

**ZEBRA MUSSELS:
MATRIX OF RELEVANT LEGAL FRAMEWORK Part 1**

PUBLIC ACCESS TO GREAT PONDS	DFG/OFA AUTHORITY	DCR AUTHORITY
<p>Great ponds are defined under MGL c. 91, § 35 as ponds containing in their natural state more than 10 acres, and under MGL c. 131, § 1 as a natural pond the area of which is 20 acres or more.</p>	<p>MGL c. 21A, § 11B establishes a public access board (PAB) within DFG that is comprised of representatives of DFG, the Department of Conservation and Recreation (DCR) and the Environmental Police.</p> <p>The PAB is responsible for designating locations (on private lands) for public access to great ponds and other state waters. Once the PAB designates a public access location, DFG is then responsible for acquiring the land for such location.</p> <p>MGL c. 21A, § 11B also allows DFG to establish public access locations on public lands with the consent of the public owner.</p>	<p><u>MGL c. 21, §§ 1 and 37B:</u> Under MGL c. 21, § 1, DCR has the authority to exercise general care and oversight of the Natural Resources¹ of the Commonwealth and of its adjacent waters, including the authority to carry out measures for the protection, conservation, control, use, increase, and development thereof.</p> <p>Under MGL c. 21, § 37B DCR is authorized to establish and maintain an Aquatic Nuisance Control Program.</p> <ul style="list-style-type: none"> ➤ DCR regards the Zebra Mussel as an Aquatic Nuisance within the meaning of MGL c. 21, § 37B and can accordingly issue Aquatic Nuisance Control Regulations to prevent, and otherwise control, the spread of the Zebra Mussel, an invasive Aquatic Nuisance, from infecting, and otherwise contaminating the Waters of the Commonwealth.

¹ "Natural Resources," is defined as "ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds; wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits." The department shall also be concerned with the development of public recreation as related to such natural resources; and shall have control and supervision of such parks, forests, and areas of recreational, scenic, or historic significance as may be from time to time committed to it.

		<ul style="list-style-type: none"> ➤ Neither section allows DCR to impose penalties or fines or otherwise enforce any regulations duly promulgated under these two statutory provisions. ➤ To the extent enforceable, regulations duly promulgated under these two provisions do not extend beyond the particular water body.
<p>Under the Colonial Ordinances of 1641-1647, great ponds are owned by the Commonwealth, and the public has the right to fish and fowl on them.</p>	<p>MGL c. 21A, § 11B further authorizes DFG to adopt regulations governing the use of land and water areas designated as public access locations by the PAB or DFG. Such regulations may be enforced by any state or municipal employee having police powers, and violations are punishable by a fine of not more than \$100.</p>	<p><u>MGL c. 21A, § 11C:</u> Under MGL c. 21A, § 11C, the commissioner, with the approval of the stewardship council, may, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife, fresh water fisheries, and irreplaceable wild, scenic and recreational river resources, adopt, amend, modify, or repeal orders regulating, restricting or prohibiting dredging, filling, removing or otherwise altering, or polluting the scenic and recreational rivers and streams of the commonwealth.</p> <ul style="list-style-type: none"> ➤ Section 11C allows DCR to issue an Order and promulgate regulations pertaining to a “scenic and recreational rivers and streams of the commonwealth.”²

² While Section 11C authorizes DCR to issue an order pertaining to scenic and recreational rivers and streams, the second sentence of Section 11C requires DCR to comply with the notice requirements of G. L.c. 30A, § 2, as a condition precedent “to the adoption or amendment of any regulation.” Given that Section 11C makes no other mention of DCR’s authority to promulgate a regulation, and the balance of Section 11C governs DCR’s authority to issue an order, DCR construes this sentence to mean that it should provide notice to affected property owners in the manner prescribed by MGL c. 30A, § 2.

		<ul style="list-style-type: none"> ➤ DCR's issuance of an Order under 302 CMR 3:00 is governed by the Scenic and Recreational Rivers Orders Regulations at 302 CMR 3:00. ➤ Any person who violates any such Order is subject to a fine of not less than \$10 nor more than \$100, or by imprisonment for not more than 6 months, or both. ➤ The Superior Court has jurisdiction in equity to restrain violations of such Order. ➤ Any Order duly issued or regulation duly promulgated under Section 11C will not extend beyond the particular scenic and recreational river or stream. ➤ To the extent enforceable, regulations duly promulgated under this provision do not extend beyond the particular water body.
<p>MGL c. 131, § 45 is the current state law embodiment of the public's right to access great ponds as established by the Colonial Ordinances.</p>	<p>DFG's Public Access Facility Regulations at 320 CMR 2.00 are administered by DFG's Office of Fishing and Boating Access (OFBA).</p>	

PUBLIC ACCESS TO GREAT PONDS	DFG/OFBA AUTHORITY	DCR AUTHORITY
<p>Under MGL c. 131, § 45, great ponds “shall” be public for the purposes of hunting and boating thereon, and “shall” be open to all inhabitants of the Commonwealth for fishing.</p>	<p>Under 320 CMR 2.02(2), OFBA has authority to establish a broad range of management measures governing boat ramps and other public access facilities under the jurisdiction of OFBA, including restricting, suspending, or prohibiting the use of such facilities.</p> <p>OFBA has <i>no</i> authority under 320 CMR 2.00 to regulate the conduct of persons who access a great pond or other MA water body by means other than the OFBA-regulated public access facility.</p>	
<p>MGL c. 131, § 45 also provides that all persons “shall” be allowed reasonable means of access to great ponds for the above recreational purposes. In that regard, MGL c. 91, § 18A allows 10 citizens to file a petition with DCR and the AG requiring them to determine whether public necessity requires a right of way easement for public access to a great pond.</p>	<p>The OFBA regulations at 320 CMR 2.02(3) and (4) set forth the procedures for adopting long-term and emergency management measures governing public access facilities.</p> <p>The OFBA regulations also prohibit a range of incompatible uses and activities at public access facilities, including, at 320 CMR 2.04(18), any action to prevent or impede the public’s access to an OFBA facility.</p> <p>Finally, 320 CMR 2.05 sets forth the penalties for violations of the OFBA regulations, including a \$100 fine and the towing or removal at the owner’s cost of any vehicle, trailer or watercraft in violation of the regulations or any applicable management measure.</p>	

PUBLIC ACCESS TO GREAT PONDS	DFG/OFBA AUTHORITY	DCR AUTHORITY
<p>MGL c. 131, § 45 further provides that for great ponds <i>not</i> exceeding 500 acres, municipalities may enact local regulations on hunting, fishing or boating on great ponds.</p> <p>However, any local regulations on hunting or fishing require the approval of the Division of Fisheries and Wildlife (DFW) in the Department of Fish and Game (DFG). Any local regulations on boating require the approval of the Office of Law Enforcement (i.e., the Environmental Police), and any local regulations on other uses require the approval of the Department of Environmental Protection (DEP).</p>		