

**MCGREGOR  
LEGERE & STEVENS PC**

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# **LAWS GOVERNING APPLICATIONS FOR WETLAND PERMITS & DETERMINATIONS**

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# Massachusetts Wetlands Laws, Regulations, Policies

- ▶ State Level
  - ▶ Wetlands Protection Act (“WPA”), M.G.L. ch. 131, § 40
  - ▶ Administered by: Conservation Commissions and Dept. of Environmental Protection (“MassDEP”)
  - ▶ Wetland Regulations (310 CMR 10.00)
- ▶ Municipal Level
  - ▶ Wetlands Protection Bylaw or Ordinance
  - ▶ Administered by: Conservation Commissions
  - ▶ Wetland Rules & Regulations
  - ▶ Must be more stringent than WPA
- ▶ Courts Interpret All!

# Massachusetts Wetlands Laws, Regulations, Policies (Cont.)

- ▶ The WPA and Bylaws/Ordinances give MassDEP and Conservation Commissions authority to enact regulations
- ▶ Regulations:
  - ▶ Help carry out purpose of statute/bylaw/ordinance;
  - ▶ Provide more details on procedures + standards;
  - ▶ Provides clarification (if needed); and
  - ▶ Establishes specific requirements or performance standards
- ▶ Regulations
  - ▶ Cannot exceed Statute/Bylaw/Ordinance
  - ▶ Enforceable
- ▶ A Policy is not enforceable if not grounded in a Bylaw /Ordinance

# Conservation Commissions

- ▶ Conservation Commissions were established by M.G.L. ch. 40, § 8C.
- ▶ M.G.L. ch. 131, § 40 subsequently charged Conservation Commissions with local implementation of the WPA.
- ▶ Conservation Commissions are also responsible for permitting under any local non-zoning wetlands bylaw or ordinance.
- ▶ Hold quasi-judicial public hearings:
  - Adjudicatory in nature;
  - Schedule and continue hearings as Commission decides;
  - Make decisions based on document records at hearings.
- ▶ All 351 cities and towns in Massachusetts have established Conservation Commissions with the power to regulate many activities in, near or affecting wetland resource areas.

# Conservation Commission Duties

Massachusetts Wetlands  
Protection Act  
M.G.L. c. 131, § 40

Wetlands  
Protection  
Regulations  
310 CMR  
10.00

Local Wetlands  
Protection Bylaw or  
Ordinance

Local  
Wetlands  
Regulations  
& Rules

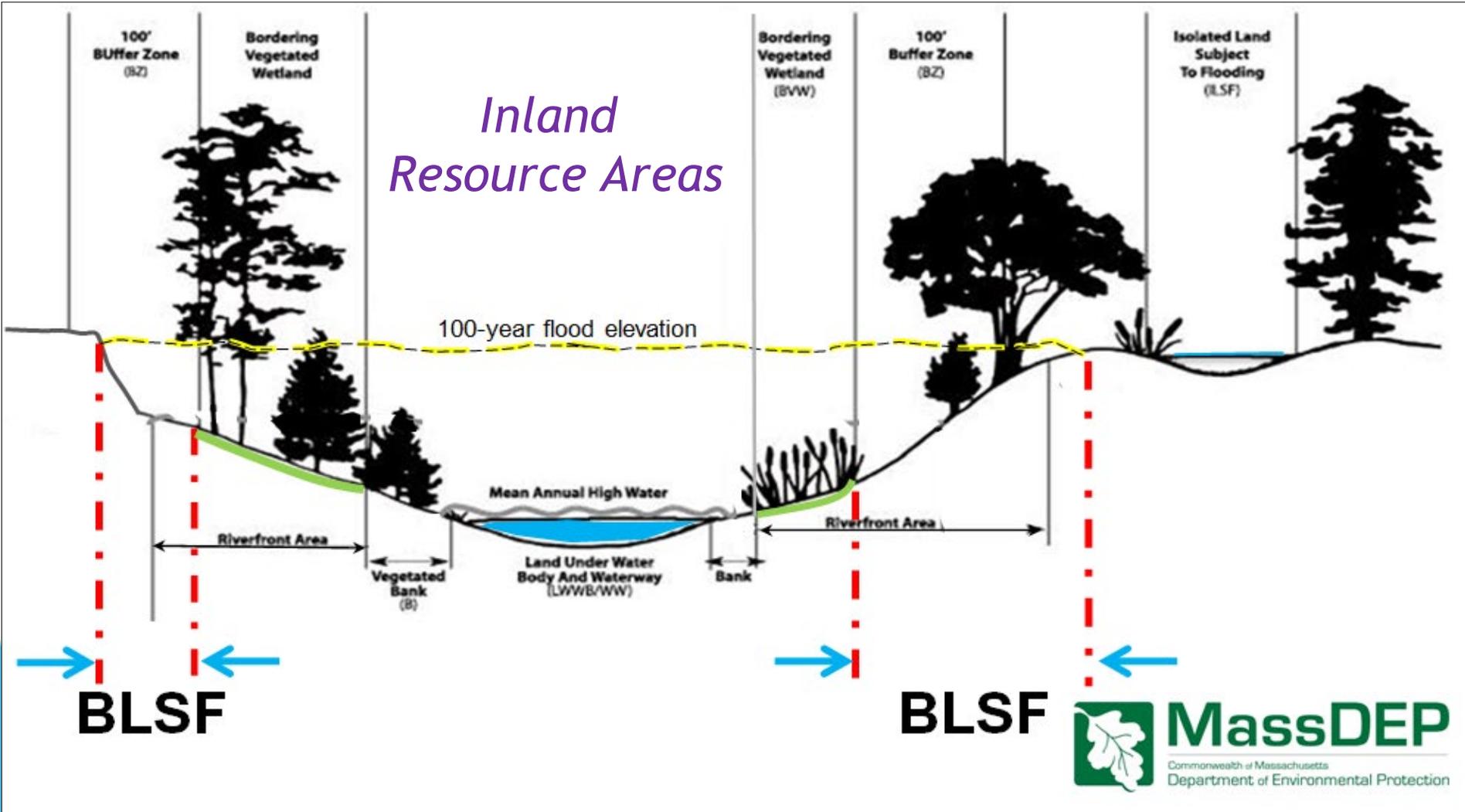
# Massachusetts Wetlands Protection Act

- ▶ The WPA and its Regulations, 310 CMR 10.01(2), protect nine important “interests” associated with wetland “Resource Areas”.
- ▶ Specifically, the WPA protects the following “interests”:
  - ▶ Private water supply;
  - ▶ Public water supply;
  - ▶ Groundwater supply;
  - ▶ Fisheries;
  - ▶ Prevention of pollution;
  - ▶ Protection of wildlife habitat;
  - ▶ Storm damage prevention;
  - ▶ Flood control; and
  - ▶ Land containing shellfish.

# Massachusetts Wetlands Protection Act

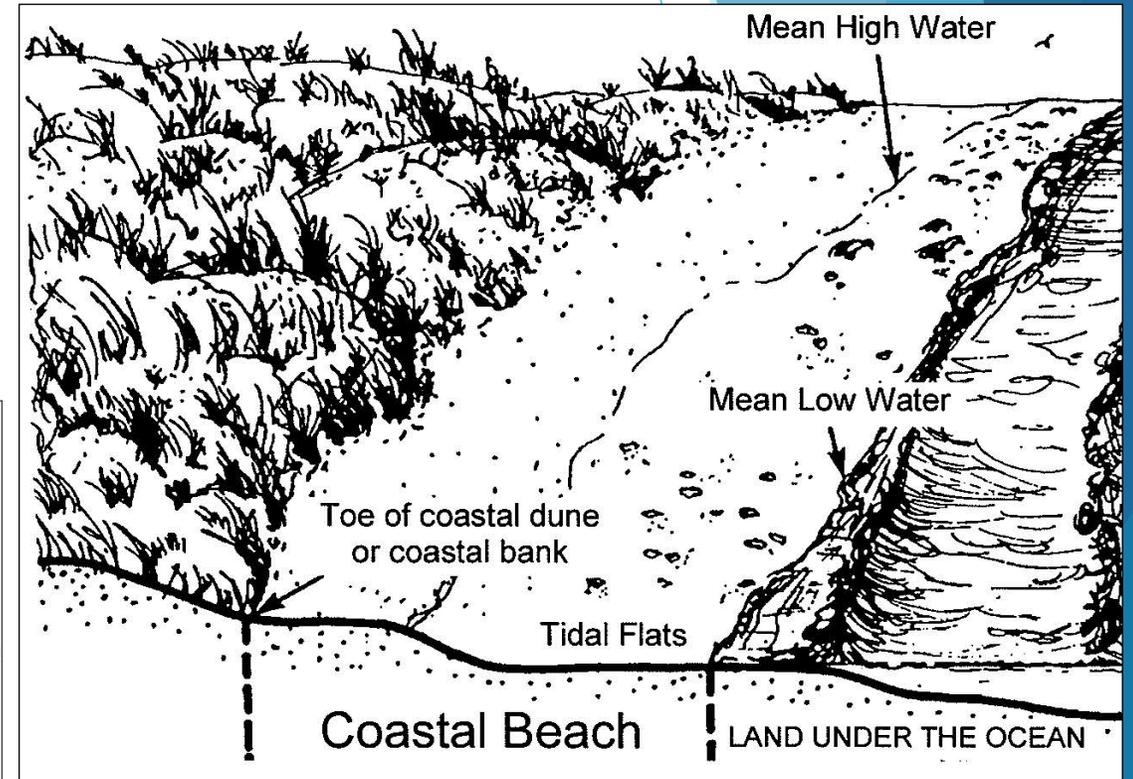
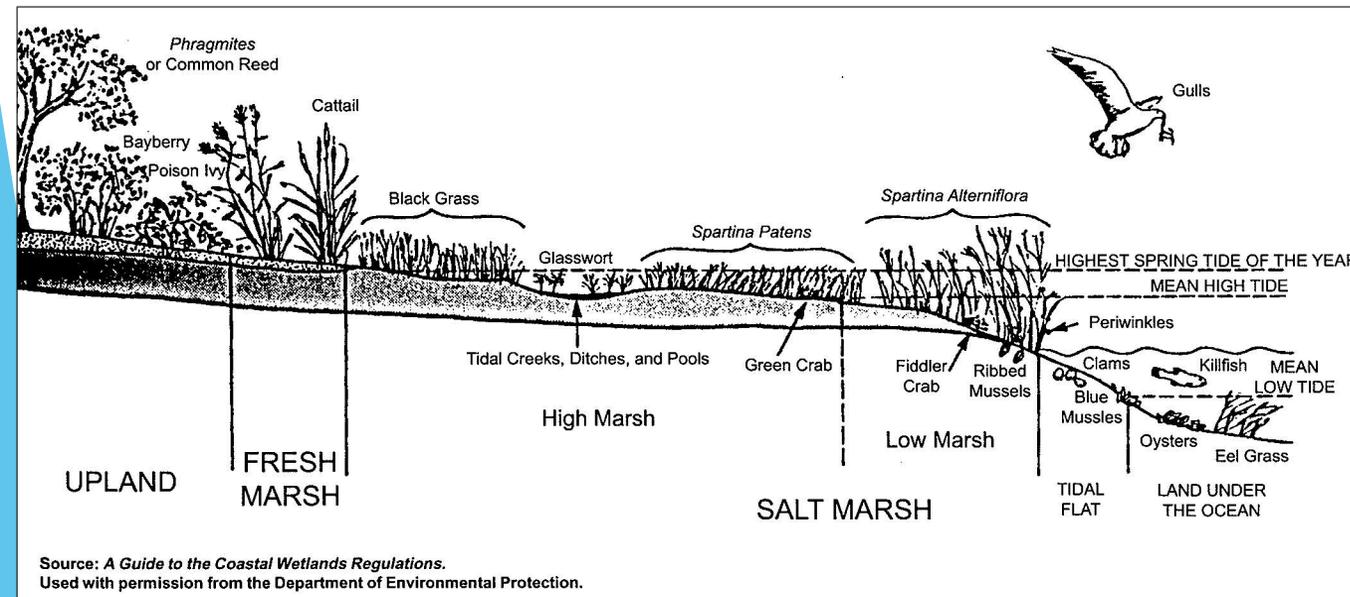
- ▶ M.G.L. ch. 131, § 40 provides that: “No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding ... .”
- ▶ These protected areas are known as “Resource Areas” or “Areas Subject to Protection under M.G.L. ch. 131, § 40”.
- ▶ Many Resource Areas also have a jurisdictional 100-foot “Buffer Zone” extending landward (or toward uplands) from their boundaries.

# Wetlands Protection - What's a Resource Area?

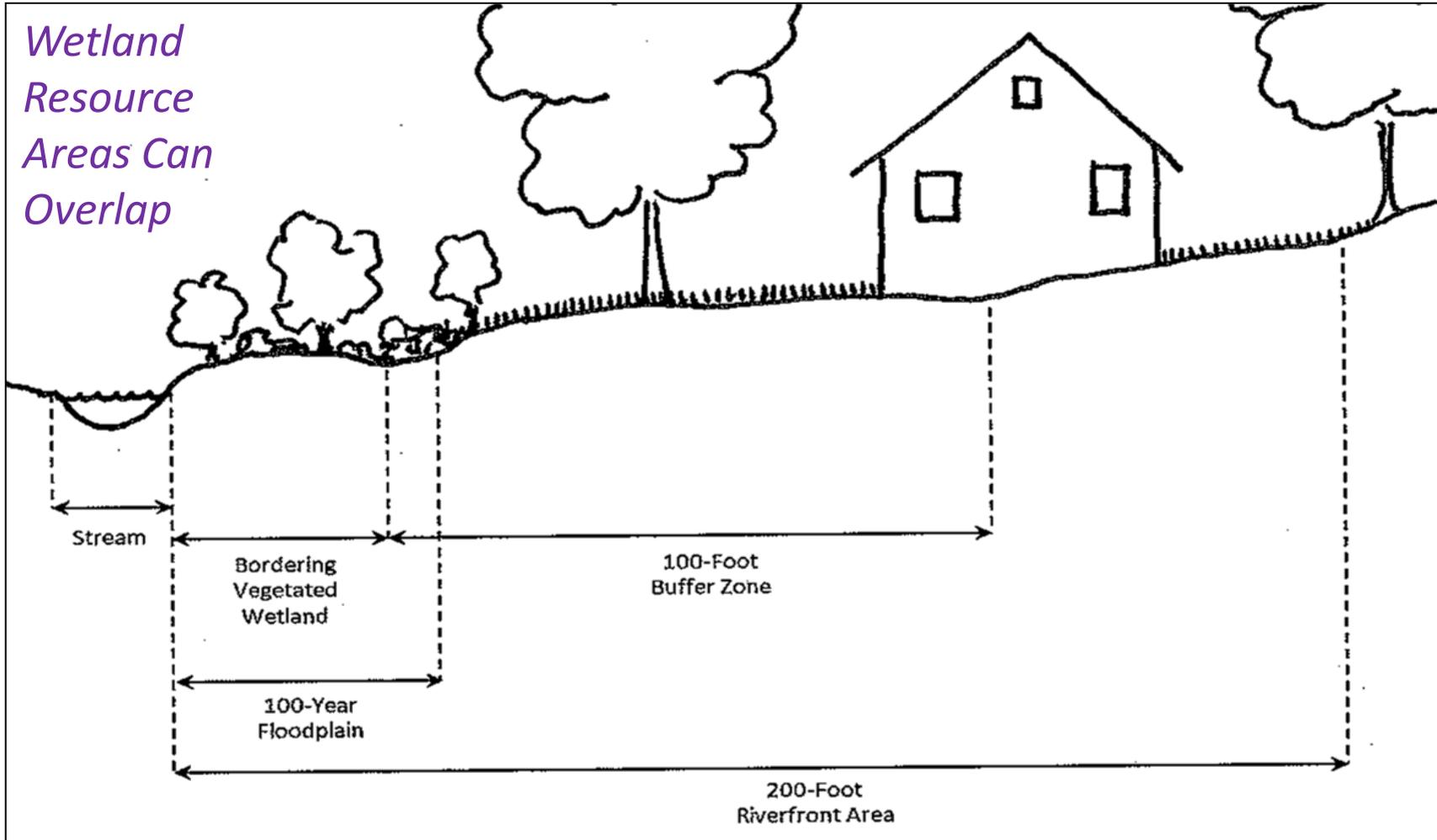


# Wetlands Protection - What's a Resource Area?

## Coastal Resource Areas



# Wetlands Protection - What's a Resource Area?



# Massachusetts Wetlands Protection Act

- ▶ The WPA Regulations, 310 CMR 10.04, broadly define “alter” as “to change the condition of any Area Subject to Protection under M.G.L. c. 131, § 40.”
- ▶ Examples of alterations include, but are not limited to, the following:
  - ▶ (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
  - ▶ (b) the lowering of the water level or water table;
  - ▶ (c) the destruction of vegetation;
  - ▶ (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.”

# Massachusetts Rivers Protection Act

- ▶ In 1996, the MA Rivers Protection Act was enacted. It regulates virtually all activities next to rivers and other flowing bodies of water. 1996 Mass. Acts c. 258.
- ▶ Essentially the Act added Riverfront Area to the Resource Areas protected under the WPA, thereby extending the jurisdiction of the WPA.
- ▶ 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.

# Home Rule Wetlands Protection Bylaw and Ordinances

- ▶ Derive from general bylaw and ordinance authority (G. L. c. 40 § 21) and Home Rule Amendment to the Massachusetts Constitution.
- ▶ Clarify and expand jurisdiction and requirements beyond WPA to be stricter than state laws.
  - ▶ For example, fewer exemptions than WPA, explicit authority to impose “no-touch” setbacks and mitigation.
- ▶ Typically allow for site inspections, violation notices, and enforcement orders. May include the “ticketing” approach outlined in G. L. c. 40, § 21D for non-criminal dispositions.
- ▶ Most allow public hearing to be combined with WPA hearing, with jurisdiction and procedure similar to WPA.
  - ▶ Appeals of decisions are to taken separately to MassDEP (WPA) and Court (Bylaw/Ordinance).

# Conservation Commission Proceedings

- ▶ Conservation Commissions consider several types of filings, including:
  - ▶ Abbreviated Notice of Resource Area Delineation;
  - ▶ Request for Determination of Applicability;
  - ▶ Notice of Intent.
- ▶ Conservation Commission issue decisions after a hearing on those filings called:
  - ▶ Order of Resource Area Delineation (“ORAD”);
  - ▶ Positive or Negative Determination of Applicability;
  - ▶ Order of Conditions.

# Conservation Commission Proceedings

- ▶ Conservation Commission will conduct a hearing, usually under both local and state law, within 21 days of receiving application.
- ▶ Commission must issue its decision within 21 days of the close of the public hearing.
- ▶ Before work may commence under an Order of Conditions:
  - ▶ Appeal period must lapse without challenge being filed; and
  - ▶ The Order must be recorded in the property's chain of title.
- ▶ Orders of Conditions and ORADs are generally valid for three years from the date of issuance, and may be extended.
- ▶ Conservation commissions will typically issue one decision which operates as state and local approvals or denials.
- ▶ Remember separate paths of appeal to challenge Commission's decision under state and local law.

# Conservation Commission Proceedings

- ▶ Conservation commission will be asked to issue a Certificate of Compliance to “close out” an Order of Conditions:
  - ▶ After work approved by an Order of Conditions has been completed;
  - ▶ If work is never performed and the permit expires;
  - ▶ May be a “Complete Certification” or a “Partial Certification”.
- ▶ Certificate of Compliance must be recorded at the Registry of Deeds.
- ▶ Certificate of Compliance may contain ongoing conditions.

# Conservation Commission

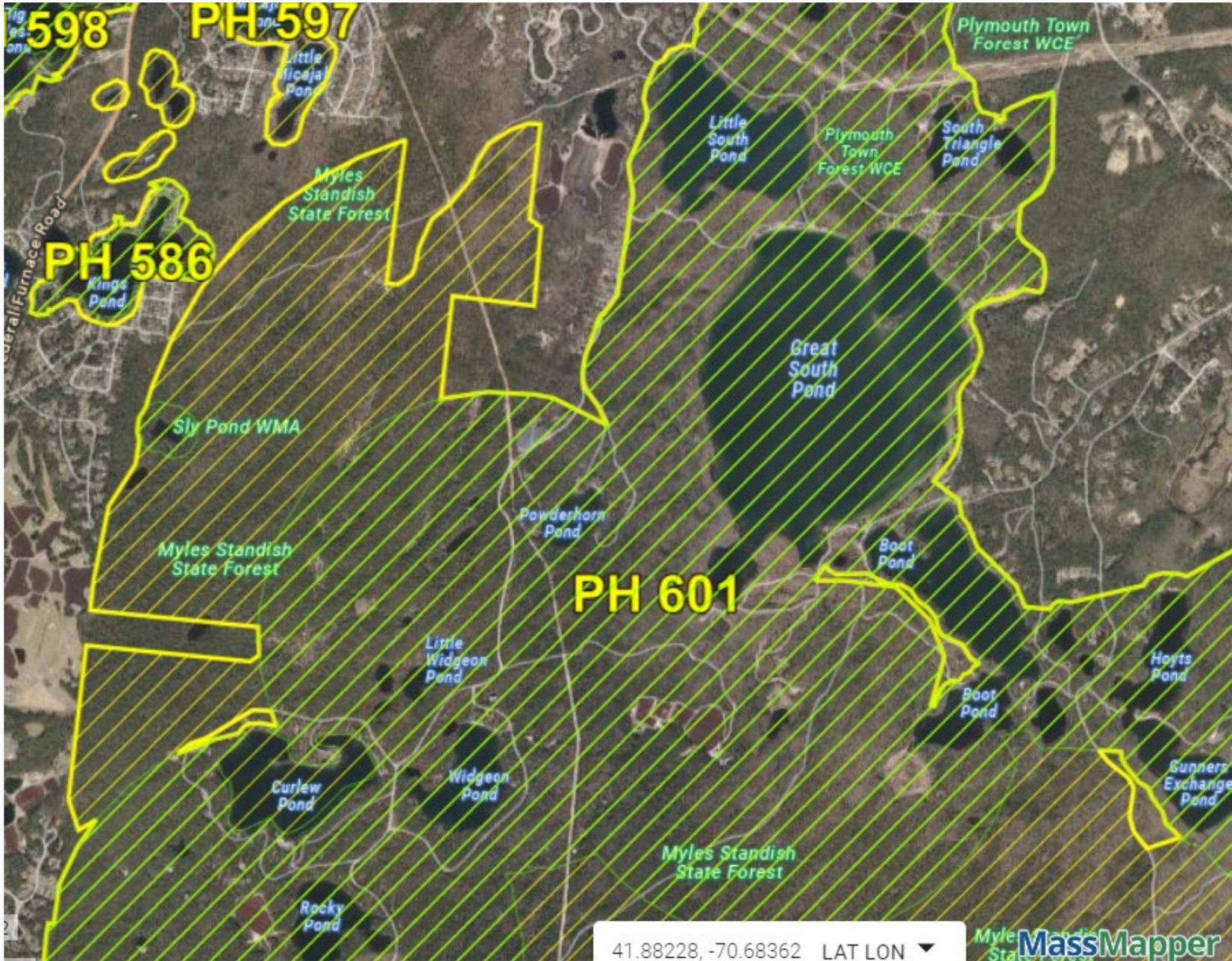
## Wetlands Protection - Permitting - Stormwater

- ▶ MassDEP Stormwater Management Standards:
  - ▶ 10 Standards;
  - ▶ Not applicable to single-family house;
  - ▶ Not applicable to four or fewer residential lot or unit development;
  - ▶ Not applicable to emergency repairs to roads or drainage systems
- ▶ Commission Determines Compliance During Wetland Permitting
- ▶ Municipal Stormwater Standards?

# Conservation Commission

## Wetlands Protection - Endangered Species

- ▶ Massachusetts Endangered Species Act, G.L. c. 131A:
  - ▶ Administered by: Natural Heritage & Endangered Species Program (NHESP);
  - ▶ Regulations: 321 CMR 10.00
- ▶ MESA Purpose:
  - ▶ Protect Endangered, Threatened, or Special Concern Species;
  - ▶ Plants and Animals;
  - ▶ Plus their Habitat;
  - ▶ By prohibiting at “take” of species or its habitat
- ▶ Mapped Priority Habitat and (subset) Estimated Habitat



Estimated  
Habitat &  
Priority  
Habitat



Estimated  
Habitat

# Conservation Commission

## Wetlands Protection - Endangered Species

- ▶ If Estimated Habitat:
  - ▶ Copy of NOI to NHESP
  - ▶ NHESP has 30 days to review
  - ▶ NHESP determines whether actual habitat
  - ▶ NHESP decides whether:
    - ▶ Adverse effects (WPA)
    - ▶ Take (MESA)

# *Oyster Creek Preservation, Inc. v. Conserv. Comm'n of Harwich, 449 Mass. 859 (2007)*

- ▶ Issue: Whether local wetlands protection bylaws and ordinances may expand or ignore the WPA's timing provisions.
- ▶ Facts:
  - ▶ On July 5, 2003, Oyster Creek Preservation, Inc. ("OCPI") filed a Notice of Intent to dredge Allen's Harbor Inlet on Cape Cod.
  - ▶ The Harwich Conservation Commission opened the public hearing on July 15, 2003.
  - ▶ With OCPI's consent, the hearing was continued to August 5, August 19, and September 16, 2003.
  - ▶ The Commission voted to close the hearing on September 16 but did not vote to approve or deny the project.

# *Oyster Creek Preservation, Inc. v. Conserv. Comm'n of Harwich, 449 Mass. 859 (2007)*

- ▶ Facts continued:
  - ▶ On September 29, 2003, the Commission received a letter from an attorney representing abutters which raised concerns about the effect of the project on abutting properties.
  - ▶ The Commission, at its September 30, 2003 meeting, unilaterally voted to re-open the hearing to accept the abutters' letter into the record. The Commission should have:
    - ▶ asked OCPI if it would agree to re-open the hearing, and then properly noticed the re-opened hearing; or
    - ▶ Explained to the abutters that the hearing had closed.
  - ▶ The Commission then voted to close the hearing (again) and proceeded to vote to deny the project.

# *Oyster Creek Preservation, Inc. v. Conserv. Comm'n of Harwich, 449 Mass. 859 (2007)*

## ▶ More Facts:

- ▶ OCPI appealed to MassDEP under the WPA on October 8, 2003, which was 22 days after the hearing was first closed on September 16, 2003.
- ▶ The Commission issued its decision on October 9 or 10, 2003. OCPI then appealed the Bylaw denial to Court.
- ▶ While the Court appeal was pending, MassDEP issued a Superseding Order of Conditions approving the project.
- ▶ A key question for the Court was when the Harwich Commission issued its denial Order of Conditions.
  - ▶ The SJC looked at the postmark date on the envelope, as provided by the state wetlands regulations (310 CMR 10.04).
  - ▶ The SJC counted the days from the first time the Commission closed the public hearing, September 16, 2003.

## *Oyster Creek Preservation, Inc. v. Conserv. Comm'n of Harwich, 449 Mass. 859 (2007)*

- ▶ Ruling: Commission's failure to issue a decision under its Bylaw within 21 days of closing the public hearing meant that DEP's approval Superseding Order of Conditions controlled.
- ▶ The SJC specifically rejected the argument that failure of a Commission to act within 21 days meant "constructive approval" of a project under municipal wetlands law.
- ▶ The Court noted that while constructive approval is part of many zoning or subdivision permitting laws, it is not provided in the WPA.
- ▶ The WPA's remedy is an appeal to MassDEP.

## *Oyster Creek Preservation, Inc. v. Conserv. Comm'n of Harwich*, 449 Mass. 859 (2007)

- ▶ Failure to abide by the WPA's statutory timelines implicates Home Rule authority.
- ▶ If Commission fails to issue decision within 21 days, it is a null and void. MassDEP's Superseding Order of Conditions governs the project.
- ▶ In other words, a Commission's failure to timely issue a decision after closing the hearing may cost the 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.

# Questions & Discussion

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