

## MASSACHUSETTS<sup>1</sup>

### *State Authority for Marine Protection*

#### Summary of State Authority

Massachusetts has designated by statute five Ocean Sanctuaries that cover most of the state’s waters.<sup>2</sup> The state also has a number of laws that authorize state agencies to protect the marine environment. The Executive Office of Energy and Environmental Affairs has used its Oceans Act authority to create a comprehensive Ocean Management Plan for marine planning, and creates Areas of Critical Concern to protect coastal areas; the Natural Heritage and Endangered Species Program designates significant habitat under Massachusetts’s Endangered Species Act; and the Underwater Archaeology Act designates restricted use sites and creates Underwater Archaeological Preserves. Other laws work in conjunction with these statutes to protect the marine environment, including the procedural requirements of the Massachusetts Environmental Policy Act and the Public Waterfront Act’s permitting program. Additionally, the Massachusetts Department of Fish and Game uses its fisheries management authority to issue fisheries restrictions and area closures.

	Ocean Sanctuaries Act	Oceans Act	Massachusetts Endangered Species Act	Areas of Critical Environmental Concern	Fisheries Management, Area Closures	Underwater Archaeology Act
Legal requirement	Designates Ocean Sanctuaries	Directs Secretary of the Executive Office of Energy and Environmental Affairs to develop the Ocean Management Plan	Allows designation of significant habitat for listed species	Allows designation Areas of Critical Environmental Concern	Allows restrictions for fisheries management	Allows designation of Underwater Archaeological Preserves and restricted use sites, Exempted Sites.
Citation	MASS. GEN. LAWS ch. 132A, §§ 12A–16E, 18 (1970)	MASS. ACTS ch. 114, §§ 1 <i>et seq.</i> (2008)	MASS. GEN. LAWS ch. 131A, §§ 1 <i>et seq.</i> (1990)	MASS. GEN. LAWS ch. 21A, § 2(7) (amended 2008)	MASS. GEN. LAWS ch. 130, §§ 1 <i>et seq.</i> (amended 2009)	MASS. GEN. LAWS ch. 6, § 180 and ch. 91 § 63. (amended 1996)
Designation authority	By statute	Executive Office of Energy and Environmental Affairs	Natural Heritage and Endangered Species Program	Executive Office of Energy and Environmental Affairs Secretary	Massachusetts Department of Fish and Game/ Division of Marine	Board of Underwater Archaeological Resources

<sup>1</sup> This state chapter is part of a 23-state assessment of state and local authority for marine protection. It should be read in conjunction with the Executive Summary, Introduction and Methodology Chapters in order to fully understand the scope and approach. Other chapters are available at [www.eli-ocean.org/mpa](http://www.eli-ocean.org/mpa).

<sup>2</sup> In 2013, the National Oceanic and Atmospheric Administration (NOAA) estimated that over 86% of Massachusetts’s marine waters are protected. NOAA, *Marine Protected Areas: Conserving Our Oceans One Place at a Time* 9 (Nov. 2013), available at [http://marineprotectedareas.noaa.gov/pdf/fac/mpas\\_of\\_united\\_states\\_conserving\\_oceans\\_1113.pdf](http://marineprotectedareas.noaa.gov/pdf/fac/mpas_of_united_states_conserving_oceans_1113.pdf).

	Ocean Sanctuaries Act	Oceans Act	Massachusetts Endangered Species Act	Areas of Critical Environmental Concern	Fisheries Management, Area Closures	Underwater Archaeology Act
		Secretary			Fisheries	
<b>Management &amp; enforcement authority</b>	Massachusetts Department of Conservation and Recreation (administration) & Massachusetts Office of Coastal Zone Management (commenting on proposals)	Executive Office of Energy and Environmental Affairs (Massachusetts Environmental Policy Act) & Massachusetts Department of Environmental Protection (permitting)	Natural Heritage and Endangered Species Program	Massachusetts Department of Conservation and Recreation (administration), Massachusetts Department of Environmental Protection (permitting) & Executive Office of Energy and Environmental Affairs (Massachusetts Environmental Policy Act)	Massachusetts Department of Fish and Game (enforcement) & Division of Marine Fisheries (management)	Board of Underwater Archaeological Resources
<b>Jurisdiction &amp; boundaries</b>	All state waters	All state waters	All state waters	Estuaries, coastal lands, beaches, and dunes	All state waters	All state waters
<b>Prohibited uses</b>	None specified	Building structures on or under the seabed and drilling or removing sand, gravel, or other minerals, gases, or oils (in the Prohibited Area)	Natural Heritage and Endangered Species Program	None specified	Massachusetts Department of Fish and Game/ Division of Marine Fisheries has authority to close marine areas or to issue permits to regulate use	Major site disruption and extraction of cultural material restricted or prohibited
<b>Permitted uses</b>	None specified	Aquaculture, cables and pipelines, and wave and tidal energy facilities (in the Multi-use Area)	None specified	None specified	None specified	Recreational and scientific visitation

The Commonwealth of Massachusetts’s jurisdiction over its coastal waters extends three nautical miles seaward.<sup>3</sup> The state holds title to its tidelands—submerged lands and tidal flats below the mean high-water mark—in trust for the public benefit.<sup>4</sup> Tidelands may also be held by a private party “subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water.”<sup>5</sup>

<sup>3</sup> See Submerged Lands Act, 43 U.S.C. § 1301(a)(2), § 1301(b).

<sup>4</sup> MASS. GEN. LAWS ch. 91, § 1 (1866).

<sup>5</sup> *Id.*

### Ocean Sanctuaries Act

The Massachusetts Ocean Sanctuaries Act created five Ocean Sanctuaries that cover most of the state's offshore waters, beginning at the mean low-water mark, with the exception of an area east of Boston Harbor and in Mt. Hope Bay.<sup>6</sup> The protected waters comprise the Cape Cod, Cape Cod Bay, Cape and Islands, North Shore, and South Essex Ocean Sanctuaries.<sup>7</sup> The Massachusetts Office of Coastal Zone Management ("MCZM"), housed within the Executive Office of Energy and Environmental Affairs ("EOEEA"), has "care, oversight and control" of all ocean sanctuaries.<sup>8</sup>

The Act covers any activity that would seriously alter or endanger the ecology or appearance of the ocean, seabed, or subsoil of the Ocean Sanctuaries or the Cape Cod National Seashore.<sup>9</sup> To accomplish this goal, the Ocean Sanctuaries Act regulations prohibit construction on the seabed or under the subsoil, oil and gas drilling, mining, commercial advertizing, incineration of solid waste, and the dumping or discharge of commercial or industrial wastes.<sup>10</sup>

However, MCZM may authorize otherwise prohibited activities through the Ocean Sanctuaries regulations. For example, "harvesting and propagation of all finfish and shellfish may be allowed if the Department and the Department of Fisheries, Wildlife and Recreational Vehicles are satisfied that such activities will be carried out in accordance with sound conservation practices."<sup>11</sup>

MCZM does not issue licenses or permits under the Ocean Sanctuaries Act; instead it acts through the regulatory process of other agencies to comment on Massachusetts Environmental Policy Act ("MEPA") filings and on Massachusetts Department of Environmental Protection ("MassDEP") Chapter 91 license applications during the respective public comment periods (see below). Proposals that are below MEPA thresholds and projects that receive Chapter 91 licenses are presumed to comply with the Ocean Sanctuaries Act.

### Oceans Act

The Massachusetts Oceans Act of 2008 required the state to develop a comprehensive plan to manage development in the state's marine waters in order to balance natural resource preservation with existing and new uses, such as renewable energy development.<sup>12</sup> The Act requires the EOEEA Secretary to develop a comprehensive ocean management plan, and the statute requires that the plan "value biodiversity and ecosystem health [and] identify and protect special, sensitive or unique estuarine and marine life and habitats."<sup>13</sup>

Upon its completion in 2009, the Ocean Plan was incorporated into the existing coastal management plan and in 2013 was incorporated into MCZM's regulations.<sup>14</sup> The law requires comprehensive science-based spatial planning of Massachusetts's marine environment in order to assure long-term protection and sustainable use of the state's waters. To do so, the Plan created three categories of management areas for the state's marine waters: prohibited, renewable energy, and multi-use.

<sup>6</sup> MASS. GEN. LAWS ch. 132A, §§ 12A–16E, 18 (1970).

<sup>7</sup> *Id.* § 13.

<sup>8</sup> MASS. GEN. LAWS ch. 132A, § 14. Note: the regulations that codify this authority, 301 CMR 24, have not yet been approved as of November 22, 2013.

<sup>9</sup> *Id.*

<sup>10</sup> 302 MASS. CODE REGS. § 5.07.

<sup>11</sup> *Id.* § 5.08(6)

<sup>12</sup> An Act Relative to Oceans, MASS. ACTS ch. 114, §§ 1 *et seq.* (2008).

<sup>13</sup> *Id.* § 2.

<sup>14</sup> 301 CMR § 28.00.

The Prohibited Area runs along the east coast of Cape Cod and overlays the Cape Cod Sanctuary.<sup>15</sup> Certain uses are prohibited in the area, such as building structures on or under the seabed and drilling or removing sand, gravel, or other minerals, gases, or oils.

In contrast, a variety of uses, activities, and facilities are allowed in Multi-use Areas, including aquaculture, cables and pipelines, and wave and tidal energy facilities.<sup>16</sup> However, these activities must meet siting and performance standards and avoid adversely affecting areas with special, sensitive, or unique estuarine and marine life and habitats. The Ocean Plan identified twelve areas that are important for special, sensitive, or unique species or habitats: core habitat for North Atlantic right whales, fin whales, and humpback whales; roseate tern core habitat; special concern (Arctic, Least, and Common) tern core habitat; Long-tailed Duck core habitat; Leach’s Storm-Petrel important nesting habitat; colonial waterbirds important nesting habitat; areas of hard/complex seafloor; eelgrass; intertidal flats; and areas of high importance to commercial and recreational fisheries.

The Ocean Plan did not alter the jurisdiction of the Division of Marine Fisheries, nor did the law alter fisheries policy. Instead, the Oceans Act is implemented and enforced through Massachusetts’s existing regulatory and permitting programs, including the Massachusetts Environmental Policy Act (“MEPA”) and the state’s waterways law (see below).

### Massachusetts Endangered Species Act

Massachusetts’s counterpart to the federal Endangered Species Act provides for listing of endangered or threatened species or species of concern, and of their habitat.<sup>17</sup> In addition to barring takings of listed species, the Act prohibits any alteration of significant habitat of any protected species that may reduce the habitat’s viability.<sup>18</sup>

The Natural Heritage and Endangered Species Program (“NHESP”), housed within the Massachusetts Department of Fish and Game’s (“MDFG”) Division of Fisheries and Wildlife, administers the Act and designates significant habitat.<sup>19</sup> For example, portions of Stellwagen Bank and Cape Cod Bay are designated as special habitat for endangered northern right whales.<sup>20</sup> If a project is proposed in an area contained within NHESP’s database of significant habitat, a Rare Species Information Request Form must be submitted to NHESP, which will subsequently issue a project permit with recommended measures to protect the listed species.

### Areas of Critical Environmental Concern

Areas of Critical Concern (“ACECs”) are coastal and inland areas in Massachusetts that receive heightened protection of their natural and cultural resources.<sup>21</sup> The purpose of the ACEC Program is to “preserve, restore, and enhance environmental resources and resource areas of statewide

<sup>15</sup> MASS. EXECUTIVE OFFICE OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS OCEAN MANAGEMENT PLAN 2-1 (2009), <http://www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> MASS. GEN. LAWS ch. 131A, §§ 1 *et seq.* (1990).

<sup>18</sup> MASS. GEN. LAWS ch. 131A, § 2 (1990).

<sup>19</sup> 321 MASS. CODE REGS. §§ 8.00, 10.00.

<sup>20</sup> SAM BRODY, GULF OF ME. MARINE PROTECTED AREAS PROJECT EVALUATION OF LEGAL MECHANISMS FOR ESTABLISHING MARINE PROTECTED AREAS IN THE GULF OF MAINE 39 (Nov. 1997) (unpublished draft report), <http://www.gulfofmaine.org/library/mpas/laws.pdf>.

<sup>21</sup> MASS. GEN. LAWS ch. 21A, § 2(7) (amended 2008); Mass. Dep’t of Conservation & Recreation, ACEC Program Home, <http://www.mass.gov/dcr/stewardship/acec/> (last visited May 31, 2013).

significance.”<sup>22</sup> The EOEEA Secretary reviews and designates ACECs, and MDCR administers the Program on behalf of the Secretary.<sup>23</sup>

Following designation, an ACEC receives an increased level of resource protection through the existing state environmental regulatory framework. MEPA (see below) thresholds are reduced in ACECs—ensuring closer regulatory scrutiny by state agencies—and MassDEP’s wetlands program (see local authorities below) includes provisions to protect resources in ACECs.<sup>24</sup> For example, the Great Marsh ACEC protects 25,500 acres of barrier beach, dune, and salt marsh habitat.<sup>25</sup>

### Fisheries Management, Area Closures

The Division of Marine Fisheries (“MDMF”), housed within MDFG, has broad authority over Massachusetts’s fin fisheries and shellfisheries.<sup>26</sup> The Division administers the marine fisheries laws through its licensing program and rulemaking activities. MDMF promulgates various size and gear restrictions,<sup>27</sup> but area-based protections for marine species are mainly provided by fisheries closures.

Area closures are used primarily for the purpose of reducing harvest or protecting spawning or otherwise aggregated fish. There are several area closures that occur for certain periods of time, such as the inshore spawning closure which prohibits commercial fishing for any finfish from February 1 to May 31,<sup>28</sup> the Spring and Winter Cod Conservation Zone closures, which prohibit the taking of cod,<sup>29</sup> the groundfish closures in the Gulf of Maine,<sup>30</sup> and the Upper Cape Cod Whiting Area.<sup>31</sup>

The only closure that targets vulnerable habitats is the year-round prohibition of net fisheries in coastal ponds and estuaries.<sup>32</sup> The purpose of this regulation is to manage net fishing participation in the nearshore harbors, bays, estuaries, tidal creek, river, and salt ponds of the Commonwealth on a year-round basis, with a particular focus on winter flounder and the spawning season. In addition, the

<sup>22</sup> Mass. Office of Coastal Zone Mgmt., Areas of Critical Environmental Concern, <http://www.mass.gov/czm/permitguide/regs/acec.htm> (last visited May, 31, 2013).

<sup>23</sup> 301 MASS. CODE REGS. § 12.00.

<sup>24</sup> The following reviews are required for a project proposed in an ACEC:

- MEPA [] - Projects proposed in ACECs are given closer scrutiny under MEPA if they need certain state permits, use state funding, or involve state agency actions. The project review thresholds (size or type) that require filing of an Environmental Notification Form (ENF) are reduced for proposals in ACECs (301 CMR 11.03: Review Thresholds). Once an ENF is filed, the review process proceeds as described in the MEPA regulations (301 CMR 11.05: ENF Preparation and Filing).
- Waterways [] - Chapter 91 regulations do not allow new fill in ACECs and place limits on new structures (310 CMR 9.32). Improvement dredging is permissible only for fishery and wildlife enhancement. Dredged material disposal is prohibited except for beach nourishment, dune construction or stabilization, or enhancement of fishery or wildlife resources (310 CMR 40.00).
- Wetlands [] - The performance standard is raised to “no adverse effects” except for maintenance dredging for navigational purposes of “Land Under the Ocean” (310 CMR 10.24).

Mass. Office of Coastal Zone Mgmt., Areas of Critical Environmental Concern, <http://www.mass.gov/czm/permitguide/regs/acec.htm> (last visited May, 31, 2013).

<sup>25</sup> Mass. Dep’t of Conservation & Recreation, ACEC Designations: Great Marsh, <http://www.mass.gov/dcr/stewardship/acec/acecs/l-parriv.htm> (last visited May, 31, 2013).

<sup>26</sup> MASS. GEN. LAWS ch. 130, §§ 1 *et seq.* (amended 2009).

<sup>27</sup> 322 MASS. CODE REGS. §§ 4.00, 6.00.

<sup>28</sup> 322 CMR § 8.09(1).

<sup>29</sup> 322 CMR § 8.15.

<sup>30</sup> 322 CMR § 8.12.

<sup>31</sup> 322 CMR § 8.14.

<sup>32</sup> 322 CMR § 4.02.

regulation is designed to reduce conflicts between different fisheries and users and to identify and regulate all inshore net fisheries for purposes of resource conservation and management.

In 2005, MDMF established the Cod Conservation Zone (CCZ) to protect the nearshore cod spawning aggregation from excessive fishing effort by recreational and commercial fishermen. In the CCZ, groundfish fishing is restricted from December 1 to February 28:<sup>33</sup>

During the closure period no person shall harvest cod from waters under the jurisdiction of the Commonwealth north of latitude 42° 20' and south of 42° 30'. It is unlawful for any person to fish, set, or abandon any gear capable of harvesting cod in this CCZ during the restricted season. This prohibition applies to all gillnets, otter trawls, mid-water trawls, seines, and all hook-and-line gears including longlines, rod-and-reel, and handlines, however exempted gears include lobster traps, and drags used for scallops and urchins.<sup>34</sup>

Massachusetts also closes certain fisheries by statute. For example, “no person shall take scallops between April first and the following October first from the flats or coastal waters of the commonwealth, or buy or sell or have in possession scallops so taken.”<sup>35</sup>

However, the majority of fisheries closures are implemented through the Division’s species-based regulations.<sup>36</sup> For example, groundfish closures in the Gulf of Maine protect various finfish populations, including Atlantic cod, windowpane flounder, witch flounder, American plaice, yellowtail flounder, haddock, pollock, winter flounder, white hake, and redfish.<sup>37</sup> From April through May and October through November, it is unlawful for commercial fishermen to possess or fish for regulated groundfish species taken from the regulated area in Cape Cod Bay and Massachusetts Bay.<sup>38</sup>

### Underwater Archaeology Act

The Massachusetts Board of Underwater Archaeological Resources (BUAR), which is part of EOEEA and is housed within MCZM, provides for the identification, preservation, and protection of the state’s submerged cultural resources.<sup>39</sup> Massachusetts holds title to submerged cultural resources located in the state’s inland and coastal waters. No one “may remove, displace, damage or destroy underwater archaeological resources . . . except in conformity with the provisions” of the Underwater Archaeology Act<sup>40</sup> The statute includes provisions for designating underwater archaeological reserves, as well as “previously discovered and commonly known underwater archaeological resources and locations” that are exempt from permitting requirements under the Act.<sup>41</sup>

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<sup>33</sup> 322 Mass. Code Regs. § 8.15

<sup>34</sup> Massachusetts Marine Fisheries Advisory Commission Approves New Regulations: Commercial Haddock Size & Cod Conservation Zone (Nov. 9, 2007), <http://www.mass.gov/eea/docs/dfg/dmf/marinefisheriesnotices/october-mfc-regs-ccz-and-haddock-111407.pdf>.

<sup>35</sup> MASS. GEN. LAWS ch. 130, § 71.

<sup>36</sup> See 322 MASS. CODE REGS. § 8.00.

<sup>37</sup> *Id.* § 8.12(1) (“Regulated Groundfish Species means those finfish regulated under the federal Northeast Multispecies Fishery Management Plan and defined as regulated species.”).

<sup>38</sup> *Id.* § 8.12(2).

<sup>39</sup> MASS. GEN. LAWS ch. 6, §§ 179-180.

<sup>40</sup> MASS. GEN. LAWS ch. 91, § 63; 312 MASS. CODE REGS. § 2.00.

<sup>41</sup> MASS. GEN. LAWS ch. 91, § 63.

In 1985, BUAR established and continues to maintain a list of exempted sites. The intent in creating an exempted site is to preserve such sites for the continued enjoyment of the recreational diving community. Recreational diving activities, which includes minor casual collecting, on exempted sites will not require a permit from BUAR. However, any major disruption of these sites remains prohibited. The recreational diving community is encouraged to work with the Board to protect these sites for the continued enjoyment of all. There are currently forty shipwrecks on the list of exempt sites. The List of Exempt Shipwrecks may be modified as sites are added to or removed from the list. All forty Exempt Sites are member sites of the National System of Marine Protected Areas. This approach balances traditional uses with contemporary views of the value of these resources.

BUAR is also authorized to designate underwater archaeological preserves.<sup>42</sup> The purpose of such designation is “to provide special protection to those underwater archaeological resources of substantial historical value.”<sup>43</sup> Access for recreational, historical, and scientific purposes is guaranteed, but recoveries are permitted only for historical or scientific purposes, with all collected materials remaining the permanent property of the state.<sup>44</sup> Such preserves serve to recognize, protect, and ensure access to important resources. This enables the Board to fulfill provisions of the federal Abandoned Shipwreck Act (ASA) and its guidelines.<sup>45</sup>

### Other Authorities

#### *Massachusetts Environmental Policy Act*

The Massachusetts Environmental Policy Act (“MEPA”) governs any project that requires state funding or environmental permits or licenses.<sup>46</sup> EOEEA’s MEPA Unit administers the review process required by the statute, which is the state counterpart to the federal government’s National Environmental Policy Act.

MEPA review is intended to help projects avoid degradation of the environment, or if damage cannot be avoided, to minimize and mitigate the impact.<sup>47</sup> The review also provides an opportunity for public

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<sup>42</sup> MASS. GEN. LAWS ch. 6, § 180.

<sup>43</sup> *Id.*

<sup>44</sup> MASS. GEN. LAWS ch. 91, § 63.

<sup>45</sup> Public Law 100-298; 43 U.S.C. §§ 2101-2106.

<sup>46</sup> MASS. GEN. LAWS ch. 30, §§ 61–62H (1977).

<sup>47</sup> MCZM’s website describes the review process:

Proponents of projects that require state action and that meet or exceed MEPA review thresholds [301 MASS. CODE REGS. 11.03: Review Thresholds] must file an Environmental Notification Form [(“ENF”)] [301 MASS. CODE REGS. 11.05: ENF Preparation and Filing] and may be required to file an Environmental Impact Report [(“EIR”)] [301 MASS. CODE REGS. 11.07: EIR Preparation and Filing]. Notice of the availability of review documents and the ENFs are published in the semi-monthly Environmental Monitor ([www.mass.gov/envir/mepa/secondlevelpages/currentissue.htm](http://www.mass.gov/envir/mepa/secondlevelpages/currentissue.htm)). The total review period for an ENF is 30 days from the publication date of the Monitor, of which the first 20 days is available for public and agency comments. After the close of public comment and before the last day of the ENF review, the Massachusetts Secretary of Environmental Affairs issues a certificate stating whether or not an EIR is required and, if so, what the scope of the EIR will be. The scope is limited to the potential environmental damages of the proposal that are within the subject matter of required state permits. The EIR review period last for 37 days following the date of the Environmental Monitor in which notice of its availability is published, of which the first 30 days are available for public and agency comment. Within seven days after the close of comments, the Secretary issues a certificate stating whether or not the EIR adequately and properly complies with the Massachusetts Environmental Policy Act and its implementing regulations. No state permits can be issued

comment on potential environmental impacts of projects for which state agency action is required. Major categories of project impacts subject to review are listed in the statute, and include altering significant habitat, coastal wetlands, tidelands, waterways, and state-designated ACECs.<sup>48</sup>

The intent of MEPA review is to inform project proponents and state agencies of potential adverse environmental impacts during the proposal stage of project design. As part of the planning process, the project proponent must prepare one or more review documents that describe the means by which the proposed project complies with the applicable regulatory standards and requirements. All relevant agencies must review the proposal, and if necessary, suggest mitigation strategies that must be performed as a condition of permit issuance.

*Public Waterfront Act*

MassDEP’s Division of Wetlands and Waterways administers the state’s Chapter 91 Waterways Program under the Public Waterfront Act.<sup>49</sup> The law is Massachusetts’s public trust statute, which “protects the public’s rights to fish, fowl, and navigate below the current or historic high water line.”<sup>50</sup> The Program governs dredging, filling, and construction activities in tidelands, or “projects in, on, over, or under tidal areas between the mean high water line [] and the limit of state territorial waters.”<sup>51</sup>

These proposed projects require a Chapter 91 license or permit.<sup>52</sup> The waterways regulations guide the Division’s permitting activities and ensure that reviewed projects “foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.”<sup>53</sup>

*Evaluation of State Authorities<sup>54</sup>*

FACTORS	Ocean Sanctuaries Act	Oceans Act	Massachusetts Endangered Species Act	Areas of Critical Environmental Concern	Fisheries Management, Area Closures	Underwater Archaeology Act
Legal Regime	★★★★ Regulatory	★★★★ Planning	★★★★ Regulatory	★★★★ Planning	★★★★ Regulatory	★★★★ Regulatory
Ocean Jurisdiction	★★★★ Specific marine waters	★★★★ All marine waters	★★★★ All marine waters	★★★ Estuarine	★★★★ All marine waters	★★★★ All inland and marine waters

until the Secretary certifies that the EIR complies with MEPA, that is, the environmental impacts have been fully described and all necessary plans to avoid, minimize, and mitigate adverse effects are in place.

The MEPA regulations also provide mechanisms to review proposals that are below MEPA thresholds but may have adverse environmental impacts [301 MASS. CODE REGS. 11.04: Fail-Safe Review], project changes and time lapses [301 MASS. CODE REGS. 11.10: Project Changes and Lapses of Time], and for waivers of certain provisions of the regulations [301 MASS. CODE REGS. 11.11: Waiver].

Mass. Office of Coastal Zone Mgmt., Massachusetts Environmental Policy Act, <http://www.mass.gov/czm/permitguide/regs/policyact.htm> (last visited May 31, 2013).

<sup>48</sup> See 301 MASS. CODE REGS. § 11.03 (review thresholds for MEPA).

<sup>49</sup> MASS. GEN. LAWS ch. 91, §§ 1 *et seq.* (1866).

<sup>50</sup> Mass. Office of Coastal Zone Mgmt., <http://www.mass.gov/czm/permitguide/regs/chapter91.htm> (last visited May 31, 2013).

<sup>51</sup> Mass. Office of Coastal Zone Mgmt., <http://www.mass.gov/czm/permitguide/regs/chapter91.htm> (last visited May 31, 2013).

<sup>52</sup> 310 MASS. CODE REGS. § 9.00.

<sup>53</sup> *Id.* § 9.01(2)(e).

<sup>54</sup> For an explanation of the evaluation matrix and criteria, please see the Introduction and Methodology Chapters.

FACTORS	Ocean Sanctuaries Act	Oceans Act	Massachusetts Endangered Species Act	Areas of Critical Environmental Concern	Fisheries Management, Area Closures	Underwater Archaeology Act
<b>Durability</b>	★★★★ In perpetuity	★★★★ Adaptive	★★★ Indeterminate	★★★ Indeterminate	★★★ Indeterminate	★★★★★ In perpetuity
<b>Consistency</b>	★★★★ Authorizes year-round protection	★★★★ Authorizes year-round protection	★★★★★ Authorizes year-round protection	★★★★★ Authorizes year-round protection	★★★★★ Authorizes year-round protection	★★★★★ Authorizes year-round protection
<b>Habitat</b>	★★★★★ Goal = multiple habitats	★★★★★ Habitat protection goal	★★★ Species-specific	★★★★★ Habitat protection goal	★★★ Species-specific	★★★ Indirect habitat protection goal (sites serve as de facto artificial reefs)
<b>Sector</b>	★★★★ Authorizes multi-sector protection	★★★★★ Authorizes multi-sector protection	★★★★★ Authorizes multi-sector protection	★★★★★ Authorizes multi-sector protection	★★★ Authorizes single-sector protection	★★★★★ Authorizes multi-sector protection
<b>Enforcement</b>	★★★ Some MPA-specific enforcement	★★★ Some MPA-specific enforcement	★★★★★ Grants MDFG authority to enforce chapter & arrest offenders or issue citations	★★★ Some MPA-specific enforcement	★★★★★ Grants MDFG authority to enforce chapter & arrest offenders or issue citations	★★★★★ Grants law enforcement agencies authority to enforce chapter & arrest offenders or issue citations
<b>Extent (Scope)</b>	★★★ Multi-site, no expansion mechanism	★★★★★ All state waters	★★★★★ Multi-site, potential expansion	★★★★★ Multi-site, potential expansion	★★★★★ Multi-site, potential expansion	★★★★★ Multi-site, potential expansion
<b>Process for designation or expansion</b>	★★★ No MPA-specific public process	★★★★★ Plan developed through specific public process	★★★ No MPA-specific public process	★★★ No MPA-specific public process	★★★ No MPA-specific public process	★★★★★ Designations through specific public process

*Local Authority for Marine Protection*

**Summary of Local Authorities**

Massachusetts grants local governments limited authority to protect the marine environment. Local conservation commissions have permitting authority over coastal wetlands bordering the ocean, estuaries, and tidal lands. Commissions also have authority to adopt orders imposing restrictions on coastal wetlands. Finally, municipalities may assume local control over alewives fisheries.

	Coastal Wetlands Restriction Act	Wetlands Protection Act	Municipal Alewives Fisheries Management
<b>Legal requirement</b>	Municipalities may adopt orders imposing restrictions on coastal wetlands	Local conservation commission wetlands permitting authority	Municipalities may regulate local alewives fisheries
<b>Citation</b> <sup>55</sup>	MASS. GEN. LAWS ch. 130, § 105 (1965)	MASS. GEN. LAWS ch. 131, § 40 (1972)	MASS. GEN. LAWS ch. 130, § 94 (amended 2009)
<b>Designation authority</b>	Local governments	Massachusetts Department of Environmental Protection	Local governments
<b>Management &amp; enforcement authority</b>	Local conservation commissions	Massachusetts Department of Environmental Protection (administration) & local conservation commissions (permitting)	Local governments
<b>Jurisdiction &amp; boundaries</b>	Estuaries, coastal lands, beaches and dunes	Estuaries, coastal lands, beaches and dunes	Estuaries, coastal lands, beaches and dunes
<b>Prohibited uses</b>	None specified	None specified	None specified
<b>Permitted uses</b>	None specified	None specified	None specified

### Coastal Wetlands Restriction Act

Under the Coastal Wetlands Restriction Act, the MassDEP Commissioner may, for purposes including the protection of wildlife and marine fisheries, adopt orders regulating, restricting or prohibiting, certain activities in coastal wetlands.<sup>56</sup> Further, the Department’s regulations authorize municipalities to adopt orders imposing restrictions on the state’s coastal wetlands: “The Orders shall regulate, restrict, prohibit, control or abate certain specified activities or uses, including dredging, filling, removing, otherwise altering or polluting coastal wetlands.”<sup>57</sup>

The Wetlands Conservancy Program (“WCP”), housed within MassDEP, used to administer these functions. Although WCP is not currently active, a number of municipalities have registered wetlands with accompanying restriction orders.<sup>58</sup> Restriction orders are recorded at the Registries of Deeds in the counties where the properties are located to inform future landowners of the restriction. Affected municipalities have copies of the community’s restricted wetlands plans and restricted wetlands orders. The restricted orders are then implemented through the Wetlands Protection Act permitting process (see below).

### Wetlands Protection Act

The Massachusetts Wetlands Protection Act is the main regulatory authority for protecting wetlands in the state and serves many public interests, including the protection of fisheries and land containing shellfish and wildlife habitat.<sup>59</sup> The Act covers coastal wetlands, beaches, dunes, tidal flats, marshes, or swamps bordering the ocean, estuaries, and land subject to tidal action.

<sup>55</sup> The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

<sup>56</sup> MASS. GEN. LAWS ch. 130, § 105 (1965).

<sup>57</sup> 310 MASS. CODE REGS. § 12.01(2).

<sup>58</sup> Mass. Dep’t of Env’tl. Prot., Communities with Previously-Registered Wetlands, <http://www.mass.gov/eea/agencies/massdep/water/watersheds/communities-with-previously-registered-wetlands.html> (last visited May 30, 2013).

<sup>59</sup> MASS. GEN. LAWS ch. 131, § 40 (1972); Mass. Dep’t of Env’tl. Prot., Protecting Wetlands in Massachusetts, <http://www.mass.gov/eea/agencies/massdep/water/watersheds/protecting-wetlands-in-massachusetts.html> (last visited May 31, 2013).

MassDEP has authority to promulgate regulations to administer the Act, but local conservation commissions have permitting authority.<sup>60</sup> The commissions’ volunteer boards are comprised of three to seven members appointed by the selectmen or city council. MassDEP also plays an oversight role, providing technical training and hearing appeals of decisions made by the commissions.

Local conservation commissions ensure that proposed activities will not alter resource areas and the public interests they provide by reviewing projects on a case-by-case basis.<sup>61</sup> MassDEP’s regulations describe how each type of resource area provides one or more of the public interests. The regulations also define the type and extent of work allowed in resource areas, and all proposed work must meet these standards. For example, a person wishing to remove vegetation or build a structure in a wetland resource area or within 100 feet of a wetland (the buffer zone) must contact the local conservation commission to begin the permitting process.

**Municipal Alewives Fisheries Management**

Local governments may petition the state for the ability to control and regulate public fisheries for alewives within their jurisdiction.<sup>62</sup> To do so, the municipality must authorize the board of aldermen, the city council or the selectmen of a town to petition the Director of MDMF. Following a petition, a hearing is held to determine “whether such control would be proper and reasonable and if the public interests therein would be best served thereby.”<sup>63</sup>

If granted, the Director may impose additional terms, regulations, or restrictions in the order granting the petition. The local government would then have authority to regulate the fishery, and may use this authority to lease the fishery to outside parties. Additionally, nearby municipalities may allege that their fisheries are adversely affected by the Director’s order and may petition the Director, who must stay the original order and, after considering the petition, confirm, rescind, or amend the original order.

**Other Authorities**

Cities and towns manage shellfisheries in all waters within their boundaries except the commercial harvest of surf clams and ocean quahogs, which the state regulates.<sup>64</sup> Most cities and towns employ a shellfish constable for shellfisheries management.<sup>65</sup> Shellfish constables enforce federal, state, and local shellfish regulations, and are responsible for maintaining and enhancing local shellfish production. The town of Yarmouth, for example, uses propagation and aquaculture techniques to manage its shellfish and purchases additional shellfish each year to supplement the existing population.<sup>66</sup>

*Evaluation of Local Authorities*

FACTORS	Coastal Wetlands Restriction Act	Wetlands Protection Act	Municipal Alewives Fisheries Management
Legal Regime	Regulatory ★★★★★	Planning ★★★★★	Regulatory ★★★★★

<sup>60</sup> MASS. GEN. LAWS ch. 131, § 40; 310 MASS. CODE REGS. 10.00.

<sup>61</sup> 310 MASS. CODE REGS. § 10.00.

<sup>62</sup> MASS. GEN. LAWS ch. 130, § 94 (amended 2009).

<sup>63</sup> *Id.*

<sup>64</sup> Executive Office of Energy and Environmental Affairs, *Shellfisheries Management*, <http://www.mass.gov/eea/agencies/dfg/dmf/programs-and-projects/shellfisheries-management.html#ta> (last visited Nov. 26, 2013).

<sup>65</sup> Woods Hole Oceanographic Institution, *Shellfish Resource Management in Massachusetts* (Sept. 2000), <http://www.whoi.edu/seagrant/page.do?pid=51817&tid=282&cid=88714> (last visited Nov. 26, 2013).

<sup>66</sup> Town of Yarmouth, *Shellfish Management & Propagation*, <http://www.yarmouth.ma.us/index.aspx?NID=213> (last visited Nov. 26, 2013).

FACTORS	Coastal Wetlands Restriction Act	Wetlands Protection Act	Municipal Alewives Fisheries Management
<b>Ocean Jurisdiction</b>	Estuarine <span style="float:right">★★</span>	Estuarine <span style="float:right">★★</span>	Estuarine <span style="float:right">★★</span>
<b>Durability</b>	Indeterminate <span style="float:right">★★</span>	Indeterminate <span style="float:right">★★</span>	Indeterminate <span style="float:right">★★</span>
<b>Consistency</b>	Authorizes year-round protection <span style="float:right">★★★★</span>	Authorizes year-round protection <span style="float:right">★★★★</span>	Authorizes year-round protection <span style="float:right">★★★★</span>
<b>Habitat</b>	Habitat protection goal <span style="float:right">★★★★</span>	Byproduct = protecting habitat <span style="float:right">★★</span>	Species-specific <span style="float:right">★</span>
<b>Sector</b>	Authorizes multi-sector protection <span style="float:right">★★★★</span>	Authorizes multi-sector protection <span style="float:right">★★★★</span>	Authorize single-sector <span style="float:right">★</span>
<b>Enforcement</b>	Some MPA-specific enforcement <span style="float:right">★★</span>	No MPA-specific enforcement <span style="float:right">★</span>	No MPA-specific enforcement <span style="float:right">★</span>
<b>Extent (scope)</b>	Multi-site, no expansion mechanism <span style="float:right">★★</span>	Local conservation commission management of single area <span style="float:right">★</span>	Fishery-by-fishery, local management <span style="float:right">★</span>
<b>Process for expansion</b>	No MPA-specific public process <span style="float:right">★★</span>	No MPA-specific public process <span style="float:right">★★</span>	No MPA-specific public process <span style="float:right">★★</span>