

SHAPING THE FUTURE OF YOUR COMMUNITY

CHAPTER 6

Project Review and Permitting

If you are concerned about the impacts of a specific development project, you should participate in the permit review processes. Project review is the process during which a proposed project is evaluated by a variety of regulatory bodies. When a development project is proposed, the plans are filed with the permit-granting boards (e.g. planning board, conservation commission, and board of health) and public meetings or hearings are held.



Whether the project is local or state, and whether it affects a wetland, a forest, or a whole community, the same general process of review and opportunity for input exists—the project proponent submits full plans for public review, the permitting board reviews the plans and any public comments, and a permit is issued (often with conditions) or denied. Developers and other landowners will often hire legal, scientific, and engineering experts to assist with permit applications and participate in the hearing process. The reviewing authorities also have the right to hire technical consultants, and can often charge the developer for reasonable independent consulting services related to the permit application.

As a citizen, you have clearly defined rights to participate with the permitting agencies at times throughout the review process. Familiarize yourself with a particular project under review by attending meetings and hearings held by the appropriate boards then clearly state your concerns or recommendations for improvements.

The project review process is designed to ensure that the project meets all regulatory requirements and has been given the proper conditions.

To understand a local development proposal, you first need to identify the local permits and boards involved. If you are unsure where to begin, use the project review table and descriptions of the authorities of various boards in

this publication to see which local community, commission, or board has jurisdiction. The local city or town clerk may also be able to guide you to the appropriate review boards.

Topic of Concern	Potentially Applicable Permits
New lots and/or streets Subdivisions	The Massachusetts Subdivision Control Act The Massachusetts Zoning Act and local zoning Local Subdivision Control and Approval Not Required (ANR) Open Space Residential Design Zoning and Subdivision Appeals
New or expanded commercial or industrial development; other large projects	The Massachusetts Subdivision Control Act The Massachusetts Zoning Act and local zoning Site Plan Review Special Permit Massachusetts Environmental Policy Act if thresholds met and triggered
Affordable Housing	Comprehensive Permit (40B) The Massachusetts Comprehensive Permit Law and Local Project Review Process
Smart Growth Zoning (“40R”)	MGL Ch. 40R
Development in or near wetlands, rivers, and floodplains	The Massachusetts Wetlands Protection Act Local Wetlands Bylaws & Regulations Federal Clean Water Act and Massachusetts Programmatic General Permit State (401) Water Quality Certification
Alteration of rare species habitat	The Massachusetts Natural Heritage & Endangered Species Program (NHESP) The Massachusetts Endangered Species Act
Large projects	Massachusetts Environmental Policy Act
Other	See Section 2 Who’s Who of Local, Regional, State, and Federal Management and Environmental Agencies and Chart of Federal State and Local Laws and Regulations Pertaining to Land Use

Local Project Review

Local review processes are fairly similar across the state. While a few communities have a process for coordinating project review by local boards, most communities have each local board review the project independently and issue permits separately. Concerned citizens should check with local officials to find out how the project review process works in their own communities. A review of the local laws will provide details on the requirements for each board when reviewing applications and the allowable time periods for review, comment, and appeals of decisions.

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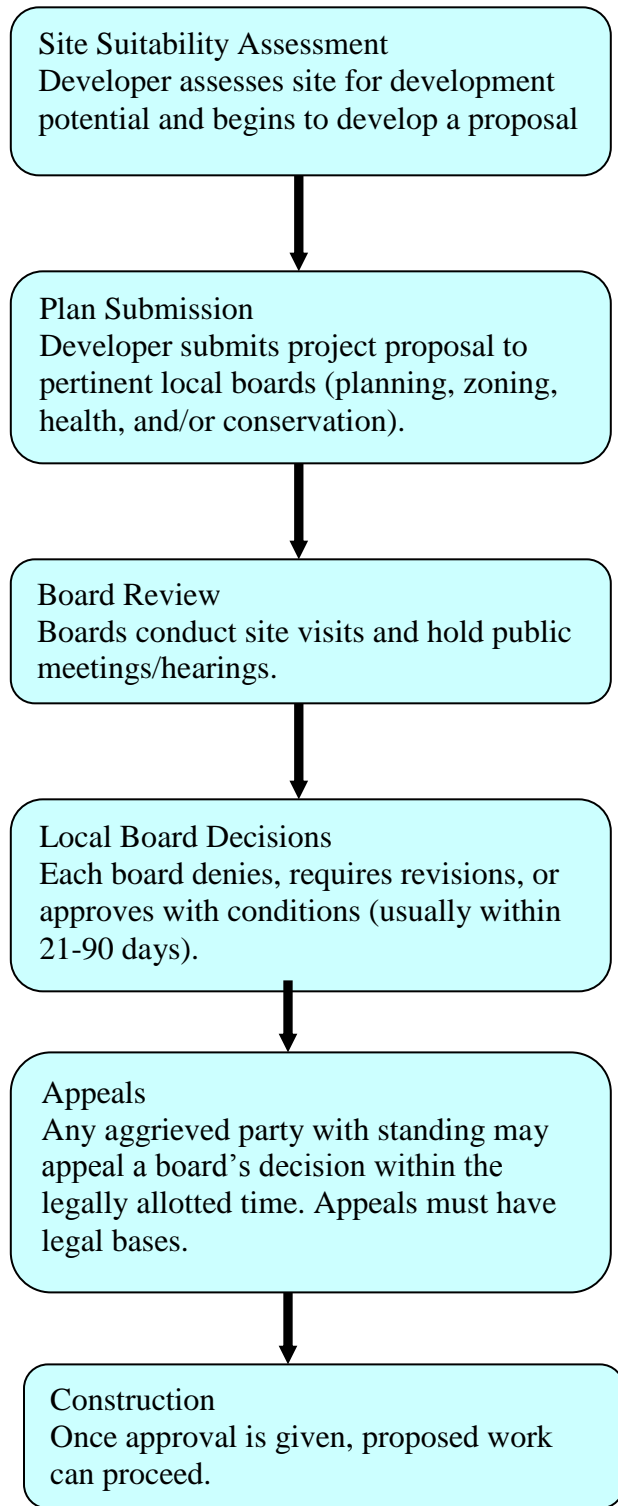
While only comprehensive planning can really guide overall development patterns, reviews of individual projects can provide some protection against increased habitat destruction, pollution, traffic, flooding, and other adverse effects of development.

In reviewing development proposals, it may be most effective to communicate with and seek the assistance of a number of local boards since each board addresses different regulatory issues. Target your comments to issues subject to each board's jurisdiction so that the board can respond with appropriate permit conditions to improve the development design.

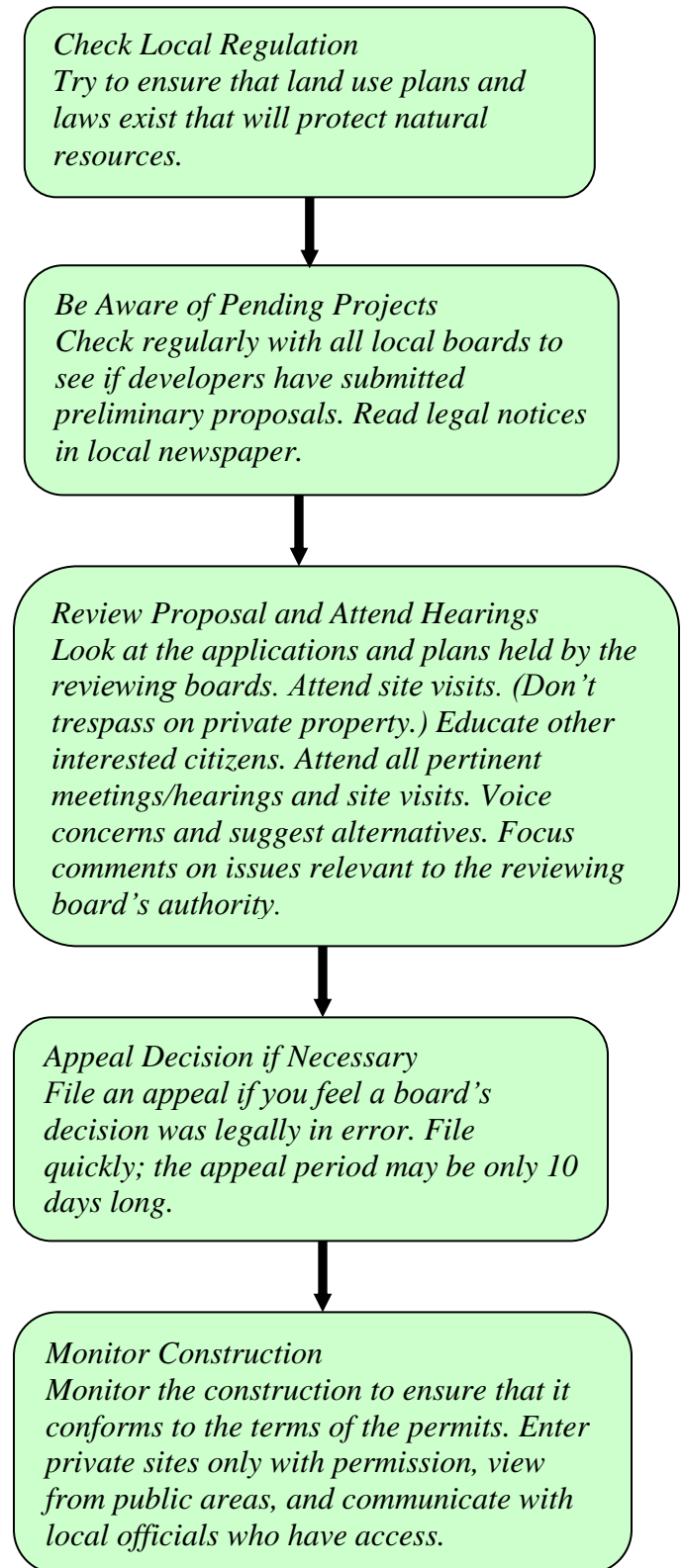
Let us imagine that a landowner wishes to build a 20-unit single-family subdivision on a parcel of land with fields, forest, streams, and wetlands. The following chart describes the process that the developer and other interested parties might follow to see the project through to construction. Opportunities for citizen involvement are indicated in italics in the right-hand column. (Note: there is no pre-set order for obtaining the required permits—this is determined by both local custom and the applicant.)

Local Project Review Process

Developer's Actions



Role for Concerned Citizens



Subdivision and Zoning

The Massachusetts Subdivision Control Act

The Massachusetts Subdivision Control Act regulates any division of land into two or more lots. The act requires minimum road frontage for the division of land into buildable lots (to accommodate services such as fire and ambulance) and gives local planning boards authority over subdivisions.

The Massachusetts Zoning Act

The Zoning Act promotes zoning in each municipality in Massachusetts. Local planning boards and zoning boards of appeal implement local zoning laws and regulations. Planning boards recommend changes to local zoning maps, laws, and regulations and implement zoning regulations through the subdivision plan review process (see below). Zoning boards of appeal grant special permits, hear requests for variances from established zoning requirements, and review appeals of the decisions of the Building Inspector.

Citizens can get involved with local zoning through any of the following three avenues:

- Developing or revising municipal zoning maps and regulations (requires a two-thirds vote of the town meeting or city council)
- Reviewing (and commenting on) requests for zoning variances
- Reviewing applications for projects requiring special permits such as cluster developments, “pork-chop” lots, or uses not automatically allowed “by right.”

Local Subdivision Control–Planning Board

Municipalities can enact local subdivision control laws and regulations that put in place requirements or restrictions to address public health, safety, and welfare. Local subdivision control is employed in close coordination with local zoning and health codes.

The Subdivision Control Law is MGL Ch. 41 s. 81K through s. 81GG. A community adopts pursuant to statute its own Subdivision Rules and Regulations, which vary greatly from community to community.

A subdivision of land includes the design of a new roadway and all associated amenities (such as stormwater management facilities and street trees) to provide access to new lots for housing and commercial and industrial development. Preliminary subdivision plans are required for land zoned for nonresidential uses. Your community should strongly encourage them for residential subdivisions as well.

Preliminary plans are just that—a first cut at how the land might be subdivided. Definitive plans are more detailed. The lot lines are surveyed, and all the details are worked out, such as precise locations of each catch basin and streetlight. The planning board must hold a public hearing to discuss a definitive plan after notifying abutters and other municipal boards and commissions. Unless the board of health finds that unhealthful conditions exist or will result from the proposal (such as an insufficient supply of water

available to serve a proposed development, either from existing public water sources or new private wells, or the land’s insufficient ability to handle septic systems if not in a sewer area), the planning board must approve the plan if it complies with the community’s Subdivision Rules and Regulations. The planning board can waive strict compliance with these regulations if such a waiver is both (1) not inconsistent with the purposes of subdivision control and (2) in the public interest.

In some communities, many new lots are being created along existing public ways. These are ANR (“Approval Not Required” under the Subdivision Control Law) or Form A (named after the first form in most communities’ Subdivision Rules and Regulations) lots, a planning tool unique to Massachusetts. If the lot has the required frontage along the public way or a way approved under the Subdivision Control Law and the required lot area, the planning board must endorse without conditions the plan creating the new lot.



Department of Environmental Protection

There are no requirements for stormwater management, street trees, streetlights, or any of the other improvements required in a subdivision. In rural communities, with many miles of road frontage, there is often little incentive to actually subdivide—most new lots are created along roads, which result in roadside sprawl—fragmenting the landscape into roadside houses with undeveloped backland.

Special Permits – Zoning Boards of Appeals and Planning Boards

Zoning boards of appeals, planning boards, or occasionally the selectboard or city council may also be designated as Special Permit Granting Authorities in the local zoning ordinance.



Special permits are a more discretionary permit than subdivisions and require a “supermajority” vote (e.g. 4 or 5 members must vote to approve). The board must make affirmative findings that the proposed development is in compliance with specific criteria in the bylaw and is afforded significant discretion by the courts in making their decisions.

Variations – Zoning Boards of Appeals

The zoning board of appeals also considers variance requests. A variance is relief from the strict application of the community’s zoning ordinance. It must be based on circumstances relating to the soil conditions, shape, or topography of the lot or structures, not the personal circumstances of the applicant. The applicant must also demonstrate that a literal enforcement of the ordinance would involve substantial hardship, financial or otherwise, and lastly, that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially deviating from the intent or purpose of the zoning ordinance or bylaw. In Massachusetts, use variances, which provide for the possibility that the use of the land be varied by the zoning board, may be allowed if the community specifically allows them in their ordinance or bylaw. Because use can be changed by the town meeting or city council as a zoning map change, it is generally not considered advisable to authorize use variances. The zoning board may impose conditions and limitations, but, once exercised, the variance “runs with the land”—the relief continues even if the ownership of the land or structure changes.

Exempt Uses – “Dover Amendment”

The Zoning Act (MGL Ch. 40A s. 3) exempts nonprofit religious and educational uses from strict compliance with the local zoning ordinance. The community may apply reasonable regulations concerning the height and massing of structures and determining lot areas, setbacks, parking, and building coverage requirements. Other exempted uses include agriculture and forestry, group homes, day care centers, and solar energy facilities.

Zoning and Subdivision Appeals

Any aggrieved party with standing may appeal a planning board or zoning board of appeals decision to the Massachusetts Superior Court within 20 days of the decision. The appeal must be based on the state and local laws governing issuance of the permit.

Site Plan

Site plan review (known in some communities as site plan approval) determines criteria for the scale, appearance, layout, safety, and environmental impacts of industrial or commercial development. The review usually concentrates on traffic, parking, drainage, signage, roadway construction, screening, utilities, and lighting. Site plan review seeks to “fit” larger projects into the existing community by designing the best possible plan for the location. Communities can generally not deny such a project but can use the site plan review process to better shape the project by modifying the proposal. Usually, a developer must obtain a site plan approval before the building or special permit is issued.

The Massachusetts Zoning Act does not provide guidelines for site plan review; rather, the varying processes are products of local boards and court decisions. The Planning board, board of selectmen or city council, zoning board of appeals, and building inspector may exercise their authority over site plan review.

Fiscal Impact Analysis

Economic analysis can also inform project reviews. Consider a proposed new residential development. Contrary to popular belief, residential development is rarely an economic boon for a community. Rather, as demonstrated by the American Farmland Trust <http://www.farmland.org/services/fiscalplanning/default.asp>, residential development tends to demand more in community services (e.g., schools, fire, police) than it generates



in tax revenues; so it actually becomes a financial burden. In addition, the loss of open space can cause the loss of recreational opportunities, flood control, clean drinking water, flora and fauna, and community character. Commercial development may provide a short-term benefit, but may also foster new residential growth and demand additional services. Economic analysis can help a community identify the true costs and benefits of development proposals.

Affordable Housing

The Massachusetts Comprehensive Permit Law

Chapter 40B (also known as The Massachusetts Comprehensive Permit Law) is a state law aiming to increase the supply and improve the distribution of low- and moderate-income housing throughout Massachusetts. The statute mandates that local zoning boards of appeal (ZBAs) apply more flexible rules to approve qualifying affordable housing developments.

For the flexible rules to apply, at least 20 to 25 percent of the units in the proposed development must have long-term affordability restrictions. The remaining market rate units can subsidize the restricted prices of the affordable units. The law aims to encourage affordable housing with little cost to the state. If 10 percent of the community's housing stock is determined to be "affordable" the law does not apply.

Local Project Review of 40B projects

A developer seeking to qualify for Chapter 40B must first seek preliminary project approval under a state or federal housing program (MassHousing, the Department of Housing and Community Development, MassDevelopment, or the U.S. Department of Housing and Urban Development). Municipal boards can comment to MassHousing as part of approval process.

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If the project is certified as an eligible 40B project, the developer then submits an application to the local zoning board of appeals for a comprehensive permit. The ZBA consults with other relevant boards—such as the planning board, historical commission, the conservation commission, water commission and the board of health—in a streamlined review process that substitutes for various local permits. The Wetlands Protection Act still regulates development under comprehensive permit, so the local conservation commission reviews the project to ensure compliance with state wetlands protection. The ZBA review substitutes for all other usual forms of local review, and local rules such as wetlands bylaw may be waived.

Within 30 days of receiving the developer’s formal application, the local ZBA begins a public hearing to review the project. Typically open for several months, the hearing culminates in the ZBA’s decision, which must be filed in writing within 40 days of the close of the public hearing. The ZBA has three options in its decision: to approve the application as submitted, to approve the project with conditions, or to deny the project outright.

Through the Chapter 40B approval process, a developer can seek waivers of any provision of the municipality’s bylaws or ordinances that would render the project unaffordable to construct. This may include waivers of specific fee requirements, lot size, local wetlands buffers and any other requirements. The applicant is required to submit detailed financial data with the application (called a pro forma) that demonstrates the need for these waivers. The ZBA reviews this information and consults with other local boards before making a decision. As a result of such waivers, and the need for additional units to subsidize the affordable units, these development projects are often built at a much higher density than would otherwise be allowed by local zoning.

For more information:

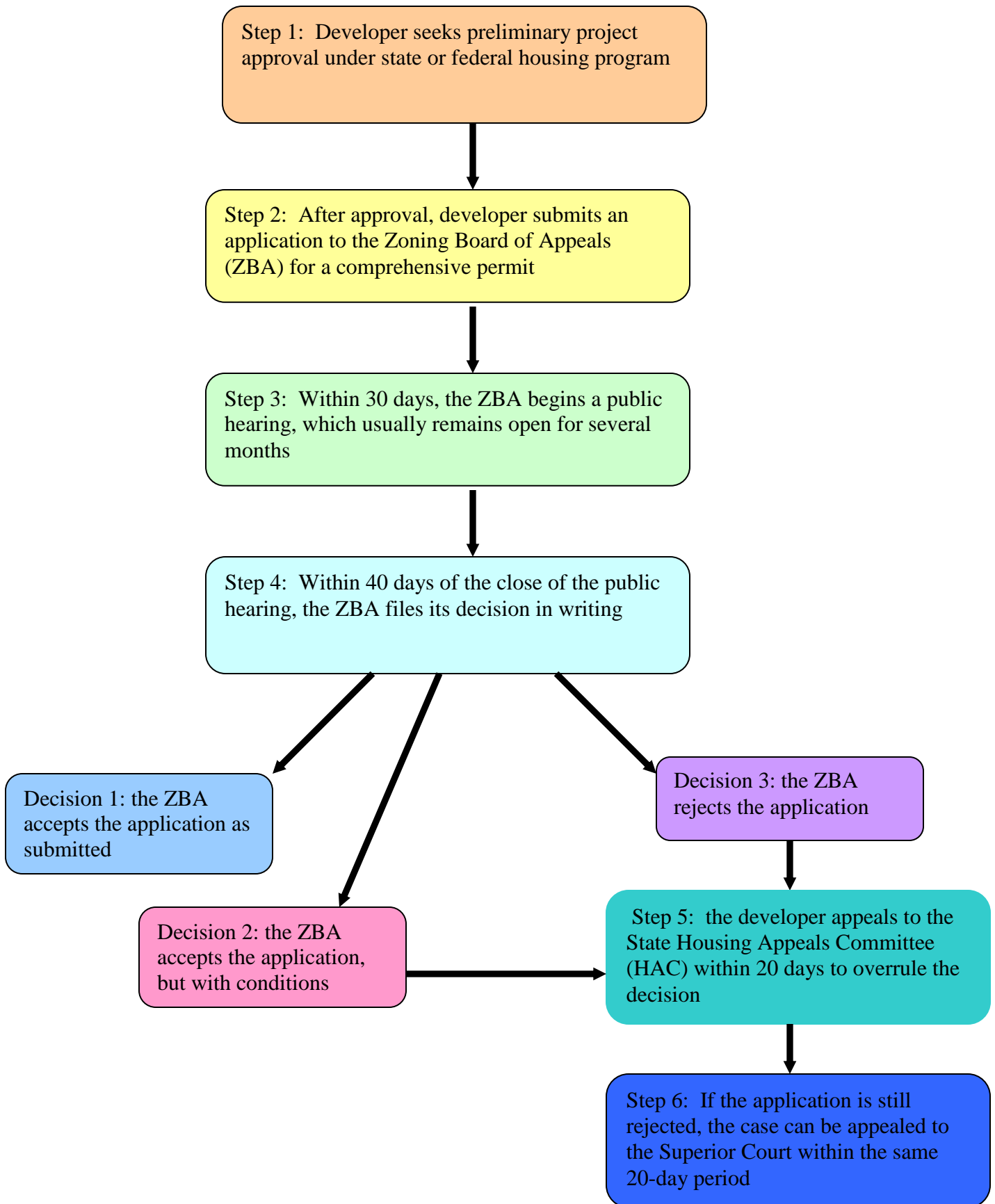
Department of Housing and Community Development
Planning and Housing Development Toolkit
<http://www.mass.gov/dhcd/components/SCP/default.htm>

Massachusetts Housing Partnership
http://www.mhp.net/community_initiatives/programs/chapter_40B.php

The Chapter 40B Appeals Process

If the ZBA rejects the application, the developer may be able to direct an appeal to the State Housing Appeals Committee (HAC). The appeal must be made within 20 days of the notice of the ZBA decision. The HAC decision can be appealed to the Superior Court.

Citizens or abutters can appeal the ZBA decision to the Superior Court within the same 20-day period. If both the developer and abutters file appeals, the Superior Court will generally not take any action pending completion of the proceedings before the HAC.



Wetlands

The Massachusetts Wetlands Protection Act

The state Wetlands Protection Act (which includes the Rivers Protection Act) is an important state conservation law. It is administered primarily at the local level by municipal conservation commissions in accordance with regulations adopted by the state Department of Environmental Protection. The act and the accompanying state wetlands regulations protect the following eight important public interests or values derived from wetlands.

- Public or private water supply
- Prevention of pollution
- Groundwater supply
- Shellfish habitat
- Flood control
- Wildlife habitat
- Storm damage prevention
- Fisheries habitat



The act prohibits any dredging, filling, or alteration of the land surface, water levels, or vegetation in wetlands, floodplains, the riverfront area (within 200 feet of a river), or other water resource areas, on private or municipal lands, without a permit from the local conservation commission. There are some exemptions for certain activities such as agriculture and mosquito control. The Massachusetts Association of Conservation Commissions <http://www.maccweb.org/> and the Department of Environmental Protection <http://www.mass.gov/dep/water/resources/wetlands.htm> provide training programs and guidance documents regarding the Wetlands Protection Act and regulations.

Local conservation commissions review project proposals and issue permits for any work within 100 feet of a designated wetland or 200 feet from either side of most perennial streams (except in certain designated urban areas where the Riverfront Area is limited to 25 feet).

Many cities and towns have adopted local wetland laws that offer greater protection, require separate permits, or dictate additional restrictions for building in designated protected resource areas such as buffer zones and near vernal pools. Model wetland laws can be obtained by contacting the Massachusetts Association of Conservation Commissions <http://www.maccweb.org/>.

Projects taking place within areas mapped by the state as “Estimated Habitat of Rare Wetlands Wildlife” require concurrent filing of the application (called a “Notice of Intent”) with the Massachusetts Natural Heritage & Endangered Species Program (NHESP) <http://www.nhesp.org/>. If a project falls within an Estimated Habitat, the proponents must submit a copy of a Notice of Intent directly to the NHESP. The NHESP determines the impact of the proposed development on rare wildlife and informs the local conservation commission of its opinion. The Natural Heritage Program also conducts a

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separate regulatory review of developments in both upland and wetlands habitats of rare species under the Massachusetts Endangered Species Act.

After a full review and appropriate public meetings, site visits and hearings, the conservation commission issues its decision.

Appeals

If you believe that the permit is contrary to the state wetland regulations or your local bylaws, you may be able to appeal. After the conservation commission issues its decision, there is a 10-day period during which time any abutter or group of 10 residents of the municipality can make an appeal to the Massachusetts Department of Environmental Protection (DEP), which will issue a Superseding Determination of Applicability or a Superseding Order of Conditions, which may uphold the original findings/permit or impose new findings, permits, and conditions.

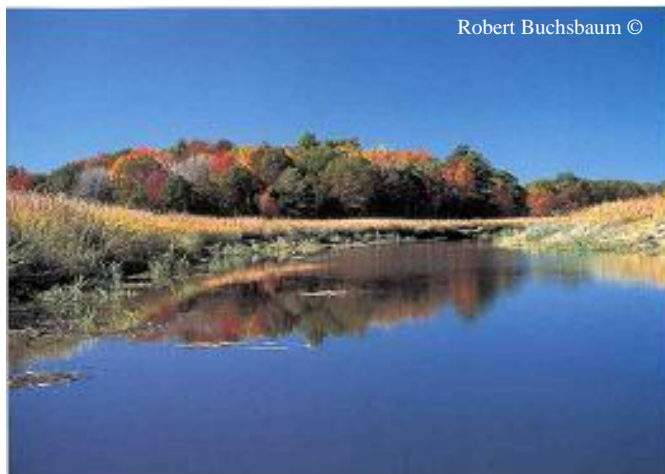
To appeal a decision under the State Wetlands Protection Act you must act within ten days after the decision was issued, show that you have the proper standing to appeal, and meet other appeal filing requirements. See the regulations for more details. If a party is dissatisfied with DEP's Superseding Order of Conditions, it may, under certain circumstances, file another appeal, which will result in DEP holding an "adjudicatory hearing" to address the concerns. A third and final appeal can be filed with the Massachusetts Superior Court.

The appeals procedure can be long and involved, and it may require the services of lawyers or expert witnesses. It should not be entered into lightly. You should make every effort to have your concerns heard and addressed at the first stage of the review process when the project is before the local conservation commission.

If a party files an appeal under the local wetland bylaw (filed with the District Court), that appeal must be resolved before the state will address appeals filed under the state Wetlands Protection Act.

401 Water Quality Certification Program

Under the federal Clean Water Act, a 401 Water Quality Certification must be obtained prior to any activity involving dredging or the discharge of dredged material into state waters above certain minimum thresholds. Under a state 401 review, it is ensured that the evaluated project will abide by state water quality standards and other relevant regulations. When



submitted, applications are evaluated in one of three categories: major projects (BRP WW 07), minor projects (BRP WW 08), or amended projects (BRP WW 09). Major project certification includes the dredging of 5,000 cubic yards (c.y.) or greater, while minor project certification includes any other projects entailing less than 5,000 c.y. but more than 100 c.y. For more information about application requirements, fees, and other specifications, see <http://mass.gov/dep/water/approvals/wwforms.htm>.

U.S. Army Corps of Engineers 404 Clean Water Act Permits

Section 404 of the federal Clean Water Act requires permits for any discharges of fill or other material into wetlands and waterways. This law is administered by the U.S. Army Corps of Engineers <http://www.nae.usace.army.mil/>. In Massachusetts, the Army Corps has adopted a statewide Programmatic General Permit (PGP). The PGP allows most small projects (less than 5,000 square feet of fill) to utilize an Order of Conditions issued under the state Wetlands Protection Act as a substitute for separate review by the Army Corps, provided all the standard conditions in the PGP are also met. Larger projects may require a screening process (Category II), and those with the greatest impacts require an Individual Permit under Category III.

Rare Species

The Massachusetts Endangered Species Act (MESA)

MESA, MGL Ch. 131A

<http://www.mass.gov/legis/laws/mgl/gl-131a-toc.htm>, prohibits the “taking” of any rare plant or animal species listed as Endangered, Threatened, or of Special Concern by the Massachusetts Division of Fisheries and Wildlife (DFW). The Natural Heritage and Endangered Species Program <http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm> within DFW regulates the issuance of permits for activities within areas mapped as Priority Habitats of state listed rare species to ensure that no takings occur. “Take” includes protection of rare species habitat, and is defined as, “in references to animals to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat.”



Permits for taking rare species for scientific, educational, conservation, or management purposes can be granted through the Division of Fisheries & Wildlife. If certain criteria are met, projects resulting in a "take" of state-listed rare species *may* be eligible for a

Conservation and Management Permit, if commitments are made to mitigation that results in a net benefit to the species. The NHESP also reviews projects within Estimated Habitats of Rare Wetland Wildlife during review under the Massachusetts Wetlands Protection Act and submits letters to the conservation commission that the commissioners must consider before issuing a wetlands permit.

For information on rare species, maps of Estimated or Priority Habitats, and the regulatory processes and requirements, please visit the Natural Heritage and Endangered Species Program website (<http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm>).

The Massachusetts Environmental Policy Act



The Massachusetts Environmental Policy Act (MEPA) <http://www.mass.gov/envir/mepa/index.htm> is the state counterpart to the National Environmental Policy Act and is administered by EOEEA. The primary purpose of MEPA is to ensure that all state-agency actions avoid and minimize the environmental impacts of state-affiliated development projects. MEPA also provides mechanisms for public participation and comment on many projects that significantly affect the environment.

State MEPA Review Process

The Massachusetts Environmental Policy Act is designed to provide state agencies with adequate information for making permitting and funding decisions and to ensure that environmental damages are minimized and mitigated.

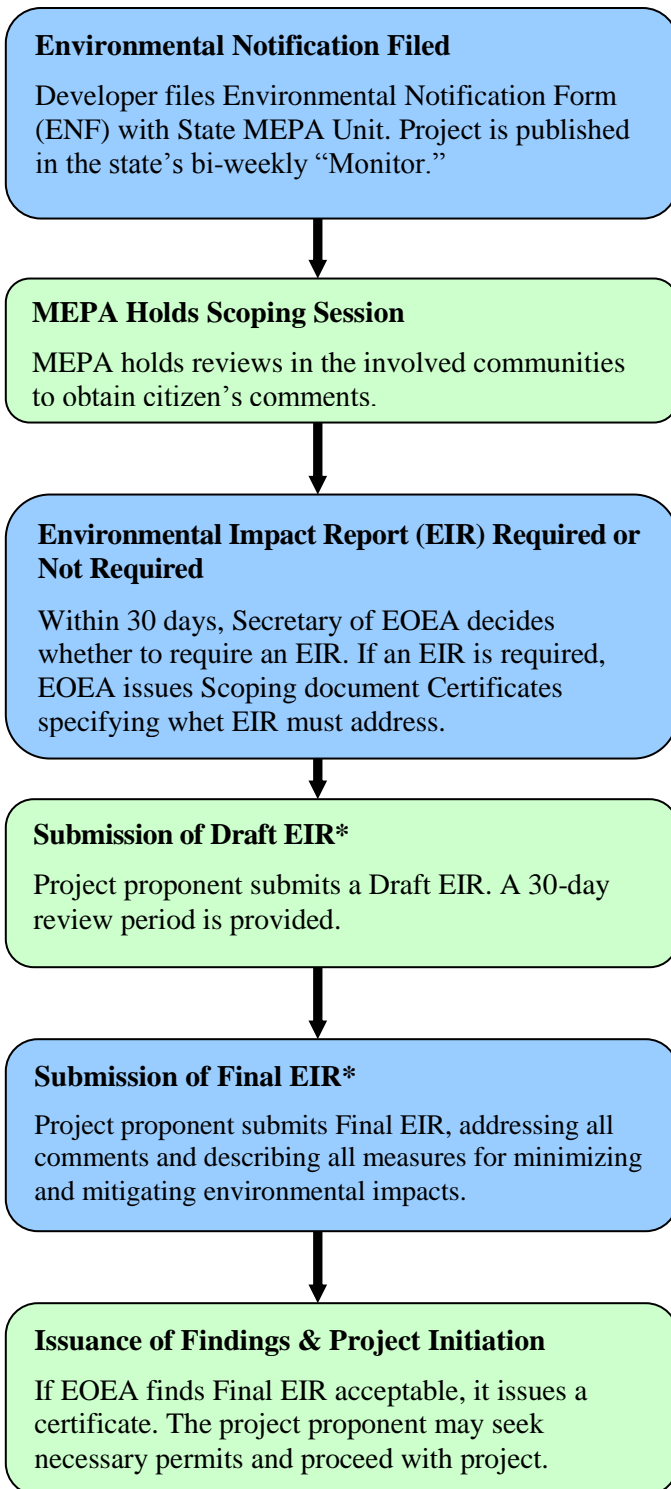
MEPA requires state and public review for projects that:

- Are conducted by, are funded by, or require permits from state agencies; *and*
- Exceed established thresholds for size or degree of environmental impact.

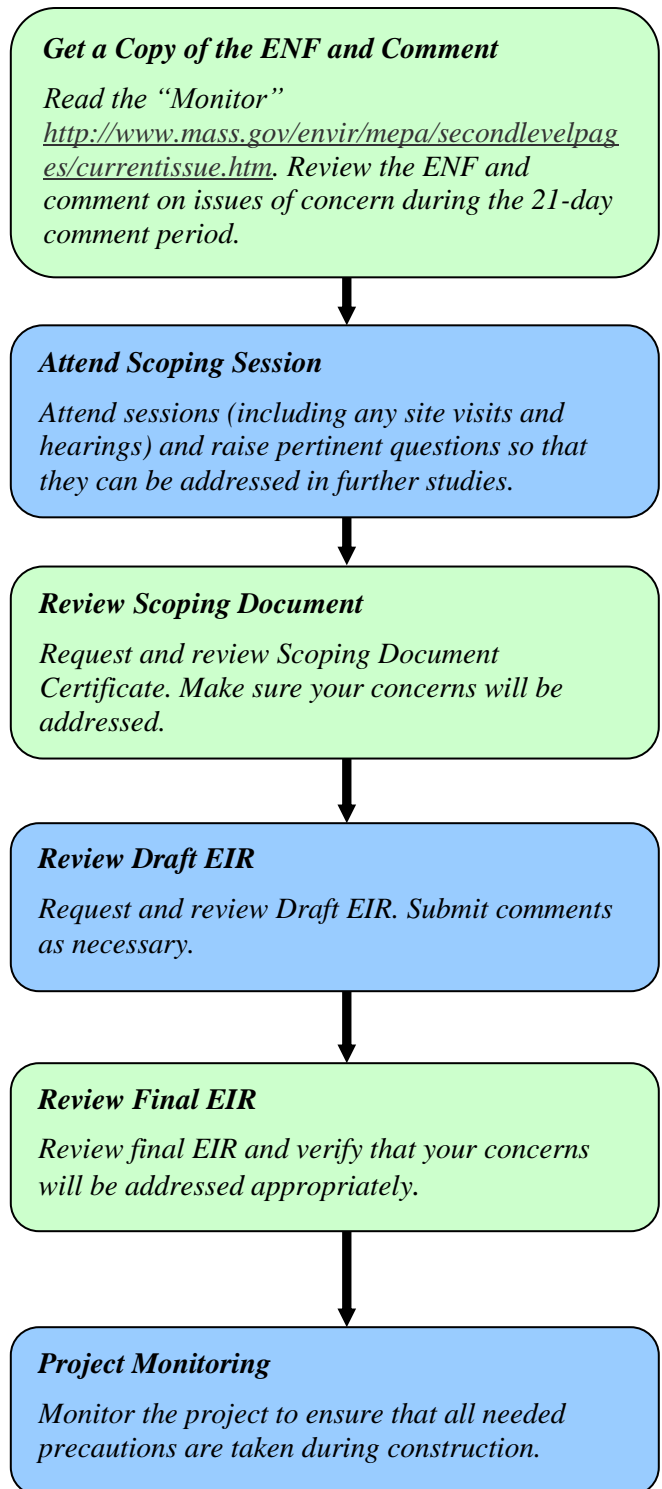
For private projects, the scope of MEPA review is limited to aspects of the project over which state agencies have jurisdiction such as state permits or use of state property. For projects undertaken or funded by the state, MEPA review includes all areas of environmental impact including air, land, and water.

The following chart describes the process through which a large development project might proceed. The MEPA review process offers important opportunities for citizens to get involved with larger scale public projects still in the planning stages. Concerned parties should call the MEPA analyst and request to be notified of scoping sessions, then attend. Opportunities for citizen involvement are indicated in detail on the chart in italics in the right-hand column.

Project Proponent's Actions



Role for Concerned Citizens



*If insufficient information is provided in the Draft or Final EIR, supplemental information may be required by the MEPA unit.

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Twice a month the MEPA office issues a summary of all projects presently under review, called *The Environmental Monitor*. Anyone can access this information and the regulations via the MEPA webpage: <http://www.mass.gov/envir/mepa/index.htm>

Useful Links

American Farmland Trust

<http://www.farmland.org/services/fiscalplanning/default.asp>

Department of Housing and Community Development
Planning and Housing Development Toolkit

<http://www.mass.gov/dhcd/components/SCP/default.htm>

Massachusetts Housing Partnership

http://www.mhp.net/community_initiatives/programs/chapter_40B.php

Massachusetts Association of Conservation Commissions (MACC)

<http://www.maccweb.org/>

Department of Environmental Protection (DEP)

<http://www.mass.gov/dep/water/resources/wetlands.htm>

Massachusetts Natural Heritage & Endangered Species Program (NHESP)

<http://www.nhesp.org/>

401 Water Quality Certification

<http://mass.gov/dep/water/approvals/wwforms.htm>

Army Corps of Engineers

<http://www.nae.usace.army.mil/>

MGL Ch. 131A

<http://www.mass.gov/legis/laws/mgl/gl-131a-toc.htm>

The Massachusetts Environmental Policy Act (MEPA)

<http://www.mass.gov/envir/mepa/index.htm>