

# ENVIRONMENTAL ASPECTS OF MUNICIPAL LAW

Gregor I. McGregor, Esq.

UPDATED January 27, 2014

MCLE MUNILAW CONFERENCE



# **McGREGOR & ASSOCIATES**

## **ATTORNEYS AT LAW, P.C.**



**McGregor & Associates**  
**15 Court Square, Suite 500**  
**Boston MA 02108**  
**Tel: 617-338-6464**  
**Fax: 617-338-0737**

**[www.mcgregorlaw.com](http://www.mcgregorlaw.com)**

©2014

The author thanks his law clerks Colleen Walsh (2009), Sarah Herbert (2010), Peter Vetere (2010), Erin Odell (2012), and Marion Goodsell (2014)





# SOURCES OF ENVIRONMENTAL LAW

- State “police power” protects public health, safety, welfare and morals.
- Federal “commerce clause” power.
- Sovereign power over public resources plus eminent domain.
- Public trust doctrine for public lands and water areas.
- Powers of taxing and spending.
- Common law doctrines including nuisance, negligence, trespass, and water rights.
- Implementing statutes and rules.
- **New energy legislation and policy.**

# SHORT HISTORY



## **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

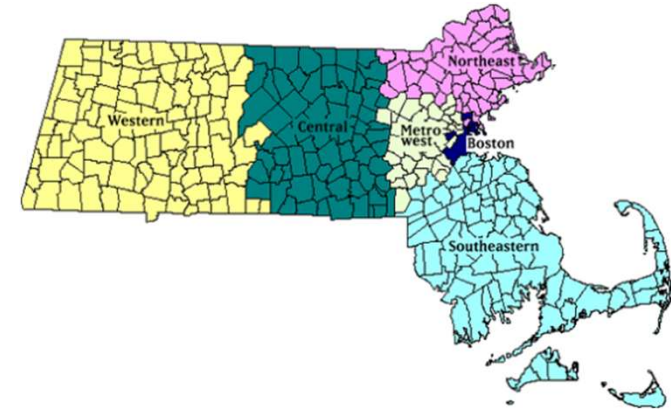
## **2000s: Climate Change and Biodiversity**

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

## **2010s: Sustainability**

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

# MUNICIPAL BOARDS & OFFICIALS



- The 351 cities and towns in Massachusetts have primary responsibility for subdivision control, zoning, land use planning, and other requirements within their borders.
- Massachusetts is a Home Rule jurisdiction so municipalities have power to enact their own legislation without advance state approval.
- **All 351 municipalities have created Conservation Commissions with power to regulate many wetlands activities.** Other municipal regulations may cover: septic systems; operation of landfills; chemical disclosures; underground storage tanks; and erosion control.
- Regional land use bodies include: Cape Cod Commission; Martha's Vineyard Commission; Town/County of Nantucket.





# AGENCY OVERVIEW

## State Agencies

- EOEEA is the central environmental agency for the Commonwealth, administering environmental grants, regulations, and enforcement through DEP and other line agencies plus the MEPA and CZM within the Secretariat.

## Municipal Role

- Cities and towns maintain primary responsibility for zoning, subdivision control, and other land use controls within their borders, plus public health, emergency management, and **Home Rule authority to enact general bylaws and ordinances.**

## Federal Role

- Federal oversight is provided by the Region 1 office of U.S. EPA, the U.S. Army Corps of Engineers and the Departments of the Interior, Agriculture, and Commerce.

# STATE ENVIRONMENTAL AGENCIES



## Executive Office of Energy and Environmental Affairs (EOEEA)



Department of  
Conservation  
and Recreation

*Manages/owns  
public parks and  
greenways metro  
Boston. Manages  
state-owned  
forests and parks.  
Division of Water  
Supply Protection*

Department of  
Agricultural  
Resources

*Manages  
agriculture,  
silviculture, and  
aquaculture  
activities.  
Pesticide Board.*

Department of  
Environmental  
Protection

*Enforcement  
and regulation  
of  
environmentally  
harmful  
activities.*

Department of  
Fish and  
Game

*Manages and  
conserves  
fisheries and  
wildlife  
resources,  
including plants  
and natural  
habitats*

**Division of  
Energy  
Resources**

*Implements  
energy policy  
and regulates  
energy usage  
and efficiency.*

Department of  
Public  
Utilities

*Responsible for  
the structure  
and control of  
energy in  
Massachusetts.*

# ENFORCEMENT PROCEDURES



## DEP Enforcement

- Initial enforcement actions are undertaken by DEP Regional Office inspectors and are typically initiated by agency inspections, citizen complaints, or as a follow-up to reports from regulated facilities.
- The most common action is a letter from DEP – a Notice of Non-Compliance (NON) – requiring a response describing how the violator intends to remedy the violation.
- When a NON is not sufficient, DEP will issue an Administrative Enforcement Order requiring specific actions by specified deadlines and providing the violator opportunity for an adjudicatory hearing.



# ENFORCEMENT PROCEDURES (Cont'd)



- DEP may impose administrative penalties – civil money fines – in Penalty Assessment Notices (PANs). G.L. c. 21A, § 16. Prior to issuing a PAN, DEP usually first must provide a Notice of Noncompliance (NON) to the violator with an opportunity to correct the violation (there are exceptions). If not corrected, nor reasonable efforts made, then DEP issues a PAN.
- Four exceptions allow DEP to issue a PAN without a NON:
  - 1) Violation significantly impacts public health, safety, welfare or environment;
  - 2) Violation is willful and not the result of error;
  - 3) Violation consists of failure to promptly report to DEP hazardous spills; or
  - 4) Violation is part of a pattern of noncompliance.
- Amount of the administrative penalty may be up to \$50,000 per day for major violations, or, up to \$1,000 per day for minor violations.
- **Alleged violator may appeal the PAN to a DEP Hearing Officer** and then to the Superior Court under the Administrative Procedures Act (APA), as long as the amount of the contested penalty is placed in an interest-bearing escrow account.

# ENFORCEMENT PROCEDURES (Cont'd)



## Attorney General Enforcement

- Civil litigation is conducted by the Attorney General (AG), usually through the Division of Environmental Protection, on behalf of DEP and other state agencies, or on the AG's own initiative, typically to compel compliance with environmental laws, regulations, or permit conditions, to prevent, forbid or remedy illegal activities, or to impose money sanctions for violations. The AG also has traditional authority to bring public nuisance suits on behalf of the Commonwealth for injunctive relief and other sanctions.
- Criminal prosecution is conducted by the AG or the District Attorney's Office to punish violations, prevent serious threats to public health and safety, or compel action when civil litigation has failed to secure compliance. Typically this is before Grand Juries or in Superior Court.
- The Attorney General by statute has authority to intervene in state and federal administrative proceedings, such as adjudicatory hearings.

# ENFORCEMENT PROCEDURES (Cont'd)



## Environmental Strike Force

- Created in 1989, the Massachusetts Environmental Crimes Strike Force (ESF) is an interagency team comprised of prosecutors from the Attorney General's Office, officers from the Massachusetts Environmental Police, and investigators, engineers and attorneys from the DEP.
- ESF is managed by DEP as a coordinating body between environmental agencies to promote proactive oversight and criminal enforcement initiatives. The ESF investigates and prosecutes civil, criminal, and administrative environmental cases of a relatively serious nature.
- ESF gathers evidence during undercover investigations, builds cases against alleged violators, then takes them to court. This can go beyond initial violations triggering ESF involvement, such as claims for failures to obtain insurance, nonpayment of taxes, loss of business licenses or professional registrations to conduct business, or asset forfeitures.



# ENFORCEMENT PROCEDURES (Cont'd)



## Citizen Suits

- G.L. c. 214, § 7A (Ten Citizen Suit Statute) and G.L. c. 30A, § 10A (Ten Person Right to Intervene) confer standing to bring civil litigation for violations of state or local environmental law, or to intervene in adjudicatory hearings where damage to the environment is or may be at issue. **They confer standing on municipalities, too.**
- SLAPP suits are “strategic lawsuits against public participation” brought mainly to intimidate citizens and groups from reporting or petitioning about government issues. G.L. c. 231, § 59H, the Anti-SLAPP statute, deters SLAPP suits by allowing the defendant to file a “special motion to dismiss.” Filing this motion stays discovery, and if defendant proves SLAPP suit is based on its petitioning activities alone with no other basis, the motion is allowed and the defendant is awarded attorney fees and costs.

# ENVIRONMENTAL IMPACT REVIEW

## 1. *Applicability*

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



- 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. G.L. c. 30, §§ 61-62H.
- MEPA applies to private projects that involve state permits, licenses, grants, and loans; however, MEPA does not apply without a state financial or regulatory connection.
- Review Thresholds: numerical action thresholds assigned to various criteria that, if reached, trigger MEPA project review. Categorical Inclusions: automatically trigger review when a project involves particular areas of concern. ACEC designation (“Area of Critical Environmental Concern”) recognize “unique clusters of natural and human resource values” worthy of high level of protection, meaning projects therein are scrutinized closely.

# ENVIRONMENTAL IMPACT REVIEW

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



- Proponent prepares EIR in draft (DEIR) and final (EIR) form to be reviewed and approved if adequate by the MEPA Unit of EOEEA. Public comment period.
- Filing an Environmental Notification Form (ENF) is less costly and time-consuming, like a mini-EIR (or good excuse for not doing EIR. MEPA Unit reviews ENF to decide if EIR needed.
- ENF and EIR availability: noticed published by EOEEA for free in the Environmental Monitor, but copies obtained from proponent or consultant.



# ENVIRONMENTAL IMPACT REVIEW

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



- EIR must contain detailed statements describing:
  - Nature and extent of the 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
- MEPA Unit may conduct a scoping session with proponents in the form of a meeting or a site visit where proponents and public participate to protect their rights and state their positions.
- A Scope is determined for the EIR – essentially a comprehensive table of contents and MEPA Unit expectations for the study.

# ENVIRONMENTAL IMPACT REVIEW

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



- Review and comment period lasts thirty days once the EIR is printed in the Environmental Monitor – public comment, interested agency review, and MEPA Unit review occur during this time. After seven days from the close of review and comment, the Secretary issues a certificate of compliance or non-compliance with MEPA requirements.
- Compliance with MEPA requires a finding by the Secretary that “all feasible measures have been taken to avoid or minimize [environmental] impacts.” G.L. c. 30, § 61.
- Statute of limitations 120 days for challenges to EIRs for public projects, with 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 IMPACT REVIEW



## Statute of Limitations for MEPA suits

*Town of Canton v. Massachusetts Highway Dept.*, 455 Mass. 783 (2010). SJC held 30-day deadline under § 62H to sue to challenge the EIR for private project began to run when DEP issued a sewer permit for the project. SJC rejected town’s argument that “first permit” triggering deadline means first permit issued addressing a party’s specific concern. SJC saw suit deadline as intended to expedite environmental approvals and reduce “potential unfairness and social economic loss that may result from the delay inherent in litigation.” The “first permit” provision refers “at the very least” to the first permit issued of those needed approvals listed in the EIR.



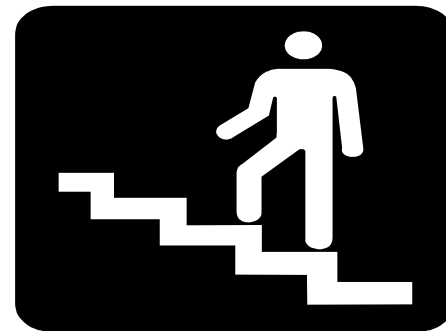
# ENVIRONMENTAL IMPACT REVIEW



## Citizen Suit Claiming MEPA Violations

*Ten Persons of the Commonwealth v. Fellsway Development, LLC*, 460 Mass. 366 (2011). The SJC held G.L. c. 214, §7A confers subject jurisdiction to hear claims of MEPA violations (here a claim of segmentation of a private commercial complex from state road improvements to avoid MEPA) when private project proponents and the permitting authority (but not Secretary of EOEEA) are joined as defendants. The SJC chose not to overrule *Cummings v. Sec’y of the Executive Office of Env’tl. Affairs*, 402 Mass. 611 (1988), which remains the law that project opponents cannot directly challenge MEPA decision by naming EOEEA Secretary as defendant.

# ENVIRONMENTAL IMPACT REVIEW



## Federal Preemption/NEPA Noncompliance

*U.S. v. Coalition for Buzzards Bay*, 644 F.3d 26 (1<sup>st</sup> Cir. 2011). The First Circuit held that the Coast Guard did not adequately explain its conclusion that its regulation concerning transit of oil barges through Buzzards Bay would improve environmental protection because state regulations, in some ways, contained more protection.

## Standard for Federal NEPA Injunctions

*Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743 (2010).

The US Supreme Court clarified that permanent injunctions to remedy a NEPA violation are appropriate only where each element of the usual four-part injunction test is satisfied. There is no presumption for the “harm” test that injunctive relief is appropriate merely because a NEPA violation has occurred.

# JUDICIAL REVIEW OF BOARDS

## ➤ Certiorari Suit Deadline Calculated

*Carney v. Town of Framingham*, 79 Mass. App. Ct. 1129, *review denied*, 460 Mass. 1111 (2011) (unreported, merely persuasive, not authoritative). Judicial review of Conservation Commission's decision under local Home Rule wetlands bylaw, to issue an Enforcement Order, is in the nature of certiorari pursuant to G.L. c. 249, § 4.

The standard of review (arbitrary and capricious or lack of substantial evidence) varies according to the nature of the action for which review is sought. A petition for certiorari review must be filed in Superior Court within sixty days from the date of the Commission's vote to issue or deny an enforcement order.



# JUDICIAL REVIEW OF BOARDS

## ➤ Certiorari Suit Deadline Considered in Other Situations

While *Carney* was only about an enforcement order issued by a conservation commission, it could have important application in other contexts: where certiorari review applies, where there is no statutory, or regulatory scheme already specifying what is issuance, such as boards of health under state codes and regulations; sand and gravel/earth removal boards under local general bylaws; historic commissions outside the zoning context; boards of public works for sewer, water, electric, and roadway matters; boards of selectmen under various non-zoning bylaws and state laws; and city councils for certain land use decisions.

# MA GLOBAL WARMING SOLUTIONS ACT



- In 2010, the EOEEA issued a **Clean Energy and Climate Plan for 2020** to set the statewide greenhouse gas (GHG) emissions limit, required by the Global Warming Solutions Act, at 25 percent below 1990 levels, the maximum authorized by the Act.
- According to MA's Energy Efficiency Advisory Council the state's first Three Year Energy Efficiency Plan (2010 to 2012) saved 2,393 GWh and 37.6 million therms of energy and returned \$4 billion in net benefits on an investment of \$1.5 billion. The second Three Year Plan (2013 to 2015) is expected to return a net cost savings of \$6 billion.
- MA's consistent gains in energy efficiency led the American Council for an Energy-Efficient Economy (ACEEE) to rank MA #1 in energy efficiency for the third year in a row.

# MA GLOBAL WARMING SOLUTIONS ACT

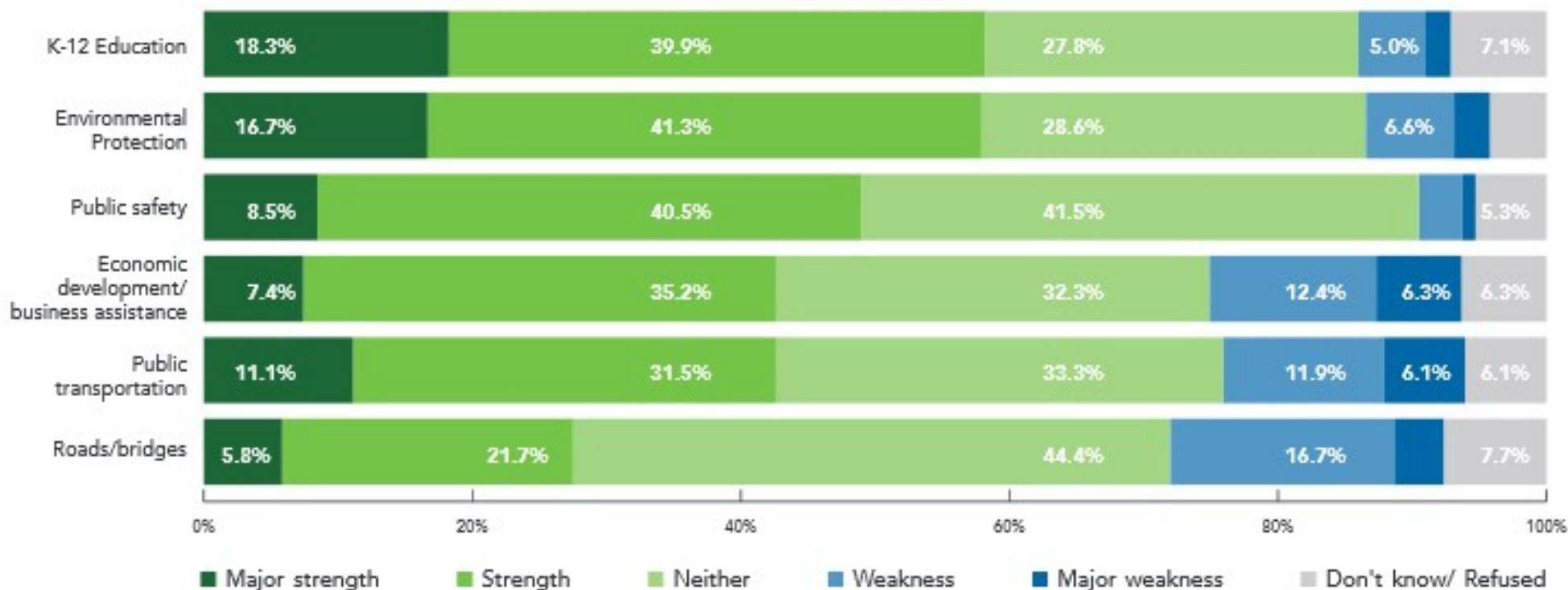


- Existing programs in energy such as the **Regional Greenhouse Gas Initiative (RGGI)** and the **Renewable Portfolio Standard** are to be supplemented by efforts to obtain clean energy by importing Canadian hydropower and through a proposed Clean Energy Performance Standard requiring electricity suppliers to favor lower- and no-emissions sources of electricity.
- RGGI is the first mandatory, market-based effort in the United States to reduce greenhouse gas emissions. Nine Northeastern and Mid-Atlantic states have capped and will reduce CO<sub>2</sub> emissions from the power sector 10% by 2018. States sell nearly all emission allowances through auctions and invest proceeds in consumer benefits: energy efficiency, renewable energy, and other clean energy technologies. The next auction is March 5, 2014.

# GREEN JOBS ACT

- The Act created the Massachusetts Clean Energy Center (MassCEC) to accelerate job growth and economic development in MA's clean energy industry. MassCEC annually assesses MA's clean energy industry. The 2013 Report studied: job growth, revenue, technology growth, business climate, capital and finance, and workforce composition.

**Strengths and Weaknesses of Massachusetts For Operating a Clean Energy Business**

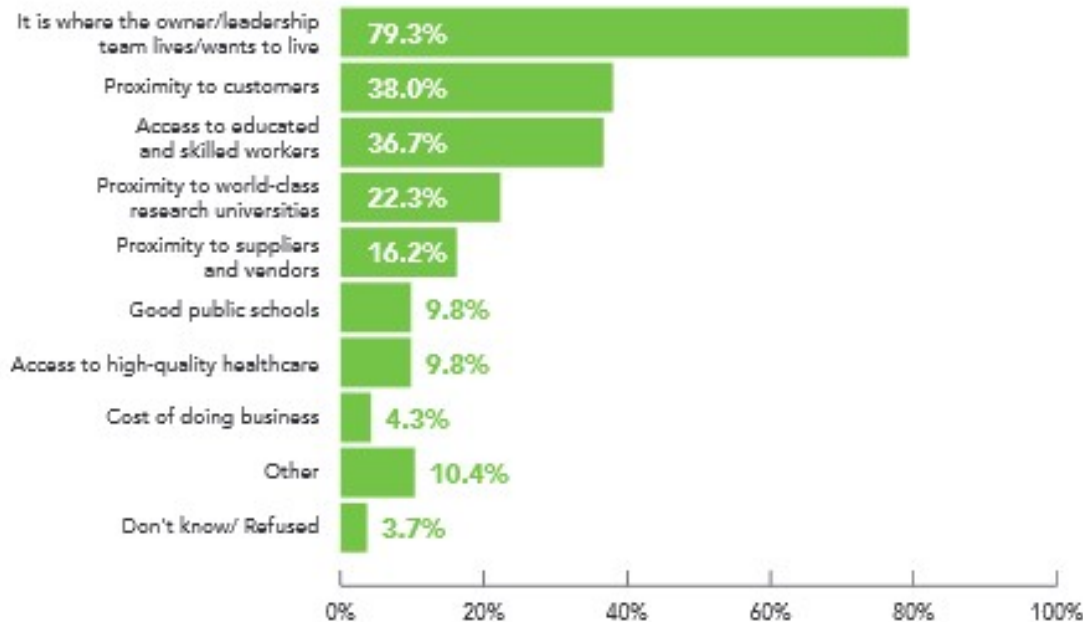




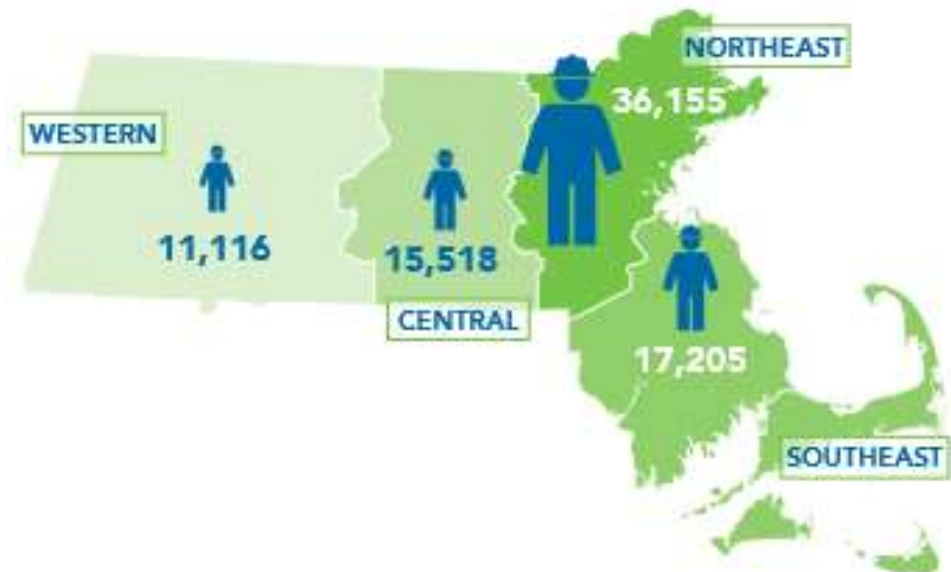
# “CLEAN ENERGY IS GENERATING AN INCREASING SHARE OF REVENUE”

- **EOEEA 2013 Massachusetts Clean Energy Industry Report\***
  - 79,994 employees hold clean energy positions in 5,557 Firms
  - These are 1.9% of MA’s workforce, an 11.8% employment growth rate in 2013
  - The report projects 88,874 clean energy jobs, an 11.1% growth rate, for 2014.

## Reasons Why Clean Energy Businesses Choose Massachusetts



## Clean Energy Workers by Region



# GREEN COMMUNITIES ACT (GCA)

## ➤ Renewable Portfolio Standard

- The GCA increases the requirement on utilities and other electricity suppliers to procure a certain amount of power from new renewable sources by an additional 1% of sales per year, rising from 4% in 2009 to 15% in 2020, 20% in 2025, etc.
- DOER determines the percentage of renewable energy that must be obtained from new on-site generation (PV) less than 6 MW in size (per land parcel). In 2014, the carve-out will be 0.9481% of an electric utility's total sales.
- To qualify for a Class I new Renewable Generation Unit, the supplier must receive electricity production from a facility that began commercial operation after 1997 and generates electricity using any of the following technologies:
  - Solar photovoltaic; solar thermal electric; wind; small, low-impact hydropower; landfill methane and anaerobic digester gas; marine or hydrokinetic energy; geothermal energy; and/or advanced low emissions biomass.

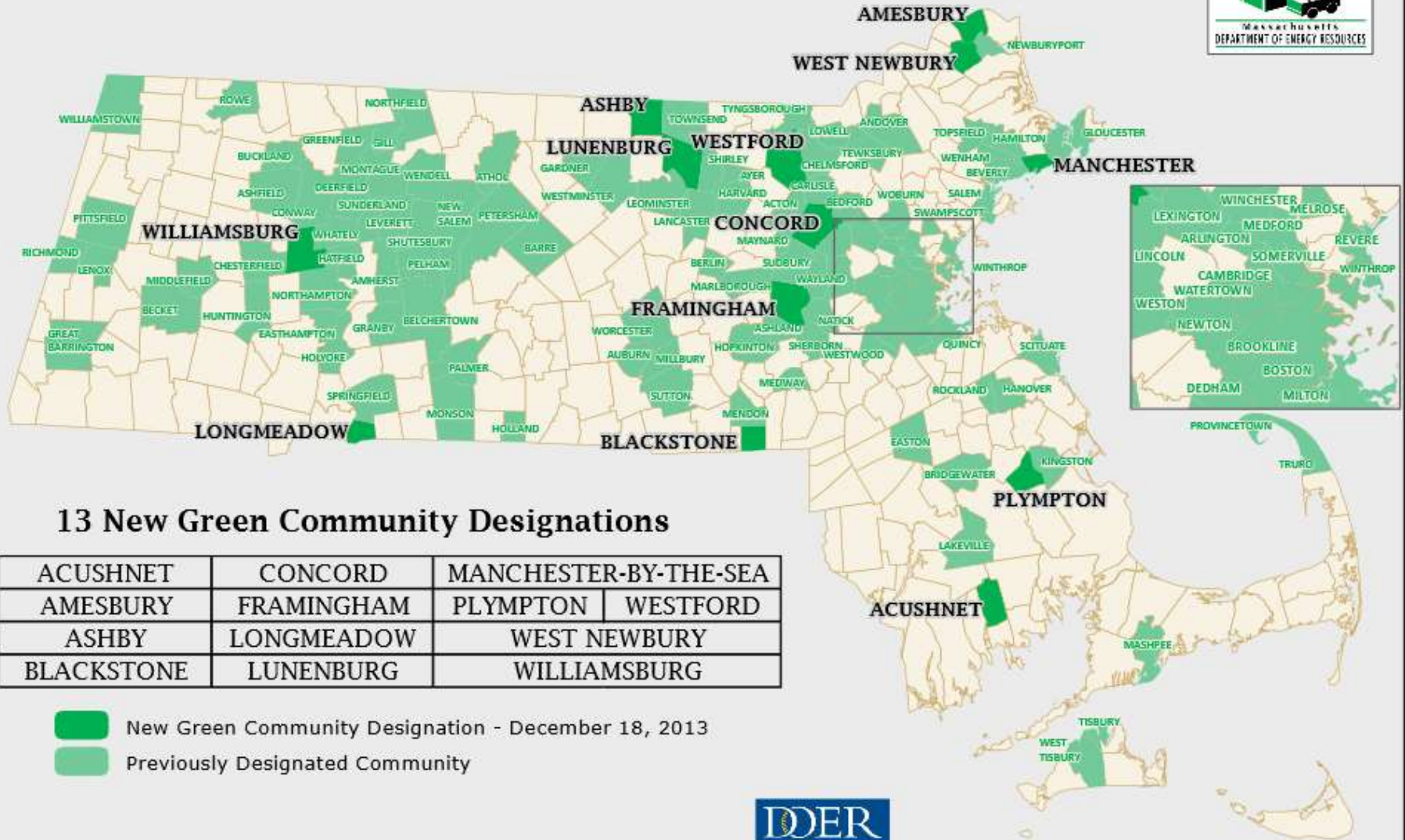
# GREEN COMMUNITIES ACT (GCA)

## ➤ Class II RPS

- GCA created a Class II of renewable energy resources subject to minimum mandatory procurement
- Class II includes generating sources that began commercial operation prior to 1998 from a variety of renewable energy sources, including solar, wind, ocean; fuel cells; landfill gas; small hydroelectric facilities that meet certain standards; low-emission biomass; and geothermal.
- A sub-class of Class II requires a minimum mandatory procurement from waste-to-energy facilities in MA; wherein revenue from this procurement supports recycling programs in the Commonwealth

# GREEN COMMUNITIES ACT – Map (Source: DOER)

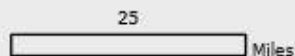
**GREEN COMMUNITY DESIGNATIONS REACH  
ONE HUNDRED TWENTY-THREE**



## 13 New Green Community Designations

ACUSHNET	CONCORD	MANCHESTER-BY-THE-SEA
AMESBURY	FRAMINGHAM	PLYMPTON   WESTFORD
ASHBY	LONGMEADOW	WEST NEWBURY
BLACKSTONE	LUNENBURG	WILLIAMSBURG

- New Green Community Designation - December 18, 2013
- Previously Designated Community





# Sustainable Development Principles & The Smart Growth Zoning Overlay District – M.G.L. c. 40R



- Promotes mixed use, affordable housing, compact design, open space, and transportation in a new zoning district in an “eligible location” within ½ mile of a transit station OR in a municipal center OR in a “highly suitable” location. The Department of Housing and Community Development (DHCD) administers c. 40R through 760 CMR 59, amended Nov. 22, 2013.
- The former Charlestown Chew factory is currently being redeveloped under c. 40R. The redevelopment team has spent \$90 million from private funding to remediate site contamination, address parking and stormwater issues, and renovate the blighted warehouse into a 328 unit, seven story apartment community within Everett’s Smart Growth Zoning District. The project also reused many of the original building materials.\*
- ***DiRico v. Town of Kingston, 458 Mass. 83 (2010)***: The SJC upheld the validity of Kingston’s smart growth zoning ordinance despite the town’s failure to revise its developable land figures in accordance with the duties imposed by c. 40R and its regulations.

\* <http://ma-smartgrowth.org/resources/smart-growth-projects/> (source and photo credit: Massachusetts Smart Growth Alliance Projects 2013)



# Smart Growth Zoning Districts Approved, Eligible, or Under Review in Massachusetts

A Growing Trend:  
As of 2013, 12,350 units,  
in 33 districts, were  
approved under 40R.\*



- Once DHCD has granted approval, then the municipality can adopt the Smart Growth Overlay District, and become eligible for zoning incentive payments:
  - \$10,000 for up to 20 units; \$75,000 for 21-100 units; \$200,000 for 101-200 units; \$350,000 for 201-500 units; to \$600,000 for 501 or more units of housing
  - \$3,000 density bonus payment for each additional unit of housing built within the district
  - M.G.L. c. 40S reimburses any net costs of educating student in new district housing
  - **Municipalities with Smart Growth Zoning Districts are preferred recipients of DHCD, EOEEA, Transportation, and Administration and Finance awards of discretionary funds**

\*<http://www.mass.gov/hed/docs/dhcd/cd/ch40r/40ractivitysummary.pdf>; MAP: <http://www.mass.gov/hed/docs/dhcd/cd/ch40r/40ractivity.pdf> J. Pfister, DHCD 5/6/13

# MUNICIPAL LAND USE PLANS



- A Comprehensive or Master Plan is optional, but important. Plans 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. The state offers some limited financial and technical assistance for community planning. There are incentives in the Cape Cod Commission Act, for the 15 Cape towns to prepare local comprehensive plans consistent with regional policy.
- **Some types of plans are necessary, though, to qualify for state grant programs or to enjoy eligibility under the Green Communities Act (GCA).**
- The Subdivision Control Act requires planning boards to prepare master plans, but it does not actually require that any laws or regulations be based on them. M.G.L. c. 41, §§ 81K-81GG. The Zoning Act permits municipalities to enact an array of zoning measures, but it does not require that such zoning be based on a plan.

# OPEN SPACE TAXATION



## ➤ **Land Conservation Incentives Act**

➤ The Act took effect January 1, 2011 providing 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

➤ EOEEA implements the Massachusetts Conservation Land Tax Credit (CLTC) Program through 301 C.M.R. 14.00.



# OPEN SPACE – Community Preservation Act, enacted 2000



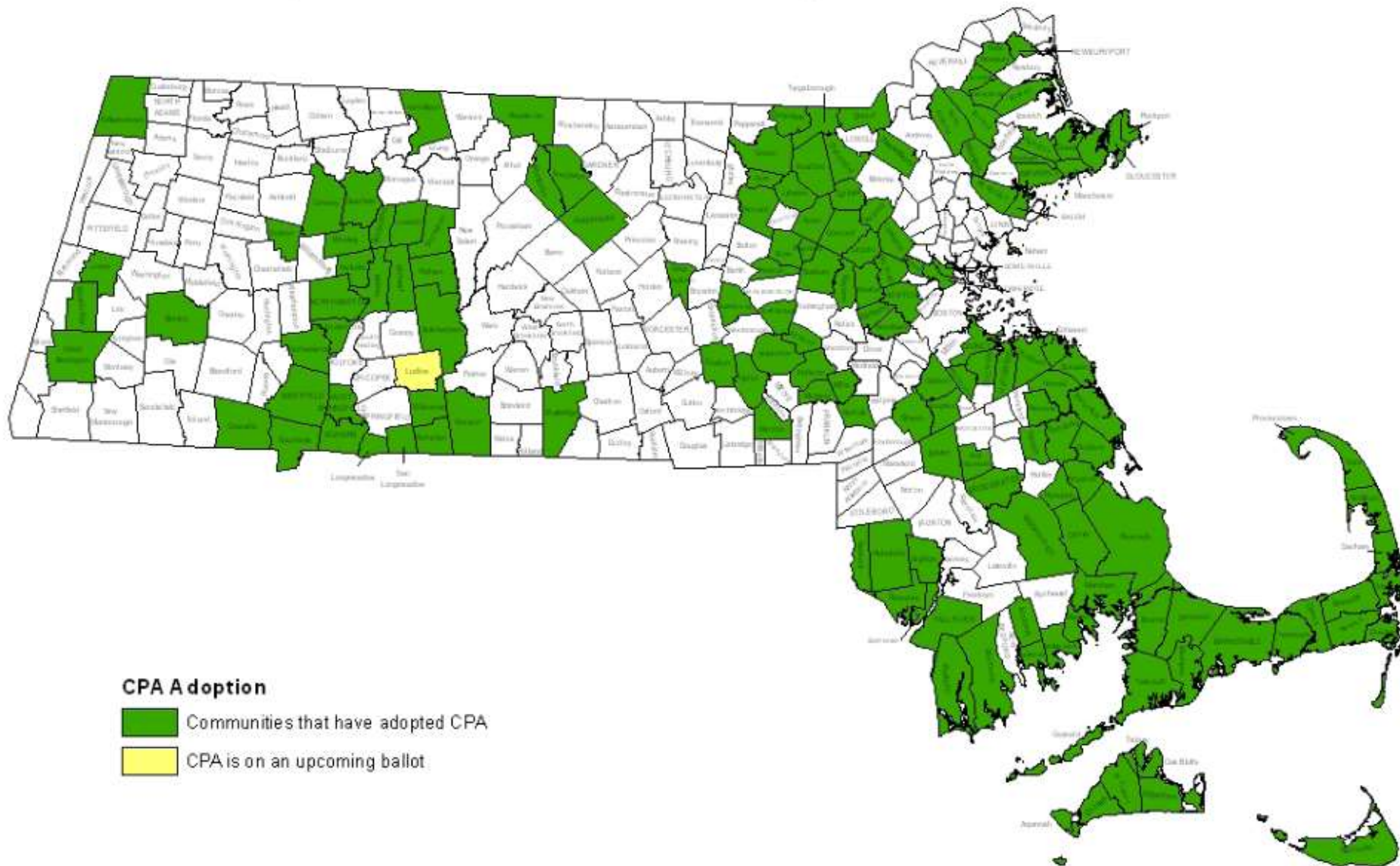
- 155 communities, representing 44% of MA cities and towns have adopted the CPA\*
- Close to \$1.2 billion has been raised for community preservation, through locally raised revenues (a property tax levy not to exceed 3% ) and with total CPA Trust Fund distributions to date of \$469.69 million.\*\* CPA finances affordable housing, open space preservation, and natural resource protection, active outdoor recreation, and historic preservation.
- Using CPA funds, municipalities have approved 6,600 projects; preserved nearly 19,200 acres of open space, including wetland resources such as lakes, rivers, and saltwater ponds; created or rehabilitated 7,300 affordable housing units and developed many affordable housing programs; and approved 3,200 appropriations for historic preservation projects and over 1,000 outdoor recreation projects.

\*<http://www.communitypreservation.org/content/cpa-overview> \*\*<http://www.communitypreservation.org/content/trustfund>



# OPEN SPACE – CPA Adoption Map

## Community Preservation Act Adoption

October 2013



### CPA Adoption

-  Communities that have adopted CPA
-  CPA is on an upcoming ballot



**Community  
Preservation Coalition**  
*Preserving our past. Building our future.*



# AIR POLLUTION

## State



- Principal Massachusetts law regulating air pollution
  - M.G.L. c. 111, §§ 142A-142N
  - Authorizes DEP to; regulate sources of air pollution, order cessation of violations, and enforce against violators
  - **Gives local boards of health authority to regulate air pollution**
- Principal Massachusetts regulations under the air pollution statute
  - 310 CMR §§ 6.00, 7.00, and 8.00
  - Section 6.00 codifies NAAQS promulgated by EPA, Section 8.00 authorizes DEP to deal with air pollution emergencies, and Section 7.00 provides detailed regulations of mobile and stationary sources of air pollution
- The definition of air is “atmosphere”
  - Indoor air is not regulated, with the exception of asbestos
  - Odor, noise, and GHG emissions increasingly regulated in recent years

# AIR POLLUTION (Cont'd)

## State



### ➤ **Regional Greenhouse Gas Initiative (RGGI)**

- Cap and trade program
- Applies to fossil-fuel fired units serving electricity generators with nameplate capacity of 25 megawatts or more.
- The ten states have agreed to cap emissions at 188 million tons of CO<sub>2</sub> per year from 2009 to 2014, and then reduce the cap by 2.5 percent each year for the next four years.

### ➤ **Massachusetts v. EPA, 127 S. Ct. 1438 (2007)**

- Supreme Court held that states have standing to sue
- Ruled that greenhouse gases are pollutants under the Clean Air Act and strongly encouraged the EPA to regulate them.
- Mandatory Reporting of Greenhouse Gases Rule – final rule issued Sept. 22, 2009
  - Suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA.

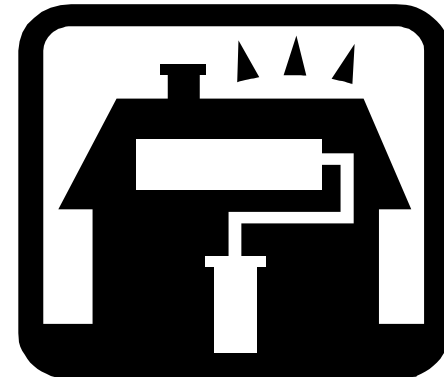
# AIR POLLUTION (Cont'd)

## Municipal Enforcement, Rulemaking & Administration



- Police & Fire Departments, Boards of Health, and Building Inspectors enforce federal, state, and local air pollution control laws and regulations
- M.G.L. c. 111, § 31C authorizes municipalities to adopt air pollution control rules covering soot, fumes, dusts, vapors, toxic and other emissions, which pose a danger or nuisance to public health or impair public comfort. The local rules must be presented at a public hearing and submitted to DEP.
- A Board of Health, or other authority established for this purpose by vote, administers local rules.
- Boards of Selectmen may limit permits issued for ceremonial bonfires in a year, as well as permits issued for property maintenance burnings;

# INDOOR AIR POLLUTION



- **Clean Indoor Air Act**, M.G.L. c. 270, §§ 21-22, restricts smoking in many public settings, including municipal buildings, nursing homes, supermarkets, mass transit facilities, airports, public elevators, open meetings of government bodies, health and daycare facilities, and student dormitories.
- Many municipalities, through their boards of health, promulgated more stringent regulations regarding separate smoking sections in local restaurants and work places, even outdoor spaces.
- **Lead Poisoning Prevention and Control Act**, M.G.L. c. 111, §§ 190-199, and agency regulations thereunder require identification and removal of lead paint, as well as detection and screening programs.
- Law applies with every change of ownership of residential property that contains lead paint. Failure of residential property owner to comply with the Act may result in liability for all damages caused thereby.
- Provision for punitive, treble damages. M.G.L. c. 111, § 199.

# INDOOR AIR POLLUTION (Cont'd)



## **Urea Formaldehyde Foam Insulation:**

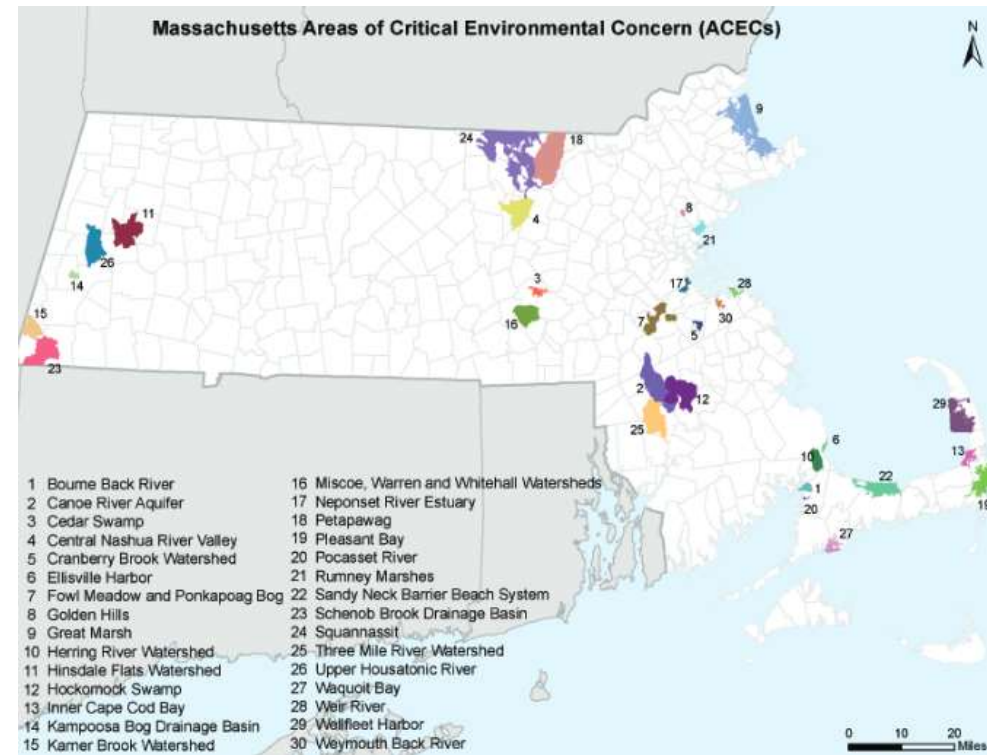
- In 1979, the State Department of Public Health (DPH) banned Urea Formaldehyde Foam Insulation (UFFI) under its authority to ban hazardous substances. M.G.L. c. 94B, § 2(a).
- MA established a trust, funded by industries involved with manufacturing, distribution, and installation UFFI, to assist landowners with the cost of UFFI removal.
- Landlords or sellers of residential property must determine whether dwelling contains UFFI and, if so, disclose the status and the formaldehyde air levels to tenants, prospective tenants, and buyers.
- Air testing is available at no cost from DPH.

## **Asbestos:**

- DPH and DEP also regulate friable asbestos, which the agencies define as an air pollutant.
- DPH's State Sanitary Code regulates the repair and removal of asbestos in residential settings.
- Asbestos removers must be licensed and meet specifications imposed by the Department of Labor and Industries (DLI).



# AREAS OF CRITICAL ENVIRONMENTAL CONCERN (ACEC) – 301 CMR 12.00



- Communities nominate areas for their “quality, uniqueness and significance of their natural and cultural resources” and then the Secretary of EOEEA designates the areas as ACECs. The designation triggers a higher level of state scrutiny of the activities in the area, most notably under MEPA.
- There are currently 30 ACECs, covering a combined 268,000 acres of land, in 76 communities.
- The Department of Conservation and Recreation (DCR) administers the program to preserve and restore natural resources within ACECs and to minimize adverse impacts of activities in or near ACECs.

# COASTAL ZONE MANAGEMENT (CZM)



- **EOEEA's Office of Coastal Zone Management:**
  - Administers the CZM programs within the state as authorized by the federal Coastal Zone Management Act
  - Promulgates policies in regulations
  - Reviews federal activities in or affecting the Massachusetts coastal zone for consistency with its enforceable policies
  - Ocean Sanctuaries Acts prohibit or restrict specified activities, including wastewater discharges, within designated ocean sanctuaries along the Massachusetts coast (M.G.L. c. 132A, §§ 12A-18)

# OCEAN MANAGEMENT & MA OCEANS ACT OF 2008



- **Massachusetts Oceans Act of 2008**
  - Required the Secretary of EOEEA to develop a MA Ocean Management Plan
  - Requires state-issued permits, certificates, and other approvals to be consistent with the Plan
  - Maintains Division of Marine Fisheries' management and control of commercial and recreational fishing
  - Allows siting of “appropriate scale” offshore renewable energy facilities in state waters
  - Establishes fund of proceeds from ocean development mitigation fees, appropriations and other monies

# OCEAN MANAGEMENT & MA OCEAN MANAGEMENT PLAN



- Massachusetts's Ocean Management Plan was the first in the nation to set guidelines for managing, reviewing, and permitting proposed uses of state waters.
- The Plan governs state coastal waters at least 0.3 nautical miles seaward of mean high water (excluding most developed harbor and port areas). The Plan offers preferential treatment to municipalities in developing ocean wind facilities.
- The Plan raises standards for protecting the most sensitive species and habitats, allows more **community-scale wind energy development**, creates a formal role for regional planning authorities (RPAs) in wind energy planning, and outlines a five-year \$2.5 million research plan to be pursued with, and funded by, the Massachusetts Ocean Partnership, a private nonprofit group.

# MA OCEAN MANAGEMENT PLAN – MAP

- **THREE MANAGEMENT AREAS:**
  - **Prohibited Area (13%):** Cape Cod Ocean Sanctuary
  - **Renewable Energy Area (2%):** designated for commercial wind energy facilities
  - **Multi-use Area (85%):** uses, activities and facilities allowed by the Ocean Sanctuaries Act

**Ocean Act and Ocean Plan legally do not govern commercial fisheries (by an exemption in the Act) or the Cape Wind project (by federal jurisdiction)**





# MA OCEAN MANAGEMENT PLAN - ENERGY



- The Plan created two designated wind energy areas, and gave the seven Regional Planning Agencies (RPAs) legal ability to define an appropriate scale of renewable energy projects in state waters of member communities.
- ‘Appropriate scale’ includes protecting the interests of fishing, fowling, and navigation; ensuring public safety; and minimizing incompatibility with existing uses and visual impacts.
- The Plan set aside legal areas for community-scale renewable energy projects, allocating the number of turbines to each RPA on a sliding scale based on shoreline length and coastal water area.
- The Plan also requires that the project enjoy host community endorsement and that the community gains direct economic benefits, in energy, royalties, or other municipal improvements.

# THE CONSERVATION RESTRICTION ACT – M.G.L. c. 184 §§ 31-33



- The Act governs Conservation Restrictions, which are voluntary agreements between a landowner and a government body or qualified charitable organization to keep land primarily in its undeveloped condition. This covenant is a recorded instrument, following a specific format, and must be approved by the selectmen or city council and then by EOEEA.
- Approved and recorded CRs may run in perpetuity or for term without re-recording.
- **CRs given to local conservation commission or charity within the community must be approved by the municipal selectmen or city council.**
- *Weston Forest and Trails Ass'n. v. Fishman*, 66 Mass.App.Ct. 654 (2006). The court upheld an order for the removal of a newly constructed barn on property which the previous owner had conveyed a CR to the town.
  - This decision denied attorney fees, and led the Legislature to amend M.G.L. c. 184, § 32 to provide reasonable attorney's fees to petitioners bringing successful court actions to enforce CRs (as well as historic, agricultural, watershed, and affordable housing restrictions).

# DRINKING WATER – Operating & Funding a Water Supply System



## Municipal and DEP Management:

- Municipalities must have a Water Management Act permit, issued by DEP, authorizing the amount of water available to the municipal water supply. DEP offers grant programs for acquiring land, addressing contamination, and constructing filtration plants. M.G.L. c. 21G.
- Except for communities served by MWRA, any town may vote to operate its own water supply system. M.G.L. c. 40 & c. 39A. Towns may purchase water from private companies or other communities.
- Recently many towns have combined their water and sewer commissions, using M.G.L. c. 40N or through the town's "special act" process.
- Towns issue bonds to finance the cost of public water supply systems, and bill users based on consumption. Under M.G.L. c. 44 § 53, towns establish "enterprise funds" to guarantee that revenue from services sufficiently covers the operation and capital costs of the water supply system.

# DRINKING WATER – Regulation & Enforcement of Water Quality



## Municipal and DEP Management:

- If a water supply fails the standard, DEP can require treatment or public notification. Water commissioners, or selectmen acting as such, may impose additional controls, subject to bylaws or town rules. M.G.L. c. 41, § 69B.
- Local boards of health regulate private wells, and DEP has no direct authority, but assists at their request. Local boards of health promulgate well regulations, which are available at the MA Association of Health Boards (MAHB) and the MA Association of Health Officials (MAHO).
- DEP has extensive authority to protect ground water from pollution. M.G.L. c. 21, §§ 26-53. DEP approval is needed to discharge most pollutants, including sewage, commercial, industrial, and agricultural waste, or runoff.
- Under the Water Management Act, M.G.L. c. 21G, DEP manages ground and surface water together as a statewide resource, and deals with water supply shortages and emergencies. **Each community must have a water resources management plan that incorporates conservation standards based on guidelines of the Massachusetts Water Resources Commission.**

# ENERGY SITING & EFFICIENCY

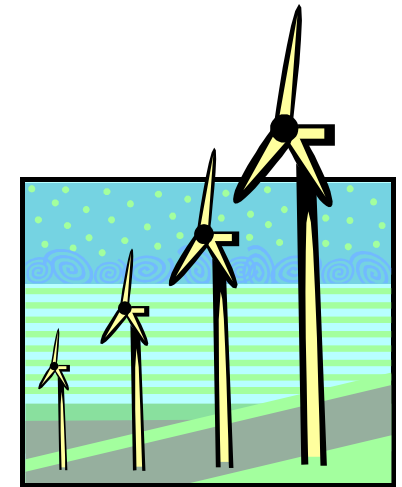


## Energy Facility Siting Board (EFSB):

- EFSB supervises a mandatory economic and environmental review and evaluation of alternative sites or routes with some authority to override local obstacles. M.G.L. c. 164, §§ 69G-69S.
- Special siting approval procedures apply to new or expanded electric generating facilities, transmission lines, and natural gas pipelines. To some extent facilities proposals can override municipal objections.



# ENERGY SITING & EFFICIENCY: WIND



## ➤ Hoosac Wind Project Upheld by SJC

The SJC upheld DEP's approach to permitting open-bottom culverts for stream crossings to span beyond bank-to-bank under Wetlands Protection Act (thus spans are subject to Buffer Zone standard only). This case was before the SJC on an important land-based wind power project of 20 turbines to generate 30 megawatts on two Berkshire ridges in Towns of Florida and Monroe, which approved and supported the project. Hoosac Wind in 2003 filed its permit applications for this inland project, delayed by years of adjudicatory hearing process. *Ten Local Citizens Group v. New England Wind, LLC*, 457 Mass. 222 (2010).

# ENERGY SITING & EFFICIENCY: WIND



## *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 457Mass.663 (2010)*

- SJC affirmed EFSB's grant of § 69K certificate of environmental impact and public interest, a composite of all individual permits and authorizations necessary for construction and operation of the transmission line (state waters), which is part of the wind farm project in Nantucket Sound (federal waters).
- Transmission lines will connect Cape Wind to the local grid on Cape Cod.
- Federal permits obtained April 2010.

# ENERGY SITING & EFFICIENCY: WIND



## Wind Siting Bill S. 1666 (pending)

- House and Senate passed the Wind Energy Siting Reform Act in 2010, almost enacted, still pending
- Develops a clear, transparent, and efficient process for the timely development of wind energy projects
- Mandates that environmentally protective statewide standards be developed to ensure that wind energy projects are sited in appropriate locations.
- Gives local boards authority to issue permits with reasonable conditions and to deny permits to projects that don't meet stringent new statewide siting standards, which will identify sites where they don't disturb residents or harm sensitive habitats

# FARMLAND & AGRICULTURE – Legal Provisions Favoring Preservation of Farming and Farmland



- M.G.L. c. 79, § 5B contains eminent domain protections for farmland regarding public hearings and the availability of non-agricultural land.
- The state, municipalities, or qualified charities may acquire Agricultural Preservation Restrictions (APRs) to prevent development of farmland.
- The State Zoning Act, M.G.L. c. 40A, § 3, exempts agricultural activities on certain size lots and exempts farm stands that meet requirements.
- M.G.L. c. 111, §§ 125A, 143 authorizes municipalities to create “agricultural incentive areas” to relax nuisance laws for farming.
- M.G.L. c. 40L § 5 provides municipalities or the Commonwealth with a right of first refusal to purchase farmland that otherwise would be sold or converted for nonagricultural use within “agriculture incentive areas.”
- State-owned agricultural lands are protected by a policy to protect the agricultural land base from “irreversible conversion.”
- The Wetlands Protection Act, M.G.L. c. 40, offers a qualified exemption for normal maintenance or improvement of lands in agricultural use.



# FARMLAND & AGRICULTURE – From Tax Relief to Aquaculture



## Property tax reductions and related benefits and protections:

- M.G.L. c. 61A reduces tax assessments for properties meeting minimum sizes and gross receipts, and is backed by tax rollbacks and conveyance taxes for properties taken out of the program. Landowners' participation is voluntary by annual filing. **M.G.L. c. 61A § 14 offers municipalities an assignable right of first refusal on farmland that would otherwise be sold or converted to non-agricultural use.**
- **Tax relief varies by specific use. Presumptive Department of Food and Agriculture guidelines are available online.**
- **While land is farmed it is exempt from special or betterment assessments.**
- Agricultural land has higher priority eligibility for the land preservation fund, and has greater protection from nuisance suits and eminent domain takings.
- Aquaculture is not a public right on private land. The cultivation of shellfish on tidal flats can be barred by the owner of the flats. *Pazolt v. Dir. of Div. of Marine Fisheries*, 417 Mass. 565 (1994).

# FORESTS AND TREES



- **Forest Cutting Practices Act**, M.G.L. c. 132, §§ 40-46, promotes responsible harvest by specifying cutting methods and requiring plans prior to high volume commercial harvests. Limited exemptions apply for public utility and highway maintenance and for some projects requiring city or town permits.
- **Scenic Roads Act**, M.G.L. c. 40, § 15C, regulates cutting or removal of trees, or tearing down or destruction of stone walls, along scenic roads so designated by town meeting or city council, and mandates a planning board public hearing.
- **Wetlands Protection Act** (and DEP regulations) contains a qualified agricultural exemption including forestry, defined in detail in DEP rules.
- **Real estate tax relief is available for land in forestry use. M.G.L. c. 61.**
  - Re-written in 2006 to make c. 61, 61A & 61B conform more closely to each other.
  - Must have at least 10 contiguous acres in same ownership to qualify. Owner must file a 10 year management plan with the state.
  - Conveyance tax provision added; applies to conversion within 10 years of acquisition. Waived if municipality buys under its right of first refusal.
  - Rollback taxes apply if land is converted to other use, except a transfer to c. 61A or 61B usage. Amount is equal to taxes due for last 5 years if not 61 classified minus amounts actually paid. Municipal right of first refusal applies as in M.G.L. c. 61A

# FORESTS AND TREES (Cont'd)



- **Forest Stewardship Council** seeks to promote permanent sustainability and has now classified all state forests and parks in MA as “Green Certified.”
- Several statutes authorize and manage state and town forests.
- Owner or occupant of land who permits cutting of brush or timber shall dispose of the “slash” (tops, branches, sawdust, and other debris) in a way that minimizes fire danger. M.G.L. c. 48, §§ 16-18.
- **Public Shade Trees Act** protects publicly-owned trees along or within the boundaries of any town, city, or county way. M.G.L. c. 87, § 1.
  - No person, including the landowner, may cut, trim, or remove such a “public shade tree” without the municipal tree warden’s permission.
  - Tree warden places notice on affected tree and holds a public hearing. If there is written objection, work may not be undertaken without approval of selectmen or mayor. Exemptions are available for local officials, if trees “obstruct, endanger, hinder, or incommode” persons traveling on a way. M.G.L. c. 87, § 5.



# FORESTS AND TREES (Cont'd)



## **The Public Lands Preservation Act (PLPA) (pending)**

### **An Act to Protect the Natural Resources of the Commonwealth**

- Under Article 97 of the Massachusetts Constitution, citizens have the right to a clean environment and the right to enjoy natural resources on publicly owned land
- Article 97 does not allow public land acquired for natural resource purposes to be used in any other way, or otherwise disposed of, without a two-thirds vote of each branch
- The PLPA would establish as the policy of the Commonwealth that approval of any change in use or disposition of land taken or acquired for natural resource purposes, which is broadly protected by Article 97, is only granted if there is no feasible alternative and if equivalent replacement land is provided, i.e. “no net loss.”
- Exception to the replacement requirement would be dispositions that lead to no physical change in the land, and dispositions of buildings.
- In June 2011, H.3438 was reported favorably from the Environmental Committee. The bill is now in the House Committee on Ways and Means.



# PRESERVING SCENIC BEAUTY



- Various statutory mechanisms are available to cities and towns with the primary aim of protecting the community's natural beauty.
- Towns are permitted by the **Scenic Roads Act**, M.G.L. c. 40, § 15C, to designate any road, other than a state highway and not maintained by the state, as a scenic road. The designation must be requested by the planning board, conservation commission, or historical commission.
- Designation of a scenic road means that the planning board must give its written consent, after a hearing, before any cutting or removal of trees or alteration or removal of stone walls. **In addition, some communities, such as Dover, have adopted local zoning or general bylaws which mandate a permit and give a local board power to disapprove or impose conditions.**
- **The Scenic Mountains Act**, M.G.L. c. 131, § 39A, permits cities and towns in Berkshire County, by local option, to regulate development in mountain areas and protect watershed and scenic qualities.
- **The Scenic Rivers Act**, M.G.L. c. 21, § 17B, permits the state to adopt orders restricting or prohibiting dredging, filling and other alterations to scenic or recreational rivers.

# HAZARDOUS MATERIALS: CLEANUP



- **Massachusetts's 'Right-to-Know' law**, M.G.L. c. 111, regulates hazardous materials. This law was promulgated due to concern that residents understand the health and safety risks involved in local industries.
- M.G.L. c. 111 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.
- The selectmen designate a municipal coordinator, who is usually the fire chief, fire commissioner, public health commissioner, or public health officer. In small towns, the selectmen may designate one of the board's members to be municipal coordinator.
- A town's emergency response personnel should be aware of potential hazards, and the town also is subject to its terms as an employer.

# HAZARDOUS MATERIALS: CLEANUP

## Liability Under MA Superfund Statute



- **The MA Superfund Statute, M.G.L. c. 21E, imposes responsibility and liability for releases of hazardous materials as well as oil and other petroleum products, and for suspected or confirmed disposal sites.**
- **Persons responsible for releases or threats of release of oil and hazardous materials (OHM), for which Massachusetts incurs cleanup costs, are strictly liable for up to three times the actual costs.**
- **All site “owners and operators” are subject to joint and several liability, meaning the Commonwealth can seek reimbursement for site cleanup costs from one, some, or all potential defendants. *Commonwealth vs. Boston Edison Co.*, 444 Mass. 324 (2005).**
- **M.G.L. c. 21E offers rights of action for private parties, public agencies and others to sue for cleanup cost-recovery and contribution as well as for property damage. Court actions must be preceded by 45-day notice plus 60-day good faith negotiations.**
- **Under c. 21E, the Commonwealth has discretion to file suit against one, some, or all potentially liable parties, so defendants may face the burden of finding other “owners and operators” to share liability for cleanup costs. *Commonwealth vs. Boston Edison Co.*, 444 Mass. 324 (2005).**

# HAZARDOUS MATERIALS: CLEANUP

## Recoverable Litigation Costs



- Attorney fees incurred to respond to releases of hazardous materials are recoverable under 21E as “response” costs, just like costs for LSPs or other environmental consultants. Attorney fees for litigation itself, however, are not recovered as “response” costs, but rather awarded under other provisions. *Bank v. Thermo Elemental, Inc.*, 451 Mass. 638 (2008).
- Legal work undertaken to manage a response action is recoverable as a response cost. Litigants should make sure that such work has been and is billed separately from litigation and cost recovery.



# HAZARDOUS MATERIALS: CLEANUP

## The Massachusetts Contingency Plan



- DEP's comprehensive regulations, known as the MCP, were promulgated pursuant to c. 21E. They rely on the private sector – especially licensed site professionals (LSPs) – to coordinate response actions and guide private actions. In MA, reporting, studies and response actions are ‘privatized.’
- The MCP instructs municipal officials about reporting of releases and sites, response actions and reports, cleanup standards, liabilities and fees, legal defenses, and presenting and pursuing claims that municipalities may have for cost recovery and property damages for which others are liable.
- Municipalities are responsible like other persons and entities for proper management of hazardous wastes and chemicals, M.G.L. c. 21C, and toxic use reduction, M.G.L. c. 21I.
- Though subject to 21E, municipalities may enjoy defenses on land taken by eminent domain, acquired in good faith innocently, or downstream of sources of contamination. They may have significant financial claims against responsible parties for cleanup reimbursement and property damage.



# HAZARDOUS MATERIALS: CLEANUP

## DEP Regulation and Response



### DEP's Bureau of Waste Site Cleanup (under the MA Superfund):

- Promulgates the MCP rules on release and site reporting, remedial plans, cleanup procedures, public participation, and liabilities of responsible parties, and establishes reportable quantities and concentrations for certain substances
- DEP routinely assesses monetary penalties for failure to comply with rules for reporting, testing, and meeting deadlines
- DEP can record a “Superlien” against contaminated property, taking priority over all other recorded instruments as to the property, and can record ordinary liens on other MA property of responsible parties (M.G.L. c. 21E, §§ 1-18)
- DEP is authorized to take necessary response actions to contend with releases and threats of release, including assessment, containment and removal or to take legal action against the responsible parties

# HAZARDOUS MATERIALS: CLEANUP

## Disposal Site Regulation



- Federal and state laws govern hazardous waste facilities. Local boards of health also have authority, under M.G.L. c. Ill, § 150B, to assign sites to store, treat, or dispose of hazardous waste.
- No disposal site shall be deemed to have all necessary response actions taken until a level of No Significant Risk (“NSR”) exists or has been achieved. In addition, all response actions must employ the “Best Response Action Management Approach.”
- Following release and initial notification to DEP, parties must undertake preliminary response actions (often resulting in Phase I Initial Site Investigation Reports) and submit them to DEP.
- Immediate notification to DEP is required of any landowner upon learning of the release or threat of release of hazardous materials on its property.
  - Failure carries penalties up to \$25,000 per violation per day per M.G.L. c. 21A
  - Knowing or reckless damage carries penalties up to \$500,000 and criminal sanctions of up to 20 years in jail per M.G.L. c. 21L

# HAZARDOUS MATERIALS: CLEANUP

## *Commonwealth v. Springfield Terminal Railway Company, 77 Mass. App. Ct. 225 (2010)*



- Defendants, four railway companies, failed to notify DEP about a diesel fuel leak in violation of G.L. c. 21 E § 7.
- Superior Court returned guilty verdicts and sentenced companies to pay fine of \$100,000, pay a \$25,000 surfine, and serve three year probation. Defendants appealed, filing a motion to stay execution of sentences. Motion was denied and fine “stayed” in that it is to be paid to a jointly held, interest bearing account pending appeal, not directly to the state.
- Appeals Court: Motion to stay is grounded in notions of justice, the idea that while a conviction is reversible, time spent incarcerated is not. Since defendants are corporations and don’t face imprisonment, there is no concern that appeal will be futile if there is prompt execution of their sentences. Placing funds in escrow avoids the danger of defendants failing to recover money paid if their appeal succeeds.

# HAZARDOUS MATERIALS: CLEAN-UP



## Brownfields

- Brownfields are contaminated lands located in urban or suburban settings which remain abandoned or ignored due to environmental liabilities and the expense of remediation.
- Massachusetts provides several incentives for remediation and redevelopment of Brownfields:
  - **The Brownfields Act, M.G.L. c. 21E**, provides financial incentives such as tax credits, loans guarantees, low-interest loans, and grants. This is a boon to municipalities as partners, facilitators, or recipients of resumed tax payments and productive employment.
  - The Act created a **Brownfield Redevelopment Fund (BRF)**, to encourage remediation and redevelopment of brownfields located in economically distressed areas by providing loans up to \$500,000.
  - “Innocent parties” who buy and clean up brownfields, adjacent property owners, secured lenders, redevelopment authorities, and community development corporations enjoy limited liability protections.



# HAZARDOUS MATERIALS: CLEAN-UP

## Brownfields (Cont'd)



- In 2006, acting under the authority of **CERCLA of 1980**, the ‘Superfund’ statute, the EPA defined the extent of due diligence required to qualify for CERCLA liability protection. 40 CFR 312.
- Persons who do not qualify for liability relief may apply to the MA Attorney General for a ‘Brownfields Covenant Not to Sue’ if they have met the following requirements:
  - A permanent solution or remedy operation status is achieved and maintained.
  - “A development plan describing the proposed use or reuse of the site and the proposed public benefits...” per M.G.L. 21E, § 3A(j)(3)(a).
  - The proposed property redevelopment or reuse will contribute to the economic revitalization of the community in which it is located.
- Lenders may foreclose on a contaminated properties without incurring liability, provided they make diligent efforts to sell or transfer sites and do not own them for more than five years. Other rules protect trustees.



# HAZARDOUS WASTE MANAGEMENT

## Additional Regulations on Hazardous Waste



- DEP's Division of Hazardous Waste implements the federal RCRA Subtitle C program regulating generation, transportation, treatment, storage, and disposal of hazardous wastes, as well as similar state statutes and regulations. M.G.L. c. 21C; M.G.L. c. 175G.
- Like the federal RCRA program, MA requires permits for treatment, storage, and disposal facilities ("TSDFs") and mandates a manifest system to track waste from "cradle to grave."
- Beyond implementing the federal RCRA program, MA expands universe of "hazardous" chemicals (to include waste oil and petroleum products), 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.

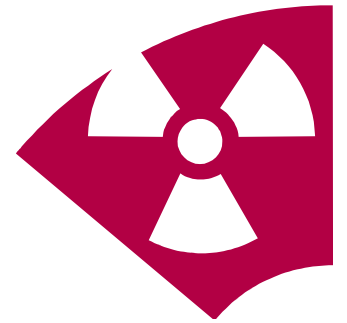
# PESTICIDES

## Department of Agricultural Resources – Pesticide Board



- The DAR's Pesticide Board administers state requirements similar to those under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”).
- Pesticide Board requires state registration of pesticides, broadly defined, registration and proper training for applicators, and pesticide programs of public utilities. M.G.L. c. 132B; 333 C.M.R. §§ 2.00, 11.00.
- The Pesticide Board has promulgated overall regulations and specific rules on pesticide use for right-of-way management. These are critical to consult for maintenance of roads, railroads, and utility lines or pipes.
- **M.G.L. c.132B pre-empts municipal regulation of pesticides and herbicides, though 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).**
- Massachusetts bans use of certain pesticides inside grade schools and child care centers and requires parental notification before outside application of pesticides. 2000 Mass. Acts c. 85.
  - 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

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

# SEWAGE DISPOSAL



- Division of Water Pollution Control and the Bureau of Waste Prevention in DEP regulate disposal of sewage in MA.
- Massachusetts Water Resources Authority (MWRA) is responsible for regional waste water collection and treatment and water supply for Metropolitan Boston. Permit program with detailed regulations and enforcement for domestic and industrial discharges to MWRA sewers.
- Title V of the State Environmental Code, promulgated in 1996, allows use of alternative technologies and requires inspection and certification of private septic systems (sewage disposal in unsewered areas) when property is transferred or use changed.
- **Local Boards of Health have jurisdiction to approve any septic system and promulgate local regulations. DEP must approve some local variances, use of alternative or innovative systems, and modifications to large flow systems. These DEP approvals have been relaxed in 2014 Regulatory Reforms.**

# SEWAGE DISPOSAL (Cont'd)



- Towns may charge developers an “inflow-and-infiltration reduction fee” to access the town’s sewer system. *Denver Street LLC v. Town of Saugus*, 462 Mass. 651 (2012).
  - Town was under administrative consent order from the DEP to reduce the inflow and infiltration of its sewer system and by paying the fee, developers gained immediate access to the sewer system.
  - A charge will be characterized as a user fee when:
    - It is charged “in exchange for a particular government service which benefits the party paying the fee in a manner ‘not shared by other members of society,’ ”
    - It is optional, and
    - It is not collected “to raise revenues but to compensate the governmental entity providing the services for its expenses.” *Denver Street LLC*, at 652 (quoting *Emerson College v. Boston*, 391 Mass. 415 (1984)).



# **SOLID WASTE - Regulated by the DEP Division of Solid Waste & Boards of Health**



- **DEP Solid Waste Master Plan and Local Boards of Health:**
  - G.L. c. 111, § 150A requires BOH approval of disposal sites
  - G.L. c. 111, § 31A requires a BOH permit to transport waste
  - 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
- DEP may clean up solid waste disposal facilities and recover costs from responsible parties. G. L. c. 21H, §§ 1-8; c. 111, §§ 150A-B.
- The EOEEA produces a state-wide plan for solid waste disposal, a policy document on which to base planning, decisions and regulations. State regulations protecting groundwater and other environmental resources make finding suitable sites for waste disposal, or even facility expansion, difficult.



## **SOLID WASTE – The Commercial Organics Waste Ban, Effective Oct. 1, 2014**



- **Affects about 1,700 businesses and institutions, producing a ton or more of food waste per week, and promotes food donation and diversion of unavoidable food waste to composting and waste-to-energy (Anaerobic Digestion) facilities. 310 CMR 19.000 with Jan. 31, 2014 amendments.**
- Works to reduce the burden on MA's shrinking landfill capacity, the disposal costs to the covered entities, and the volume of methane released each year, while creating a reliable supply of food waste to spur development of waste-to-energy facilities, which in turn generate renewable energy and clean energy jobs.
- Promotes several MA clean energy generation and waste reduction goals and is supported by extensive technical assistance to covered entities through RecyclingWorks in MA and by a combined \$4 million in loans and grants offered by EOEEA, DOER, and MassDEP.

# STORAGE TANKS - Underground Storage Tank (UST) Program, M.G.L. c. 21 J.



- DEP, DPH, MA Board of Fire Prevention, and local officials, regulate above and below ground tanks, containers, and associated piping if the tanks contain flammable or hazardous materials.
- MA implements federal law, but has stricter standards under the state UST Program, which requires double containment for hazardous material tanks and deadlines for retrofitting.
- DEP regulates the design, installation, monitoring, maintenance, and removal of tanks, and administers a limited reimbursement program for the costs of cleanup and removal or replacement of tanks.
- **Municipalities may adopt tougher UST standards in ordinances and bylaws. Typically, these authorize a local board to conduct an inventory of tanks, and require local registration of USTs. Several communities require the replacement of older tanks, and some offer low interest loans or other subsidies to assist removal projects.**
- Local zoning governs structures and uses within Flood Plain Districts, but also requires consistency with all relevant provisions of other agencies.

# STORMWATER MANAGEMENT – EPA Regulations



- EPA has not delegated National Pollution Discharge Elimination System (NPDES) permitting authority to MA. EPA's New England Region office in Boston administers a federal stormwater permitting program in MA.
- EPA's NPDES Phase II Stormwater Program requires public and private entities to develop comprehensive stormwater management programs focused on water quality. Affects municipalities, industries, and large landowners.
  - The legally mandated programs for so-called MS4s typically deal with treatment standards, anti-degradation, retrofitting treatment, low impact development, wetlands construction and restoration, erosion and sedimentation control, pavement types and natural alternatives. Municipalities are busy meeting these requirements.
- EPA regulations cover most stormwater discharges into waters in MA.



# STORMWATER MANAGEMENT – Municipal Separate Storm Sewer Systems (MS4s)



- Municipalities with MS4s that have been designated as regulated by NPDES Phase II must now comply with all EPA- and DEP-promulgated MS4s standards.
- Municipal plans for MS4s typically deal with treatment standards, anti-degradation, retrofitting treatment, low-impact development, wetlands construction and restoration, erosion and sedimentation control, pavement types, and natural alternatives. There are at least 257 Phase II communities in Massachusetts.
- Beyond federal regulation, DEP regulates stormwater discharges. Permits are required under state Clean Water Act for both surface and groundwater discharges. Stormwater further is regulated by the Wetlands Protection Act, the Tidelands and Waterways Statutes, and through various certification reviews for activities in MA. Federal permits and grants are also required for water quality certification and coastal zone consistency determinations.

# STORMWATER MANAGEMENT

## – MA Wetlands Protection Act & DEP Regulations



- **MA Wetlands Protection Act** covers stormwater drainage from most projects regulated by that law.
- Wetlands Regulations of DEP and Water Quality Certification Regulations in 2008 incorporated the Stormwater Management Standards. 310 CMR 10.00 and 314 CMR 9.00
  - Eliminates need for separate DEP Stormwater Policy and provides strength and enforceability of regulations rather than policy
  - Applies to any NOI filed under the Wetlands Act from January 2, 2008
  - New stormwater management facilities are not protected as wetlands resource areas.
  - Not applicable to housing units of four families or fewer 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.

# STORMWATER MANAGEMENT – DEP Proposed Stormwater General Permit Program



- Requires private owners of large impervious areas to manage stormwater
  - Threshold:  $\geq 5$  acres of impervious surface
    - Private Property Owners must implement good housekeeping practices
    - Private New Developments must meet MA stormwater standards 3-6, including recharge and water quality treatment
    - Private Redevelopment shall maintain same level of stormwater control and recharge
  - TMDL Areas: 65% reduction in phosphorus load is necessary to achieve compliance with the state's water quality standards.
    - Private Property Owners covered if they own  $\geq 2$  acres of impervious surface
    - New Projects and Redevelopments must meet statewide requirements and implement Best Management Practices for phosphorus reduction
    - Existing Properties have 10 years to retrofit properties to meet phosphorus reduction requirement

# WATER POLLUTION



- DEP Division of Water Pollution Control and the Bureau of Waste Prevention regulate industrial and other discharges to surface water bodies, as well as discharges to groundwater, large and small septic systems, and industrial sites. G. L. c. 21, §§ 26-53.
- The Division may enter, inspect and sample sources, issue enforcement orders, suspend or revoke permits, levy administrative penalties, and seek criminal penalties, civil fines, or injunctive relief.
- A permit may be needed for any activities that foreseeably may result, directly or indirectly, in discharge of pollutants into surface or groundwaters, including stormwater drainage from industrial sites.



# WATER WITHDRAWAL & TRANSFER



## Water Management Act

- DEP Division of Water Supply administers the MA Water Management Act requiring registration of withdrawals of water in excess of 100,000 gallons per day from any source (other than a public water supply system), except withdrawals in existence and registered prior to January 1, 1988. G. L. c. 21G, §§ 1-19.
- DEP will issue permits for an average daily withdrawal rate in five-year increments and may set seasonal peaks as well. DEP 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.
- The thrust of the permit program is to reduce water use, increase reuse and conservation, and minimize the loss of water to a basin through evaporation and out-of-basin discharge.

# WATER WITHDRAWAL & TRANSFER (Cont'd)



## Water Withdrawal Permits

- Water Management Act allows for the withdrawal of water by private and public water suppliers by registration and permit. G. L.c. 21G, §§ 6-7
- Determinations of withdrawal requests involve analysis of safe yields, local and regional water resource management plans, and state criteria.
- Recent agency and court decisions upheld DEP's conservation-oriented conditions in water withdrawal permits for municipalities. These conditions include reduced outdoor lawn watering when stream flows are low, capped summer water withdrawals, performance standards for residential use and "unaccounted for water," and mandated water bank if water use exceeds a community's total allocation.

# WATER WITHDRAWAL & TRANSFER (Cont'd)



- Municipalities have the authority to adopt “reasonable health regulation” ordinances or bylaws that are stricter than the state’s. G. L. c. 40 §21 and c. 111 §31.
- The Water Resources Commission in EOEEA and the Division of Water Resources in DEM regulate transfers of water across river basins.
- To protect the water supply of metropolitan Boston, 1992 legislation imposed land use controls – including density restrictions and activity prohibitions – on lands within the metropolitan watershed system.

# WETLANDS, WATERWAYS & FLOODPLAINS – Under The Zoning Act, M.G.L. c. 40A



- Since *Turnpike Realty Co., Inc. v. Town of Dedham*, 362 Mass. 221 (1972) floodplain protection is found in most local zoning. About 80% of municipalities have a floodplain zone “overlay district,” where filling and excavating are banned and other activities require ZBA special permits.
- This method of land use control became popular due to restrictions from the FEMA flood insurance program whereby FEMA designates flood prone areas and flood hazard zones on periodically revised Flood Insurance Rate Maps (FIRM). New FIRMs were recently proposed by FEMA.
- **The Biggert-Waters Flood Insurance Reform Act of 2012** sought to transfer the price of coastal development and storm recovery from taxpayers to property holders, to cut federal subsidies and to rescue FEMA’s flood insurance program from \$24 billion in debt. However, in January, after property owners received astronomical insurance bills, the Act’s sponsor led the effort to gut the law. National flood insurance programs have cushioned prices since 1968, but such staggering rate hikes were not anticipated, and motivate both parties to draft a new law. Photo Credit Luke Sharrett for New York Times



# WETLANDS, WATERWAYS & FLOODPLAINS



- DEP Division of Wetlands and Waterways supervises the administration of the Wetlands Protection Act (“WPA”) by promulgating regulations governing work in and near wetlands and related water resources and flood prone areas, all known as Resource Areas. DEP hears appeals from local conservation commissions on permits and jurisdiction. G. L. c. 131, § 40.
- Any development project which involves filling, dredging, grading, construction, or other alteration to wetlands, water bodies, riverfront areas, or flood prone areas (or in buffer areas around some of these Resource Areas) may trigger the WPA by requiring an application and permit from the conservation commission or DEP on appeal. Also banks, beaches, dunes, and meadows bordering water bodies. Jurisdictional rulings may be requested.

# WETLANDS, WATERWAYS & FLOODPLAINS (Cont'd)



- Work inside or otherwise altering a Resource Area needs an application known as Notice of Intent (“NOI”) filed with the conservation commission, unless the work enjoys an exemption, exception, exclusion, or other relief from jurisdiction per the WPA, DEP regulations, or Special Act of the Legislature.
- Work in a 100-foot Buffer Zone around some Resource Areas may trigger jurisdiction and the developer has the option of filing a NOI or, instead, a Request for Determination (“RDA”) or more formal ruling (“ORAD”). This is known as a Buffer Zone project.
- Work outside a Resource Area and any Buffer Zone may be regulated under the Act, but only when and if it causes alteration of a Resource Area. This is known as after-the-fact jurisdiction.

# WETLANDS, WATERWAYS & FLOODPLAINS (Cont'd)



- If appealed, the decisions of local conservation commissions are subject to Superseding Orders of Conditions (“SOC”) or Superseding Determinations by DEP.
- DEP will grant adjudicatory hearings after the issuance of a SOC or Determination if requested by the applicant/landowner, the conservation commission, or any person aggrieved IF previously a participant in the permit proceedings.
- "Previous participation" is defined as “the submission of written information to the conservation commission prior to close of the public hearing, requesting a Superseding Order or Determination, or providing written information to the Department prior to issuance of a Superseding Order or Determination.”

# WETLANDS, WATERWAYS & FLOODPLAINS (Cont'd)



- In 1996 the **MA Rivers Protection Act** was enacted. It regulates virtually all activities next to rivers and other flowing bodies of water. Essentially the Act added a new Riverfront Area to the Resource Areas protectable under the Wetlands Protection Act, thereby extending the jurisdiction of the WPA. 1996 Mass. Acts c. 258.
- The Act also amended the WPA to require applicants to prove they meet a two-part test “by a preponderance of the evidence” that:
  - 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, WATERWAYS & FLOODPLAINS (Cont'd)



- ***Garrity v. Conservation Commission of Hingham, 462 Mass. 779 (2012):***
  - The SJC ruled that the WPA's 21-day deadlines for local conservation commissions to hold a public hearing on a notice of intent and to issue a decision after the public hearing are waivable by the applicant, provided the waiver is:
    - (1) intentional,
    - (2) "voluntary in fact,"
    - (3) of a reasonable and definite duration, and
    - (4) publicly noticed.

# WETLANDS, WATERWAYS & FLOODPLAINS (Cont'd)



## The Dam and Seawall Repair and Removal Fund

- Massachusetts Executive Office of Energy and Environmental Affairs is in charge of administering
- To assist with growing need for repair of dams and coastal and inland flood control structures
- The fund is used to provide grants and loans to qualified organizations in order to finance the costs of repair and removal projects for dams, levies, seawalls, jetties, revetments, retaining walls, and other flood control structures
- Created pursuant to authority from M.G.L. c. 29, §2III and regulations issued under 301 C.M.R. §15.00

# WETLANDS, WATERWAYS & FLOODPLAINS (Cont'd)



## FEDERAL CLEAN WATER ACT

- Section 404 of the federal Clean Water Act (“CWA”) regulates discharge of dredged or fill material into the waters of the United States, which includes federal wetlands, by requiring Corps of Engineers (“COE”) permit, with input from the Environmental Protection Agency (“EPA”), before such activity.
- The US Supreme Court added confusion to what is a “federal wetland” with its Rapanos and Carabell decisions. A plurality ruled that wetlands adjacent to non-navigable tributaries are protectable “waters of the United States” only if the tributary to which the wetland is adjacent is a “relatively permanent” water body and the wetland has a “continuous surface connection” with the tributary. *Rapanos v. US*, 126 S. Ct. 2208 (2006).

# HOME RULE WETLANDS BYLAWS



## OVERVIEW

- Local permit program administered by the Conservation Commission
- Uses general bylaw and ordinance authority in G. L. c. 40 § 21 and Home Rule Amendment to the Massachusetts Constitution, Articles II and LXXXIX
- For local bylaws & regulations [http://maccweb.org/resources\\_bylaws.html](http://maccweb.org/resources_bylaws.html)

## TYPICAL LOCAL BYLAW

- Jurisdiction and procedure similar to Wetlands Protection Act. Clarifies and expands jurisdiction and requirements beyond Act to be stricter than DEP
- Fewer exemptions than in Wetlands Protection Act with explicit authority to disapprove projects or impose setbacks and mitigation
- Most bylaws allow public hearing on an application to be combined with Wetlands Protection Act hearing, but appeals are to both DEP and Court

## ENFORCEMENT

- Typical site inspections, violation notices, and enforcement orders. As well as traditional remedies for injunctions and civil forfeitures in Superior Court, and criminal prosecution with criminal fines and incarceration
- Bylaws following the MACC model include the “ticketing” approach outlined in G. L. c. 40, § 21D for so-called non-criminal dispositions



# HOME RULE WETLANDS BYLAWS – Conservation Commissions



- Implements both the local wetland bylaws and WPA. Reviews NOIs and RDAs for projects under regulations the commission has promulgated. These typically are to be more strict than those of DEP.
- Holds quasi-judicial public hearings like a planning board or zoning board. These are supposed to be adjudicatory in nature. Schedules and continues hearings as commission decides.
- Makes decisions based on document records at hearings.
  - If the commission fails to issue its decision within the timeframe specified by municipal bylaw, a denial issued later is a nullity and the DEP SOC governs the project. The SJC noted that a commission's failure to timely act did not constitute constructive approval. *Oyster Creek Preservation, Inc. v Conservation Commission of Harwich*, 449 Mass. 859 (2007)
  - Decisions separately reviewable in DEP (under WPA) and court (bylaw)

# CIVIL AND CRIMINAL PENALTIES IN LOCAL ENFORCEMENT ACTIONS

ACTIVITY OR USE	APPLICABLE LAW	CIVIL PENALTY	CRIMINAL PENALTY
<b>Air</b>	M.G.L. c. 111, § 142A	\$25,000 for each 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>	M.G.L. c. 21E, § 11	\$50,000 for each violation	\$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>	M.G.L. c. 21H, § 8	\$25,000 for each 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>	M.G.L. c. 21, § 42	\$50,000 for each 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>	M.G.L. c. 131, § 40	\$25,000 for each violation	\$25,000 fine or by imprisonment for up to two years, or both

# *RECENT DECISIONS AND UPDATES*



## **RECENT DECISIONS AND UPDATES**

- **Permit Extension Act**
- **Koontz v. St. Johns River Water Management District**
- **DEP Regulation Reform**
- **Pepin v. Division of Fisheries and Wildlife**
- **Mahajan et al v. DEP and BRA**



## **THE PERMIT EXTENSION ACT**



- Permit Extension Act, so-called, created by Section 173 of Chapter 240 of the Acts of 2010, was extended by Sections 74 and 75 of Chapter 238 of the Acts of 2012, the 2012 Economic Development Act.
- The purpose is to help promote job growth and long-term economic recovery by establishing an automatic four-year extension to certain state, regional and municipal permits and licenses concerning the use or development of real property. The list of permit types is long.
- With limited exceptions, the Act automatically extends, for four years beyond its otherwise applicable expiration date, any permit or approval that was “in effect or existence” during the qualifying period beginning on August 15, 2008 and extending through August 15, 2012.



## THE PERMIT EXTENSION ACT (Cont'd)



### ➤ Statutes covered:

- Ch. 21 – Department of Environmental Management
- Ch. 21A, except § 16 – Executive Office of Energy and Environmental Affairs
- Ch. 21D – Massachusetts Hazardous Waste Facility Siting Act
- Ch. 30, § § 61-62H – Massachusetts Environmental Policy Act
- Ch. 30A – State Administrative Procedure Act
- Ch. 40 – Powers of Cities and Towns
- Ch. 40A – Zoning Act
- Ch. 40B – Regional Planning including Low and Moderate Income Housing
- Ch. 40C – Historic Districts Act
- Ch. 40R – Smart Growth Act
- Ch. 41 – Subdivision Control Act
- Ch. 43D – Expedited Permitting Act
- Ch. 81, § 21 – Excavation or Curb Cut on State Highway
- Ch. 91 – Waterways Act
- Ch. 131 – Wetlands Protection Act
- Ch. 131A – Endangered Species Act
- Ch. 143 – Building and Elevator Licenses
- Ch. 665 of Acts of 1956 – Boston Zoning Enabling Act
- Any local bylaw or ordinance

## RECENT DECISIONS AND UPDATES

### *Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013)*



- Case involved alleged regulatory taking after Koontz sought to develop 3.7 acres of a 14.9-acre parcel, much of it wetlands. Under Florida law, Koontz was required to mitigate the project’s environmental effects. Koontz offered to do so by deeding a conservation easement over his remaining 11 acres, but the District sought more and proposed two alternatives, both of which the Koontz thought to be excessive.
- Reversing the Florida Supreme Court’s ruling in favor of the District, the Supreme Court expanded upon the well-known *Nollan* and *Dolan* decisions by holding that a community may not “extort” from the applicant or otherwise “thwart the Fifth Amendment right to compensation.” Those cases apply to permit denials.
- The Supreme Court held that the “unconstitutional conditions” doctrine applies to the exaction of money as well as to the exaction of real property.

## DEP REGULATION REFORM



- Comprehensive streamlining rule changes are expected in 2013 and 2014 as part of the DEP-wide effort known as Regulatory Reform
- DEP has proposed revisions to regulations in the following areas:
  - M.G.L. c. 21E (the Massachusetts Contingency Plan)
    - Removal of Tier I Permits, streamline NAUL requirements, revise numeric cleanup standards
  - Wetlands, Waterways, Water Quality, and Wastewater
    - Regulation of sewer connection and extension permitting, surface water quality standards, land application of wastewater sludge and septage
  - Asbestos & Solid Waste Regulation
    - Streamline abatement work practices, streamline homeowner requirements, standardize use of third party inspections

## *Pepin v. Division of Fisheries and Wildlife,* **2014 Mass. LEXIS 29 (Feb. 18, 2014)**



- The SJC affirmed the Superior Court’s judgment in favor of Division of Fisheries and Wildlife (DFW), in a challenge to regulations promulgated by DFW under the MA Endangered Species Act (MESA) M.G.L. c. 131A, specifically 321 C.M.R. §§ 10.11-10.25 designating “priority habitat” under the National Heritage and Endangered Species Program (NHESP).
- Pepin owns 36 acres of undeveloped land. After an Eastern Box Turtle (a species of “special concern”) was spotted on the premises in 1991, the land was designated as “priority habitat.” When the Pepins sought approval for a subdivision plan in 2007, the DFW authorized the project, but subject to several conditions to avoid triggering a “take.”
- Pepin in 2009 sought judicial review of DFW’s final decision, as well as a declaratory judgment that the priority habitat regulations are facially invalid as in excess of MESA. SJC determined that Pepin did not meet the burden of demonstrating that their property was improperly delineated as priority habitat, and that the decision was proper.

# RECENT DECISIONS AND UPDATES

## *Mahajan et al v. MA DEP and BRA, 464 Mass. 604 (2013)*



- SJC held for the BRA, but clarified how to assess a property's protected status under Article 97. Decision make highly relevant the history of actual land uses as proving original intent. Importantly, the wording of the original order of taking here was NOT dispositive.
- Rather, the use to which the parcel is thereafter put could be the most important evidence of what was the original purpose was. Record of this case did not prove Boston's Long Wharf to be Article 97-protected land.
- Consider that public land no matter how or when acquired, could be or become Article 97-protected by a specific enough eminent domain taking, recorded deed restriction, condition on a gift, subsequent dedication, or even property uses over time demonstrating the original purpose was an Article 97 purpose.
- SJC relied heavily on Bd. of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) dealing with an intra-town transfer. This suggests that, as a property's history is considered in the Article 97-protection assessment, it is a good practice for towns to develop intra-department municipal transfer documents, which may later clarify the intended purpose for the property.

(Photo by Matt Conti 2011)



# TRENDS IN MUNICIPAL ENVIRONMENTAL LAW



- Adopt more consistent, coordinated policies.
- Recognize energy and environmental considerations.
- Cope with shrunken budgets and staffs. Share conservation staff.
- Simplified and predictable permitting. Increased fees.
- Promote 40B and other affordable housing. Redevelop Brownfields.
- Preserve open space, recreation areas, and neighborhoods.
- **Qualify as a Massachusetts Green Community and utilize the CPA.**



