

ACEC Dock and Pier Policy

In recent years the Town of Newbury Conservation Commission has approved the construction of several new piers within the Great Marsh Area of Critical Environmental Concern (ACEC) on properties where no previously existing structure could be documented. As the number of these requests has increased the Commission has further investigated the regulatory ties between the Commission's jurisdiction under 310 CMR 10.00 (Wetland Protections Act) and ACEC related regulations under 310 CMR 9.00 (Waterways Regulations). The goal of this investigation was to better understand the regulatory obligations of the Commission regarding these structures and develop a Commission Policy to handle future applications in the Town.

The Commission has specifically noted that the Waterways Regulations restrict new fill within flowed tidelands (below mean high water) that are also within ACECs (see sections 9.32(1)(e) and 9.32(2)). Proposed new, privately owned structures for water-dependent use below the high-water mark, such as private docks or piers, are only eligible for a license provided that such structures are consistent with an ACEC resource management plan adopted by the municipality and approved by the Secretary of Energy and Environmental Affairs.

The Wetlands Protection Act Regulations the performance standard for proposed work within an ACEC is no adverse effect as per (310 CMR 10.24 (5)(a) and (b) states:

- (5) (a) When any area subject to 310 CMR 10.21 through 10.37 has been designated an Area of Critical Environmental Concern by the Secretary of Energy and Environmental Affairs pursuant to 301 CMR 20.00: *Coastal Zone Management Program*, and when the Secretary has made a finding of the significance of the area to one or more interests of M.G.L. c. 131, § 40, the issuing authority shall presume that such area is significant to those interests.
- (b) When any portion of a designated Area of Critical Environmental Concern is determined by the Issuing Authority to be significant to any of the interests of M.G.L. c. 131, § 40, any proposed project in or impacting that portion of the Area of Critical Environmental Concern shall have no adverse effect upon those interests, except as provided under 310 CMR 10.25(4) for maintenance dredging, under 310 CMR 10.11 through 10.14, 10.24(8) and 10.53(4) for Ecological Restoration Projects, and under 310 CMR 10.25(3) for improvement dredging conducted by a public entity for the sole purpose of the maintenance or restoration of historic, safe navigation channels or turnaround basins of a minimum length, width, and depth consistent with a Resource Management Plan adopted by the municipality(ies) and approved by the Secretary of the Executive Office of Energy and Environmental Affairs.

The Commission recognizes that the interpretation of what comprises an "adverse effect" is central to the question of what can be permitted within the Great Marsh ACEC, which does not have a resource management plan adopted by the municipality and approved by the Secretary. No Adverse impact is defined in 310 CMR 10.00 as:

Adverse Effect means a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area to one or more of the specific interests of M.G.L. c. 131, § 40, as determined by the issuing authority. Negligible means small enough to be disregarded.

The Town of Newbury Conservation Commission has considered all of the information above and determined that the Commission will presume, as a general policy matter and based upon past experience that the construction of new piers, docks or other structures within the portion of the Great

Marsh ACEC in Newbury constitutes an adverse effect due to the likelihood for impacts to vegetation, wildlife habitat, fisheries and shellfish habitat and will likely be considered impermissible as described above. Accordingly, the Commission will maintain a presumption that such applications must be denied. Notwithstanding this presumption, an applicant is welcome to and encouraged to present any evidence it wishes the Commission to consider justifying its any proposed construction of a new pier or other structure within the Great Marsh ACEC. The Commission will continue to consider the merits of any application and all the evidence presented at the public hearing. Accordingly, the Commission will continue to evaluate all applications based on the entirety of the evidence presented and the Commission will continue to exercise its discretion in granting or denying applications in a manner that is consistent with all applicable State and local requirements and in a manner that is consistent with this policy.