

GUIDE TO ENVIRONMENTAL LAW IN MASSACHUSETTS

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WHERE DO YOU FIND ENVIRONMENTAL LAW?

- **Not in just one book on the shelf of a law library.**
- **Not in a single volume of federal or state statutes.**
- **Not within one set of published court decisions.**
- **Not in one compilation of bylaws and ordinances.**
- **Not in one chapter of federal or state regulations.**



HOW DO YOU RECOGNIZE ENVIRONMENTAL LAW?

- **Environmental laws take many forms.**
- **No government agency or board has a monopoly.**
- **Statutes are just for starters; obtain rules and cases.**
- **Environmental law is any principle or procedure protecting the human environment, controlling pollution, regulating land use, allocating natural resources, conserving cultural resources, or balancing respective rights affecting the environment.**



HOW DO YOU DEAL WITH ENVIRONMENTAL LAW?

- **Recognize that environmental law is organic and growing.**
- **Regard the law as creating problems as well as opportunities.**
- **Expect that environmental law can be learned and applied.**
- **See environmental law and real estate as two sides of a coin.**
- **A solid understanding of environmental law assures your good judgment in counseling and representing clients on all manner of proceedings and transactions with environmental aspects.**



WHAT ARE SOURCES OF ENVIRONMENTAL LAW?

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

WHAT'S A HISTORY OF ENVIRONMENTAL LAW?

1950s: Common Law Cases

1960s: Research and Funding

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

1970s: Permitting and Standards

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

1980s: Carrots and Sticks

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

1990s: Interdisciplinary and Multimedia

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

2000s: Climate Change and Biodiversity

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

2010s: Sustainability

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





HOW CAN YOU APPROACH ENVIRONMENTAL LAW?

- **Good attorneys, engineers, scientists and environmental consultants advise their clients to be proactive and not reactive.**
- **Address the law where it is now and where it is heading.**
- **Understand the meaning of the law and its policy goals.**
- **Meet legal minimums as well as emerging best practices.**
- **See the future of the law by watching evolving science.**
- **Utilize law, science and policy (and politics) as the key to winning environmental controversies, solving environmental problems, and accomplishing environmental goals.**

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*



MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION



Mission:

Protecting and enhancing the state's natural resources (air, water, and land) in order to provide for the health, safety, welfare, and enjoyment of the citizens and the protection of their property.

Approach:

Identifying important natural resources, planning for implementing protection programs, using permitting and enforcement to prevent pollution, cleaning up contaminated sites, helping people understand the environment, providing financial and technical assistance for cities and towns, and conducting research and analysis.



MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION



Organization:

Headquartered in Boston with four regional offices. Top DEP officials include: Commissioner; General Counsel; Counsel to the Commissioner; Deputy Commissioners for Policy and Program Development, Operations, Administration, and Municipal Assistance; Assistant Commissioners for Resource Protection, Waste Prevention, and Waste Site Cleanup; Director of Public Affairs

Program Areas:

Drinking Water, Municipal Assistance, Stormwater, Wastewater Watershed Management, Wetlands, Recycling, Air Quality, Hazardous Waste, Permitting, Emissions

MUNICIPAL BOARDS AND 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.**



FEDERAL AGENCIES

- **Federal environmental protection for New England is provided by the Region 1 office of the U.S. Environmental Protection Agency (EPA), based in Boston. EPA administers federal clean air, clean water, hazardous waste, and other permit programs.**
- **Region 1 jurisdiction covers New England: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.**
- **U.S. Departments of the Interior and Agriculture, and Army Corps of Engineers also administer federal programs.**





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.**

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 imposing an administrative penalty, DEP usually must first provide a NON to the violator and 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 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) on behalf of DEP and other state agencies or on the AG's own initiative and is appropriate to compel compliance with a procedural requirement or to permit condition or forbid certain activities.**
- **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.**
- **The advantages and disadvantages of both approaches must be weighed prior to the initiation of the court action.**

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.**
 - **Investigates and prosecutes civil, criminal and administrative environmental cases**
- **ESF gathers evidence during undercover investigations, carefully builds cases against alleged environmental violators, then takes them to court.**
 - **Evolved into a “full product” approach going beyond the initial violation triggering ESF involvement. Results in claims for failure to pay taxes or obtain insurance.**

ENFORCEMENT PROCEDURES (Cont'd)

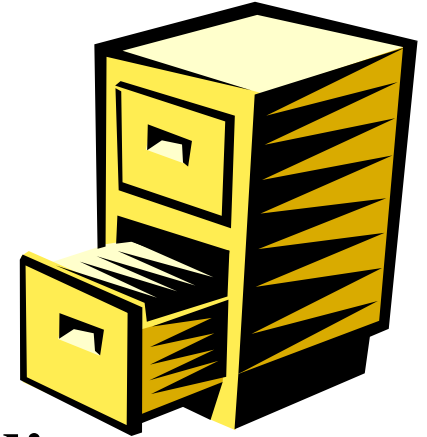


Citizen Suits

- **There are two citizen statutes that allow civil litigation or administrative intervention by any ten persons for environmental protection issues. They are G.L. c. 214, § 7A (the Citizen Suit Statute) and G.L. c. 30A, § 10A (the Citizen Right to Intervene).**
- **SLAPP suits are “strategic lawsuits against public participation” brought mainly to intimidate citizens and groups from reporting or petitioning about government issues. The Anti-SLAPP statute deters SLAPP suits by allowing the defendant to file a “special motion to dismiss.” G.L. c. 231, § 59H. Filing this motion stays discovery. If defendant proves SLAPP suit is based on its petitioning activities alone with no other basis, motion allowed and awards attorney fees and costs.**

FREEDOM OF INFORMATION & OPEN MEETINGS

Public Records Statute – G.L. c. 66, § 10



- **Records of state, county, and local governments are required to be open for public inspection “at reasonable times and without unreasonable delay” and a copy is to be furnished “on payment of a reasonable fee.”**
- **If a search of public records is requested, the person requesting must “pay the actual expense of such search.”**
- **The custodian of the public record has 10 days to provide requested records.**

FREEDOM OF INFORMATION & OPEN MEETINGS

(Cont'd)



Open Meeting Law – G.L. c. 39, §§ 23A, 23B

- **Open Meeting Law deals with posting notices, maintaining accurate records, conducting emergency meetings, audio and video recording, and jurisdiction of the courts to hear complaints about violations– which may lead to invalidation of action taken at an illegal meeting.**
- **No quorum of a governmental body “shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter,” except as otherwise provided in the Open Meeting Law.**
- **Amendments (effective July 2010):**
 - **Clarifies that a meeting can take place through “an oral or written communication through any medium, including electronic mail” G. L. c. 30A § 18**
 - **Transfers investigative responsibilities from district attorneys to state attorney general G. L. c. 30A § 19(a)**
 - **Raises the standard of proof to require evidence of intentional violation before issuing a penalty G. L. c. 30A § 23(c)(4)**

PROGRAMMATIC AREAS from A to Z

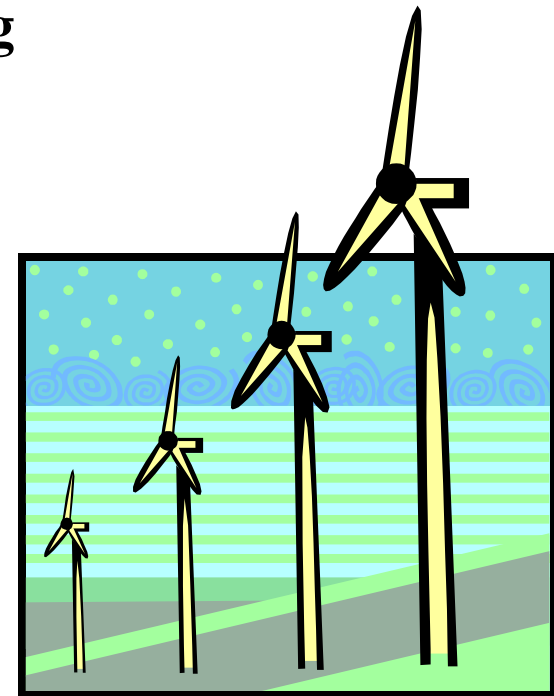
- **Agriculture/Animal Feedlots**
- **Air Pollution**
- **Archeological Resources**
- **Brownfields**
- **Climate Change**
- **Coastal Zone**
- **Common Law**
 - **Nuisance**
 - **Negligence**
 - **Trespass**
- **Conservation**
- **Restrictions/Easements**
- **Dams/Reservoirs**
- **Drinking Water**
- **Earth Removal**
- **Emergency Management**
- **Eminent Domain/Condemnation**
- **Endangered Species**
- **Energy Efficiency/Conservation**
- **Energy Facility Siting**
- **Energy Transmission**
- **Environmental Impact Review**
- **Erosion/Sedimentation Control**
- **Farms, Farming and Farmland**
- **Fish and Game**
- **Fisheries and Shellfish**
- **Floodplains**
- **Forests and Trees**
- **Ground water**

PROGRAMMATIC AREAS from A to Z

- **Hazardous and Toxic Materials**
- **Hazardous Waste Cleanups**
- **Hazardous Waste Management**
- **Historic and Cultural Sites/Structures**
- **Housing Policy/Projects**
- **Indoor Pollution**
 - **Lead Paint**
 - **Radon**
 - **Urea Formaldehyde Insulation**
 - **No Smoking**
 - **Asbestos**
 - **Mold**
 - **Sick Buildings**
- **Mining and Minerals**
- **Outdoor Pollution**
 - **Noise**
 - **Lighting**
 - **Blasting**
 - **Odors**
 - **Vibration**
- **Open Space**
- **Parklands and Reservations**
- **Pesticides**
- **Petroleum Products**
- **Public Lands and Water Areas**
- **Radioactive Materials**
- **Regulatory Takings**
- **Scenic Resources**

PROGRAMMATIC AREAS from A to Z

- **Sewage and Septic Systems**
- **Smart Growth**
- **Solid Waste Facilities/Siting**
- **Solid Waste/Cleanup**
- **Storage Tanks**
- **Stormwater**
- **Streets, Roads and Highways**
- **Subdivision Control**
- **Taxation**
- **Telecommunications**
- **Tidelands and Waterways**
- **Toxic Substances**
- **Water Bodies**
- **Water Supply**
- **Water Pollution**
- **Water Rights**
- **Wetlands**
- **Wilderness**
- **Wildlife**
- **Zoning**



AIR POLLUTION

State

- **DEP's Division of Air Quality Control:**
 - **Regulates new and existing emissions of pollutants, including noise and odor**
 - **Requires registration and compliance inspections of large sources**
 - **Establishes ambient air quality standards**
 - **Promulgates state implementation plan (SIP) under the federal Clean Air Act**
 - **Imposes prohibitions and standards on asbestos**
 - **Requires motor vehicle emission inspections and maintenance**
 - **Divides the state into Air Pollution Control Districts**



AIR POLLUTION (Cont'd)

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 have been 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 CO₂ 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 gasses 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)

Federal

- **Under the Clean Air Act, EPA sets limits on certain air pollutants; including emissions of air pollutants coming from sources like chemical plants, utilities, and steel mills.**
- **Title I of the CAA requires the EPA to promulgate national ambient air quality standards (NAAQS) for common air pollutants, including:**
 - **Ozone**
 - **Particulates**
 - **Carbon monoxide**
 - **Sulfur dioxides**
 - **Nitrogen oxides**
 - **Lead**
- **For each pollutant, EPA sets ‘primary’ standards to protect public health and ‘secondary’ to protect public welfare.**



AIR POLLUTION (Cont'd)

Federal

- **Title V of the CAA requires each state establish a federally approved operating permit program for all major sources subject to federal emission standards.**
 - **State-issued permits must incorporate all state and federal requirements applicable to each major source into one document, which is subject to EPA review and approval.**
 - **Massachusetts' permit program is implemented through 310 C.M.R. pt. 7.00, app. C.**
- **The “Tailoring Rule” sets GHG emission standards triggering permit requirement under New Source Review Prevention of Significant Deterioration (PSD) and Title V operating permits for new and existing facilities.**
 - **Phase 1: January 2011 - June 2011**
 - **Applied only to those sources already subject to permitting requirements for sources other than GHGS**
 - **Phase 2: July 1, 2011- June 30, 2013**
 - **Subjects sources emitting at least 100,000 tpy of carbon dioxide equivalent to Title V permitting requirements, even if such requirements would not apply based on emissions of any other pollutant.**
 - **Phase 3: Continues to Focus Permitting on the Largest Emitters**
 - **EPA issued a final rule that retains the GHG permitting thresholds established in Phase 1 and 2.**



AREAS OF CRITICAL ENVIRONMENTAL CONCERN



- **Secretary of EOEEA has authority to designate areas which represent “unique clusters of natural and human resources values” worthy of a high level of concern and protection as an area of critical environmental concern.**
 - **Designation as an ACEC triggers a higher level of state scrutiny of the activities in them (most notably under MEPA).**
 - **There are currently 30 identified ACECs, covering approximately 268,000 acres of land.**
- **Agencies generally directed to administer their programs to preserve, restore, and enhance the natural resources of ACECs and ensure that activities in, or impacting upon them, minimize adverse impacts.**

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 (G.L. c. 132A, §§ 12A-18)**

OCEAN MANAGEMENT



- **Massachusetts Oceans Act**
 - **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



- **Massachusetts made national news as well as new law in promulgating its first-in-the-nation Massachusetts Ocean Plan. The final version of the Ocean Plan set guidelines for managing, reviewing and permitting proposed uses of state waters.**
- **The Plan deals with and governs state coastal waters at least 0.3 nautical miles seaward of mean high water (excluding most developed harbor and port areas) out to the three-mile limit of state legal control. Within that water area, the Ocean Plan creates three management categories.**

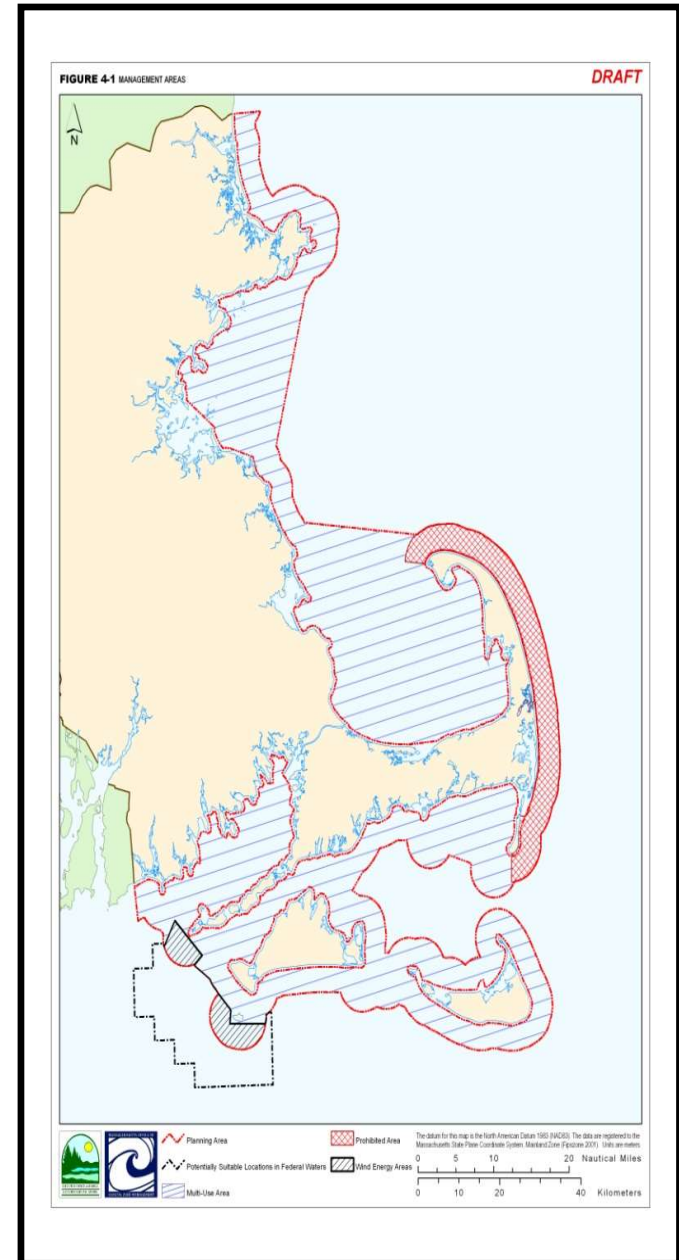
PROGRAMMATIC AREAS from A to Z

OCEAN PLAN: Maps

➤ 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

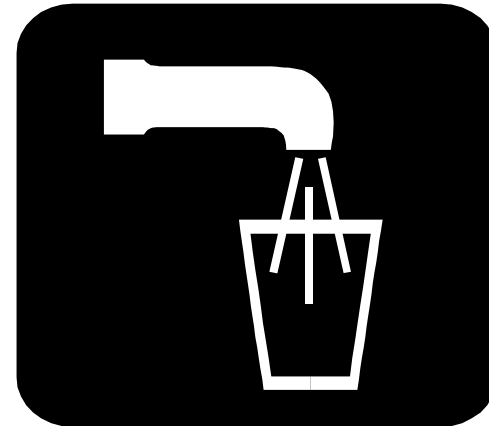
Ocean Act and Ocean Plan legally do not govern commercial fisheries (by an exemption in the Act) or pending Cape Wind project (by federal jurisdiction)



CONSERVATION RESTRICTIONS

- **Conservation Restriction (CR) is voluntary agreement between a landowner and a government body or qualified charitable organization to keep land primarily in its undeveloped condition. G. L. c. 184 §31.**
- **This covenant is a recorded instrument and must follow a specific format approved by the Secretary of EOEEA.**
- **CRs when approved and recorded may run in perpetuity or for a specified term without the need for re-recording.**
- **CR given to local conservation commission or charity within the community must be approved by the municipal selectmen or city council.**
- **Massachusetts Appeals 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. Weston Forest and Trails Ass'n. v. Fishman, 66 Mass.App.Ct. 654 (2006).**
 - **This decision denying attorney fees led the Legislature to amend 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). St. 2006, c. 205, §13**

DRINKING WATER



- **DEP's Division of Water Quality:**
 - **Implements federal Safe Drinking Water Act and similar state laws**
 - **Approves new public wells and reservoirs**
 - **Enforces the state's Maximum Contaminant Levels**
 - **Mandates monitoring of water supplies**
 - **Requires protection of wellhead zones**
 - **Evaluates projects with water supply impacts**

ENERGY SITING & EFFICIENCY



- **Energy Facility Siting Board (EFSB) supervises a mandatory economic and environmental review and evaluation of alternative sites or routes with some authority to override local obstacles. G. L. c. 164, §§ 69G-69S.**
- **Special siting approval procedures apply to new or expanded electric generating facilities, transmission lines, and natural gas pipelines.**

ENERGY SITING & EFFICIENCY (Cont'd)



- **Green Communities Act (2008) promotes expansion in energy efficiency, development of renewable energy resources, new greener state building code, renewable energy installations, technology innovation, utility bill savings.**
 - **GCA requires by 2020:**
 - **At least 25% of state's electric load met with energy efficiency, load management, demand response, and customer heat/power generation**
 - **At least 20% of state's electric load met with new, renewable and alternative energy generation.**
 - **Target of 10% of fossil fuel use in buildings over 2007**
 - **GCA establishes:**
 - **Regional Greenhouse Gas Initiative (RGGI) Auction Trust Fund: 80% of auction proceeds go to energy efficiency programs**
 - **Green Communities Program: provides cities and towns with energy efficiency and renewable energy opportunities.**

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 does apply to private projects that involve state permits, licenses, grants, and loans. 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 closer.**

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).**

FARMLAND & AGRICULTURE



- **Legal provisions favor preservation of farming activities and land:**
 - **Eminent domain statute contains special protections for farmland regarding public hearings and availability of non-agricultural land**
 - **The state, municipalities or qualified charities may acquire Agricultural Preservation Restrictions (APRs), receiving deed restrictions to prevent farmland from being developed.**
 - **State Zoning Act exempts agriculture on land at least five acres, and may exempt land at least two acres if at least \$1000 per acre gross sales. Municipalities authorized to establish “agricultural incentive areas” to further protect farmers and farms**
 - **State-owned agricultural lands are protected by a policy to protect agricultural land base from “irreversible conversion”**

FARMLAND & AGRICULTURE (Cont'd)



- **Under G.L c. 40L the city, town or Commonwealth enjoys a right of first refusal to purchase farmland that otherwise would be sold or converted for nonagricultural use in agriculture incentive areas.**
- **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)**
- **Property tax reductions and related benefits and protections:**
 - **Chapter 61A allows reduced property tax assessments. Participation for landowners is voluntary on annual form filing. Tax relief varies by specific use. Presumptive Department of Food and Agriculture guidelines are available online.**
 - **Exempt from special or betterment assessments while land is farmed**
 - **Higher priority eligibility for land preservation funds**
 - **Increased protection from nuisance suits and eminent domain**

FORESTS AND TREES



- **Forest Cutting Practices Act promotes responsible harvest by specifying cutting methods and requiring work plans prior to commercial harvests of high volume. Limited exemptions available. G. L. c. 132, §§ 40-46.**
- **Wetlands Protection Act (and DEP regulations) contains a qualified agricultural exemption including forestry, carefully defined in DEP rules.**
- **Real estate tax relief is available for land in forestry use. G. L. c. 61.**
 - **Statute was 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.**
 - **Classification fee and stumpage fees no longer apply.**
 - **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 G. L. c. 61A**

FORESTS AND TREES (Cont'd)



- **All Massachusetts state forests and parks are now “Green Certified” by the Forest Stewardship Council, whose goal is permanent sustainability.**
- **Every 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. G. L. c. 48, §§ 16-18.**
- **Several statutes authorize and manage state and town forests.**
- **Public Shade Trees Act protects publicly-owned trees along all town, city, and county ways in Massachusetts. Public shade trees are “all trees within a public way or on the boundaries thereof.” 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.**
 - **The tree warden places a notice on the affected tree and holds a public hearing. If there is written objection, the work may not be undertaken without approval of the selectmen or mayor. Exemptions are available for local officials, if trees “obstruct, endanger, hinder, or incommode” persons traveling on a way. G. L. c. 87, § 5.**

FORESTS AND TREES (Cont'd)



The Public Lands Preservation Act (PLPA)

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 was created to ensure “no net loss” of Article 97 lands or easements**
- **To approve a change in use of Article 97 land, PLPA dictates that there be no other feasible alternative and that replacement land of the same value is provided**

HAZARDOUS MATERIALS: CLEANUP



- **G. L. c. 21E, the Massachusetts Superfund statute, makes “owners and operators” liable to the Commonwealth for all site cleanup costs. Covers Oil and Hazardous Materials (“OHM”). Oil includes all petroleum products.**
- **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).**
- **G. L. c. 21E gives the Commonwealth 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 (Cont'd)



- **Persons responsible for releases or threats of release of OHM, for which Massachusetts incurs cleanup costs, are strictly liable for up to three times the actual costs.**
- **DEP rules known as the Massachusetts Contingency Plan (“MCP”), promulgated pursuant to 21E, relies on the private sector – especially licensed site professionals (LSPs) – to coordinate response actions and to guide private party actions. So in MA response actions are ‘privatized.’**
- **21 E contains 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.**

HAZARDOUS MATERIALS: CLEANUP (Cont'd)



- **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).**
- **Practical import is 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 (Cont'd)



- **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**
 - **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 (G. L. c. 21E, §§ 1-18)**
 - **DEP authorized to take necessary response actions to contend with releases and threats of release, including assessment, containment and removal and go after the responsible parties.**
 - **Establishes reportable quantities and concentrations of certain substances, as well as release notification content and follow up.**

HAZARDOUS MATERIALS: CLEANUP (Cont'd)



- **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 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 G. L. c. 21L**

HAZARDOUS MATERIALS: CLEANUP (Cont'd)



Brownfields

- **Brownfields is a term meaning land previously used for industrial purposes that may be contaminated by low levels of hazardous materials that potentially could be reused once cleaned up**
- **Massachusetts provides several incentives to encourage clean up and redevelopment of Brownfields:**
 - **G. L. c. 21E provides financial incentives such as tax breaks, loans, and grants for cleanup activities on brownfields.**
 - **Creation of Brownfield Redevelopment Fund (BRF), encouraging clean up and redevelopment of brownfields located in economically distressed areas by providing grants 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: CLEANUP (Cont'd)



Brownfields (Cont'd)

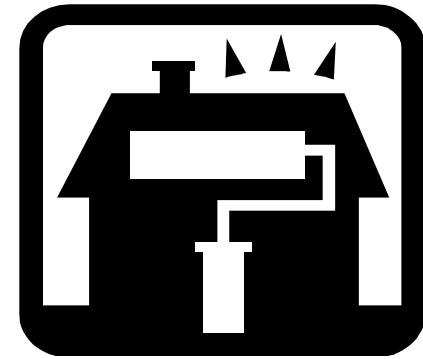
- **Under federal Superfund statute EPA defined in 2006 the extent of due diligence required to qualify for CERCLA liability protection. 40 CFR 312.**
- **Persons who do not qualify for liability relief may apply to the MA Attorney General for a Brownfields Covenant Not to Sue as long as three requirements are met:**
 - **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 G.L. 21E, § 3A(j)(3)(a).**
 - **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



- **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. G. L. c. 21C; G. L. c. 175G.**
- **Like 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."**
- **In addition to 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.**

INDOOR AIR POLLUTION



Lead Paint

- **Lead Poisoning Prevention and Control Act and agency regulations thereunder require identification and removal of lead paint, as well as detection and screening programs. G. L. c. 111, §§ 190-199.**
- **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. G.L. c. 111, § 199.**

INDOOR AIR POLLUTION (Cont'd)



Urea Formaldehyde Foam Insulation (UFFI)

- **In 1979 “UFFI” was banned for use in the state by the Department of Public Health (“DPH”) under its authority to ban hazardous substances. G. L. c. 94B, § 2(a). UFFI regulations upheld in court.**
- **MA created a trust fund, which is funded by industries involved with UFFI (manufacturing, distribution, and installation), which landowners may utilize to pay for the removal of UFFI.**
- **Landlords or sellers of residential property must determine whether dwelling contains UFFI and, if so, disclose this and the formaldehyde air levels to tenants, prospective tenants and buyers.**
- **Air testing is available at no cost from DPH.**

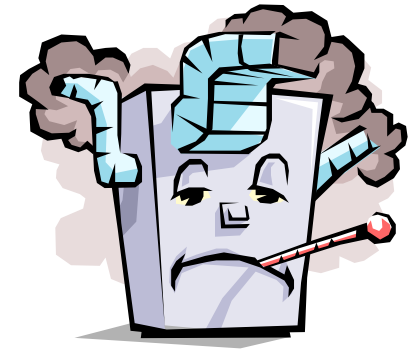
INDOOR AIR POLLUTION (Cont'd)



No Smoking Regulations

- **Clean Indoor Air Act 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. G. L. c. 270, §§ 21-22.**
- **Signs to restrict smoking in these areas posted conspicuously.**
- **Local health officer or building inspector is to receive complaints.**
- **Many municipalities, through their boards of health, promulgated more stringent regulations regarding separate smoking sections in local restaurants and work places, even outdoor spaces.**

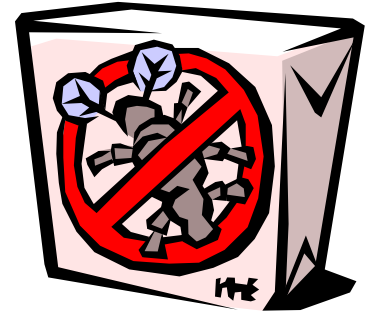
INDOOR AIR POLLUTION (Cont'd)



Asbestos

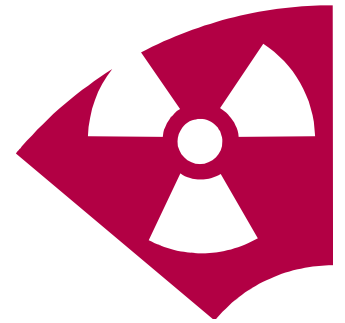
- **Friable asbestos defined as an air pollutant by DEP and regulated by DEP and DPH.**
- **Provisions of the State Sanitary Code of DPH regulate the repair and removal of asbestos in residential settings.**
- **Asbestos removers must be licensed and meet specifications imposed by the Department of Labor and Industries (“DLI”).**

PESTICIDES



- **Pesticide Board in the Department of Agricultural Resources (“DAR”) administers state requirements similar to those under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”).**
- **Pesticide Board requires state registration of these materials, the applicators of these materials, and pesticide programs of public utilities.**
- **G. L. c.132B pre-empts municipal regulation of pesticides and herbicides, although local regulations can require board of health hearing to ensure use is in compliance with state restrictions. *Wendell v. Attorney General*, 394 Mass. 518 (1985).**
- **Massachusetts bans use of certain pesticides inside grade schools and child care centers and requires parental notification before outside application of pesticides.**
 - **Treated areas posted at least 72 hours after applications.**
 - **Schools and child care facilities must implement integrated pest management (“IPM”) for low to no toxicity pest control**

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. 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”) responsible for regional waste water collection and treatment and water supply for Metropolitan Boston. Administers a permit program with detailed regulations and enforcement for domestic and industrial discharges to the MWRA sewer system.**
- **Title V of the State Environmental Code, promulgated in 1996, allows use of alternative technologies and requires the 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.**

SEWAGE DISPOSAL (Cont'd)



- Towns can charge developers an “inflow-and-infiltration reduction fee” for access to 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 “paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge,” and**
 - **It is not collected “to raise revenues but to compensate the governmental entity providing the services for its expenses.”** *Denver Street LLC v. Town of Saugus*, 462 Mass. 651 (quoting *Emerson College v. Boston*, 391 Mass. 415 (1984)).

SOLID WASTE



- **DEP Division of Solid Waste along with Boards of Health:**
 - **Determine site suitability of solid waste facilities**
 - **Regulate transportation of solid waste within communities**
 - **Regulate operation of public and private landfills, incinerators, transfer stations, recycling facilities, transporters, materials recovery, disposal and old dumps.**
- **DEP may clean up solid waste disposal facilities and recover costs from responsible parties. G. L. c. 21H, §§ 1-8; c. 111, §§ 150A-B.**

STORAGE TANKS



- **DEP, DPH and MA Board of Fire Prevention, along with local officials, regulate above and below ground tanks, containers, and associated piping if the tanks contain flammable or hazardous materials.**
- **Design specifications, performance standards, inspection provisions, permit requirements, and location criteria for installations, as well as requirements for composition, removal, monitoring, and testing of the tanks. Reporting requirements when they fail.**
- **MA implements federal regulations for Underground Storage Tanks (“UST”) but imposes stricter standards, specifically double containment for hazardous material tanks and deadlines for retrofitting.**
- **Local zoning governs structures and uses within Flood Plain Districts, but also requires consistency with all relevant provisions of other agencies.**

STORMWATER MANAGEMENT

Federal



- **EPA has not delegated National Pollution Discharge Elimination System (“NPDES”) permitting authority to MA. Federal stormwater permitting program within MA administered through EPA’s New England Region office in Boston.**
- **EPA’s NPDES Phase II Stormwater Program requires public and private entities to develop comprehensive stormwater management programs focused on water quality. Affects many municipalities, industries and large landowners.**
 - **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.**
- **Most stormwater discharges into water bodies in MA are covered by the provisions of EPA regulations.**

STORMWATER MANAGEMENT

State



- **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

State



- **DEP Proposed Stormwater General Permit Program – requires private owners of large impervious areas to manage stormwater**
 - **Threshold: ≥ 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 ≥ 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



- **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)



- **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.**

Garrity v. Conservation Commission of Hingham, 462 Mass. 779 (2012)

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



- **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**

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 (Cont'd)



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)**

Carney v. Town of Framingham 79 Mass.App.Ct. 1129 (2011)



- **This case involved an alleged violation of the state Wetlands Protection Act and the Town’s wetlands bylaws. This decision is “unreported” under the court rules, however, so may not be cited as authoritative, merely persuasive.**
- **The Appeals Court ruled that the statutory 60-day period for filing a certiorari appeal under G.L. c. 249, § 4 begins “when the administrative agency makes a final decision in the issue at hand, not when it later memorializes that determination in written form.” The question became how that is applied to this enforcement order situation.**
- **Consequently, here the deadline ran from the board vote at its meeting, not the date on the order sent to the violator, who lost the case for suing late. Lesson: the 60-day period begins running the date the vote is taken to issue an enforcement order. Consult this case and others over the years for what starts the period for what your client wants to challenge.**

ZONING AND SUBDIVISIONS



- **Massachusetts, like a few other states, is a Home Rule jurisdiction. By virtue of a Home Rule Amendment to the Constitution of Massachusetts and the Home Rule state statute, cities and towns have the power to enact their own legislation on many subjects (if they do not conflict with federal or state law) without the need for the state legislature to enact specific enabling statutes on those subjects.**
- **The Home Rule Amendment includes authority to protect the public health and safety. It has been interpreted to confer broad authority to protect the environment. For example, under this sort of automatic delegation of the state's Police Power, many Home Rule towns have enacted wetlands protection bylaws.**

ZONING AND SUBDIVISIONS



- **Zoning is administered by municipalities through the Zoning Enforcement Officer (ZEO), usually the building inspector or the building commissioner, and the board of appeals or other designated permit granting authority. There also may be site plan review by the board of selectmen or another designated board.**
- **Essentially, municipalities may elect to use the zoning power or the general bylaw power (and in some instances, both) to accomplish important public purposes.**

ZONING AND SUBDIVISIONS



➤ **Several communities have enacted local legislation dealing with:**

- **Wetlands protection;**
- **Storage tanks;**
- **Petroleum and other chemicals;**
- **Industrial chemicals storage and reporting;**
- **Sand and gravel operations**
- **Public and private wells and other water supplies;**
- **Sedimentation and erosion control;**
- **Air pollution;**
- **Noise limitations; and**
- **Environmental impact analyses of local government projects or permits for private projects.**

ZONING AND SUBDIVISIONS



The Subdivision Control Act

- Authorizes and empowers municipalities to control divisions of land into new parcels not already served by public ways. The same statute offers landowners an opportunity (reportedly unique in the United States) to get rulings from the local planning board that a full subdivision approval is not required. This procedure is called an Approval Not Required (ANR).
- Under the auspices of subdivision control, the planning board must promulgate subdivision rules and regulations. Some municipalities adopt merely a basic set of procedures. Others use the opportunity to establish comprehensive engineering, design, and environmental standards for roadway construction and operations, utility installation, tree removal and landscaping, stormwater management, identification and preservation of historic sites or significant vistas, planning and layout, signage, and other public health and safety matters. Some incorporate technical environmental specifications and performance standards, plus environmental studies for large subdivisions.
- In addition, a planning board may not approve a developer's subdivision plan that does not comply with the recommendation of its municipality's board of health.

WILDLIFE & ENDANGERED SPECIES



MA Endangered Species Act

- **MESA protects rare species and their habitats by prohibiting the “take” of any plant or animal listed as endangered, threatened, or of special concern by the MA Division of Fisheries & Wildlife (“DFW”).**
 - **Regulations broadly define Take: “in references to animals to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat.”**
- **If a project falls within Priority Habitat of rare species and does not meet MESA filing exemptions, proponents must file with the Natural Heritage & Endangered Species Program (“NHESP”). This is independent of the requirement to submit to NHESP a copy of NOI under DEP’s WPA rules for a project located in an Estimated Habitat for Rare Wildlife.**

WILDLIFE & ENDANGERED SPECIES



Review of Projects/Activities Outside of Priority Habitat

- **A Project or Activity may be subject to MESA review if:**
 - **Subject to MEPA review, and**
 - **Division has credible evidence that a State-listed Species or habitat is within the area to be disturbed.**

- **A Project or Activity also may be subject to MESA review where new information on a State-listed Species occurrence is received by the Division, prior to:**
 - **The issuance of a final Order of Conditions by Conservation Commission,**
 - **The issuance of any permit subject to a public hearing that was publicly noticed, or**
 - **Fifteen days after the issuance of a building permit not subject to public hearing.**

WILDLIFE & ENDANGERED SPECIES



Conservation and Management Permits

- **Director may permit a Take for conservation and management purposes provided there is a Long-Term Net Benefit.**
- **Applicant must show that impacts are avoided, minimized, and mitigated consistent with the following performance standards:**
 - **Adequately assessed alternatives for both temporary and permanent impacts,**
 - **An insignificant portion of the local population would be impacted, and**
 - **Agreement to carry out an approved Conservation and Management Plan that provides for the Long-Term Net Benefit.**
- **An applicant who has made every reasonable effort to avoid, minimize, and mitigate impacts but cannot provide for the Long-Term Net Benefit on-site, may still be approved for off-site mitigation.**

WILDLIFE & ENDANGERED SPECIES

Conservation and Management Permits (Cont'd)

- **Director must respond in writing within 30 days of submission of a final Conservation and Management Permit.**
- **Failure to respond constitutes constructive approval unless the project is undergoing MEPA review. Then 30 days after issuance of a final MEPA certificate or submission of the Conservation and Management permit application, whichever is longer.**
- **Director may extend the 30 day response time for two successive 30 day periods due to circumstances beyond the control of the Division.**
- **Application guidelines for MESA Conservation and Management Permits can be found at: http://www.mass.gov/dfwele/dfw/nhosp/regulatory_review/pdf/cmpermitguide06.pdf**



WILDLIFE & ENDANGERED SPECIES



Administrative Appeals

- **Any person aggrieved by a final agency decision may appeal:**
 - **Delineation of Priority Habitat,**
 - **Review of a proposed Project or Activity in Priority Habitat**
 - **Conservation and Management Permit.**
- **Written appeal must be pursuant to G. L. c. 30A and 801 CMR 1.02 and 1.03 and hand-delivered or post-marked within 21 days of the final agency decision.**
- **Request must contain:**
 1. **Specific facts showing how the requirement of “aggrieved person” are met:**
 - a. **A definite interest in the matters in contention within the scope of interests or area concern, and**
 - b. **Must have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division;**
 2. **Clear statement that an appeal is being requested;**
 3. **Clear and concise statement of facts which are grounds for the appeal and specific objections to Division actions; and**
 4. **Relief sought.**

PROGRAMMATIC AREAS from A to Z

CIVIL AND CRIMINAL PENALTIES IN LOCAL ENFORCEMENT ACTIONS



ACTIVITY OR USE	APPLICABLE LAW	CIVIL PENALTY	CRIMINAL PENALTY
Air	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
Hazardous Waste	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
Solid Waste	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
Water	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
Wetlands	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**



THE PERMIT EXTENSION ACT



- **The Permit Extension Act, so-called, was created by Section 173 of Chapter 240 of the Acts of 2010. It was extended by Sections 74 and 75 of Chapter 238 of the Acts of 2012, known as 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

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



- This case involved an alleged taking after the petitioner sought to develop 3.7 acres of his 14.9-acre parcel, much of which is wetlands. Under Florida law, the petitioner was required to mitigate the project’s environmental effects. Accordingly, petitioner 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 petitioner 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.”
- The Supreme Court also 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 SJC No. 11332



- **Currently on appeal to the SJC, this case concerns a challenge to regulations promulgated by the Division of Fisheries and Wildlife (DFW) under the Massachusetts Endangered Species Act (MESA) G.L. c. 131A, namely 321 C.M.R. §§ 10.11-10.25 which designate “priority habitat” under what is called the National Heritage and Endangered Species Program.**
- **The Pepins own 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 attempted to get approval for a subdivision plan in 2007, the DFW authorized the project, but subjected the Pepins to several conditions to avoid triggering a “take.”**
- **The Pepins filed an action in September 2009 seeking judicial review of the DFW final decision, as well as a declaratory judgment that the priority habitat regulations are facially invalid because they are in excess of the authority granted by MESA.**
- **The Superior Court found in favor of the DFW.**



WHAT ARE PRACTICAL TIPS FOR ENVIRONMENTAL LAW ADVOCACY?

- Learn about environmental agency organization and “who’s who.” This means headquarters and regional office authority. Identify roles of division chiefs and directors. Find out who are the real decision makers.**
- Master the substantive and procedural requirements of the agency. These are notice requirements, document deadlines, submittal requirements, performance standards, design specifications, and appeal avenues.**
- Collect all applicable laws and regulations. Obtain previous permits and typical permit conditions. Get any guidelines. Research cases.**



WHAT IS THE BEST WAY TO APPROACH ENVIRONMENTAL AGENCIES?

- **Make informal contact with low-level agency officials to get tentative reactions to any proposals and submittals. Make early informational filings with them. Senior staff rely on them, so pitch to them. Meet their needs.**
- **Solicit agency ideas and incorporate their ideas in projects. Let the agency personnel feel they have a role in shaping proposals before they are cast in stone and formally submitted.**
- **Allow all to see the “larger plan” and avoid the “pinball effect” whereby applicants bounce from one agency to another. Consider arranging coordinated filings, joint meetings, distribution lists, and deadlines for feedback.**



HOW CAN YOU MOVE STEADILY TOWARD FAVORABLE ACTION?

- **Communicate with agencies openly. Anticipate likely reactions and concerns. Understand and use agency precedents, common approaches, and traditional practices. Keep a record of all contacts, meetings and phone calls. Memorialize in writing all expectations and commitments. Thank them for time and input.**
- **Plan ahead for agency meetings and hearings. Avoid pointless, premature sessions with high level agency officials who will spot issues, ask for more data, and then rely on staff reviews anyway.**
- **Work up the agency ladder so that a “yes” is final at any level but a “no” can go higher. Never accept a “no” answer.**



WHAT ARE WAYS TO MAXIMIZE THE CHANCE OF SUCCESS?

- **Use the persuasive approach, relying on the strength of your information. Master your project to show it meets all standards “and then some.” Argue established law, fair process, and sensible policy. Be firm but civil. Appear ready, willing and able to appeal.**
- **Lobby around the agency’s back only rarely, but utilize political clout when necessary. More often than not, political muscle is most useful by “holding it back.” Let the agency know you can and would if needed enlist strong outside influence in support.**
- **Secure the support of constituents, organizations and the public.**
- **Continue to keep track of your promises and meet them..**



WHAT IS THE BEST STYLE FOR THE ATTORNEY?

- **Answer questions fully and accurately, but do not acquiesce in unending requests for more information. Repeat and confirm requests until they are precise. Confirm your responses, even if not liked.**
- **Make clear what you seek and why, and that you provided everything legally required and reasonable. Label anything else a voluntary or courtesy submittal. Explain the context for the decision to be made.**
- **Stay calm. Lawyers can be most effective by leading others to common ground through careful listening, rather than by aggressively staking out legal arguments. Outspokenness will be more effective if you stay measured.**
- **Thank the agency or board orally and in writing for its consideration.**

TRENDS IN ENVIRONMENTAL LAW



- **Streamlined, coordinated, predictable permitting.**
- **Accomplish objective environmental results.**
- **Protect natural resources for their inherent value.**
- **Foster conservation and alternative energy sources.**
- **Balance population growth and housing policy.**
- **Clean up and redevelop contaminated land.**

FURTHER TRENDS IN ENVIRONMENTAL LAW



- **Adopt consistent, concerted government policies.**
- **Engage in transparent environmental decision-making.**
- **Conserve nonrenewable natural resources.**
- **Manage renewable natural resources.**
- **Manage for ecosystem health (biodiversity).**
- **Make both the economy and environment sustainable.**

