



University of Arkansas Division of Agriculture

An Agricultural Law Research Project

## **Applicator Certification & Education Statutes & Regulations**

**Massachusetts**

[www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org)



## Applicator Certification & Education

### STATE OF MASSACHUSETTS

- 1) **ALM GL ch. 131, § 40A; 310 CMR 13.02**
- 2) **ALM GL ch. 92A ½ §§ 5 (a, b, c, i, j, k, l, m, n), 6, 7, 8, 9; 313 CMR 11 (.04)–(.07), (.09(1)), (.10), (.12)**

*The statutes and Constitution are current through the 2018 regular and special legislative sessions. The statutes are subject to changes by the Massachusetts General Court.*

#### 1) **ALM GL ch. 131, § 40A; 310 CMR 13.02**

##### **§ 40A. Orders protecting inland wetlands.**

The commissioner of environmental protection shall from time to time, for the purpose of preserving and promoting the public safety, private property, wildlife, fisheries, water resources, flood plain areas and agriculture, adopt, amend or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering or polluting inland wetlands. In this section, the term "inland wetlands" shall include the definition of "freshwater wetlands" as set forth in section forty, and it shall further include that portion of any bank which touches any inland waters of any freshwater wetland, and any freshwater wetland subject to flooding.

The commissioner of environmental protection shall protect flood plain areas by establishing by order that, along any waterway or flood-prone area lines beyond which in the direction of the waterway or flood-prone area, no obstruction or encroachment shall be placed by any person, firm or corporation, public or private, unless authorized by the commissioner. Said commissioner, in establishing such encroachment lines shall base their location on the boundaries of the area which have been mapped, designated and recorded as inland wetlands in accordance with the provisions of this section.

The commissioner of environmental protection shall, before adopting any such order under the preceding paragraphs, hold a public hearing thereon in the city or town or watershed region in which the inland wetlands or flood plains to be affected are located, giving notice thereof to the state reclamation board, the department of environmental management, the Massachusetts Water Resources Authority, the selectmen, conservation commissioners and assessors of each such city or town, and each assessed owner of such wetland or flood plains by certified mail at least twenty-one days prior thereto. For the purposes of this section, the person to whom the land was assessed in the last preceding annual tax levy shall be deemed to be the assessed owner thereof, and the notice shall be addressed in the same manner as the notice of such tax levy unless a different owner or a different address is known by said commissioner to be the correct one in which case the notice shall be so addressed. No order shall be adopted until it is approved by the

selectmen or city council of the town or city in which said wetlands or flood plains are located; provided, however, that if the selectmen or the city council fail to approve or disapprove in writing, stating reasons for such disapproval, such proposed order within thirty days after receipt of a written request from said commissioner such order shall be deemed to have been approved; and provided, further, if such order is so disapproved said commissioner may, after expiration of six months from the date of such disapproval and after due consideration of the reasons for such disapproval, adopt such order or amended order.

Upon the adoption of any such order or any order amending or repealing the same, the commissioner of environmental protection shall cause a copy thereof, together with a plan of the lands affected and a list of the assessed owners of such lands, to be recorded in the registry of deeds or the office of the assistant recorder for the district wherein the land lies, and shall send by certified mail a copy of such order and plan to each assessed owner of land affected and to the clerk and board of assessors of each city or town in which the land is located. Such order shall not be subject to the provisions of chapter one hundred and eighty-four. The superior court shall have jurisdiction to enforce, and remedy violations of such orders.

Any person having an ownership interest, any lessee holding a lease of twenty-five years length or more and any mortgagor having an interest in land affected by any such order, may within ninety days after receiving notice thereof, petition the superior court to determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The commissioner of environmental protection shall cause a copy of such finding to be recorded forthwith in the proper registry of deeds or, if the land is registered, in the registry district of the land court. The method provided in this paragraph for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding, nor shall any person have a right to petition for the assessment of damages under chapter seventy-nine by reason of the adoption of any such order. Any person who violates any such order, (a) shall be punished by a fine of not less than one hundred nor more than twenty-five thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment; or (b) shall be subject to a civil penalty not to exceed twenty-five thousand dollars for such violation. Each day such violation continues shall constitute a separate offense.

The department of environmental management may, after a finding has been entered that such order shall not apply to certain land as provided in the preceding paragraph, take the fee or any lesser interest in such land in the name of the commonwealth by eminent domain under the provisions of chapter seventy-nine and hold the same for the purposes set forth in this section. No such order shall prohibit, restrict or regulate the use or

improvement of land or water for agricultural purposes without the written consent of the owner, provided, however, that any subsequent nonagricultural use of land which was filled or drained for agricultural purposes at a time when said land was subject to an order under this section may be regulated, restricted, or prohibited by such order. No such order shall prohibit, restrict or regulate the exercise or performance of the powers and duties conferred or imposed by law upon the Massachusetts Water Resources Authority, the division of fisheries and wildlife, the Massachusetts aeronautics division, or the state reclamation board, or any mosquito control or other project operating under or authorized by chapter two hundred and fifty-two. If after following the procedures hereinbefore set forth, no such order has become effective as to any particular land or interest therein, the department of environmental management may, subject to a specific appropriation for the purpose, take such land or interest therein by eminent domain, or may acquire the same by purchase, gift or otherwise. Awards of damages, expenses of acquisition of land and water, and expenses incidental thereto and to the preparation of maps and plans of the lands to be affected, to the holding of hearings, and to the adoption and recording of orders, as provided in this section, may be paid out of funds made available for the purpose of section three of chapter one hundred and thirty-two A.

### **13.02: Definitions**

**Act** means M.G.L. c. 131, § 40A.

**Agriculture purposes** means one or more of the following activities or uses: raising, breeding or producing a specified type of animal or vegetable life, including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees, fur-bearing animals, and fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flowers, sod, trees, nursery or green house products, forest products, and ornamental plants, shrubs, fish and shellfish, provided that such activity or use results in or is or was clearly intended to result in a product of demonstrable market value.

**Altering** means causing change, directly or indirectly within any inland wetland or flood plain area and includes, but is not limited to, one or more of the following actions:

- (a) changing pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood storage retention areas;
- (b) draining or otherwise disturbing surface or groundwater levels;
- (c) degrading water quality;
- (d) driving pilings or erecting buildings or structures of any kind;
- (e) placing any obstruction to water flow;

- (f) destroying plant life, but not including the limbing of trees;
- (g) discharging, releasing, or causing to be released, any contaminating materials, including sediments, from any source directly into any inland wetland or flood plain area whether by overland flow or through a new or existing pipe or other conduit;
- (h) causing adverse effects to wildlife, inland fisheries, or to their habitat;
- (i) lowering, polluting, or otherwise changing the level, quantity, or quality of ground water by doing any work in an inland wetland or flood plain area.

**Amendment** means any change in the allowed or prohibited activities or uses contained in any Order adopted under M.G.L. c. 131, § 40A; any addition to or deletion of, including any change in the definition of, the types of inland wetlands defined in any Order; any addition to or deletion of any wetland or flood plain area; any change in the location of any wetland boundary or encroachment line which does not constitute a correction; or any addition to any list of assessed owners adopted as part of the Order. An amendment shall not include a correction as defined in 310 CMR 13.02.

**Assessed owner** means the person to whom land within an inland wetland or flood plain area affected by an Order was assessed in the last preceding annual tax levy.

**Bank** means the contiguous upland slope landward of any inland water or freshwater wetland up to and including the crest of the slope, which may or may not include vegetation characteristic of transitional zones (ecotones) or plant communities immediately adjacent to any inland water or freshwater wetland.

**Commissioner** means the Commissioner of the Department of Environmental Protection.

**Correction** means any minor change in the location of the inland wetland or flood plain area boundary or encroachment line on a plan, the substitution or deletion of any name or names from the list of assessed owners adopted as part of any Order, or any typographical, grammatical or other correction which does not change the sense or meaning of any Order.

**Department** means the Department of Environmental Protection.

**Dredging** means the removal of materials including, but not limited to, rock, bottom sediment, debris, loam, peat, soil, sand, refuse, plant or animal matter, in any excavating, grading, cleaning, deepening, widening or lengthening, either permanently or temporarily, of any inland wetland or flood plain area. Dredging shall include improvement dredging, maintenance dredging, back-filling or other dredging and subsequent refilling.

**Encroachment Line** means any boundary line which is based upon an inland wetland boundary line beyond which no structures or other encroachments may be established in the direction of the waterway or flood-prone area.

**Filling** means the placing of any material that raises, either temporarily or permanently, the existing elevation of any inland wetland or flood plain area.

**Flood Plains**, means for the purposes of M.G.L. c. 131, § 40A, inland wetlands that are subject to flooding, and normally dry land areas which are subject to a general and temporary condition of partial or complete inundation by runoff from surface water or by overflow of inland waters. Flood plains or flood plain areas may further include those areas of land which have been designated as being within the 100-year flood as determined by the Office of Federal Insurance and Hazard Mitigation within the Federal Emergency Management Agency.

**Flood Plain Area** means any inland wetland or flood plain delineated by a continuous boundary line which encloses that area.

**Flooding** means a local and temporary inundation or rise in the surface water level of any inland water such that it inundates or overflows land not usually under water.

**Inland Wetlands** means "freshwater wetlands" as defined in M.G.L. c. 131, § 40 and that portion of any bank which touches any inland waters or any freshwater wetland, and any freshwater wetland subject to flooding.

**Improvement Dredging** means any dredging in an area which has not previously been dredged or which extends the original dredged width, depth, length, or otherwise alters the original boundaries of a previously dredged area.

**Inland Wetland affected by an Order** means any inland wetland or flood plain area that is subject to any restriction under an Order.

**Modification** means any amendment as defined in 310 CMR 13.02 **Amendment**.

**Obstruction or Encroachment** shall be defined as including, but not limited to, any structure, building, fence, wall, fixture, or other barrier.

**Maintenance Dredging** means any dredging under a License in any previously dredged area which does not extend the originally dredged width, depth, or length, but does not mean improvement dredging or backfilling.

**National Map Accuracy Standards** means meeting or exceeding the map accuracy standards established by the U.S. Bureau of the Budget on June 10, 1941, as revised April 26, 1943 and June 17, 1947, and as amended from time to time. For maps on publication scales larger than 1:20,000, not more than 10% of the points tested may be in error by more than 1/30 inch (0.846mm) measured on the publication scale; for maps on

publication scales of 1:20,000 or smaller, 1/50 inch (0.508mm). These limits of accuracy shall apply in all cases to positions of well-defined points only. Well-defined points are those that are easily visible or recoverable on the ground. In general, what is well-defined will also be determined by what is plottable on the scale of the map within 1/100 inch (0.254mm).

**Order** means any instrument issued by the Commissioner that imposes restrictions on any inland wetland or flood plain area in accordance with M.G.L. c. 131, § 40A.

**Person** means any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof, any administrative agency, public or quasi-public corporation or body or any other legal entity or its legal representative, agents or assigns.

**Person having an ownership interest** means any assessed owner or any record holder of an easement, covenant, restriction or any other ownership interest, any lessee holding a lease of 25 years length or more and any mortgagor.

**Plan** means a map made by surveying techniques, a line and symbol photogrammetric map or an orthophoto map, which meets National Map Accuracy Standards, upon which inland wetlands and flood plain areas are delineated.

**Polluting** means, but is not limited to, the discharge, release or flow of any product, by-product, material or waste resulting from sewage, sewage processing, or from any industrial, commercial, or other man-made process, any man-made thermal discharge, run-off, leachate, or any other substance in any form, which is or can be drained, discharged or infiltrated, or otherwise introduced into any inland wetland or flood plain area, or any discharge or release of agricultural waste or chemicals for non-agricultural purposes.

**Removing** means to take away any type of material that alters the elevation of any inland wetland or flood plain area.

**Repeal** means the rescinding of any Order, including the plan or plans and list of assessed owners incorporated with the Order.

**Restriction** means any provision in any Order limiting activities or uses in or on inland wetlands or flood plain areas.

**Wetland area** means any inland wetland or flood plain delineated by a continuous boundary line which encloses that area.

**2) ALM GL ch. 92A ½ §§ 5 (a, b, c, i, j, k, l, m, n), 6, 7, 8, 9; 313 CMR 11 (.04)–(.07), (.09(1)), (.10), (.12)**

**§ 5. Discharge of pollutants prohibited.**

(a) Any alteration, or the generation, storage, disposal, or discharge of pollutants is prohibited within those portions of the watersheds that lie within 200 feet of the bank of a tributary or surface waters or within 400 feet of the bank of a reservoir.

(b)

(1) The uses and activities set forth in paragraph (2) are prohibited within those portions of the watersheds that lie:

(i) within the area between 200 and 400 feet of the bank of a tributary or surface waters;

(ii) within the flood plain of a tributary or waters, including that flood plain;

(iii) within bordering vegetated wetlands that border on tributaries or surface waters, or reservoirs;

(iv) within land that overlays an aquifer with a potential well yield of 100 gallons per minute or more as determined pursuant to subsection (m); or

(v) within land that overlays an aquifer with a potential well yield of one or more but less than 100 gallons per minute pursuant to a finding by the division, in consultation with the department of environmental protection, that regulation of the aquifer is necessary for the protection of the quality of the water in the surface waters, aquifers, reservoirs or the tributaries.

(2) The following uses are prohibited within the area regulated by paragraph (1):

(i) the disposal of pollutants from either private or publicly owned sewage treatment facilities;

(ii) the placement of the leaching field of a subsurface waste water disposal system less than 4 feet above the maximum water table level as measured at the time of annual high water;

(iii) the storage of liquid petroleum products of any kind; provided, however, that an end user of such product, such as a resident in connection with normal residential use or a person responsible for supplying heat to a residence, may store a reasonable volume of such material so long as such storage is in a free standing container inside of a structure, which structure



shall include at a minimum a foundation thereof with a poured cement slab floor or a concrete reservoir of sufficient volume to hold 125 per cent of the tank's capacity;

(iv) the treatment, disposal, use, generation, or storage of hazardous material or waste, except a reasonable volume of hazardous material or waste, incidental to normal residential use;

(v) the storage and the disposal of solid waste other than a reasonable volume incidental to normal residential use;

(vi) the outdoor storage of road salt or other deicing chemicals; provided, however, that this section shall not prohibit the outdoor storage of sand, gravel, or materials used in road construction which are not hazardous materials or waste;

(vii) the outdoor storage of fertilizers, herbicides, and pesticides;

(viii) the use or storage of pesticides or herbicides which carry a mobility rating as provided for by the United States environmental protection agency or which have been determined by the commonwealth using environmental protection agency standards to pose a threat or potential threat to ground water;

(ix) the outdoor uncovered storage of manure;

(x) the servicing, washing, or repairing of boats or motor vehicles other than as reasonably incidental to normal residential use;

(xi) the operation of junk and salvage yards;

(xii) the rendering impervious of more than ten percent of any lot or 2500 square feet, whichever is greater;

(xiii) the excavation of gravel and sand to a depth greater than 6 feet above the maximum water table, except where incidental to the construction of permitted structures;

(xiv) the altering of bordering vegetated wetlands;

(xv) any other activity which could degrade the quality of the water in the watersheds as determined by the division after consultation with the department of environmental protection; provided, however, that de-icing may be performed on a roadway under procedures approved by the secretary of environmental affairs.

(c) This section shall not apply to uses, structures or facilities lawfully in existence or for which all applicable municipal, state and federal permits and approvals, other than building permits and permits for septic systems, have been obtained prior to July 1, 1992. This section shall not apply to any reconstruction, extension, or structural change to any structure in lawful existence as of said date; provided, however, that such reconstruction, extension, or structural change (i) does not constitute a substantial change to or enlargement of that lawfully existing structure, and (ii) does not degrade the quality of the water in the watershed.

[ . . . ]

(i) Subsequent to the issuance of regulations as provided for in this section, any person owning an interest in real property located in a community with land that lies within the watersheds, by written request may submit to the division the determination of a land surveyor registered with the board of registration of professional engineers and of land surveyors as to whether such owner's real property interests are located within areas regulated by this section. The division shall have been deemed to have concurred with the determination unless within 60 days from the submission of the determination the division issues a written notice of denial to the owner. The division shall issue regulations pursuant to section 6 regarding such submissions and any requirements thereto. All surveys and additional materials or studies required to make a determination, whether or not requested by the division, shall be prepared and delivered at the sole cost of the person desiring the determination.

(j) A tributary or portions thereof may be exempted from the provisions of this section, if after taking into account the rate of flow, slope, soil characteristics, proximity to a reservoir or the Ware river above the Ware river intake, the current level of water quality and the current degree of development, the division, in consultation with the department of environmental protection, determines that such exemption poses no significant risk to the quality of the water.

(k) The division, after consultation with the department of environmental protection, shall issue regulations pursuant to section 6 for appealing the inclusion of a location in the areas regulated by this section. It shall be the responsibility of the appellant to prove that the location was improperly included. If the appeal is decided in the appellant's favor, a court of competent jurisdiction shall award to appellant reasonable attorney fees, costs and expenses incurred in the action.

(l) The division, in accordance with procedures for notice and a hearing as provided by chapter 30A, may grant upon appeal or petition with respect to particular uses or structures, and shall grant upon request with respect to crossings of tributaries and bordering vegetated wetlands a variance from the provisions of this section where the division specifically finds that owing to circumstances relating to the soil conditions, slope, or topography of the land affected by such uses or structures, desirable relief may be granted without substantial detriment to the public good and without impairing the quality of water in the watersheds. The division shall issue regulations pursuant to section

6 regarding such proceedings. The division may impose reasonable conditions, safeguards and limitations to any variance as it may find desirable in its sole discretion which, based upon such hearing record, are necessary to protect the water in the watersheds. The division shall issue regulations pursuant to section 6 regarding such proceedings. The division may impose reasonable conditions, safeguards and limitations to any variance as it may find desirable in its sole discretion which, based upon such hearing record are necessary to protect the water in the watersheds. The division shall record and index in the grantor index in the registry of deeds or register in the registry district of the land court for the county or district where the land lies, a notice of said variance, and conditions thereto, which notice shall describe the land by metes and bounds or by reference to a recorded or registered plan showing its boundaries.

(m) The location of tributaries and surface waters shall be determined by reference to maps generated by the Massachusetts geographic information service based on the most recent edition of the United States Geological Survey 1 to 25,000 thousand scale quadrangle maps. The location of flood plains shall be determined by reference to the most recent edition of the flood hazard boundary maps issued by the director of the Federal Emergency Management Agency. The location and the potential well yield of aquifers shall be determined by reference to maps generated by the Massachusetts geographic information service based on the United States Geological Survey water resource atlases. The division, in consultation with the department of environmental protection, may adopt more accurate maps pursuant to notice and a public hearing as provided in chapter 30A and shall file such more accurate maps with the clerks of the house of representatives and the senate 90 days prior to such maps taking effect.

(n) This section shall not apply to the division in the performance of its responsibilities and duties to protect the quality of the water in the watersheds, or to the Authority in the performance of its responsibilities and duties to maintain, operate and improve the waterworks system. The provisions of this section shall not apply to activities relating to normal maintenance or improvement of land in agricultural use as defined in section 40 of chapter 131, or regulations promulgated thereunder; provided, however, that such activities do not impair the quality of the water. Nothing in this section shall be construed to limit conversion of land for agricultural use, or preparation of land for agricultural use; provided, however, that such conversion shall be made under a plan approved by the United States Department of Agriculture Soil Conservation Service and the department in consultation with the department of agricultural resources. This section shall not apply to the maintenance, repair, replacement or reconstruction of public roadways existing as of September 1, 1989 or railroad track and rail bed existing as of September 1 1990, including associated drainage systems, that are necessary to preserve or restore the facility's serviceability for the number of travel lanes and uses existing as of September 1, 1990; provided, however, that in the case of any replacement the design is substantially the functional equivalent of, and is of similar alignments to that which is being replaced; provided, further, that design plans and specifications for said work on roadways, or railroad track and rail beds are provided to the division prior to the work's commencement. This section shall not apply to the construction of public highways, railroad track and rail beds and facilities directly related to their operation; and provided,

further, that the secretary of environmental affairs has determined that such highway or transportation service construction project requires direct access to or location in the lands set forth in this section and that said secretary and the division have determined that the construction does not materially impair the quality of the water in the watershed and does not otherwise materially impair the quality of the environment. This section shall not apply to the maintenance, repair or expansion of lawfully located structures or facilities used in the service of the public to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services; provided, however, that such maintenance, repair or expansion activities, structures, or facilities do not materially impair the quality of water in the watersheds as determined by the division after consultation with the department of environmental protection. This section shall not apply to the maintaining, repairing or replacing but not substantially changing or enlarging an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services in bordering vegetated wetlands; provided, however, that such maintenance and repair activities do not materially impair the quality of water in the watersheds. Nothing herein shall limit the ability of a person, municipality, the United States government or the commonwealth to undertake temporary operations to clean up, prevent or mitigate releases of hazardous materials or wastes. This section shall not be construed to limit changes in agricultural crops produced. Nothing in this section shall be construed to limit the use of new or existing agricultural technologies that do not degrade the quality of the water in the watersheds more than the present agricultural technologies that such new or existing agricultural technologies replace.

[ . . . ]

## **§ 6. Environmental protection regulations.**

The division after consultation with the department of environmental protection, shall make rules and regulations by July 1, 1992 and from time to time thereafter for the protection of the watersheds and the watershed system. The regulations shall include provisions that require notice to the department and the division of applications for variances for uses or structures that affect the watersheds. Notice of hearings on the proposed regulations shall be sent to the chief executive officer of all cities and towns within the watersheds and any other cities and towns affected by such regulations. The division shall file copies of the regulations promulgated in accordance with this section with the clerk of the house of representatives and the clerk of the senate and send copies to the chief executive officer of all the cities and towns within the watersheds and any other cities and towns affected by such regulations. The regulations shall not take effect until 60 days have elapsed from the time of said filing. The division shall cause such rules and regulations to be posted at or near the waters to which they respectively apply, and shall also cause the same to be published at least once in a newspaper published in the county where said waters are in whole or in part situated, and such posting and publication shall be sufficient notice to all persons. The sworn certificate of any senior member of the department of such posting and publication, or of the posting or publication of an order made by the department, shall be prima facie evidence of the

posting and publication. A copy of any such rule, regulation or order, attested by any senior member of the department, shall be prima facie evidence that said rule, regulation or order was made by department or by the commissioner, as the case may be.

**§ 7. Taking or improperly using water.**

No person shall take or divert any water of the watershed system of the division, and no person shall corrupt, render impure, waste or improperly use any such water.

**§ 8. Enforcement of Secs. 1 to 7.**

The department, and its employees designated for the purpose, shall enforce sections 1 to 7, inclusive, and the rules, regulations and orders made thereunder, and may enter into any building, and upon any land for the purpose of ascertaining whether sources of pollution there exist, and whether the sections and the rules, regulations and orders made as aforesaid are complied with.

**§ 9. Punishment for water supply tampering**

A person who without lawful authority takes or diverts water from a water supply within the watershed system of the division, corrupts or defiles the water supply or a source of the water supply, injures, destroys or interferes with property held or used by the authority for the purpose of constructing, operating or maintaining the watershed system or who violates or refuses to comply with a rule, regulation or order of the department shall be punished by a criminal fine of not more than \$50,000 or by imprisonment in state prison for not more than 5 years or in the house of correction for not more than 2 years or by both such fine and imprisonment. In cases of continuing violation, the maximum fine shall be \$10,000 per day for each day the violation occurs or continues; provided, that a person convicted of the wanton or malicious destruction of or injury to property used in the construction, operation or maintenance of the watershed system shall also be liable in tort to the department for triple the amount of damages thereby caused. The fine or tort judgment shall be payable to the treasury of the commonwealth.

**11.04: Jurisdiction**

(1) Areas Regulated. Areas regulated by St. 1992, c. 36 and 313 CMR 11.00 include those portions of the Watersheds which lie:

- (a) within 400 feet of the Bank of a Reservoir;
- (b) within 200 feet of the Bank of a Tributary or Surface Waters;
- (c) within the area between 200 and 400 feet of the Bank of a Tributary or Surface Waters;

(d) within the Flood plain of a Tributary or Surface Waters, including that flood plain; (e) within Bordering Vegetated Wetlands that border on Tributaries or Surface Waters or Reservoirs;

(f) within land that overlays an Aquifer with a potential well yield of 100 gallons per minute or more as determined in accordance with St. 1992, c. 36 and 313 CMR 11.00; or

(g) within land that overlays an Aquifer with a potential well yield of one or more but less than 100 gallons per minute pursuant to a finding by the Division, in consultation with DEP, that regulation of said Aquifer is necessary for the protection of the quality of the water in the Surface Waters, Aquifers, Reservoirs or Tributaries.

(2) Presumptions – Properties Identified in the List of Affected Parcels. For purposes of 313 CMR 11.00, all properties identified in the List of Affected Parcels shall be presumed to be in an area regulated under 313 CMR 11.04(1)(a) through (g). Any property which is not identified in the List of Affected Parcels shall be presumed not to be in an area regulated under 313 CMR 11.04(1)(a) through (f).

(3) Uses and Activities Regulated or Prohibited.

(a) Any Alteration, or the Generation, Storage, Disposal or Discharge of Pollutants is prohibited within those portions of the Watershed that lie:

1. within 400 feet of the Bank of a Reservoir (313 CMR 11.04(1)(a)); or
2. within 200 feet of the Bank of a Tributary or Surface Waters (313 CMR 11.04(1)(b)).

(b)

1. Within those portions of the Watershed that lie:
  - a. within the area between 200 and 400 feet of the Bank of a Tributary or Surface Water (313 CMR 11.04(1)(c));
  - b. within the Flood Plain of a Tributary or Surface Water (313 CMR 11.04(1)(d));
  - c. within Bordering Vegetated Wetlands that border on Tributaries or Surface Waters or Reservoirs (313 CMR 11.04(1)(e));
  - d. within land that overlays an Aquifer with a potential well yield of 100 gallons per minute or more as determined in accordance

with St. 1992, c. 36 and 313 CMR 11.00 (313 CMR 11.04(1)(f));  
or

e. within land that overlays an Aquifer with a potential well yield of one or more but less than 100 gallons per minute, pursuant to a finding by the Division, in consultation with DEP, that regulation of said Aquifer is necessary for the protection of the quality of the water in the Surface Waters, Aquifers, Reservoirs or Tributaries (313 CMR 11.04(1)(g))

2. the following uses of the area of the Watershed described in 313 CMR 11.04(3)(b)1. are prohibited:

a. the Disposal of Pollutants from either privately or publicly owned Sewage Treatment Facilities;

b. the placement of the Leaching Field of a Subsurface Waste Water Disposal System less than four feet above the maximum water table level as measured at the time of annual high water;

c. the storage of liquid petroleum products of any kind; provided, however, that an end user of such product, such as a resident in connection with normal residential use or a person responsible for supplying heat to a residence, may store a reasonable volume of such material so long as such storage is in a free standing container inside of the Structure, which Structure shall include at a minimum a foundation thereof with a poured cement slab floor or a concrete reservoir of sufficient volume to hold 125% of the tank's capacity;

d. the Treatment, Disposal, use, generation or Storage of Hazardous Material or Waste, except a reasonable volume of Hazardous Material or Waste incidental to normal residential use;

e. the Storage and the Disposal of solid waste other than a reasonable volume incidental to normal residential use;

f. the outdoor Storage of road salt or other de-icing chemicals; provided, however, that 313 CMR 11.00 shall not prohibit the outdoor Storage of sand, gravel or materials used in road construction which are not Hazardous Materials or Waste; g. the outdoor Storage of fertilizers, herbicides and pesticides;

h. the use or Storage of pesticides or herbicides which carry a mobility rating as provided for by the United States Environmental Protection Agency or which have been determined by the Commonwealth using United States Environmental Protection

Agency standards to pose a threat or potential threat to Ground Water; i. the outdoor, uncovered Storage of manure;

j. the servicing, washing or repairing of boats or motor vehicles other than as reasonably incidental to normal residential use;

k. the operation of junk and salvage yards;

l. the rendering Impervious of more than 10% of any Lot or 2,500 square feet, whichever is greater;

m. the excavation of gravel and sand to a depth greater than six feet above the maximum water table, except where incidental to the construction of permitted Structures;

n. the Alteration of Bordering Vegetated Wetlands;

o. any other activity which could degrade the quality of the water in the Watersheds as determined by the Division after consultation with DEP; provided, however, that de-icing may be performed on a roadway under procedures approved by the Secretary; or

p. the construction of any Dwelling, including its subsurface sewage absorption system, which exceeds a density of two bedrooms per acre or any use which may generate more than 220 gallons of sanitary sewage per acre per day.

(c) In addition to, and without limiting, the prohibitions contained in 313 CMR 11.04(3)(a) and (b), the construction of any Dwelling which exceeds a density of one bedroom per acre and any use which may generate more than 147 gallons of sanitary sewage per acre per day are prohibited within those portions of the Watersheds which overlay Aquifers with potential well yields of between 100 and 300 gallons per minute as determined by the Division, or land whose regulation has been determined to be necessary for the protection of the quality of the water in the Surface Waters, Aquifers, Reservoirs and Tributaries, pursuant to 313 CMR 11.04(1)(g).

(d) In addition to, and without limiting, the prohibitions contained in 313 CMR 11.04(3)(a), (b) and (c), the construction of any Dwelling which exceeds a density of one bedroom per acre and which may generate more than 110 gallons of sanitary sewage per acre per day are prohibited within those portions of the Watersheds that overlay Aquifers with potential well yields of over 300 gallons per minute as determined by the Division.



(e) In making the calculation required under 313 CMR 11.04(3)(b)2.a. all contiguous real property within an area described in 313 CMR 11.04(1) owned by the same Person shall be used, in the aggregate; provided, however, that said area may be so used in making such calculation for only one Lot.

(f) In making the calculation required under 313 CMR 11.04(3)(b)2.p., all contiguous real property within an area described in 313 CMR 11.04(1) owned by the same Person shall be used, in the aggregate, to determine the total acreage for density purposes; provided, however, that said area may be so used for determining area density for only one Lot.

### **11.05: Exemptions**

The provisions of 313 CMR 11.04 shall not apply to the following:

(1) Uses, Structures or Facilities in Existence. Uses, Structures or facilities lawfully in existence or for which all applicable municipal, state and federal permits and approvals, other than building permits and permits for septic systems, were obtained prior to July 1, 1992;

(2) Reconstruction, Extension or Structural Change. Any reconstruction, extension or structural change to any Structure lawfully in existence on July 1, 1992, provided that such reconstruction, extension or structural change:

(a) does not constitute a substantial change to or enlargement of that lawfully existing Structure; and

(b) does not degrade the quality of the water in the Watershed.

(3) Lot in Existence. The construction of one single-family Dwelling on any Lot existing as such prior to July 1, 1992, or the division of an owner occupied Lot existing as such as of July 1, 1992 into one additional Lot for a single family dwelling; provided, that wherever possible, there shall be no Alterations within the areas described in 313 CMR 11.04(1)(a) and (b).

(4) Construction - Sewer System. The construction of any Dwelling described in 313 CMR 11.04(3)(b)2.p., (c) or (d) if a Sewer System existed prior to July 1, 1992 to which a direct connection shall be made without expansion of capacity and said connection is used for all sanitary sewage of any Dwelling or other Structure resulting from said construction and the sewer pipe to which said connection shall be made is within the Lot or along the Lot's road frontage prior to July 1, 1992;

(5) Tributaries. Tributaries, or portions thereof, which the Division, in consultation with DEP, has exempted pursuant to 313 CMR 11.00, upon a determination that such exemption will pose no significant risk to the quality of

the water, after taking into account the rate of flow, slope, soil characteristics, proximity to a Reservoir or the Ware River above the Ware River intake, the current level of water quality and the current degree of development;

(6) Work of the Division. The Division, in the performance of its responsibilities and duties to protect the quality of the water in the Watersheds, or the Authority in the performance of its responsibilities and duties to maintain, operate and improve the Waterworks System;

(7) Conversion of Land for Agricultural Use. Conversion of Land for Agricultural Use or preparation of Land for Agricultural Use; provided, however, that such conversion shall be made under a plan approved by the United States Department of Agriculture, Natural Resources Conservation Service and the Commissioner, in consultation with the Commonwealth's Department of Agricultural Resources, or have an approved Forest Cutting Plan;

(8) Maintenance of Public Roadways in Existence. The maintenance, repair, replacement or reconstruction of public roadways existing as of September 1, 1989 or railroad track and rail bed existing as of September 1, 1990, including associated drainage systems, that are necessary to preserve or restore the facility's serviceability for the number of travel lanes and uses existing as of September 1, 1990; provided, however, that in the case of any replacement the design is substantially the functional equivalent of, and is of similar alignments to that which is being replaced; provided, further, that design plans and specifications for said work on roadways, or railroad track and rail beds are provided to the Division prior to the work's commencement;

(9) Maintenance or Improvement - Agricultural. Activities relating to normal maintenance or improvement of Land in Agricultural Use; provided, however, that such activities do not impair the quality of the water or have an approved Forest Cutting Plan;

(10) Construction of Public Highways. The construction of public highways, railroad track and rail beds and facilities directly related to their operation; provided, that the Secretary has determined that such highway or transportation service construction project requires direct access to or location in the lands described in 313 CMR 11.04(1) to avoid or minimize damages to the environment and that said Secretary and the Division have determined that such construction does not materially impair the quality of the water in the Watersheds;

(11) Maintenance of Public Utilities. The maintenance, repair or expansion of lawfully located Structures or facilities used in the service of the public to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services; provided, however, that such maintenance, repair or expansion activities, Structures, or facilities do not materially impair the quality of water in the Watersheds as determined by the Division after consultation with DEP;

(12) Maintenance of Public Utilities - Wetlands. The maintenance, repair or replacement, but not the substantial changing or enlargement of, an existing and lawfully located Structure or facility used in the service of the public and used to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services in Bordering Vegetated Wetlands; provided, however, that such maintenance and repair activities do not materially impair the quality of water in the Watersheds;

(13) Clean up or Prevention of Releases. The undertaking by any Person, municipality, the United States government or the Commonwealth of temporary operations to clean up, prevent or mitigate releases of Hazardous Material or Waste;

(14) Changes in Agricultural Crops Produced. Changes in agricultural crops produced;

(15) Agricultural Technologies. The use of new or existing agricultural technologies that do not degrade the quality of water in the Watersheds more than the present agricultural technologies that such new or existing agricultural technologies replace; and

(16) Municipal Sewage Treatment Facility or Water System. The construction of a new municipal Sewage Treatment Facility or new municipal water system if the Division determines that water quality will not be adversely impacted from said construction and provided that such new systems comply with all existing regulations and standards applicable to water pollution abatement districts.

## **11.06: Procedures**

(1) Advisory Rulings.

(a) Request for Advisory Ruling. Any person Owning an Interest in Real Property may, by written request to the Division at the address posted on its website by certified mail or hand delivery, request an Advisory Ruling as to:

1. whether such Person's property is located within an area regulated by St. 1992, c. 36 or 313 CMR 11.00; or

2. Whether existing or proposed Structures, Uses or Activities on such Person's property are permitted under St. 1992, c. 36 or 313 CMR 11.00 by virtue of the exemptions set forth in 313 CMR 11.05.

(b) Information Required. Such written request shall identify the property by street address and include:

1. a copy of the current Assessor's Map showing the location of the property or reference to the applicable Assessor's Map by sheet and parcel number;
2. a copy of (or reference to) the most recent edition of the Massachusetts Geographic Information System (MassGIS) map based on the United States Geological Survey (USGS), 1 to 25,000 scale, quadrangle maps, showing the location of the property;
3. a copy of such Owner's deed as recorded in the applicable registry of deeds; and
4. copies of any plans, mortgage inspection plans and tape surveys of the property which are available.

(c) Issuance of Advisory Ruling. Within 30 days of the Date of Submission of a Request for Advisory Ruling, the Division may issue a written Advisory Ruling to the Person who submitted the request, or in its sole discretion, the Division may notify such Person that a Request for Watershed Determination of Applicability is required pursuant to 313 CMR 11.06(2).

(d) Remedy. The Person to whom an Advisory Ruling is issued shall have no right to appeal such ruling, but may at such Person's election, submit a request for Watershed Determination of Applicability or an Application for Variance in accordance with 313 CMR 11.06. A Person who has not been issued an Advisory Ruling within 30 days of the Date of Submission may, at such Person's election, resubmit the request, or submit a request for Watershed Determination of Applicability or an Application for Variance in accordance with 313 CMR 11.06.

(e) Authorization; limitations. Any Advisory Ruling hereunder shall be issued by the Division pursuant to and subject to the limitations of M.G.L. c. 30A, § 8.

## (2) Requests for Watershed Determinations of Applicability.

(a) Filing. Any Person Owning an Interest in Real Property who desires a Determination as to whether or not:

1. such Person's property is located within an area regulated by St. 1992, c. 36 or 313 CMR 11.00;
2. proposed Structures, Uses or Activities on such Person's property are permitted under St. 1992, c. 36 or 313 CMR 11.00;
3. a reconstruction, extension or structural change constitutes a substantial change or enlargement or one which will degrade the quality of water under 313 CMR 11.05(2);

4. Alterations within areas described in 313 CMR 11.04(1)(a) and (b) in connection with construction permitted under 313 CMR 11.05(3) are possible;

5. the maintenance, repair or replacement activities described in 313 CMR 11.05(9), (10) or (11) will impair or materially impair the quality of the water in the Watersheds; or

6. a new municipal Sewage Treatment Facility or new municipal water system will have an adverse impact on water quality under 313 CMR 11.05(16), may submit a Request for Watershed Determination of Applicability to the Regional Director of the watershed in which such property is located. Submission for a Determination should be addressed to the appropriate Reservoir office posted on the Division's website. Submissions are accepted via certified mail or hand delivery.

(b) Land Surveyor Determination. Any request for determination under 313 CMR 11.06(2)(a)1. shall be accompanied by a written determination of a land surveyor registered with the Board of Registration of Professional Engineers and Land Surveyors of the Commonwealth as to whether such Person's real property interests are located within areas regulated by St. 1992, c. 36 or 313 CMR 11.00.

(c) Related Statement. Requests for Watershed Determinations other than those in 313 CMR 11.06(2)(a)1. shall include a detailed description of the Structures, Uses and Activities which are proposed.

(d) Additional Materials. All surveys and additional materials or studies required to make a determination, whether or not requested by the Division, shall be prepared and delivered at the sole cost of the Person desiring the determination.

(e) Issuance of Applicability Decision. Within 60 days of the Date of Submission of such request for Watershed Determination of Applicability, the Division shall issue a written Applicability Decision to the Person who submitted such request, in form suitable for recording in the registry of deeds or registration in the registry district of the land court where the property is located (313 CMR 11.12), which shall contain a brief statement of the reasons for the Decision. If the Division fails to issue the Applicability Decision within such 60 day period, the Division shall be deemed to have:

1. concurred with the land surveyor's determination set forth in a request for Determination under 313 CMR 11.06(2)(a)1.; or

2. determined that the proposed Structures, Uses and Activities on such Person's property described in the request for Determination are permitted by St. 1992, c. 36 and 313 CMR 11.00; or

3. determined that such Structures, Uses and Activities will not impair or materially impair the quality of water in the Watersheds.

(f) Appeal. A Person to whom the Division's Applicability Decision has been issued, who seeks to appeal such Decision, shall file a Notice of Claim for an Adjudicatory Proceeding with the Commissioner at the address posted on its website within 21 days from the Date of Issuance of the Decision by the Division. The procedures for appeal before the Commissioner shall be as set forth in 801 CMR 1.00: Standard Adjudicatory Rules of Practice and Procedure. At the time of filing of such Notice of Claim, a copy shall also be filed with the Division.

### (3) Variances

(a) Variances. The Division may grant a variance from the provisions of St. 1992, c. 36 and 313 CMR 11.00 with respect to particular Structures, Uses and Activities, and shall grant, upon request, a variance with respect to crossings of Tributaries and Bordering Vegetated Wetlands, where the Division specifically finds that owing to circumstances relating to the soil conditions, slope, or topography of the land affected by such Structures, Uses or Activities, desirable relief may be granted without substantial detriment to the public good and without impairing the quality of water in the Watersheds.

#### (b) Presumptions and Standards for Required Findings.

1. There shall be a presumption that granting a variance from the applicability of St. 1992, c. 36 and 313 CMR 11.00 to specific Structures, Uses and Activities is contrary to the achievement of the purpose of St. 1992, c. 36. This presumption may be rebutted only by the submission of credible evidence by the Person submitting the application for variance that such variance may be granted without substantial detriment to the public good and without impairment of water quality in the Watersheds.

2. The standard of substantial detriment to the public good shall mean a factual determination by the Division of the overall effect of the proposed Structure, Use or Activity at a particular location in relation to the purpose of St. 1992, c. 36.

3. The standard of impairment of water quality shall mean:

a. the risk of water quality impairment presented by Structures, Uses and Activities which are permissible under all other relevant federal, state and local laws, but would not be permissible under 313 CMR 11.00 without a variance; and

b. the cumulative risk of water quality impairment from all Structures, Uses and Activities allowed under current regulations over time.

(c) Applications. Any Person Owning an Interest in Real Property may make an application for variance to the Division (see 313 CMR 11.12) by filing the same by certified mail or hand delivery with the Division at the address posted on its website. A copy of the application for variance shall be sent to DEP at the address specified on its website.

(d) Detailed Statement. The application for variance shall include a detailed description of the Structures, Uses and Activities proposed on such Person's property. The application for variance shall include detailed information regarding each specifically enumerated factor stated in 313 CMR 11.06(3)(a). Detailed information regarding each factor shall be provided as follows:

1. Soil Conditions. A map prepared at a minimum scale of 1"=100' indicating the soil types as mapped by the USDA Natural Resources Conservation Service ("NRCS") shall be provided. Site specific soils data, including borings, test pits and percolation tests, may be submitted including copies of all field logs, notes, observations, conclusions and test methods employed. A detailed analysis of the soil characteristics of erodibility and permeability shall be provided. Permeability should be described in terms of percolation rate measured as minutes per inch as specified in 310 CMR 15.00: The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage.

2. Slope. Calculations of the ground slope at all lands within the areas that would be subject to St. 1992, c. 36 if the variance were not granted shall be provided. The results of such calculations shall be presented graphically on a map prepared at a scale of 1"=100' or larger, expressed as percent slope. Where applicable, the average slope of a Tributary measured as the change in elevation divided by the distance in stream miles from the upstream point of the Tributary at or near such Person's property to the downstream point of the Tributary at or near such Person's property shall also be stated.

3. Topography. A topographical plan at a minimum scale of 1"=100' or larger showing contour elevations at two foot intervals shall be submitted. Said plan shall be prepared and stamped by a professional surveyor or engineer registered in the Commonwealth of Massachusetts and shall show the location of all areas which would be subject to St. 1992, c. 36 if the variance were not granted. The plan shall show the location of all Ground Water, soil and percolation test locations. Such topographic

information as depth to the maximum annual high Ground Water table, depth to ledge or refusal, and distances from all mapped and unmapped streams, ponds and water bodies shall also be provided.

4. Water Quality. The application shall include a detailed analysis of the impacts on Surface Water and, where applicable, Ground Water quality of any proposed Structure, Use or Activity which would be allowed if the variance is granted. An evaluation of the potential impact of such proposed Structure, Use or Activity on water quality by reference to DEP's Surface Water Quality Standards for Class A Surface Waters and Outstanding Resource Waters of the Commonwealth, set forth in 314 CMR 4.00: Massachusetts Surface Water Quality Standards, and/or where applicable, the Massachusetts Ground Water Quality Standards, set forth in 314 CMR 5.00: Ground Water Discharge Permit Program shall be provided. The application shall include the water quality data and results to support each analysis and shall provide a detailed description of any methodology employed in performing such analysis to show that water quality will not be impaired by the Structure, Use and Activity for which the variance is being requested, whether during construction or upon continued use or operation of such Structure, Use or Activity.

5. Mitigating Measures. The application shall include an analysis of any mitigating measures that will be used which would enable the Division to grant a variance without substantial detriment to the public good and without impairing the quality of water in the Watersheds.

(e) Additional Materials. All surveys and additional materials or studies required to act on an application for variance, which may include an analysis of alternatives (as described in 301 CMR 11.07(4)(f), whether or not requested by the Division, shall be prepared and delivered at the sole cost of the Person submitting the application.

(f) Public Hearing. Within 30 days of the Date of Submission of the application for variance with the Division, the Division shall hold a public hearing. The date, time, and place of the public hearing shall be set by the Division, and the Division shall create a notice thereof. Such notice shall be given by the person who submitted the application, at their expense, not less than five days prior to such hearing by publication in a newspaper of general circulation in the city or town where the property in question is located and by mailing a copy of such notice to the Building Inspector, Conservation Commission, and the Board of Health in such city or town. Failure by the applicant to give such notice shall result in the calculation of the 30 day notice period to re-commence from the scheduled date of the public hearing, subject to such applicant providing the required notice as outlined in 313 CMR 11.06(3)(f). At the request of the applicant, at least two days before the date of the scheduled hearing, the date of the hearing may be rescheduled to a time which is mutually convenient for the applicant and the



Division, provided that such rescheduled time shall permit re-publication of notice as provided in 313 CMR 11.06(3)(f). The public hearing may be continued, with the consent of the Person who submitted the application, to a mutually agreeable date, which shall be announced at the hearing. At the public hearing, such Person may be represented by counsel and/or professional consultants and may present oral or written evidence, including the presentation of witness testimony.

(g) Variance Decision. Within 30 days of the close of the public hearing, the Division shall issue a written Variance Decision on the application for variance. If the variance is granted, the Division may impose in the Variance Decision such reasonable conditions, safeguards and limitations as it may find desirable in its sole discretion, which, based on the application for variance and the evidence presented at the public hearing, are necessary to protect the water in the Watersheds. If a variance is denied, the Variance Decision shall contain a brief statement of the reasons for the denial. The granting of a variance is limited to the provisions of St. 1992, c. 36. No activity may be conducted three years after the date the Variance Decision is issued without written approval by the Division. All other applicable laws, regulations and ordinances shall not be affected by the granting of a variance.

(h) Recording of Variance Decision. No variance granted hereunder shall take effect until a Variance Decision (see 313 CMR 11.12) shall have been recorded and indexed in the grantor index in the registry of deeds or registered in the registry district of the land court for the county or district where the property is located, containing any conditions applicable thereto and describing the land by metes and bounds or by reference to a recorded or registered plan showing the property's boundaries.

(i) Appeal. A Person to whom a Variance Decision is issued, who seeks to appeal the Division's Variance Decision, shall file a Notice of Claim for an Adjudicatory Proceeding with the Commissioner at the address posted on its website within 21 days from the Date of Issuance of the Variance Decision by the Division. The procedures for appeal before the Commissioner shall be as set forth in 801 CMR 1.00: Standard Adjudicatory Rules of Practice and Procedure. At the time of filing of such Notice of Claim, a copy shall also be filed with the Division.

#### (4) Exemption of a Tributary.

(a) Exemption of a Tributary. The Division, in consultation with DEP, may exempt a Tributary, or portions thereof, upon a determination that such exemption will pose no significant risk to the quality of water, after taking into account the following factors:

1. rate of flow;

2. slope;
3. soil characteristics;
4. proximity to a Reservoir or the Ware River above the Ware River intake;
5. the current level of water quality; and
6. the current degree of development.

(b) Presumptions and Standards for Required Findings.

1. The standard of no significant risk to the quality of water refers to:
  - a. the risk of water quality impairment presented by Structures, Uses and Activities which are permissible under all other relevant state, federal and local laws, but would not be permissible under 313 CMR 11.00 without an exemption; and
  - b. the cumulative risk of water quality impairment from all Structures, Uses and Activities allowed under current regulations over time.
2. There shall be a presumption that exempting a Tributary or portion thereof is contrary to the achievement of the purpose of St. 1992, c. 36. The presumption may be rebutted only by the submission of credible evidence by the Person submitting the request for Exemption to establish that such exemption will pose no significant risk to the quality of water, taking into account the factors enumerated at 313 CMR 11.06(4)(a).

(c) Requests for Exemption.

1. A request for Exemption of a Tributary may be made by:
  - a. An affected landowner;
  - b. Any state agency or regional planning commission;
  - c. The Board of Selectmen, City Council, Mayor, Planning Board of Conservation Commission of any city or town which would be affected by the exemption; or
  - d. The Governor or any member of the General Court.

2. A request for Exemption of a Tributary shall be made to the Division (see 313 CMR 11.12) by filing the same by certified mail or hand delivery with the Division at the address posted on its website. A copy of the Request for Exemption of a Tributary shall be sent to DEP at the address posted on its website.

(d) Detailed Statement. The request for Exemption of a Tributary shall include detailed information regarding each specifically enumerated factor listed in 313 CMR 11.06(4)(a)1. through 6. Such detailed information shall be provided based on conditions existing as of the time of the request and based on conditions which would, or may, result if such exemption were granted and if development occurred to the maximum extent and type allowed by current law. Detailed information on each factor shall be provided as follows:

1. Flow Rate. The request shall include the flow rate of the Tributary stated as the annual average daily stream flow, reported as cubic feet per second ("cfs") as measured at the downstream point of discharge for the Tributary or portion thereof, taking into account the entire contributing drainage area. Such flow rate may be based on field data collected in accordance with accepted stream flow measurement methods as established by the United States Geologic Survey, or estimated based on procedures established by the United States Geologic Survey. The request shall describe, in depth, the basis and method employed for the reported flow rate to assess full build-out scenarios.

2. Slope. The request shall state the average slope at the Tributary measured as the change in elevation divided by the distance in stream miles from its source to the downstream point of discharge. The ground slope of all lands adjacent to the Tributary within the areas that would be subject to St. 1992, c. 36 if the exemption were not granted shall be calculated and the results of such calculations shall be presented graphically on a map prepared at a scale of 1"=100' or larger, expressed as percent slope.

3. Soil Characteristics. A map prepared at a minimum scale of 1"=100' shall be submitted indicating the soil types as mapped by the NRCS. Site specific soils data supporting or contradicting the NRCS soil mapping including borings, test pits and percolation tests may be submitted including copies of all field logs, notes, observations, conclusions and test methods employed. A detailed analysis of the soil characteristics of erodibility and permeability shall be provided. Permeability should be described in terms of a percolation rate measured as minutes per inch as specified in 310 CMR 15.00: The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage.

4. Proximity to a Reservoir or the Ware River above the Ware River Watershed. Proximity of the Tributary proposed to be exempted to a Reservoir or the Ware River above the Ware River intake shall be indicated by reference to the Protection Zone, defined by the DEP's Division of Water Supply, Watershed Resource Protection Plan Policy, as Zone A, Zone B and Zone C. The measured distance in stream miles from the downstream discharge point of the Tributary or portion thereof in question from that Tributary's ultimate point of confluence with a Reservoir or stream miles above the Ware River intake shall be stated.

5. Water Quality. The request shall include water quality monitoring data for the Tributary consisting of, at a minimum, monthly samples for a continuous one year period at a sampling station located at or near the downstream point of discharge of the Tributary or portion thereof for which exemption is requested. Water quality data of the Division and DEP may be utilized in satisfaction of this requirement where such data is available. Minimum analysis shall include fecal coliform bacteria, color, turbidity, temperature, pH, dissolved oxygen, total suspended solids, total phosphorus, ammonia nitrogen and chloride. A detailed analysis of the water quality data with reference to DEP's Surface Water Quality Standards for Class A Surface Waters and Outstanding Resource Waters of the Commonwealth, 314 CMR 4.00: Massachusetts Surface Water Quality Standards., shall be provided. The request shall include a detailed analysis of the impact on water quality of any potential Structures, Uses or Activities allowed if the exemption is granted.

6. Development. A general plan showing existing land use within the contributing drainage area upstream at the point of discharge of the Tributary or portion thereof shall be provided. The request shall include a calculation of the percent imperviousness of the contributing drainage area based on the existing land uses shown and shall indicate the change of percent imperviousness which may result from any Structures, Uses or Activities allowed or proposed if the exemption is granted.

7. Other Information. The request shall include a detailed description of the Structures, Uses and Activities which are or may be proposed to occur within those areas which would be subject to the Wetlands Protection Act, M.G.L. c. 131, § 40, without the exemption and shall include an analysis of any mitigating measures which will be used which would ensure that granting the exemption would present no substantial risk to the quality of water.

(e) Additional Materials. All surveys and additional materials or studies required to act on a request for Exemption of a Tributary, whether or not requested by the

Division, shall be prepared and delivered at the sole cost of the Person submitting the request.

(f) Public Hearing. Within 30 days of the Date of Submission of the Request for Exemption of a Tributary with the Division and DEP, the Division and DEP shall hold a public hearing. The date, time, and place of the public hearing shall be set by the Division, and the Division shall create a notice thereof. Such notice shall be given by the person who submitted the application at their expense, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the property in question is located and by mailing a copy of such notice to the Building Inspector, Conservation Commission and Board of Health in such city or town. Failure by the Person who submitted the application to give such notice shall result in the calculation of the 30 day notice period to re-commence from the scheduled date of the public hearing, subject to such Person providing the required notice as outlined in 313 CMR 11.06(9)(f). At the request of the Person who submitted the request filed with the Division at least two days before the date of such hearing, the date of the hearing may be rescheduled to a time which is mutually convenient for such Person, the Division and DEP, provided that such rescheduled time shall permit re-publication of notice as provided in 313 CMR 11.06(4)(f). The public hearing may be continued, with the consent of the Person who submitted the request, to an agreed upon date, which shall be announced at the hearing. At the public hearing, such Person may be represented by counsel and/or professional consultants and may present oral or written evidence, including the presentation of witness testimony.

(g) Exemption Decision. Within 60 days of the close of the public hearing, the Division shall issue a written Exemption Decision regarding the request for Exemption of a Tributary. If the exemption is granted, the Division may impose in the Exemption Decision such reasonable conditions, safeguards and limitations as it may find desirable in its sole discretion, which, based on the request for Exemption of a Tributary and the evidence presented at the public hearing, are necessary to protect the water in the Watersheds. If the exemption is denied, the Exemption Decision shall contain a brief statement of the reasons for the denial. The granting of an exemption is limited to the applicability of the Wetlands Protection Act, M.G.L. c. 131, § 40. All other applicable laws, regulations and ordinances shall not be affected by the granting of an exemption.

(h) Notice of Exemption. Notice of the Exemption Decision shall be mailed to the Person who submitted the request, and to the City Council or Board of Selectmen in the city or town where the Tributary is located. Notice shall also be published once in a newspaper of general circulation in such city or town, provided, however, that a failure to publish shall not affect the validity of the Exemption Decision. A record of the Exemption Decision shall be kept on file with the Division and, if a Tributary or portion thereof is exempted, the affected area shall

be shown on the most recent edition of the Massachusetts Geographic Information System Map (see 313 CMR 11.07).

(i) Appeal. A Person to whom an Exemption Decision is issued, who seeks to appeal the Division's Exemption Decision, shall file a Notice of Claim for an Adjudicatory Proceeding with the Commissioner at the address posted on its website within 21 days from the Date of Issuance of the Exemption Decision by the Division. The procedures for appeal before the Commission shall be as set forth in 801 CMR 1.00: Standard Adjudicatory Rules of Practice and Procedure. At the time of filing of such Notice of Claim, a copy shall also be filed with the Division.

(5) Work Pending Appeal of Applicability Decision, Variance Decision or Exemption Decision. No Alterations shall be made or Structures, Uses or Activities commenced until a final administrative or judicial determination has been made and all appeal periods shall have expired if the Division issues:

(a) an Applicability Decision that the property is located in an area regulated by St. 1992, c. 36, that the Structures, Uses or Activities proposed are prohibited by St. 1992, c. 36 under 313 CMR 11.04(3), or that the Structures, Uses or Activities will impair or materially impair the quality of water in the Watersheds; or

(b) a Variance Decision denying the variance requested in an application for variance; or

(c) an Exemption Decision denying a request for Exemption of a Tributary.

(6) Access to Property by Division. Any Person making a request for Watershed Determination of Applicability, an Application for Variance or a request for Exemption to the Division shall, upon request, allow the Division or its duly authorized representatives to inspect the property in question in order to assist the Division in the determination which is to be made. Personnel of the Division may enter, at reasonable times, any property, public or private, for the purpose of investigating or inspecting any condition relating to the discharge or possible discharge of Pollutants into the Watershed System and may make such tests as may be necessary to determine the existence and nature of such discharge as provided in M.G.L. c. 21E, § 4.

### **11.07: Maps**

(1) Aquifers. The location and potential well yield of Aquifers shall be determined by reference to the most recent edition of maps generated by the Massachusetts Geographic Information System based on the United States Geological Survey Water Resource Atlases.

(2) Flood Plains. The location of Flood plains shall be made by reference to the most recent edition of the Flood Hazard Boundary Maps issued by the Federal Emergency Management Agency.

(3) Surface Waters and Tributaries. The location of Surface Waters and Tributaries shall be determined by reference to the most recent edition of maps generated by the Massachusetts Geographic Information System based on the United States Geological Survey, 1 to 25,000 scale quadrangle maps.

(4) Adoption of More Accurate Maps. With respect to any of the maps referred to in 313 CMR 11.07, the Division, in consultation with DEP, may adopt more accurate maps pursuant to notice and a public hearing as provided by M.G.L. c. 30A. The Division shall file any of such maps which are adopted with the Clerk of the House of Representatives and Clerk of the Senate and such maps shall not take effect until 90 days have elapsed from the time of said filing. Copies of maps which have taken effect shall be filed with the Chief Executive Officers of all cities and towns within the Watersheds, provided that the Division's failure to do so shall not invalidate the maps or any actions taken by the Division in connection therewith.

#### **11.09: General Rules and Regulations for the Protection of Watersheds and Watershed System**

[ . . . ]

(1) Waters of the Watershed System.

(a) No Person shall take or divert any Waters of the Watershed System and no Person shall corrupt, render impure, waste or improperly use any such water.

(b) No Person shall:

1. engage in any construction activity involving filling, dredging, grubbing or altering land without adequate provisions to prevent erosion resulting in clay, silt or other turbidity laden waters from entering the Waters of the Watershed System;

2. construct, establish or maintain any agricultural facility or place where animal manure may be deposited or accumulated without adequate provision to prevent any manure or other Pollutant from flowing or being washed into the Waters of the Watershed System;

3. engage in any other activity which could degrade the quality of Waters of the Watershed System or interfere with their use as a source of water supply.

(c) in the direct or ultimate discharge of any Pollutant into the Waters of the Watershed System.

(d) Any records of any board of health or health agent concerning matters within the Watershed shall be open to inspection by the employees and agents of DCR and DEP.

(e) Whenever an incident occurs, is likely to occur, or a situation exists that threatens to add Pollutants to the Waters of the Watershed System, the Person causing or contributing to the pollution or potential pollution shall notify DCR and DEP immediately.

[ . . . ]

### **11.10: Enforcement**

(1) Any Person who, without lawful authority, takes or diverts any Waters of the Watershed System or corrupts or defiles any such Waters or any source of such Waters or who violates and refuses to comply with any rule, regulation or order of DCR shall be subject to the fines set forth in M.G.L. c. 92A1/2, § 9. The provisions of 313 CMR 11.00 shall be enforced upon petition of the Commission or of any town or Person interested by the Supreme Judicial Court or Superior Court or any justice of either court as provided in M.G.L. c. 92A1/2, § 10. In addition, upon written request by the Division, DEP shall have the authority to enforce the provisions of St. 1992, c. 36 and 313 CMR 11.00 by all legally permitted enforcement mechanisms including, but not limited to: issuing notices of noncompliance; convening pre-enforcement conferences; issuing water supply orders pursuant to M.G.L. c. 111, § 160; and imposing administrative penalties pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00: Administrative Penalty. Such written request by the Division to DEP may seek enforcement for a specified type of violation or area, for a designated group of cases or for an individual matter.

(2) Any person determined by DCR to have acted negligently in requiring a search and rescue response by DCR may be required to make restitution for the cost of those services as determined by the Commissioner.

### **11.12: Forms**

Forms for use under 313 CMR 11.00:

(1) Form 1 - Request for Watershed Determination of Applicability

(2) Form 2 - Applicability Decision

(3) Form 3 - Application for Variance

(4) Form 4 - Variance Decision for Recording in Registry of Deeds



(5) Form 5 - Request for Exemption of a Tributary

Forms 1, 3 and 5 and a Guidance Document, which may be of assistance in completing the forms, may be obtained from the Division at the addresses posted on its website.