Developments in Environmental Law 2023-2024

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1. ADMINISTRATIVE LAW

The conservative-dominated U.S. Supreme Court is proving to be an obstacle to progress as it relates to environmental law, overturning precedent by way of the “Major Questions Doctrine” — allowing courts to reject agency claims of a regulatory authority when the underlying claim of authority concerns an issue of “vast economic and political significance” and when Congress has not clearly empowered the agency with authority over the issue.

Cases like *Sackett v. EPA* and *West Virginia v. EPA* under the Major Questions Doctrine have the effect of lessening protection of wetlands and wetland resources by limiting what can constitute “waters of the U.S.” (*Sackett v. EPA*) as well as retroactively ruling against more comprehensive plans to better regulate greenhouse gas emissions (*West Virginia v. EPA*).

The *Chevron Doctrine* under the Administrative Procedure Act is also under attack and at risk of being overturned in the Supreme Court in the pending case of *Loper Bright Enterprises v. Raimondo*, which could remove agency deference to decide on matters initially governed by the Congress but later needing clarification due to legislative language being ambiguous. Stay tuned.

If *Chevron* is reversed, this would be a major development in administrative law. It would open a new and broad pathway for legal challenges to agency regulations. Complex issues usually left to specific agencies like EPA to parse out because of the agency's specialized knowledge would be left to the discretion of the judiciary.

This effectively would mean that federal courts would presume that Congress does not delegate to agencies such issues. This would bode ill for some long-established important mainstay environmental laws administered to EPA and many other agencies.

2. AIR POLLUTION

EPA strengthened standards on fine particulate matter under the Clean Air Act (CAA) National Ambient Air Quality Standards (NAAQS). In February 2023, after receiving nearly 700,000 written comments, the EPA finalized updates to its NAAQS as it relates to $PM_{2.5}$. Such standards have been in place for approximately 20 years without change.

The updates strengthen the annual health-based NAAQS for PM2.5 from a level of 12 micrograms per cubic meter (µg/m3) to 9 $\mu g/m^{3.5}$ Scientific evidence revealed that the previous standard of 12 $\mu g/m^3$ was insufficient to protect public health with an adequate margin of safety as required by the CAA.

Other particulate matter standards, like those for PM_{10}, will remain unchanged under the final rule.

Particles 10 micrometers in diameter or smaller are known as PM_{10}, and those particles 2.5 micrometers or smaller are known as $PM_{2.5}$, and it is the latter of the two that pose the greatest health risks to humans and the environment.

3. ARTICLE 97

Massachusetts has codified in the *Public Lands Preservation Act* (PLPA), effective February 2023, the administrative process, documentation, and criteria for proposing a transfer or change of use of public natural resources lands, waters and other real estate interests (commonly called open space and parklands but actually much broader) protected by *Article 97 of the Amendments to the Massachusetts Constitution*.

This new law, formally titled An Act Preserving Open Space in the Commonwealth, is on the books now. Implementing regulations from EOEEA are due and expected by August 2024.

Public and private landowners, property managers, facility operators, open space stewards, funding agencies, and the boards with care and control of "Article 97 Lands," and their legal counsel involved in projects and transfers, take note of the 2023 EEA Guidelines and Portal for proposals and submittals on "Article 97 Actions."

In summary the PLPA obligations include a written notification to the public and the Commonwealth, finding of necessity, alternatives analysis, replacement land, funding arrangements, any proposed funding-in-lieu of replacement, natural resource report, appraisal report, any waivers sought, approvals by public agencies, and submission of the authorizing legislation with some of that documentation to accompany it.

The PLPA was first proposed over 20 years ago to strengthen and codify the state-announced goal of No Net Loss, which had been set by administrative policy, generally providing that Article 97 land to be transferred or changed as to use must be replaced with land of equivalent financial and natural resource value. The EEA issued and oversaw implementation of that policy.

EEA will issue the initial form for projects to use to start the public notification and all the documentation and EEA findings needed for passage of a bill in the Legislature for an Article 97 transaction or change of use.

4. CAPE COD SEPTICS

MassDEP has targeted Cape Cod's nitrogen pollution with new watershed and septic system rules.

Effective July 7, 2023, 314 C.M.R. § 21.00 designated 30 watersheds on Cape Cod as "Nitrogen Sensitive Areas." Such communities have two years to opt into the watershed permitting process with plans to address nitrogen pollution and restore estuaries.

Failure to obtain a watershed permit within those two years will require new septic systems in nitrogen-sensitive watersheds to include enhanced nitrogen-reducing treatment technology.

Basically, MassDEP using its state Clean Water Act authority has required the 11 towns on the Cape to remediate the excess nitrogen in Cape Cod waters. In communities that do not do so, owners of septic systems will have new obligations to meet within deadlines a few years out.

Note that there are some stressed watershed designations effective immediately, timetables and options for actions applicable to Cape Cod towns, and retrofit requirements that will apply to septic system owners depending on what town they are in, what watershed, and what is their septic systems' level of nitrogen compliance.

A given community may seek exemption from the requirements by filing a Notice of Intent (to secure a Watershed Permit), an application for a Watershed Permit, or a De Minimis Nitrogen Load Exemption.

Septic system owners within Nitrogen Sensitive Areas already designated in these regulations will need to add nitrogen removal to their Title 5 systems within seven years from when these regulations took effect.

5. CLIMATE

The Massachusetts Climate Law, entitled *An Act Creating a Next-generation Roadmap for Massachusetts Climate Policy*, set ambitious statewide limits on emissions to achieve net zero by 2050. With interim emissions reduction goals, this statute should revitalize the need for quick climate solutions and collaborative processes across all sectors.

Massachusetts right now is focused on climate resiliency, a proactive effort to protect communities, critical assets, and natural resources from the vulnerabilities associated with flooding, coastal storms, and other natural hazard events.

As just one example, as of this writing MassDEP has prepared to issue under the *Wetlands Protection Act* and Chapter 91, for the first time, performance standards for doing work in the Resource Area known as Land Subject to Coastal Storm Flowage.

6. DRINKING WATER WELLS

The state has no specific law regulating private wells. It does, however, publish guidelines for local boards of health to use in their regulation of these sources.

In addition, the state regulates well drillers and has other laws that are applicable to private water supply systems. The major intent of these laws and guidelines is to ensure that users of private wells have safe water to drink and that the wells themselves are protected from contamination.

MassDEP's private well guidelines were last updated by the DWP in February 2023. See https://www.mass.gov/private-wells

The purposes of these guidelines are to encourage boards of health to follow certain procedures, preferably through adopting regulations; to assist drillers and diggers; and to inform private well owners, developers, and other interested persons in order to provide some consistency across municipal boundaries.

7. ENVIRONMENTAL JUSTICE

On the federal level, environmental justice considerations are being more heavily applied to staffing, programs, rulemaking, permitting, enforcement, cleanups, grants, and education.

The Biden administration has prioritized justice and equity across all federal agencies through funding initiatives, personnel, policies, enhanced public participation, and other EJ-related efforts.

The Inflation Reduction Act (IRA) and the Bipartisan Infrastructure Law also included significant funding for EJ-related initiatives, which agencies are now working to implement.

Massachusetts is focused on renewable energy and energy efficiency, as well as a strong prioritization of environmental justice. The transition to a clean energy economy while ensuring all residents of the state are equally benefitted from this new standard of living is known as a “just transition” and is a key focus of Massachusetts moving forward.

Massachusetts adopted its first ever comprehensive environmental justice strategy (EJ Strategy) directing all EOEEA agencies to develop their own EJ strategies to ensure that the principles of EJ and equity are embedded into the work of EOEEA and its agencies when implementing their agendas and when transitioning to a clean energy economy.

The EJ Strategy explains how EOEEA agencies plan to incorporate industry-specific EJ policies into their missions.

The 2024 EJ Strategy is to ensure that the principles of EJ and equity are embedded into the work of EAA and its agencies when implementing their agendas.

It is essentially a roadmap for EEA and its agencies to achieve such a just result and to reverse the environmental burdens that have historically plagued lower-income communities and communities of color.

8. HOME RULE PREEMPTION

If a conservation commission relies on a bylaw provision that is not stricter than state law, it risks having its decision superseded on appeal by the MassDEP. The same thing can happen if a commission relies on the Act or MassDEP regulations rather than its local provisions.

We term this consequence, “Use it (Home Rule) or lose it.” The issue came before the SJC in *City of Boston v. Conservation Commission of the City of Quincy*, SJC No. 13244, July 25, 2022 (LW 10-092-22).

The issue for the SJC as usual was whether MassDEP's order supersedes the Commission's local ordinance denial decision disapproving the Long Island Bridge rebuild. The Commission argued that it relied on its ordinance's reference to "cumulatively adverse effect[s] upon wetland values," and that this language is more stringent than the language in the Act.

Several cities and towns have this “cumulative effects” language in their Home Rule wetland protection bylaws and ordinances and sometimes take heart that the *Cave Corp.* case validates that wording and lets commissions consider and rely on it in evaluating and acting on projects. The lesson from the *Boston-Quincy* case, as we will shortly see, is that it matters whether they merely invoke it or actually utilize it.

As the Quincy Commission did not couch its stated concerns on wetland interests different than the Act, did not base its findings on any Regulations other than those of MassDEP, did not raise issues other than those within the purview of MassDEP, and did not have an ordinance stricter than the Act except in its general purpose and scope language, the Quincy denial was preempted. That made it null and void, hence MassDEP’s permit governs the wetland aspects of the Long Island Bridge reconstruction.

9. MBTA COMMUNITIES ZONING

In 2020, as part of an omnibus infrastructure and development act and in response to the acute need for housing in Massachusetts, the Legislature added Section 3A to the Zoning Act, G.L. c. 40A, titled “Multi-family Zoning as-of-Right in MBTA communities” which applies to 177 municipalities but does not include Boston (where the Zoning Act does not apply).

Any city or town served by the Massachusetts Bay Transportation Authority (MBTA) is required to have at least one zoning district “of reasonable size” in which multi-family housing is allowed as of right. The multi-family housing district cannot contain age restrictions and must be “suitable for families with children.”

The district must have a minimum gross density of 15 units per acre, subject to limitations of the Wetlands Protection Act and Title 5 of the State Environmental Code, and be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal, or bus station. G.L. c. 40A, § 3A.

An MBTA community that does not comply with this provision shall not be eligible for funds from the Housing Choice Initiative, the Local Capital Project Fund, the MassWorks infrastructure program, or the HousingWorks infrastructure program. Id.

The Executive Office of Housing and Livable Communities (EOHLC; formerly the Department of Housing and Community Development), in consultation with the Executive Office of Economic Development, the MBTA, and the state Department of Transportation, was directed to promulgate guidelines to determine whether a community has complied with this law. Id. The EOHCL issued draft guidelines in 2021 and final guidelines in 2022.

On March 15, 2023, the Massachusetts' Attorney General issued an Advisory that "[a]ll MBTA Communities must comply with the Law . . . MBTA Communities cannot avoid their obligations under the Law by foregoing this funding."

10. MUNICIPAL HARBOR PLANS

In July 2022, the Supreme Judicial Court held that certain provisions in MassDEP's Waterways Regulations that allowed the Secretary to substitute regulatory standards to approve Municipal Harbor Plans (MHPs) were an improper delegation of MassDEP's public trust authority. *Armstrong v. Sec'y of Energy & Env't Affs,* 490 MASS. 243, 256 (2022).

To ensure that existing licenses approved in the past contingent on such substitute standards remained valid, MassDEP amended its regulations in 2022 to formally incorporate and approve existing MHP substitutions and offsetting measures. 310 CMR 9.02, 9.57.

At present 17 MHPs have been approved by MassDEP and incorporated into the Waterways Regulations. 310 C.M.R. § 9.57(1)(a)-(q).

11. NEPA

On May 1, 2024, the White House Council on Environmental Quality (CEQ) issued its "Phase 2" final NEPA rule, finalizing revisions to the CEQ regulations for the implementation of the National Environmental Policy Act (NEPA).

Phase 2 represents a major sea change for projects and parties whose actions and activities are subject to NEPA’s environmental reviews.

This means that NEPA is no longer seen as merely a procedural “disclosure” or “study it first” statute, rather recognizing it as a fundamental charter for environmental protection.

As a result, the Phase 2 rule introduces directives aimed at enhancing environmental outcomes, advancing climate change mitigation, bolstering resiliency, and safeguarding communities with environmental justice concerns.

The revised regulations highlight several major changes:

- Recasts NEPA's purpose less as procedural and more as a planning tool to actually bring about positive environmental and social outcomes;
- Minimizes impact on environmental justice communities, addresses climate change, and builds ecosystem resilience.
- Streamlines the NEPA process and documentation to be more efficient, e.g., page and time limits for environmental assessments (EA) and environmental impact statements (EIS).

- Rigorous investigations of alternatives and mitigation strategies will be necessary to support Findings of No Significant Impact (FONSIs) for environmental assessments.

- Specific attention will be required for climate change, environmental resiliency, Tribal treaty rights, and communities with environmental justice concerns.

- The range of considered alternatives will need to expand to include those that minimize impacts on the human environment.

12. PFAS

EPA issued a final rule in April 2024 listing two ubiquitous “forever” PFAS chemicals -PFOA and PFOS- as hazardous substances under Superfund (CERCLA).

The listing triggers reporting, testing, cleanup, and monitoring responsibilities for arrangers, transporters, treaters, disposers and other Potentially Responsible Parties (PRPs), including manufacturers, users, and property owners and managers, under Superfund’s strict, joint and several, and retroactive liability features.

Accordingly, the listing will affect real estate site assessments, Due Diligences in purchases, environmental audits, Innocent Landowner status, existing Superfund sites (and reopeners at closed sites), and those buying, selling, leasing, lending or investing in dirty property.

Earlier that month EPA announced its final new drinking water standards under the Safe Drinking Water Act (SDWA) for six PFAS compounds.

These new Maximum Contaminant Levels (MCLs) mean that public water systems (PWSs) nationwide must now sample for, monitor, and remove these chemicals that typically require them to install new treatment treatments and methods.

The states appear to be following the federal lead and then some, meaning even tougher limits, including Massachusetts.

MassDEP in recent years amended its public drinking water regulations, 310 C.M.R. § 22.00, to address Per- and Polyfluoroalkyl Substances (PFAS). Specifically, MassDEP has established a public water drinking standard of 20 parts per trillion (ppt) for the sum of six PFAS compounds, together with specific standards for the clean-up of each of the six PFAS in soils. EPA also proposed federal drinking water regulations to establish a standard for PFAS, at the significantly lower level of 4 ppt.

13. PRIOR PUBLIC USE

Carroll v. Select Board of Norwell (SJC-13410, January 5, 2024) ruled on local land dedication under the Prior Public Use Doctrine.

This case upheld Norwell's designation of land for affordable housing, rejecting an attempt by residents to transfer the property to another purpose without the Select Board's determination under G.L. c. 40, Section 15A that the land was no longer needed for affordable housing purposes.

The SJC framed the test governing control of a public property, surveyed its jurisprudence, explicated the doctrine of Prior Public Use, navigated facts determining dedication of land, and limned Article 97 of the Amendments to the Massachusetts Constitution as analogous and illustrative.

"The issue on appeal is whether the totality of the circumstances test articulated in *Smith v. Westfield*…applies to the determination whether land is 'held by a city or town…for a specific purpose' under G. L. c. 40, § 15A. "

“In support of our conclusion, we draw upon the common-law doctrine of prior public use. The prior public use doctrine protects all public land, resolving potential disputes over intergovernmental transfers. Under that doctrine, land devoted to one public use cannot be diverted to another, inconsistent public use without plain and explicit legislation authorizing the diversion.”

On that common law foundation, the Court regards both Section 15A and Article 97 as codifications of the prior public use doctrine, developed in our common law as a means to resolve potential conflicts over the use of public lands between various governmental entities.

Noting that case law is scarce on the standard for assessing specific-use designations under Section 15A, the SJC says it regards Article 97 as imposing a “corresponding standard” and so prior Article 97 cases “provide a useful framework for determining specific municipal use designations under § 15A.”

The SJC cites *Mahajan v. Department of Environmental Protection*, 464 Mass. 604 (2013) for its proposition, applied in *Westfield*, that land can become after-dedicated by actions evidencing that intent by a municipality.

The Count in passing resolves a prior point of confusion and contention on the mechanics of dedication, arising from interpretation of *Hanson*: “To be clear, the court in Selectmen of Hanson did not adopt… a bright-line rule requiring towns to file deed restrictions or transfer control of property to specific entities in order to hold it for a specific purpose under G. L. c. 40, § 15A.”

This language eliminates a common misperception stemming from the Hanson case, leading some to think a deed transfer between town entities is needed to dedicate a piece of property. Not so.

14. REGULATORY TAKING

Tyler v. Hennepin County, MN 598 U.S. 631 (2023) ruled that taxation laws and practices can be targeted as Regulatory Taking claims, leading to the popular meme “Home Equity Theft.”

Tyler owned a condominium that accumulated about $15,000 in unpaid real estate taxes along with interest and penalties. The County seized and sold it for $40,000, keeping the $25,000 excess over Tyler's tax debt.

Tyler sued, alleging the County unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment.

The Supreme Court unanimously ruled Tyler plausibly alleged the County's retention of the excess value violated the Takings Clause, and thus was an unconstitutional Regulatory Taking.

Noteworthy takeaways

Tyler's claim the County illegally appropriated sale surplus constitutes classic pocketbook injury sufficient to give her standing.

Court rejected the County's argument Tyler had relinquished any interest in the surplus equity in her home due to her failure to pay property taxes.

Whether the remaining value from a tax sale is property protected under the Takings Clause depends on state law, “traditional property law principles,” historical practice, and the Supreme Court's precedents.

History and precedent dictated that, while the County had the power to sell Tyler's home to recover the unpaid property taxes, it could not use the tax debt to confiscate more property than was due.

Doing so effected a “classic taking in which the government directly appropriates private property for its own use.”

Today 36 states and the federal government require excess value be returned to the taxpayer whose property is sold to satisfy outstanding tax debt. Supreme Court precedents long recognized that a taxpayer is entitled to the surplus in excess of the debt owed.

States have long imposed taxes on property, not themselves a taking, but a mandated “contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords.”

After enunciating these findings and rulings, the Supreme Court quipped: “The taxpayer must render unto Caesar what is Caesar's, but no more.”

The Supreme Court thus has taken its Regulatory Taking jurisprudence into the realm of state and local real estate taxes, resulting in several states moving to cure any constitutional infirmities. As of this writing there are several curative bills in the Massachusetts Legislature and cases are pending in the lower courts.

15. STORMWATER

MassDEP's Stormwater Management Handbook and Stormwater Report Checklist can be found at https://www.mass.gov/guides/massachusetts-stormwater-handbook-and-stormwater-standards.

An updated Stormwater Management Handbook is currently being drafted. Regulations relating to wetlands, stormwater, and certifications under 310 C.M.R. § 10.00 and 314 C.M.R. § 9.00 will likely be amended to conform to the new Stormwater Management Handbook. The public comment period ended March 1, 2024.

Once new regulations are promulgated there will be a 6-month "amnesty" period whereby projects submitted during that time will not be subject to the new stormwater requirements. MassDEP's Draft Stormwater Management Handbook can be found at https://www.mass.gov/doc/massachusetts-stormwater-management-handbook/download

16. SUPERFUND

Current and prospective property owners who may wish to be able to invoke certain legal defenses to liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) should be aware that the EPA has amended its regulations governing such defenses.

The update to EPA's so-called All Appropriate Inquiries (AAI) regulations, 40 CFR Part 312, was announced in a Final Rulemaking published in the December 15, 2022 Federal Register.

Engineers and consultants, property owners and managers, buyers and sellers, lenders and investors, commercial and industrial tenants, attorneys and their clients, and others who wish to find safe harbor from certain Superfund liabilities, will be attending to the new clarity and objectivity in the All Appropriate Inquiry part of their Due Diligence.

AAI is essentially a prerequisite to claiming protection from CERCLA liability as an “innocent” landowner, abutting property owner, or prospective purchaser. The AAI regulations govern Due Diligence standards and practices used in evaluating environmental conditions at a site, which may impact responsibility and/or liability for contamination for the property.

Effective February 13, 2023, the AAI regulations incorporated the current ASTM E1527-21 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.” The Final Rulemaking incorporates the current standard (E1527-21) for entities attempting to qualify for CERCLA liability protections by conducting AAI.

EPA did include a sunset clause for landowners who have already begun Phase I investigations using the prior ASTM E1527-13 standard. The amended regulations allow for use of that old standard until December 15, 2023, or one year from publication of the Final Rule.

17. WATER MANAGEMENT ACT

The Massachusetts Water Management Act, G.L. c. 21G, in 1986 replaced the prior common law–based system of water allocation. It protects water resources for a variety of public purposes and authorizes state regulation of major (100,000 gallons per day or more) withdrawals of water from both groundwater and surface waters.

The Act is a companion to the 1983 Interbasin Transfer Act, which regulates water withdrawals and wastewater discharges crossing river basin boundaries. Both laws are aimed at comprehensive state management and protection of water resources.

After January 1, 1988, registration statements were not accepted. Withdrawals that should have been registered, but were not, require a permit. Permits are required for any withdrawal after January 1, 1986, including increases from registered sources, over the threshold volume.

Registrations must be renewed every ten years. The regulations at 310 C.M.R. § 36.07 authorize conditions on registered withdrawals. Initially, MassDEP included conditions requiring metering and other recordkeeping and reporting measures.

In 2007, MassDEP included additional conditions requiring the implementation of conservation measures consistent with the state water conservation standards adopted by the Water Resources Commission under Section 3 of the Act.

When registrants challenged MassDEP's authority to impose these conditions, the SJC ruled that MassDEP must promulgate regulations in order to implement them. *See Fairhaven Water Dep't v. Mass. Dep't of Envtl. Prot.*, 455 Mass. 740, 751 (2010).

In 2023, MassDEP promulgated amendments to the regulations to include new conditions for registrations restricting nonessential outdoor water use during periods of drought. These restrictions were incorporated into registrations during the 2023 renewal.

18. WETLANDS--FEDERAL

The case of *Sackett v. U.S. Environmental Protection Agency,* No.21-454, 2023 WL 3632751 (U.S. May 25, 2023) redefined what is a federal wetland for purposes of regulation.

The Supreme Court sharply limited the scope of protection for the nation's waters under the federal Clean Water Act (CWA), redefining the CWA's coverage of "waters of the United States," hotly contested since the Court's previous decisions and EPA's regulatory expansion of what adjacent wetlands are included.

This amounts to repudiation of the EPA and U.S. Army Corps of Engineers (COE) WOTUS rule issued December 2022, which had clarified federal jurisdiction over wetlands adjacent to navigable waters.

Sackett states that the CWA extends protection and permit requirements only to those waters that are described "in ordinary parlance" as "streams, oceans, rivers, and lakes," and to wetlands only if those wetlands have a "continuous surface connection" to such waters "making it difficult to determine where the water ends and the wetland begins."

The Supreme Court stated its central tenet: “We hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right,’ so that they are ‘indistinguishable’ from those waters.”

In effect, the Supreme Court has decided that polluting or filling many types of wetlands does not need EPA and COE permits as they are not governed by the CWA. They do not constitute what are termed “federal wetlands.”

Sackett turns on whether the included wetlands are “adjacent” to the water, or must they be “adjoining.” While all nine justices concurred in the judgment, they are split over the definition of “adjacent.”

Justice Alito, writing for the majority, acknowledged that “[d]ictionaries tell us that the term ‘adjacent’ may mean either ‘contiguous’ or ‘near,’” but he nonetheless decided that the word “adjoining” is what Congress meant.

Justice Alito responded that Congress must use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the government over private property.”

Justice Kagan rejoined: “Today’s pop-up clear-statement rule is explicable only as a reflexive response to Congress’s enactment of an ambitious scheme of environmental regulation. It is an effort to cabin the anti-pollution actions Congress thought appropriate.”

What have been lost, legally, are waters previously under EPA and COE jurisdiction under the prior WOTUS definitions, now no longer federally regulated.

At the least this decision means that those who would have been subject to permit requirements will be able to fill in or discharge pollutants, without needing federal permits what are “non-federal” ditches, gullies, potholes, arroyos, and seasonal wetlands, ephemeral streams, and isolated marshes—hydrological features that, scientists say, are crucial for maintaining the well-being of watersheds as a whole.

19. WETLANDS--STATE

MassDEP is to promulgate during 2024 a comprehensive suite of new regulations to deal with climate change in the form of storms, flooding, and sea level rise. They will affect three related regulatory and policy programs.

These changes and the policies behind them have been long in the works, since the MassDEP regulations lacked since 1978 and 1983 any specified performance standards for Land Subject to Coastal Storm Flowage.

Now the science of climate change, the need for climate adaptation, mitigation and resilience, and the urgency of public health, safety, and the environmental considerations press the point.

These new rules will amend 310 CMR 10.00: Wetlands Protection, and 314 CMR 9.00: 401 Water Quality Certification for Discharges of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth; and 310 CMR 9.00: Waterways (including Tidelands and Great Ponds).

MassDEP has two main objectives:

Promote coastal resiliency against worsening impacts of storms, flooding, and sea level rise through

- First-time standards to protect the coastal floodplain (Land Subject to Coastal Storm Flowage or “LSCSF”) from damage, which will help to maintain its natural capacity to protect structures and properties from storm damage and sea level rise
- Provisions to support resilient shorelines, roadways, and water dependent uses and to allow scientific test projects to study effects of climate change

Promote resiliency against increasing flooding, storm damage, and runoff pollution through updated stormwater management standards by

- Incorporating current science and data for better rainfall estimates into updated stormwater management rules and replace outdated (60-year-old) precipitation data
- Improving consistency between state regulations and EPA stormwater permit
- Encouraging use of nature in design (“environmental design”) through seven cost-effective green design credits in lieu of built structures

20. WETLANDS—DEADLINES

The SJC has instructed Conservation Commissions procedurally if missing statutory deadlines could be fatal. Local wetlands bylaw (or ordinance) jurisdiction over projects in and near resource areas depends on Commission compliance with the 21-day deadlines for commencing public hearings and issuing decisions on Notices of Intent (NOI).

Those timing provisions in the state Wetlands Protection Act (the Act) are binding on the Commission, with failure to meet them potentially fatal to any decision the Commission may render.

The two seminal cases on timing in wetlands protection jurisprudence are *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007) and *Boston Clear Water Company, LLC v. Town of Lynnfield,* No. 21-P-166, 100 Mass. App. Ct. 657 (Mar. 23, 2022).

Recall a Commission loses its “Home Rule” wetland bylaw control (with the result that the applicant has no need for the local permit) if it fails to issue its denial, permit or other decision by the deadline of 21 days from the close of the public hearing and the applicant appeals this inaction to the DEP under the Act. That is the SJC’s 2007 *Oyster Creek case.*

Per the Massachusetts Appeals Court’s decision in the 2022 *Boston Clear Water* case, the Commission likewise loses its control, and the applicant does not need the local wetlands permit, if the Commission fails to convene the public hearing by the deadline of 21 days from the NOI being filed and the applicant appeals to DEP under the state Act. This is no matter what is the eventual result of any Commission hearing.

The upshot of either untimely default by the Conservation Commission is that the project is no longer subject to the municipal bylaw and, in most situations where this comes up, the only wetlands permit needed for an applicant’s project is the Order of Conditions from the DEP on appeal under the state Act.

QUESTIONS & DISCUSSION

McGregor Legere & Stevens PC