> Unless a discharge is specifically exempted, it will necessitate a permit from the Army Corps. Section 404 applies to federally designated wetlands as well.

#### *Other Regulations*

The following list identifies some of the additional state and federal regulatory programs that may apply to industrial and/or waterfront sites, particularly in connection with redevelopment or other projects requiring physical changes: the Massachusetts Environmental Policy Act (MEPA)<sup>97</sup>; Massachusetts General Laws c. 21E, entitled the Oil and Hazardous Material Release Prevention and Response Act; Section 10 of the Rivers and Harbor Act<sup>98</sup> Section 307(c) of Coastal Zone Management Act<sup>99</sup>; the Homeland Security Act<sup>100</sup>; and section 7 of the Endangered Species Act.<sup>101</sup>

## VI. Municipal Harbor Plans

Land and water areas that are included in DPAs may also be subject to Municipal Harbor Plans (MHPs).<sup>102</sup> A MHP is a document that sets forth:

- A community's goals and objectives for harbor planning
- An implementation program that specifies legal and institutional arrangements, financial strategies and other measure to govern public and private utilization of the harbor waters and lands
- The date on which a municipality proposes to submit a plan
- A planning analysis that synthesizes technical data, community input and other information in order to evaluate tradeoffs among alternative courses of actions
- A review of the public participation and
- Other elements deemed important by the Secretary of the EEA to serve the purposes of 301 CMR 23.00<sup>103</sup>

The MHP process is begun by the municipality (or municipalities) submitting a Notice to Proceed which is a written statement describing the proposed planning area.<sup>104</sup> This is submitted to the director of CZM and must at least include: a description of the harbor planning group; a appropriately scaled map; a concise historical narrative of the land and water use; and development in the harbor planning area; a general description of a participation program that includes communication and interaction with the public and a general description of a study program that identifies the analysis to be employed for developing goals, addressing issues and assessing alternatives.<sup>105</sup> Within two years of the issuance of a Notice to Proceed, the planning representative "shall submit a proposed plan to the Secretary."<sup>106</sup>

When seeking to undertake "a harbor or waterfront improvement or a harbor plan" a coastal city or town (acting through its mayor, the town manager, or board of selectmen) may apply for financial assistance to the Secretary of EEA.<sup>107</sup>

In order to qualify for assistance, the coastal city or town has to comply with the following conditions:

- a) the improvement must be public and used principally for fishing, shell fishing, marine commerce or industry, or marine recreation or public access;
- b) EEA needs to determined that the project site is in substandard condition, defined as in the definitions section of c. 21f as physical deterioration, faulty arrangement or design, overcrowding, lack of access, or other factors which cause the condition of a harbor or waterfront facility to be detrimental to the public safety, health, morals, welfare or sound growth of a coastal city or town. The site may be located within a DPA; and

- c) the coastal city or town seeks to obtain reasonable fees from users of the improvement or related facilities.<sup>108</sup>

The maximum assistance a coastal city or town may seek “in no case shall exceed two million dollars for improvements in designated port areas and one million five hundred thousand dollars in all other areas.”<sup>109</sup> Further, to be approved for assistance, a coastal city or town must establish that it meets the following criteria: it serves the public interest and is consistent with community wide needs and priorities; it has a significant economic impact on maritime industry, recreation or tourist industry or provide significant public benefits; a clear need exists for the improvements; it is consistent with EEA guidelines and all local, state and federal permits, licenses, and approvals have been obtained; the application has been approved by the mayor, town manager, or board of selectmen; and the funds shall not be used dredging.<sup>110</sup>

When coastal cities or towns apply for assistance, they are required to follow the rules and procedures set forth in MGL c. 21F s.1-7 and 301 CMR 23.00-23.09. Three governing bodies assist in approving MHPs, and each has a distinct set of statutory duties and are guided by a distinct set of regulations. The approval process is meant to encourage municipalities to develop long-term comprehensive plans for their harbors that are consistent with the Department of Environmental Protection Waterway Regulations (310 CMR 9.00) and the CZM regulations that directly address MHPs (301 CMR 23.00).<sup>111</sup> Ultimately, the Secretary of the EEA determines whether any MHP complies with the aforementioned statutes regulations and either approves or denies the Plan.<sup>112</sup>

As noted above, MHPs that cover DPAs may include DPA Master Plans.<sup>113</sup> Master Plans must strive to “preserve and enhance the capacity of the DPA to accommodate water-dependent industrial uses.”<sup>114</sup> To meet this goal, the Master Plan must ensure that a large majority of the total “DPA land area in close proximity to the water will be reserved for water-dependent industrial uses.”<sup>115</sup> Temporary Uses may be allowed “on such reserved lands” if the DPA Master Plan “establishes guidelines for solicitation of a maritime industrial tenant as a pre-condition of the temporary occupancy.”<sup>116</sup>

As a general rule, the Master Plan shall ensure that commercial uses and any accessory uses will not occupy more than 25% of the total DPA land area covered by the DPA Master Plan.<sup>117</sup> The DPA Master Plan must set forth “reasonable arrangements ... to prevent commitments of any space or facilities that would significantly discourage water-dependent industrial activity especially on waterfront sites.”<sup>118</sup> Such “arrangements” may set limits on the type of commercial uses allowed, as well as on their location, scale, duration, or operation, or any other relevant aspect of commercial uses, so as to “ensure that the such uses will mix compatibly with and not significantly alter the predominately maritime industrial character of the DPA.”<sup>119</sup> The DPA Master Plan should also identify any industrial and commercial uses that qualify as a Supporting DPA Uses which are allowable under the local zoning code.<sup>120</sup>

A DPA Master Plan “shall set forth a strategy to guide the on-going promotion of water-dependent industrial use by appropriate municipal, state, and federal agencies.”<sup>121</sup> It also needs to include certain requirements listed in 301 CMR 23.05(e)(4), including: recommendations for

capital improvements or other economic or operations benefits to be provided by projects involving Supporting DPA Uses; recommendations for how to preserve and enhance the infrastructure of navigation channels, truck route, rail lines, and other transportation facilities providing user access to the working waterfront and its backland; and commitments to maintain a development pattern for land surrounding the DPA that provides an appropriate buffer between the industrial uses in the DPA and other community activities situated outside the DPA, in order to avoid significant operational conflict.<sup>122</sup>

Interestingly, 301 CMR 23.05(4) states that “[t]he plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00.”<sup>123</sup> This section could arguably indicate that the MHP may contain measures that are less restrictive than those required in the Waterways regulations, so long as there is something in place that acts as an offset for this less restrictive aspect of the MHP.

Three DPAs are the subjects of state-approved DPA Master Plans: East Boston, New Bedford-Fairhaven and Salem Harbor.<sup>124</sup> Gloucester is in the process of amending its Harbor Plan.<sup>125</sup>

### *Individual Municipal Harbor Plans*

The following summaries of individual MHPs illustrates that they are developed to address the individual attributes of the particular harbors they serve. Thus, MHPs may provide more flexibility and accessibility for community members seeking to introduce change to waterfront areas subject to DPAs.

#### New Bedford-Fairhaven<sup>126</sup>

The New Bedford/Fairhaven Municipal Harbor Plan demonstrates how creative planning may greatly benefit an existing DPA.

This New Bedford/Fairhaven MHP represents a joint plan for the City of New Bedford and the Town of Fairhaven.<sup>127</sup> A significant amount of the planning area is situated within the New Bedford/Fairhaven DPA, which has been active in “seafaring activities for over 150 years.”<sup>128</sup> The New Bedford/Fairhaven MHP was created in such a manner as to maintain the traditional waterfront industries and activities, and also to meet the “statewide public interest in maximizing the capacity of DPAs to accommodate water-dependent industry.”<sup>129</sup> According to the Secretary of EEA, the New Bedford/Fairhaven MHP contains a DPA Master Plan that “far exceeds the minimum approval requirements” for a DPA.<sup>130</sup>

The New Bedford/Fairhaven MHP was commemorated for excelling on both its promotional and regulatory fronts. Promotionally, it combined \$12 million in short-term (five year) public initiatives with a series of longer-term (ten year) initiatives that are designed to promote a significant expansion of the harbor’s capacity for maritime industry.<sup>131</sup> On the regulatory side, it proposed a first-of-its-kind program under which tourism and other commercial activities are allowed in a few selected locations within the DPA, situated in such a manner as to not conflict

with nearby maritime operations.<sup>132</sup> To implement this scheme, “developers of non-port projects are required to provide direct financial assistance to waterfront business owners.”<sup>133</sup>

To mobilize investment in the working port, the New Bedford/Fairhaven MHP “calls for extensive maintenance dredging to restore all the federal channels in the harbor to authorized depths and ... additional ... dredging of driveways, anchorages, turning basins and other berthing and maneuvering areas serving a multitude of public and private shorefront facilities.”<sup>134</sup> In land areas, the New Bedford/Fairhaven MHP proposes development of a major transportation center for commuter and freight rail, local/regional bus service, taxis, and waterfront alley and a complete redesign and redevelopment of state Route 18 (a major artery).<sup>135</sup>

The New Bedford/Fairhaven MHP also focuses on how to increase tourism in its harbor area. It recommends expansion of boating slips and mooring fields, and the establishment of a network of open spaces.<sup>136</sup> It is worth noting that both of these recreation-related recommendations are for land and water areas located outside of the DPA. For one area located on the “fringe” of the DPA, the New Bedford/Fairhaven MHP notes that its recommended developments “will allow public observation of the waterfront at work without interfering with activity on the piers themselves.”<sup>137</sup> In short, although the New Bedford/Fairhaven MHP reflects a desire to enhance public access to and enjoyment of the waterfront, it also adheres to the notion that such public access should remain outside the boundaries of the DPAs.

The Secretary of EEA determined that the New Bedford/Fairhaven MHP was consistent with applicable CZM policies.<sup>138</sup> At the time of the Plan’s adoption, there were twenty-seven CZM policies, and seven were recognized as applicable to New Bedford/Fairhaven.<sup>139</sup>

The Secretary stated that not only did the New Bedford/Fairhaven MHP adhere to all of these CZM Policies, but it “also proposes significant expansion of multi-use terminal capacity within a ten-year timeframe [which] is a vote of confidence in the long-term viability of the maritime economy of southeast Massachusetts, and [] is a welcome addition to the state’s dwindling supply of port infrastructure.”<sup>140</sup>

To ensure that the commercial development (including the building of an oceanarium) would succeed and help improve the port, New Bedford established the mechanism known as “Supporting DPA Use Eligibility Credit Program” (ECP). This is the functional equivalent of the “so-called ‘transfers of development rights.’”<sup>141</sup> The ECP will be enforced through the state waterways regulation and “governs the basic allocation of land uses within the New Bedford DPA.”<sup>142</sup> This allocation of land is accomplished through the creation of two mutually exclusive areas: “Sending Zones and Receiving Zone.”<sup>143</sup>

In Sending Zones, the New Bedford/Fairhaven MHP establishes “a categorical prohibition on any future non-port uses, except on a temporary basis ... [In addition,] the ECP stipulates that only Water-dependent Industrial Uses, Temporary Uses and certain existing non-port uses shall be eligible for authorization on filled tidelands within such zones.”<sup>144</sup> The effect of the Sending Zone, thus, is that “85% of this land area will be reserved in the long run for water-dependent industry.”<sup>145</sup>

Receiving Zones are the “relatively small collection of sites where new development for non-maritime purposes is allow, in the form of commercial Supporting DPA Uses or Temporary Uses only.”<sup>146</sup> Fifteen parcels are earmarked to be designated as Receiving Zones; they constitute approximately fifteen percent of the land area of the New Bedford DPA.<sup>147</sup> With the exception of the large power plant site where the Oceanarium complex is proposed, these Receiving Zones are “interstitial (small) sites where nonwater-dependent industrial use is operating currently” and have “functioned without detriment to the port for many years.”<sup>148</sup> As a condition of obtaining state and/or local permits, “developers must purchase a ‘credit’ costing \$2,500 for every 1,000 square feet of occupied surface area within the receiving zone.”<sup>149</sup>

The New Bedford ECP also “customize[s]” the definition of Supporting DPA Use in two ways:

The ECP stipulates that a project applicant must acquire sufficient Eligibility Credits to accommodate the combined footprint of all commercial Supporting DPA Uses and [any] accessory uses to be developed within the Receiving Zone in question ... [In addition,] ... commercial Supporting DPA Uses may occupy up to the entire footprint of the Receiving Zone, exclusive of any portion designated as a Harbor Management Plan Setback Area and subject to all other applicable dimensional restrictions.<sup>150</sup>

The New Bedford DPA Master Plan also specifies locations “for a series of public projects to enhance the capacity of the working port.”<sup>151</sup> These public projects include a ferry terminal, pier extensions for fishing vessels, and a water-taxi dock.<sup>152</sup> Furthermore, the DPA Master Plan “maintains a surrounding land development pattern that provides an appropriate buffer between industrial uses in the DPA and community uses that might otherwise give rise to significant operational conflict.”<sup>153</sup>

Lastly, the New Bedford/Fairhaven DPA Master Plan regulates the “intermingling of port-related uses” by requiring that “certain types of water-borne freight activity ... be confined to specific location in the harbor, and by declaring that such designated locations shall be off-limits to all other permanent uses – even other types of water-dependent industry.”<sup>154</sup> These limitations are meant to facilitate an “orderly, efficient, and equitable process of port management, and to protect prior and future public investments to accommodate freight operations.”<sup>155</sup> The New Bedford/Fairhaven MHP states that these limitations are intended to provide “a cohesive framework for long-term port planning ... [that] ensures freight uses are accommodated in locations that are compatible with the needs of other DPA users [rather than their being accommodated] on an *ad hoc* basis.”<sup>156</sup>

In sum, the New Bedford/Fairhaven MHP illustrates the continuing importance to regulators and planners of the industrial waterfront and the maintenance of DPAs. It demonstrates how improvements to the industrial waterfront are planned and encouraged, and also how recreational/public uses fit into a harbor plan.

## Salem Harbor

Salem is the second oldest settlement in New England, and has almost nineteen miles of tidal shoreline.<sup>157</sup> This shoreline has traditionally been used for water-dependent industry and continues to be used as such today. In 2008, the City of Salem submitted a MHP Renewal request that was designed to supplement the Plan put into place in 2000.<sup>158</sup> In June 2008, the EEA Secretary approved the Renewal with conditions.

The Salem MHP encompasses the shoreline and adjacent lands between Winter Island and Palmer Cove, and is divided into five sections, all of which serve varying purposes.<sup>159</sup> The five sections include the South Commercial Waterfront, the Tourist Historic Harbor, North Commercial Waterfront, Industrial Port and Community Waterfront.<sup>160</sup> The North Commercial and Industrial Port areas contain a DPA.<sup>161</sup> Almost the entire DPA is under the jurisdiction of Chapter 91.<sup>162</sup> In the 2008 Renewal Request, the southwest part of the planning area was expanded to encompass the filled tidelands in that area.<sup>163</sup> The overall goal of the MHP is to ensure that there is “proper coordination between Plan recommendations and other issues and initiatives that are linked to the harbor.”<sup>164</sup>

Salem’s goals for the harbor include maintaining a vibrant commercial and recreational area, cultivating an environmentally healthy setting, preserving and celebrating the historic integrity of the area, and improving the quality of life of all who live and visit it.<sup>165</sup> In his approval of the Renewal Request, the Secretary deemed this vision of the harbor consistent with Massachusetts’ waterfront and DPA policies.<sup>166</sup>

Since 2000, the City has worked to implement the MHP. One new feature includes the Salem Harbor Ferry which provides access to Boston. Grants have also been received for wharf land acquisition, construction and park cleanup.<sup>167</sup> Substantial dredging was an important part of the Plan, allowing a variety of vessels to move safely through the water, with the aim of reinvigorating the harbor.<sup>168</sup>

Several new projects were proposed in the 2008 Renewal Request and many of the original projects will receive continued efforts. The City wished to continue dredging, as well as to improve public access by foraging a Salem Harbor Walk and other walkways that will connect with other areas of the city.<sup>169</sup> The Renewal Request includes numerous recommendations to improve public access to the waterfront district and increase awareness of it.<sup>170</sup>

Transportation opportunities will be improved by the creation of parking areas and access to public transportation.<sup>171</sup> The additions to the Salem Wharf project will support a variety of commercial water-dependent uses such as ferry, cruise, and tour boat commercialism.<sup>172</sup> The MHP seeks to continue in the “activation of the harbor’s edge and watersheet” through support and promotion of initiatives that are meant to improve the public’s connection to the waterfront.<sup>173</sup> Such initiatives include accommodations to visit historic and recreational vessels, celebrations to promote Salem’s maritime heritage and culture and increase public amenities and water dependent activities.<sup>174</sup> The MHP also recognizes that Salem Harbor is an environmental resource, and it seeks to improve the quality of this resource through specific recommendations.<sup>175</sup> These recommendations include: “encourage and support eco-friendly

forms of transportation, and the support of decreased environmental impact through the long-term goal of alternative forms of energy within the DPA.”<sup>176</sup> Several groups will participate in the implementation of the projects, including the Harbor Plan Implementation Committee and the Management for Wharf and Island.<sup>177</sup> The Renewal Request sets out estimates of costs and how to acquire funds.<sup>178</sup>

The Secretary of EEA determined that the proposed renewed MHP was consistent with CZM policies, explicitly naming several elements of the plan discussed above.<sup>179</sup>

After the Secretary concluded that the Renewal Request was consistent with the “spirit and intent” of the CZM policies, he also found the renewed MHP consistent with tidelands policy objectives, noting several exceptions and deeming them appropriate.<sup>180</sup> In regards to use limitations and numerical standards that are imposed by the Waterways requirements, a municipality may propose alternatives that are less restrictive “provided that the plan includes other requirements that, considering the balance of effects on an area-wide basis, will be mitigated, compensated for, or otherwise offset adverse effects on water-related public interest.”<sup>181</sup>

The Secretary focused directly on the DPA Master Plan because he had to find the Master Plan consistent with the DPA approval criteria found at 301 CMR 25.05(2)(e).<sup>182</sup> The approach, as with the other DPA Master Plans, was to make certain the Master Plan preserved and enhanced the capacity of the DPA to accommodate water-dependent industrial uses and prevent substantial exclusion.<sup>183</sup> The Master Plan “should also identify industrial and commercial uses allowable under local zoning that will qualify as a supporting DPA use, and identify a strategy for the ongoing promotion of water-dependent industrial use.”<sup>184</sup>

At the time the MHP was developed, the entire land area of the DPA was used for water-dependent industrial uses and “the City continues to be steadfast in its intent to preserve and enhance this irreplaceable working waterfront.”<sup>185</sup> The renewed MHP does not customize the definition of a DPA in any manner and approached non-maritime development of the area conservatively by limiting such development.<sup>186</sup> It allows only water-dependent industry with accessory uses, excepting temporary uses of other varieties.<sup>187</sup> Within the DPA, Salem seeks to continue to encourage new types of water-dependent industrial uses of the port.<sup>188</sup> A particular project includes the construction of the Sale Port Expansion project which is planned to support cruise ship, ferries, water taxis and commercial vessel berthing.<sup>189</sup> This new wharf will expand the upland portion of the DPA and the proposed dredging will expand the turning basins for vessels bound for the power plant and provide more navigational water.<sup>190</sup>

The renewed MHP limits the scope of projects that may qualify as a Supporting DPA Use to only “boat yards, business offices, general storage and warehousing, retail and service, restaurants and off-street parking.”<sup>191</sup> In the future, Salem wishes to develop alternative energy industry including solar and wind; however, this type of use is currently not allowed in a Chapter 91 jurisdiction and, therefore, it is unlikely that this plan will materialize.<sup>192</sup>

## Gloucester Harbor (Draft Plan)

The 1999 Gloucester Municipal Harbor Plan (GMHP),<sup>193</sup> which contained a DPA Master Plan, focused on infrastructure improvements for maritime industries and visitor-oriented businesses and, for the most part, ignored a “confusing web of land use regulations that has since emerged as the central force stagnating much of the waterfront’s revitalization.”<sup>194</sup> This “confusing web of ... regulations” includes the DPA regulations, which are being accused of causing some of the stagnation on the waterfront.

In 2006, Gloucester began the process of trying to update the 1999 GMHP. This effort eventually resulted in an entire rewrite of the 1999 GMHP, dubbed the 2009 GMHP draft.<sup>195</sup>

According to the 2009 GMHP draft, Gloucester Harbor “is the center of one of the country’s most important commercial fishing communities,” but as groundfish stocks have decreased and management measures to rebuild the stocks have reduced, the “infrastructure has deteriorated and businesses that depend groundfish have struggled.”<sup>196</sup> City and state regulations have protected the commercial fishing industry, but the question as to whether there is any viable economic use for waterfront property in the DPA has been raised.<sup>197</sup> Further, the question of whether the DPA regulations allow for enough diversity of uses has also been raised.<sup>198</sup>

The 2009 GMHP draft states that some owners of properties within the DPA feel frustrated by the limited economic potential from commercial fishing and the regulatory restrictions on land use such that these owners have been unable or unwilling to access capital to invest in maintaining and improving their waterfront infrastructure.<sup>199</sup> To address the circular problem of the regulations being too restrictive and commercial fishing not being as profitable as it once was with owners not wanting to invest in the waterfront, the 2009 GMHP draft proposes six strategies, including:

- Supporting the commercial fishing industry directly by trying to attract and expand the kind of business and industries that might build upon existing marine assets
- Providing greater flexibility for supporting commercial uses on the waterfront
- Promoting public access along the waterfront that does not interfere with water industrial uses
- Promoting change that benefits the downtown
- Providing infrastructure and navigation improvements and
- Enhancing and focusing on the administrative resources of the city to support and strengthen the viability of the port<sup>200</sup>

The 2009 GMHP draft states that the City of Gloucester is dedicated to maintaining and strengthening the harbor as a working waterfront, and that, in order for reinvestment and revitalization of the harbor to succeed, the Community Development Department (those putting

together the GMHP) “must develop or secure capabilities specific to the working waterfront.”<sup>201</sup> Perhaps the most important aspect of the draft plan to focus on is the DPA

Gloucester Harbor was designated a DPA in 1978 and since that time “fundamental changes in marine industry have introduced inconsistency between the regulations and the intent of preserving an active waterfront.”<sup>202</sup> For example, the 2009 GMHP draft points out that the DPA regulations’ introductory language sought to have “judicious planning of mix use in a DPA,” yet the regulations do not encourage (or, arguably, allow) such mixed uses.<sup>203</sup> In addition, changes in the amount of fish received from the docks (most come by truck now), and the fact that vessels travel so much faster and therefore need more docking space, are further examples of changes in the maritime industry that are not acknowledged or anticipated in the DPA regulations.<sup>204</sup>

The 2009 GMHP draft does state that “[a] strong [DPA] will build the assets of the marine industry and also find ways to promote active use of the water’s edge” and, therefore, seeks to work within the DPA program to encourage growth and expansion.<sup>205</sup> The 2009 GMHP draft states that “sufficient opportunity must be available within the Gloucester Harbor DPA to accommodate the full range of community’s desires for its waterfront.”<sup>206</sup> The 2009 GMHP draft emphasizes this point because, unlike many of the other DPAs, the Gloucester Harbor DPA covers virtually all the land and water of the inner harbor, making it difficult to enact changes outside of the DPA to address the community’s goals.<sup>207</sup> (This is important to note since an area like Chelsea Creek is similarly situation, with its DPA encompassing nearly its entire waterfront.)

Presently, over seventy percent of the land within the Gloucester DPA is subject to industrial use, with over sixty percent of that land dedicated to water-dependent industry.<sup>208</sup> Commercial activities occupy slightly more than ten percent of the DPA. Thus, even though the 2009 GMHP draft seeks to preserve and enhance the capacity of the DPA to accommodate water-dependent industry and prevent substantial displacement of these activities by nonwater-dependent activities, “data presented ... indicate[s] that there is ample opportunity to allow, or even encourage, additional carefully planned and controlled commercial uses and still comfortably remain within the boundaries applicable to DPA properties.”<sup>209</sup> In short, the GMHP seeks to accommodate non-DPA activities in the Gloucester DPA as much as possible, including allowing property owners to devote up to fifty percent of their land area (above and below the historic high water line) to supporting DPA uses.<sup>210</sup>

The argument that Gloucester may increase Supporting Uses above the twenty-five percent allowed by the DPA regulations is presented as follows:

A significant portion of the Gloucester DPA land is above the historic high watermark area and according to the 2009 GMHP [draft], the state assumes that all of the land outside of the historic high watermark area may be used for commercial purposes when calculating the twenty-five percent limitation on commercial uses within a DPA. Thus, based on the configuration of the Gloucester DPA, and the fact that much of its land is outside of the HHW and presumptively considered commercial use, in order to be within the 25% limitation for supporting uses it would need to restrict an additional 7.6 acres of

land within the DPA.<sup>211</sup> Due to this, the City is unable to make full benefit of the supporting use flexibility without increasing the amount (percent) of land that can be used for supporting uses.<sup>212</sup>

Whether this interpretation will be accepted is yet to be determined, as the Secretary of the EEA has not yet rendered a decision on the 2009 GMHP draft. If the EEA accepts the Gloucester interpretation, the decision may allow other cities to analyze their DPAs in light of the HHW mark.

In addition to this increase in the Supporting Use percentage, Gloucester's DPA Master Plan (as noted above, the DPA Master Plan is part of the 2009 GMHP draft) includes other "regulatory changes to support economic diversification and clarity of permitting."<sup>213</sup> Furthermore, the 2009 GMHP draft supports the following uses of properties within the DPA, which appear to define a broader scope of uses than those that have been allowed in other DPAs:

- water-dependent industrial uses on filled tidelands, pile-supported structures, or upland and accessory uses outside the water-dependent use zone;
- other water-dependent uses (specified in the GMHP) on filled tidelands, pile-supported structures, or upland;
- water-dependent and nonwater-dependent commercial and general industrial uses as supporting uses on filled tidelands or uplands only (these uses are prohibited on pile-supported structures by 310 CMR 9.02); and
- commercial and industrial uses ... that provide direct economic or operational support to water-dependent industrial uses<sup>214</sup>

The 2009 GMHP draft explains how the above-listed types of uses can be developed within the DPA:

- Water-dependent industrial uses are given top priority, and as such, are designated "permitted uses (as opposed to special permit uses) requiring only site plan review for approval."<sup>215</sup> Thus, there are very few limitations on location and intensity of these uses.<sup>216</sup>
- Water-dependent uses (what a park/green space is deemed under the Waterways regulations) are considered "essential to the continued viability of the DPA in Gloucester Harbor, attracting people and new investment to waterfront properties and infrastructure, which produces operational, financial and community support for the DPA."<sup>217</sup> Thus, public access facilities should be sited whenever feasible so long as they do not interfere with the working waterfront activities.<sup>218</sup> In fact, in numerous sites around Gloucester "open areas used to support working waterfront activities during part of the year can accommodate public access at other times."<sup>219</sup>

- Commercial and general industrial uses that are allowable uses in the mixed-industrial zoning district need to be eligible for licensing by the DEP as supporting DPA uses.<sup>220</sup>

In sum, the 2009 GMHP draft is an interesting and extensive document that appears to take a flexible approach to the activities that may be allowed within a DPA, making the argument that because of the nature of the Gloucester DPA, such flexibility is necessary in order to revitalize the waterfront. Whether the Secretary of the EEA accepts the approach has yet to be seen.

### Other MHPs

Other MHPs either do not discuss or impact a DPA. These MHPs include:

- South Boston, which does have a DPA that “was the subject of a joint BRA/Massport planning process that resulted in the *Port of Boston Economic Development Plan of 1996*” but the MHP did not include it.”<sup>221</sup>
- Lovejoy Wharf Amendment - the geographic area subject to this decision is limited to the privately owned Lovejoy Wharf property...which at present contains two buildings built in the early 1900s and occup[ies] approximately 45,000 square feet at ground level.<sup>222</sup>
- Phases 1 and 2 of the Fort Point Downtown Waterfront Harbor Plan<sup>223</sup>

## **VII. Existing DPAs**

### *Mystic River*<sup>224</sup>

The Mystic River DPA is the DPA that was under discussion in the *Gypsum* case (see discussion above). That case clarified that the CZM director does not possess the discretionary authority to remove a parcel of property from a DPA if that parcel meets the regulatory criteria for inclusion in the DPA. Examination of the Mystic River Boundary Review in the context of the *Gypsum* decision makes clear the importance, to an advocate seeking the removal of a parcel from a DPA, of making a case that the parcel no longer serves the purposes of the DPA regulations.<sup>225</sup>

In 2002, the Mystic River DPA underwent a boundary review. According to the study produced, the land uses in the DPA were “generally characterized as core industrial uses, mixed industrial and commercial uses, and vacant or underutilized historical industrial use properties...[while the] Schrafft Center, at the extreme west end of the DPA, [was] the only property given over entirely to non-industrial use.”<sup>226</sup>

The Mystic River DPA is close to the interstate highway system, and the Boston Inner Harbor Channel, by which all maritime traffic reaches the DPA, was deepened in 1998 to provide sufficient ship maneuvering areas.<sup>227</sup> Direct access to this deep water is available from all of the properties located in the DPA, with the exception of the Schrafft Center and one other parcel.<sup>228</sup>

The Schrafft Center is located on the edge of the Mystic River DPA, on a parcel of land that did not have a shoreline substantially developed to support maritime industry.<sup>229</sup> However, this

parcel is in a contiguous chain of other parcels within the DPA that are able to support DPA uses (as defined in 301 CMR 25.04(2)(a)).<sup>230</sup> The Schrafft parcel is served by sewer and water facilities adequate to support general industrial uses.<sup>231</sup> Nevertheless, in the Mystic River DPA Boundary Review, the CZM director was able to conclude that, under the criteria set forth at 301 CMR 25.02(2)(d), the parcel did not exhibit a character that was predominantly industrial because it was occupied by “a thriving commercial complex.”<sup>232</sup>

When under renovation in 1987, the Schrafft property required a Waterways license “to eliminate an irregularity in the shoreline with fill.”<sup>233</sup> The Waterways license required that the renovation provide greater public access to the private tidelands that were part of the impacted shoreline.<sup>234</sup> As a result, extensive public amenities were developed in order to make the shoreline as accessible as possible, and these public amenities rendered it “effectively ... incompatible with future re-industrialization.”<sup>235</sup> Based on this finding, and in spite of the fact that CZM had previously determined that the public amenities were not incompatible with potential maritime uses because such amenities could easily be removed, in the boundary review the CZM director observed that “the amenities have served their purposes well, and have become fully integrated in the fabric of the community.”<sup>236</sup> Thus, the CZM director concluded that to consider these public access amenities as subject to displacement by future maritime industrial activities was unrealistic.<sup>237</sup>

Based upon his examination of the circumstances that created the Schrafft Center, the CZM director noted that “the current allocation of the uses of the property and the functional relation between the property, the DPA, and the surrounding neighborhood ... [allows] the Schrafft [Center] [to] continue to provide effective transitional function from a location outside of the DPA as well as within.”<sup>238</sup> Thus, he concluded, the Schrafft Center could be removed from the DPA.<sup>239</sup>

It is important to note that the allowance of the public access amenities on the Schrafft site took place before promulgation of the 1990 Waterways regulations amendments. In 1987, the Waterways licensing process focused solely on whether “the project provided greater public benefits than detriments to the public’s rights in private tidelands.”<sup>240</sup> From this pre-1990 perspective, CZM concluded that the terms of the license did not “conflict with either a present or prospective maritime use of the site or nearby properties ... [n]or [did] the proposed work appear to constitute a preemptive use of the site.”<sup>241</sup> In connection with the 1994 amendments to the DPA regulations, CZM stated that “conflict” and “preemption” principles remain “operational in [the] DPA policy as a whole, but are subordinate in this instance to the language of the DPA regulations that now provide specific direction for the evaluation of the suitability of a property to remain in a DPA.”<sup>242</sup> Thus, “public access amenities can no longer realistically be held to be only transitory features of the property.” This observation may undermine any argument that public access amenities should be allowed within a DPA because they can be removed easily.

## *Chelsea Creek*

The Chelsea Creek DPA has not undergone Boundary Review and is not subject to a MHP. Therefore, information about the Chelsea Creek DPA was collected through various sources, including the *Chelsea Community Development Plan* (CDP) developed in 2004 and the *Chelsea Creek Waterfront Plan* (Waterfront Plan) put together by Vine Associates, Inc. in June 2007. A study that summarizes these sources, as well as additional research about Chelsea Creek, has been published as *The Complex Waterfront: A Study of the Chelsea Creek Designated Port Area*, a thesis paper completed in February 2009 and authored by a Tufts University graduate student.<sup>243</sup> All three documents serve as sources of the brief summary below.

The Chelsea Creek DPA includes all of the land extending from the Chelsea Creek Bridge to Railroad Street between the commuter rail line in Chelsea and Route 1A in Revere.<sup>244</sup> Historically, Chelsea has been an industrial waterfront (along with East Boston, Revere, and Everett) which has been “host to multiple bulk storage and distribution facilities.”<sup>245</sup> The Chelsea waterfront is used mostly for marine transportation of petroleum products. Its traffic includes approximately 50% to 70% of the fuel and oil coming through Boston Harbor, and it houses storage facilities for all the jet fuel used at Logan Airport.<sup>246</sup> Nearly the entire Chelsea waterfront is privately owned, which make public access difficult; buildings and fences make visual access difficult as well.<sup>247</sup> Underground storage of fuel and oil has resulted in contamination which necessitates remediation.<sup>248</sup> The overall consensus of the sources reviewed is that the Chelsea community is not satisfied with the DPA designation and the burden that it places on the city, but have yet to develop a complete vision for the waterfront.<sup>249</sup>

The CDP discusses the need for residential and economic growth in Chelsea and focuses on how economic growth is directly related to waterfront activities.<sup>250</sup> The CDP concludes that the status of Chelsea’s waterfront needs to be changed in order to allow the city to “capitalize on any opportunities to advocate for changes to the current regulations to allow for ‘higher and better’ uses at the waterfront ... [and] ... allowing the appropriate co-existence of public access and the industrial uses.”<sup>251</sup> The CDP states that more planning needs to be done. This led to the Waterfront Plan prepared by Vine, Inc.<sup>252</sup>

The Waterfront Plan provides “baseline information of the physical, land use, market and regulatory issues affecting the waterfront, as well as providing regulatory steps needed to be taken to address the DPA regulations.”<sup>253</sup> Such steps/recommendations include “revisions to local zoning, research into C. 91 and its jurisdictional boundaries, MHP and boundary reviews, and research on “watersheet activation and navigation to allow recreational uses.”<sup>254</sup>

The Waterfront Plan is the first phase of long-term planning for Chelsea’s waterfront. In order to realize the long-term goals of revitalizing the waterfront to transform it from its current industrial-based use to a mixed-use which would benefit the city, Chelsea might choose to emulate a city such as Gloucester, which is currently working with state agencies to review its DPA.<sup>255</sup> Until Chelsea is able to find a means to modify its DPA (perhaps through a MHP) the waterfront will more than likely remain as it is.

### *Weymouth/Fore River*

The writers of this Manual have not located any boundary review or MHP amendment for this DPA. However, we have discovered some legislative interest in the area.

On May 3, 2007, Bill number 4002 from Representatives Ronald Mariano and Joseph R. Driscoll was transmitted to the State Secretary. The Bill concerned “the boundaries of a certain parcel of land on the Fore River located in the city of Quincy and in the town of Braintree.”<sup>256</sup> The bill was discharged from substantive committee (Environment, Natural Resources, and Agriculture) on March 8, 2008, and is now in the House Rules Committee.<sup>257</sup> It is now numbered 4568 and, as of January 6, 2009 no further action has been taken on it.<sup>258</sup>

### *East Boston*

From 1840 until 1865, East Boston was a significant waterfront industrial center, with shipyards as the most prominent feature.<sup>259</sup> During this period, East Boston “rivalled Ellis Island as a port of entry to the United States” since the rapid growth of the shipbuilding industry attracted many immigrants.<sup>260</sup> The shipbuilding industry declined after a fire in 1870 destroyed much of East Boston’s piers and, during the same period, land-based transportation grew.<sup>261</sup> The construction of Boston’s airport in the 1920’s, the development of the Sumner and Callahan tunnels (1934 and 1961 respectively), and construction of the McClellan Highway all adversely impacted the role of East Boston Harbor.<sup>262</sup> The East Boston waterfront was no longer the “industrial engine,” and existing waterfront industries have had to adapt to the constraints of existing conditions including “continued residential development and transportation connection limitations imposed by existing street networks and traffic conditions.”<sup>263</sup> According to the BRA, “vacant and underutilized parcels along East Boston’s Harbor and potential links into East Boston are important to the City of Boston’s future and ... should be developed to meet East Boston’s needs within the context of the entire Boston Harbor.”<sup>264</sup>

The 2002 East Boston Municipal Harbor Plan (EBMHP), developed by the BRA, sought to ensure that the East Boston waterfront, as it developed, “provide[d] the public with meaningful access to the waterfront, preserve[d] and strengthen[ed] the working port, enhance[d] the East Boston community, and [became] a positive economic force in East Boston’s and the city’s economy.”<sup>265</sup>

The 2002 EBMHP built upon the East Boston Master Plan that the BRA developed with extensive community participation from 1998 to 1999 and published in April 2000.<sup>266</sup> The Master Plan “provide[d] a framework for new growth and development in the community’s commercial districts and waterfront area, while preserving and enhancing the quality of life in the community’s residential neighborhoods.”<sup>267</sup> The Master Plan focused on four broad goals: reviving the East Boston waterfront; enhancing the neighborhood’s commercial centers; strengthening the residential neighborhoods; and shoring up the airport edge. In these interests, the Master Plan offered recommendations on land use, open space, public environment, historic resources, and transportation.<sup>268</sup>

When the BRA received the Notice to Proceed (for discussion of Notices to Proceed, see section VI), its intention was to include a DPA Master Plan in the EBMHP. However, the BRA decided to wait on developing a DPA Master Plan until the 2001 DPA Boundary Review was completed.<sup>269</sup> The first MHP-related submittal to the EEA, therefore, contained the information discussed in the Notice to Proceed with the exception of any discussion of the DPA.<sup>270</sup> The second submittal aimed to take CZM's conclusions from the DPA Boundary Review into consideration.<sup>271</sup>

In the original EBMHP in 2002, the BRA divided Boston Harbor into eight planning districts because the size and complexity of Boston Harbor made it difficult to develop a single plan to address the varying needs, functions, and characteristics of the different waterfront areas. The East Boston Waterfront is one of the eight Boston Harbor planning districts.<sup>272</sup> The East Boston Waterfront consists of the Inner Harbor waterfront, including Massport properties, and lower Chelsea Creek.<sup>273</sup> According to this EBMHP, “[t]he City of Boston intends to develop a separate Municipal Harbor Plan for [the Chelsea Creek] area in the future, most likely in conjunction with the cities of Chelsea and Revere, which also border the Chelsea Creek waterfront.”<sup>274</sup>

The study area for the EBMHP is located along the Inner Harbor shore of East Boston.<sup>275</sup> It lies directly across Boston Inner Harbor from the Charlestown, North End, Downtown, and South Boston Districts, and the EBMHP area generally extends from Jeffries Point to the Chelsea Creek entrance to Boston Harbor.<sup>276</sup> The landside boundary coincides with the first public way of the Harbor which is east of the Inner Harbor but excludes all Massport Waterfront parcels, which are the subject of the Massport planning rather than the EBMHP.<sup>277</sup>

A major focus of the EBMHP was the detailed description of six planning sub-areas identified as: existing residential, the traditional working waterfront (North and South Border Street), the gateways, the neighborhood extensions, Jeffries Point, and Massport Properties.<sup>278</sup> The EBMHP looked at each of these six planning areas and identified the characteristics of the sites involved as a means of documenting existing conditions in these planning areas.<sup>279</sup>

The goals of the EBMHP were consistent with and derived from the earlier East Boston Master Plan.<sup>280</sup> These goals include: preserving and promoting water-dependent industrial uses; provide full and appropriate utilization of the Inner Harbor waterfront; preserving, protecting, and enhancing public access to and use of the waterfront; and maintaining and improving the quality of life and the public's enjoyment of the waterfront.<sup>281</sup> Additional goals include promoting housing to meet community needs; preserving, maintaining, and enhancing historic residential neighborhoods and natural resources; and reinforcing existing commercial business centers.<sup>282</sup>

The 2002 EBMHP planning process was open to the public, with the City's Municipal Harbor Plan Advisory Committee (MHPAC) providing community meetings at which the general community could air its concerns and questions.<sup>283</sup> The MHPAC includes “community representatives from the City's waterfront neighborhoods, elected officials, representatives from federal, state and city agencies, educational institutions, advocacy groups and commercial interests.”<sup>284</sup>

The East Boston Master Plan (as noted above, the Master Plan is distinct from the EBMHP) suggested specific uses for two DPA waterfront sites, the Boston East Site and the Hess Oil Site.<sup>285</sup> The Master Plan recommended that housing be developed on the Boston East site, which would require the removal of the DPA classification because part of the site is located within the DPA while another part of the site is not.<sup>286</sup> The Hess Oil Site is located within the Chelsea Creek DPA, and information about this site and Chelsea Creek can be found above in the Chelsea Creek section.

On July 15, 2002, the Secretary of the EEA approved the City's EBMHP.<sup>287</sup> The Secretary noted that the East Boston DPA did not have the same large-scale container-type capacity as the South Boston or Charlestown DPAs, but observed that the East Boston DPA was "well suited for the tug boat, marine construction, vessel repair, industrial welding, and boating supply businesses, and other support services that are critical to port activities."<sup>288</sup> The Secretary's words makes clear that industrial uses within a DPA do not have to be large-scale operations and that a DPA will be considered successful if it supports smaller businesses that "contribute to the success of the Port of Boston, as well as the Massachusetts maritime infrastructure and economy."<sup>289</sup>

The Secretary's 2002 EBMHP Decision approved substitute provisions related to setbacks, facilities for public accommodation, and building height for two specific properties at that time – Hodge Boiler Works and Clippership Wharf.<sup>290</sup> The EBMHP Decision also required that a DPA Boundary Review be conducted before further planning for the properties within the DPA could proceed.<sup>291</sup>

The East Boston DPA Boundary Review was initiated by the CZM in December 2001, with the Boundary Review analysis published on December 18, 2002 and a decision answering comments issued on April 23, 2003. The 2003 decision did not substantively change the Boundary Review conclusions from December 2002.<sup>292</sup> Therefore, any time the term "East Boston Boundary Review" is used in this report, it refers the 2002 December document. While the boundary review was pending, this allowed the EBMHP recommendation regarding the planned alterations to Hodge Boiler Works and Clippership Wharf to occur with the understanding that site-specific substitutions, offsets, or amplifications related to the Waterways Regulations for other properties in the planning area would be addressed in a forthcoming amendment to the approved EBMHP.<sup>293</sup>

The East Boston DPA is directly connected to the surrounding areas by bridges and tunnels and the topography is described as typical of a highly urbanized waterfront that had been altered to accommodate maritime industry.<sup>294</sup> With regard to the water and sewer systems, CZM determined that the presence of seven active water-dependent use parcels and five parcels with supporting uses demonstrated that the existing water and sewer supply was capable of supporting maritime industrial uses.<sup>295</sup> Under 301 CMR 25.04(1)(a)(2) and 25.04(2)(a) the shoreline was determined to be substantially developed to establish a functional connection with a DPA land area and to establish a functional connection with a navigable waterway.<sup>296</sup> Further, under 301 CMR 25.04(2), the land area was determined to be adequately served by roadways leading to major arterial routes, had water and sewer facilities capable of supporting general industrial use, and free of topographical restrictions to industrial use.<sup>297</sup>

The DPA is comprised of four sub-areas, with three of them having been the focus of the boundary review.<sup>298</sup> Within these sub-areas CZM determined that twenty-three of the parcels contained therein were not eligible for review per 301 CMR 25.03(2) because they were currently in maritime industrial use.<sup>299</sup> The activities on these parcels included metal fabrication, marine retail and industrial storage.<sup>300</sup>

The following are brief descriptions of the parcels which were not modified:

- 102 & 120 Border Street – Vacant properties that became the property of the City of Boston through foreclosure. These sites are “generally characterized as significantly deteriorated with abandoned piers, pilings, marine railways and bulkheads extending into the harbor ... [b]roken slabs, rebar, weeds, broken glass, and debris dominate the upland portion of the site.”<sup>301</sup>
- 170-180 Border Street – “An abandoned one-story 11,700 square foot industrial warehouse ... and a small office are located in the existing building. The last use on this site occurred in 1991.”<sup>302</sup>
- 184 Border Street – Contains a retail complex dating back to the mid 1800s including CVS Pharmacy, Kappy’s Liquors, etc. The waterfront parcel located behind the retail stores supports a marine industrial use.<sup>303</sup>
- 266 Border Street – Current uses included a Laundromat, a gift-wrapping service, and rental space used by local musicians. There is no shoreline associated with this site but an abutting site has a shoreline, developed with piers, etc.<sup>304</sup>
- 276 Border Street – Used for storage of large equipment. The waterfront associated is “comprised of a dilapidated concrete/asphalt pier extending approximately 322 feet into the harbor.”<sup>305</sup>
- 282 Border Street – Comprised of a one-story industrial building with little paved land area; no shoreline associated with this parcel.<sup>306</sup>
- 60 Border Street – 120 feet of shoreline associated with this parcel and the owners of the property occupied the building’s warehouse space and offices for their large machinery conditioning business.<sup>307</sup>
- 80 Border Street – The building located here is 70-80% occupied by various businesses and is owned by the City of Boston.<sup>308</sup>

CZM then considered which parcels were eligible for review by virtue of the fact that (a) the parcels were not the subject of a designation decision within the previous five years (nor demonstrated to be an area of rapid change which affected the suitability of the area to accommodate water-dependent industrial use); (b) the parcels were not areas within a DPA upon which reasonably continuous water-dependent industrial use had occurred within the previous five years, or in which a user had involuntarily discontinued use ... or (d) the parcels were not

areas within a DPA entirely bounded by existing DPA lands and/or by waters.<sup>309</sup> In reviewing the eligible parcels, CZM focused on 301 CMR 25.05(2) which states that “[e]xcept as otherwise deemed appropriate ... DPA boundaries shall coincide to the maximum practicable extent with roadways, property lines, or other physical or legal landmarks that are generally permanent ... CZM may make minor adjustments of an existing DPA boundary to facilitate its identification in relation to such physical or legal landmarks.”<sup>310</sup> Thus, review of certain parcels (4-26 New Street and 310 Border Street) allowed the DPA boundary to be redrawn in order to maintain an overall contiguous boundary for the DPA.<sup>311</sup>

From the East Boston DPA boundary review, it appears that the best chance for having property removed from a DPA is to have the parcel boundaries altered to comply with 301 CMR 25.05(2). The only areas removed by CZM in the East Boston Boundary Review were those portions of properties which were only partially within the DPA. Where the DPA boundary lines intersected the buildings located on the parcel or otherwise were not in conformance with property lines, CZM determined that the entire property should be removed from the DPA.

As a result of the 2002 and 2003 Boundary Review and Decision, the amendments to the 2002 EBMHP identified site-specific substitutions and offsets for three specific parcels in the planning area: 6-26 New Street (addressed in the Phase I-Decision, December 17, 2008 ), and 102-148 Border Street and 125 Sumner Street (addressed in the Phase II-Decision, March 4, 2009).<sup>312</sup>

In the Phase I decision, because portions of the New Street site were within the East Boston DPA, the Secretary had to review the EBMHP plan to confirm that it was consistent with Chapter 91 requirements and the 2003 DPA Boundary Review Decision.<sup>313</sup> In the 2003 DPA Decision, land area from New Street had been removed from the DPA, leaving only the northerly portion of the watershed in the DPA.<sup>314</sup>

The New Street Project site consists of the redevelopment of an existing 9-story building, and the construction of a new 6-story building and a small parking garage.<sup>315</sup> Also, the project site includes a small marina with water taxi service, public open space, dredging, public access to and along Boston Harbor, and improvements to the navigability of the DPA watershed area on the site.<sup>316</sup>

Based upon the DPA decision requirements,<sup>317</sup> the 2008-2009 EBMHP commits the MHP to the following requirements: removal of all pile fields (DPA and non-DPA); repair of seawalls and adjacent surfaces; provision of a permanent vehicle access route from New or Sumner Street to the DPA and Water-Dependent Use Zone; provision of language in lease forms or deeds indicating the existence of nearby water-dependent industrial facilities and uses with operational characteristics as enumerated in 310 CMR 9.51(1); construction of a two-level parking structure to physically buffer the new mixed-use buildings from the adjacent DPA, and construction techniques to minimize noise; construction of a docking facility in a non-DPA watershed to serve water taxi service; and development of site improvements to improve the DPA area’s accessibility for vessels berthing at the existing neighboring dock.<sup>318</sup>

Based upon the above conditions being met, the Secretary found that the Plan was consistent with the requirements of the DPA and the 2003 DPA Designation Decision as long as sufficient

watersheet along the northern property line remains clear of obstructions so that “adjacent water-dependent industry, Boston Transportation and Towing, can berth and maneuver commercial vessels on both sides of its existing piers.”<sup>319</sup> Thus, even where a parcel was removed from the DPA through an earlier boundary review, the parcel owner remained obligated to ensure that activities on his parcel did not interfere with the existing maritime industry which would continue to operate on the DPA.

In the Phase II decision, the Secretary of the EEA determined that the EBMHP amendment applying to Border and Sumner Streets was consistent with applicable CZM policies.<sup>320</sup> At the time of the Plan’s adoption, there were twenty CZM policies, and fifteen were recognized as applicable to the EBMHP.<sup>321</sup>

In the Phase II decision, the Secretary approved changes to the Border Street planning area related to building setbacks from a Water-Dependent Use Zone (WDUZ).<sup>322</sup> The reconfigured WDUZ provides setbacks along the waterfront and Harborwalk and additional setbacks in other areas of the site that are contiguous to the DPA and the proposed historic maritime interpretive area.<sup>323</sup>

The Secretary also approved an increase in building height and a substitution for the Utilization of the Shoreline for Water-Dependent Purpose which requires a pedestrian access with walkways no less than ten feet in width.<sup>324</sup> The EBMHP proposed substitution would require a twelve foot wide public pedestrian accessway which was approved by the Secretary.<sup>325</sup>

In order to enhance the DPA, even with certain parcels having been removed, the Secretary required improvements to render parcels more suited for maritime-industrial uses and functions, and also to provide buffering elements between DPA and non-DPA activities.<sup>326</sup> Rather than specifying all improvements, the Secretary listed examples, including:

- Removal of dilapidated pile fields (DPA and non-DPA)
- Restoration of seawalls and adjacent surfaces;
- Regrading and remediation of site;
- Specifically for the mixed use building on Border street, inclusion of a provision of language in lease forms (or deeds) indicating the existence of nearby water-dependant industrial facilities and uses with operations characteristics as enumerated in 310 CMR 9.51(1);
- Use of appropriate construction materials, for the mixed-use building at Border Street, to mitigate potential adverse impacts of neighboring water-dependent and marine industrial activities; and
- Provision of buffer, or transitional, land uses along the ground floor of the mixed-use building which is adjacent to the DPA.<sup>327</sup>

The Secretary also approved requests for substitutions of certain provisions for the Sumner Street area in the Amendment to the EBMHP.<sup>328</sup> The Sumner Street area substitutions referred mostly to residential units and the redevelopment of such units.<sup>329</sup> The EBMHP noted that plans for this area were in early stages and thus the project size is unclear; however, the Plan indicated that the site would at least retain a current number of affordable units.<sup>330</sup> No parts of Sumner Street were located within the DPA.

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<sup>1</sup> 16 U.S.C. 1452(1)(2009)

<sup>2</sup> 301 CMR 25.00 *Designation of Ports Areas* (October 6, 1994). Introduction, p. 2. Hereinafter referred to as “Introduction p. #”.

<sup>3</sup> Massachusetts Office of Coastal Zone Management. *About the Massachusetts Coastal Zone Management Program*. Available at: <http://www.mass.gov/czm/aboutczm.htm>. Last updated January 1, 2009.

<sup>4</sup> Massachusetts Office of Coastal Zone Management. *CZM Mission Statement*. Available at: <http://www.mass.gov/czm/mission.htm>. Last updated January 1, 2009.

<sup>5</sup> Introduction, p. 1.

<sup>6</sup> *Id.*

<sup>7</sup> Introduction, p. 2.

<sup>8</sup> *Id.*, p.2-3

<sup>9</sup> Heacock, Erin L., “The Complex Waterfront: A Study of the Chelsea Creek Designated Port Area in Chelsea, Massachusetts.” (MA Tufts University, 2009), p. 4.

<sup>10</sup> Heacock, Erin. *DPA Chart*. Available at:

<https://wikis.uit.tufts.edu/confluence/display/TheComplexWaterfront/Massachusetts+DPAs>. Hereinafter referred to as: “Heacock, DPA Chart”.

<sup>11</sup> It shall be referred to as EEA throughout this document for consistency’s sake.

<sup>12</sup> Introduction, p. 3.

<sup>13</sup> *Id.* “Interim basis” appears to be a reference to Temporary Uses, discussed below.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Massachusetts Office of Coastal Zone Management. *Coastal Zone Management Program Policies*. Available at: <http://www.mass.gov/czm/policies.htm>

<sup>17</sup> Massachusetts Office of Coastal Zone Management. *301 CMR 21.00: Coastal Zone Management Program Federal Consistency Guidelines: 21.98 – Policy Appendix*. Available at:

<http://www.mass.gov/czm/frczmregs.htm#98>. Last updated October 11, 2007.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Heacock, Erin, p. 34-35.

<sup>21</sup> 310 CMR 9.00

<sup>22</sup> Massachusetts Coalition for Healthy Communities. *Chapter 91, The Massachusetts Public Trust Doctrine*. March 3, 2003. Available at: <http://www.masschc.org/printer.php?id=261>. Hereinafter referred to as “Health Communities: *Massachusetts Public Trust Doctrine*”

<sup>23</sup> Introduction, p. 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Introduction, p. 3.

<sup>27</sup> The Boston Harbor Association. *Inside the Working Port: A story of Boston’s Designated Port Areas*. June 2003. p.2-3 Hereinafter referred to as “TBHA: *Inside the Working Port*, p.#”

<sup>28</sup> *Id.*, p. 5-5.

<sup>29</sup> *Id.*

<sup>30</sup> *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 654 (1979).

<sup>31</sup> *Id.* at 636

<sup>32</sup> *Id.* at 636-637

<sup>33</sup> *Id.* at 647

<sup>34</sup> *Id.* at 647-648, quoting *Bradford v. McQuesten*, 182 Mass. 80, 82 (1902).

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<sup>35</sup> 301 CMR 25.01(2)  
<sup>36</sup> 16 U.S.C. 1452, Sec. 303(1)  
<sup>37</sup> 16 U.S.C. 1452, Sec. 303(2)  
<sup>38</sup> 301 CMR 25.01(2)  
<sup>39</sup> *Id.*  
<sup>40</sup> *Id.*  
<sup>41</sup> *Id.*  
<sup>42</sup> *Id.*  
<sup>43</sup> *Id.*  
<sup>44</sup> 310 CMR 9.12(2)(b)  
<sup>45</sup> 301 CMR 9.12(1)  
<sup>46</sup> 310 CMR 9.02  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.*  
<sup>49</sup> *Id.*  
<sup>50</sup> *Id.*  
<sup>51</sup> TBHA: *Inside the working Port*, p. 3-4.  
<sup>52</sup> 301 CMR 9.12(3)  
<sup>53</sup> 301 CMR 9.12(3)(a), (b)  
<sup>54</sup> 301 CMR 9.12(3)  
<sup>55</sup> 301 CMR 23.02  
<sup>56</sup> *Id.*  
<sup>57</sup> New Bedford-Fairhaven Harbor Plan, p. 6.  
<sup>58</sup> *Id.*  
<sup>59</sup> 301 CMR 25.03(1)(a)-(d)  
<sup>60</sup> 301 CMR 25.03(2)(a)-(d)  
<sup>61</sup> 301 CMR 25.04(1) and (2)  
<sup>62</sup> 301 CMR 25.04(3)  
<sup>63</sup> 301 CMR 25.03(3)  
<sup>64</sup> 301 CMR 25.04(3)  
<sup>65</sup> 301 CMR 25.04(1)(a)(1)-(2)  
<sup>66</sup> 301 CMR 25.04(1)(b)  
<sup>67</sup> 301 CMR 25.04(1)(b)(1)-(2)  
<sup>68</sup> 301 CMR 25.04(2)(a)  
<sup>69</sup> 301 CMR 24.04(2)(b)(1)-(2)  
<sup>70</sup> 301 CMR 25.04(2)(c)  
<sup>71</sup> 301 CMR 25.04(2)(d)(1)-(2)  
<sup>72</sup> 301 CMR 25.05(2)  
<sup>73</sup> *Id.*  
<sup>74</sup> *U.S. Gypsum Co. v. Executive Office of Environmental Affairs*, 69 Mass.App.Ct 243 (2006).  
<sup>75</sup> *Id.* at 250  
<sup>76</sup> *Id.* at 250-251.  
<sup>77</sup> *Id.* at 251, quoting 301 CMR 25.03(5)  
<sup>78</sup> *Id.* at 250 (quoting 25.04(2))  
<sup>79</sup> *Id.* at 250  
<sup>80</sup> 301 CMR 25.03(5)  
<sup>81</sup> *Id.* at 251  
<sup>82</sup> *Id.* at 252  
<sup>83</sup> *Id.* at 252  
<sup>84</sup> Heacock, Erin, p. 26, quoting Chelsea Zoning Ordinance 2006.  
<sup>85</sup> *Id.*, p. 26.  
<sup>86</sup> *Id.*, p. 27, quoting Chelsea Zoning Ordinance 2006.  
<sup>87</sup> *Id.*, p. 28.  
<sup>88</sup> TBHA: *Inside the Working Port*, p. 2-4.

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<sup>89</sup> *Id. Referencing*: Commonwealth of Massachusetts, Massachusetts Port Authority and the City of Boston. *Port of Boston Economic Development Plan*. March 1996. Section 2.9.

<sup>90</sup> 301 CMR 10.01(2). *Also see*: M.G.L. c. 131, s. 40

<sup>91</sup> *See*: Department of Environmental Protection, Wetlands. <http://www.mass.gov/mgis/wetdep.htm>

<sup>92</sup> Heacock, Erin, p. 29.

<sup>93</sup> *Id.*, referencing 301 CMR 10.02(2)

<sup>94</sup> *Id.*

<sup>95</sup> M.G.L. c. 40A, s. 1A

<sup>96</sup> 33 U.S.C. 1344 (Section 404).

<sup>97</sup> Massachusetts General Laws Chapter 30 and 301 CMR 11.00

<sup>98</sup> 33 U.S.C. 401 *et seq.*

<sup>99</sup> 33 U.S.C. 1451 *et seq.*

<sup>100</sup> 6 U.S.C. 101 *et seq.*

<sup>101</sup> 16 U.S.C. 1531 *et seq.*

<sup>102</sup> *See* M.G.L.A. 21F s. 1-7 and 301 CMR 23.00-23.09

<sup>103</sup> 301 CMR 23.02

<sup>104</sup> 301 CMR 23.03(1)

<sup>105</sup> 301 CMR 23.03(1)(a)-(e)

<sup>106</sup> 301 CMR 23.04(1)

<sup>107</sup> M.G.L. c. 21f, s. 4

<sup>108</sup> M.G.L. c., 21f, s. 5

<sup>109</sup> M.G.L. 21F, s. 4

<sup>110</sup> M.G.L. c. 21f, s. 6

<sup>111</sup> 301 CMR 23.01(2)

<sup>112</sup> 301 CMR 23.04(4)

<sup>113</sup> *See* 301 CMR 23.05(e)

<sup>114</sup> 301 CMR 23.05(2)(e)

<sup>115</sup> 301 CMR 23.05(2)(e)(1)

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 301 CMR 23.05(2)(e)(2)

<sup>119</sup> *Id.*

<sup>120</sup> 301 CMR 23.05(2)(e)(3)

<sup>121</sup> 301 CMR 23.05(2)(e)(4)

<sup>122</sup> 301 CMR 23.05(2)(e)(4)(a)-(c)

<sup>123</sup> 310 CMR 253.05(4)

<sup>124</sup> Heacock, Erin, p. 17.

<sup>125</sup> City of Gloucester Harbor Plan & Designated Port Area Master Plan 2009, January 21, 2009. Available at <http://www.ci.gloucester.ma.us/localpages/comdev/harbor2009.pdf>.

<sup>126</sup> The Decision by the Secretary of EEA was made on September 24, 2002 and expired September 24, 2007. *See*: [http://www.mass.gov/czm/nbfhp\\_full\\_decision.pdf](http://www.mass.gov/czm/nbfhp_full_decision.pdf) for the full decision. As of 2009, there has been no renewal of the Harbor Plan. A Public Meeting was to take place April 3, 2008 about renewing the plan. *See*: <http://www.ci.new-bedford.ma.us/Mayor/PressReleases2008/PressRelease032408-NewBedford-FairhavenHarbor.pdf>

<sup>127</sup> *Id.* p. 3. The planning areas encompass the entire basin at the mouth of the Acushnet River, along with adjacent shorelines and four islands, bounded by the Coggeshall Street Bridge to the north and the Hurricane Barrier to the south.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, p. 6.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*, p. 9.

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<sup>136</sup> *Id.*, pp. 10-11.

<sup>137</sup> *Id.*, p. 11.

<sup>138</sup> *Id.*, p. 13.

<sup>139</sup> *Id.* p. 13-14..The listed CZM policies were: CZM Policy 1: protect ecologically significant resource areas; CZM Policy 3: support attainment of national water quality goals; CZM Policy 5: minimize adverse effects of dredging; CZM Policy 7: encourage location of maritime industry in DPAs; CZM Policy 12: minimize adverse impact on historical districts/sites; CZM Policy 19: provide public benefit from channel dredging; CZM Policy 20: encourage water-dependent use of developed harbors.

“The current policy statements are set forth in EOE regulations at 301 CMR 21.98 (effective March 11, 1997). The prior policy statements were contained in 301 CMR 20.05(3). While the new policies were re-organized under categories and renumbered, changes in the policies applicable to this plan were minimal. The Plan is consistent with these policy revisions, contained in Water Quality Policies 1 and 2, Habitat Policy 1, Protected Area Policy 3, and Ports Policies 1-3.”

<sup>140</sup> *Id.*, p. 14.

<sup>141</sup> *Id.*, p. 12.

<sup>142</sup> *Id.*, p. 14.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, pp. 14-15.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*, p. 16.

<sup>149</sup> *Id.* These credits are initially given to owners of properties that are devoted to Sending Zones which “are expected to benefit directly from the proceeds of credit sales.”<sup>149</sup> “Based on the combined developable areas of all the Receiving Zones established by the Plan, at full buildout as much as \$4 million in financial assistance could flow into the port economy in conjunction with the development of tourism-related facilities in the DPA.”

<sup>150</sup> *Id.*, pp. 15-16.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*, pp. 16-17.

<sup>153</sup> *Id.*, p. 17.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*, p. 18.

<sup>156</sup> *Id.*, p. 18 quoting, p. 60 of the New Bedford/Fairhaven Harbor Plan: Compliance with Standards for Plan Approval, Including DPA Master Plan Approval Standards,” enclosed with the plan submission letter of New Bedford Mayor Frederick M. Kalisz, Jr., dated February 9, 2001.

<sup>157</sup> City of Salem website, *available at*: [http://www.salem.com/Pages/SalemMA\\_WebDocs/destination](http://www.salem.com/Pages/SalemMA_WebDocs/destination)

<sup>158</sup> “Decision on the City of Salem’s Request for Approval of the Salem Municipal Harbor Plan Renewal” was decided by the EEA Secretary on June 24, 2008, *available at*

[http://www.mass.gov/czm/docs/pdf/decisions/salem\\_mhp\\_decision\\_06-24-08.pdf](http://www.mass.gov/czm/docs/pdf/decisions/salem_mhp_decision_06-24-08.pdf). Hereinafter referred to as “Salem Renewal 2008”.

<sup>159</sup> *Id.*, p. 1.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* p. 1-2. See figure 1, “Planning Area” and the yellow DPA area outlined in yellow.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*, p. 2.

<sup>165</sup> *Id.*, p. 3.

<sup>166</sup> *Id.*, p. 4.

<sup>167</sup> Salem Harbor Plan Update, *available at* [http://www.salem.com/Pages/SalemMA\\_News/I012D5294](http://www.salem.com/Pages/SalemMA_News/I012D5294).

<sup>168</sup> 2008 Salem Renewal Plan, p. 3.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, p. 4.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*, p. 5.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*, p. 4.

<sup>178</sup> *Id.*

<sup>179</sup> The policies that were discussed in this MHP include: Water Quality Policy #1, Water Quality Policy #2, Habitat Policy #1, Protected Areas Policy #3, Ports Policy #1, Ports Policy #2, Ports Policy #3 and Ports Management Principle #1.

<sup>180</sup> 2008 Salem Renewal, p. 7.

<sup>181</sup> *Id.* See page 7-9 for a review of these substitutions. This is an example of how the Zoning Act (M.G.L. C. 40A) allows municipalities to work within a MHP and make changes to existing (or to be built) structures.

<sup>182</sup> *Id.*, p. 13.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*, p. 13.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*, p. 14-15.

<sup>193</sup> The Gloucester documents refer to the Gloucester plan as “Harbor Plan” although the document was created following the Municipal Harbor Plan regulations (301 CMR 23.00). For consistency’s sake with the rest of the document, the Gloucester Harbor Plan will be referred to as “GMHP”.

<sup>194</sup> City of Gloucester. *Harbor Plan Implementation*. 2003-2007. Available at:

[http://www.ci.gloucester.ma.us/index.php?module=pagemaster&PAGE\\_user\\_op=view\\_page&PAGE\\_id=23&MMN\\_position=43:43](http://www.ci.gloucester.ma.us/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=23&MMN_position=43:43)

<sup>195</sup> *Id.*

<sup>196</sup> City of Gloucester Harbor Plan & Designated Port Area Master Plan 2009. January 21, 2009. p. 1. Available at: <http://www.ci.gloucester.ma.us/localpages/comdev/harbor2009.pdf?2ed757879199e3a8b617afae48187d20=86741d6d85a84538bcdb912ac26f420f>. Hereinafter referred to as: “GMHP, p. #”.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*, p. 1-2.

<sup>201</sup> *Id.*, p. 2.

<sup>202</sup> *Id.*, p.6.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*, p. 66.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*, p. 17.

<sup>209</sup> *Id.*, pp.18 and p. 66.

<sup>210</sup> *Id.*, p. 69.

<sup>211</sup> *Id.* “The principal reason that the DPA cannot currently meet the standard is that 33.5 percent of the land area in the DPA consists of upland parcels outside of Chapter 91 jurisdiction.” p. 72.

<sup>212</sup> *Id.*, p. 72.

<sup>213</sup> *Id.*, p. 2. These other recommendation include:

A recommendation that the City pursue local zoning amendments for site plan review and for use table changes in order to make local and state permissible uses consistent with one another

A provision which suggests that if no immediate water-dependent industrial use is available for a parcel of land, the owner may provide compensation investment in piers and wharves or, if not possible, there could be a mitigation payment to a new Gloucester Port Maintenance and Improvement Fund.

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<sup>214</sup> *Id.*, p. 67.

<sup>215</sup> *Id.*, p. 67.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*, p. 68.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*, p. 68-69. Generally, the supporting commercial uses must meet the local standards for Special Permits (section 2.2.4, as suggested revised, of the Gloucester zoning code) as well as a new Section 3.6 proposed to be inserted into the Zoning Ordinance.

<sup>221</sup> Executive Office of Energy and Environmental Affairs. *Decision on The City of Boston's South Boston Waterfront District Municipal Harbor Plan*. December 6, 2000. p. 14. The decision is available at: <http://www.mass.gov/czm/mhpfdes.htm> and the amendment at: <http://www.mass.gov/czm/sbostonmhp.pdf>

<sup>222</sup> Executive Office of Energy and Environmental Affairs. *Decision on The City of Boston Request for Approval of Lovejoy Wharf Municipal Harbor Plan Amendment Pursuant to 301 CMR 23.00*. October, 12, 2006. p. 1. Available at: [http://www.mass.gov/czm/docs/pdf/decisions/lovejoy\\_wharf\\_mhpa\\_decision\\_10-12-06.pdf](http://www.mass.gov/czm/docs/pdf/decisions/lovejoy_wharf_mhpa_decision_10-12-06.pdf)

<sup>223</sup> Executive Office of Energy and Environmental Affairs. *Decision on The City of Boston's Fort Point Channel Phase I and Phase II Municipal Harbor Plan*. October 10, 2002 and March 8, 2004 respectively. Phase I available at: [http://www.mass.gov/czm/fpchp\\_fulll\\_decision.pdf](http://www.mass.gov/czm/fpchp_fulll_decision.pdf) and Phase II available at: <http://www.mass.gov/czm/secdecfpdwp2mph.pdf>

<sup>224</sup> Executive Office of Environmental Affairs Office of Coastal Zone Management, Boundary Review of the Mystic River Designated Port Area, Charlestown Shore 38 October 9, 2002. Available at: [www.mass.gov/czm/mysticriverdpa.pdf](http://www.mass.gov/czm/mysticriverdpa.pdf). Hereinafter referred to as "Mystic River Boundary Review , p. #".

<sup>225</sup> See 301 CMR 25.04(2)(d)

<sup>226</sup> Mystic River Boundary Review, p. 10.

<sup>227</sup> *Id.*, pp. 10, 12.

<sup>228</sup> *Id.*, p. 12.

<sup>229</sup> *Id.*, p. 24.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*, p. 25.

<sup>232</sup> *Id.* It is important to make note that the Schrafft parcel was located at the outer edge of the DPA and, therefore, its removal from the DPA would, arguably, not interfere with or disrupt maritime industrial activities within the DPA.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*, p. 27.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*, p. 25.

<sup>241</sup> *Id.*, p. 26. As part of a consistency finding by CZM (of the proposed project being consistent with its policies), CZM explored the question of whether the physical and operational attributes of the Schraffts [sic] site, or the Mystic River DPA as a whole, are likely to be impaired to any significant degree by the fill and structures proposed to be licensed."

<sup>242</sup> *Id.*, referring to the suitability criteria found at 301 CMR 25.04.

<sup>243</sup> See footnote 9 for full citation including a link

<sup>244</sup> Vine Associates, Inc. Chelsea Creek Waterfront Plan. June 2007. available at: [https://wikis.uit.tufts.edu/confluence/download/attachments/10980249/Chelsea+Creek+Waterfront+Plan\\_Final+Report\\_8-16-07.pdf?version=1](https://wikis.uit.tufts.edu/confluence/download/attachments/10980249/Chelsea+Creek+Waterfront+Plan_Final+Report_8-16-07.pdf?version=1) p. 3-12. Hereinafter referred to as "Chelsea Creek Waterfront Plan, p.#".

<sup>245</sup> Heacock, Erin, p. 44.

<sup>246</sup> Chelsea Creek Waterfront Plan, p. 1-2.

<sup>247</sup> Heacock, Erin, p. 4.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*, p.2, referencing Community Development Plan.

<sup>250</sup> *Id.*, pp. 48 and 50.

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- <sup>251</sup> *Id.*, p. 50.
- <sup>252</sup> *Id.*
- <sup>253</sup> *Id.*, pp. 50-51.
- <sup>254</sup> *Id.*, p. 50-51 and Chelsea Creek Waterfront Plan, pp. 4-14-4-18.
- <sup>255</sup> Heacock, Erin, pp, 51-52.
- <sup>256</sup> The Commonwealth of Massachusetts, House of Representatives, *see*:  
<http://www.mass.gov/legis/185history/h04002.htm>
- <sup>257</sup> *Id.*
- <sup>258</sup> The Commonwealth of Massachusetts, House of Representatives., *see*:  
<http://www.mass.gov/legis/185history/h04568.htm>
- <sup>259</sup> East Boston Municipal Harbor Plan, p. 23.
- <sup>260</sup> *Id.*
- <sup>261</sup> *Id.*
- <sup>262</sup> *Id.*, p. 24.
- <sup>263</sup> *Id.*
- <sup>264</sup> *Id.*
- <sup>265</sup> *Id.*, p. 63.
- <sup>266</sup> East Boston Municipal Harbor Plan, p. 1.
- <sup>267</sup> Boston Redevelopment Authority. *Planning Initiatives, East Boston*. Available at:  
<http://www.bostonredevelopmentauthority.org/Planning/PlanningInitsIndividual.asp?action=ViewInit&InitID=14>
- <sup>268</sup> *Id.*
- <sup>269</sup> East Boston Municipal Harbor Plan. March 2002. Available at:  
[http://www.bostonredevelopmentauthority.org/pdf/PlanningPublications/East%20Boston%20Waterfront%20Municipal%20Harbor%20Plan%20FINAL%20Submittal%20Fig\\_Wrd&App%2002April18.pdf](http://www.bostonredevelopmentauthority.org/pdf/PlanningPublications/East%20Boston%20Waterfront%20Municipal%20Harbor%20Plan%20FINAL%20Submittal%20Fig_Wrd&App%2002April18.pdf). p. 3. Hereinafter “EBMHP 2002, p. #”.
- <sup>270</sup> *Id.*, p. 4.
- <sup>271</sup> *Id.*
- <sup>272</sup> *Id.*, p. 1.
- <sup>273</sup> *Id.*
- <sup>274</sup> *Id.*
- <sup>275</sup> *Id.*
- <sup>276</sup> *Id.*
- <sup>277</sup> *Id.*
- <sup>278</sup> These properties are included in the EBMHP as a reference point only since Massport and DEP are currently developing a Memorandum of Understanding to govern Chapter 91 jurisdiction of these parcels. *Id.*, p. 5.
- <sup>279</sup> *Id.*, pp. 6-7.
- <sup>280</sup> *Id.*, p. 7.
- <sup>281</sup> *Id.*
- <sup>282</sup> *Id.*, p. 7-8.
- <sup>283</sup> *Id.*, p. 19.
- <sup>284</sup> *Id.*
- <sup>285</sup> *Id.*, p. 34.
- <sup>286</sup> *Id.*
- <sup>287</sup> Executive Office of Energy and Environmental Affairs. *Decision on the City of Boston’s Request for Approval of the East Boston Municipal Harbor Plan*. July 15, 2002. p. 3. Hereinafter referred to as “EBMHP 2002, p. #”.
- <sup>288</sup> *Id.*, p. 4.
- <sup>289</sup> *Id.*
- <sup>290</sup> *Id.*, p. 24.
- <sup>291</sup> *Id.*, p. 9.
- <sup>292</sup> Executive Office of Energy and Environmental Affairs. *East Boston Designated Port Areas Boundary Review*. December 18, 2002. p. 4 Hereinafter referred to as “EB Boundary Review 2002, p. #”.
- <sup>293</sup> EBMHP 2002, p. 9
- <sup>294</sup> *Id.*, pp. 10-11.
- <sup>295</sup> *Id.*, p. 11.
- <sup>296</sup> *Id.*, p. 20.

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<sup>297</sup> *Id.*  
<sup>298</sup> *Id.*, p. 10.  
<sup>299</sup> *Id.*, p. 13.  
<sup>300</sup> CZM, *supra* note 1, pp. 13-14.  
<sup>301</sup> *Id.*, p. 15.  
<sup>302</sup> *Id.*, p. 16.  
<sup>303</sup> *Id.*  
<sup>304</sup> *Id.*, p. 17.  
<sup>305</sup> CZM, *supra* note 1, p. 17.  
<sup>306</sup> *Id.*  
<sup>307</sup> *Id.*, p. 18.  
<sup>308</sup> *Id.*, p. 18-19.  
<sup>309</sup> *Id.*, p. 15. *See also* 301 CMR 25.03(2) .  
<sup>310</sup> EB Boundary Review Decision, 2003, p. 3.  
<sup>311</sup> The boundary at 4-26 New Street had been bisecting a building and the boundary line at 310 Border Street did not appear coincident with any permanent, ascertainable physical monument, feature or other legal description and was recommended for adjustment.  
<sup>312</sup> Executive Office of Energy and Environmental Affairs. *Decision on the City of Boston’s Request for Approval of the East Boston Municipal Harbor Plan Amendment Pursuant to 301 CMR 23.00 – Part I: 6-26 New Street.* December 17, 2008. Hereinafter referred to as “EBMHP Part I, p. #”.  
<sup>313</sup> *Id.*, p. 10.  
<sup>314</sup> *Id.*  
<sup>315</sup> *Id.*, p. 9.  
<sup>316</sup> *Id.*, p. 6.  
<sup>317</sup> *Id.*, p. 11. The DPA designation decision included the following commitments by the property owner: Infrastructures improvements by the property owner including: removal or restoration of all on-site piled (DPA and non-DPA); side-wide reconstruction of all deteriorated sections of the bulkheads and inclusions of a permanent vehicular access route from New or Sumner Street to the DPA and WDUZ in design for any future projects that will be included in any future c. 91 license review process. To implement these upgrades, one of the following options was required: construction of a permanent pile supported pier in the DPA; installation of a floating docs capable of berthing vessels of a type and size common to marine industry; or restoration of the DPA portion of the site to a level that will allow the areas to be accessible for vessels berthing at existing neighborhood docks.  
<sup>318</sup> *Id.*  
<sup>319</sup> *Id.*, p. 11.  
<sup>320</sup> Executive Office of Energy and Environmental Affairs. *Decision on the City of Boston’s Request for Approval of the East Boston Municipal Harbor Plan Amendment Pursuant to 301 CMR 23.00 – Part II: 102-148 Border Street and 125 Sumner Street.* March 4, 2009. p. 5. Hereinafter referred to as “EBMHP Part II, p. #”.  
<sup>321</sup> These CZM policies have been addressed above. For EBMHP, the policies deemed applicable were: Water Quality Policy #1, Water Quality Policy #2, Habitat Policy #1, Habitat Policy #2, Protected Areas Policy #3, Coastal Hazards Policy #1, Coastal Hazards Policy #2, Coastal Hazards Policy #3, Ports Policy #3, Ports Management Principle #1, Public Access Policy #1, Public Access Management Principal #1, Public Access Management Principal #2, Public Access Management Principal #3, Public Access Management Principal #4.  
<sup>322</sup> EBMHP Part II p. 10-11.  
<sup>323</sup> *Id.*  
<sup>324</sup> *Id.*, p. 78.  
<sup>325</sup> *Id.*  
<sup>326</sup> *Id.*, p. 12.  
<sup>327</sup> *Id.*, pp. 12-13.  
<sup>328</sup> *Id.*, p. 13.  
<sup>329</sup> *Id.*  
<sup>330</sup> *Id.*, pp. 13-14.