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301 CMR 28.00: OCEAN MANAGEMENT PLAN

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28.01: Authority and Purpose

(1) 301 CMR 28.00 is adopted pursuant to M.G.L. c. 21A, § 4C and M.G.L. 132A, §§ 12A through 16F (Massachusetts Oceans Sanctuary Act) as amended by St. 2008, c. 114 (Massachusetts Oceans Act). 301 CMR 28.00 implements, administers, and enforces M.G.L. c. 21A, § 4C and the Ocean Management Plan, developed and promulgated in accordance with the Massachusetts Oceans Act. In accordance with St. 2008, c. 114, § 23 and with the federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq.*) and implementing regulations at 15 CFR §§ 923 and 930, enforceable standards of the Ocean Management Plan form part of the Massachusetts Coastal Zone Management Program and shall be interpreted and applied in a manner consistent with 301 CMR 20.00: *Coastal Zone Management Program*.

(2) 301 CMR 28.00 is promulgated by the Secretary to fulfill, in part, the statutory responsibility for the oversight, coordination, and planning for ocean waters and ocean-based development in the Commonwealth. The Massachusetts Oceans Act, St. 2008, c. 114, requires the Secretary to develop and implement an integrated ocean management plan for a specified Ocean Management Planning Area. The purpose of 301 CMR 28.00 is also to define, interpret, and clarify the procedures and rules necessary for agencies to carry out responsibilities under the Massachusetts Oceans Act, M.G.L. c. 21A, § 4C, and M.G.L. 132A, §§ 12A through 16F. Pursuant to statutory directive, the Ocean Management Plan establishes management areas and standards for certain Activities allowed under M.G.L. c. 132A, §§ 15 and 16 within the Ocean Management Planning Area. The Activities subject to the Ocean Management Plan are governed by siting and performance standards, associated with mapped resources and uses, that direct development away from areas with important and high value resources and water-dependent uses. 301 CMR 28.00 establishes the procedures and requirements necessary to interpret, implement, administer, and enforce M.G.L. c. 21A, § 4C and the Ocean Management Plan, including provisions to:

- (a) Codify the jurisdiction, management areas, and standards developed by the Ocean Management Plan;
- (b) Establish procedures for assessing the Ocean Development Mitigation Fee, pursuant to M.G.L. c. 132A, § 18;
- (c) Develop provisions for the review of the Ocean Management Plan and its baseline assessment and enforceable measures;
- (d) Define the process for making updates or amendments to the Ocean Management Plan; and
- (e) Ensure regulatory consistency for pertinent agency decisions regarding ocean development.

(3) Nothing in the Ocean Management Plan or 301 CMR 28.00 shall be construed to supersede existing general or special laws, or to confer rights and remedies in addition to those conferred by existing general or special laws.

28.02: Definitions

Activities means activities, uses or facilities allowed under M.G.L. c. 132A, §§ 15 and 16.

Agency means any agency, department, board, commission, or authority of the Commonwealth.

28.02: continued

Cables means linear infrastructure for the transmission of telecommunications or electricity.

Commercial Scale Wind Energy means wind energy projects of a scale designed for the generation of energy at commercial scale; that is, greater than wind energy projects for an individual community or subset thereof. Commercial scale wind energy facilities are those that are larger than the community-scale allocations contained in the Ocean Management Plan.

Commercial Scale Tidal Energy means tidal energy facilities at scale greater than could be authorized by the Federal Energy Regulatory Commission (FERC) as a pilot project under FERC's Hydrokinetic Pilot Project Licensing Process described in the April 2008 *Licensing Hydrokinetic Pilot Projects* White Paper.

Community Scale Wind Energy means wind energy projects of a scale designed to provide energy for an individual community or communities. Community Scale Wind Energy Facilities must conform to the maximum allocation of turbines that may be approved within the areas of the coastal Regional Planning Agencies as contained in the Ocean Management Plan.

Concentrations of Water-dependent Uses means areas described and mapped in the Ocean Management Plan, as may be updated or amended, where the intensity of marine-based commercial and recreational fishing, commercial shipping and navigation, and recreational boating uses are significant. Maps of the Concentrations of Water-dependent Uses and the methods utilized for developing them are available on the Massachusetts Ocean Resources Information System.

Environmental Impact Report means an Environmental Impact Report, or EIR, as defined and used in 301 CMR 11.00: *MEPA Regulations*.

Environmental Monitor means the publication, titled the *Environmental Monitor*, issued by the Executive Office of Energy and Environmental Affairs to provide information on projects under review by the MEPA office, recent MEPA decisions, and other public notices from Agencies. The URL for the online version of the *Environmental Monitor* is <http://www.env.state.ma.us/mepa/emonitor.aspx>.

Environmental Notification Form means an Environmental Notification Form, or ENF, as defined and used in 301 CMR 11.00: *MEPA Regulations*.

Host Community means any town or city in which all or part of a renewable energy Activity's energy generating facilities (*i.e.*, turbines not cables) are located.

Massachusetts Ocean Resources Information System means the online geographical information system (GIS) data base and mapping tool managed by the Office of Coastal Zone Management. All of the maps and GIS data contained in the Ocean Management Plan are maintained and available in digital format on the Ocean Management Plan Data site of the Massachusetts Ocean Resources Information System. The URL for is <http://www.mass.gov/eea/agencies/czm/program-areas/mapping-and-data-management/moris/>.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00: *MEPA Regulations*.

Ocean Advisory Commission means the advisory commission established by the Oceans Act for the purpose of assisting the Secretary in the development of an Ocean Management Plan. Membership and other terms are defined in M.G.L. c. 21A, § 4C(c)(i) through (iii).

Ocean Management Plan means the Massachusetts Ocean Management Plan developed and promulgated pursuant to St. 2008, c. 114 and M.G.L. c. 21A, § 4C.

28.02: continued

Ocean Management Planning Area means the waters and associated submerged lands of the ocean, including the seabed and the soil, lying between a line designated as the "Nearshore Boundary of the Ocean Management Planning Area" and the seaward boundary of the Commonwealth, as defined in 43 U.S.C. § 1312. The "Nearshore Boundary of the Ocean Management Planning Area" is depicted on a map dated January 31, 2006, prepared by the Office of Coastal Zone Management, and available on the Massachusetts Ocean Resources Information System, that constitutes the landward boundary of the Ocean Management Planning Area.

Ocean Science Advisory Council means the council established by the Oceans Act for the purpose of assisting the Secretary in creating a baseline assessment and obtaining any other scientific information necessary for the development of the Ocean Management Plan. Membership and other terms are defined in M.G.L. c. 21A, § 4C(d).

Person means any individual, corporation, partnership, trust, association, or other business or nonprofit organization, or any Federal, municipal, or regional governmental, intergovernmental or other entity that is not an Agency.

Pilot Tidal and Wave Energy Project means a tidal and wave energy (or hydrokinetic) facility at a scale that could be authorized by the Federal Energy Regulatory Commission (FERC) as a pilot project under FERC's Hydrokinetic Pilot Project Licensing Process described in the April 2008 Licensing Hydrokinetic Pilot Projects White Paper.

Pipeline means linear infrastructure for the conveyance of such materials as natural gas.

Proponent means any Agency or Person, including a designee or successor in interest, that undertakes, or has a significant role in undertaking, an Activity.

Regional Planning Agency means, for the purposes of 301 CMR 28.00, one of the six coastal regional planning organizations established pursuant to statewide enabling legislation that help communities plan and implement short- and long-range improvements for transportation, economic development, environmental, land use, and community development needs. The six coastal regional planning organizations are: the Cape Cod Commission, the Martha's Vineyard Commission, the Merrimack Valley Planning Commission, the Metropolitan Area Planning Council, the Nantucket Planning and Economic Development Commission, and the Southeastern Regional Planning and Economic Development District.

Renewable Energy Activities means wind, tidal, or wave energy projects allowed under M.G.L. c. 132A, §§ 15 and 16 and includes Commercial Scale Wind Energy, Commercial Scale Tidal Energy, Community Scale Wind Energy, Pilot Tidal and Wave Energy, and Test or Demonstration-scale Renewable Energy Projects.

Sand and Gravel Extraction means the activity of removing sand or gravel from the seabed and subsoil for the purpose of beach restoration, nourishment or shore protection.

Secretary means the Secretary of the Executive Office of Energy and Environmental Affairs.

Special, Sensitive or Unique Resources means special, sensitive or unique estuarine and marine life and habitats, pursuant to St. 2008, c. 114 and M.G.L. c. 21A, § 4C. Special, Sensitive or Unique Resources are described and mapped in the Ocean Management Plan, as may be updated or amended. Maps of the Special, Sensitive or Unique Resources and the methods utilized for developing them are available on the Massachusetts Ocean Resources Information System.

Test or Demonstration-scale Renewable Energy Projects mean wind, tidal, or wave energy projects of a limited scale designed to pilot, test, and demonstrate renewable energy technology.

28.03: Jurisdiction(1) Areas Subject to Jurisdiction.

- (a) Activities listed in 301 CMR 28.03(2) that occur in all or part of the Ocean Management Planning Area are subject to jurisdiction.

28.03: continued

(2) Activities Subject to Jurisdiction.

- (a) Any Person engaged in the following Activities shall comply with the siting and performance standards set forth in 301 CMR 28.04, *i.e.* renewable energy, sand and gravel extraction, cables and pipelines.
- (b) Within the Ocean Management Planning Area, the Ocean Management Plan standards apply to Activities that are required to file an Environmental Impact Report.
- (c) Proponents of Activities that exceed Environmental Notification Form thresholds are required to document any potential impacts to Special, Sensitive and Unique Resources or areas of Concentrations of Water-dependent Uses.
- (d) The Ocean Management Plan may be amended to include other Activities allowed under M.G.L. c. 132A, §§ 15 and 16 pursuant to 301 CMR 28.07.
- (e) Upon written request, the Secretary or his or her designee will provide Proponents, Persons, or Agencies with a written advisory opinion regarding the applicability of the Ocean Management Plan or 301 CMR 28.00.
- (f) Activities that are allowable pursuant to M.G.L. c. 132A, §§ 15 and 16 and that are not required to develop an Environmental Impact Report are presumed to meet the standards in 301 CMR 28.04.

(3) Protected Resources and Uses.

- (a) The Ocean Management Plan identifies key components of Massachusetts estuarine and marine ecosystems, defined as Special, Sensitive or Unique Resources, and establishes standards to protect them. The Ocean Management Plan also establishes management guidance for balancing potential impacts to areas with Concentrations of Water-dependent Uses with new Activities in the Ocean Management Planning Area. The standards for protected resources and uses are contained in 301 CMR 28.04.
- (b) Maps developed in the Ocean Management Plan and maintained in the Massachusetts Ocean Resources Information System delineate the areas of defined Special, Sensitive or Unique Resources and Concentrations of Water-dependent Uses. These maps shall be used to ensure that the standards in 301 CMR 28.04 are met. Additional information, including more accurate characterization or delineation of Special, Sensitive or Unique Resources and Concentrations of Water-dependent Uses, may be required pursuant to a Secretary's MEPA certificate. This additional information and other information made available during MEPA review will be utilized in the review and authorization of proposed Activities.

(4) Activities and Resources not subject to Ocean Management Plan Jurisdiction.

- (a) Pursuant to M.G.L. c. 130 and any other applicable general or special law, the Division of Marine Fisheries shall have sole responsibility for developing and implementing any fisheries management plans or fisheries regulations. Marine fisheries shall be managed in compliance with the applicable rules and regulations of the Division of Marine Fisheries and federal or interstate fishery management plans issued pursuant to M.G.L. c. 130 or any other applicable general or special law and shall be integrated, to the maximum extent practicable, with the Ocean Management Plan.
- (b) Maps and information contained in the Ocean Management Plan will assist the Division of Marine Fisheries in the review of proposed Aquaculture Facilities pursuant to 322 CMR 15.00: *Management of Marine Aquaculture.*

28.04: Management Areas and Standards(1) Management Areas. Within the Ocean Management Planning Area, the following management areas are defined in the Ocean Management Plan:

- (a) Prohibited Areas. Areas where Activities are expressly prohibited by either the Ocean Sanctuaries Act or Ocean Management Plan.
- (b) Wind Energy Areas. Areas suitable and presumptively allowed for commercial-scale wind energy facilities and other renewable energy Activities subject to standards and conditions contained in the Ocean Management Plan and 301 CMR 28.00.
- (c) Multi-use Areas. Areas, including portions of state waters not identified as Ocean Sanctuaries pursuant to the M.G.L. c. 132A § 13(a), where Activities allowed under the Ocean Sanctuaries Act are subject to the standards and conditions contained in the Ocean Management Plan and 301 CMR 28.00.

28.04: continued

(2) Management Standards for Special, Sensitive or Unique Resources. The following standards apply only to those Activities that are required to file an Environmental Impact Report pursuant to MEPA:

- (a) Activities proposed in the Ocean Management Planning Area are presumptively excluded from the Special, Sensitive or Unique Resource areas delineated on maps contained in the Ocean Management Plan and maintained in the Massachusetts Ocean Resources Information System.
- (b) This presumption may be overcome by demonstrating to the Secretary that:
 1. The maps delineating the Special, Sensitive or Unique Resources do not accurately characterize the resource based on substantial site-specific information collected in accordance with data standards and processes contained in 301 CMR 28.08; or
 2. No less environmentally damaging practicable alternative exists. For the purposes of this standard, an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics with respect to the purpose of the Activity; and
 3. The Proponent has taken all practicable measures to avoid damage to Special, Sensitive or Unique Resources, and the Activity will cause no significant alteration Special, Sensitive, or Unique Resources. Demonstrating compliance with this standard may include the incorporation of measures to avoid resources and impacts through time of year controls such that the construction, operation, or removal of the Activity will not occur when the Special, Sensitive or Unique Resource is present or may be adversely effected; and
 4. The public benefits associated with the proposed Activity outweigh the public detriments to the Special, Sensitive or Unique Resource.

(3) Management Standards for Concentrations of Water-dependent Uses. The following standard applies only to those Activities which are required to develop an Environmental Impact Report pursuant to MEPA. To the maximum extent practicable, Proponents of Activities must avoid, minimize, and mitigate impacts to areas of Concentrations of Water-dependent Uses delineated on maps developed in the Ocean Management Plan and maintained in the Massachusetts Ocean Resources Information System.

(4) Additional Management Standards for Renewable Energy Activities. The following standards apply to Renewable Energy Activities:

- (a) Pursuant to M.G.L. c. 132A, § 15, a Regional Planning Agency shall define the appropriate scale of offshore renewable energy Activities and review such Activities as developments of regional impact in municipalities where Regional Planning Agencies have regulatory authority. A Proponent may seek review of the Regional Planning Agency's development of regional impact determination, but not its determination of appropriate scale, pursuant to M.G.L. c. 164, §§ 69K through 69O.
- (b) For Commercial Scale Wind Energy Activities, the following standard applies. For Activities not subject to review by Regional Planning Agencies with regulatory authority as developments of regional impact, appropriate scale shall be determined by the Secretary in consultation with the Host Community and shall include consideration of economic benefits that the Host Community must receive from the Commercial Scale Wind Energy Activity.
- (c) For Community Scale Wind Energy Activities, the following standard applies. The Ocean Management Plan lists the maximum number of turbines allocated for Community-scale Wind Energy Activities within each Regional Planning Agency's planning area. The maximum allocation may be raised by the Secretary based on a demonstration by a Regional Planning Agency that the existing cap for a community-scale wind energy facility is not economically viable or that raising the allocation will cause no significant impact to appropriate scale interests.
- (d) For Community-scale Wind and Pilot Wave or Tidal Activities, the following standards apply:
 1. For Activities not subject to review by Regional Planning Agencies with regulatory authority as developments of regional impact, appropriate scale shall be determined by the Secretary in consultation with the Host Community.

28.04: continued

2. Proponents of Activities must demonstrate that the Host Community formally supports the project. Such support may be demonstrated by a letter from the town's Board of Selectman, or the city's Mayor or City Council; and,
3. Proponents of Activities other than test or demonstration-scale renewable energy projects must provide an economic benefit to the Host Community.

28.05: Consistency of Agency Authorizations

(1) It shall be the responsibility of all Agencies to ensure that all certificates, licenses, permits and approvals for any proposed Activities in the Ocean Management Planning Area and subject to the jurisdiction of the Ocean Management Plan, as contained in 301 CMR 28.03, are consistent, to the maximum extent practicable, with the provisions of said plan.

(2) In issuing licenses, permits and approvals for the Activity, Agencies shall act consistently, to the maximum extent practicable, with the Secretary's findings and determinations contained in a MEPA certificate, including as they may apply to the Activity's compliance with the management standards contained in 301 CMR 28.04(2). An Agency may also rely upon such findings and determinations of the Secretary when reviewing and taking action on an application or request by a proponent for a license, permit or approval from the Agency for the Activity.

(3) An Agency shall include a determination in its M.G.L. c. 30, § 61 findings pursuant to MEPA, that all feasible measures have been taken such that its approval of the Activity is consistent with the Ocean Management Plan and 301 CMR 28.00. The Agency shall specify any measures required to achieve consistency, the Person or Agency responsible for funding and implementing such measures, and the anticipated implementation schedule that will ensure that the measures shall be implemented prior to, or when appropriate, in relation to timing of unavoidable impacts.

28.06: Ocean Development Mitigation Fee

(1) Any Activity subject to the jurisdiction of the Ocean Management Plan and 301 CMR 28.00 and requiring a permit or license issued by a department, division, commission, or unit of the Executive Office of Energy and Environmental Affairs and other affected agencies or departments of the commonwealth shall be subject to an Ocean Development Mitigation Fee as established by the Secretary. The purpose of the fee is to compensate the Commonwealth for unavoidable impacts of ocean development Activities on the broad public interests and rights in the lands, waters, and resources of the Ocean Planning Area and to support the planning, management, restoration, or enhancement of marine habitat, resources, and uses pursuant to the Massachusetts Oceans Act, St. 2008, c. 114. No portion of the fee assessed by the Secretary shall be based on the Activity requiring a commercial or recreational fishing permit or license.

(2) All fees assessed by the Secretary shall be deposited in the Ocean Resources and Waterways Trust pursuant to M.G.L. c. 10, § 35HH and shall be administered in accordance with the purposes of the Fund and guidelines established by the Secretary.

(3) Under 301 CMR 28.06, the Secretary shall promulgate a fee structure for ocean development Activities subject to the Ocean Management Plan and 301 CMR 28.00. The Ocean Development Mitigation Fee should reflect differences in the scope and scale of Activities and their effects on protected resources or uses.

(4) The Ocean Development Mitigation Fee as determined by 301 CMR 28.06(3) will be listed in the final MEPA certificate.

(5) Nothing in 301 CMR 28.06 shall modify or otherwise affect an Agency's independent authority to require the Proponent to provide mitigation or compensation in lieu of mitigation as a condition of a permit or license issued by the Agency for the Activity.

28.07: Standards for Plan Review, Amendments, and Updates

- (1) Consistent with M.G.L. c. 21A, § 4C, the development and revision of the Ocean Management Plan is the authority and responsibility of the Secretary. The Office of Coastal Zone Management will support the Secretary, and act on his or her behalf as delegated, in the administration, implementation, and oversight of the Ocean Management Plan and 301 CMR 28.00.
- (2) The Secretary shall ensure that the Ocean Management Plan, its baseline assessment, and the enforceable provisions of relevant statutes and regulations are reviewed at least once every five years.
- (3) The scope of such review will be determined by the Secretary in consultation with the Ocean Advisory Commission and the Ocean Science Advisory Council.
- (4) The following changes to the Ocean Management Plan shall be made only through an amendment:
 - (a) The revision of existing or the creation of new management area locations or boundaries, excepting minor adjustments;
 - (b) The substantial revision of existing or the creation of new management standards;
 - (c) The identification of new or removal of current protected Special, Sensitive, or Unique Resources;
 - (d) The identification of new or removal of current protected areas of Concentrations of Water-dependent Uses; or,
 - (e) Other changes that would result in significant alteration to the management framework or geographic extent of the plan.
- (5) The Secretary will conduct the review and amendment process in accordance with the following guidelines:
 - (a) The plan amendment process will be initiated with a public notice in the *Environmental Monitor* announcing the intent to review and amend the current Ocean Management Plan.
 - (b) Public hearings will be held to receive input on the content and implementation of the current Ocean Management Plan. Generally, a hearing will be held in the each of the following regions: North Shore, Metro Boston, South Shore, Cape and Islands, and South Coastal.
 - (c) The Secretary will consult with the Ocean Advisory Committee in determining the scope of the plan amendment and in the development of amendments pursuant to said scope.
 - (d) The Secretary will consult with the Ocean Science Advisory Council in determining the scope of the updated baseline assessment scope and in the review of science related to the plan amendment scope.
 - (e) The Secretary will make a draft of the plan amendment available in electronic and printed copy form for public comment. Public hearings will be held on the draft amended plan. The public comment period will remain open for a minimum of 60 days after the last hearing.
 - (f) After the close of the public comment period, the Secretary will promulgate a final amended Ocean Management Plan and will file the plan with the House of Representatives and Senate clerks.
 - (g) 301 CMR 28.00 will be revised as necessary to implement, administer and enforce M.G.L. c. 21A, § 4C and the Ocean Management Plan.
- (6) Distinct from an amendment to the Ocean Management Plan, updates are revisions to the plan intended for proposed changes necessary for effective and efficient administration but not at the scope or scale of an amendment. The following changes to the Ocean Management Plan may be made through an update:
 - (a) Corrections to address errata, technical discrepancies or errors, or to clarify intent or meaning;
 - (b) Updated data and information on the spatial extent or further characterization of Special, Sensitive and Unique resources or Concentrations of Water-dependent Uses;
 - (c) Minor shifts in existing management area boundaries; and,
 - (d) Other adjustments that do not result in significant changes to the management framework or geographic extent of the Ocean Management Plan.

28.07: continued

- (7) The Secretary will conduct the update process in accordance with the following guidelines:
- (a) Requests for an update by an Agency or Person will be submitted to the Secretary. Proposed updates must meet a confirmed need for adjustments to the plan or clarify the management or administrative framework of the current and any proposal for an update must include a clear summary statement and rationale for the purpose of the update.
 - (b) For a proposed update that pertains to new or updated data on Special, Sensitive, or Unique Resources or Concentrations of Water-dependent Uses, the update must conform with the data standards and processes contained in 301 CMR 28.08.
 - (c) The Secretary will seek input from Agencies and will consult with the Ocean Advisory Commission and the Ocean Science Advisory Council on the proposed update.
 - (d) The Secretary will provide for public notice in the *Environmental Monitor* of the intent to update the Ocean Management Plan upon a determination that the update meets the above criteria and will further the goals of the Ocean Management Plan. The public comment period will be at least 30 days. The Secretary may hold one or more public hearings on the proposed update.
 - (e) After the close of the public comment period, the Secretary will issue a final decision on the proposed update. This decision will be noticed in the *Environmental Monitor*.

28.08: Data Standards

- (1) For Proponents seeking to demonstrate that the maps contained in the Ocean Management Plan do not accurately characterize the protected resource or use pursuant to 301 CMR 28.04(2)(a)1., the following standards apply:
- (a) Consultation with the Secretary, the Office of Coastal Zone Management, and other Agencies with expertise or authority is advised in order to review any proposed effort to map or otherwise characterize protected resources or uses.
 - (b) Information presented must be based on site-specific investigation or characterization that conforms with contemporary and accepted standards.
- (2) For proposed updates to or the delineation of new areas of mapped Special, Sensitive and Unique Resources or Concentrations of Water-dependent Uses pursuant to 301 CMR 28.07, the following standards apply:
- (a) Prior to initiating a proposed investigation or mapping effort, Persons or Agencies shall consult with the Secretary, the Office of Coastal Zone Management and other Agencies with expertise or authority to determine study requirements and data products.
 - (b) Any new or revised data set for Special Sensitive and Unique Resources or Concentrations of Water-dependent Uses should be based on site-specific studies that conform with contemporary and accepted standards, and adhere to other customary principles such as peer review.
 - (c) Any final data product must include acceptable geospatial meta-data, including the identification and description of any data modification or transformation, synthesis, or extraction.

28.99: Severability

If any section or clause of 301 CMR 28.00 is held invalid or unconstitutional by a court of competent jurisdiction, the remainder of 301 CMR 28.00 shall not be affected thereby.

REGULATORY AUTHORITY

301 CMR 28.00: St. 2008, c. 114, § 23 and M.G.L. c. 21A, § 4C.

(301 CMR 29.00 THROUGH 39.00: RESERVED)

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