

EBC Professional Development Program Series: Wetlands Protection Act for the Ascending Professional – An Advanced Introduction

Welcome

Jackson Bailey

*Communications & Marketing Coordinator
Environmental Business Council*



Environmental Business Council of New England
Energy Environment Economy

Thank you to our Host

Nutter
uncommon law

Thank you to the Collaborating Organization



Welcome to Nutter, Program Introduction & Overview

Brian Beaulieu

Associate

Nutter McClennen & Fish LLP



Environmental Business Council of New England
Energy Environment Economy

The Wetlands Protection Act: An Advanced Introduction

Keynote Speaker:

- **Nancy Lin**, Wetlands & Waterways Programs
Massachusetts DEP

Panelists:

- **Stacy Minihane**, *Senior Associate, Beals and Thomas*
- **Scott Smyers**, *Vice President, Oxbow Associates*
- **Mike Stroman**, *Wetlands Program Chief, MassDEP*



Environmental Business Council of New England
Energy Environment Economy



Understanding the Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40 and its Regulations (310 CMR 10.00)



Nancy Lin and Michael Stroman, MassDEP Wetlands and Waterways Program
Environmental Business Council, October 17, 2018

Topics Covered



- WHY wetlands are protected in Massachusetts
- WHAT areas are regulated and how to recognize regulated areas
- HOW to move through the permitting process
- Where to FIND additional information on wetlands protection in Massachusetts.



What are the Interests Protected by the MA Wetland Protection Act?

Public Interests Protected by the Act



Protects

- Public and Private Water Supply
- Groundwater Supply
- Fisheries
- Wildlife Habitat
- Land Containing Shellfish



Prevents

- Pollution
- Storm Damage

Controls

- Floods



Statement of Jurisdiction: 310 CMR 10.02



Areas Subject to Protection Under M.G.L. c. 131, § 40.

The following areas are subject to protection under M.G.L. c. 131, § 40:

- | | | |
|-------------------------|------------------|-------------|
| a. Any bank, | | the ocean |
| any freshwater wetland, | | any estuary |
| any coastal wetland, | | any creek |
| any beach, | <i>bordering</i> | any river |
| any dune, | <i>on</i> | any stream |
| any flat, | | any pond |
| any marsh, | | or any lake |
| or any swamp | | |

Land

- *Under any of the Waterbodies Listed Above*
- *Subject to Tidal Action, Coastal Storm Flowage, Flooding*
- *Riverfront Area*

Presumption of Significance



- Areas Subject to Protection are **Presumed** to be **Significant** to one or more the eight public interests identified in the Wetlands Protection Act



Performance Standards



- Most wetland resource areas have performance standards listed in the regulations that must be met
- The performance standards are different for each wetlands resource area
- Projects must be designed and conditioned to meet the performance standards

Structure of the Resource Area Sections of the Wetlands Regulations



Section 1 – Preamble – Why is this resource area important?

Section 2 – Definition – Where is it?

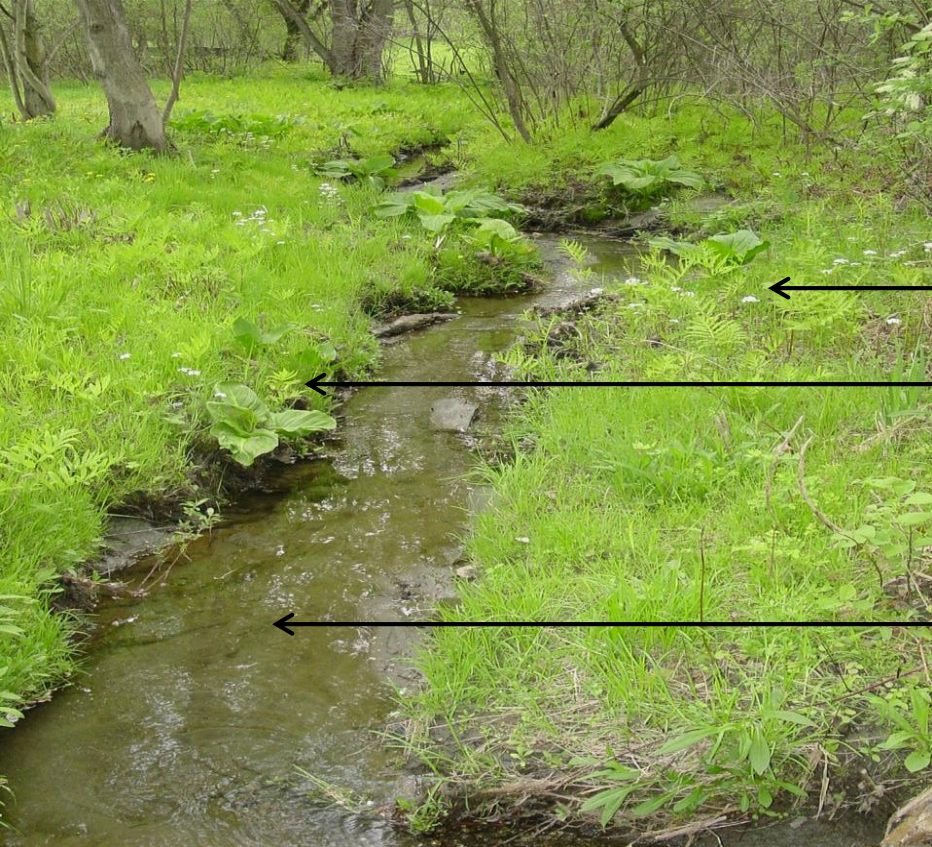
Section 3 – Presumption – regulations presume this resource area is significant to the protection of the Interests of the Act

Section 4 – General Performance Standards – if you want to work in the resource area, must comply with these standards

INLAND Wetland Resource Areas

- Bank
- Bordering Vegetated Wetland (BVW)
- Land Under Water Bodies and Waterways (LUW)
- Land Subject to Flooding (Bordering & **Isolated Areas-exception to “Bordering”**)
- Riverfront Area (RFA)





Bordering Vegetated Wetlands

Bank

Land Under Water

**Bordering Land Subject
to Flooding**



Buffer Zone = 100 feet from...



Inland Wetlands:

- Bank
- Bordering Vegetated Wetlands
(Wet Meadows, Bogs, Swamps and Marshes)



NOTE: Land Subject to Flooding, Land Under Water and Riverfront Area **DO NOT** have a buffer zone

Bordering Vegetated Wetland



Boundary is Line Where:

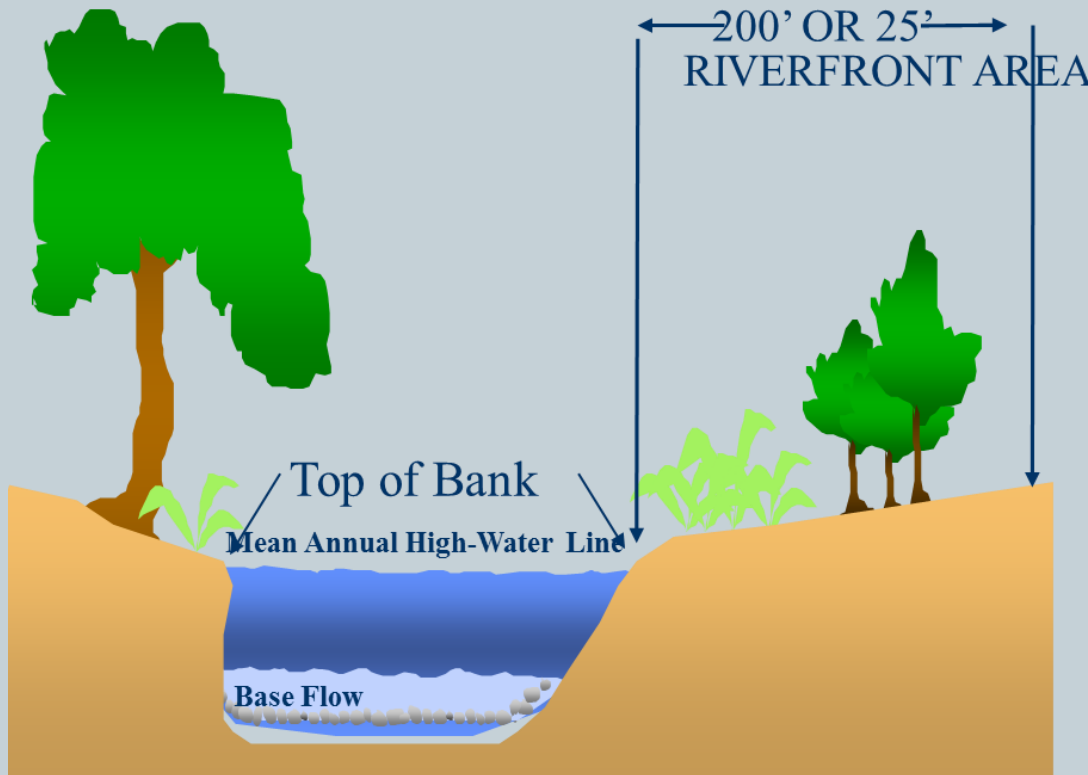
- 50% or More of Wetland Indicator Plants
- Wetland Hydrology is Present
- Other Indicators of Hydrology

e.g. Hydric Soils

- Boundary is Approved by Conservation Commission or DEP

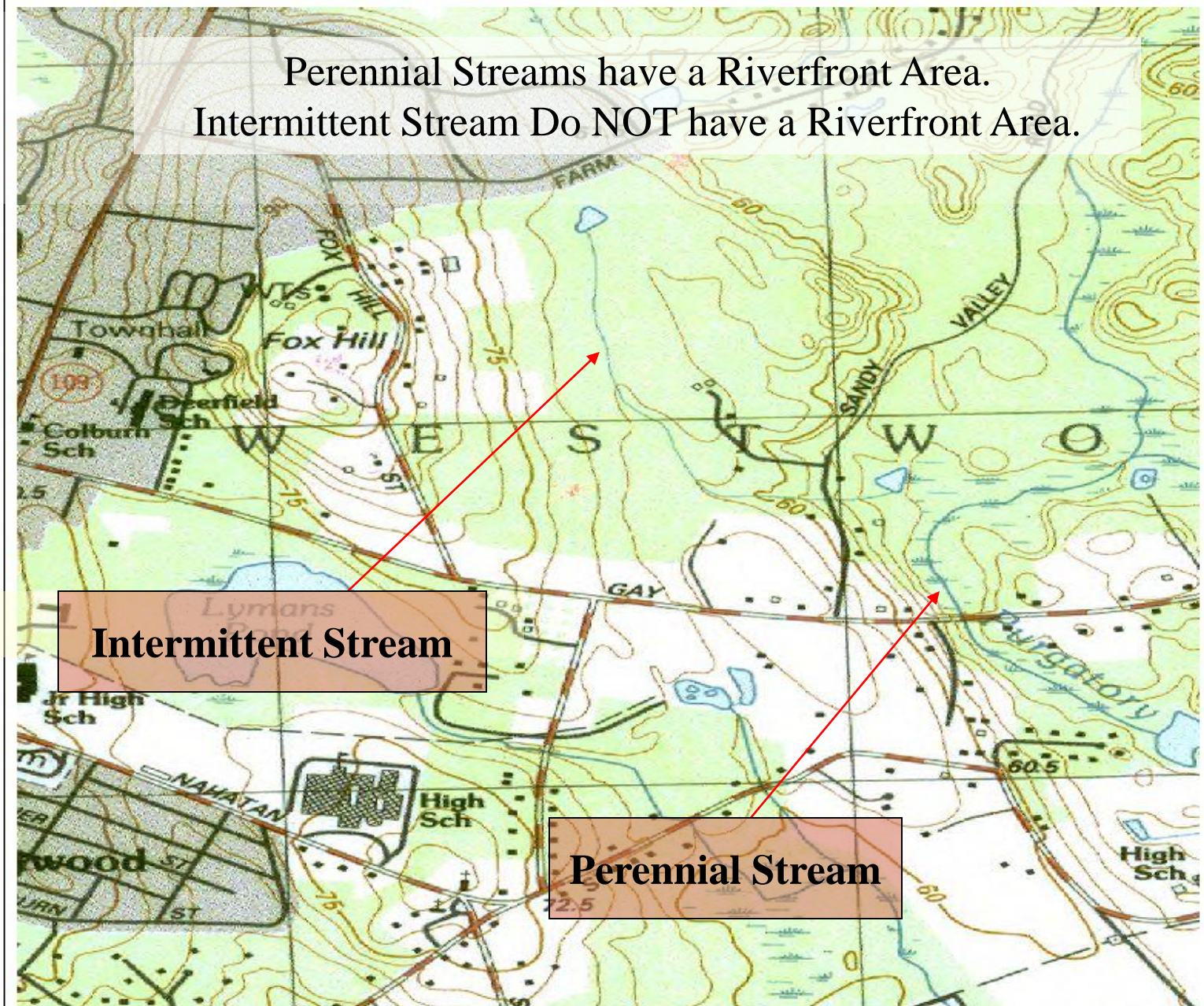
Riverfront Area

CROSS-SECTION OF A RIVER



- Along a “River”
- No Buffer Zone
- Extends 200 Ft from Mean Annual High Water
 - 25 Ft in Densely Developed Areas
- May Overlap Other Wetland Resources

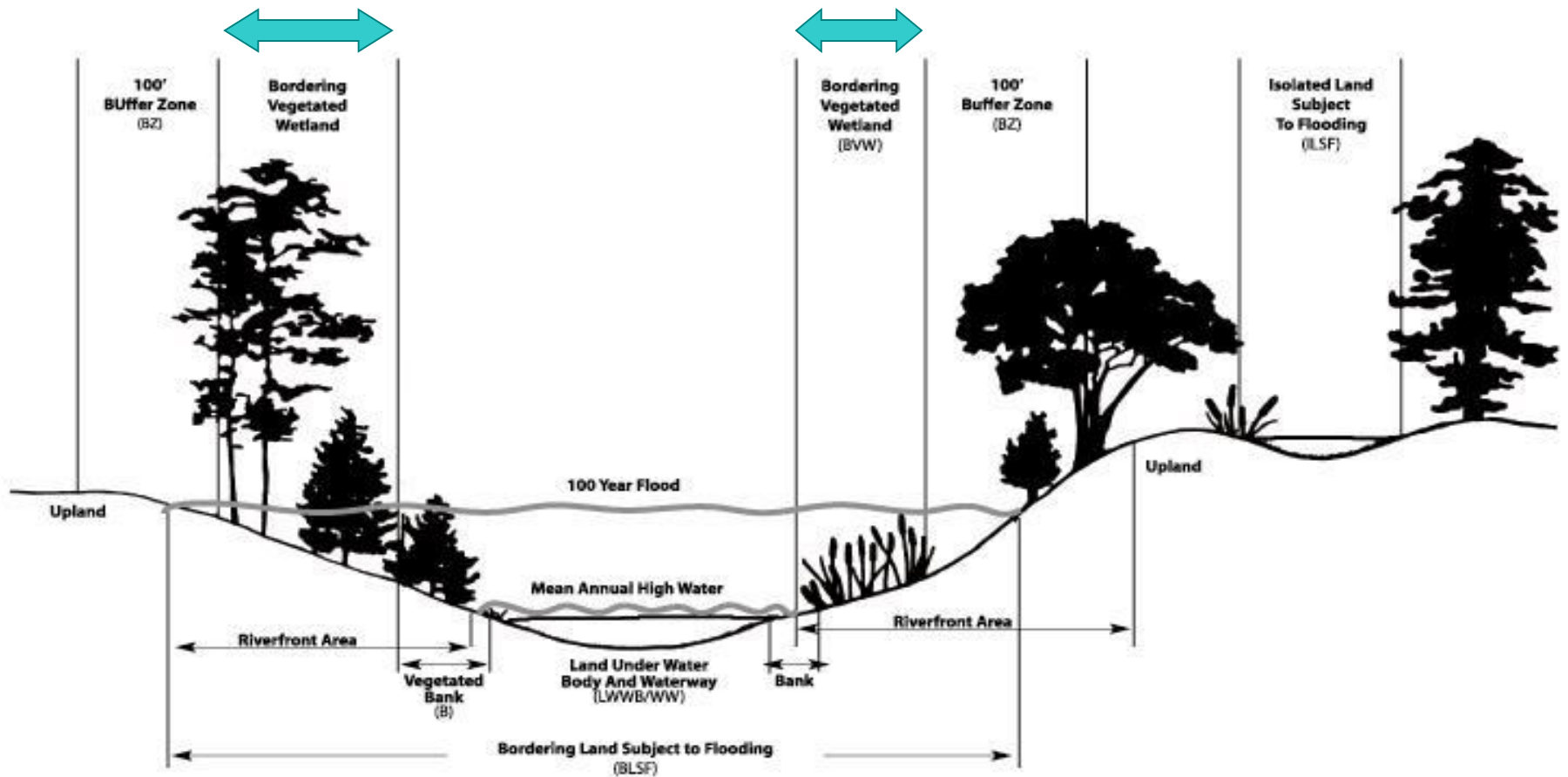
Perennial Streams have a Riverfront Area.
Intermittent Stream Do NOT have a Riverfront Area.



Intermittent Stream

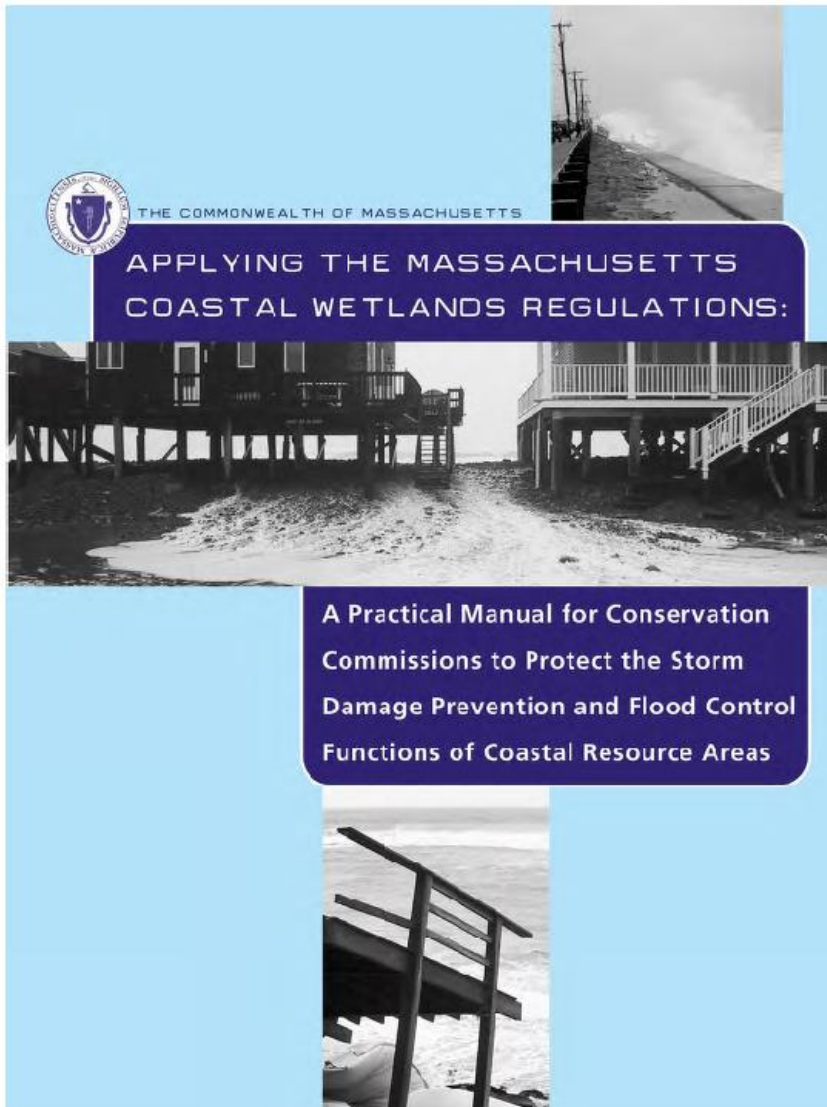
Perennial Stream

**Figure C-1:
Inland Wetland Resources Area
and Associated Buffer Zones**



Applying the MA Coastal Wetlands Regulations

Data Checklists for the Delineation of Resource Areas



THE COMMONWEALTH OF MASSACHUSETTS

APPLYING THE MASSACHUSETTS COASTAL WETLANDS REGULATIONS:

A Practical Manual for Conservation Commissions to Protect the Storm Damage Prevention and Flood Control Functions of Coastal Resource Areas

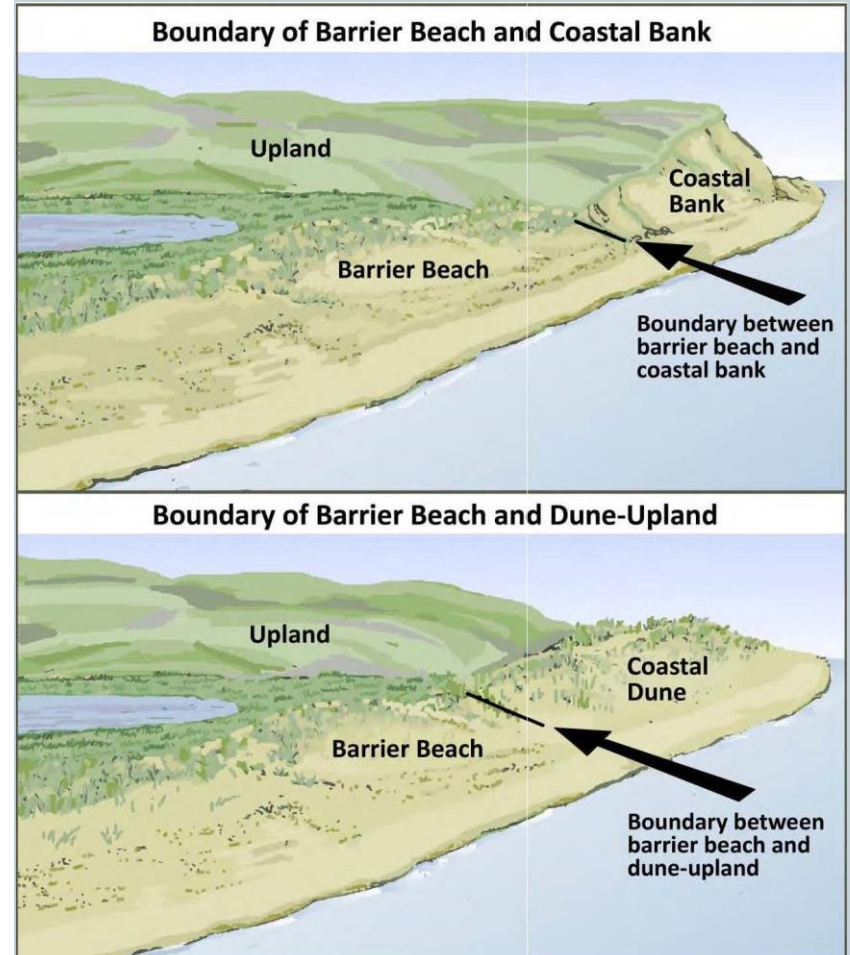
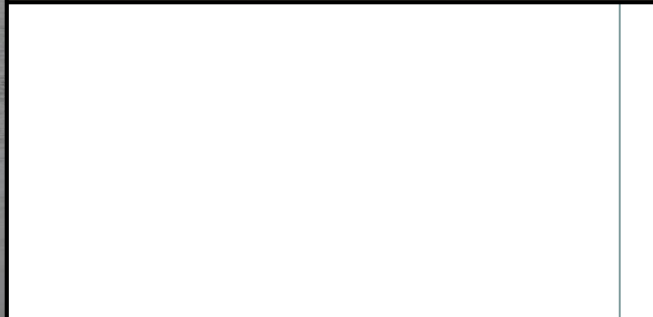
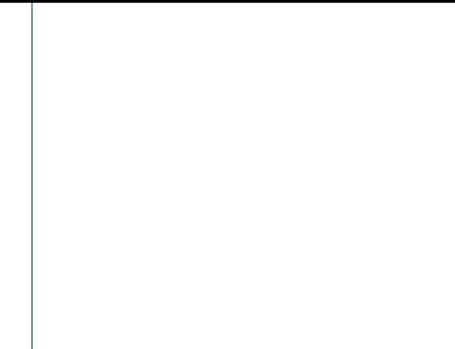


Figure 1.9. Two types of lateral upland barrier beach boundaries: coastal bank and dune-upland. Figure modified from *Barrier Beach Management Sourcebook*, CZM.

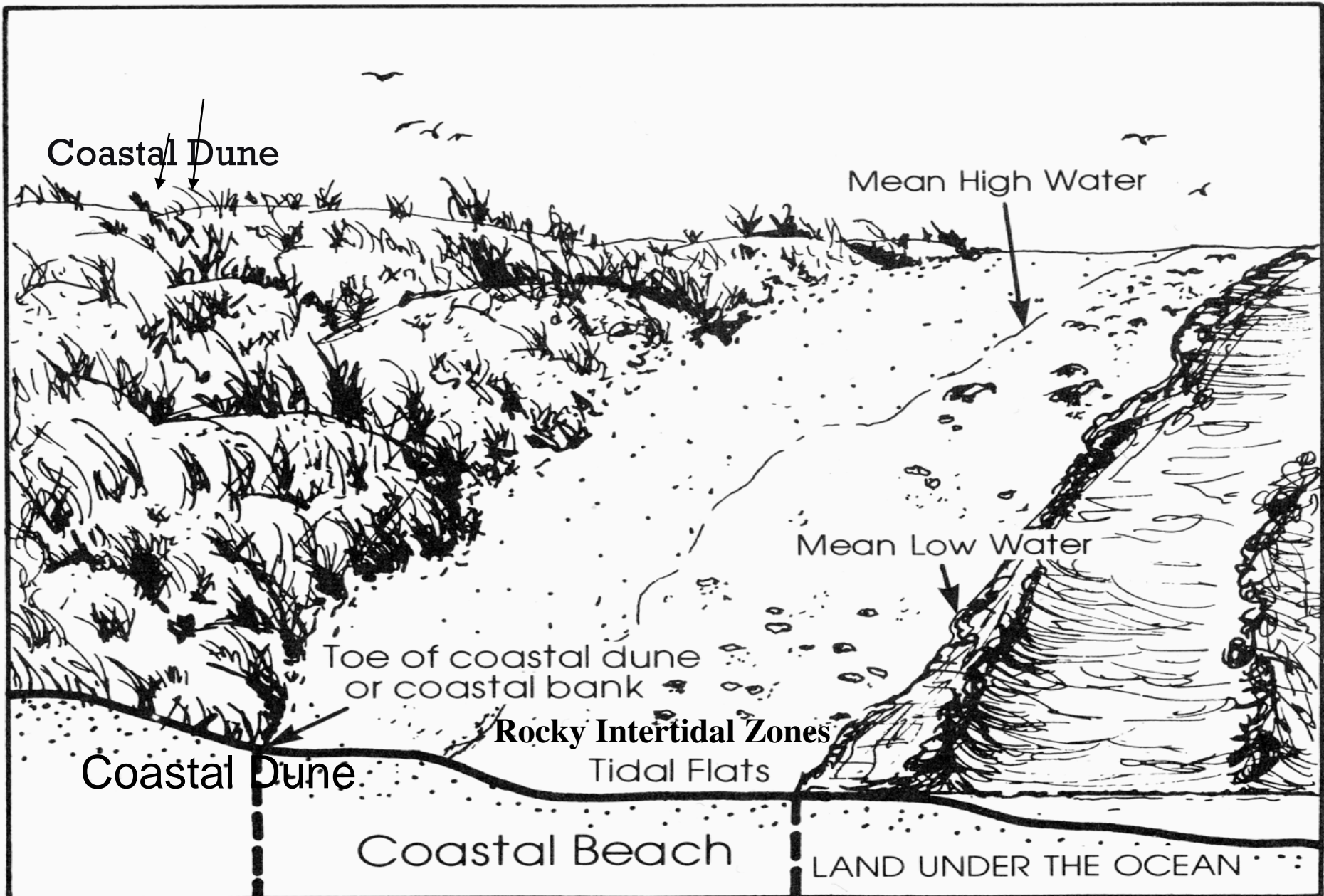


COASTAL Resource Areas

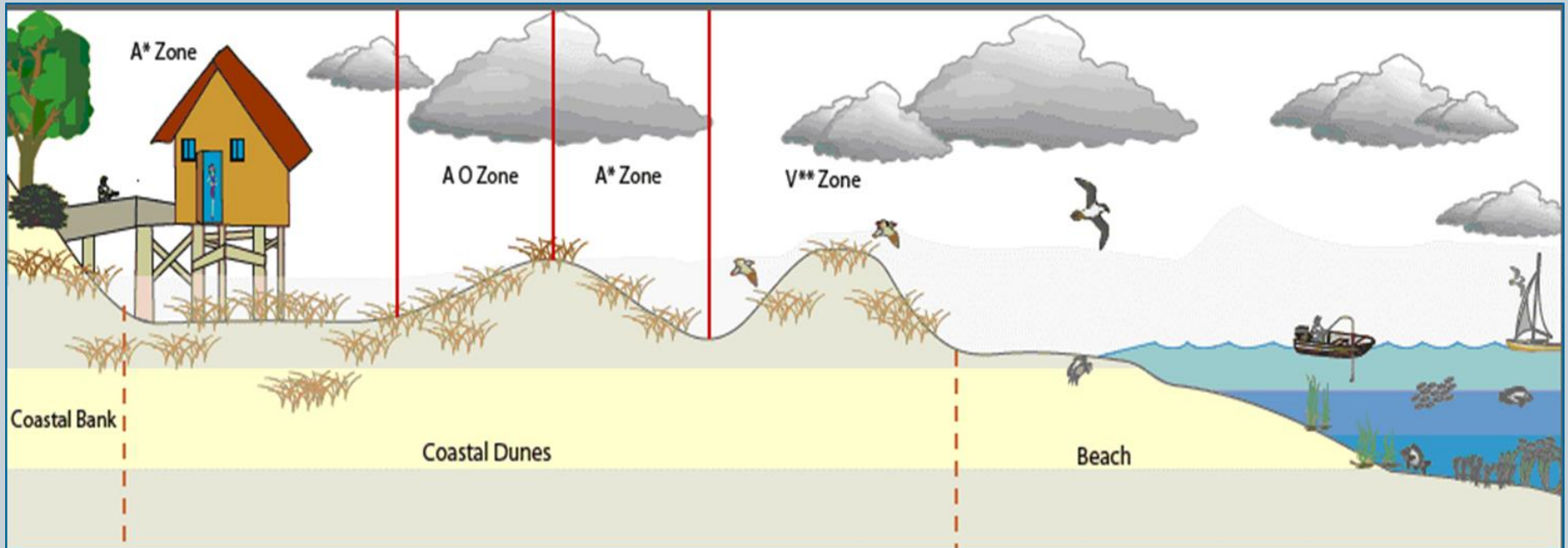


- Land Under Ocean
- Designated Port Areas (CZM)
- Coastal Beaches
- Coastal Dunes
- Barrier Beaches
- Coastal Banks
- Rocky Intertidal Shores
- Land Under Salt Ponds
- Land Containing Shellfish
- Banks of, or Land Under / Fish Run
- Salt Marshes
- Land Subject to Coastal Storm Flowage (Regulations in development)

Coastal Wetland Resource Areas



Cross Section Illustration of Some Coastal Resource Areas and Flood Zones



Buffer Zone = 100 feet from...



Coastal Wetlands

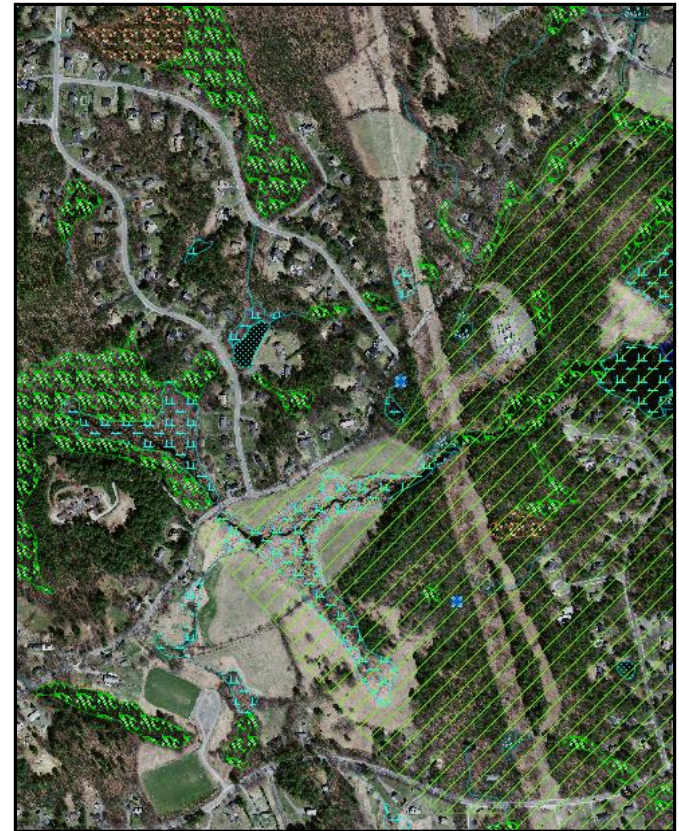
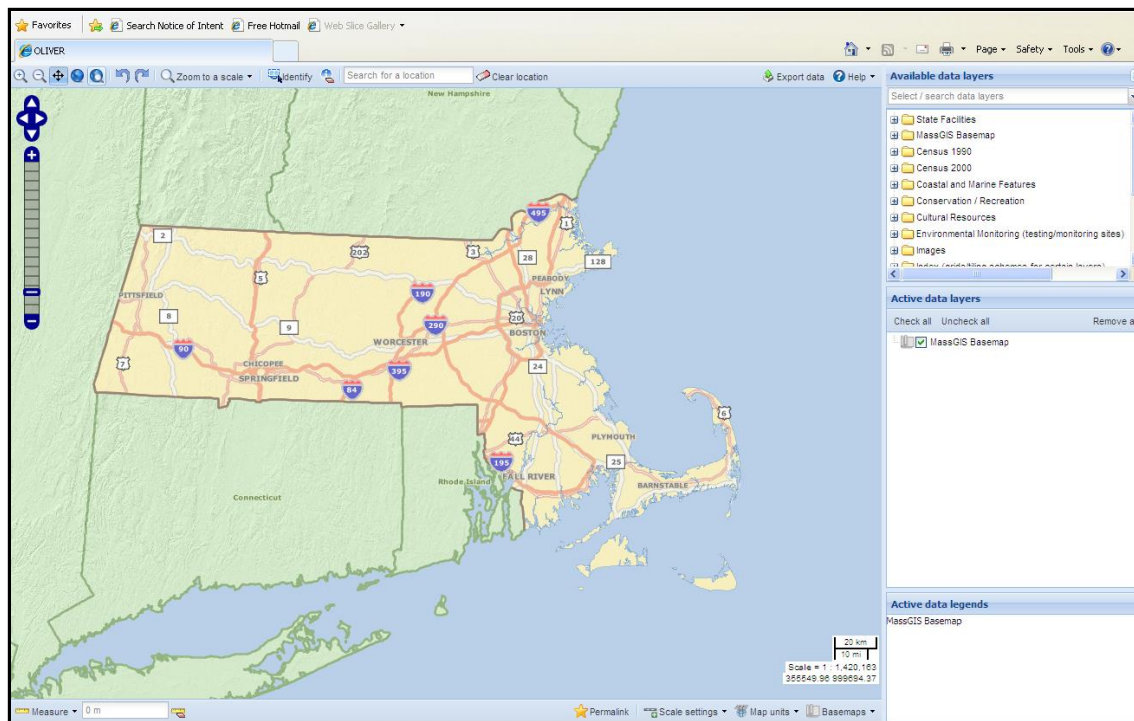
- Coastal Beach
- Coastal Dune
- Coastal Bank
- Salt Marsh
- Rocky Intertidal Shore



MassGIS OLIVER- the MassGIS Online Data View

http://maps.massgis.state.ma.us/map_ol/oliver.php

- Display and query nearly all MassGIS data
- Download up-to-date shapefiles from our MassGIS, with legend files
- Overlay MassGIS data onto other basemaps, such as Google Terrain



Wetland Applications & the Permitting Process



JURISDICTIONAL AREAS

EXEMPT ACTIVITIES

APPLICATIONS AND PERMITS

APPEAL PROCESS

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



“No person shall remove, fill, dredge or alter any (resource area) without filing written notice including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions and provided all appeal periods have elapsed.”



MA Wetlands Protection Act Regulations, 310 CMR 10.00



“Any activity other than minor activities proposed or undertaken within the 100’ Buffer Zone associated with a resource area and will *alter* an Area Subject to Protection requires a filing of a Notice of Intent or a Request for Determination of Applicability.”



Is the Work Jurisdictional?



- Are you proposing work in a wetland resource area?
- Is the work proposed within 100' Buffer Zone to a coastal or inland wetland resource area?
- Demonstrate that your work will not alter the wetland resource area.

What does Alter mean???



Alter means to change the condition of any area subject to protection under the WPA. Examples include, but are not limited to, the following:

- ...changing of pre-existing drainage characteristics
- ...lowering of the water level or water table
- ...destruction of vegetation
- ...changing of water temperature, and other physical biological or chemical characteristics of receiving water.

Projects Should Avoid and Minimize First, Mitigate Last



- Avoidance: Consider Alternatives to Design Project Away from Wetlands & Eliminate Impacts
- Minimization: Design Project to Reduce Wetlands Impacts
- Mitigate: Replication or Restoration

Avoid, Minimize, Mitigate = Sequencing

Exempt Minor Activities- WPA Regulations



Must be within the Buffer Zone and /or Riverfront Area **310 CMR10.2(2)(b)1.**

- Unpaved walkways for private use;
- Fencing (not a barrier for wildlife movement), stonewalls, stacks of cordwood;
- Vista pruning & Conversion of law to uses accessory to residential structures **IF > 50'** from MHW or BVW;
- Plantings of native species, but excluding turf lawns;
- The conversion of impervious to vegetated surfaces;
- Exploratory work for planning and designing (temporary and negligible impacts i.e. Monitoring Wells)

Municipal Wetland Laws



- Approximately 200 municipalities have a local wetland by-law or ordinance.
- Generally parallels state wetland jurisdiction, can be stricter, may also include additional resource areas and interests to protect (i.e., isolated vegetated wetlands, vernal pools, buffer zones as resource area).
- Different levels of protection and additional filing requirements. Must be equal or more protective than state regulations. Reviewed by AGs office.



What is the Permitting Process



- Submitted to local conservation commission (issuing authority) and MassDEP.
- Commissions are required to review applications to ensure compliance with the MA Wetland Protection Act (WPA) and its Regulations, as well as local wetland laws.
- Commissions issue wetland permits, emergency certifications and enforcement orders.
- Appeals requests under the WPA are submitted to MassDEP. Appeal requests under a local bylaw or ordinance go to Superior Court.

Wetlands Protection Act Exemptions



- Normal maintenance or improvement of land in agricultural use.
- Maintaining, repairing or replacing but not substantially changing or enlarging electric, gas, water, sewer and telecommunication facilities.
- Mosquito Control.
- Minor Activities in Buffer Zone/Riverfront Area.

Types of Applications & Permits

Application

Request for Determination of Applicability (RDA - Form 1)

Abbreviated Notice of Intent (Form 4)

Notice of Intent (NOI – Form 3)

Abbreviated Area of Resource Area Delineation (ANRAD – Form 4A)

Request for Certificate of Compliance (Form 8A)

Permit

Determination of Applicability (DOA – Form 2)

Order of Conditions (OOC – Form 5)*

Order of Conditions (OOC)*

Order of Resource Area Delineation (ORAD – Form 4B)*

Certificate of Compliance (COC – Form 8B)

* Can be extended for one or more years.

WPA Form 1: Request for Determination of Applicability (RDA)



- a. Whether the area is subject to **WPA** jurisdiction.
- b. Whether the work is subject to **WPA** regulation.

Note: To delineate and determine Wetland Resource Area boundaries use the ANRAD/ORAD process.



Determination of Applicability Process

Request for a Determination

Legal Advertisement

5 business days prior to hearing

Open Public Meeting

Close Public Meeting

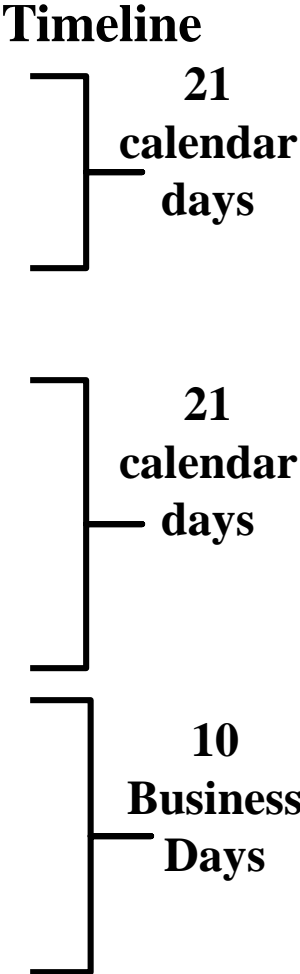
Positive Determination

Negative Determination

Notice of Intent

Request for Departmental Action

No further review is required. Valid for 3 years



WPA Form 3: Notice of Intent (NOI)



- An NOI must be filed if work is proposed in a wetland resource area.
- Minimum submittal Requirements:
 - ✓ Wetland delineation
 - ✓ Site plans
 - ✓ Locus map
 - ✓ Stormwater calculations
 - ✓ Title 5 Compliance
 - ✓ Abutter notification
 - ✓ Legal Ad
 - ✓ Correct filing fee
 - ✓ NOI submitted to NHESP
 - ✓ Signed correctly



Notice Of Intent Submittal Requirements



- Submit application (original signed copy) to the conservation commission, and **CONCURRENTLY** to MassDEP. If applicable to NHESP, Marine Fisheries.
- Send “Notification to Abutters” by certified mail at least 7 business days prior to the hearing.
- Place legal notice in the local newspaper at least 5 business days prior to the hearing.
- MassDEP will issue a File Number and will review / comment on the application.

Notice of Intent Hearing – Issuing an Order



- Conservation Commission acquires information
- Site visit
- Close hearing – discusses the “special conditions” which will be made part of the Order of Conditions
- Issues an Order of Conditions within 21 calendar days of the close of the public hearing

Most Common NOI Mistakes



Administrative

- DEP **fee payment** is sent with NOI to DEP regional office (not lock box).
- NOI copy is sent to the DEP PO Box rather than to the DEP regional office.
- Incorrect filing fee - if the fee is questioned by the town or DEP there may be a delay in receiving a File Number and/or Order of Conditions. Use the fee descriptions in the regulations 310 CMR 4.00 – [Timely Action Schedule and Fee Provisions](#)

Most Common NOI Mistakes



Substantive

- In NOI section **C. Other Applicable Standards and Requirements**
Incorrect check off of “NO”
 - Question 4 – is area in ACEC – see website for [ACEC](#) designation sites
 - Question 5 – is area in an ORW- see [MA Water Quality Standards, 314 CMR 4.00](#)
 - Question 6 – is site subject to [Wetlands Restriction Order](#) ? (Inland - MGL c. 131 sec. 40 or Coastal – MGL c. 13, sec. 105). Communities have the restricted Wetland Plans and Orders.
- Inadequate plans/not submitting plans.
- Not coordinating processing timelines with respect to the project timeline.
- Confusion about how Limited Projects are applied. Discretionary– Coastal LPs (310 CMR 10.24 (7)(a)through(c) and (8); Inland (310 CMR 10.53 (3) and (4) .

Most Common NOI Mistakes



- **Stormwater Management**
 - Not applying Stormwater Standards.
 - Inaccurate or deficient Stormwater design/calculations.
 - No Low Impact Development (LIDs).
 - Failure to submit Stormwater Operation and Maintenance Plans.
- Failure to submit an adequate **Wetland Replication Plan**.
 - Where is groundwater level for the replication area?
 - Replication Monitoring Plans
 - Failure to fully characterize the type of wetland that is being alter – shrub swamps, maple swamps, emergent marsh, wet meadows.
 - Incorrect Wetland delineation.
- Identifying Riverfront Area boundary
- Bordering Land Subject to Flooding boundary– not using FEMA maps

Most Common NOI Mistakes



- Don't check "Buffer Zone Only" if there are Wetland Resource Area impacts. Very common mistake.
- Don't overdesign in order to scale back later (i.e. 4,990 sf of BVW fill).
 - Resource sensitive designs from the start is preferred.
- Not enough info. about the resource area boundaries.
 - A report with data sheets is ideal
 - A note on the plan stating who delineated the border (with a **date** and **method**) may be sufficient.
 - Field confirmation required of current site conditions.

Most Common NOI Mistakes



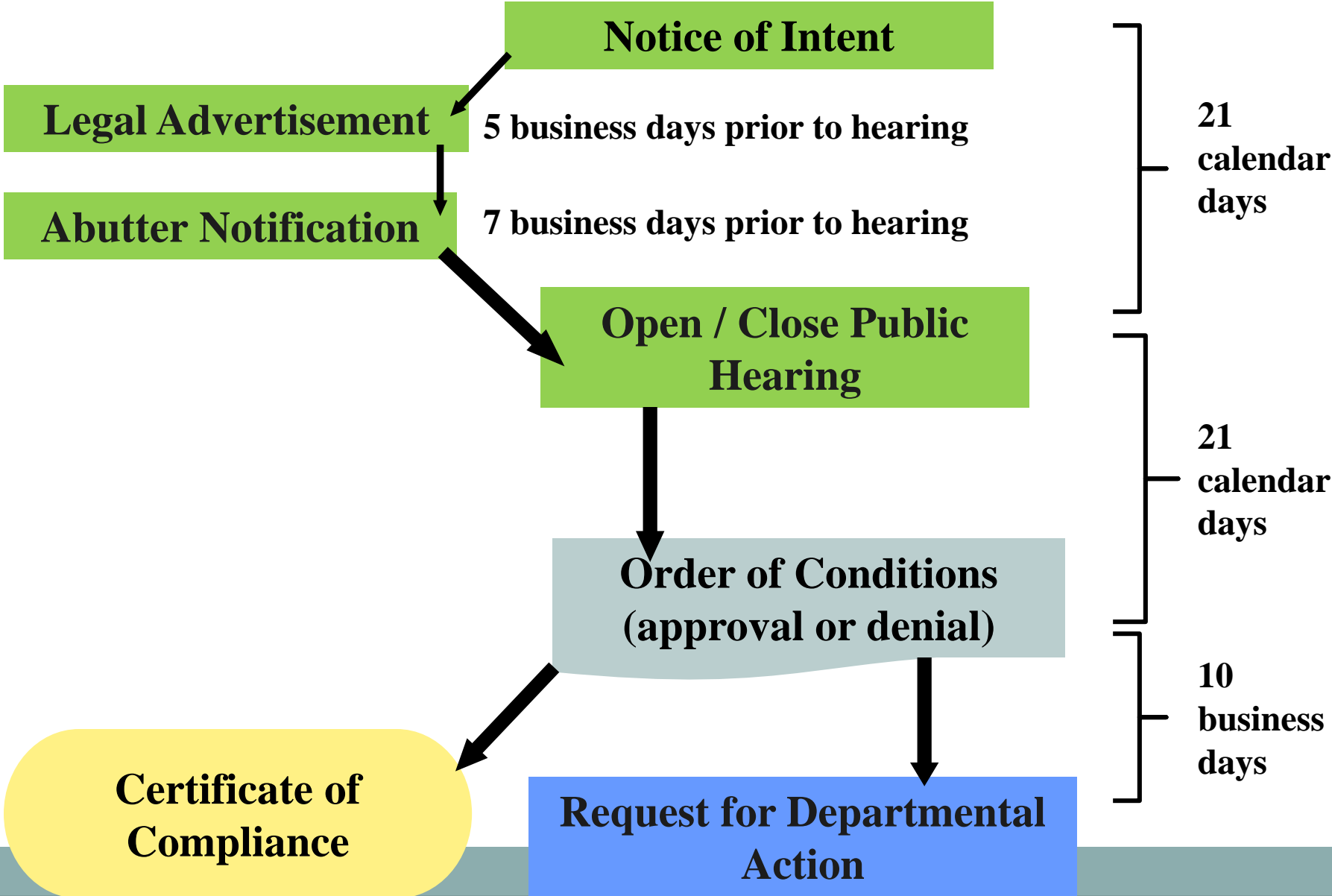
- **Appendix A** must be included for all Ecological Restoration Limited Projects.
 - Budget adequate time for noticing in the Environmental Monitor and receiving a response from NHESP, if needed, prior to submitting the NOI.
- Good Site Plan includes:
 - Locations of all wetland resources and the Buffer Zone(s),
 - Erosion controls
 - Related regulatory overlays (Zone A, NHESP habitat, etc.).
 - **No** extraneous information not related to wetlands permitting (i.e. architectural plans, street lighting design plans, traffic sign details)

WPA Form 5: Order of Conditions



- Used to allow or deny proposed activities.
- Indicates that proposed work is significant to the Interests of the WPA.
- Establishes general and “special” conditions to allow work.
- Original signed copy goes to Applicant, one copy to MassDEP.
- 10 business day appeal period.
- Must be recorded at the Registry of Deeds prior to the commencement of work.

Notice of Intent Application Process

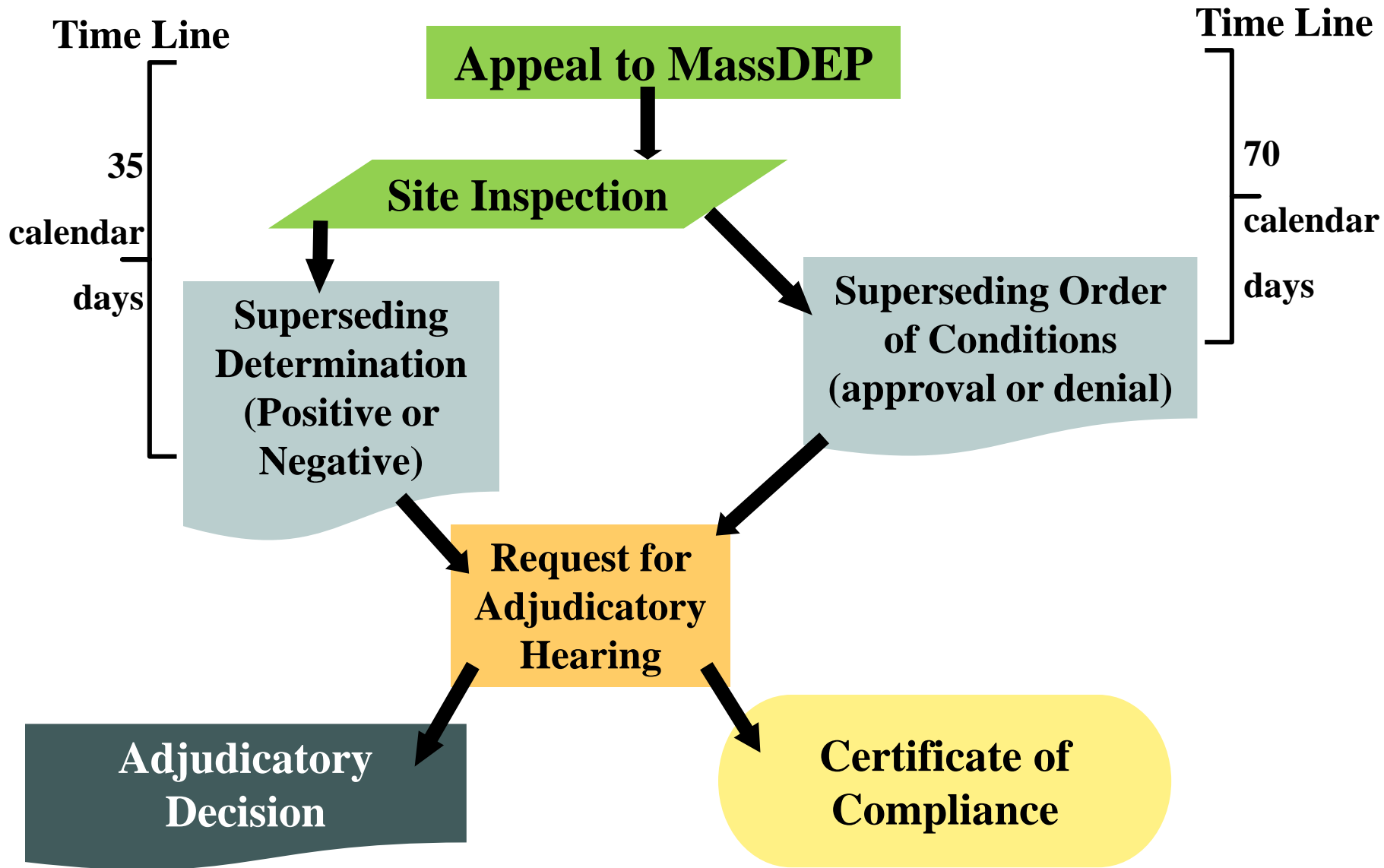


Who can Appeal a Conservation Commission Decision???



- The applicant;
- Landowner, if not the applicant;
- Any person aggrieved by a Determination or Order;
- A direct abutter;
- Any 10 residents of the city / town where the work is to be done; and
- MassDEP- known as an “Intervention”

Request for Departmental Action*



* Note: A State Issued Permit such as an SOC or SDA MAY require MEPA ENF and/or Review if it Exceeds MEPA Thresholds

Where to Find Additional Information



- Talk to the local conservation commission or conservation agent
- [MassDEP Wetlands Webpage](#)
- [MassDEP Regional Circuit Rider](#)
- [MassGIS OLIVER](#)
- [Mouth of Coastal River](#)
- Notice of Intent Lookup has moved to the EEA Data Portal
<https://eeaonline.eea.state.ma.us/portal#!/search/wire>
- [MA Association of Conservation Commissions](#)
- [Association of Massachusetts Wetlands Scientists](#)
- [Society of Wetlands Scientists – New England Chapter](#)

Regulations, Policies & Guidance Documents



[Wetlands Reference Links](#)

[MA Wetlands Protection Act MGL c.131 §40](#)

[MA Wetlands Protection Act Regulations, 310 CMR 10.00](#)

[MA Rivers Protection Act](#)

[MassDEP Stormwater Handbook](#), revised January 2008

[MA Wetland Protection Act Permit Forms](#)

[On-line Permitting](#) for NOIs, ANRADs, OCs, ORADs

Regulations, Policies & Guidance Documents



- [MA Wildlife Habitat Protection Guidance for Inland Wetlands](#), March 2006
- [Guidance for Aquatic Plant Management in Lakes and Ponds](#)
- [MA Inland Wetland Replication Guidelines](#), March 2002
- [MassDEP Wetlands Enforcement Manual](#), March 2004
- [Farming in Wetlands Resource Areas Manual](#), REV January 1996
- [MassDEP Delineating Bordering Vegetated Wetlands Under the WPA](#)
- [MA River and Stream Crossing Standards](#), August 27, 2017
- MA Coastal Zone Management, Coastal Landscaping
http://www.mass.gov/czm/coastal_landscaping/index.htm

Regulations, Policies & Guidance Documents



- [Guidance on Agriculture and Solar Energy under the WPA and the Solar MA Renewable Target \(SMART\) Program](#) – October 2018
- [MassDEP to Review Recent Studies on Precipitation Rates in MA](#)
- [Photovoltaic System Solar Array Review, WPA Policy 17-1](#)
- [Emergency Repairs to Structures, roads, and Facilities Located in Wetland Resource Areas or Buffer Zones, and Waterways](#)
- [Beach Nourishment Projects](#)
- [MA Stormwater Handbook](#)

MassDEP Regional Wetlands Circuit Riders



- Northeast Office, Wilmington:
Kimberly Roth 978.694.3234 kimberly.roth@mass.gov
- Southeast Office, Lakeville (inc. Cape & Islands):
Currently Vacant. Wetlands Helpline # 508.946.2800
- Western Office, Springfield:
Mark Stinson 413.755.2257 mark.stinson@mass.gov
- Central Office, Worcester:
Judith Schmitz 508.767.2722 judith.schmitz@mass.gov
- Boston: Nancy Lin 617.556.1109 nancy.lin@mass.gov

Questions & Stacy's, Scott's & Mike's Input



Wetlands Protection Act for the Ascending Professional – An Advanced Introduction (10/17/18 EBC Program)

Key Buzzwords

- Wetland Resource Area (includes non-wetland areas, inland, coastal)
- Interests of the Act
- Performance Standards
- Limited Project
- Stream Crossing Standards
- Law, Regulation, Policy, Guidance
- Wetlands Change Mapper

**When in doubt (or even if not) re-read the Act, the Regulations and any applicable policies/guidance!

Scott Smyers, MS PWS: President AMWS
Vice President & Senior Scientist Oxbow Associates, Inc.
smyers@oxbowassociates.com 978.929.9058

Stacy Minihane, MVP, PWS: Secretary AMWS
Senior Associate Beals and Thomas, Inc.
sminihane@bealsandthomas.com 508.366.0560

WPA Greatest Hits/Questions/Do's & Don'ts

- Main Resource Areas and Considerations:
 - BVW (vegetation and soils, vs. IVW)
 - RFA (MAHW delineated, aerial, previously developed)
 - Bank (inland and coastal)
 - Salt Marsh
 - Floodplain (digitize vs. elevation, inland vs. coastal)
 - What gets flagged when and how to locate (outermost resource area, off-site resource areas, resource areas that aren't delineated in the field, GPS vs. Total Station)
- Buffer Zones (not resource areas but jurisdictional reach across property lines, roads, ROWs)
- Vernal Pools:
 - Certification
 - Habitat feature
- Limited Projects vs. Meeting the Performance Standards
- Protecting a resource area's ability to protect the Interests of the Act, not the resource area itself
- Performance standards for wetland resource areas vs. buffer zone
- Wildlife habitat evaluations
- Stamping Plans (PLS vs. PE, 250 CMR 5.00)
- Abutter notification (don't forget adjacent towns)
- DEP File Numbers (don't wait until the day of the hearing)
- Who's responsibility to follow the legal process? Considerations to avoid appeal, or facilitate successful outcome upon appeal
- Situations when work can start pending appeal
- Local bylaws: different requirements; appeal process

AMWS Annual Meeting: What Could Go Wrong (November 9, 2018) <https://amws.org/calendar/> to Register

