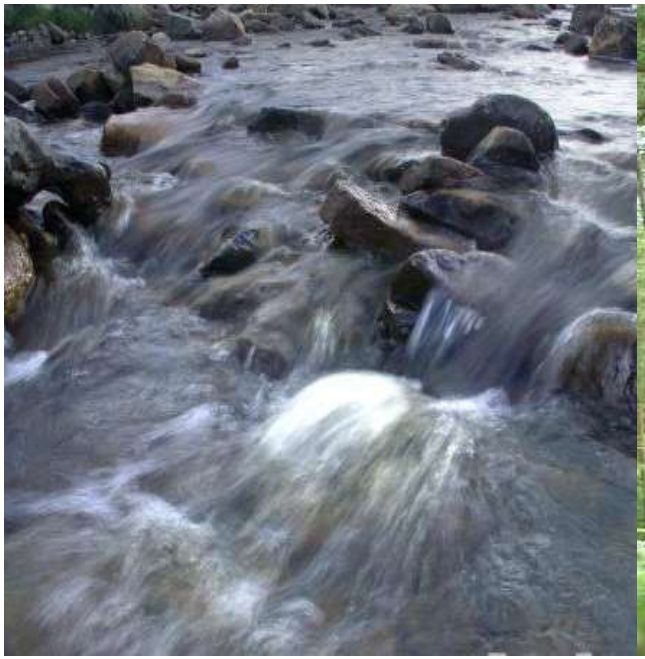
STORMWATER & WATER POLLUTION UPDATE

MMLA ANNUAL MEETING SPRINGFIELD, MA 9.26.19

Federal and State Statutes, Regulations and Trends



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AGENDA

- **Federal Stormwater Regulation**
- **MassDEP Stormwater Regulation**
- **MA Sewage and Stormwater Rules**
- **New Developments in PFAS as Water Contaminant, Waters of the United States Defined, NPDES Jurisdiction via Groundwater, State Wetlands Programs and Process, Local Bylaws on Climate Change, Regulatory Takings, and Chapter 91 Enforcement**

Federal Stormwater Regulation

- **NPDES Permit Required for Discharges From:**
  - Industrial plant where stormwater flows may contact chemical substances; or
  - Construction activities resulting in disturbance of land (clearing, grading, etc).
- **NPDES Permit Options**: individual, group, or general.
- **Two Regulatory Frameworks:**
  - Phase I: ten categories of industrial activities, construction disturbing over 5 acres of land, medium and large (population above 100,000) municipal separate storm sewer systems (MS4s);
  - Phase II: construction disturbing one to five acres of land, potentially covers construction disturbances of less than one acre provided a water quality impact, and small MS4s (serving populations under 100,000 – there are at least 260 such communities in MA).
- **Multi-Sector General Permit Covers Industrial Activities**.
- **Construction General Permit Covers Construction**.
- **MS4s Have Individual Permits** (small MS4 general permit).

Industrial Activities & Construction

- Dischargers of stormwater "associated with industrial activity and with small construction activity" are given the choice of applying for an individual permit or seeking coverage under a general permit. 40 C.F.R. § 122.26(c).
- The covered categories include discharges from:
  - Exposed areas of an industrial plant where stormwater flows may come into contact with chemical substances; and
  - Construction activity, such as clearing, grading, and excavation, that results in disturbance of between one and five acres of land (and possibly construction activity disturbing less than one acre of land that results in a water quality impact).

General Permits

- **General Permit Requires Permittees to Develop Stormwater Pollution and Prevention Plans:**
  - Structural controls to divert, store and attenuate flows;
  - Best management practice, spill prevention, cleanup and reporting protocols, employee training and preventative maintenance;
  - Prohibition on new or increased stormwater discharges;
- Required setbacks of outfall pipes, infiltration trenches, and other measures for improving water quality. For construction sites, such plans must include erosion and sediment controls; structural practices to divert, store, or attenuate flows from exposed soils; and controls on waste disposal.
- For other industrial activities, the plan must include drainage areas; an inventory of exposed materials; structural control measures; a list of significant spills and leaks that have occurred at points exposed to rainfall; identification of risks associated with particular pollutant sources and activities; a preventive maintenance program; procedures for spill prevention and response; and provisions for inspections, employee training, and recordkeeping.

State Certifications

- In addition, both general permits include provisions, required by Massachusetts through the certification process under Section 401 of the CWA, 33 U.S.C. § 1341, that:
- Essentially prohibit new or increased stormwater discharges to coastal water segments designated as areas of critical environmental concern or to Outstanding Resource Waters; and
- Require setbacks of outfall pipes, infiltration trenches, or other measures for improving water quality prior to discharge.

Municipal Discharges

- In April 2003, MassDEP amended its surface water discharge permit regulations at 314 C.M.R. § 3.00 to require small MS4s obtain a Phase II general permit from MassDEP. *See* 314 C.M.R. § 3.06(11).
- The EPA and MassDEP jointly issued a small-MS4s general permit applicable to Massachusetts in May 2003.
- EPA issued a final MS4 General Permit in January 2017, which became effective on July 1, 2018 following a one-year postponement of the effective date. The General Permit expires June 30, 2022.
- This MS4 governs all MS4s operated within the regulated area. These are subject to the Phase II MS4 Program. MS4 applies to 260 of the 351 municipalities in Massachusetts.

Small Municipal Discharges

- **Legally the Small MS4 permit allows operators of small municipal separate storm water sewer systems, which meet specified requirements, to discharge and to continue to discharge in accordance with the regulatory permit conditions and requirements.**

- **The new MS4 permit included some standards that were more protective than the then current Massachusetts requirements.**

- **Imposes Minimum Control Measures and increased requirements for:**
  - Public Education
  - Public Involvement and Participation
  - Illicit Discharge Detention and Elimination (IDDE)
  - Construction Site Stormwater Runoff Control
  - Post-Construction Stormwater Management in New Development and Redevelopment
  - Pollution Prevention and Good Housekeeping in Municipal Operations

- **Discharges to Impaired Waters subject to added requirements based on existing TMDLs.**

Federal Guidance

- Current information on the EPA's stormwater program may be found at http://www.epa.gov/npdes
- MassDEP's Stormwater Management Handbook and Stormwater Report Checklist can be found at https://www.mass.gov/guides/massachusetts-stormwater-handbook-and-stormwater-standards

State Stormwater Regulation

- MassDEP's Stormwater Management Policy (1996) described how stormwater discharges will be regulated by the state. Policy applied to industrial, commercial, institutional, residential subdivision, and roadway projects, and established stormwater management standards to address water quality (pollutants) and water quantity (flooding, low base flow, and recharge).
- Policy listed standard controls that must be in place for stormwater, depending on the source and destination of the stormwater.
- Basic approach: Applicant files a stormwater report, prepared and certified by a registered professional engineer licensed in the Commonwealth, with a notice of intent to establish compliance with the stormwater standards.

Discharges to Wetlands

- MassDEP incorporated its revised stormwater management standards into its:
  - Wetlands Protection Act regulations, 310 C.M.R. § 10.05(6)(k) through (q), and
  - Water Quality Certification regulations, 314 C.M.R. § 9.06(6)(a).
- Conservation Commissions and MassDEP administer the policy under the Wetlands Protection Act for stormwater discharged from new development and redevelopment (which is subject to the Act's jurisdiction)
- MassDEP administers the policy under the state Clean Waters Act for existing stormwater discharges.

Discharges to Sewers

- Most industrial waste and sewage flows into publicly owned treatment works (POTWs).
  - POTWs hold permits for discharges of treated effluent to surface waters.
  - Municipal, regional or state authorities operate POTWs (Mass. Water Resources Authority (MWRA) is most prominent).
- Access to sewers regulated by:
  - Municipality that owns sewer system;
  - Entity that operates POTW;
  - Often, also by MassDEP and EPA (federal CWA for industrial waste).
- MWRA and other POTWs require industrial sewer users to have their own POTW discharge permit.
- Cost is often driving factor: sewer connection and access fees vs. NPDES, permits, and on-site treatment technology costs.

Sewer Regulations

- **Sewer System Extension and Connection Permit Program**
  - G.L. c. 21, §43(2) requires permit for any sewer extension or connection.
  - Must file application 90-days before construction.
  - No building permit will issue to project without sewer permit.
- Several exemptions including, *inter alia*, projects:
  - Using existing connections previously permitted and in compliance;
  - Responding to floods or other emergencies;
  - Sending less than 25,000 gallons/day to a POTW with no industrial pretreatment program.
- Without permit, industrial generator may have to barrel and ship wastes for processing at a licensed facility.
- Permits effective for fixed term not to exceed 5 years.

Sewer and Stormwater Connections

- G.L. c. 83, § 10: Rules and Regulations Regarding Use of Connections
  - A city, town, sewer district, or a district established for the purpose of managing stormwater, pursuant to section 1A of Ch. 40, may prescribe rules and regulations for the use of main drains and the management of stormwater to:
    - Prevent the discharge of sediment and pollutants so they don't degrade wetlands, streams, groundwater, and other water bodies;
    - Inspect the facilities for the collection and infiltration of stormwater in order to reduce flooding, improve the quality and decrease the quantity of stormwater runoff;
    - Connection of estates and buildings with main drains;
    - Construction, alteration, and use of all connections to main drains;
    - Inspection of all materials used therein.
  - A city, town, or sewer district may prescribe civil penalties, not more than $5,000 for each day of violation of any such rule or regulation.

Amended by St. 1964, c. 736, § 3; St. 1985, c. 289; St. 1987, c. 174 § 7; St. 2004, c. 149, § 138, eff. July 1, 2004.

Fees for Connections

- G.L. c. 83, § 16: Charge for Use of Sewers
  - The aldermen of any city or the sewer commissioners, selectboard, or road commissions of a town, may establish just and equitable annual charges for the use of common sewers and main drains and related stormwater facilities, which shall be paid by every person who enters his particular sewer therein.
  - Money received to be applied to cover costs of maintenance and repairs of any debt contracted for sewer purposes.
    - Uniform fee for residential properties and a separate uniform fee for commercial properties; or
    - Annual charge based upon a uniform unit method (fair and equitable)
    - Calculated to supplement other available funds to plan, construct, operate, and maintain stormwater facilities and conduct stormwater programs.
  - City, town or district may grant credits against the amount of the charge to those property owners who maintain on-site functioning retention/detention basins or other filtration structures as approved by the stormwater utility, conservation commission, or other governmental entity with appropriate authority.

Amended by St. 1961, c. 311; St. 2004, c. 149, §§ 139, 140, eff. July 1, 2004.

Recent Developments in Water Contaminants: PFAS

- **PFAS:** Per- and polyfluoroalkyl substances. Family of compounds including Teflon and Scotchguard, used since the 1950s on non-stick, water resistant, and stain resistant products (ranging from pizza boxes and firefighting foam, to pots and pan and dental floss).
- **Prevalence:** PFAS has been detected in blood of 99 percent of Americans and above DEP guidelines in public water supplies in Ayer, Barnstable, Harvard, Hudson, Mashpee, Middleton, Shirley, and Westfield. They pollute water, do not break down, and remain in water and people for decades.
- **Massachusetts:** 2019 budget will propose $8.4 million to test drinking water for PFAS contamination, and another $20 million for PFAS remediation.
- **Regulation:** January 2019, MassDEP announced intention to develop a Maximum Contaminant Level for PFAS. This is still under development.
  - Current (6/18/19) EPA Health Advisory Standards of 70 ppt (parts per trillion) for some PFAS
  - Current (6/18/19) Vermont Legislative limits for PFAS is 20 ppt

Recent Developments in Federal Jurisdiction: WOTUS Rule

Obama-Era WOTUS Rule Repeal

- On September 12, 2019 the Trump Administration announced a restoration of a pre-2015 definition of "Waters of the United States"
  - "The agencies are taking this final action to repeal the Clean Water Rule: Definition of "Waters of the United States," 80 FR 37054 (June 29, 2015), and to recodify the regulatory definitions of "waters of the United States" that existed prior to the August 28, 2015 effective date of the 2015 Rule.
- Repeals a rule that placed limits on polluting chemicals that could be used near streams, wetlands, and other bodies of water.
  - Rescinded the 2015 "Clean Water Rule" rule from the Obama-era.
  - Obama-era rule was designed to limit pollution in about 60 percent of the nation's water bodies, and defined what bodies of water are protected by the Clean Water Act.
  - New rule says that the Obama administration's definition of "Waters of the U.S." exceeded the EPA and ACOE's authority under the Clean Water Act.
- The repeal will take effect in 60 days (early November 2019).
- Final rule rescission issued more than two years after it was proposed.

WOTUS Rule, cont.

New Rule:

- Retains federal protections for larger bodies of water, rivers that drain into them, and wetlands that are directly adjacent to those bodies of water;
- Removes protections for "ephemeral streams" and wetlands not adjacent or surface connected to other bodies of water.

The Trump Administration announcement ends with a list of the CFR parts that were affected by the rescission, illustrating the breadth of the changes:

33 CFR Part 328; 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, 302, 401

- Water Pollution Control; Waterways; Oil Pollution; Reporting and Recordkeeping; Penalties; Hazardous Substances; Intergovernmental Relations; Chemicals, Superfund; Hazardous Waste; and Waste Treatment and Disposal.

Later a new "Waters of the United States" definition is to recodify some pre-existing rules administered by the Department of the Army, Arm Corps of Engineers, Environmental Protection Agency, and Department of Defense. Good luck there.

WOTUS Rule, cont.

Details:

- Agencies assert the Rule repeal is for four primary reasons:
  - 2015 Rule was not consistent with the legal limits of the agencies' authority under the CWA (as intended by Congress, and in SCOTUS cases, such as Justice Kennedy's "significant nexus" test in *Rapanos*);
  - 2015 Rule did not consider or give due weight to the congressional policy in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use…of land and water resources." 33 U.S.C. 1251(b).
  - Avoid interpretations of 2015 Rule that overreach agencies' constitutional and statutory authority; and
  - The 2015 Rule's distance-based limitations suffered from procedural errors and a lack of adequate record support.

WOTUS Rule, cont.

- Pro Repeal:
  - Returning to pre-2015 Rule regulatory regime would promote regulatory certainty;
  - Restore properly limited statutory authority and adequately consider and accord due weight to Congress' policy expressed in CWA sec. 101(b).
- Against Repeal:
  - Reinstates prior regulatory regime's case specific nexus analysis for certain jurisdictional determinations, which is case-by-case, inconsistent and burdensome.
  - Disregards substantial uncertainty, confusions, and inconsistencies under the prior regime that agencies had sough to address in developing the 2015 Rule.

EPA established a docket for this action under Docket ID No. EPA-HQOW-2017-0203. All documents in the docket are listed on the http://www.regulations.gov website.

Listed at the end of the announcement are the codifications the repeal is having the agencies revert back to:

"As of the effective date of this final rule, the agencies will administer the regulations promulgated in 1986 and 1988 in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401,1 and will continue to interpret the statutory term "waters of the United States" to mean the waters covered by those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience."

WOTUS Rule, cont.

- TRUMP ADMINISTRATION NEW NPDES AND 404 DEFINITIONS 9.19.19 (excerpted)
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- PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
- The revision and addition read as follows: §122.2 Definitions. * * * * * Waters of the United States or waters of the U.S. means:
- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands;”
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
- (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
- (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands)
- identified in paragraphs (a) through (f) of this definition.
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- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States...
- Waters of the United States do not include prior converted cropland. Notwithstanding determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA...
- Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

WOTUS Rule, cont.

- PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL
- § 230.3 Definitions. * * * * * (b) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.” * * * * * (s)
- The term waters of the United States means:
- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) The territorial sea;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
- Waters of the United States do not include prior converted cropland. Notwithstanding determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (t) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

WOTUS Rule, cont.

- PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS
- §232.2 Definitions. * * * * *
- Waters of the United States means:
- All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- All interstate waters including interstate wetlands.
- All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:
- Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- Which are used or could be used for industrial purposes by industries in interstate commerce.
- All impoundments of waters otherwise defined as waters of the United States under this definition;
- Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;
- The territorial sea; and
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.
- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.
- Waters of the United States do not include prior converted cropland. Notwithstanding determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Recent Developments in Federal NPDES: Jurisdiction via Groundwater

County of Maui, Hawaii v. Hawaii Wildlife Fund

Docket No. 18-260, argument set for 11/6/19. County Council 9/23/19 voted 5-4 to settle. Mayor disputes authority over the litigation. Stay tuned.

Issue: Whether CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Facts: Maui County is injecting wastewater into wells near the ocean. The injected wastewater mixes with groundwater and migrates to the ocean.

Upstate Forever v. Kinder Morgan Energy Partners

887 F.3d 637 (4th Cir. Apr. 12, 2018), (cert. petition pending)

Issues: 1) Whether CWA's permitting requirement is confined to discharges from a point source to navigable waters, or also to discharges into soil or groundwater where there's a "direct hydrological connection" between the groundwater and nearby navigable waters; and

2) whether an "ongoing violation" of CWA exists for purposes of citizen-suit provision when a point source has permanently ceased discharging pollutants, but one of the them is still reaching navigable water through groundwater.

Facts: Gasoline spilled 2014 and has continued to travel to "navigable waters."

NPDES via Groundwater, cont.

Tennessee Clean Water Network et al. v. Tennessee Valley Authority

SCOTUS Docket No. 18-1307, dismissal requested 9/4/19 based on settlement

Issue: Does CWA cover pollution that travels through groundwater?

Facts: Coal-fired electricity plant disposes of coal ash by sluicing and allowing it to settle in unlined ponds adjacent to a river. Coal ash residue is migrating to the river via leaks in the coal ash pond.

Notes: Settled by parties in July 2019. The Tennessee Walley Authority will clean up the coal ash ponds at the center of the dispute.

Recent Developments in State Wetlands: *Miramar Park Case*

- On August 20, 2018 the SJC decided *Miramar Park Association, Inc. & Others,* v. *Town of Dennis*, considering if Dennis violated MassDEP regulations by not depositing the spoils from a river-dredging project on a private beach. This highly technical and procedurally-oriented case, significant coming from the SJC, addresses overlapping jurisdictions and permitting procedures for dredging and beach nourishment projects, On its own initiative, the SJC had transferred this case from the Appeals Court.

- Court emphasized the applicability of the Massachusetts Citizens Suit Statute, M.G.L. c. 214, § 7A, and the importance of developing a full court record, consistent pleadings, and timeliness. In the end, the SJC ruled that the Superior Court's decision against the Town was based on a claim not included in the Complaint and unsupported by evidence in the record, so the Town was not found to have violated any environmental regulations. Consequently, Dennis was not obligated to nourish Miramar Beach with dredged materials.

Miramar Park case, cont.

- Decision offers useful take on role of MassDEP's regulatory performance standards. They are "to guide local conservation commissions in issuing permits under the act" and impose "no such obligation on jetty owners." Decision at 24. MassDEP's performance standards therefore may not be self-enforcing (automatically applicable to a project). Rather, Commissions apply them through their wetland permits, and appeals to MassDEP are available to challenge wetland permits for being inadequate in that regard.

- With the expanding understanding of hard as well as soft structures and their impacts on dynamic equilibrium and littoral drift along our shorelines, these issues are even more prevalent. This is especially so in our era of climate change, sea level rise, more and stronger storms, and expected large and expensive shoreline adaptation and protection projects.

New Developments Local Wetlands: Bylaws Take on Climate Change

- Conservation Commissions in coastal and inland communities are looking to their local Home Rule wetland permitting bylaws and regulations as one place to help build climate change adaptation and resilience, not waiting for the state or federal governments.
- MACC estimates that 200 of the 351 municipalities in the Commonwealth currently have their own Home Rule wetlands protection bylaw or ordinance (collectively, “bylaw”), administered in conjunction with the state Wetlands Protection Act (the “WPA”).
- Some of these communities already have provisions that address climate change. Others are contemplating amending their existing wetland bylaws and regulations to do so. Still others, like the City of Boston, are considering adopting for the first time a local wetland permitting program as part of an overall strategy to build climate change resilience.
- With sea level rise being one of the most commonly discussed impacts of climate change, it is not surprising that several coastal towns have provisions in their wetlands bylaws to consider this during project review.

Local Bylaws on Climate Change, cont.

- Recognizing FEMA's 100-year floodplain mapping can be inaccurate or outdated, many commissions in coastal areas allow the coastal floodplain (or Land Subject to Coastal Storm Flowage ("LSCSF")) to be defined by the FEMA maps, surge of record, or flood of record, whichever is greater. Similarly, recognizing that coastal banks function as barriers to coastal storm flooding, some commissions define the top of coastal bank at a higher point than MassDEP would under the WPA or DEP policies.
- Arlington added to its wetland regulations a new "Climate Change Resilience" section, requiring an applicant "to the extent practicable and applicable as determined solely by the Commission, integrate considerations of adaptation planning into their project to promote climate change resilience so as to protect and promote resource area values into the future."

Local Bylaws on Climate Change, cont.

- Duxbury's regulations require design and construction of projects in the FEMA- designated "A-zone" portion of the 100-year floodplain to take into account sea level rise at a rate of 2.8 feet per 100 years.
- Hingham has a similar requirement, but also applies it to projects proposed in the velocity zone ("V-zone"). Hingham's regulations specify that a rate of 1 foot per 100 years "or other credible evidence" such as from the Intergovernmental Panel on Climate Change be used.
- Falmouth has one sea level rise rate ("at least" 1 foot per 100 years) for work in AE-zones and a higher rate ("at least" 2 feet per 100 years) for work in the VE-zone. Falmouth provides any activity within the 10-year floodplain cannot have an adverse effect by impeding the landward migration of other resource areas within this sub-area of the floodplain.
- Scituate requires the landward migration of resource areas in response to sea level rise. As sea levels rise, coastal wetland resource areas are predicted to shift landward.

Local Bylaws on Climate Change, cont.

- An “Ordinance Protecting Local Wetlands and Promoting Climate Change Adaptation in the City of Boston” explicitly and comprehensively integrates climate change resiliency measures into a local wetland permitting program. It draws on approaches and definitions of other communities and expands on them.
- For instance, LSCSF is defined not as the more common FEMA 100-year floodplain, but the FEMA 500-year floodplain. “Special Transition Areas” landward of salt marsh, barrier beaches, and coastal dunes are designated to allow transition of those areas landward, so must be kept in a natural state as much as possible.
- Stormwater calculations must be based on “best available measures of precipitation” frequency. Also, the Conservation Commission is directed to consider eight factors when considering a project’s adaptation to potential climate change impacts.

Recent Developments on Takings: *Smyth*

- *Smyth v. Conservation Commission of Falmouth,* Case No. 17-P-1189, the Appeals Court on February 19, 2019 reversed a Superior Court jury verdict of $640,000.00 on a claim that the Falmouth Wetland Bylaw, as applied, created a "regulatory taking" of plaintiff's property. This decision was eagerly awaited by land use planners, municipal boards, and real estate practitioners.
- Decision illustrates the formidable showing that any regulatory taking plaintiff must make to show that his or her property has been "taken" by a bylaw, ordinance, regulation or permit denial, so that he or she should be compensated by money damages.
- Incidentally, the Appeals Court ruled for the first time in Massachusetts that there is no right to a jury trial on a regulatory taking claim.
- The property owner, newly supported by the Pacific Legal Foundation, filed a petition for further appellate review (FAR) by the SJC, which denied it. A petition before the US Supreme Court, supported by several conservative amici, is pending as of this writing.

Regulatory Takings: *Smyth case, cont.*

- Owner had inherited unimproved lot from her parents. She engaged professionals and filed a Notice of Intent (NOI) under the state WPA and local Wetlands Bylaw. She requested from the Commission several variances from the provisions of the Bylaw, which were denied, with respect to requirements for the Resource Areas coastal bank, salt marsh, and land subject to coastal storm flowage.
- Appeals Court ruled that claims of regulatory taking, where there is no permanent physical invasion and no complete deprivation of all economically beneficial use, require a "highly nuanced balancing of multiple factors." The factors with particular significance are economic impact on the plaintiff, extent the regulation has interfered with property owner's distinct investment-backed expectations, and character of the governmental action.
- Appeals Court commented that the property could be used, among other things, as a park or a playground, and it would be attractive to the abutting owners on either side for privacy or expansion.

Regulatory Takings: *Smyth* case, cont.

- Applying these factors, Appeals Court ruled that, even though the value of the property if unbuildable ($60,000) was substantially less than if buildable ($700,000), the unbuildable amount was still more than the amount plaintiff's parents paid for it ($49,000), so that the compensation would be a "windfall." Court also noted a lack of any financial investment toward developing the property by the plaintiff's parents or the plaintiff for many years.
- Finally, Court observed that there was no physical invasion of plaintiff's property and the regulation at issue did not single out the plaintiff's property, but was uniformly applicable throughout the Town.
- In summary, a regulatory taking claim in Massachusetts requires proof that the law, regulation or action challenged causes complete deprivation of all economically beneficial use of the property (known as a per se taking) or, in the alternative, fails the highly nuanced balancing of multiple factors (known as the Penn Central test).

Recent Developments: Tidelands and Waterways Enforcement

- Only the Commonwealth may enforce public trust rights in Commonwealth tidelands. Property owners lack legal authority to use private litigation for enforcement of public trust rights. Reinforced in the Appeals Court's July 10, 2018 in *Commercial Wharf East Condo Assoc. v. Boston Boat Basin, LLC,* 93 Mass. App. Ct. 523 (2018).
- Plaintiff association of owners of condominiums located at the landward end of Commercial Wharf in Boston. Defendant owner of inn and marina at seaward end of Wharf.
- Suit to enforce property use restrictions burdening Defendant (parking and deliveries, commercial boats selling alcohol or allowing gambling, and number of "special events" to be hosted at the inn each year). Defendant argued restrictions are void because they unduly restrict the public's access and use of the Boston Harbor waterfront in violation of public trust doctrine.

Chapter 91 Enforcement, cont.

Case involves "Commonwealth tidelands" (as opposed to "private tidelands"). Defined as "tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose." G.L. c. 91, § 1.

Appeals Court rejected Defendant's argument that the restrictions on use of its property violated public trust doctrine, making clear that litigation between private parties may not be used as a vessel to enforce public trust rights.

Public trust rights may be enforced only by the Commonwealth and entities to which the state Legislature has delegated that enforcement authority. Legislature has delegated that enforcement authority to the Massachusetts Department of Environmental Protection (DEP) through the Chapter 91 licensing process.

QUESTIONS?