

GML GREEN MILES LIPTON, LLP

77 PLEASANT STREET
P.O. BOX 210
NORTHAMPTON, MA 01061-0210
PHONE (413) 586-8218
FAX (413) 584-6278
(Main Office)
www.greenmiles.com

WESTFIELD OFFICE:
48 EAST SILVER STREET, SUITE 5
WESTFIELD, MA 01085
PHONE (413) 642-8367
FAX (413) 579-5357

ATTORNEYS AT LAW

JOHN J. GREEN, JR.
HARRY L. MILES
ROGER P. LIPTON
JOHN M. MCLAUGHLIN*
*ALSO ADMITTED IN CONNECTICUT
MICHAEL PILL (mpill@verizon.net)
BRAD A. SHIMEL
SUSAN L. MILES
MICHAEL Z. EDELSTEIN
DAVID C. KUZMESKI, OF COUNSEL
RAYMOND W. ZENKERT, JR., OF COUNSEL***
*** ALSO ADMITTED IN OHIO & MICHIGAN
BRIAN L. BLACKBURN (Dec.)

May 21, 2020 VIA email attachment to DOER.SMART@mass.gov "SMART Public Comment"
To: Dept. of Energy Resources, 100 Cambridge St., Suite 1020, Boston, MA 02114, attn: Kaitlin Kelly
Re: Legal reasons why BioMap2 provisions should be deleted from Solar Massachusetts Renewable Target ("SMART") regulations, 225 C.M.R. §§ 20.02 & 20.05(5)(e)(7)(c).

Executive Summary

1. BioMap2 **"information is intended for conservation planning, and is not intended for use in state regulations."** *"BioMap2 is a planning tool with no regulatory function,"* and it "is intended for conservation planning purposes only. It should not be used for regulatory purposes. The NHESP layers designed for regulatory use are produced in the Natural Heritage Atlas and include Priority Habitat and Estimated Habitat." Public comments urging incorporation of BioMap2 into SMART regulations failed to disclose that it is not a land use regulatory tool; in Massachusetts such deception by half-truth constitutes fraud. (Citations for quotes are on page 2.)
2. BioMap2 is based primarily on desktop computerized modeling; it lacks due process because there is no procedure for revision once a property is in its "core habitat" or "critical natural landscape;" such procedures are an essential part of endangered species and wetlands protection regulation.
3. Under NHESP (Natural Heritage and Endangered Species Program), any property owner may
 - (a) request reconsideration of an area delineated as rare species habitat under 321 C.M.R. 10.12(8),
 - (b) request review of a proposed project under 321 C.M.R. 10.18, which can include a challenge to the habitat delineation, and
 - (c) apply for a permit under 321 C.M.R. 10.23 if the agency determines the project will result in taking a protected species.An agency decision may be appealed as provided by 321 C.M.R. 10.25.
4. Wetlands Protection Act regulations (310 C.M.R. 10.00) set forth procedures for applications to the municipal Conservation Commission to delineate wetlands boundaries and obtain an order of conditions authorizing work in or near wetlands, with rights of administrative and judicial appeal.
5. SMART regulations incorporating BioMap2 are invalid on several independent legal grounds; they are (a) unreasonable and therefore arbitrary and capricious, (b) beyond the bounds of DOER (Dept. of Energy Resources) enabling legislation, and (c) an unlawful delegation or subdelegation of regulatory authority to a private special interest group (The Nature Conservancy) which co-created BioMap2 and is trying use it to insinuate itself into the government land use regulatory process.

Recommendation: DOER should delete BioMap2 provisions from SMART Regulations

1. BioMap2 **“information is intended for conservation planning, and is not intended for use in state regulations.”**¹ *“BioMap2 is a planning tool with no regulatory function,”*² and it *“is intended for conservation planning purposes only. It should not be used for regulatory purposes. The NHESP layers designed for regulatory use are produced in the Natural Heritage Atlas and include Priority Habitat and Estimated Habitat.”*³

The complete text and source for the quotations in the topic heading above are as follows. Every BioMap2 Town Report states as follows on the first page (bold face type in original):

This report and associated map provide information about important sites for biodiversity conservation in your area.

This information is intended for conservation planning, and is not intended for use in state regulations.

Every BioMap2 Town Report also states as follows on page 7 (italics in original):

While *BioMap2* is a planning tool with *no regulatory function*, all state-listed species enjoy legal protection under the Massachusetts Endangered Species Act (M.G.L. c.131A) and its implementing regulations (321 CMR 10.00). Wetland habitat of state-listed wildlife is also protected under the Wetlands Protection Act Regulations (310 CMR 10.00). The *Natural Heritage Atlas* contains maps of Priority Habitats and Estimated Habitats, which are used, respectively, for regulation under the Massachusetts Endangered Species Act and the Wetlands Protection Act. For more information on rare species regulations, and to view Priority and Estimated Habitat maps, please see the Regulatory Review page at <http://www.mass.gov/eea/agencies/dfg/dfw/natural-heritage/regulatory-review>

The Massachusetts Department of Fish & Game web page entitled “MassGIS Data: BioMap2” (<https://docs.digital.mass.gov/dataset/massgis-data-biomap2>) states as follows under the heading “Usage:”

The legend that MUST accompany these datalayers on ALL maps is:
“NHESP/TNC *BioMap2*”

Please note that Core Habitat polygons were designed for use at a regional or town scale. For accurate portrayal, the data should be displayed at scales of less than 1:25,000 (e.g., 1:30,000).

This datalayer is intended for conservation planning purposes only. It should not be used for regulatory purposes. The NHESP layers designed for regulatory use are produced in the Natural Heritage Atlas and include Priority Habitat and Estimated Habitat.

¹ Disclaimer on the first page of every BioMap2 “Town Report” (bold face type in original) online at www.mass.gov/service-details/biomap2-town-reports

² Statement on page 7 of every BioMap2 “Town Report (italics in original) online at www.mass.gov/service-details/biomap2-town-reports

³ Mass. Dept. of Fish & Game web page entitled MassGIS Data: BioMap2 online at <https://docs.digital.mass.gov/dataset/massgis-data-biomap2>

Despite the caveats set forth above, the Solar Massachusetts Renewable Target (“SMART”) regulations state as follows at 225 C.M.R. [Code of Mass. Regulations], sections 20.02 & 20.05(5)(e)(7)(c):

[225 C.M.R. 20.02 “Definitions”:]

Core Habitat. Key areas that are critical for the long-term persistence of rare species and other species of conservation concern, as well as a wide diversity of natural communities and intact ecosystems across the Commonwealth, as identified by the Massachusetts Division of Fisheries and Wildlife BioMap2 framework within the Natural Heritage and Endangered Species Program.

Critical Natural Landscape. Areas including large natural landscape blocks and buffering uplands around coastal, wetland and aquatic Core Habitats to help ensure their long-term integrity, as identified by the Massachusetts Division of Fisheries and Wildlife BioMap2 framework within the Natural Heritage and Endangered Species Program.

[225 C.M.R. 20.05(5)(e)(7)(c):]

c. Ineligible Land Use. Solar photovoltaic Generation Units that meet or one or more of the following criteria shall not be eligible to qualify as Solar Tariff Generation Units under 225 CMR 20.00:

1. One or more of the criteria established in 225 CMR 20.05(5)(e)5.; or
2. Solar Tariff Generation Units sited on land designated as Priority Habitat, Core Habitat or Critical Natural Landscape, that do not meet the criteria of Category 1 Land Use.
3. Solar Tariff Generation Units sited on a parcel with 50% or more of its area designated as Priority Habitat, Core Habitat and/or Critical Natural Landscape, that do not meet the criteria of Category 1 Land Use.

BioMap2 Core Habitat and Critical Natural Landscapes are not included in any other any state or federal regulations. No other development project has to consider core habitat or critical natural landscapes as part of a land use regulatory permitting process.

To learn more about how the BioMap2 provisions came to be included in the SMART regulations, I downloaded the “400MW Review Comments (zip. File)” under the heading “Public Comments” at the DOER web page entitled “SMART Emergency Rulemaking” at www.mass.gov/info-details/smart-emergency-rulemaking.

Whether by ignorance or design, none of the comments recommending inclusion of BioMap2 in the regulations disclosed the issues set forth in the topic heading above. A September 27, 2019 letter (at page 3) from the Mass Audubon Advocacy Department described BioMap2 as “a scientifically-based land planning blueprint” that DOER could use “to eliminate or at least greatly reduce new impacts to lands the state has identified as high conservation value.”

A letter from the Cape Cod Commission, also dated September 27, 2019 (at page 1), conflated BioMap2 with established land use regulation protecting wetlands and endangered species, stating, “The presence and concentration of various underlying resource areas within these undeveloped areas (e.g. wetlands, Priority Habitat, BioMap2 Core Habitat or Critical Natural Landscapes, etc.)

determine the proportion of the required offset in relation to proposed development, or alternately, whether the land is appropriate for development at all.” The Appalachian Mountain Club’s September 29, 2019 letter (at page 3) did the same thing, stating that

DOER should establish more thorough land-siting criteria for all solar development, using readily available data such as Prime Farmland Soils, Prime Forest Land, Biomap2 Core Habitat and Critical Natural Landscape, Designated Priority Habitat of state-listed rare species, Permanently Protected Open Space, and Land designated as “Forest Land” under Chapter 61.”

The Nature Conservancy’s September 27, 2019 letter (at page 3) offers the following detailed description of BioMap2:

The Nature Conservancy recommends the application of spatial data to inform SMART incentives. Three years ago, stakeholders recommended using spatial data to inform the SMART program, with the intent of disincentivizing solar development in sensitive habitat. These recommendations were not incorporated into the SMART program, and the 400 MW review provides an opportunity to do so. We recommend the use of BioMap2 habitat data to inform these changes. These data were developed by the MA Division of Fisheries and Wildlife/Natural Heritage and Endangered Species Program, in collaboration with The Nature Conservancy. These data and methodologies are based on decades of habitat mapping by both entities and have been readily adopted as a primary input to state, NGO, land trust, and municipal conservation priorities. As one example, different components of BioMap2 data could be used to direct different levels of incentives (e.g. Core Habitats would be ineligible for incentives, Critical Natural Landscapes would qualify for reduced incentives, and areas outside of BioMap2 would receive full incentives). . . .

As one of the principal sponsors of BioMap2, The Nature Conservancy was fully aware of the limitations quoted in the topic heading at the beginning of this section. The Nature Conservancy’s description of BioMap2 is a half-truth, omitting to disclose that crucial information. Such conduct was described this way by the Massachusetts Supreme Judicial Court in *Kannavos v. Annino*, 356 Mass. 42, 48 (1969):

Although there may be "no duty imposed upon one party to a transaction to speak for the information of the other . . . if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge. Fragmentary information may be as misleading . . . as active misrepresentation, and half-truths may be as actionable as whole lies" See Harper & James, Torts, Section 7.14. See also Restatement: Torts, Section 529; Williston, Contracts (2d ed.) Sections 1497-1499.

2. BioMap2 is based primarily on desktop computerized modeling; it lacks due process because there is no procedure for revision once a property is in its “core habitat” or “critical natural landscape;” such procedures are an essential part of endangered species and wetlands protection regulation.

The BioMap2 summary report (available online at www.mass.gov/service-details/biomap2-conserving-the-biodiversity-of-massachusetts-in-a-changing-world) was copyrighted a decade ago in 2010 by the Commonwealth and a private corporation – The Nature Conservancy.

The BioMap2 Technical Report (also available online at www.mass.gov/service-details/biomap2-conserving-the-biodiversity-of-massachusetts-in-a-changing-world) is dated November, 2011. It is based on the Conservation Assessment and Prioritization System (CAPS), developed by the Landscape Ecology Program at UMass/Amherst. That report states as follows at page 29:

A primary goal of BioMap2 is to identify the most resistant and resilient ecosystems in Massachusetts. To accomplish this, BioMap2 used the Conservation Assessment and Prioritization System (CAPS, <http://www.umass.edu/landeco/research/caps/caps.html>) developed over the past decade by researchers in the Landscape Ecology Program at the University of Massachusetts, Amherst.

CAPS is a “coarse filter” “computer software program” “based on models”⁴ using spatial data, which may be defined as “information about a physical object that can be represented by numerical values in a geographic coordinate system.”⁵ This approach does not include any ground truthing and includes many areas on the fringes of intact landscapes that have already been developed.

The mapping in BioMap2 is based on CAPS datasets that are from 2009; The BioMap2 Technical Report states at page 21 that “BioMap2 uses the 2009 version of CAPS.”

The BioMap2 mapping has not been updated since publication and as it does not appear there are any plans to update the mapping to reflect 2020 conditions on the ground.

Under the 14th Amendment to the U. S. Constitution, due process has two components--substantive and procedural-- defined in these words by the Massachusetts Supreme Judicial Court in *Aime v. Commonwealth*, 414 Mass. 667, 673-675 (1993) (Citations and internal quotation marks omitted):

The nature of the individual right affected by a challenged statute is of crucial importance to constitutional analysis under the due process clause. The Supreme Court of the United States has construed this clause to provide two basic forms of protection against improper governmental action. So-called ‘substantive due process prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty. Procedural due process’ requires that a statute or governmental action that has survived substantive due process scrutiny be implemented in a fair manner.

⁴ The CAPS computer program is described as follows at described at <http://umasscaps.org/>:

The Conservation Assessment and Prioritization System (CAPS) is an ecosystem-based (coarse-filter) approach for assessing the ecological integrity of lands and waters and subsequently identifying and prioritizing land for habitat and biodiversity conservation. We define ecological integrity as the ability of an area to support biodiversity and the ecosystem processes necessary to sustain biodiversity over the long term. CAPS is a computer software program and an approach to prioritizing land for conservation based on the assessment of ecological integrity for various ecological communities (e.g., forest, shrub swamp, headwater stream) within an area.

CAPS combines principles of landscape ecology and conservation biology with the capacity of modern computers to compile spatial data and characterize landscape patterns. This process results in a final Index of Ecological Integrity (IEI) for each point in the landscape based on models constructed separately for each ecological community.

⁵ Definition is from <https://searchsqlserver.techtarget.com/definition/spatial-data>.

While I have not yet had time to research thoroughly the constitutional due process issue, I believe we are concerned here with procedural due process. It is grossly unfair to categorically exclude photovoltaic projects based on BioMap2, both because it was never intended to be used for land use regulation, and because the BioMap2 provisions in the SMART regulations lack any procedure that allows for site-specific on-the-ground analysis to determine whether or not a particular solar project site is located within BioMap2 “core habitat” or “critical natural landscape.” Indeed, whether a specific site is part of a “critical natural landscape” would likely be difficult to determine in light of the vague parameters for that classification.

We likely do not have, and need not claim, a right to a formal trial-type hearing that would occur in a courtroom, but IF the BioMap2 provisions are to remain in the DOER SMART regulations, then DOER has imposed upon itself an obligation to afford at least the administrative adjudicatory procedures available under NHESP (Natural Heritage Endangered Species Program) and the Wetlands Protection Act, which are described below in the next two sections of this memorandum.

As a practical matter, qualifying a photovoltaic project as a Solar Tariff Generation Unit likely will determine whether or not that project (in which a developer may have invested hundreds of thousands of dollars) can go forward at all. An application under the SMART regulations is analogous to an application for a professional license required to pursue an occupation, where some measure of procedural due process is required. *Ludvigsen v. Town of Dedham*, 48 Mass. App. Ct. 682, 685 n. 6 (2000); *Yeardi’s Moody Street Restaurant and Lounge, Inc.*, 19 Mass. App. Ct. 296, 302-304 (1985); *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 495-500 (1965); *Marmer v. Board of Registration of Chiropractors*, 358 Mass. 13, 16-17 (1970).

While the adoption of the BioMap2 provisions is regulatory rather than adjudicatory, it excludes potentially many solar projects without affording applicants any adjudicatory procedure for determining whether a particular project is properly included in BioMap2 “core habitat” or “critical natural landscape” under 225 C.M.R. 20.02 & 20.05(5)(e)(7)(c). *Cambridge Electric Light Co. v. Dept. of Public Utilities*, 363 Mass. 474, 485-493 (1973); *Sierra Club v. Commissioner of Dept. of Environmental Management*, 439 Mass. 738, 745-747 (2003).

This case presents an interesting twist on factual situations found in prior court decisions. On the one hand, inclusion of the BioMap2 provisions in the SMART regulations is part of a regulatory proceeding. On the other hand, that regulatory process excludes photovoltaic projects categorically, without affording an applicant any due process at all to determine whether that exclusion is correctly applied to a particular project.

3. Under NHESP (Natural Heritage and Endangered Species Program), any property owner may
(a) request reconsideration of an area delineated as rare species habitat under 321 C.M.R. 10.12(8),
(b) request review of a proposed project under 321 C.M.R. 10.18, which can include a challenge to
the habitat delineation, and
(c) apply for a permit under 321 C.M.R. 10.23 if the agency determines the project will result in
taking a protected species.
An agency decision may be appealed as provided by 321 C.M.R. 10.25.

The regulations cited in the topic heading above are promulgated under the Endangered Species Act, G.L. c. 131A. The regulations authorize requests for reconsideration of an area delineated as rare species habitat under the following provisions of 321 C.M.R. 10.12(8):

- (8) Any Record Owner of real property in Priority Habitat may request reconsideration by the Division of the delineation affecting that Record Owner's property. Such request shall be made in writing by certified mail to the Division. Within 30 days of the Division's receipt of a request for reconsideration, the Division shall make available to the Record Owner, consistent with the provisions of M.G.L. c. 66 § 17D, information from the Division's files relating to the delineation and species listing affecting that property. In providing such records, the Division shall require the Record Owner to execute a confidentiality agreement pursuant to M.G.L. c. 66 § 17D and shall redact the names and personal information of persons submitting State-listed Species occurrence information affecting a property. Following the receipt of information used as the basis of the delineation the Record Owner shall notify the Division in writing if they wish to proceed with the reconsideration. If the Record Owner determines to proceed with the reconsideration they shall provide the following information:
- (a) Name;
 - (b) Address;
 - (c) Ownership interest in the property;
 - (d) Acreage of the property;
 - (e) A copy of a USGS topographic map in scale 1:24,000 or 1:25,000 with the property location clearly marked and centered on the page, and;
 - (f) A clear statement explaining the reasons for the reconsideration request with specific reference to scientific studies, records, surveys or other information relevant to the request. Within 45 days of its receipt of such information and the payment of a fee, the amount of which shall be determined by the commissioner of administration under the provisions of M.G.L. c.7, § 3B, the Division shall, applying the criteria in 321 CMR 10.12(2), issue a written decision either confirming the original delineation or modifying that delineation as the Division determines is warranted by the additional information submitted to the Division. The decision shall state the grounds for the Division's determination, and shall be mailed by certified mail to the Record Owner. This decision shall be considered the final agency action for the purposes of M.G.L. c. 30A. No Record Owner may appeal the delineation in the Priority Habitat Map pursuant to c. 30A without first requesting reconsideration as provided above. However, the failure to request reconsideration shall not preclude a Record Owner from challenging the Priority Habitat delineation in connection with the review of a Project or Activity pursuant to 321 CMR 10.18 or in any subsequent appeal relating to that review.

A project developer also can request review of a proposed project under 321 C.M.R. 10.18, which can include a challenge to the habitat delineation, under the procedure authorized with these words:

- (1) Except as provided in 321 CMR 10.13 and 10.14, any Project or Activity that will be located or will take place in Priority Habitat shall be reviewed by the Division as provided in this section prior to commencement of any physical work or action in Priority Habitat. The Division shall review any such Project or Activity for the purposes of determining if a Take will result from

any temporary or permanent modification, degradation or destruction of Priority Habitat occurring as a result of the proposed Project or Activity. Prior to the commencement of any physical work in Priority Habitat, the Record Owner of the land where such Project or Activity will occur shall submit the information listed in 321 CMR 10.20 to the Division. ...

- (2) After the issuance of a file number, the Division shall review the submitted materials to determine, based on the performance standard in 321 CMR 10.19, if the proposed Project or Activity either:
 - (a) has avoided a Take as proposed, or with conditions and may proceed without further review; or
 - (b) will result in a Take and cannot proceed as proposed. For purposes of M.G.L. c. 30A, §§ 10 through 14, the determination of a Take shall constitute final agency decision in the form of a denial. ...
- (3) If the Division has made a determination of a Take, the Record Owner may request a consultation with the Division to discuss options for the Project or Activity that may avoid a Take.
- (4) Any Project or Activity that receives a determination that no Take will result (whether in writing or by expiration of the 60-day review period, as may be extended) shall not be subject to further review under 321 CMR 10.18 if physical work on the Project or Activity is commenced within five years from the date of the determination (or the expiration of the 60-day review period, as may be extended). If no physical work is commenced on the Project or Activity within that five-year period, or there is a material change in the plans that were submitted to the Division, the Project or Activity may be subject to further review by the Division. ...

A “Conservation and Management Permit” may be issued under 321 C.M.R. 10.23, which authorizes “the Taking of a State-listed Species for conservation or management purposes provided there is a long-term Net Benefit to the conservation of the impacted species.” Section 10.23 imposes detailed specific requirements for such a permit.

An agency decision outlined above may be appealed as provided by 321 C.M.R. 10.25. Section 10.25(1) “Adjudicatory Hearing Before the Division” provides that “Any person aggrieved by a final agency decision made pursuant to 321 CMR 10.12, 10.18 or 10.23 shall have the right to an adjudicatory hearing at the Division pursuant to M.G.L. c. 30A, § 11 in accordance with the procedures for informal hearings set forth at 801 CMR 1.02 and 1.03.”

If an applicant does not obtain relief through an administrative appeal, 321 C.M.R. 10.25(4) “Judicial Review Under M.G.L. c. 30A” states that “Any person aggrieved by any final decision of the Division made under 321 CMR 10.12, 10.18, or 10.23 in an adjudicatory proceeding shall be entitled to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14.”

4. Wetlands Protection Act regulations (310 C.M.R. 10.00) set forth procedures for applications to the municipal Conservation Commission to delineate wetlands boundaries and obtain an order of conditions authorizing work in or near wetlands, with rights of administrative and judicial appeal.

Regulations promulgated under the Wetlands Protection Act (G.L. c. 131, § 40) establish a detailed adjudicatory scheme under 310 C.M.R. 10.05 “Procedures.” One can request a “Determination of Applicability” from the municipal Conservation Commission under 310 C.M.R. 10.05(3) to obtain “a determination as to whether M.G.L. c. 131, § 40 applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40...” 310 C.M.R. 10.05(3)(a)1. Such a determination can include a request for an Order of Resource Area Delineation defining the boundaries of wetlands, buffer zones and any other protected areas on a project site. 310 C.M.R. 10.05(3)(a)1.

Any project that requires work in a wetland, buffer zone or other protected area requires the filing of a “Notice of Intent” under 310 C.M.R. 10.05(4), to obtain an “Order of Condition” allowing the work to proceed subject to specified conditions. 310 C.M.R. 10.05(6).

A Conservation Commission determination can be appealed to the Department of Environmental Protection under 310 C.M.R. 10.05(3)(c) & 10.05(7), which will review the case and issue a “Superseding Determination of Applicability.” If an order of conditions is appealed, after review the Department of Environmental Protection will issue a “Superseding Order of Conditions” under 310 C.M.R. 10.05(7).

A Superseding Determination or Superseding Order of Conditions may be appealed to a formal adjudicatory administrative proceeding under 310 C.M.R. 10.05(7)(j), which is governed by the adjudicatory proceeding rules set forth in 310 C.M.R. 1.01. Under 310 C.M.R. 1.01(14)(f), “After the issuance of a final decision, a person who has the right to seek judicial review of the decision may file with the appropriate Superior Court, pursuant to M.G.L. c. 30A, § 14.”

5. SMART regulations incorporating BioMap2 are invalid on several independent legal grounds; they are (a) unreasonable and therefore arbitrary and capricious, (b) beyond the bounds of DOER (Dept. of Energy Resources) enabling legislation, and (c) an unlawful delegation or subdelegation of regulatory authority to a private special interest group (The Nature Conservancy) which co-created BioMap2 and is trying use it to insinuate itself into the government land use regulatory process.

In addition to the constitutional procedural due process issue discussed above, the BioMap2 provisions in the SMART regulations also can be challenged on the state law grounds listed in the topic heading above.

While I have researched many of these court cases, I believe the best summary is set forth with these words in the leading legal treatise (i.e. commentary) on Massachusetts administrative law, Gerald A. McDonough, 39 Mass. Practice: Administrative Law & Practice, § 12.32 “[Grounds for Invalidity of Rule or Regulation] Arbitrary, capricious or unreasonable” (2nd Ed. & Supp. 2020):

A state administrative agency rule or regulation which would be regarded as valid in every other respect may still be found to be invalid if it is determined to be arbitrary or capricious, or unreasonable.¹ The Supreme Judicial Court has in essence required every agency rule or regulation

to measure up to an overall general requirement of reasonableness. Every duly promulgated rule or regulation, therefore, must have a rational basis or foundation.²

For a rule or regulation to be upheld judicially, there must be a reasonable ground for the exercise of the agency's judgment and discretion as reflected in the rule or regulation. Where no such reasonable ground exists, the agency has acted in an unreasonable manner—or, as courts will sometimes state it, in an arbitrary or capricious manner. “Arbitrary” and “capricious” are merely words which are employed to indicate the failure to act in a reasonable manner.³

Because the consideration of a challenged rule or regulation necessarily involves examining a rule or regulation in the context of specific factual circumstances, the Supreme Judicial Court has held that merely because a certain rule or regulation is found to be reasonable in the context of one set of specific factual circumstances does not mean that a subsequent attack and judicial reconsideration in the light of a different factual situation are precluded.⁴

If a rule or regulation formerly determined to be reasonable is found to be unreasonable in the light of a subsequent different factual context, the rule or regulation will be declared invalid.⁵ On the other hand, because the overall general requirement of reasonableness is the applicable determining standard, if a rule or regulation is determined to be unreasonable in any one specific factual context, it is invalid and void and cannot be declared reasonable in any subsequent factual context.⁶ Having failed to meet the reasonableness requirement in any one specific factual context, the rule or regulation is declared invalid once and for all. It cannot later be revived and rendered valid because of its reasonableness in the light of a subsequent specific factual context.⁷

The BioMap2 provisions in the SMART regulations have no support in the legislation defining DOER’s powers and duties. G.L. c. 25A, § 6, states in relevant part that “The department and its appropriate administrative units shall:-- (1) develop and administer programs relating to ... alternative energy development ... (2) advise, assist, and cooperate with other state, local, regional and federal agencies in developing appropriate programs and policies relating to energy planning and regulation in the commonwealth”

Nothing in G.L. c. 25A authorizes or envisions DOER setting itself up as an environmental regulatory agency imposing through BioMap2 restrictions never intended to be part of any land use regulatory scheme.

Finally, the BioMap2 provisions in the SMART regulations represent an illegal subdelegation of regulatory authority to The Nature Conservancy, a private special interest organization. The Nature Conservancy’s September 27, 2019 comment letter (at page 3) discloses that organization’s desire to insinuate itself into the government regulatory process with these words:

[D]ifferent components of BioMap2 data could be used to direct different levels of incentives (e.g. Core Habitats would be ineligible for incentives, Critical Natural Landscapes would qualify for reduced incentives, and areas outside of BioMap2 would receive full incentives). The Nature Conservancy would be willing and able to assist DOER in interpreting and applying these and other natural resource data to refine and improve the SMART Program incentives.

As stated succinctly by Gerald A. McDonough, 38 Mass. Practice: Administrative Law & Practice, § 3.27 “Subdelegation” (2nd Ed. & Supp. 2020), The Supreme Judicial Court has consistently adopted a strong position against such subdelegation. [Footnote omitted.]”

Recommendation: DOER should delete BioMap2 provisions from SMART Regulations.

The validity of the BioMap2 provisions in the SMART regulations can be challenged directly by legal action for declaratory judgment under G.L. c. 231A, § 2 & c. 30A, § 7. There is no need to exhaust administrative remedies before going to court.

G.L. c. 231A, § 2 provides that the declaratory judgment procedure may be “may be used to secure determinations of right, duty, status or other legal relations under ... administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination.” G.L. c. 30A, § 7, states that Unless an exclusive mode of review is provided by law, judicial review of any regulation or of the sufficiency of the reasons for its adoption as an emergency regulation may be had through an action for declaratory relief in the manner and to the extent provided under chapter two hundred and thirty-one A.

As an alternative to invalidating the BioMap2 provisions in the SMART regulations, a court could order DOER to provide an adjudicatory procedure for them. Such a procedure would have to be analogous to the endangered species and wetlands protection adjudicatory procedures describe above in this memorandum. One problem with that approach is whether DOER’s legislative mandate includes having that agency engage in environmental land use regulation. Another problem is whether DOER has any expertise that would enable it to make such determinations. Any attempt to delegate such adjudicatory authority to another public agency or perhaps The Nature Conservancy likely would constitute unlawful delegation.

In conclusion, the best course of action is for DOER simply to delete the BioMap 2 provisions from the SMART Regulations 225 C.M.R. 20.02 & 20.05(5)(e)(7)(c).

Very truly yours,



Michael Pill

MP/csh/L1.1169.2.