

# ENVIRONMENTAL LAW from A to Z in MASSACHUSETTS

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# **MCGREGOR LEGERE & STEVENS PC**

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**MASSACHUSETTS ENVIRONMENTAL LAWYERS  
FOR OVER 45 YEARS**

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The author thanks his law clerks: Colleen Walsh (2009), Sarah Herbert (2010), Erin Odell (2011), Andrea Cone (2012), Allison Finnell (2013), Jess Bardi (2014), and Olympia Bowker (2015, 2017), and his Associate Caroline Smith (2022, 2023).



# SOURCES OF ENVIRONMENTAL LAW

- State “police power” protects public health, safety, welfare, and morals
- Federal “commerce clause” power
- Sovereign power of over public resources plus eminent domain
- Public trust doctrine on public lands and water areas and other natural resources
- Powers of taxing and spending
- Powers to make contracts and compacts
- Common law doctrines like nuisance, negligence, trespass and water rights
- Federal and state environmental laws
- Municipal Home Rule ordinances
- Energy legislation and policy
- Climate legislation and policy
- Federal and state court decisions



# ENVIRONMENTAL LAW IS NOW IN...

- Administrative Law
- Constitutional Law
- Contract Law
- Corporate Law
- Criminal Law
- Finance Law
- International Law
- Labor and Employment
- Municipal Law & Planning
- Public Health & Safety
- Real Estate
- Tort Law

# A SHORT HISTORY OF ENVIRONMENTAL LAW

## **1950s: Common Law Cases**

## **1960s: Research and Funding**

- Federal grants to states and municipalities
- States decide how clean to be

## **1970s: Permitting and Standards**

- Public concerns: oil spills, rivers catching fire, cancer clusters
- Federal legislation on clean air, water, waste
- Environmental Impact Statements
- Agencies implementing comprehensive regulations

## **1980s: Carrots and Sticks**

- Environmental laws became broad and strong
- Hazardous substances made subject to strict, joint and several, retroactive liability for costs of remediating contamination

## **1990s: Interdisciplinary and Multimedia**

- Growth of environmental law slowed—new approaches emerged
- “Rethinking” or “reinventing” environmental regulations

## **2000s: Climate Change and Biodiversity**

- Connecting environmental, land use, energy, and transportation considerations
- Independent actions by cities and towns using taxing, spending, and police power

## **2010s: Sustainability and Survival**

- Maintaining the natural environment while allowing both humans and nature to be productive
- Use of “green” building, siting, construction, operations, utilities, products, technology, and energy

## **2020s: Energy Reform, Climate Adaptation, Mitigation and Resilience, Environmental Justice**





# AGENCY OVERVIEW

## **Federal Agencies**

- Environmental Protection Agency, Army Corps of Engineers, Departments of Agriculture, Commerce, and Interior, FWS

## **State Agencies**

- Executive Office of Environmental and Energy Affairs (EOEEA)
- Administers conservation, environmental, and agricultural lands, policies, incentives, grants, regulations, and enforcement through DCR, DAR, DEP, DFG, DER, DPU, MEPA and CZM

## **Municipal Agencies**

- Cities and towns maintain primary responsibility for zoning, subdivision control, public health, emergency management, and general bylaws and ordinances through Conservation Commissions, Boards of Health, Planning Boards, Zoning Boards of Appeal, Park and Rec, DPW, Assessors, Road Superintendents, Select Boards, Historic District Commissions, Tree Warden, Animal Control Officer

# ***PROGRAMMATIC AREAS from A to Z***

- **Affordable Housing**
- **Agriculture/Animals**
- **Air Pollution**
- **Archeological Resources**
- **Brownfields**
- **Climate Change**
- **Coastal Zone Management**
- **Common Law**
  - **Nuisance**
  - **Negligence**
  - **Trespass**
- **Community Preservation Act**
- **Conservation Restrictions**
- **Dams/Reservoirs**
- **Drinking Water**
- **Earth Removal**
- **Emergency Management**
- **Eminent Domain/Condemnation**
- **Endangered Species**
- **Energy Generation**
- **Energy Efficiency/Conservation**
- **Energy Facility Siting**
- **Energy Transmission**
- **Environmental Impact Review**
- **Environmental Justice**
- **Erosion/Sedimentation Control**
- **Farms, Farming and Farmland**
- **Fish and Game**
- **Fisheries and Shellfish**
- **Floodplains**

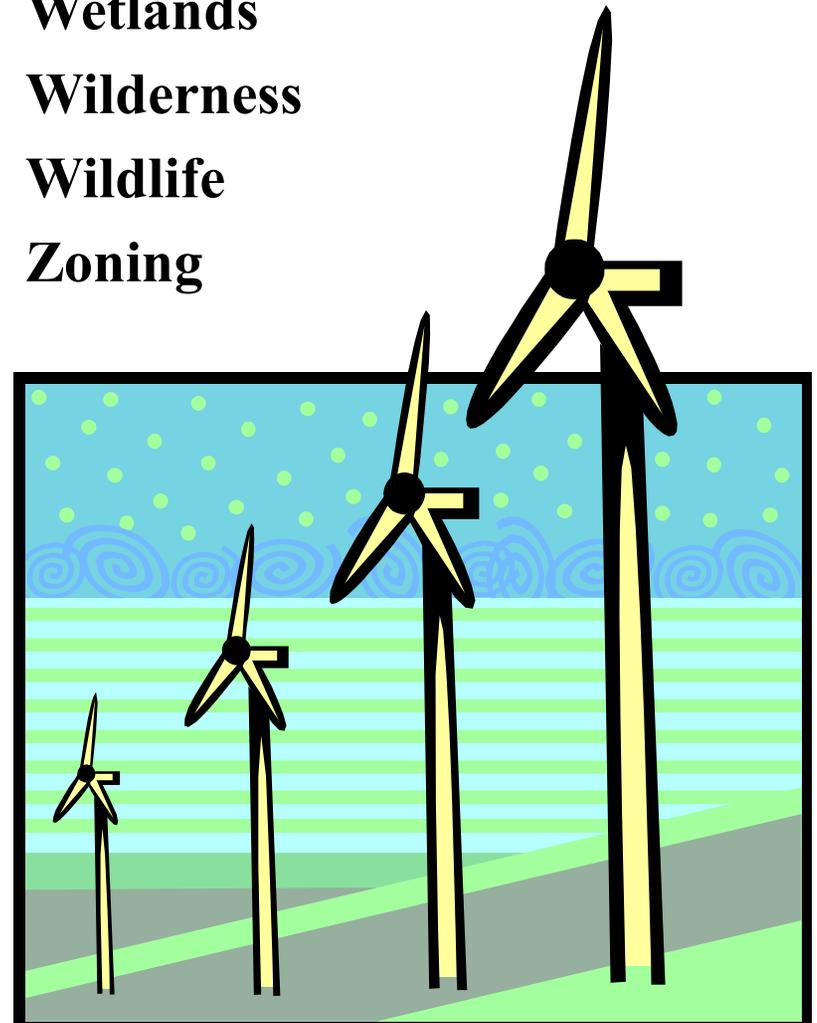
# ***PROGRAMMATIC AREAS from A to Z***

- **Forests and Trees**
- **Great Ponds**
- **Ground Water**
- **Growth Management**
- **Hazardous and Toxic Materials**
- **Hazardous Waste Cleanups**
- **Hazardous Waste Management**
- **Historic Sites/Structures**
- **Home Rule Bylaws/Ordinances**
- **Housing Policy/Projects**
- **Indoor Pollution**
  - **Lead Paint**
  - **Radon**
  - **UFFI**
  - **No Smoking**
  - **Asbestos**
- **Mold**
- **Sick Buildings**
- **Land Use Control**
- **Mining and Minerals**
- **Navigable Waters**
- **Open Meeting Law/Public Records**
- **Open Space**
- **Outdoor Pollution**
  - **Noise**
  - **Lighting**
  - **Blasting**
  - **Odors**
  - **Vibration**
- **Parklands and Reservations**
- **Pesticides**
- **Petroleum Products**
- **Public Lands and Water Areas**

# *PROGRAMMATIC AREAS from A to Z*

- **Radioactive Materials**
- **Regulatory Takings**
- **Scenic Resources**
- **Sewage and Septic Systems**
- **Solid Waste Facilities/Siting**
- **Solid Waste/Cleanup**
- **Storage Tanks**
- **Stormwater Management**
- **Streets, Roads and Highways**
- **Subdivision Control**
- **Taxation (federal, state, local)**
- **Telecommunications**
- **Tidelands and Waterways**
- **Toxic Substances**
- **Transportation/Projects**
- **Water Supply**

- **Water Pollution**
- **Water Rights**
- **Wetlands**
- **Wilderness**
- **Wildlife**
- **Zoning**



## **AIR POLLUTION: Federal**

### **Clean Air Act (CAA), 42 U.S.C. §7410 et seq. (1970)**

- EPA sets limits on certain air pollutants, including emissions from stationary sources like chemical plants, utilities, and steel mills
- Limits are “National Ambient Air Quality Standards” (NAAQS) for common air pollutants
- EPA regulates emissions allowed from mobile sources like cars, trucks, buses, trains, boats and planes.
- EPA can control sources of interstate pollution and of climate changing chemicals.
- EPA gives grants and subsidies to states implementing the CAA.
- EPA has enforcement powers to investigate, issue violation notices and enforcement orders, impose administrative fines, and go to court for civil remedies and criminal sanctions.



## **AIR POLLUTION: State**



### **Principal MA statute regulating air pollution**

- **M.G.L. c. 111, §§ 2B, 31C, 142A-142N**
  - Authorizes DEP to regulate and enforce
  - Gives local boards of health authority to regulate air pollution

### **Principal MA regulations under the air pollution statute**

- **310 CMR §§ 6, 7, 8**
  - § 6 codifies AAQS (Ambient Air Quality Standards) promulgated by EPA
  - § 7 provides detailed regulations of mobile and stationary sources of air pollution
  - § 8 authorizes DEP to deal with air pollution emergencies

### **DEP's Division of Air Quality Control**

- Regulates new and existing emissions of pollutants, including noise and odor

**NOTE:** The definition of air is “atmosphere”

Indoor air is not regulated, with the exception of asbestos.

Odor, noise, and GHG emissions have been increasingly regulated in recent years.

## **AIR POLLUTION: State**



### **DEP's Division of Air Quality Control**

- Regulates new and existing sources of emissions of pollutants, including noise and odor as well as temporary or fugitive emissions
- Requires registration and compliance inspections of stationary sources
- Establishes and measures compliance with ambient air quality standards
- Promulgates state implementation plan (SIP) under the CAA
- Requires motor vehicle emission inspections and maintenance

### **Global Warming Solutions Act, G.L. c. 21N**

- A framework for reducing GHG emissions in each sector of the economy.

### **Multi-state agreement: Regional Greenhouse Gas Initiative (RGGI)**

- Multi-State Cap and Trade program applying to fossil-fuel fired units serving electricity generators

## **AIR POLLUTION: Local**



- Local officials (police departments, fire departments, boards of health, and building inspectors) have authority to enforce air pollution control laws and regulations
- Municipalities have authority under **M.G.L. c. 111, § 31C** to adopt air pollution control programs
  - Areas of regulation: emissions of smoke, particulate matter, soot, cinders, ashes, toxic and radioactive substances, fumes, vapors, gases, industrial odors, and dusts which constitute a nuisance or danger to public health or which impair public comfort and convenience
  - Local requirements administered by the board of health or other authority established for this purpose by vote
  - Local health regulations must be presented at a public hearing, promulgated, published, and provided to DEP

## BROWNFIELDS

### Brownfields:

Lands, often in urban or older suburban areas which, for reasons of real or perceived contamination, have remained abandoned or underused due to fear of legal liability and unpredictable costs.



- Federal Superfund statute: imposes strict, joint and several, and retroactive liability for hazardous substances in the ambient (outdoor) environment but has Brownfields cleanup and redevelopment incentives
- Massachusetts Superfund statute, **M.G.L. c. 21E** has even more extensive liabilities, including property damage, petroleum products, and triple cleanup costs but likewise contains state Brownfields incentives.
  - Tax credits for 25% of cleanup costs are available for sites with future Activity-an-Use Limitations (AULs)
  - Tax credits up to 50% are available for sites that are cleaned up to the point that no AULs are required
  - Loans guaranteed to businesses or individuals that clean up sites, plus funds for economically distressed areas

## **COASTAL AND OCEAN LAW**



### **MA Coastal Zone Management Program**

- Administered by Office of Coastal Zone Management:
  - Promulgates plans, policies and regulations
  - Reviews projects and permits of state agencies for consistency
  - MA Oceans Plan, Designated Port Areas, Ocean Sanctuaries and other laws
  - Essentially “networks” existing constitutional, common law, and statutory authorities of the state in order to accomplish CZM goals

**PRACTICE TIP:** Secure a Consistency Determination by the CZM Program for projects and activities that need or seek federal approvals or financial assistance

### **On a Local Level, CZM works with coastal communities to:**

- Develop Municipal Harbor Plans which can free them from some state constraints
- Encourage marine industrial uses in state designated port areas
- Ensure municipalities get preferential treatment in connection with ocean wind facilities under the Ocean Management Plan, which more broadly deals with state oversight, coordination, planning and policy for the state’s ocean resources

## **COASTAL AND OCEAN LAW**



### **Designated Port Areas**

- Office of CZM works with DEP to encourage Marine Industrial Uses in state-approved Designated Port Areas (DPAs)
  - Promotes and protects water-dependent industrial uses
  - 10 DPAs: Gloucester Inner Harbor, Salem Harbor, Lynn, Mystic River, Chelsea Creek, East Boston, South Boston, Weymouth Fore River, New Bedford-Fairhaven, and Mount Hope Bay

### **Ocean Sanctuaries Act M.G.L. c. 132 A, §§ 12A-18**

- Prohibits or restricts specified activities, including wastewater discharges, within designated ocean sanctuaries along the Massachusetts coast
- There are five designated sanctuaries: Cape Cod Ocean Sanctuary, Cape Cod Bay Ocean Sanctuary, Cape and Islands Ocean Sanctuary, North Shore Ocean Sanctuary, and South Essex Ocean Sanctuary

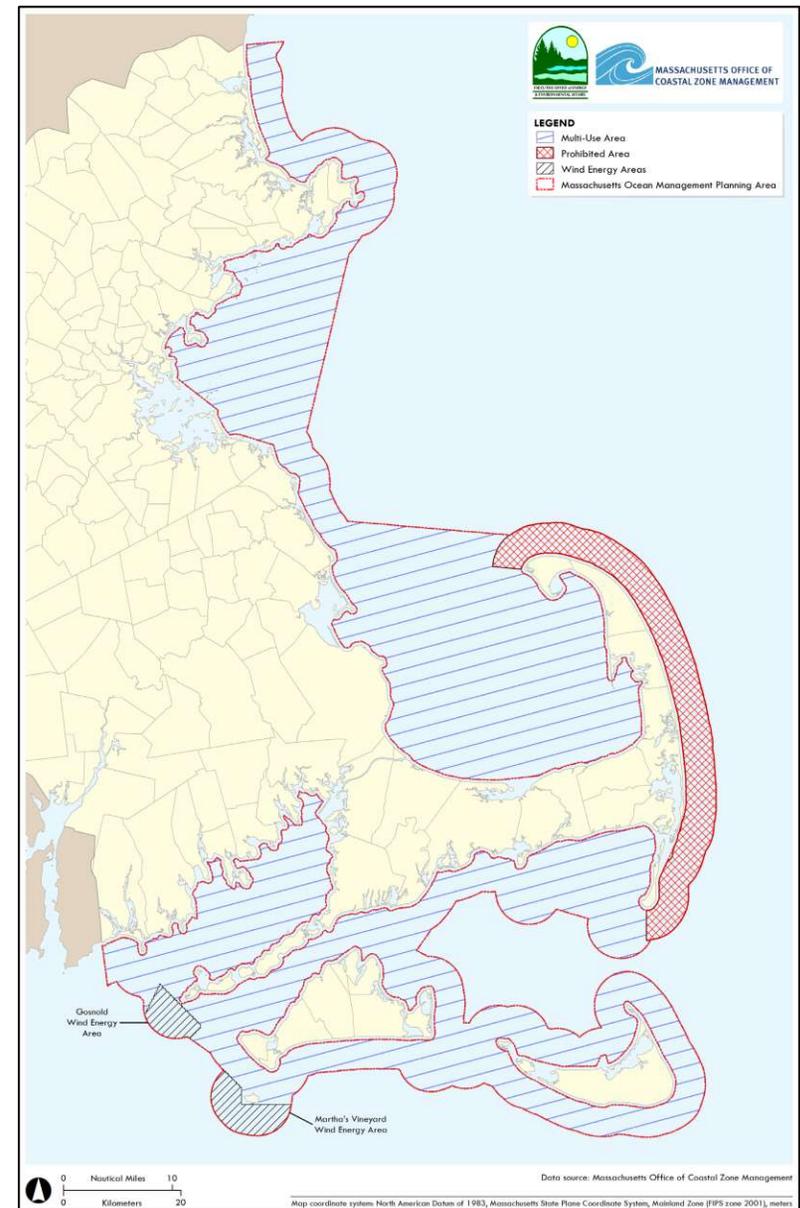
# PROGRAMMATIC AREAS from A to Z

## OCEAN PLAN MAP:

### THREE CATEGORIES OF MANAGEMENT AREAS:

- **Prohibited Area:** Cape Cod Ocean Sanctuary
- **Renewable Energy Area:** marked renewable energy leases
- **Multi-use Area:** Allows specific uses and activities under the Ocean Sanctuaries Act

**NOTE:** The Ocean Act and Ocean Plan legally do not govern commercial fisheries (by an exemption in the Act) or certain offshore wind project (by federal jurisdiction)



## COMMUNITY PRESERVATION



- Any municipality may establish a Community Preservation Act fund
  - Fund may be appropriated and spent for certain open space, historic resources, some recreation, and affordable housing purposes
  - To establish a fund, a community must accept the statute by approval by the town meeting or city council, and a subsequent acceptance by vote at the next regular municipal or state election. **M.G.L. c. 44B**
- Primary source of revenue: a property tax surcharge up to 3% assessed on each parcel of taxable real estate within the community—amounts not subject to the levy limitations of Propositions 2 ½
- Second source of revenue: matching distributions when available from the state's Massachusetts Preservation Trust Fund.

**NOTE:** Many cities and towns adopted the Community Preservation Act, imposing surcharges ranging from 1% to 3%. Guidelines are available from the state Department of Revenue

## **CONSERVATION GRANTS, CREDITS AND DEDUCTIONS**



### **Division of Conservation Services Grants**

- Cities and towns may also apply for open space grants through the Division of Conservation Services (DCS) in the EOEEA
- Use them for acquisition, reacquisition, and renovation of open space
- DCS programs include: the Massachusetts Parkland Acquisitions and Renovations for Communities Program (PARC), Massachusetts Land and Water Conservation Fund, and the Conservation Partnership Grant

### **Land Conservation Incentives Act**

- Effective January 1, 2011. Presently allowed by a lottery system.
- Provides a tax credit for donations of certain land to land trusts or public conservation agencies resulting in permanent protection of drinking water supplies, wildlife habitat and biological diversity, scenic and cultural values, or agricultural and forestry production
- Tax credit is valued at 50% of the fair market value of the gifted land.

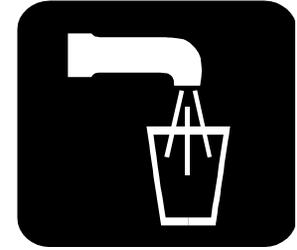
## CONSERVATION RESTRICTIONS



**Conservation Restrictions (CR):** Voluntary agreements between landowner and either a government body or qualified charitable organization, by which owner covenants to keep land primarily in its undeveloped condition forever or term of years.

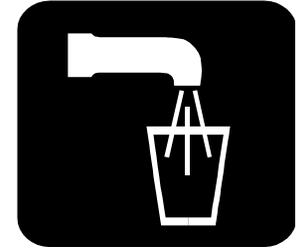
- CR must be sold, donated or bequeathed to a local conservation commission or charitable organization, typically a land trust, within the community
- Must be approved by the recipient and municipal selectboard or city council
- CR is a recorded instrument in a form with an application package submitted to and approved by EOEEA and signed by the EEA Secretary.
- **Conservation Restriction Act, M.G.L. c. 184, §§ 31-33**
- CRs can be bought and sold, donated, or bequeathed
- This Act governs CRs, Agricultural Preservation Restrictions (APR), and Historic Preservation Restrictions (HPR).
- By virtue of the Act, the municipal assessors are required to take account of the restrictions imposed when assessing a property

## **DRINKING WATER**



- **Private Wells**
  - Private well drillers must register annually and submit reports about the wells they have drilled
  - Regulated by local boards of health which promulgate rules for wells
    - Regulations available from the MA Association of Health Boards (MAHB) and the MA Association of Health Officials (MAHO)
- **Public Water Supply**
  - A system that has at least 15 service connections, or regularly serves an average of 25 or more people at least 60 days a year is by law a public system regulated by the federal Safe Drinking Water Act (SDWA)
  - Although many towns still rely, in part, on private wells, most towns in Massachusetts are served by one or more public water supply systems, from municipal wells, reservoirs, or combination

## DRINKING WATER



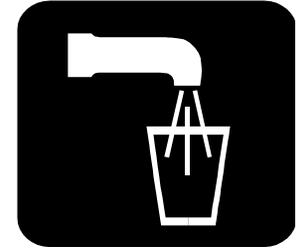
### DEP Authority

- Monitor and enforce water quality standards for *public water supplies*
- Approve sources of water, water systems, and treatment facilities
- No building permit can be issued for building which would need water, unless a water supply is available from a public or private water system

**NOTE:** Owners of buildings that need a source of water but municipal water supply is not available, must receive a permit from the local board of health certifying that there is an adequate supply of potable water at the site

- Approve regulations for new sources, including requirements for controlling land use near wells in order to protect the water quality
- Regularly test public water supplies for contaminants (levels set by EPA)
- If water supply fails the standard, DEP requires public notice or treatment

## DRINKING WATER



- On A Local Level...** Towns with their own water systems may construct and maintain dams, wells, reservoirs, pumping and filtration plants, buildings, stand pipes, tanks, fixtures and other structures, and purification and treatment plants
- Municipalities must have a Water Management Act permit from DEP authorizing the amount of water available to the municipal water supply
  - Towns with a public water supply may create a board of water commissioners or selectmen may be authorized to act as the board. May impose additional controls on a water system, subject to bylaws or any rules and regulations approved by the town **M.G.L. c. 41, § 69**
  - Towns can use the legislative “special act” process to create municipal water departments and combined water and sewer commissions **M.G.L. c. 40N**
  - Except for communities receiving water service from the Massachusetts Water Resources Authority (MWRA), any town may vote to establish and operate its own water supply and distribution system **M.G.L. c. 40 and c. 39A**
  - Towns may purchase water from private companies or from other communities

## **ENERGY LAW**

### **Energy Facility Siting Board (EFSB), M.G.L. c. 164, §§ 69G-69S**

- Licenses construction of major energy infrastructure in MA

### **Renewable Energy Portfolio Standard (RPS) – 2003**

- Required certain percentage of MA electricity to be renewable

### **Regional Greenhouse Gas Initiative (RGGI) – 2007**

### **Climate Protection and Green Economy Act – 2008**

- Requires monitoring, reporting and regulating of GHG emissions with a regional greenhouse gas registry M.G.L. c. 21N

### **Global Warming Solutions Act – 2008**

### **Green Communities Act – 2008**

### **Green Jobs Act – 2008**

### **2016 Massachusetts Clean Energy Industry Report**

### ***An Act Relative to Energy Diversity, Chapter 188 of the Acts of 2016***

### ***Establishing an Integrated Climate Change Strategy for the Commonwealth,*** **Executive Order No. 569**

## **ENFORCEMENT AUTHORITIES**



### **DEP Enforcement**

- Agency inspections, citizen complaints, or follow-up to reports from regulated facilities trigger enforcement from DEP Regional Office

### **Attorney General Enforcement**

- Civil Litigation
- Criminal prosecution

### **Massachusetts Environmental Crimes Strike Force (ESF)**

- Managed by DEP as a coordinating body between environmental agencies to promote proactive oversight and criminal enforcement initiatives.

### **Citizen Suits**

- Citizen Suit Statute, **M.G.L. c. 214, § 7A**
- Citizen Right to Intervene, **M.G.L. c. 30A, § 10A**

### **Anti-SLAPP Statute - M.G.L. c. 231, § 59H**

- Strategic Lawsuits Against Public Participation

# PROGRAMMATIC AREAS from A to Z

## ENFORCEMENT PENALTIES

ACTIVITY OR USE	APPLICABLE LAW	CIVIL PENALTY	CRIMINAL PENALTY
<b>Air</b>	<b>M.G.L. c. 111, § 142A</b>	\$25,000 per violation, each day or part thereof that the violation occurs shall be a separate offense	\$25,000 fine or by imprisonment for up to one year, or both
<b>Hazardous Waste</b>	<b>M.G.L. c. 21E, § 11</b>	\$50,000 per day	\$50,000 fine or by imprisonment for up to two years, or both. Violations of §7 can result in \$100,000 fine, or imprisonment in the state prison for twenty years, or two and one-half years in jail, or both for each violation
<b>Solid Waste</b>	<b>M.G.L. c. 21H, § 8</b>	\$25,000 per violation, each day that the violation occurs shall be a separate offense	\$25,000 fine or by imprisonment for up to two years, or both
<b>Water</b>	<b>M.G.L. c. 21, § 42</b>	\$50,000 per day of the violation	Minimum \$2,500 fine, maximum \$50,000 fine or by imprisonment for up to one year, or both
<b>Wetlands</b>	<b>M.G.L. c. 131, § 40</b>	\$25,000 per violation	\$25,000 fine or by imprisonment for up to two years, or both

## **ENFORCEMENT PROCEDURES**



### **Attorney General Enforcement**

- Civil Litigation
  - On behalf of DEP and other state agencies, or on the AG's own initiative
  - Compels compliance with procedural requirements or permit conditions, or forbids certain activities, by court-ordered injunctions or civil money sanctions
- Criminal prosecution
  - By AG, MA Strike Force, or County District Attorney's Office
  - Punishes violations, prevents serious threats to public health and safety, or compels action when civil litigation has failed to secure compliance

## **ENFORCEMENT STRIKE FORCE**



### **Massachusetts Environmental Crimes Strike Force (ESF)**

- Created in 1989
- Managed by DEP as a coordinating body between environmental agencies to promote proactive oversight and criminal enforcement initiatives.
  - ESF gathers evidence during undercover investigations, builds cases against alleged environmental violators, then takes them to court
  - Investigates and prosecutes civil, criminal and administrative environmental cases
    - Interagency team:
      - Prosecutors from AG Office
      - Officers from the Massachusetts Environmental Police
      - Investigators, engineers, and attorneys from the DEP

## ENFORCEMENT TOOLS



### DEP Enforcement

- Agency inspections, citizen complaints, tips, or reporting from regulated facilities trigger enforcement actions by the DEP Regional Office
  - Notice of Non-Compliance (NON) from DEP—requires a response describing how the violator intends to remedy the violation
  - Penalty Assessment Notices (PANs) **M.G.L. c. 21A, § 16**
    - Up to \$25,000/day for major violations, up to \$1,000/day for minor
    - When DEP can issue a PAN without a NON:
      - 1) Significant impacts to public health, safety, welfare or environment;
      - 2) Violation is willful and not the result of error;
      - 3) Failure to promptly report to DEP hazardous spills; or
      - 4) Violation is part of a pattern of noncompliance
  - Administrative Enforcement Order (ACO) requiring specific actions by specified deadlines, usually first proposed voluntarily and then unilaterally. Violator may appeal it for an adjudicatory hearing at DEP

## ENVIRONMENTAL IMPACT REPORTS



### Massachusetts Environmental Policy Act (MEPA)

- Requires all *state* bodies to prepare, circulate, and consider an **Environmental Impact Report (EIR)** 60 days prior to undertaking any project which may cause significant damage to the environment **M.G.L. c. 30, §§ 61-62H**
- Broad definition of “projects”—including government grants and approvals
  - Can reach private sector projects through:
    - state permits, licenses, and approvals
    - state agency resolution of appeals from local boards
    - state grants and other forms of financial assistance

Does not apply to private businesses or local government decisions unless the subject of the determination has some regulatory or financial connection with or is being conducted or constructed for the Commonwealth.

# PROGRAMMATIC AREAS from A to Z

## ENVIRONMENTAL IMPACT REPORTS

### ENVIRONMENTAL IMPACT REVIEW

1. *Applicability*
2. Procedures
3. Contents of an EIR
4. EIR Review and Approval

## Environmental Impact Review (EIR)

- **MEPA Review Thresholds:** numerical values for various criteria apply to proposed actions
  - Reaches or goes above threshold—must undergo MEPA review
  - Falls below threshold—MEPA will not apply to proposed action
  - Different Review Thresholds for:
    - Permits for agencies within several Executive Offices of Massachusetts
    - Agency actions and financial assistance that present numerical limits for various functions of government such as operations, maintenance, and repair, minor alterations, construction, replacement, reconstruction, repair, etc.
- **Categorical Inclusions:** Projects automatically trigger EIRs due to their volume of...
  - acres of land; wetlands; waterways; tidelands
  - boat slips
  - Height or floor space of residential units; buildings
  - parking spaces
  - water from public water supplies



# *PROGRAMMATIC AREAS from A to Z*

## **ENVIRONMENTAL IMPACT REPORTS**

### **ENVIRONMENTAL IMPACT REVIEW**

1. Applicability
2. *Procedures*
3. Contents of an EIR
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### **Environmental Notification Form (ENF)**

- Submitted to MEPA Unit for review before project
- Less costly and time-consuming than EIR
- MEPA Unit reviews the ENF to decide if an EIR is necessary

### **Area of Critical Environmental Concern (ACEC)**

- Designed by the Secretary of EOEEA
- Represent “unique clusters of natural and human resources values”
- Designation triggers a higher level of state scrutiny for activities in them
  - Currently about 30 identified ACECs, covering about 268,000 acres of land
  - Agencies directed to preserve, restore, and enhance the natural resources of ACECs and ensure that activities in, or impacting upon them, minimize adverse impacts

# PROGRAMMATIC AREAS from A to Z

## ENVIRONMENTAL IMPACT REPORTS

### ENVIRONMENTAL IMPACT REVIEW

1. Applicability
2. *Procedures*
3. *Contents of an EIR*
4. EIR Review and Approval

### EIR Scope and Publication

- MEPA Unit holds meeting or site visit where proponents and public participate
- Scope and expectations are determined for the EIR; Proponents draft EIR
  - EIR availability noticed in Environmental Monitor
  - Review and comment period lasts 30 days: public comment, interested agency review, and MEPA Unit review occur during this time

### Contents

EIR must contain detailed statements describing:

- Nature and extent of proposed project
- Description and analysis of all feasible alternatives
- Environmental impacts of the project
  - Unavoidable adverse environmental consequences of the project, both short- and long-term
  - All mitigation measures used to lessen environmental impacts



# PROGRAMMATIC AREAS from A to Z

## ENVIRONMENTAL IMPACT REPORTS

### ENVIRONMENTAL IMPACT REVIEW

1. Applicability
2. Procedures
3. Contents of an EIR
4. *EIR Review and Approval*

### EIR Certificate, Section 61 Finding, and Suits

- 7 days from the close of review and comment, Secretary issues a certificate of compliance or non-compliance with MEPA requirements
  - Secretary must find “all feasible measures have been taken to avoid or minimize [environmental] impacts” to comply with MEPA **M.G.L. c. 30, § 61**
- Statute of limitations is 120 days for challenges to EIRs for public projects
  - Extensions granted only in situations where environmental problems have been concealed Town of Hull v. Mass. Port Auth., 441 Mass. 508 (2004)
  - 30-day deadline for a private project begins to run when first state permit issued for the project Town of Canton v. Mass. Highway Dept., 455 Mass. 783 (2010)





# ENVIRONMENTAL JUSTICE

## Exec. Order No. 552 (2014)

Signed on November 20th, 2014 by Governor Deval Patrick

*Purpose:*

Incorporate consideration of Environmental Justice Populations into framework of MA law

*Strategy:*

Create new positions to enforce the preexisting environmental justice policy, review the existing definition of “Environmental Justice Population,” make data on Environmental Justice Populations publically available

- In addition, the Order required each Secretariat to develop, and post online, its own strategy to promote Environmental Justice for them to implement independently.

## **FARMLAND & AGRICULTURE**



### **Farming Protections and Tax Breaks**

- **Eminent domain statute:** special protections for farmland for public hearings and availability of non-agricultural land
- **Agricultural Preservation Restrictions (APRs):** deed restrictions preventing farmland development
- **State Zoning Act:** exempts agriculture on land greater than five acres
  - Municipalities authorized to establish “agricultural incentive areas” to further protect farmers and farms
- **Wetlands Protection Act, M.G.L. c. 40:** Qualified exemption for normal maintenance or improvement of lands already in agricultural use
- State-owned agricultural lands are protected by a policy to protect agricultural land base from “irreversible conversion”
- Property Tax Reductions administered by the city or town Board of Assessors

## **FARMLAND & AGRICULTURE**



### **Property Tax Reductions and Property Rights**

- **M.G.L. c. 61A:** Allows reduced property tax assessments
  - Participation for landowners is voluntary on annual form filing
  - Tax relief varies by specific use, under guidelines of the state Department of Agricultural Resources (DAR)
- Exempt from special or betterment assessments while land is farmed
- Higher priority eligibility for land preservation funds
- Increased protection from nuisance suits and eminent domain
- Commonwealth enjoys a right of first refusal to purchase farmland that otherwise would be sold or converted for nonagricultural use in agriculture incentive areas **M.G.L c. 40L**

## **FORESTS AND TREES**



### **Forest Cutting Practices Act M.G.L. c. 132, §§ 40-46**

- Promotes responsible management for harvesting of trees

### **Wetlands Protection Act M.G.L. c. 40**

- Contain a qualified agricultural exemption including forestry

### **M.G.L. c. 48, §§ 16-18**

- Every owner/occupant of land who permits cutting of brush/timber shall dispose of the “slash” in a way that minimizes fire danger

### **M.G. L. c. 61**

- Property tax relief is available from local assessors for land in forestry use

### **Public Shade Trees Act, M.G.L. c. 87**

- Protects publicly owned trees along public ways

### **Scenic Roads Act**

- Regulates permanent or temporary removal of trees and stone walls along scenic roads so designated by the municipality

## HAZARDOUS MATERIALS: CLEANUP



### Massachusetts Superfund Law, M.G.L.c.21E

- Imposes responsibility and legal liability for:
  - Releases of oil and hazardous materials (OHM) into the ambient environment
  - Strict, Joint and Several, and Retroactive liability to DEP and other parties
  - Suspected or confirmed disposal sites in lists maintained by DEP
  - Rights of action for private parties and public agencies to sue for cleanup cost-recovery, contribution, and/or property damage
    - Attorney fees and expert costs incurred as response to releases recoverable as “response” costs,
    - *Bank v. Thermo Elemental, Inc.*, 451 Mass. 638 (2008)
  - Discretion to issue orders, negotiate Activity and Use Limitations (AULs), or file suit against one, some, or all potentially liable parties (PRPs).
  - DEP can record a “Superlien” against contaminated property:
    - Taking priority over all other recorded instruments

## **HAZARDOUS MATERIALS: DEP**



### **DEP's Bureau of Waste Site Cleanup**

- Promulgates **Massachusetts Contingency Plan (MCP)**
  - DEP's comprehensive set of regulations on testing, reporting, planning, designing, cleaning up, and monitoring OHM releases and sites
  - Establishes reportable quantities and concentrations of certain substances
  - Governs anyone who is a present or former site owner or operator who generated, stored, transported, or disposed of OHM
- Routinely imposes administrative fees for sites in the system and assesses civil monetary penalties (PANs) for failure to comply with rules for reporting, testing, and meeting deadlines
- DEP authorized to take response actions for releases and threats of release, including assessment, containment, removal, and to go after the responsible parties to reimburse the Commonwealth

## **HAZARDOUS WASTE MANAGEMENT**



Federal:

### **Resource Conservation and Recovery Act (RCRA)**

**42 U.S.C. §6901 et seq. (1976)**

- EPA regulatory authority to control hazardous waste “cradle to grave”

State:

### **DEP’s Division of Hazardous Waste**

- Implements RCRA Subtitle C program
  - Regulating generation, transportation, treatment, storage, and disposal of hazardous wastes
- Implements **M.G. L. c. 21C; M.G. L. c. 175G**
- Requires permits for treatment, storage, and disposal facilities (“TSDFs”) and mandates a manifest system to track waste from “cradle to grave”
- Expands universe of “hazardous” chemicals, reduces thresholds of Small Quantity Generators (“SQGs”) to reach Very Small QGs (“VSQGs”), requires licenses for transporters (not just registrations), tightens release reporting requirements, and adds procedures and siting criteria for TSDFs

## **HISTORIC SITES AND STRUCTURES**



### **Historic Districts**

- Created by municipalities under **Historic District Act, M.G.L. c. 40C**
- Provide management for sites and structures that meet the criteria

### **Historic District Commissions**

- City or town boards which regulate the established Historic District(s)
- More than 220 local historic districts are in more than 100 communities

### **Local Historical Commissions (LHCs), M.G.L. c. 40, § 8D**

- Broad planning responsibility to identify, evaluate, and protect historic properties
- Provide leadership to preserve historic sites and buildings
- Almost all MA communities have established LHCs

## **HISTORIC SITES AND STRUCTURES**



### **“Demolition Delay” bylaws**

- Enacted under Zoning Act or Home Rule Ordinance/Bylaw
- Provides a cooling-off period of time after a property owner of a subject building files an application for a demolition permit from the building inspector
  - Building inspector prohibited from issuing the demolition permit for a set period of time, usually 90 days to six months
  - Local officials work with the property owner to seek alternatives to demolition

### **Historic Preservation Restrictions (HPRs)**

- Authorized by same statute creating Conservation Restrictions (CR) and Agricultural Preservation Restrictions (APR).
- APR may be given to state or local historical commission or qualified non-profit

### **Archeological Discoveries**

- MA regulates archeological discoveries from survey, excavation, or construction
- Result: mandatory report to the State Archeologist, and then secure preservation

## HOME RULE AUTHORITY



### HOME RULE

- Allows municipalities to enact their own independent legislation
  - Includes authority to protect the public health and safety
  - Interpreted to confer broad authority to protect the environment
  - Implemented through enactment of General Bylaws or General Ordinances
- Source of authority:
  - Home Rule Amendment to MA Constitution, **MA. CONST. amend. 89 § 7**
  - Home Rule statute, **M.G.L. c. 43B**
- **Under Home Rule...**
  - 213 municipalities have given Conservation Commissions power to regulate work in and near water bodies, wetlands, flood plains, and lands subject to the tidal action and storm flowage.
  - Approved in seminal case of *Lovequist v. Conservation Commission of Town of Dennis*, 379 Mass 7 (1979)

## **HOME RULE BYLAWS & ORDINANCES**



### **Home Rule Examples**

- Many communities have General Bylaws and General Ordinances for:
  - Storm water management and facilities
  - Underground tanks storing petroleum and chemicals
  - Industrial disclosures about chemical use
  - Operations of landfills and incinerators
  - Protection of public and private water supplies
  - Sedimentation and erosion control
  - Control of air pollution and noise
- Some communities have adopted regulations or standing orders on:
  - septic systems and sewage treatment
  - underground storage tanks
  - landfills and incinerators
  - cleanup of contaminated land

## **INDOOR AIR POLLUTION**



### **Urea Formaldehyde Foam Insulation (UFFI)**

- Banned in 1979 by the MA Department of Public Health (DPH) under authority to ban hazardous substances **M.G.L. c. 94B, § 2(a)**
- MA trust fund funded by UFFI industries for landowners to use to remove UFFI
- Residential landlords or sellers must determine if UFFI is present

### **Asbestos**

- Friable asbestos defined as an air pollutant by DEP and regulated by DEP and DPH
- State Sanitary Code of DPH regulates the repair and removal of asbestos in residential settings
- Asbestos removal contractors must be licensed and meet specifications of MA Department of Labor and Industries (DLI)

## **INDOOR AIR POLLUTION**

### **Lead Paint:**

#### **Lead Poisoning Prevention and Control Act, M.G.L. c. 111, §§ 190-199**

- Requires identification, removal, detection, and screening for lead paint
- Applies to every change of ownership of leaded residential property
- Failure of residential property owner to comply may result in liability
- Provision for punitive, treble damages

#### **No Smoking Regulation: Clean Indoor Air Act, M.G.L. c. 270, §§ 21-22**



Restricts smoking in many public settings:

- Municipal buildings, nursing homes, supermarkets, mass transit facilities, airports, public elevators, open meetings of government bodies, health and daycare facilities, student dormitories. Signs to restrict smoking in these areas must be posted conspicuously.

Local health officer or building inspector receives complaints

- Many municipal boards of health promulgated more stringent regulations on separate smoking sections: local restaurants and work places, outdoor spaces

## LANDFILLS, INCINERATORS, AND TRANSFER STATIONS



**Regulatory Authority:** DEP Division of Solid Waste and DPH

Comprehensive regulations for:

- Siting of landfills, refuse transfer stations, resource recovery plants, refuse composting plants, and other facilities for the storage, treatment or final disposal of waste

### **DEP Authority**

- Clean up solid waste disposal facilities and recover costs from responsible parties  
**M.G. L. c. 21H, §§ 1-8; c. 111, §§ 150A-B**
- Issues MA Solid Waste Master Plan:
  - Addresses waste management, waste reduction, and waste diversion

### **DPH Authority**

- Decides whether to approve solid waste disposal sites, **M.G.L. c. 111, § 150A**, and hazardous waste facilities **M.G.L. c. 111, § 150B**
- Permit required to transport garbage through town streets **M.G.L. c. 111, § 31A**
- Landfills may close because of proximity to resource areas **M.G.L. c. 111, § 50A**

## **PARKLANDS AND PUBLIC TRUST**



### **Article 97 of Amendments to the Massachusetts Constitution**

- Codifies the Public Trust Doctrine in Massachusetts
- Requires special high-level consideration of any proposed disposition of or change in use of dedicated parklands which is a term broadly defined
  - Requires a 2/3 roll call vote of both House and Senate on passage of a bill in order to dispose of or change the use of certain state, county, or local public lands originally taken or acquired for natural resources purposes
  - Also covers such lands that have been later dedicated to these purposes
  - About 16 to 20 Article 97 bills have passed the Legislature and were signed by the Governor each year, typically about state or municipal changes or exchanges involving parkland, forest, open space, or water supply land for some public project, private development, city or town building, residential project, etc.

## **PARKLANDS AND PUBLIC TRUST**



### **Article 97 Land Disposition Policy, Feb. 19, 1998**

*Purpose:* “Ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions.”

- The policy provides an extensive internal review process for potential dispositions
- EOEEA will not support land disposition unless sponsoring agency establishes “exceptional circumstances exist” and certain conditions will be met.

### **Codified by the Public Lands Preservation Act (PLPA)**

An Act Preserving Open Space in the Commonwealth, known as the Public Lands Preservation Act (PLPA), took effect February 15, 2023, establishing a process and criteria for submitting a proposal to EOEEA and an “Article 97 bill” to the Legislature to authorize a new use and/or disposition (“Article 97 Action”) affecting “Article 97 land.”

## **PARKLANDS AND PUBLIC TRUST**



### **Public Lands Preservation Act (PLPA) Core Provisions**

Clarity, consistency, and compliance measures to achieve No Net Loss of Article 97 lands and water areas by building on the existing EOEEA process requiring justification, assessment, and often replacement of Article 97 areas.

PLPA allows limited cases for cash payments or other financial arrangements in lieu of designating replacement land, easement, or other real property interest.

EOEEA reviews and publishes a public notice, needs assessment, alternatives analysis, natural resource assessment, financial appraisal, any proposed waiver or modification of the rules, the designated replacement land, easement, or interest, any proposed funding-in-lieu of that replacement, approvals by public agencies involved, and authorizing legislation to be submitted, which must be accompanied by EEA findings.

## **PARKLANDS AND PUBLIC TRUST**



### **Additional Protections**

Specific resources are governed by individual statutes—many state, county and municipal public lands municipalities are managed under these laws.

- **M.G.L. c. 45, §§ 1-13, city and town parks**
- **M.G.L. c. 45, § 3, parklands**
- **M.G.L. c. 45, § 14, playgrounds**
- **M.G.L. c. 45, § 19, public domain**
- **M.G.L. c. 45, § 21, city and town forests**
- **M.G.L. c. 45, § 23A-23C, shore reservations**
- **M.G.L. c. 92, §§ 33-59, urban parks and recreation lands**
- **M.G.L. c. 132, state forests**
- **M.G.L. c. 132A, §§ 1-18, state parks**

**PARKLANDS AND PUBLIC  
TRUST**



**Deed in Trust:**

An instrument, drafted and recorded to impress a charitable trust requiring that the property be used forever for a specified stated purpose, and the government accepts the property and those conditions.

**M.G.L. c. 214, § 3(10):**

Basis for 10 taxpayers to commence an action to enforce the terms of a conveyance or gift to a municipality, county, or state agency. This public charitable trust statutory enforcement has been used effectively against many cities and towns to protect parks and forests from other projects.

## PESTICIDES



### **Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)**

### **State Pesticide Board, Department of Agricultural Resources (DAR)**

- Administers state requirements similar to those under FIFRA
  - Requires state registration, applicators, and pesticide programs of public utilities
- M.G.L. c. 132B**
- Pre-empts municipal regulation of pesticides and herbicides, although local regulations can require board of health hearing to ensure use is in compliance with state restrictions *Wendell v. Attorney General*, 394 Mass. 518 (1985)
  - MA bans certain pesticides inside grade schools and child care centers
  - Requires parental notification before outside application of pesticides
    - Treated areas posted at least 72 hours after applications
    - Schools and child care facilities must implement integrated pest management (IPM) for low to no toxicity pest control

## **PUBLIC HEALTH LAW**



### **Municipal Boards of Health (BOH)**

#### **Composition:**

- Selectmen can act as the board of health, or appoint one.  
**M.G.L. c.41, § § 1, 121**
- Members of boards of health are not required by law to have any medical or health training—a board may appoint a physician to advise and assist them. **M.G.L. c. 111, § 27**

#### **Main Purpose:**

- Protect public health in Massachusetts **M.G.L. c.41, § 1**
- Regulate environmental areas where risk of adverse health impacts
- Adopt and enforce reasonable health regulations **M.G.L. c. 111, § 31**

## **PUBLIC HEALTH LAW**



### **BOH Mandatory Obligations**

- Must enforce **State Sanitary Code**
  - Establishes standards for day camps, swimming pools, and food service establishments **M.G.L. c. 111, § 127A**
  - Code permits a board of health or other health authority to adopt rules and regulations stricter than those contained in the code
- Act as local enforcement agents for the **State Environmental Code, Title 5** (sewage disposal standards)
- Must appoint a person to maintain a record of diseases
  - Must notify the school committee of all reported diseases that are dangerous to the public health

## **PUBLIC HEALTH LAW**



### **BOH Discretionary Duties**

- Can establish and maintain dental, medical, and health clinics and to conduct general education campaigns relating to health matters
- May issue orders declaring that an emergency exists and requiring that certain actions be taken
- May take action in the removal of health nuisances

### **M.G.L. c. 111, § 50**

- Health nuisance: source of filth or a cause of sickness
- BOH has power to approve “site assignment”

### **M.G.L. c. 111, § 122**

- Some towns have nuisance abatement bylaws which allow them to clean up nuisances, bill the property owners for costs, and place liens on the property if the bill is not paid

## **PUBLIC HEALTH LAW**

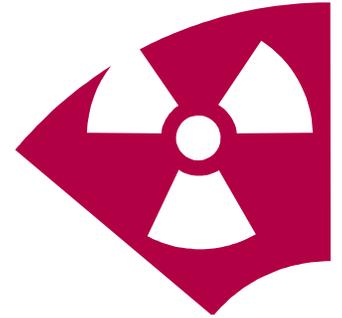


- Several groups of towns have elected to form regional health districts  
**M.G.L. c. 111, § 26A**
- Towns may also specify in their home rule charters a different method of delegating health duties  
**M.G.L. c. 43B, § 20**
- The local health authority is required to notify the state Department of Public Health within 24 hours of the discovery of a case of a communicable disease  
**M.G.L. c. 111, §§ 112, 113**

### **Health Inspector**

- Selectmen are authorized by law to appoint a health inspector, and in towns of less than 3,000 people that person maybe the school physician  
**M.G.L. c. 41, §§ 102, 102A, 102B**
- Health Inspectors must be registered sanitarians (RS)
- Many towns require that inspectors be certified health officers (CHO)

**RADIOACTIVE MATERIALS**



**DPH and Low-Level Radioactive Waste Management Board**

- Within the Executive Office of Administration and Finance
- Plan for MA waste disposal needs in accordance with federal law
- Regulates persons who generate, transport, store, treat or dispose of low-level radioactive waste within the state, and regulates other radioactive hazards

**M.G. L. c. 111H; c. 111, § 4F**

- Massachusetts is not in a Low-Level Radioactive Waste compact
- Massachusetts and federal Nuclear Regulatory Commission (NRC) share 1993 memorandum as basis for MA use of NRC emergency response data system during an emergency at a commercial nuclear power plant in MA

## RIGHT TO KNOW



### **Right to Know Law M.G.L. c. 111F**

- Regulates information on hazardous materials
- *Purpose:* Ensure residents understand the health and safety risks involved in the town's industries
- *How:* Requires cities and towns to respond to citizens' requests for information on hazardous substances used by local employers in the course of their routine work

## **SEWAGE AND SEPTIC SYSTEMS**



### **Division of Water Pollution Control**

- Within the Bureau of Waste Prevention in DEP
- Regulates disposal of sewage in MA

### **Massachusetts Water Resources Authority (MWRA)**

- Responsible for regional waste water collection and treatment and water supply for Metropolitan Boston
- Administers permit program with detailed regulations and enforcement for domestic and industrial discharges to the MWRA sewer system

### **Title V**

- Code of DEP regulations which governs on-site sewage disposal, mandatory inspections, proper components and capacity, periodic pumping, and qualifications of inspectors and contractors.

## SEWAGE AND SEPTIC SYSTEMS



### **Title V**

- On-site sewage disposal:  
System installer, permit procedure, design specifications, testing prerequisites, performance standards (including certain inspections during the life of the system, as with most land transfers such as sale of a home.
- Each septic system requires a construction permit from the local BOH or its agent, with observation of percolation tests and deep test pits, and physical inspection of the system before it is covered over.
- Any variance from Title V requires approval of the BOH and certain provisions cannot be waived without DEP approval, and some cannot be waived at all.

### **Local Rules**

- Municipalities have authority to promulgate their own septic system regulations
- Some have used this power to regulate:
  - Package treatment plants, mounded septic systems, ground water and soil conditions, time-of-testing during the year, deeper depth to ground water.

## **SEWAGE AND SEPTIC SYSTEMS**



### **Publicly Owned Treatment Works (POTW)**

- Operated by cities, towns, counties or their special districts, or state authorities like the Massachusetts Water Resources Authority (MWRA)
- Mandated to receive waste by NPDES, state waste discharge permitting, and direct discharge requirements
- POTWs also have independent rules and regulations with design specifications, performance standards, monitoring obligations, and sanction

## **SHORELINE RIGHTS**



### **Public Shoreline Access**

### **Purchased Public Rights**

- Commonwealth may purchase a general right for the public to walk along the wet sand during dawn to dusk hours
- Right is not effective unless state acquires it on behalf of the public through eminent domain proceeding involving specific property
- State must compensate for taking.

### **Vested Public Rights**

- Fishing, fowling, navigation
- Passage over and through the water
- Essentially there is an implied public easement to use land below the tide for these purposes

**NOTE:** These purposes do not include camping, picnicking, or other broad activities or uses

## **SOLID WASTE**



### **DEP Solid Waste Master Plan**

- State-wide plan for solid waste disposal
- Policy document on which to base planning, decisions and regulations
- DEP may clean up solid waste disposal facilities and recover costs from responsible parties **M.G.L. c. 21H, §§ 1-8; c. 111, §§ 150A-B**

### **Local Boards of Health:**

- BOH approves disposal sites **M.G.L. c. 111, § 150A**
- BOH permits waste transport **M.G.L. c. 111, § 31A**
- Regulate operation of public and private landfills, incinerators, transfer stations, recycling facilities, transporters, materials recovery, disposal and old dumps.
- Work with industry groups to build markets for recycling
- Conduct household solid waste reuse and recycle programs.

## STORAGE TANKS



### **Above and below ground tanks**

Regulated by: DEP, DPH, MA Board of Fire Prevention, Local officials

How:

- Design specifications, performance standards, inspection procedures, permit requirements, and location criteria for installations
- Requirements for composition, removal, monitoring, and testing
- Reporting requirements when they fail
- MA implements federal EPA regulations for Underground Storage Tanks (UST) but imposes stricter standards, specifically double containment for hazardous material tanks and deadlines for retrofitting (MA deadline to remove single-walled USTs was August 7, 2017).
- Local zoning governs structures and uses within Flood Plain Districts, including underground and above ground storage tanks.

## **STORMWATER LAW: Federal**



### **NPDES: National Pollution Discharge Elimination System**

- Permitting program administered through EPA's Region One office in Boston
- Most stormwater discharges into MA water bodies covered by EPA regulations

### **EPA NPDES Phase II Stormwater Program**

- Requires public and private entities to develop comprehensive stormwater management programs focused on water quality
  - Affects many municipalities, industries and large landowners
  - There are at least 257 Phase II communities in Massachusetts
- **MS4s**
  - Phase II municipalities with MS4s must comply with EPA and DEP MS4s standards and obligations
  - Legally mandated programs for MS4s deal with:
    - Treatment standards, anti-degradation, retrofitting treatment, low impact development, wetlands construction and restoration, erosion and sedimentation control, pavement types, and natural alternatives

## STORMWATER LAW: State



### Wetlands Protection Act (WPA)

- Covers stormwater drainage from most projects regulated by the WPA

### Wetlands Regulations & Water Quality Certification Regulations

#### 310 CMR 10.00 and 314 CMR 9.00 Stormwater Management Standards

- Eliminate need for separate DEP Stormwater Policy
- Applies to any NOI filed under the WPA filed on or after 1/2/08
- New stormwater management facilities not protected as wetland Resource Areas
- Not applicable to housing units of <four families if no effect on a critical area
- Regulations promote:
  - increased stormwater recharge
  - low impact development techniques
  - removal of illicit discharges
  - improved operation and maintenance of stormwater systems

## **SUBDIVISION CONTROL**

### **Subdivision Control Act**

- Authorizes municipalities to control divisions of land into new parcels not already served by public ways
- Offers landowners an opportunity to get rulings from the local planning board that a full subdivision approval is not required. [Approval Not Required (ANR)]

### **Planning Board Duties**

- Must promulgate subdivision rules and regulations
- May not approve a developer's subdivision plan that does not comply with the recommendation of its municipality's BOH



## TIDELANDS, WATERWAYS, AND GREAT PONDS



- DEP licenses required for filling, occupation of, construction, use of structures on, “tidelands”

**Tidelands:** Present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is further landward and the seaward limit of that jurisdiction

**Great Pond:** A pond, which in its natural state was more than 10 acres

- *Public tidelands and Great Ponds:*
  - Generally held in trust by the state for the benefit of the general public
- *Private tidelands:*
  - Subject to easement for public purposes of navigation, fishing, fowling
  - “Reserved Public Rights” date back to the Colonial Ordinances of 1641 and 1647, later codified in **M.G.L. c. 91**

## **TIDELANDS, WATERWAYS, AND GREAT PONDS**



### **DEP regulations under M.G.L. c. 91**

- Licenses for the construction and use of structures on:
  - Great Ponds
  - Public and Private tidelands
  - River and streams with state funds invested
- Require balancing public benefits against private benefits from development. This results in negotiating public benefits to be incorporated in projects or to be required by license conditions, such as for public moorings, commercial berthing, marine services, public access, parks and vistas, and sometimes public passage memorialized in easements.
- Licenses are commonly for 30 or 99 years depending on factors and type, and impose substantial fees for the amount of tideland occupied by the structure and the volume of tidewater displaced.

## **WATER POLLUTION**



### **DEP Division of Water Pollution Control**

- Regulates discharges into surface water bodies, groundwater, septic systems, and industrial sites **M.G. L. c. 21, §§ 26-53**

#### Authorities:

- Enter, inspect, and sample sources
- Issue enforcement orders
- Suspend or revoke permits
- Levy administrative penalties (PAN)
- Seek criminal penalties, civil fines, or injunctive relief in court.
- Permit necessary for:
  - Activities that foreseeably may discharge pollutants into surface water or ground water. Ground water is regarded as a Water of the Commonwealth.

## **WATER RIGHTS**



### **Water Management Act, M.G. L. c. 21G, §§ 1-19**

- Administered by DEP's Division of Water Supply

***Purpose:* Reduce water use, increase reuse and conservation, and minimize loss of water to a basin through evaporation and out-of-basin discharge**

- Requires registration of water withdrawals in excess of 100,000 gallons/day
- DEP Duties
  - Issue permits for an average daily withdrawal rate in five-year increments
  - May set seasonal peaks as well
  - Reviews all registrations and permits in a river basin together at the end of each five-year anniversary to ensure that each has met the conditions of their registration or permit

## WATER RIGHTS



### **Water Management Act: Water Withdrawal Permits**

- Withdrawal of water by private and public water suppliers allowed by registration and permit **M.G. L.c. 21G, §§ 6, 7**
- Determinations involve:
  - Analysis of safe yields
  - Local and regional water resource management plans
  - State criteria
- Agency and court decisions upheld DEP's conservation-oriented conditions in water withdrawal permits for municipalities:
  - Reduced outdoor lawn watering when stream flows are low,
  - Capped summer water withdrawals
  - Performance standards for residential use and “unaccounted for water”
  - Mandated water bank if water use exceeds a community's total allocation

## **WATER RIGHTS**



### **Interbasin Transfer Act M.G.L. c. § 8B-8D**

- Administered by the Water Resources Commission (WRC)
- *Purpose:* Prevent excess transfer of water from one part of the state to another
- Regulates transfers of water across river watersheds (we have 27)
  - This includes water supplies transporting water across watersheds and sewer systems relocating water across watersheds

### **Cohen Act/ Watershed Protection Act (1992) M. G. L. c. 40 §21 and c. 111 §31**

- Protects the Boston metropolitan area water supply (all the way from W. Mass)
- Imposes land use restrictions within parts of the metropolitan watershed system

## WETLANDS AND FLOODPLAIN LAW: Federal



### Section 404 of the Federal Clean Water Act (CWA)

- Regulates discharge of dredged or fill material into the waters and federal wetlands of the United States: such discharge requires EPA review and Army Corps of Engineers permit, either an individual permit or approve under a General Permit
- **RECENT CHANGES:** On May 25 the Supreme Court in *Sackett v. EPA*, sharply limited the scope of protection for the nation's waters under the federal Clean Water Act (CWA). Court redefined the CWA's coverage of "waters of the United States" which had been hotly contested since the Court's previous decision on point and EPA's regulatory expansion of what adjacent wetlands are included. [\*Sackett et al. v. U.S. Environmental Protection Agency et al.\*, No. 21-454, 2023 WL 3632751 \(U.S. May 25, 2023\)](#). The decision overturned is *Rapanos v. United States*, 547 U.S. 715 (2006).

## WETLANDS AND FLOODPLAIN LAW: Federal



### Section 404 of the Federal Clean Water Act (CWA)

- The majority opinion in *Sackett* states that the WPA extends protection and permit requirements only to those waters that are described “in ordinary parlance” as “streams, oceans, rivers, and lakes,” and to wetlands only if those wetlands have a “continuous surface connection” to such waters “making it difficult to determine where the water ends and the wetland begins.”
- In effect, the Supreme Court decided that polluting or filling in many types of wetlands does not need EPA review and COE permits since they do not constitute “federal wetlands” so they are not governed by the CWA. This undid decades of rulemaking and court litigation concerning the definition of “waters of the United States” (acronym WOTUS) under the CWA.

**WETLANDS AND FLOODPLAIN  
LAW: Federal**

**Section 404 Permits**

*General Permit:* 5-year permit that provides expedited review for smaller activities under Corps jurisdiction, under section 404 of the CWA

**Nationwide General Permits (NWPs)**

- NWPs authorize a variety activities, such as mooring buoys, utility lines, and mining activities

**State General Permits (SGPs)**

- In New England States, NWPs are suspended and replaced by SGPs
- Feb. 4, 2015: Army Corps issued statewide MA General Permits for minimal impact activities subject to Corps jurisdiction.

*Individual Permits:* Case-by-case permits

## **WETLANDS AND FLOODPLAIN LAW: State**

### **Wetlands Protection Act, M.G.L. c. 131, § 40**

- Protects water bodies, related wetlands, flood prone areas, and tidelands
- Administered by DEP Division of Wetlands and Waterways
- Promulgates regulations governing work in and near “**Resource Areas**”
- Triggered by: Any development project which involves filling, dredging, removing, or otherwise altering Resource Areas or a defined Buffer Zone
- Requires: An application (Notice of Intent) and permit (Order of Conditions from the city or town conservation commission
- Applicant has option of filing a Request for Determination (RDA) or more formal ruling on jurisdiction (“ORAD”)



## **WETLANDS AND FLOODPLAIN LAW: State**

### **MA Rivers Protection Act (1996)**

- Regulates activities next to rivers and other flowing bodies of water
- Added “Riverfront Area” to the Resource Areas protectable under the Wetlands Protection Act, extending the jurisdiction of the WPA about 200 feet therefrom
- Amended WPA to require applicants to prove they meet a two-part test in the RA
  - 1) [the work proposed], including proposed mitigation measures, will have no significant adverse impact on the Riverfront Area and
  - 2) there is no practicable and substantially equivalent economic alternative with less adverse effects on such purposes.



## **WETLANDS BYLAWS: Home Rule**



### **Overview**

- Local permit program administered by the Conservation Commission
- Authority: **M.G.L. c. 40 § 21, MA. CONST. amend. 89 § 7**

### **Typical Local Bylaw:**

- Jurisdiction and procedure similar to WPA, but more explicit and strict
- Fewer exemptions than WPA; authority to disapprove projects or impose setbacks and mitigation
- Allows public hearing on an application to be combined with WPA hearing, but appeals are to both DEP and Court
- Site inspections, violation notices, and enforcement orders
- Bylaws following the MACC model include the “ticketing” approach outlined in **M.G. L. c. 40, § 21D** for so-called non-criminal dispositions

## **WILDLIFE & ENDANGERED SPECIES: Federal**



### **Endangered Species Act (ESA)**

Prohibits take of endangered, threatened species without authorization

- Two proposed rules
  - 1) Redefines “adverse modification” by emphasizing species recovery after being listed as endangered under the ESA
  - 2) Clarifies the scope of critical habitat based on geographic range of the species
- Proposed policy
  - Critical habitat designation exclusions
    - It would require the government to look at national security and economic impact before making the determination and includes a benefits analysis to compare designating land versus excluding the land

## WILDLIFE & ENDANGERED SPECIES: State



### MA Endangered Species Act (MESA)

- Administered by MA Div. of Fisheries & Wildlife, and Dept. of Fish and Game
- Protects rare species and their habitats by prohibiting a “take” listed species
  - Endangered
  - Threatened
  - Species of Special Concern
    - 18 specific exemptions

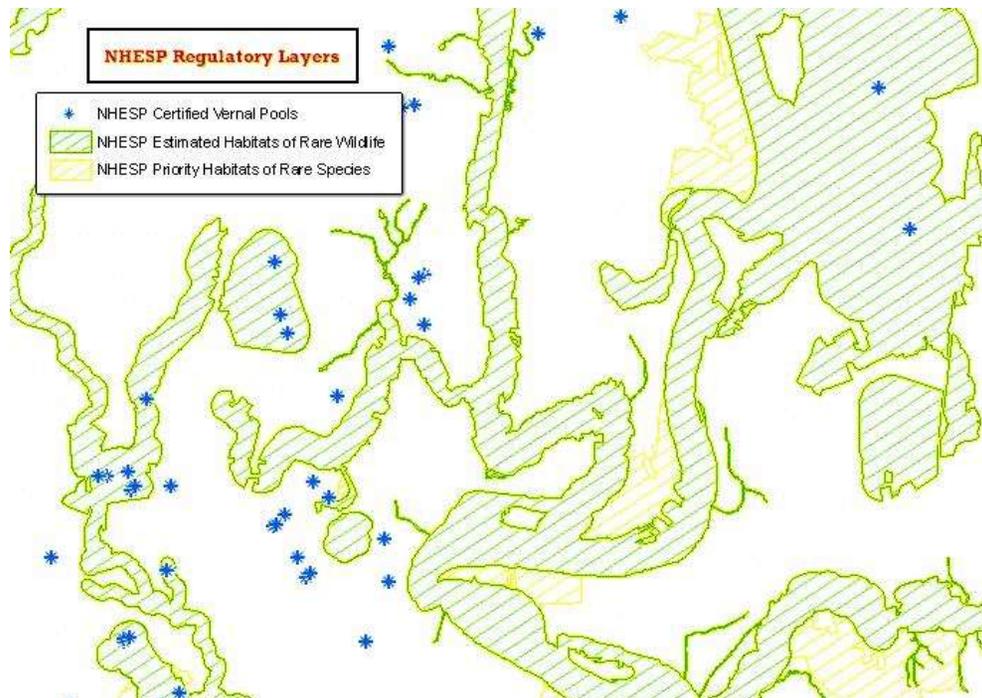
***Take:*** [I]n references to animals to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat.”

## WILDLIFE & ENDANGERED SPECIES: State



### Regulatory maps: Priority and Estimated Habitats

- Used to determine whether or not a proposed project must be reviewed by the NHESP for MESA and WPA compliance
  - 14<sup>th</sup> Edition of Maps issues August 1, 2017
  - <https://www.mass.gov/service-details/regulatory-maps-priority-estimated-habitats>



## ZONING

Zoning power is the classic municipal or regional authority to protect the public health, safety, and welfare (and sometimes morals).



(source and photo credit: Massachusetts Smart Growth Alliance Projects 2013)

### **Zoning Enforcement Officer (ZEO)**

- Administers zoning bylaws (towns) and ordinances (cities). Special Permits, Variances, administrative and court enforcement both civil and criminal
- Usually the Building Inspector or the Building Commissioner, and the Zoning Board of Appeals or other designated permit granting authority
- May be optional Site Plan Review by the ZBA, Planning Board or Select Board

## ZONING



### **Smart Growth Zoning Overlay District M.G.L. c. 40R**

Administered by Department of Housing and Community Development (DHCD)  
Promotes mixed use, affordable housing, compact design, open space, and transportation in a new zoning district:

- An “eligible location” within ½ mile of a transit station
- A municipal center
- A “highly suitable” location

Once DHCD grants approval, the municipality can adopt the Smart Growth Overlay District and become eligible for zoning incentive payments for the number of housing units as well as density bonus payments.

Municipalities with Smart Growth Zoning Districts are preferred recipients of DHCD, EOEEA, Transportation, and Administration and Finance awards of discretionary funds. **M.G.L. c. 40S** reimburses net costs of educating students in new district housing.

## ZONING



- **Housing Choice Act of 2020** was enacted January 2021 as part of an economic development bill, administered by the Executive Office of Housing and Economic Development (EOHED).
- **HCA** made substantive changes to the Zoning Act and Chapter 40R (Smart Growth Districts): lowers the quantum of vote needed for town meeting or city council approval of certain zoning by-laws or ordinances from 2/3 to majority; lowers the quantum of vote needed to grant certain types of special permits from 2/3 to majority; adds several new definitions to the Zoning Act; and adds zoning requirements specifically for “MBTA Communities.”
- **HCA** favors **as-of-right** developments, density, or intensity, reduced parking, dimensional specifications, transferable development rights, and more, in eligible multi-family or mixed-use developments, eligible residential and open space residential developments, eligible locations, and some other eligible situations.
- MBTA municipalities are required to have zoning by-laws or ordinances that provide for at least one district of reasonable size in which multi-family housing is permitted as of right. For list of 175 cities and towns. See G.L.c. 161A, Section 1.



## ZONING



### Municipal Land Use Plans

Subdivision Control Act requires planning boards to prepare master plans  
M.G.L. c. 41, §§ 81K-81GG

- Comprehensive/Master Plan
  - Support zoning ordinances and bylaws, subdivision regulations, public health rules, land acquisition, building programs, and road or utility construction
  - Professional consulting, public participation, wide publication, and periodic updates yield good plans
- Some types of plans are necessary to qualify for state grant programs or to enjoy eligibility under the Green Communities Act (GCA)
- Zoning Act permits municipalities to enact an array of zoning measures, but it does not require that such zoning be based on a plan
- MA offers some financial and technical assistance for community planning



# IS ENVIRONMENTAL LAW EXPANDING?

## YES

- Pre-existing statutory and regulatory standards amended and modernized
- Energy and climate statutes and rules
- Citizen suits by non-governmental organizations and private citizens
- Criminal prosecutions for fines, jail and other sanctions
- Duties of directors and officers to corporation and its stockholders
- Common law tort and mass tort liabilities
- Environmental liabilities in property and business transfers
- Whistleblowers statutes
- Lender liability requirements
- Public opinion and public relations
- Union contracts
- Environmental regulation in European trade markets
- Securities law disclosure and internal controls
- Employee retention and morale
- Insurance requirements and practices
- Municipal law expansion
- Corporate policies and self-enforcement
- Environmental Justice communities

# TRENDS IN ENVIRONMENTAL LAW

- Stronger laws, regulations, policies, guidelines and conditions’
- New or amended statutes to address newly appreciated problems
- Increased incentives, tax subsidies, financial grants
- More streamlined, coordinated, predictable permitting
- Measure and achieve objective environmental results
- Preserve open space, water and historic resources
- Foster conservation and alternative energy sources
- Integrate business, housing, and transportation
- Clean up and redevelop contaminated land
- Adopt consistent, concerted government policies
- Make transparent environmental decisions
- Conserve nonrenewable natural resources and manage renewable ones
- Integrate and coordinate environmental and economic considerations
- Prioritize climate adaptation, mitigation and resilience in all sectors of society
- Manage for ecosystem health (biodiversity restoration and preservation)





