



Cape Cod Cranberry Growers' Association

GROWER ADVISORY

Chapter 91 – Public Waterfront Act

Background

Chapter 91, or the Public Waterfront Act, is intended to (1) protect and promote the use of tidelands for water dependent uses; and (2) promote public access on great ponds and navigable rivers and streams. The law is familiar to many cranberry growers who have held Chapter 91 licenses for pumps, flumes, and dams on Great Ponds for many years. In fact, the statute has been on the books since 1866.

An amendment to the law in 1983 re-established regulation that provided jurisdiction over navigable water ways and implemented a more comprehensive licensing procedure. The purpose of this advisory is to make you aware of those regulations and clearly layout your responsibilities under Chapter 91.

What Areas are Affected by Chapter 91?

Cranberry growers only need to be concerned with two situations: (1) Structures on Great Ponds; and (2) Structures on navigable waters ways.

Great Pond: Any lake or pond which is ten acres or more in size, unless it can be shown that the original size of the pond was less than 10 acres. Man-made ponds or reservoirs are not considered Great Ponds. A list of Great Ponds can be found here: <http://www.mass.gov/dep/water/resources/grtpond.htm>

NOTE: According to MassDEP, this list is considered incomplete and a ten-acre pond not on this list may still be considered a Great Pond. To be sure, contact CCCGA or MassDEP.

Navigable Waterways: Any river or stream that can be navigated by any vessel, including a canoe or kayak, at any time of the year. However, sections of rivers or streams which are obstructed by dams or other water control structures (flumes) and therefore not normally navigable, may not be subject to jurisdiction.

How are Structures on Great Ponds Affected?

Massachusetts has required licenses for flumes, dams, and pumps on Great Ponds and waterways for many years. Generally speaking, if structures extend beyond the ordinary high water shoreline they are within jurisdiction and subject to licensing by the Department.

Portable pumps that are used adjacent to an existing structure will not require licensing or permitting provided that conditions of the existing license regarding “drawdown” of the pond are not exceeded. It is highly recommended that notify MassDEP for a determination in these instances.

If a portable pump is used where no licensed structure exists, a permit will be required from MassDEP. However, in lieu of formal engineering plans which are usually required with a permit application, paper plans will be acceptable to MassDEP. This permit will

provide a determination of drawdown and build a history of compliance with the Department.

How are Structures on Navigable Waterways Affected?

Structures on a navigable waterway are held to the same standard that if they extend beyond the ordinary high water shoreline they are within jurisdiction and subject to licensing by the Department.

Portable pumps do not require a license or permit provided their use is consistent with the agricultural exemptions for normal maintenance and improvement activities outlined in the Wetlands Protection Act regulations.

How Do I Find Out if My Property is Already Licensed?

- Unlike a water withdrawal permit, a Chapter 91 License is linked with your property's deed. Your county's Registry of Deeds should have a record of any property having a Chapter 91 License. When looking for the license language, please keep in mind that some were issued as far back as the late 1800s and will be listed under Public Waterfront Act or the Department of Public Works and may be very minimal in nature.
- You may also contact the Lakeville DEP office and ask for the Chapter 91 or Waterways program. If you provide your name and the pond or river you are drawing from and the town in which it is located, they will be able to search their database for existing licenses. Please provide the names of previous landowners if the property has changed ownership. The more information MassDEP has, the better they will have of verifying if a license has been issued.
- You may also schedule an appointment to review the MassDEP records for a particular property by contacting the Department's Boston office. Appointments are available Wednesdays from 9am-3pm and can be made by contacting the Waterways Research Area voicemail system at 617-292-5929. Not all Waterways licenses and plans may be photocopied; some are too old and too large. You should be prepared to photograph or transcribe the text licenses.

How Do I Obtain a License?

You will want to contact the MassDEP to notify them that you are going to apply for a license or permit. MassDEP will then want to conduct a pre-application consultation meeting in order to receive a presentation of the project proposal, explain the necessary licensing procedures, and answer any appropriate inquiries concerning the program. The participants in the pre-application consultation meeting may make arrangements for further consultation sessions and for coordinated review of the project.

An application has to be submitted to the MassDEP and to the Planning Board of the city or town where the work is to be performed. Include the proposed use, location, dimensions, and the mode of work to be performed at the site. From the start of applying for a Chapter 91 license, the whole process can take as long as 276 days but no more.

| Action | Time Allowed |
|--|------------------------|
| DEP assigns file #, issues public notice | ≤ 45 days |
| Public Comment Period | 30 – 60 days |
| Administrative Review at DEP | ≤ 60 days |
| Technical Review & Written Determination | ≤ 90 days |
| Appeal Period | 21 days |
| <i>Maximum Application Process Time</i> | <i>276 days</i> |

Once an application has been submitted, MassDEP will send a notice to you or your representative which must be distributed to abutters and to certain municipal, state, or federal officials or agencies. Publication of the notice begins a 30 day public comment period. Following the 30 day comment period, the MassDEP will issue a written determination to accept or deny the application for a license. If they are issuing a license, the determination will include the conditions upon which the license will stand.

Are there any other Requirements that must be met?

Within 60 days of the date of issuance, you must have your Chapter 91 License and plan recorded at the Registry of Deeds within the property’s chain of title. You are also required to provide MassDEP with written notice of that recordation, including the date of recordation, instrument number, and the name of the Registry of Deeds or Land Court where the recordation was made. Failure to record your license will render the license void.

When your project has been completed, and not later than five years after your license has been issued, you must apply to MassDEP for a Certificate of Compliance. Your application should be in writing and be accompanied by a certification of a registered engineer licensed in Massachusetts that your project has been completed according to plan.

Once a license is obtained, it is recorded with your deed, and you have requested a certificate of compliance, you will not be subject to any further requirements, provided that you adhere to the conditions specified on your license and that no substantial alterations of the structure are made. You are required to maintain and submit water level readings, measurements or other criteria as specified in your license. These requirements are specialized to each license and if you have any questions, please contact CCCGA or MassDEP.

How Long is a License Good For?

Chapter 91 licenses run for 30 years and are renewable at the end of that time. There is a one-time cost for each 30 year license. The fee to renew is ½ of the original license application fee.

If your license was issued prior to 1984 or your structure was built prior to 1984 and you signed up for the cranberry amnesty program in 1990, your license will carry on in

perpetuity. Structures built and licensed between 1984 and October 1, 1993 were licensed for 99 years. All other projects granted licenses now will carry 30 year terms. If you suspect your property was part of the amnesty program of 1990 and was wait-listed by MassDEP, please contact CCCGA to verify.

What about regular maintenance or replacing an Existing Licensed Structure?

Regular maintenance on licensed structures is encouraged, and in fact, required as part of Chapter 91 under the terms of conditions per each license. A licensed structure can not be left to fall into disrepair or will be subject to penalty or fine.

If you are simply rebuilding or replacing what exists, you may go ahead without notifying DEP. The regulation in 310 CMR 9.22 requires that any changes that are “insignificant” do not require notification – this is generally interpreted as roughly 10% of the existing size – but we would advise you to contact MassDEP if you have any questions about this.

If you are replacing a pipe but want to increase the diameter from, say 18” to 24”, or you want to replace the pumphouse but locate it six feet further north, it is generally allowable as a simple modification to the license. Contact MassDEP to discuss modifying your license to note the changes to the new structure.

Maintenance not Directly Related to Structures

Under 310 CMR 9.05 (2) there are several activities that you may consider maintenance but within Chapter 91, these activities require a permit. The most common of these activities is “dredging” – or clearing of siltation around a pump or flume. Although dredging is an exempt activity under the Wetland Protection Act, where a Chapter 91 license exists, you are required to notify MassDEP to apply for a Chapter 91 permit. This permit is different from a license in that it grants permission for certain activities in a Great Pond or navigable waterway and the application process is much simpler than that of a license, requiring you to notify the Department and request a permit. They will usually issue a permit relatively quickly and permits are valid for five years unless otherwise specified within the permit.

Maintenance dredging is allowed under a Chapter 91 License for the first five years after the license was issued without receiving a Chapter 91 Permit. The following chart summarizes these conditions:

| <u>License Status</u> | <u>Permit Required for Dredging</u> |
|-------------------------------|---|
| Licenses issued prior to 1984 | YES |
| “Amnesty” Program Licenses | YES ; unless issued less than five years ago |
| Newly-issued Licenses | <ul style="list-style-type: none"> ▪ NO, if your license was issued less than five years ago, or is newly issued, you have until the fifth anniversary of your license being issued before a Ch. 91 permit is required. ▪ YES; unless issued less than five years ago |

What to do in the Event of an Emergency for Harvest?

There is a process in place for obtaining emergency relief with MassDEP for growers that have a Chapter 91 Waterways license and need to lower the water in the pond below the allowed benchmark. This relief can be granted to allow enough flood water to harvest your crop or to protect in the case of frost. You will need to send a letter to the MassDEP Southeast Regional Office in Lakeville and explain your particular situation. In the letter, state the purpose for the request for relief, record the current pond elevation, an estimate of the water level after you withdraw (if possible, otherwise ignore this if you are unsure), when you anticipate withdrawing the water, how long you anticipate needing the water, if it will be returned to the pond or released elsewhere, your Ch. 91 license number, location of the structure, and information on how to contact you, including your mailing address and telephone number.

MassDEP will then make a determination on your request. Allow yourself as much time as possible. However, if time is short, call the MassDEP Lakeville office directly.

If you have any further questions about a structure on your property or if you are unsure if your property may have a Chapter 91 license, please do not hesitate to contact CCCGA.

The information in this guide is provided by the Cape Cod Cranberry Growers' Association as a service to its members. The information represents our interpretation of the state requirements and by no means is intended to act as a substitute for reading and following the specific regulatory requirements.

**Massachusetts General Law Chapter 91
And
Code of Massachusetts Regulations 310 CMR 9.00**

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For More Information Contact:

Mitch Ziencina
Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
Phone: 508-946-2734
Email: Mitch.Ziencina@state.ma.us
Web: www.mass.gov/dep/water

Jeff LaFleur, Executive Director
Brian Wick, Regulatory Services
Cape Cod Cranberry Growers' Association
3203-B Cranberry Highway
East Wareham, MA 02538
Phone: 508-759-1041
Email: jlafleur@cranberries.org
bwick@cranberries.org
Web: www.cranberries.org