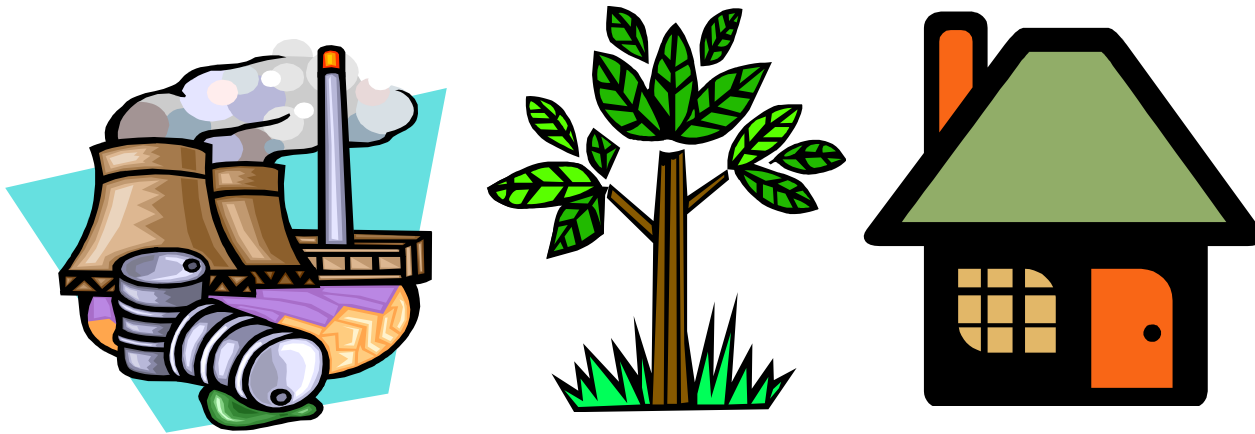


MASSACHUSETTS WETLANDS, FLOODPLAIN, RIVERFRONT, STORMWATER, TIDELANDS, WATERWAYS and COASTAL LAWS

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MASSACHUSETTS WETLANDS, FLOODPLAIN, RIVERFRONT, STORMWATER, TIDELANDS, WATERWAYS and COASTAL LAWS



WHO ARE AFFECTED BY WETLANDS LAWS?

DEVELOPER?

BUILDER?

LANDOWNER?

CONTRACTOR?

MUNICIPALITY?

LENDER?

FACILITY OPERATOR?

TENANT?

ABUTTER?

LANDLORD?

AS WELL AS REAL ESTATE COUNSEL,
MANAGER, APPRAISER, ASSESSOR,
BUYER, SELLER AND LENDER

WHAT WORK IS REGULATED BY WETLANDS LAWS?

- FILLING or CUTTING
- DRAINING or FLOODING
- BUILDING or DEMOLISHING
- DREDGING
- REMOVING
- EXPANDING
- CONSTRUCTING
- GRADING or REGRADING
- PLANTING
- CLEARING
- ANY TYPE OF ALTERING as broadly defined in various laws

WHAT RESOURCE AREAS ARE PROTECTED BY WETLANDS LAWS?

Protected Resources

WETLANDS = areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support (and normally does support) prevalent vegetation typical of saturated soil conditions (33 CFR § 328 (b))

- Vegetated Wetlands (marshes, swamps, bogs)
- Coastal Wetlands (salt marshes)

FLOODPLAINS = areas prone to flooding according to published maps

CAUTION: Working definitions are merely rules of thumb and may vary between different statutes and bylaws that protect different resources or portions thereof in different ways

WHAT OTHER RESOURCE AREAS ARE PROTECTED?

Protected Resources

OTHER WATER RESOURCES

- Rivers, Streams, Creeks, Lakes, Ponds, Estuaries, Ocean
- Banks, Beaches, Dunes, Flats
- Areas Affected by the Tide or Coastal Storm Flowage

CAUTION: Working definitions are merely rules of thumb and may vary between different statutes and bylaws that protect different resources or portions thereof in different ways

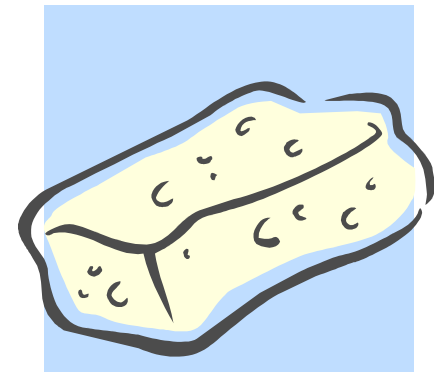
WHAT PUBLIC INTERESTS ARE PROTECTED BY WETLANDS LAWS?

- Public or Private Water Supply
- Navigation
- Flood Control
- Groundwater Supply
- Recreation
- Aquaculture
- Preventing Pollution
- Storm Damage Prevention
- Fisheries
- Agriculture
- Wildlife and Habitat
- Shellfish
- Aesthetics

EXAMPLE OF A RESOURCE AREA AND ITS LEGALLY PRESCRIBED PUBLIC VALUES

Wetlands are natural sponges, wildlife habitat, water sources, and nutrient sources.

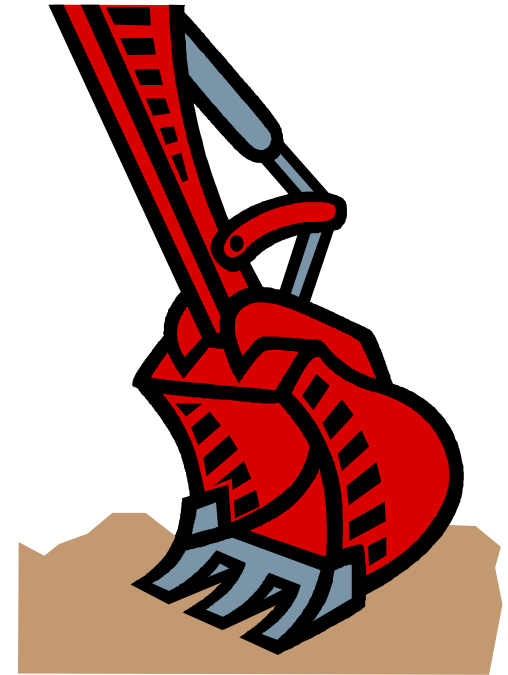
Wetlands absorb flood waters and reduce damage. They store water to release it during times of low water levels. They filter water physically, chemically, and in other ways. They infiltrate water to the ground as well as release groundwater to streams and rivers. They are water sources for humans.



Wetlands provide food, shelter, migratory pathways, breeding habitat, and other uses for wildlife. They are habitat for fisheries and shellfish. They are food sources for humans.

PRACTICAL TIP No. 1

The first step for one involved in any capacity with developing, financing, or regulating land is to determine if the project or land use involves construction or activity regulated by state, local or federal wetland, floodplain, riverfront, storm water, tideland, or coastal law. This involves knowing whether work will occur in or near any wetland, flood prone, river or stream, tidal, or coastal land area that is jurisdictional and thus subject to regulation and control.



PRACTICAL TIP No. 2



Next determine if the structure or use will affect or cause any regulated impacts to protected jurisdictional resources, and who needs to obtain permits from whom to do so, triggering what submittals, designs, standards, hearings, issues, timing, and costs. Understand what public interests or values protected by these programs trigger permit criteria, design specifications, performance standards, or outright prohibitions affecting project cost, timing or fate.

WETLANDS PROTECTION ACT

- MA DEP's Division of Wetlands and Waterways supervises administration of the Wetlands Protection Act by promulgating regulations and hearing appeals from rulings of local Conservation Commissions on permits and jurisdiction (G.L. Ch. 131, § 40).
- Originally the state DNR granted wetland permits with input from local Commissions until the Coastal and Inland Wetlands Act were codified in a new Wetlands Protection Act in 1972 under DEQE (now DEP)



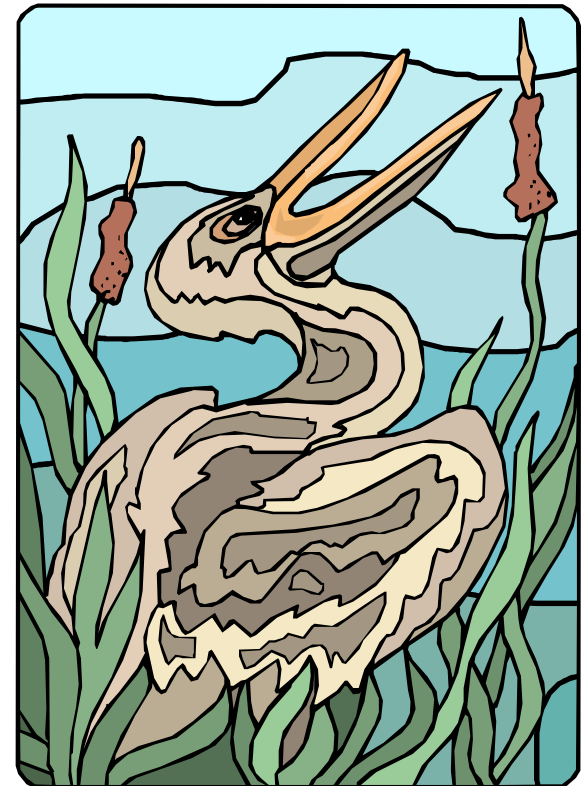
WETLANDS PROTECTION ACT

- Any work involving filling, dredging, removing, or otherwise altering the jurisdictional wetlands, water bodies, riverfront areas, flood prone areas, or coastal areas, unless grandfathered or exempt by law, triggers the Act and requires an application and permit after public hearing.
- This permitting approach in environmental law is commonly called “preconstruction review.”



WETLANDS PROTECTION ACT

- **Basic Procedure**
 - Notices of Intent (NOIs)
 - Orders of Conditions (permits)
 - Requests for Determination of Applicability (RDAs) and ORADs
- **Resource Areas Protected**
 - Banks, Beaches, Dunes, Flats, Marshes, Meadows, Swamps, Freshwater and Coastal Wetlands bordering listed bodies of water, Land Under Water, Land Subject to Flooding, Tide or Coastal Storm Flowage, and Riverfront Area
- **Activities Regulated**
- **Wetlands Values Protected**

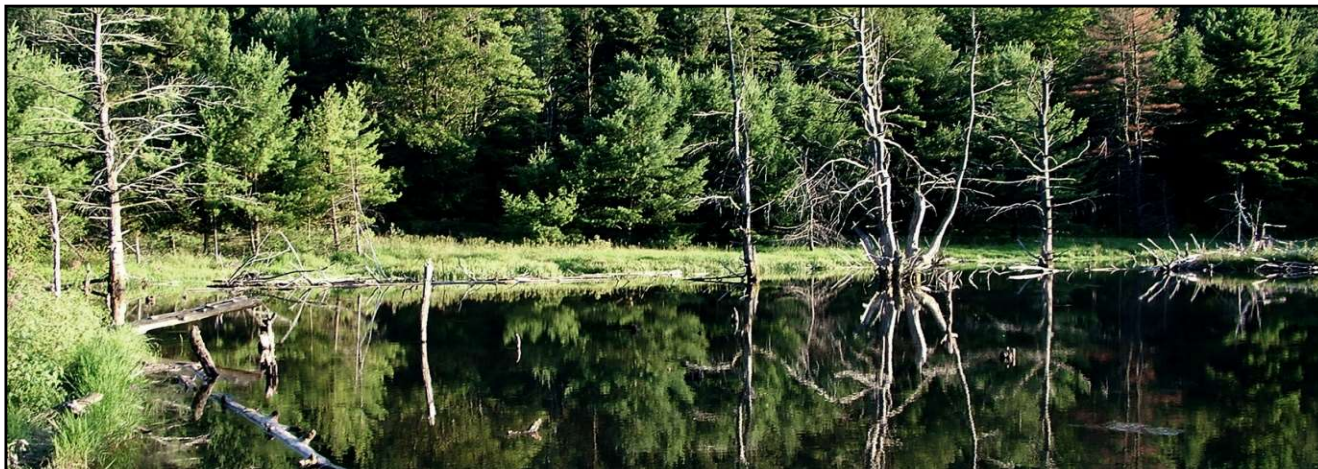


WETLANDS PROTECTION ACT

- The vegetated Resource Areas, with their listed indicator plants and related water conditions at or near the surface of the ground, must border bodies of water to be protectable and trigger the need for permission under the Act. That is why they are termed Bordering Vegetated Wetlands (BVWs).
- Other Resources Areas are defined and described in DEP Regulations. LUW includes lakes, ponds, rivers, streams, creeks, estuaries and the ocean; BLSF is presumed to be the most current published FEMA Flood Insurance Rate Map (rebuttable); ILSF is defined by a calculated size and capacity of water held; and Riverfront Area is 200 feet laterally from Mean Annual High Water (MAHW) or MHW (tidal).

WETLANDS PROTECTION ACT

- To be regulated an activity must consist of dredging, filling, removing or altering, all terms defined, with “altering” very broadly defined so as to include most impacts occurring from work in and near water.
- Note jurisdiction is NOT established by there being a Commission’s mere guess there are resource areas present or concern about impacts from work being done.



WETLANDS PROTECTION ACT

- The Buffer Zone is not a Resource Area. It was created by 1983 DEP Regulations implementing the Act with listed Resource Areas, presumed values, delineation methods, application process, submittal requirements, approval criteria, performance standards, and permit conditions. It is a kind of administrative “look-see” area.
- DEP established the 100-foot Buffer Zone because of “experience that work performed in close proximity to wetlands often has an impact on them...” and “not to expand jurisdiction automatically beyond the boundaries of BVWs but to provide a mechanism by which local conservation commissions can be notified of projects located outside these boundaries but sufficiently close thereto to pose a potential environmental threat.”

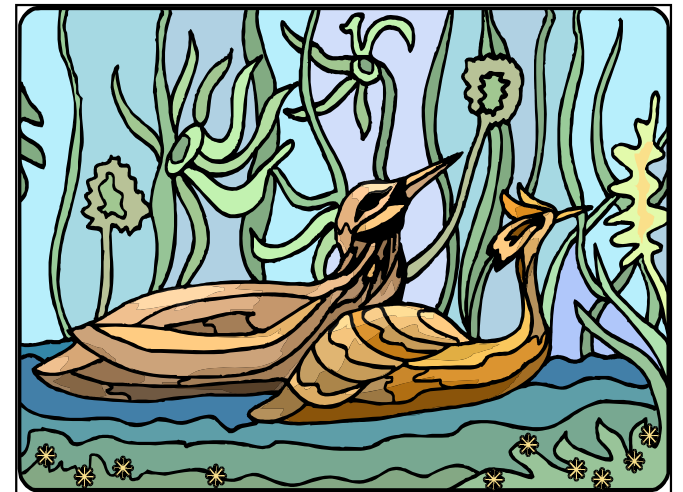
WETLANDS PROTECTION ACT

- Work in the Buffer Zone triggers the need for some kind of Commission approval, either an RDA or an NOI at the option of the applicant. The inquiry in the Buffer Zone is whether the work “will alter” a nearby Resource Area, and how it can be conditioned or avoided. The inquiry is not whether the work “may or might or could alter...”



WETLANDS PROTECTION ACT

- Abutter Notices
- Newspaper Ads
- Public Hearings/Meetings
- Time Periods/Deadlines
- Orders of Conditions
- Appeals to DEP
- DEP Superseding Orders
- DEP Adjudicatory Hearings
- DEP Inland Wetlands Rules
- DEP Coastal Wetlands Rules
- DEP Administrative Rules
- Adjudicatory Hearing Rules
- Wildlife Habitat Regulations
- Riverfront Area Regulations



AGENCY ORGANIZATION

- **State Agencies**

- ◆ EOEAA is lead environmental agency for the State administering environmental regulations, programs and grants on everything from air to water to waste to wildlife (including wetlands) through MassDEP as well as DCR, DAR, DFG, DOE, DPU, MEPA, and OCZM.

- **Municipal**

- ◆ Cities and towns maintain primary responsibility for zoning, subdivision control, and other land use laws within their borders, and they have Home Rule power to enact and administer local wetlands protection bylaws.

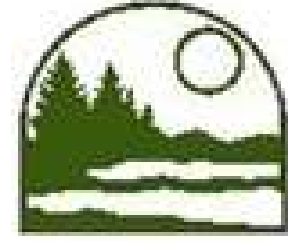
- **Federal**

- ◆ Federal permits for work in and near wetlands and waters of the US are administered by the New England Army Corps of Engineers and EPA with USFWS and others.

STATE ENVIRONMENTAL AGENCIES



Executive Office of Energy and Environmental Affairs (EOEEA)



Department of
Conservation
and Recreation

Department of
Agricultural
Resources

Department of
Environmental
Protection

Department of
Fish and Game

Division of
Energy
Resources

Department of
Public Utilities

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

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

*Enforcement and
regulating
environmentally
harmful activities*

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

*Implements
energy policy and
regulates energy
usage and
efficiency*

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

MUNICIPAL BOARDS AND OFFICIALS

- The 351 cities and towns in Massachusetts have primary responsibility for subdivision control, zoning, public health, land use, governance and “police power” 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 cities and towns have created Conservation Commissions with power to regulate many activities in, near or affecting wetlands and related bodies of water. Other municipal regulations commonly cover: septic systems; solid waste facilities; waste transportation; underground storage tanks; earth removal; and erosion control.
- Regional land use control bodies include the Cape Cod Commission, Martha’s Vineyard Commission, and Town/County of Nantucket.

FEDERAL ENVIRONMENTAL AGENCIES

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



STATE LAWS DEALING WITH WETLANDS

1. Wetlands Protection Act
2. Coastal and Inland Wetlands Restriction Acts
3. Chapter 91 Waterways and Tidelands Licenses
4. Coastal Zone Management
5. Massachusetts Ocean Act
6. Scenic Rivers Act
7. Sewage Disposal/Solid Waste
8. Water Pollution Control
 - NPDES Permits
 - Storm Water Management
9. Section 401 Water Quality Certification Program
10. Groundwater Discharge Permits
11. Inter-Basin Transfer Act
12. Drinking Water Standards
13. Watershed Protection Act
14. Aquifer Land Acquisition
15. Water Supply Grants
16. Water Conservation Rules
17. Water Management Act
 - ♦ GW Withdrawal Permits
18. EOEA GIS Program/ BioMaps
19. Natural Heritage and Endangered Species Program
20. Massachusetts Environmental Policy Act (MEPA)
21. Green Communities Act

LOCAL LAWS DEALING WITH WETLANDS

1. Wetland/Floodplain Zoning
 - Floodplain zoning held legally valid in *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. Denied, 409 U.S. 1108 (1973).
 - Wetland zoning upheld in *Golden v. Board of Selectmen of Falmouth*, 358 Mass. 519, 265 N.E.2d 573 (1970).
2. Aquifer Zoning
3. Site Plan Review/Special Permits
4. Cluster and Planned Unit Development (PUD) Zoning
5. Growth Control
 - Phased Growth Control
 - Transferable Development Rights (TDR's)
 - Moratoria
 - Smart Growth Districts



OTHER LOCAL LAWS DEALING WITH WETLANDS

6. Subdivision Regulations
7. Earth Removal/S&G Bylaws
8. Roadway Access/Specs
9. Land/CR/APR Acquisitions
10. Town land policies and rules
11. Community Preservation Act
12. Conservation Fund
13. Property Tax/Classifications
14. Board of Health Rules
15. Beaver/Insect Pest Controls
16. Home Rule Wetlands Bylaws
17. Easements and Licenses
18. Town budget policies/process
19. Bidding and Contracting
20. Historic Preservation



HOME RULE WETLANDS BYLAWS

- Overview
 - Local permit program administered by Conservation Commission
 - General bylaw/ordinance authority in G.L. c. 40, § 21 and Home Rule Amendment to the Massachusetts Constitution, Articles II and LXXXIX
 - For local bylaws and regulations: http://maccweb.org/resources_bylaws.html
- Typical Local Bylaw
 - Jurisdiction/procedure similar to Wetlands Protection Act. Clarifies and expands jurisdiction and standards beyond Act to be stricter than DEP
 - Fewer exemptions than Wetlands Protection Act with explicit authority to require data, 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 plus traditional remedies (injunctions) in Superior Court, and criminal prosecution with criminal fines for bylaw violations
 - Bylaws adopt the “ticketing” or “citation” approach outlined in G.L. c. 40, § 21D for so-called non-criminal dispositions of relatively small penalties

HOME RULE WETLANDS BYLAWS



- Conservation Commission
 - Entertains applications for projects and rulings under its bylaw and implementing regulations promulgated by the Commission
 - Holds quasi-judicial public hearings like a planning board or zoning board
 - Schedules and continues hearings at Commission's discretion
 - Mistakes implicate Home Rule authority
 - If Commission fails to issue decision within 21 days, it is a null and void. DEP Superseding Order of Conditions governs the project. SJC noted Commission's failure to timely act did not constitute constructive approval *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859 (2007) but rather cost town its Home Rule power over project.
 - See also *Regan v. Conservation Comm'n of Falmouth*, 77 Mass. App. Ct. 485 (2010), holding DEP Superseding Order of Conditions trumped bylaw denial issued one day after expiration of statutory deadline for decision.
 - Implements both local wetland bylaw and state Wetland Protection Act
 - Issues decisions separately reviewable in DEP (under Act) and court (bylaw)
 - Commission bylaw and regulations typically tougher than WPA/DEP

HOME RULE WETLANDS BYLAWS



- Conservation Commission
 - Variances and Permits
 - When applying for variance under bylaw, burden on property owner to show why other options that comply with bylaw are not economically feasible; merely because variance desirable to the landowner does not mean denial rises to level of substantial hardship. *Brown v. ZBA of Norfolk*, 74 Mass. App. Ct. 1111 (2009)
 - Conservation Commission cannot use higher standard of burden of proof when deciding to issue or deny permits than contained in the local bylaw, and tougher standard in regulation is not valid. *Conroy v. Conservation Comm'n of Lexington*, 73 Mass. App. Ct. 552 (2009)
 - DEP may issue a Superseding Order of Conditions where the decision-making authority has not its decision based exclusively on the specific terms of a bylaw more stringent than the Act. *Healer v. DEP*, 73 Mass. App. Ct. 714 (2009)

FEDERAL LAW OUTLINE

1. Army Corps of Engineers Section 404 Permits

- Federal Clean Water Act
- Regulates Filling and Discharge
- Nationwide and Regional Permits
- Massachusetts Programmatic General Permit
- Individual Permits
- Alternatives Test
- Permit Hearings (Optional)
- Exemptions
- EPA Review and Veto
- Delegation to States
- Enforcement



OTHER FEDERAL LAWS



2. Rivers and Harbors Act 1899
 - Regulates dredging, structures and water course changes (§ § 9, 10, 13)
 - Permits from Corps of Engineers
3. Executive Orders on Wetlands and Floodplains
4. FEMA Flood Insurance Program
5. Superfund/ Brownfields Amendments
6. Endangered Species Act
7. Clean Water Act / NPDES /Storm Water
8. Historic Preservation Act
9. Coastal Zone Management Act
10. National Environmental Policy Act

Massachusetts Rivers Protection Act

- A river is “a naturally flowing body of water that empties into any ocean, lake, or other river and that flows throughout the year.”
- The Rivers Protection Act amended the Wetlands Protection Act to regulate activities within a new wetland resource area, known as the Riverfront Area.
- The Riverfront Area is generally 200 feet from either side of bank and begins at the river’s mean annual high water line. In some listed stretches of urban rivers, the Riverfront Area is 25 feet.



Permits Under the Rivers Protection Act



- Application triggers a two-part test not in the Act for other Resource Areas
 - ◆ No Practicable Alternative Test
 - ◆ No Significant Adverse Impact Test
- Does a practicable alternative exist, including consideration of available technology, the cost of the proposed alternative, and the purpose of the project.
- Does the proposed project not have a significant adverse impact on the Riverfront Area or the interests protected by the Act
- Presence of a Previously Developed Area can relax these tests
- Check if Act or DEP Regulations make a Riverfront Area exempt, as could be if a prior-existing residential lot, agriculture, aquaculture, forestry, or mosquito control.

WETLANDS PROTECTION ACT ADJUDICATORY HEARINGS



Appeal provisions for Adjudicatory Hearings in wetlands cases changed - effective for appeals filed after October 31, 2007 (no change for initial Requests for Superseding Orders filed with DEP)

- Abutters no longer entitled automatically to get Hearing
- Prescreening conference at DEP held with 30 days of appeal
- Petitioner files its direct case evidence within 45 days of the conference
- Adjudicatory Hearing at DEP is to held presumptively within 120 days with an extension of 30 days for major and complex cases
- Adjudicatory Hearing ordinarily is limited to one day
- As before, most testimony is filed in writing, with cross exam at Hearing
- Presiding Officer at Adjudicatory Hearing shall issue written recommended decision within 30 days of the hearing.

WETLANDS PROTECTION ACT

**EXEMPTIONS, EXCEPTIONS, EXCLUSIONS,
GRANDFATHER PROTECTIONS, STATUTES OF
LIMITATIONS, LIMITED PROJECTS, MINOR ACTIVITIES,
EMERGENCIES. AND VARIANCES**



WETLANDS PROTECTION ACT EXEMPTIONS

- Exemptions under the Wetlands Protection Act, by whatever name known, come in several varieties but have several common features easily understood. Fundamentally they afford some version of elimination or reduction of legal jurisdiction, relaxation of agency procedure, special project consideration, streamlined permit approval, constitutional protections, or other escape mechanism sanctioned by the Legislature, the DEP, or operation of law.

- Some exemptions are in the Wetlands Protection Act itself, put there in the modern recodification in 1972 (combining and rewriting the Hatch Act (1965) and Jones Act (1963)). These include:
 - ◆ Agriculture
 - ◆ Mosquito control
 - ◆ Utilities
 - ◆ Emergencies



WETLANDS PROTECTION ACT EXEMPTIONS

- These statutory exemptions are carefully worded, and thus conditional, meaning the eligibility criteria are in the Act. For example, the original agricultural loophole for agricultural work (big enough to drive a tractor through) was tightened by later amendment after the Cumberland Farms Great Cedar Swamp controversy in Middleborough, to exemption for “work performed for normal maintenance or improvement of land in agricultural use....”
- The agricultural exemption is a good example of a statutory exemption further fleshed out in DEP regulations, where more eligibility fine print is found. There are lengthy, comprehensive and carefully written definitions of the words normal, maintenance and improvement, as well as a tightening of this exemption to land used to produce specific types of animal and plant commodities “for...commercial purposes.”



EXEMPTIONS (cont.)

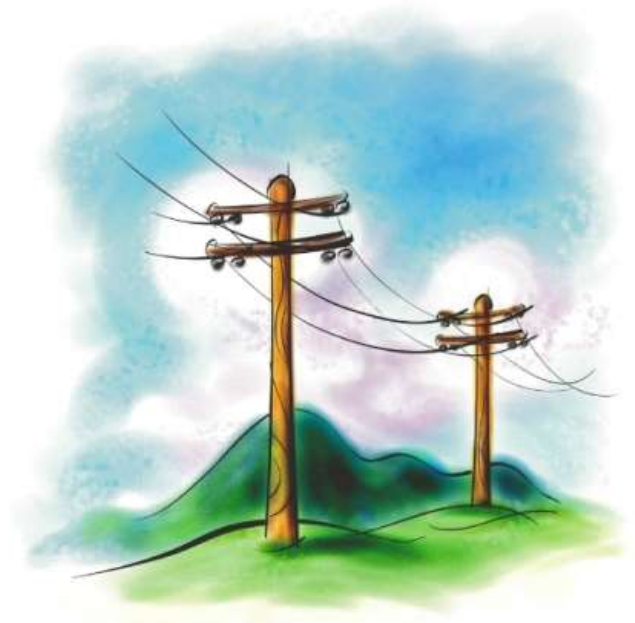
- One sees in the regulations a commodities list including forest products, so the rule covers some silviculture, but still finer print limits most of this silviculture exemption to activities under approved Forest Cutting Plan issued by another agency, DCR.





EXEMPTIONS (cont.)

- Another statutory exemption is for utility work, but note how the list in the Wetlands Protection Act of utility projects exempt covers only “maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services...”
- Conspicuously absent are new utility installations. Also missing is anything about sewerage.



WETLANDS PROTECTION ACT EXEMPTIONS (cont.)

- For additional statutory exemptions, but only with regard to one Resource Area, consider the various carve-outs from the Riverfront Area definition enacted with amendments in 1996. They are historic mill complexes, mosquito control, forest harvesting, cranberry bog water systems, agricultural and aquacultural use, structures and activities licensed under Chapter 91, residential lots pre-existing the amendments, and Special Act projects authorized before 1973.



WETLANDS PROTECTION ACT PROCEDURAL EXEMPTIONS

- Some statutory exemptions are not jurisdiction but procedural. Consider the notification to abutters not applying to projects of MassHighway. Then consider one for maintenance dredging projects, incorporating a grandfather protection for earlier licensed dredging for a period of years, a mere written notice to the Conservation Commission, the right to proceed if the Commission delivers no specific objections in 20 days, but allowing the Commission to designate the spoils area.



EXEMPTIONS (cont.)



- Another source of exemptions is the DEP regulations. One approach is to make favored types of work automatically approvable notwithstanding the usual performance standards.
- Minor Activities in the buffer zone was inserted at the time of the Riverfront Area regulations. This regulatory exemption is not mentioned in the Act.
- For simple activities, some of them beneficial, of a sort DEP thought could and should be automatically approved on routine conditions easily verified, stated in the rules. One example is “vista pruning.” Consider whether DEP should add another for “invasives removal.”

WETLANDS PROTECTION ACT EXEMPTIONS (cont.)

- In the DEP regulations one finds exemptions for maintenance of stormwater management facilities approved by Orders of Condition after April 1, 1983. Essentially, this type of exemption avoids the application of the usual submittals and performance standards.
- Another regulatory exemption of this sort is for improving the natural capacity of resource areas to protect the interests in the Act. This has the potential to facilitate many wetland restorations and improvement projects.



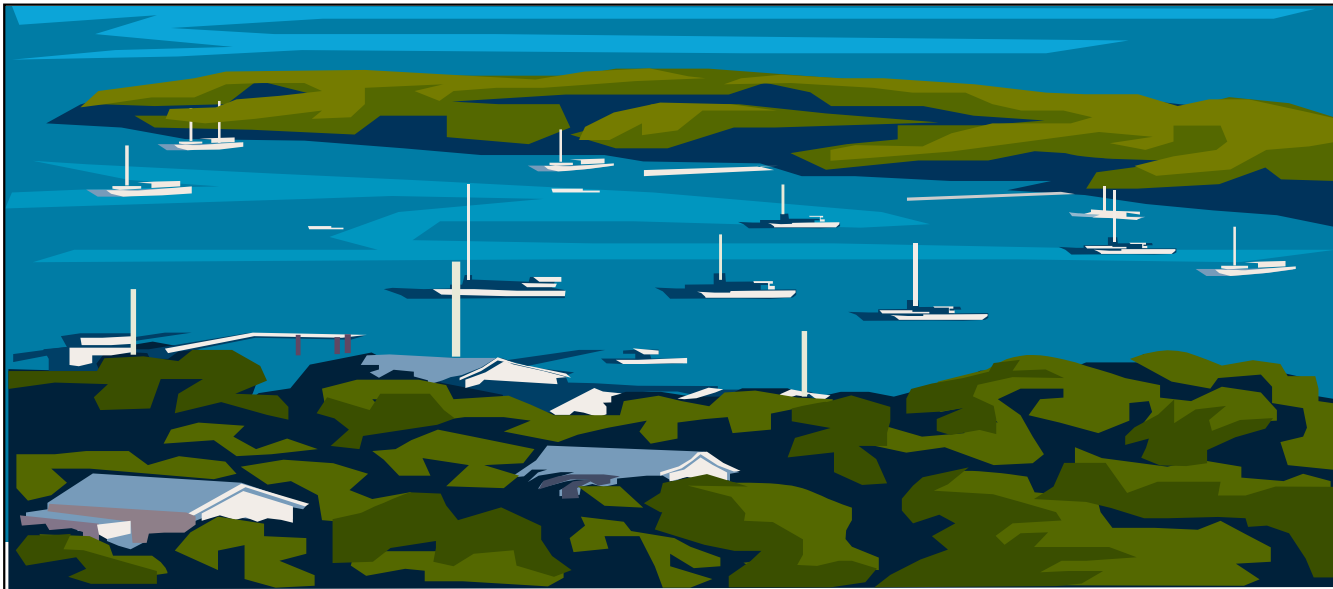
WETLANDS PROTECTION ACT EXEMPTIONS (cont.)

- DEP regulations allow structures in or on banks when required to prevent flood damage to facilities, buildings and roads constructed or approved by Orders of Condition prior to a certain critical date, April 1, 1983. The privilege includes renovation or reconstruction (but not substantial enlargement)
- The agricultural exemption was revised to add supporting existing agricultural production by reconstructing existing dikes, constructing new ponds or reservoirs or expanding existing, or constructing tailwater and bypass systems



WETLANDS PROTECTION ACT LIMITED PROJECTS

- Limited Projects are exempted from the usual standards and prohibitions. They have been in the rules since 1983. One set is for inland resource areas; another is for coastal resource areas. Basically they carve out some favored types of work, facilitating approvals.





WETLANDS PROTECTION ACT SPECIAL PROVISIONS

- Not a Limited Project but just as popular is the 5000 square foot provision and its lesser known cousin, the 500 square foot provision. These operate to allow a Commission to approve the loss of up to that size of Bordering Vegetated Wetland on conditions in the rules. Otherwise the virtual prohibition on BVW and Salt Marsh loss would apply.
- Another variety of exemption comes as redefinition of a key jurisdiction term. At the behest of the users of herbicides to control Right of Way vegetation, the definition of the word “alter” was revised in the DEP regulations to exclude properly conducted spraying of rights of way on notice to the Commission.



PRESUMPTIONS AND GRANDFATHERING

- Presumption of approvability can function to exempt a project from the usual tests. A good example is the regulatory presumption that subsurface disposal of sanitary sewage by septic systems meeting Title 5 (as well as local rules) meets the eight interests in the Act. **Close reading shows this is for the septic system effluent only, not the construction of the system, and the system location must be at least 50 feet from listed resource areas and 100 from high water.**
- The Riverfront Act created exemptions for grandfathered single family home lots existing by a date, types of activities such as footpaths, bike paths and other pedestrian or non-motor access, and redevelopment projects provided they result in net improvement of the Riverfront Area. These are fleshed out and supplemented in DEP's 1997 Riverfront Area regulations.



WETLANDS PROTECTION ACT

“COURT MADE” EXEMPTIONS

- Common law or other “court made” exemptions are afforded by court decisions interpreting or applying the Act.
- Noteworthy is the Massachusetts Appeals Court 1985 decision in *Town of Bourne v. Austin*. Enforcement over seawall maintenance and repair led to a ruling against the commission that “repair” is not a listed regulated activity in the Act, so does not need an application and permit, even though the work put scaffolding in tidal water for a time, and the seawall ended up repaired four inches higher. Many conclude there is an implied exemption in the Act for “repair and maintenance” of a lawfully existing facility or structure.



WETLANDS PROTECTION ACT GRANDFATHER PROTECTION

Grandfather protection is the term applied to exempting work done or permitted or applied for prior to an effective date of a new law or regulation, or amendment.

- The Jones Act dates to 1963, the Hatch Act to 1965. The recodified Wetlands Act was in 1972. The first DEQE regulations, procedural only, were in 1974. The coastal wetland regulations came in 1978.
- The comprehensive concepts of resource areas, buffer zone, submittal and plan requirements, notice and hearing procedures, presumptions of significance, design specifications, performance standards, and limited projects and all the rest came in 1983.
- The wildlife habitat value was added to the Act in 1987. Along came the Rivers Act in 1996 with Riverfront Area regulations in 1997.
- None of these applied retroactively to work already applied for and thus did not govern work begun or finished under later permits or extensions granted.

WETLANDS PROTECTION ACT STATUTE OF LIMITATIONS

- A Statute of Limitation legalizes work by the passage of time. The Act has a statute of limitations, acting as a deadline for court enforcement, of two years from the illegal work. After that the work becomes legal by operation of law. This general deadline is not in the Act but elsewhere in G.L. Ch.131.
- Another deadline, found in the Act itself, says enforcement may be had for three years against a new owner who acquires a property with violations on it.
 - The so-called Grant Amendment to the Act in 1990 provides that some types of violations, such as placing fill in a wetland, can be continuing violations that do not trigger the running of the statute of limitations, thus giving more time for the government, property owners, or the public to sue or prosecute.





WETLANDS PROTECTION ACT DETERMINING JURISDICTION

The Act provides ways to confirm lack of jurisdiction over an area or work:

- Determination of Non-Significance (a ruling the commission may make, according to the Act, after the public hearing on an Notice of Intent, “that the proposed activity does not require the imposition of such conditions....”). Rarely used.
- Request for Determination of Applicability (RDA) (available to any person wishing a ruling whether the Act applies to any land or activity or both). Very often used.
- So is another provision for an Order of Resource Area Delineation (ORAD). This process, in the DEP rules and not the Act, is popular to fix wetland type and location.





WETLANDS PROTECTION ACT LEGISLATIVE EXEMPTIONS

Exemptions can be afforded by legislation after the Act:

- Special Act of the Legislature for a particular project such as highway, bridge, or airport authorization.
- Provisions in bond authorization bills such as for funding a public project like sewer or water or other infrastructure.
- Provisions in appropriation laws such as so-called “side sections” of the annual state budget.



MINOR ACTIVITIES

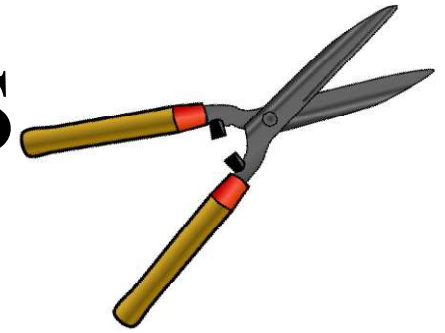
The February 2005 revisions to the Regulations introduced what amounts to a new exemption: a list of fairly simple activities exempt from review. They were promulgated because DEP felt these are quite common, usually insignificant, or even beneficial, and don't need to be regulated beyond the eligibility criteria set forth. They are not mentioned in the Wetlands Act.

Minor activities within the buffer zone and outside any areas specified in 310CMR 10.02(1)(a) through (e) are not subject to regulation under [M.G.L. c. 131, § 40](#):

- a. Unpaved pedestrian walkways for private use;
- b. Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;



MINOR ACTIVITIES

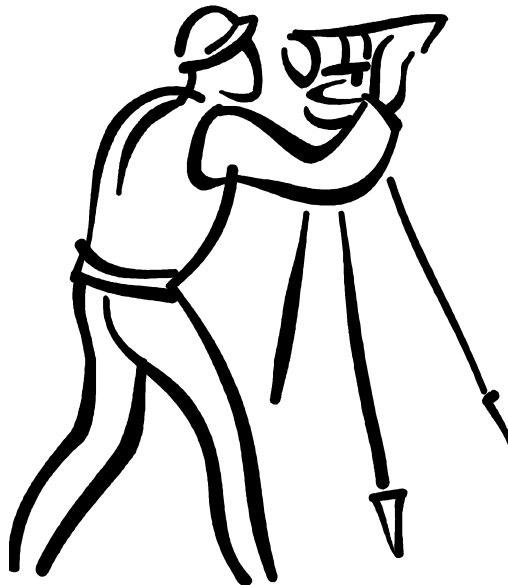


- c. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);
- d. Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;
- e. The conversion of lawn to uses accessory to residential structures such as decks, sheds, patios, and pools, provided the activity is located more than 50 feet from the mean annual high-water line within the riverfront area or from bordering vegetated wetland, whichever is farther, and erosion and sedimentation controls are implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);

MINOR ACTIVITIES (cont.)

- f. The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and
- g. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (*e.g.*, installation of monitoring wells, exploratory borings, sediment sampling and surveying).

310 CMR 10.02(2)(b)1



EMERGENCIES

An emergency exemption is in the Wetlands Protection Act, meaning the commission and DEP lack jurisdiction to regulate a qualifying emergency project. No formal application, public hearing, and permission are required.



HOME RULE WETLANDS BYLAWS

1. Overview

- Local permit program administered by the ConCom based on general bylaw and ordinance authority in G.L. c. 40 § 21 and Home Rule Amendment to the Massachusetts Constitution , Articles II and LXXXIX

2. Typical Municipal Bylaw

- Jurisdiction and procedure similar to Wetlands Protection Act but may clarify and expand jurisdiction and requirements beyond Act
- Usually fewer exemptions than those listed in Wetlands Protection Act
- Most bylaws allow public hearing on an application to be combined with Wetlands Protection Act hearing

HOME RULE WETLANDS BYLAWS (cont.)

3. Enforcement

- Typical cease and desist orders, site inspections, and permit revocation
- Traditional remedies for injunctions in Superior Court under the Citizen Suit Statute, G.L. Ch. 214, § 7A, and criminal prosecution
- Bylaws following the MACC model include the “ticketing” approach outlined in G.L. Ch. 40, § 21D



HOME RULE WETLANDS BYLAWS (cont.)

Appeals to Court / DEP

- A local decision rendered by the ConCom under a local bylaw is appealable by *certiorari*. The statute of limitations for such a court complaint is 60 days.
- Review is on the record, not *de novo*. There are no new witnesses.
- Appeal to the DEP is due as usual within 10 days of the date of issuance of the ConCom decision.
- An applicant seeking a permit who challenges a ConCom decision must be successful in both the DEP and Superior Court. A project opponent needs to be successful in only one forum.
- Plaintiff in court tries to prove legal errors apparent on record caused manifest injustice.

HOME RULE WETLANDS BYLAWS (cont.)

4. Legal Aspects

- Incorporates features of the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 and adds tougher procedures and standards
- Upheld in *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7, 393 N.E.2d 858 (1979)

5. Quasi-Judicial Process

- Find the relevant facts
- Apply the standards
- ConCom promulgates its own written rules under bylaws

6. Hearings and Permits

- Hear evidence at public hearing and decide based on record
- Set conditions which can be stricter than Act

7. Power to Deny

- If applicant fails to meet burden of proof, refuses reasonable ConCom information requests, meet performance standards, or meet conditions adequate to protect values
- Any decision must be supported by substantial evidence, after proper procedures, and not be an unconstitutional taking of property

The environmental aspects of real estate can be anticipated and managed professionally and successfully.

