



Commonwealth of Massachusetts
Executive Office of Environmental Affairs

Department of Environmental Protection

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Division of Wetlands and Waterways Wetlands Protection Program Policies 1994 Revisions

As part of the 1994 Wetlands Initiative, the Department of Environmental Protection/Division of Wetlands and Waterways (DWW) has undertaken a comprehensive review of its Wetland Program policies. The Wetland Program Policies have been updated and revised to provide straight forward guidance for the implementation of the wetlands regulations without changing the basic purpose of the policies.

Wetland protection is enhanced in both this new policy package and the regulatory and programmatic changes associated with the 1994 Wetlands Initiative. The no net loss of wetlands policy, as enunciated by the Massachusetts Water Resources Commission, Executive Office of Environmental Affairs, and DEP, is embodied in the 401 Water Quality Certification Program. The no net loss policy was a series of statements articulating the overarching goal for the Commonwealth to stem wetland loss. I believe the no net loss policy has been fully implemented through the following components of the 1994 Wetland Initiative:

- Water Quality Certification Revisions (314 CMR 9.00): reducing duplication with the Wetland Protection Program and increase protection where necessary to ensure compliance with the state's water quality standards.
- Surface Water Quality Standards (314 CMR 4.00): coordinating this program with the 401 Program and clarify the regulations as related to the discharge of fill into vegetated wetlands.
- Bordering Vegetated Wetlands Delineation: providing a more scientifically-based procedure for determining wetland boundaries by allowing hydrologic indicators, such as soils, to be used in addition to wetland plants.
- Adjudicatory Hearing Rules: improving the speed and efficiency of processing adjudicatory hearing appeals and allowing greater staff time for compliance and enforcement.

These regulations provide enhanced protection for large projects and those projects with the potential for cumulative impacts in critical resources, and also require 1:1 replication for small wetland impacts. The 1994 Wetland Initiative including the new 401

regulations and the revised policy package advance the Commonwealth's commitment to cease unmitigated wetlands loss.

The new policy package has been consolidated into 12 reformatted policies, effective March 4, 1995. The former DWW policy numbers have been referenced in the new edition for ease of cross-referencing. The original issuance date is also provided, as well as revision dates for those policies which requiring substantive changes. The revised package has removed several wetland policies which have become either outdated, revised, or replaced since 1982.

The significant changes in the new Wetland Policy Package involve the addition of a new policy and the removal of some policies. The new policy (Titled: Bordering Vegetated Wetland Delineation Criteria and Methodology) has been developed to provide clear guidance on the definition, critical characteristics, and boundary of Bordering Vegetated Wetlands (BVW). This new BVW policy is also supplemented with a detailed BVW handbook, entitled Delineating Bordering Vegetated Wetlands Under the Wetland Protection Act, dated March 1995. In addition, some policies have been removed: recent incorporation into the wetland regulation amendments (new definition for agriculture), replacement by more detailed guidance documents (developed enforcement manual), representing internal guidance to DWW staff (file number form), or not sufficiently useful in their current form. The Wildlife Habitat and Evaluation Policies (DWW Policies 88-1 and 88-5) have been withheld at this time because I believe that they need to be fully reviewed and revised. Nevertheless, the policies will serve as a useful guidance until revised in the coming year.

Copies of the 1995 Wetlands Program Policies may be obtained from the Department of Environmental Protection (One Winter Street, 8th Floor, Boston, MA 02108) or the Massachusetts Association of Conservation Commissioners (10 Juniper Road, Belmont, MA 02178)

I am confident that the revised policy package will provide a useful tool in the application of the wetlands regulations.


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Contents

ILSF Definition: Interpretation of 310 CMR 10.57(2)(b): Definition of Isolated Land Subject to Flooding (DWW Policy 85-2)	1
Amended Orders: Amending an Order of Conditions (DWW Policy 85-4)	3
Title 5: 310 CMR 10.03(3): Presumptions for Subsurface Sewage Disposal Systems that Meet Title 5 or More Stringent Local Board of Health Requirements (DWW Policy 86-1)	5
Expedited Review: Policy Relating to the Expedited Review of License, Approval, or Permit Applications (same as current DEP Policy CO93-1) (DWW Policy 87-1)	7
Access Roadways: Interpretation of 310 CMR 10.53(3)(e) Limited Projects: Access Roadways or Driveways (DWW Policy 88-2)	9
Multiple Filings: Multiple Notice of Intent Filings for the Same or Similar Projects on the Same Property (DWW Policy 88-3)	11
Appeal Stays: Stay of Requests for Adjudicatory Hearings in Wetlands Permit Cases When an Order of Conditions has been Denied Under a Local Wetlands Bylaw (Zoning or Non-Zoning) (DWW Policy 89-1)	13
Rare Species: Standards and Procedures for Determining Adverse Impacts to Rare Species Habitat (DWW Policy 90-2)	15
Plan Changes: Administrative Appeals Policy for the Review of Project Plan Changes (DWW Policy 91-1)	17
Salt Ponds: Criteria for Evaluating and Permitting Openings of Salt Ponds In Order to Manage, Maintain or Enhance Marine Fisheries (DWW Policy 91-2)	19
Coastal Banks: Definition and Delineation Criteria for Coastal Banks (DWW Policy 92-1)	23
BVW: Bordering Vegetated Wetlands Delineation Criteria and Methodology	27
Appendix: Status Summary of Wetland Protection Program Policies and Guidelines	31



ILSF Definition: Interpretation of 310 CMR 10.57(2)(b): Definition of Isolated Land Subject to Flooding (DWW Policy 85-2)

Issued: January 24, 1985

Revised: March 1, 1995

"Land Subject to Flooding," as defined in the Wetlands Protection Act (the "Act"), has been divided in the regulations into two different types of areas. Bordering Land Subject to Flooding includes areas which flood as a result of water rising from creeks, ponds, rivers, or lakes. Isolated Land Subject to Flooding includes areas which flood due to ponding of runoff or high ground water. The characteristics of these different types of areas are defined in 310 CMR 10.57(2). The interests served by these areas are set forth in the discussion section and the performance standards, 310 CMR 10.57(1) and 310 CMR 10.57(4) respectively.

One of the principal purposes of the definition of Isolated Land Subject to Flooding (ILSF) is to differentiate between those areas that serve the interests of the Act in a significant way and areas where small amounts of water may collect occasionally--puddles, in effect. A second purpose is to distinguish between those areas that are important parts of a larger water resource system--for which the cumulative effects of even small fillings can lead incrementally to serious flooding problems over the entire floodplain--and those that are only locally significant to the interests of storm damage and flood prevention. By making these distinctions, the regulations provide appropriate protection to land areas that function in different ways. A third purpose is to ensure consistent application of these distinctions by the issuing authority, providing a greater degree of certainty for land owners with regard to the standards of review they should expect.

Unfortunately, there has been some confusion as to the interpretation of the definition of an ILSF, reducing the degree to which consistent administration has been achieved. This policy sets forth, for the guidance of landowners, developers, and the issuing authority, the Department's interpretation of specific portions of its regulations defining an ILSF.

(1) "An isolated depression or closed basin without an inlet or an outlet". The phrase "without an inlet or an outlet" is not intended as a literal exclusion of all sources of flow, channelized or otherwise, into a basin. Obviously, any basin must have an "outlet" of some kind at some elevation at which the basin would be overtopped; similarly, there must be some flow of water

into the basin (whether through ground or surface water) if there is to be any accumulation. In the context of this definition, "inlet" is intended to refer only to a hydrologic connection with the 100-year flood event on a waterbody. "Inlet" is only used to distinguish ILSF from Bordering Land Subject to Flooding (BLSF), which has such a hydrologic connection with the 100-year flood event on a waterbody. A different set of performance standards, appropriate to the flood storage function within the larger system, applies to the BLSF. Thus, a basin which receives a channelized flow generated by runoff may constitute an ILSF if the remaining elements of the definition are met, even though such a channel could be termed an "inlet" in some sense. Similarly, the existence of an "outlet" at a certain elevation does not preclude a finding that a basin constitutes an ILSF, if the requisite volume of water is confined within the basin below that elevation.

(2) "An area which at least once a year confines standing water" "At least once a year" refers to a statistical event with a one-year return period, and is not dependent on direct annual observations and measurements of volumes confined within a specific basin. The observation that the requisite volume of water was or was not confined within a specific basin in a particular year is not conclusive, though of course it may be relevant to a determination that the basin is or is not an ILSF. The methodology of the calculations should be consistent with that described in 310 CMR 10.57(2)(a)(3) and (b)(3), except that the calculation should be based on a 24 hour event with a one-year return period.

One question involves the use of high ground water, especially where it may rise above the surface of the ground, and when it should be used to determine jurisdiction. The Preamble at 310 CMR 10.57(1)(b) recognizes that ILSF can serve to pond ground water which has risen above the ground surface. This ponding will impact the ability of the site to store water and may affect flooding on the site. When information is available that indicates that ground water contributes to the volume of water in an ILSF basin it should be used to determine the jurisdiction. Information such as records of ground water (e.g., septic system design percolation rate data or soil pits) or other credible



evidence could also be used to identify whether surface water on the site is due to surface runoff ponding on the site or is due to ground water that has risen above the surface of the ground.

(3) Boundary of ILSF. The boundary of an ILSF is defined in 310 CMR 10.57(2)(b)(3) as the largest observed or recorded volume of water confined within the area. In the event of dispute, calculations regarding the extent of the 100-year flood event are used to determine the probable extent of such water. The lateral boundary of the ILSF is the area that will be inundated during that event. As indicated above, if there is an outlet at a given elevation such that water will not be confined within the basin above that elevation, the outlet elevation should generally represent the boundary of the area (unless water will continue to be contained above that elevation despite the presence of an outlet). Thus, the boundary of the ILSF is either the elevation at which retained waters reach an "outlet" and flow out of an ILSF basin, or the area of inundation resulting from a 100-year storm if there is no such outlet. The calculations should assume that the ILSF basin is impervious, but should use standard methodologies to account for infiltration within the contributing watershed based on the relative proportions of pervious and impervious surfaces.

However, this interpretation does not prohibit the use of additional information, such as ground water data where available, from being used. It is appropriate for the issuing authority to review all credible information to reach a decision and, as indicated above, direct

observations can be used to determine the boundary of ILSF. Therefore, the runoff calculation identified in 310 CMR 10.57(2)(b)(3) and referred to in this policy is not presumed to be correct if ground water information, where available, is ignored or omitted. As an example, the runoff calculation is important when determining impacts due to flooding and may be especially important for protecting the public interests of public or private water supply and ground water supply when an ILSF is underlain by pervious material. However, when using observations of surface water, it must be made certain that the surface water observed at a site is due to high ground water and is not solely a result of surface water collecting on the site. If observed surface water is due to runoff collecting on the site it would not be appropriate to combine the observed water with runoff calculations since the observed water is only a result of runoff.

It is important to note that two sets of calculations may be relevant for determining the existence and extent of an ILSF. First, the 1 year storm calculation is a threshold determination of jurisdiction. If the calculations show that the requisite volume of water is confined within a particular basin, the basin is an ILSF. Second, in making a boundary determination for areas that meet or exceed the threshold, the 100 year storm calculation or the location of an outlet may be used. In both cases, the calculations should assume no infiltration within the ILSF basin itself, but may make standard assumptions with respect to infiltration within the contributing watershed.

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Amended Orders: Amending an Order of Conditions (DWW Policy 85-4)

Issued: September 17, 1985

Revised: March 1, 1995

Following the issuance of a Final Order of Conditions, unforeseen circumstances sometimes arise which may require minor deviations from the project approved in that Order. To allow for the smooth operation of the permitting procedure and to avoid unnecessary and unproductive duplication of regulatory effort after a Final Order of Conditions has been issued, the Department recognizes that it would not be reasonable to require a complete refile of the Notice of Intent when the changes sought in the Final Order of Conditions are relatively minor and will have unchanged or less impact on the interests protected by the Act. Amended Orders provide assurances to applicants that modifications undertaken in the course of the project are within the scope of the deviations allowed for the receipt of a Certificate of Compliance at 310 CMR 10.05(9)(d). Thus, the process of amending a Final Order of Conditions is acceptable to the Department as long as certain procedural safeguards are employed. This policy does not apply to Final Orders of Conditions which have expired.

Amending a Final Order of Conditions is at the discretion of the body that issued the Final Order of Conditions ("the issuing authority"). There is no provision in the wetland regulations that requires the issuing authority to consider or act upon a request to amend a Final Order of Conditions. There is no right to request a Superseding Order of Conditions or an Adjudicatory Hearing if a request to amend is not granted. If the issuing authority refuses to amend a Final Order of Conditions, the only opportunity for further review is the filing of a new Notice of Intent.

The Department recommends that in processing an amendment to a Final Order of Conditions, the most simple changes, such as correcting obvious mistakes such as citing a wrong file number or typographical errors, be accomplished by correction of the Order, with a copy sent to the Department. In other cases, the Department recommends that the following procedures be used:

1) The applicant makes a request for an amendment to the issuing authority (the Conservation Commission in the case of an Order of Conditions or the Department of Environmental Protection in the case of a Superseding Order of Conditions). The request for an amendment of the Final Order of Conditions issued by a

Conservation Commission is to be made either orally at a regularly scheduled meeting of the Commission or by submitting the request to the Commission in writing. In either case a written copy of the request, a narrative description of what changes have been proposed and any pertinent plans showing the changes are to be sent to the Department's Regional Office. The request for an amendment of a Superseding Order of Conditions issued by the Department's Regional Office is to be made in writing to the DEP Regional Office. A written copy of the request should also be forwarded to the Conservation Commission.

2) The issuing authority first makes a determination whether the requested change is great enough to warrant the filing of a new Notice of Intent or whether it is of a relatively minor nature and can be considered as an amendment to the original Final Order of Conditions. In making this determination, the issuing authority should consider such factors as: whether the purpose of the project has changed, whether the scope of the project has increased, whether the project meets relevant performance standards, and whether the potential for adverse impacts to the protected statutory interests will be increased. Relatively minor changes which result in the same or decreased impact on the interests protected by the Act are appropriate for amendments. If the determination is made that the project purpose or scope has changed substantially or that the interests specified in the Wetlands Protection Act are not protected, then the issuing authority should not issue the amendment, but should require the filing of a new Notice of Intent.

3) If the Conservation Commission determines that a new Notice of Intent is not necessary, the Conservation Commission should publish newspaper notice (at the applicant's expense) in the same general manner as outlined in the Act for new Notices of Intent and as required by the Open Meeting Law, M.G.L. c. 39, §23B, to inform the public that the request for amendment to the Order of Conditions will be considered by the Commission at a public hearing. In addition, the applicant must follow the requirements of abutter notification as if filing a Notice of Intent as described in the Act. When the request for an amendment is before the Department the applicant must publish notice in a newspaper of general circulation in the municipality where the requested amendment to the



proposed activity will take place. The notice must describe that an amendment to a Final Order is being requested, that the request is before the Department for review, and the date that the public comment period closes. Proof of notice must be provided to the Department.

4) If, after considering the information presented by the applicant and any comments received at the public hearing, or submitted to the Department within 21 days of the requested amendment, and the issuing authority decides to issue an amended Order of Conditions, a copy of such Order should be forwarded to the Department's Regional Office or the Conservation Commission, as the case may be, at the time of issuance. By analogy to the usual appeal procedure of the Final Order of Conditions, a person aggrieved by the amendments to the Order, or the other parties given appeal rights in 310 CMR 10.07, may, within ten days of issuance, request that the Department review the changes made to the Final Order of Conditions. The issues under appeal will be limited to

those issues subject to the amendment(s) or the change(s) made in the Final Order of Conditions. Until there is a final resolution of the appeal, no work may continue on those portions of the project not permitted under the Final Order of Conditions but only permitted by the amendment(s) which has been appealed.

5) Under no circumstances will the issuance of an Amended Order of Conditions extend the effective date of the original Final Order of Conditions. The Amended Order shall run with the term of the original Order of Conditions or the effective date of an extended Order of Conditions.

6) The Amended Order should be issued on the form provided for an Order of Conditions, with the insertion of the word "Amended" and the amendment date. Amended Orders must be recorded with the Registry of Deeds in the same manner as Orders.



Title 5: 310 CMR 10.03(3): Presumptions for Subsurface Sewage Disposal Systems that Meet Title 5 or More Stringent Local Board of Health Requirements (DWW Policy 86-1)

Issued: July 11, 1986

Revised: March 1, 1995

The Wetlands Regulations, at 310 CMR 10.03(3), establish a presumption that a subsurface sewage disposal system, which complies with the requirements of Title 5 or more stringent local Board of Health requirements, protects the interests of the Wetlands Protection Act (the "Act"). Compliance with the requirements of Title 5 or more stringent local requirements may be ascertained by the Conservation Commission either by reliance on the issuance of the Disposal System Construction Permit or by consultation with the Board of Health. The Department will generally rely on the issuance of the Disposal System Construction Permit by the Board of Health unless the Department is provided with credible evidence from a competent source or otherwise determines that further inquiry is appropriate. This presumption, however, only has effect if none of the components of the system is located within certain resource areas set forth at 310 CMR 10.03(2), and if the leaching facility of the system is located:

- (a) at least 50 feet from the most landward edge¹ of those areas when the system is eligible for construction in compliance with the 1978 Title 5; or
- (b) at least 50 feet from the most landward edge of the BVW, salt marsh, inland or coastal bank, 100 feet from the most landward edge of wetlands bordering a surface water supply or tributary thereto, or 100 feet (50 feet if the system is downgradient) from the most landward edge of a vernal pool certified at the time the application for the Disposal System Construction Permit is filed when the system is to be constructed in compliance with the 1995 Title 5²; or
- (c) a greater distance if required by a local Board of Health by-law or regulation.

Conservation Commissions and the Department, however, are not authorized to enforce more stringent local Board of Health requirements because neither has the authority to interpret ambiguous language that may be included in those by-laws or regulations or to determine whether the local Board of Health should grant a variance from the local standards. Any systems granted a variance which would reduce the setback to less than 50 feet from certain resource areas set forth at 310 CMR 10.03(2) will not be entitled to this presumption.

Therefore, the Department adopts the following guidelines for applying the provisions of 310 CMR 10.03(3):

(1) When reviewing a Notice of Intent, a Conservation Commission or the Department must determine whether a proposed sewage disposal system meets the applicable Title 5 wetlands setbacks as set forth above. Usually, Title 5 issues other than wetlands set-backs should be left to the Board of Health unless there is overwhelming evidence that the Board of Health has failed to properly review the case. The Title 5 requirements that may be considered are limited to those, such as the depth to groundwater, where a system not in compliance would have the potential to impair resource areas identified in 310 CMR 10.03(3). It is highly unlikely, therefore, that a standard such as a lot-line set-back requirement should ever be considered in a wetlands review.

(2) Neither a Conservation Commission nor the Department have the authority to interpret Board of Health regulations or to decide whether a local Board of Health will issue a variance from its own regulations. Where a proposed project meets the require-

¹ All setback distances from wetlands shall be measured in accordance with criteria of the Wetlands Protection Act and 310 CMR 10.00 from the most landward edge of the following: BVW, salt marsh, top of inland bank and top of coastal bank, all as defined in 310 CMR 10.00.

² The intent of the Title 5 regulatory citation contained in 310 CMR 10.03(3) is to reference the Title 5 in effect at the time the regulatory presumption is applied. Accordingly, the 1995 Title 5 setbacks (see 310 CMR 15.211) referenced in this paragraph (b) update the regulatory reference to the 1978 Title 5 setbacks contained in 310 CMR 10.03(3).



ments of Title 5, but may fail to meet more stringent local standards, the Conservation Commission and the Department have two recommended alternative courses of action:

a) Where it is clear that the system does not meet the local Board of Health requirements, such as when the Board of Health has already denied a request for a permit, the Conservation Commission or the Department could deny the project and require the applicant to obtain a permit from the local Board of Health prior to the issuance of an Order of Conditions. Suggested wording for such a denial is:

"This project is denied because it does not meet the [specify requirement not met that would have the potential to impair resource areas identified in 310 CMR 10.03(3)] requirements of the [town name] Board of Health and therefore does not have the benefit of the presumption under 310 CMR 10.03. A new Notice of Intent may be filed if the [town name] Board of Health issues a permit, or the project is revised to meet the [town name] Board of Health requirements."

Conservation Commissions and the Department must be careful when using this alternative. Many Boards of Health simply will not take any action before the issuance of an Order of Conditions. It would not be proper, therefore, to create a situation where the applicant is placed in the impossible position of having

neither approval available until the other is obtained.

b) If the only question about the permissibility of the proposed work is whether it will receive a local Board of Health permit, it is generally preferable for the Conservation Commission or the Department to issue an Order of Conditions that will permit the work on the condition that the applicant subsequently receives a local Board of Health permit. Suggested wording for such a condition is:

"No work permitted by this Order may begin unless and until the applicant receives a subsurface sewage disposal permit from the [town name] Board of Health which complies with both the requirements of Title 5 and any more stringent local standards, and until a copy of said permit is sent to the Conservation Commission and the Department.

The Conservation Commission or the Department are responsible for making the wetland boundary delineation in accordance with 310 CMR 10.00 and relevant policies [e.g. BVW policy, coastal bank policy] for the Board of Health to use in its review. Generally, this delineation will take place when the applicant's plans have been reviewed and found accurate, or modified in accordance with the findings of the Conservation Commission or the Department.

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Expedited Review: Policy Relating to the Expedited Review of License, Approval, or Permit Applications (same as current DEP Policy CO93-1; DWW Policy 87-1)

Issued: December 8, 1987

Revised: March 1, 1995

Applicability

The following policy is applicable to all DEP Programs excluding those administered by the Bureau of Waste Site Cleanup, effective April 15, 1993.

Policy

Generally, the Department of Environmental Protection (DEP) policy regarding the review of applications for licenses, approvals, and permits and adjudicatory hearings concerning such licenses, approvals, and permits is to consider them in the order in which they are received. Exceptions to this chronological review procedure can be made when, in adjudicatory hearings, enforcement cases are prioritized over permit appeals, with permit applications where a fee refund would result if an application were to await chronological review or in the limited number of cases where there is a substantial public interest at stake and a formal request to expedite the review is granted. At least one of the following criteria must be the basis for approving such a request.

1. The application involves a project of significant public benefit - for example, the construction of a new municipal water supply, a public water transportation terminal, a public recreational facility, elderly housing project, or;
2. The application involves a project that will result in a significant improvement of environmental quality - for example, a hazardous waste site cleanup, a landfill capping project, municipal wastewater treatment facilities, or;
3. The application involves a project that will reduce or eliminate a demonstrated threat to the public health or safety - for example, the installation of a new flood control structure, upgrading substandard and hazardous road intersections or publicly funded erosion control structures.

Procedure for Requesting Expedited Review:

All requests for expediting must be in writing, must indicate the time frame sought for a DEP final determination and must clearly explain the urgency; why the public benefit will be lost or the public harm increased if review of the license or permit is not expedited. For projects proposed by private applicants, the request **must** also include a letter from an appropriate public agency certifying in sufficient detail and documentation the public benefit and purpose to be served by the project and verifying the urgency of the request. Requests should include the transmittal number (or file number) of the application for which expedited review is being sought.

For a license, permit or approval issued by a DEP Regional Office, requests for expedited review should be addressed to the Regional Director of the issuing office:

Northeast Regional Office 10 Commerce Way Woburn, MA 01801	Southeast Regional Office 20 Riverside Drive Route 105 Lakeville, MA 02347
Central Regional Office 75 Grove Street Worcester, MA 01605	Western Regional Office 436 Dwight Street Springfield, MA 01103

For licenses, permits, or approvals issued through DEP's Boston Office, the Grafton Technical Services Section, or the Lawrence Experiment Station, requests should be made to the Deputy Commissioner for Operations, One Winter Street, Boston, MA 02108.

Request for expediting adjudicatory hearings should be directed to the DEP General Counsel, One Winter Street, Boston, MA 02108 and should include provisions by the requesting party for stenographic transcription of the final hearing in the case.



Administration of Policy

This policy supersedes DEP Commissioner's Memorandum, "Expediting Policy for Non-Wetlands/Waterways Permitting Cases," June 27, 1990; Wetlands Protection Program Policy 87-1 and Waterways Licensing Program Policy 87-1, "Requests for Expedited Review of License and Permit Applications." December 8, 1987.

The following conditions apply to cases where expedited review is sought:

1. The decision to expedite review of an application shall not in any way preclude a thorough review of that application nor should it imply support for or an eventual approval of the proposed activity or project.
2. The decision on whether to expedite a specific review lies solely with the Deputy Commissioner, General Counsel or respective Regional Director.
3. The technical review of applications approved under this policy will not be different in substance from permits reviewed in the sequence of submittal.

4. If approved for expedited review, effort will be made, where legal, practical and appropriate, to render a determination by the decision date requested, however, no decision dates can be guaranteed.

5. Expediting requests are to be considered independent of fee-paying/exempt status.

A tracking system has been established within the Commissioner's Office to prevent abuse of the expediting process and to identify potential permitting problems. Accordingly, copies or notification of all expediting requests and determinations must be submitted to the Deputy Commissioner for Operations for inclusion in this system.

Documentation is the responsibility of the approving authority. Written determination of expedite requests will be sent to the party requesting the expedited review and all other parties to the Department proceeding in which the request is made. Suitable notification will also be given to the relevant Assistant Commissioner, Division Director and Permit Manager.

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Access Roadways: Interpretation of 310 CMR 10.53(3)(e) Limited Projects: Access Roadways or Driveways (DWW Policy 88-2)

Issued: February 29, 1988

The limited project provisions of 310 CMR 10.53(3) are designed to provide the issuing authority with the discretion to allow certain work to proceed although the work may not meet the performance standards set forth in 310 CMR 10.54 through 10.57. These provisions merely provide the discretion to permit these projects and the authority to impose conditions which, in addition to those set forth in the applicable portion of 310 CMR 10.53(3), the issuing authority determines are necessary to adequately protect the interests of the Wetlands Protection Act, M.G.L. c.131, §40. The issuing authority is not required to give approval to all projects filed under this provision, but should examine the facts and determine whether the project qualifies as a limited project.

The purpose of 310 CMR 10.53(3)(e) is to allow projects in which wetlands will be crossed with a new roadway to provide access to otherwise unreachable upland areas. In this Program Policy, the Department elaborates on the analysis that should be applied when determining whether a new roadway qualifies for consideration as a limited project.

In each case proposed under 310 CMR 10.53(3)(e), the issuing authority must determine, before approving the project under this section; (1) whether the project satisfies the general requirements stated in the regulation; (2) whether it is appropriate to grant an exception from the provisions of Sections 10.54 through 10.57 in this case, and (3) if the project is approved, what conditions should be imposed in addition to those required by 310 CMR 10.53(3)(e) to adequately protect the interests of the Act.

1) A project satisfies the general requirements of a limited project roadway, if the issuing authority determines no reasonable alternative means of access from a public way to uplands of the same owner is available. For the purposes of 310 CMR 10.53(3)(e), a public way includes any road, whether publicly or privately owned, off of which access may be gained into the subject property. In making the determination regarding alternate means of access, the issuing authority may require the applicant to evaluate the reasonableness of any previously or currently available alternatives including the realignment or reconfiguration of the project, to conform with the

requirements of 310 CMR 10.54 through 10.57, or to minimize to the greatest extent possible disruption of wetlands. For example, the issuing authority may require the applicant to utilize upland access over an adjacent parcel of land owned by the applicant, or which the applicant has a beneficial ownership of through a realty trust, to avoid filling of wetlands. The issuing authority may also consider whether adjacent property, which would have provided dry access to the uplands, has been sold off or built on, particularly where the applicant has had notice as described in #3 below.

For projects subject to a Planning Board's jurisdiction, the issuing authority must also determine whether the new roadway or driveway is the minimum length and width acceptable to the Planning Board. Therefore, the issuing authority may require the applicant to request the Planning Board to formally rule on revisions of the project which would protect wetlands, even if approval of the revisions would require the Planning Board to apply variance provisions that allow the Board to waive or vary its standard requirements. The issuing authority should only determine that no reasonable alternative means of access are available after the applicant has made a good faith effort to identify alternate means of access and has actually presented any reasonable alternatives to the Planning Board and received that Board's ruling. This provision does not preclude the possibility of more than one wetland crossing in certain circumstances, such as where an applicant is developing a very large parcel of land and the Planning Board has required, after a review of alternatives as discussed above, the applicant to provide multiple access points into the property.

2) Even if the general requirements of the regulation are met as described in paragraph 1 above, the issuing authority may deny limited project status for certain work. The issuing authority should evaluate the magnitude of the wetlands impacts proposed and the significance of that particular wetland to the interests of the Act. For example, the issuing authority may permit an access proposal requiring a relatively small wetlands loss, all of which would be replicated, to gain access to a relatively large area of uplands all of which would otherwise be inaccessible. If, however, it is particularly important to avoid alteration of this



wetland in order to protect the interests of the Act, for example when the wetland: lies adjacent to or above a public water supply, particularly in an area that is the primary cone of influence to a well; is in an Area of Critical Environmental Concern, contains rare species habitat; is a Class A designated water body by the Division of Water Pollution Control; is an anadromous fish run; or has some other special environmental attribute, the issuing authority may appropriately deny the same proposal¹.

3) When the issuing authority decides to grant an exception for a new roadway or driveway, it must condition the work in a manner adequate to protect the interests of the Act. The conditions set forth in the

General Performance Standards of 310 CMR 10.54 through 10.57 should be used as guidelines. In particular, the Department strongly endorses requiring replication of all wetlands filled and compensation for lost flood storage volume on a 1 to 1 basis, wherever practicable.

It is also recommended, where appropriate, to include a special permanent condition advising the applicant and anyone performing a title search on the property in the future, that any future project to cross wetlands to gain access to certain portions of the property will not be qualified as a limited project roadway under 310 CMR 10.53(3)(e).



¹ Under the Department's 401 Water Quality Certification Program, spanning of certain areas may be presumed to be a practicable alternative to avoid fill in wetlands. See 314 CMR 9.06.



Multiple Filings: Multiple Notice of Intent Filings for the Same or Similar Projects on the Same Property (DWW Policy 88-3)

Issued: February 29, 1988

Revised: March 1, 1995

From time to time, the Department receives revised Notices of Intent involving the same or very similar project for which a request for a Superseding Order of Conditions or an Adjudicatory Hearing is pending. Many applicants prefer to revise their plans to satisfy the concerns raised by the Department, Conservation Commissions or an appellant, rather than incur the time and expense of the appeal process. Although the Department generally encourages the refiling and processing of revised projects at the local level, the Department wants to avoid review and issuance of two or more Orders of Conditions for the same or similar projects at the same site. Conservation Commissions, the Department, and applicants stand to benefit when applicants resolve their differences with the Department or the Conservation Commission by refiling. These benefits include reduction of the number of appeals pending before the Department and the assurance that Conservation Commissions retain primary responsibility for the project including site monitoring, enforcement, and issuing a Certificate of Compliance.

To these ends, the following procedures are effective:

1. Upon written notice (either by letter, new Notice of Intent, Order of Conditions or letter of appeal) that a

refiling will be made or upon realization by the Department that a refiling has been made, all administrative action on the original appeal will be stayed while processing the new Notice of Intent.

2. In the case of Superseding Orders of Conditions, the applicant has 21 days from the date of issuance of the Order of Conditions to withdraw, in writing, one of the two Notices of Intents. In cases where the Department learns of the refiling after a second file number has been issued, the Regional Office shall immediately send a Notification Letter instructing the applicant that he/she has 21 days from when the Order of Conditions was issued or from when the Department learned of the refiling (whichever is later) to withdraw one of the two Notices of Intents. If the Department does not receive such notice in the required time, the Department will issue a follow-up letter which will dismiss the earlier-filed Notice of Intent.

3. In the case of adjudicatory hearings, the applicant has 21 days from the date of issuance of the Order of Conditions to withdraw, in writing, one of the two Notices of Intents. Failure to do so will result in the applicant being required to show cause why the earlier filed Notice of Intent should not be dismissed.



Non-text page



Appeal Stays: Stay of Requests for Adjudicatory Hearings in Wetlands Permit Cases When an Order of Conditions has been Denied Under a Local Wetlands Bylaw (Zoning or Non-Zoning) (DWW Policy 89-1)

Issued: June 16, 1989

Revised: March 1, 1995

The Department currently has many requests for adjudicatory hearings involving wetland permit cases.

Many Massachusetts municipalities (more than 100) have adopted and implement their own wetland bylaws, both zoning and non-zoning. Review of these permits is outside DEP's M.G.L. c. 131, §40 jurisdiction. Some bylaws afford protection to interests not mentioned in the state law; some bylaws protect the same interests more stringently. A number of the requests for adjudicatory hearing are filed for projects which have been denied under a local bylaw. Even if the Department were to go forward, complete the adjudicatory hearing process and issue Final Orders approving each of the projects, none of these projects can go forward until each independently receives approval under the municipality's bylaw. Therefore, until there is a resolution of the bylaw denial, further proceedings by the Department are futile.

In order to conserve and better utilize administrative resources, the Department will stay administrative action on any Request for an Adjudicatory Hearing in a wetlands permit case when the project has been denied under a local wetlands bylaw, whether that bylaw is a

wetlands zoning bylaw or a wetlands non-zoning bylaw. (Note that the stay will be implemented only at the adjudicatory hearing level; this policy will not apply to requests for Superseding Orders of Conditions. Action by the Office of Administrative Appeals will be stayed on an appeal of an agency action involving either a Superseding Order of Conditions or a Superseding Determination of Applicability.

Should the denial under the town bylaw be appealed to Superior Court, the Department's technical review of the project is embodied in the Superseding Order of Conditions. If the denial under the bylaw is not appealed within the appropriate time frame that denial is final. No work can take place under such a denial. If an applicant fails to diligently pursue approval of the project under the local bylaw, the Notice of Intent shall expire as provided in 310 CMR 10.05(4)(g).

Upon proof of the project's approval under the local bylaw, the Department will go forward with the adjudicatory proceeding. All Requests for Adjudicatory Hearings will remain stayed in the chronological order in which they were filed.



Non-text page

REMOVED



Rare Species: Standards and Procedures for Determining Adverse Impacts to Rare Species Habitat (DWW Policy 90-2)

Issued: August 13, 1990

Purpose

The purpose of this policy is to clarify the rules regarding rare species habitat contained in the Wetlands Protection Regulations (The "regulations") at 310 CMR 10.37 and 10.59. This policy provides a clear standard and specific procedural guidelines for determining whether a project will have an adverse effect (short or long term) on state listed (rare) species habitat and whether such effects can be mitigated.

Regulatory Standards

Coastal and inland regulations pertaining to projects which impact Rare Species wetlands habitat are found at 310 CMR 10.37 and 10.59 respectively. Both sections refer to the roles of the "issuing authority" (Conservation Commissions and the Department) and "the Program" (Natural Heritage and Endangered Species Program). The regulations provide in part that:

"... if a proposed project is found by the issuing authority to alter a resource area which is part of the habitat of a state-listed species, such project shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species. A determination of whether or not a proposed project will have such an adverse effect shall be made by the issuing authority. However, a written opinion of the Program on whether or not a proposed project will have such an adverse effect shall be presumed by the issuing authority to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary." (310 CMR 10.37 and 10.59, emphasis added).

Analysis

When work is proposed in a rare species habitat, the applicant shall have the burden of demonstrating to the

issuing authority that the alteration will not adversely effect the habitat of the local population of that species. In order to meet this burden, the applicant shall be required to: 1) identify the relevant habitat requirements of the rare species in question; 2) identify the habitat characteristics of the resource areas and the important wildlife functions provided for that rare species; and 3) demonstrate that the proposed work will not alter any habitat characteristics which are providing important wildlife functions for the rare species. Wildlife habitat functions to be analyzed are important food, shelter, migratory or overwintering areas, or breeding areas. (Wildlife habitat characteristics for inland resource areas can be found at 310 CMR 10.60(2).)

The issuing authority shall presume a written opinion from the Program on whether a proposed project will have an adverse effect to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary. In the absence of a finding by the Program, the issuing authority may require additional information, which may include a written opinion from the Program or other qualified wildlife expert, to show that the proposed project will not have an adverse effect.

The issuing authority is prohibited from allowing any project which has not met the burden of demonstrating no adverse effect. Furthermore, habitat replication, relocation of individual animals, or other proposed measures purported to offset adverse effects, shall not be permitted because these activities cannot meet the performance standard of no adverse short or long term effect on the habitat of the local population.



Non-text page



Plan Changes: Administrative Appeals Policy for the Review of Project Plan Changes (DWW Policy 91-1)

Issued: February 8, 1991

Revised: March 1, 1995

Purpose

The primary purpose of this policy is to promote the intent of the Wetlands Protection Act, M.G.L. c. 131 §40, to ensure thorough local review of work proposed in or near wetland resource areas by identifying those circumstances in which the Department will consider changes to plans filed under Notices of Intent (NOI) which are before the Department under appeal for a Superseding Order of Conditions (SOC) or for which a Claim for an Adjudicatory Hearing has been filed. It is also the purpose of this policy to encourage submission, at the earliest possible time during Conservation Commission review, of project designs that meet the performance standards and minimize impacts to resource areas. This policy specifically distinguishes those plan changes which are substantial, and will require a new NOI filing, from those plan changes which are deemed insubstantial and thus may be considered as part of the appeal review process. This policy only applies to plan change reviews contemplated prior to the issuance of a Final Order of Conditions.

Regulatory Standards

Minimum submittal requirements for filing an NOI are contained at 310 CMR 10.05(4)(a) and (b) and include submission of "plans, supporting calculations, and other documentation sufficient to completely describe the proposed work and mitigating measures". The Department may accept project revisions at any time while an NOI is under appeal. This discretion is limited only by 310 CMR 10.05(7)(h) which precludes the Department from considering new information when the Conservation Commission has denied the project for lack of such information and the Department concurs that the information is necessary.

Analysis

From time to time, parties to projects under appeal will request the Department to consider new information or will seek to amend project plans.

For the purpose of this policy, plan changes include changes in "project configuration" (e.g. roadway alignment, drainage structures, building footprints) and changes which result from the introduction of new information which changes the amount or type of

resource area impact (e.g. identification of a stream or other resource areas that had previously been missed) despite the absence of a change in project configuration.

The Department will not consider plan changes, as defined above, which are deemed to be substantially different from the plan acted upon by the Conservation Commission and which are referenced in the Order of Conditions. Substantial plan changes are deemed to be those changes which significantly modify the project configuration and which result in increased impacts to wetland resource areas. There are three exceptions to this policy. The Department may accept plan changes that are substantial if 1) the Conservation Commission has failed to act on the Notice of Intent; 2) the Conservation Commission has approved a project plan which does not meet the performance standards of the regulations; or 3) after consultation, the Conservation Commission does not object to the Department considering a substantial plan change.

The Department may consider plans which contain insubstantial changes from the plans acted upon by the Conservation Commission and referenced in the Order of Conditions. Insubstantial plan changes are limited to those changes which involve unchanged or decreased impacts but which do not constitute significant changes from the project configuration acted upon by the Conservation Commission (e.g. retaining walls, bridges, and spans for a wetlands crossing; repositioning of structures within the buffer zone to increase the distance from a wetland resource area; improvements to flow control or sediment control devices; and changes in the location of a deck on a house resulting in a change in the building footprint).

In presenting proposed plan changes to the Department, the burden is on the project proponent to demonstrate that the plan change is insubstantial. Specifically, the project proponent must show that the plan change results in an unchanged, or not significantly changed, project configuration and unchanged or decreased impact to any wetland resource areas as compared to the plan acted upon by the Conservation Commission and referenced in the Order of Conditions.



Non-text page



Salt Ponds: Criteria for Evaluating and Permitting Openings of Salt Ponds In Order to Manage, Maintain, or Enhance Marine Fisheries (DWW Policy 91-2)

Issued: March 28, 1991

Purpose

The purpose of this policy is to clarify the Department's position concerning when salt pond openings to the ocean may be allowed pursuant to M.G.L. c. 131 §40, the Wetlands Protection Act (the "Act"), and to give guidance to the issuing authority by providing a process for the evaluation of a pond opening proposal. This policy is intended to allow the Department to gather information and further evaluate the effects of pond openings.

Regulatory Standards

A salt pond opening is subject to the Act because it involves activities which will alter, dredge, fill, or remove resource areas subject to protection under the Act. 310 CMR 10.33(3) provides, generally, that projects in and around salt ponds may not have an adverse effect on the marine fisheries or wildlife habitat of the pond. However, 310 CMR 10.33(4) provides that "Notwithstanding the provisions of 10.33(3), activities specifically required and intended to maintain the depth and the opening of the salt pond to the ocean in order to maintain or enhance the marine fisheries or for the specific purpose of fisheries management, may be permitted." This provision evidences an intent on the part of the Department to allow projects "specifically required and intended" to maintain a salt pond opening necessary to manage, maintain or enhance marine fisheries.

310 CMR 10.33(4) is silent concerning its interaction with the performance standards established under 310 CMR 10.27, 10.28, 10.29, 10.32 and 10.55 for resource areas typically encountered around salt ponds. When the performance standards for these resource areas are read literally it is difficult, if not impossible, for pond opening projects to satisfy the applicable performance standards.

Analysis

As "activities specifically required and intended to maintain the depth and opening of a salt pond" must necessarily include the breaching of the pond's associated barrier beach (when the opening is presently closed) and would result in impacts to adjacent

resource areas, it is the Department's interpretation that the openings may be allowed under limited, controlled conditions when certain prerequisites are satisfied.

When the alteration of inland resource areas will result from a salt pond opening undertaken in accordance with this policy, such alteration may be permitted under 310 CMR 10.53(4). The issuing authority may exercise its judgement to determine that a project to manage, enhance or maintain marine fisheries, conditioned in accordance with this policy, may improve the area's natural capacity to protect the interests identified in the Act.

In order to give full meaning and effect to all regulatory provisions, while protecting the interests of the Act, the Department concludes that salt pond openings may be authorized by the issuing authority when:

- a. the applicant demonstrates that the opening is necessary to manage, maintain or enhance an existing or historically viable marine fisheries; and
- b. conditions are imposed that prevent or minimize adverse effects to Coastal Beaches, Coastal Dunes, Barrier Beaches, and any affected inland resource area to the greatest extent possible. "Minimize," as used in this policy, has the same definition as found at 310 CMR 10.23.

If the issuing authority concludes that such conditions cannot be developed, then it must deny the project.

The Department has determined that since salt marshes have a high level of functional value, as recognized by the level of protection afforded this resource area under the regulations, pond opening projects must satisfy the standards at 310 CMR 10.32(3).

Under no circumstances may a project be permitted which will have any adverse effect on the specified habitat site of rare species as identified pursuant to 310 CMR 10.37 and 10.59.



Requirements for Project Review and Conditioning

A. Applicant Must Show That Opening is for an Approvable Purpose.

When the outlet of a salt pond which has supported a viable marine fisheries becomes closed (either because the outlet becomes filled in or its position shifts along the barrier beach), it may be desirable to periodically open the outlet artificially in order to manage, maintain or enhance the fishery. The threshold finding the issuing authority must make is whether the applicant has demonstrated that the primary purpose of the pond opening is to manage, maintain or enhance marine fisheries. An applicant may propose activities to maintain the depth and opening of an existing opening, or activities to re-open a closed pond; provided the applicant demonstrates that the pond has been opened in the past as a result of natural or man-made causes *and* that a viable fisheries in the pond presently exists or existed in the past.

The existence of a "viable fisheries" shall be determined by the issuing authority using best professional judgment (after consultation with the Division of Marine Fisheries and the local shellfish constable) and shall be based upon submitted information. The existence of a viable marine fisheries and of prior openings may be demonstrated by reliable, credible information. The applicant may submit historical records, including photographic evidence, or if no records exist, he/she may submit an affidavit of one or more individuals made upon personal knowledge.

If an applicant cannot demonstrate an approvable purpose enabling the issuing authority to make this threshold finding, the issuing authority must deny the project. For example, when the intended purpose of a salt pond opening is to control eutrophication or to reduce odor, the project would fall outside of this policy and would not be allowed unless it met all of the applicable performance standards of the regulations.

B. Permit Conditions Must Minimize Adverse Impacts

If an applicant demonstrates an approvable purpose, the issuing authority may permit the activity, provided conditions can be imposed that will prevent or minimize adverse effects to resource areas (except salt marshes) in and around the pond to the greatest extent possible. If conditions adequate to prevent or minimize adverse effects cannot be imposed, an Order of Conditions allowing the opening should not be issued.

Proposed salt pond openings for which the applicant has demonstrated an approvable purpose should be

evaluated in the following manner:

1. Assess all impacts to affected resource areas and their respective protected interests;
2. Develop conditions to prevent or minimize adverse effects to existing resource areas to the greatest extent possible, in accordance with the applicable regulatory provisions; and
3. Allow the opening if the project: a) does not have unacceptable adverse effects upon any interests of the Act; b) maximizes fisheries resource maintenance, enhancement or management; and c) prevents or minimizes adverse effects so that the project, overall, contributes to those interests.

Information Requirements

The Notice of Intent (NOI) should document that the project is necessary to manage, maintain or enhance marine fisheries and provide baseline information on all resource areas which will be affected by the project. The information provided should be sufficient to allow the issuing authority to assess impacts to these resource areas. Each proposed opening is unique and the level of information required to assess impacts and impose appropriate conditions necessarily will vary. The issuing authority should require the level of information appropriate to the particular project.

At a minimum, the applicant should submit information:

- a. describing the history of pond openings and its use as a fishery, and the proposed plan for fisheries resource management, enhancement, or maintenance;
- b. delineating all affected resource areas and identifying short- and long-term impacts to affected resource areas and their affected interests;
- c. describing the location of, and impacts on, public and private water supplies in the pond's vicinity;
- d. assessing wildlife habitat, including the presence of rare species habitat in accordance with the applicable procedures at 310 CMR 10.37, 10.59 and 10.60; and
- e. describing the history of storm events in the immediate area of the pond and impacts of the events on existing resource areas.

In certain instances, the information presented will indicate that no number of conditions will adequately prevent or minimize adverse effects so as to adequately



protect the interests of the Act. For example, salt water intrusion may contaminate water supplies to unacceptable levels and no alternative source may be available. It may not be possible to condition a project so that there will be no adverse effect of specified habitat sites of rare species. In such instances, the project should be denied.

Minimum Conditions

Certain conditions will always be necessary to prevent or minimize adverse effects. For example, material excavated from the channel opening should not be removed from the barrier beach. Material should be stockpiled on site and placed, within the barrier beach system as appropriate. Any sediment lost due to excavation and scouring should be replenished to the barrier beach system. A time schedule for pond openings should be included in any Order of Conditions. The schedule should take into account tide fluctuations, impacts on wildlife habitat of fluctuating water levels and exposure in inclement weather, storm forecasts and the potential presence of rare or endangered species in the area. Disturbance of vegetation should be minimized to protect dune stability. Replication of any Bordering Vegetated Wetlands altered directly or by vegetative dieback should be required

where possible, particularly within the area exposed by pond lowering, if the area does not naturally revegetate after two growing seasons. Conditions protective of actual or potential water supplies should be incorporated.

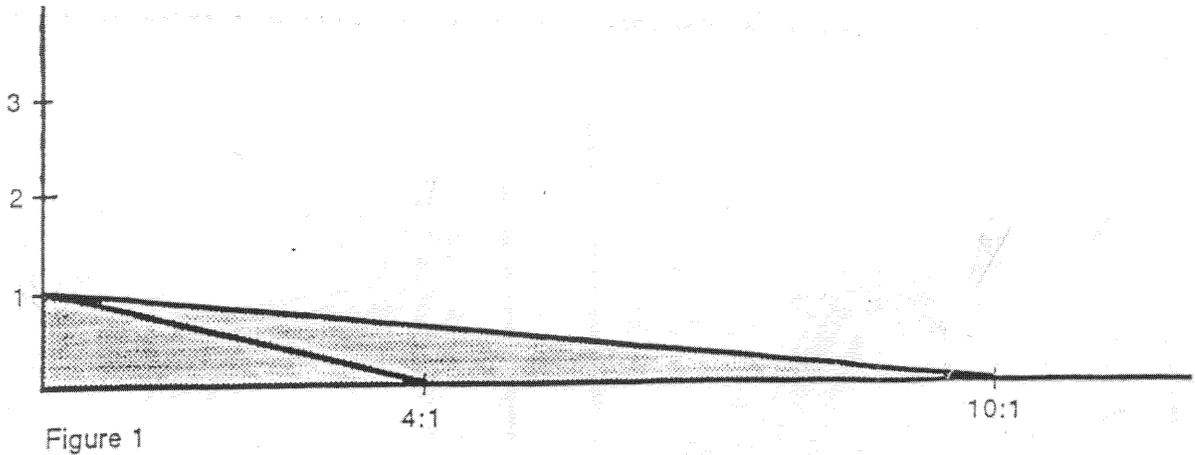
Specific monitoring provisions should be incorporated into the Order of Conditions to track the impacts of the opening on the interests of the Act. Reports on all monitoring should be submitted to the Conservation Commission and the Department and reviewed by the issuing authority to determine whether any change in conditions and methods of data collection is warranted to protect the interests of the Act. Conditions should include a provision authorizing the discontinuation of the pond openings, if necessary, to protect the interests of the Act.

Finally, note that projects permitted under this policy may still need to obtain a license pursuant to M.G.L. c. 91, the Waterways Act, and remain subject to applicable terms of any restriction order adopted under M.G.L. c. 131 §40A, Protection of Inland Wetlands, and M.G.L. c. 130 §105, Protection of Coastal Wetlands.



Non-text page





Note that 4:1 slope is greater than (steeper than) 10:1 slope.
 ■ 4:1 is equivalent to 14 degrees or 25 percent.
 ■ 10:1 is equivalent to 6 degrees or 10 percent.

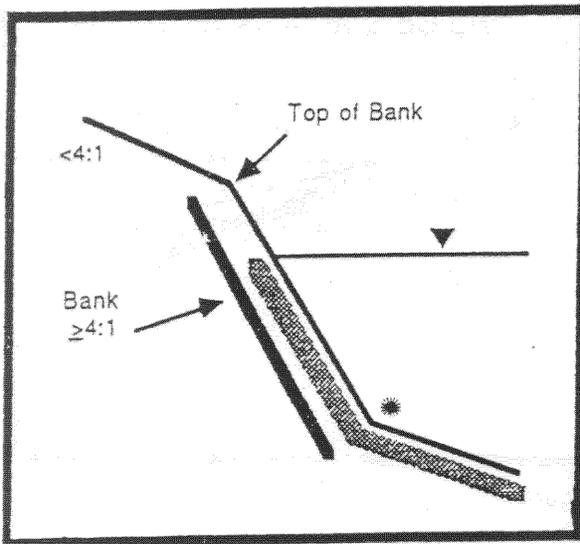


Figure 2

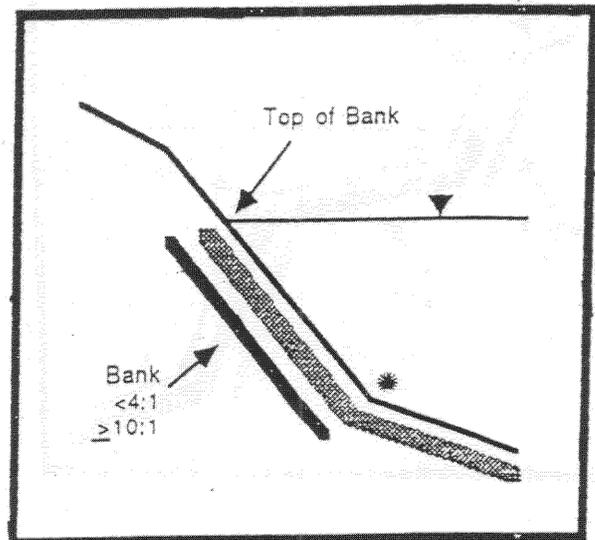


Figure 3

Legend - Figures 2 and 3 are not to scale

- ▼ 100 year flood elevation (as shown on community FIRM) or storm of record
- Land subject to coastal storm flowage (LSCSF)

- Coastal Bank
- ★ Toe of bank which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland

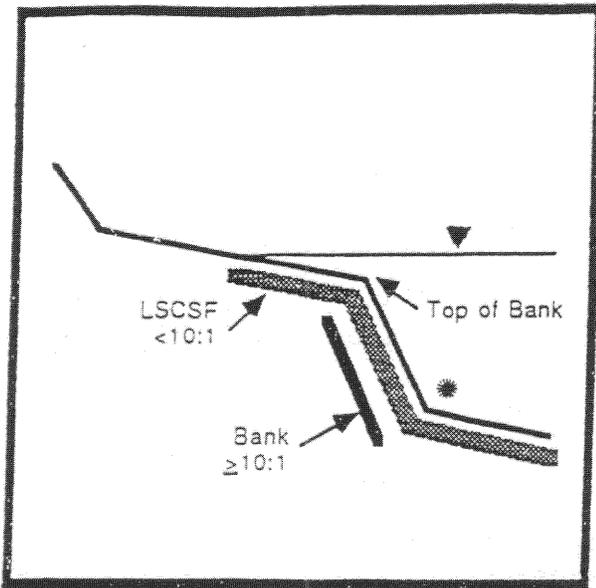


Figure 4

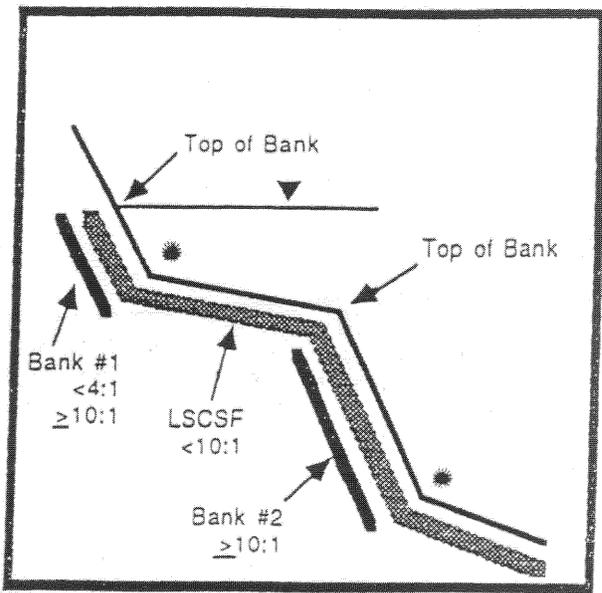


Figure 5

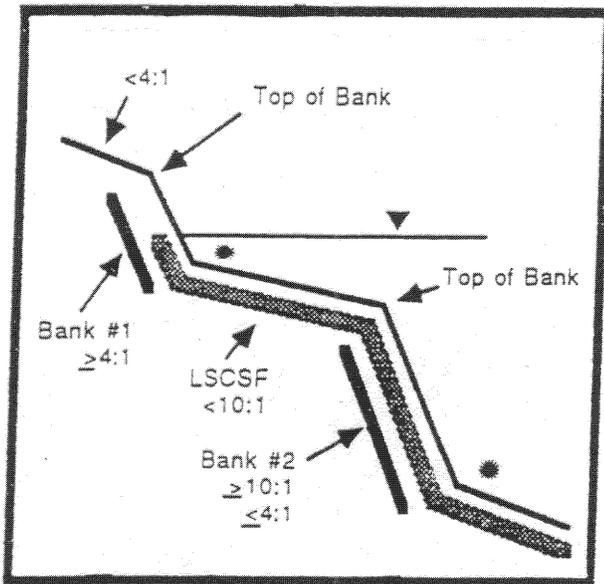


Figure 6

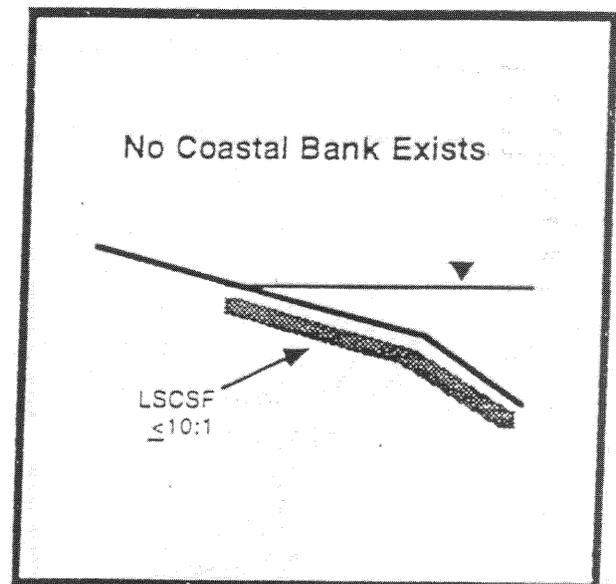


Figure 7

Legend - Figures 4, 5, 6, and 7 are not to scale

▼ 100 year flood elevation (as shown on community FIRM) or storm of record

▨ Land subject to coastal storm flowage (LSCSF)

■ Coastal Bank

● Toe of bank which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland



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Wetlands Program Policy 92-1: Coastal Banks

Coastal Banks: Definition and Delineation Criteria for Coastal Bank (DWW Policy 92-1) Issued: March 3, 1992

Purpose The purpose of this policy is to clarify the definition of coastal bank contained in the Wetlands Regulations, 310 CMR 10.00, by providing guidance for identifying 'top of coastal bank'. Regulatory Standards Coastal wetlands are defined in the Wetlands Protection Act (MGL c. 131, s.40) as:

"any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage".

Coastal banks are defined at 310 CMR 10.30(2) as:

"the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland".

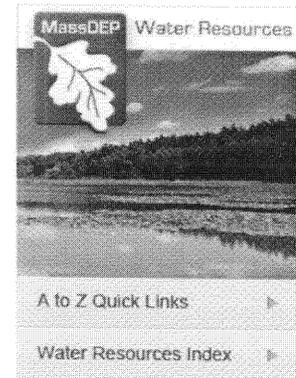
When these two definitions are read together, coastal banks can be inferred to be associated with lowlands subject to tidal action or subject to coastal storm flowage. Coastal banks, therefore, can occur around non-tidal ponds, lakes and streams provided that these elevated landforms confine water associated with coastal storm events, up to the 100-year storm elevation or storm of record. Land Subject to Coastal Storm Flowage, in turn, is defined at 310 CMR 10.04 as:

"land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater".

The Department uses the 100-year coastal flooding event as defined and mapped by the Federal Emergency Management Agency (FEMA) per the National Flood Insurance Program, as the maximum flood elevation associated with land subject to coastal storm flowage, unless recorded storm data reveals a higher flood elevation (which is the storm of record). Analysis Top of Coastal Bank Delineation The phrase "top of coastal bank" is used to establish the landward edge of the coastal bank (310 CMR 10.30). There is no definition for "top of coastal bank" provided in the Act or the Regulations. A Guide to the Coastal Wetlands Regulations, prepared by the Massachusetts Coastal Zone Management Office, upon which Conservation Commissions and the Department have relied for guidance, states that the landward boundary of a coastal bank is "the top of, or first major break in, the face of the coastal bank", and implies that it is easily identified using United States Geologic Survey topographic quadrangles. However, the scale of topographic quadrangle maps generally do not allow for parcel specific analysis. No further definition of "top of" and "major break" is provided. The following standards should be used to delineate the "top of coastal bank" [refer to figures 1-7 for a graphic presentation of the information below]:

- A) The slope of a coastal bank must be greater than or equal to 10:1 (see [Figure 1](#)).
- B) For a coastal bank with a slope greater than or equal to 4:1 the "top of coastal bank" is that point above the 100-year flood elevation where the slope becomes less than 4:1. (see [Figure 2](#)).
- C) For a coastal bank with a slope greater than or equal to 10:1 but less than 4:1, the top of coastal bank is the 100-year flood elevation. (see [Figure 3](#)).
- D) A "top of coastal bank" will fall below the 100-year flood elevation and is the point where the slope ceases to be greater than or equal to 10:1. (see [Figure 4](#)).
- E) There can be multiple coastal banks within the same site. This can occur where the coastal banks are separated by land subject to coastal storm flowage [an area less than 10:1]. (See [Figures 5 and 6](#)).

When a landform, other than a coastal dune, has a slope that is so gentle and continuous that it does not act as a vertical buffer and confine elevated storm waters, that landform does not qualify as a coastal bank. Rather, gently sloping landforms at or below the 100-year flood elevation which have a slope less than 10:1 shall be regulated as "land subject to coastal storm flowage" and not as coastal bank (see [Figure 7](#)). Land subject to coastal storm flowage may overlap other wetland resource areas such as coastal beaches and dunes. Information Requirements for Project Review Due to the complex topography associated with coastal banks, the following requirements are intended to promote consistent delineations. In order to accurately delineate a coastal bank, the following information should be submitted, at a minimum, to the Conservation Commission and the Department of Environmental Protection: the coastal bank should be delineated and mapped on a plan(s) to a scale of not greater than 1 inch = 50 feet, including a plan view and a cross section(s) of the area being delineated showing the slope profile, the linear distance used to calculate the slope profile, and the location of this linear distance. In addition, there must be an indication which of the five diagrams mentioned above is (are) representative of the site. Averaging and/or interpolating contours on plans can result in inaccurate delineations. Therefore, it is strongly recommended that follow-up field observations be made to verify delineations made from engineering plan data and as shown on the submitted plans. The final approval of resource boundary delineations rests with the issuing authority (Conservation Commission or Department of Environmental Protection).



PG 23 + 24



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Wetlands Policy: Coordinated Review Relating to Endangered Species

Procedures for Coordinated Review Under the Endangered Species and Wetlands Protection Regulations for State-Listed Wildlife in Wetlands

Effective Date: 5-1-2006

DWW Policy 06-1 (BRP/DWM/WWP 06-1)

Program Applicability: All Boston and regional BRP programs

Supersedes Policy: None

Approved by: [signed] Glenn Haas, Director, Division of Watershed Management

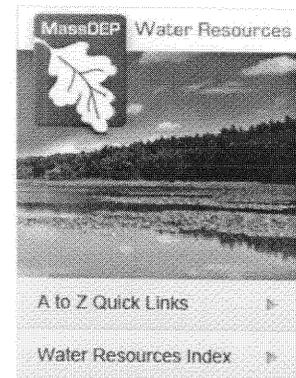
The Massachusetts Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program's ("Natural Heritage Program") recent revision of its regulations pursuant to the Massachusetts Endangered Species Act has prompted MassDEP to coordinate the implementation of the revised regulations with MassDEP's wetlands regulations. In an effort to improve administrative effectiveness and to protect the environment, MassDEP will coordinate the implementation of its wetlands regulations, specifically, its regulations regarding the protection of state-listed wildlife habitat in wetlands resource areas (estimated habitat) and the Natural Heritage Program's regulations.

Pursuant to 321 CMR 10.00, the Natural Heritage Program reviews any project proposed for state-listed species habitat. When a project is proposed in estimated habitat in wetland resource areas, it is also subject to MassDEP's wetlands regulations. In fulfilling its responsibilities under 321 CMR 10.00, the Natural Heritage Program considers whether a take will occur under 321 CMR 10.18 and whether it can be permitted under 321 CMR 10.23. A set of conditions that avoid a take under 321 CMR 10.18, will be presumed to not have an adverse effect on the habitat of state-listed wildlife species pursuant to 310 CMR 10.37 and 10.59. It makes sense for the Natural Heritage Program to make these determinations at the same time as it fulfills its obligations under MassDEP's wetlands regulations.

As provided in 310 CMR 10.37 and 10.59, when a project is proposed in estimated habitat, the issuing authority relies on the Natural Heritage Program's opinion as to whether a proposed project has any short or long-term effect on the habitat of the local population of any state-listed wildlife species. Accordingly, when the Natural Heritage Program makes a determination pursuant to 321 CMR 10.23, that a project may proceed pursuant to a conservation and management permit, this determination shall be presumed to satisfy the standard for no short or long-term adverse effect pursuant to the wetlands regulations (310 CMR 10.37 and 10.59.)

To facilitate this coordinated review, MassDEP will make available on its website to project applicants a form to request coordinated review under both programs. The issuing authority shall incorporate conditions in its order consistent with the conditions or determinations of the Natural Heritage Program.

At the conclusion of three years from the date of issuance of this policy, MassDEP will evaluate this policy to determine how well the coordinated review process has worked and whether changes should be made.



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Wetlands Program Policy 08-1: Lack of Information Necessary for Conservation Commission Decisions

Effective Date: 3-28-2008

DWW Policy 08-1 (BRP/DWM/WWP 08-1)

Program Applicability: All Boston and regional BRP programs

Supersedes Policy: None

Approved by: [signed] Glenn Haas, Acting Assistant Commissioner, BRP

This policy sets forth the Department's approach for reviewing requests for Superseding Orders of Conditions when a conservation commission denies an Order of Conditions (OOC), a Request for Determination of Applicability, or a Notice of Resource Area Delineation due to a lack of necessary information pursuant to 310 CMR 10.05(6).

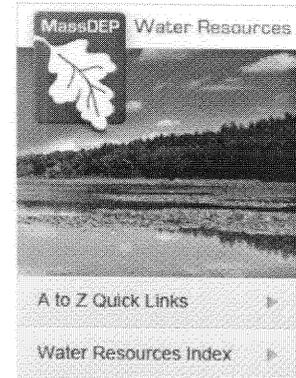
To help ensure that conservation commissions have sufficient expertise available to address the specific issues raised by an applicant's project, c. 44, section 53G* gives conservation commissions authority to charge a fee for the employment of outside consultants. Conservation commissions can utilize that fee to ensure that an application has the necessary information for them to make a decision pursuant to the Wetlands Protection Act, M.G.L. c. 131, sec.40, and 310 CMR 10.00. The Department will apply the following criteria when reviewing a request for a Superseding Order of Conditions where the commission's denial was based upon a lack of necessary information provided by the applicant.

1. The Department will not automatically uphold a commission's decision or support a commission's lack of action (e.g. failure to hold a public hearing or issue an OOC), based on a claim that the file is administratively incomplete, solely due to the lack of consultant fee payment. Nor will the Department make a determination about the reasonableness of the amount of a fee requested by a commission. Rather, the Department will review the decision to determine whether it was reasonable under the Wetlands Protection Act and the regulations promulgated at 310 CMR 10.00. To assist in this review, the Department will look for documentation by the commission that identifies the "information which is lacking and why it is necessary" in accordance with the requirements of 310 CMR 10.05(6)(c). The commission should also confirm that the information to be generated by the outside consultant was not otherwise available or previously provided to other town agencies such as the Planning Board or the Board of Health. In fairness to project proponents, commissions and other town agencies are encouraged to coordinate overlapping information requests to avoid duplicative requests for the same information.
2. To avoid issuing decisions based upon lack of information, commissions are encouraged to negotiate appropriate scopes of work with applicants as part of the deliberative process to ensure that the final scope of work does not include elements beyond those necessary to satisfy the standards of 310 CMR 10.05(6)(c). If the Commission ultimately denies due to failure to pay the fee, the scope of work should be attached to the decision.
3. When the Department reviews a decision based on a lack of sufficient information, the Department will review the reasonableness of the scope of work outlining the "information which is lacking and why it is necessary". The Department will assess such factors as the adequacy of the proponent's submission, the degree to which the application involves technical or complex questions, the need for an outside consultant to address those questions, the capability of a typical commission to perform a meaningful review of the submission without an outside consultant, and other pertinent factors. Based upon its review, the Department will either affirm the denial, reverse the denial, or remand to the commission.

This guidance is for Department staff reviewing requests for Superseding Orders of Conditions when a conservation commission denies an Order of Conditions (OOC), a Request for Determination of Applicability, or a notice of Resource Area Delineation due to a lack of necessary information pursuant to 310 CMR 10.05(6) and may not be relied upon for any other purpose. This guidance does not constitute a final agency decision and does not create any legal rights or relieve any person of obligations that exist pursuant to applicable laws.

* M.G.L. c. 44, Section 53G provides, in relevant part:

...any city or town that provides by rules promulgated ... by a conservation commission established by a city or town ... when implementing the authority conferred under ... section 40 of chapter 131, or under any local wetlands ordinance or by-law, for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account. Such rules shall provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications.



Status Summary of Wetland Protection Program Policies and Guidelines

<u>Policy</u>	<u>Former Status</u>	<u>Current Status</u>	<u>Issued</u>	<u>Revised</u>
82-1	Policy	Deleted	2/16/82	
82-2	Policy	Deleted	2/16/82	
84-1	Policy	Deleted	6/26/84	
85-1	Policy	Deleted	1/24/85	
85-2	Policy	Revised Policy	1/24/85	3/1/95
85-4	Policy	Revised Policy	9/17/85	3/1/95
85-5	Policy	Deleted	10/26/85	
86-1	Policy	Revised Policy	7/11/86	3/1/95
87-1	Policy	Revised Policy	12/8/87	3/1/95
88-1	Policy	Deleted	3/9/88	
88-2	Policy	Unrevised Policy	2/29/88	
88-3	Policy	Revised Policy	2/29/88	3/1/95
88-4	Policy	Deleted	4/11/88	
88-5	Policy	Deleted	4/12/88	
88-6	Policy	Deleted	9/19/88	
89-1	Policy	Deleted Revised Policy	6/16/89	3/1/95
90-1	Policy	Deleted	8/10/90	
90-2	Policy	Unrevised Policy	8/13/90	
91-1	Policy	Revised Policy	2/8/91	3/1/95
91-2	Policy	Unrevised Policy	3/28/91	
92-1	Policy	Unrevised Policy	3/3/92	
95-1	Policy	New Policy	3/1/95	
06-1	Policy	New Policy	5/11/06	
08-1	Policy	New Policy	3/8/08	





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Emergency Repairs to Structures, Roads, and Facilities Located in Wetland Resource Areas or Buffer Zones, and Waterways

Emergency work in wetland resource areas necessary for the protection of the health or safety of the citizens of the Commonwealth may be allowed in two ways. First, MassDEP Wetland, 401, and Waterways regulations all allow for emergency authorizations to repair damaged structures from localized sudden or unforeseen events and when conducted by an agency of the Commonwealth or when ordered to be performed by a public agency. Work under these emergency provisions requires notice, public agency approval or directives, and issuance of an emergency certification by the conservation commission. A second type of emergency authorization may result from severe storms that cause regional or statewide damage such as ice storms or hurricanes. In such cases, MassDEP may issue emergency regulations that allow repair to storm damaged property without need for local approval. When emergencies regulations are issued for severe storms that cause wide spread damage, they will be posted to MassDEP's web site.

The following information pertains to requests for the first type of localized emergency authorization requiring conservation commission review and approval:

- Wetlands regulations, 310 CMR 10.06 (M.G.L. c. 131, sec. 40): The person requesting authorization must specify why the project is necessary to protect the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof (e.g. municipal building official) is to perform the project or has ordered the project to be performed. Requests must be submitted to the municipal Conservation Commission. Any emergency work authorized by the Conservation Commission shall not include any work beyond that necessary to abate the emergency and must be completed within 30 days (or 60 days for Immediate Response Actions approved by MassDEP Bureau of Waste Site Cleanup). Pertinent emergency requirements: [310 CMR 10.06, Emergency Repairs in Wetlands](#)  
- [Emergency Certification process for authorizing Rebuilding of Primary Coastal Dunes](#)  
- [Emergency Certification Form used by Conservation Commission to authorize emergency work](#)  
- 401 Water quality regulations, 314 CMR 9.12: In the rare situation where immediate action is essential to avoid or eliminate a serious and immediate threat to the public health or safety or to the environment, a person may act without a certification, provided that the person obtains prior approval of the Department or authorization under M.G.L. c. 131, s. 40. Any emergency authorization issued by the Department shall not relieve such person from compliance with other applicable federal, state, and local requirements and approvals, including approval by the Corps of Engineers. Pertinent emergency requirements: [Emergency Repairs, 401 Water Quality Regulations](#)  
- Waterways regulations, 310 CMR 9.20 (MGL Chapter 91): In an emergency situation where swift and immediate action is essential to avoid or eliminate a serious and immediate threat to health, safety, or the environment, the Department may approve a project or portion thereof, without a license or permit, in accordance with procedures described at 310 CMR 9.20. Request must be made to MassDEP. Pertinent emergency requirements: [310 CMR 9.20, Emergency Repairs in Waterways](#)  

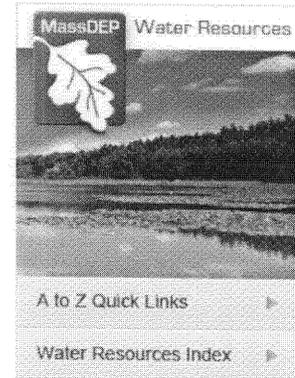
Other Helpful Information:

- [Flood Cleanup and Recovery Guidance](#)
- [Protecting Coastal Property from Major Storm Damage](#)
- [Flooding and Sewage Backups](#)

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Energy and Environmental Affairs

EEA Home > Agencies > MassDEP > Water Resources > Laws & Rules > Snow Disposal Guidance

Snow Disposal Guidance

Snow Disposal - Storm Preparation

February 9, 2015; if you need to contact MassDEP with emergency snow disposal questions, call the emergency line at 888-304-1133 for immediate assistance.

February 9, 2015: Due to the extraordinary weather experienced by the Commonwealth in the past several weeks, municipalities throughout the Commonwealth are facing significant challenges in their efforts clear, remove and dispose of historic accumulations of snow. MassDEP recognizes that cities and towns may need to undertake emergency measures to ensure protection of public safety.

As communities proceed with necessary emergency snow disposal, we recommend you use the best management guidelines included in the MassDEP Emergency Disposal Guidance below, including:

- Dispose of snow in open water with adequate flow and mixing to prevent ice dams from forming.
- Do not dispose of snow in saltmarshes, vegetated wetlands, certified vernal pools, shellfish beds, mudflats, drinking water reservoirs and their tributaries, Zone IIs or IWPA's of public water supply wells, Outstanding Resource Waters, or Areas of Critical Environmental Concern.
- Do not dispose of snow where trucks may cause shoreline damage or erosion.
- Consult with the municipal Conservation Commission to ensure that snow disposal in open water complies with local ordinances and bylaws.

The snow disposal guidelines below offer information on the proper steps to take when locating sites and coming up with options for disposing of snow. Finding a place to dispose of collected snow poses a challenge to municipalities and businesses as they clear roads, parking lots, bridges, and sidewalks. Public safety is of the utmost importance. However, care must be taken to ensure that collected snow, which may be contaminated with road salt, sand, litter, and automotive pollutants such as oil, is disposed of in a manner that will minimize threats to nearby waterbodies. This guidance describes appropriate measures to be taken, including in cases of emergency when other options are not available.

If you have questions or need assistance on snow disposal, you may contact one of MassDEP's Regional Offices:

Northeast Regional Office, Wilmington, 978-694-3249
 Southeast Regional Office, Lakeville, 508-946-2714
 Central Regional Office, Worcester, 508-767-2722
 Western Regional Office, Springfield, 413-784-1100.

Effective Date: March 8, 2001

Guideline No. BRPG01-01

Applicability: Applies to all federal, state, regional and local agencies, as well as to private businesses.

Supersedes: BRP Snow Disposal Guideline BRPG97-1 issued 12/19/97, and all previous snow disposal guidance

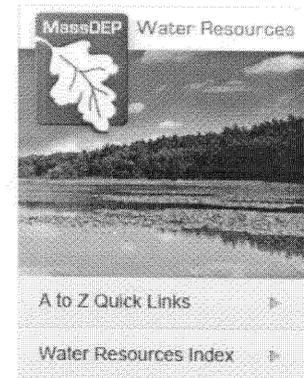
Approved by: Glenn Haas, Assistant Commissioner for Resource Protection

PURPOSE: To provide guidelines to all government agencies and private businesses regarding snow disposal site selection, site preparation and maintenance, and emergency snow disposal options that are acceptable to the Department of Environmental Protection, Bureau of Resource Protection.

APPLICABILITY: These Guidelines are issued by the Bureau of Resource Protection on behalf of all Bureau Programs (including Drinking Water Supply, Wetlands and Waterways, Wastewater Management, and Watershed Planning and Permitting). They apply to public agencies and private businesses disposing of snow in the Commonwealth of Massachusetts.

INTRODUCTION

Finding a place to dispose of collected snow poses a challenge to municipalities and businesses as they clear roads, parking lots, bridges, and sidewalks. While we are all aware of the threats to public safety caused by snow, collected snow that is contaminated with road salt, sand, litter, and automotive pollutants such as oil also threatens public health and the environment.



As snow melts, road salt, sand, litter, and other pollutants are transported into surface water or through the soil where they may eventually reach the groundwater. Road salt and other pollutants can contaminate water supplies and are toxic to aquatic life at certain levels. Sand washed into waterbodies can create sand bars or fill in wetlands and ponds, impacting aquatic life, causing flooding, and affecting our use of these resources.

There are several steps that communities can take to minimize the impacts of snow disposal on public health and the environment. These steps will help communities avoid the costs of a contaminated water supply, degraded waterbodies, and flooding. Everything we do on the land has the potential to impact our water resources. Given the authority of local government over the use of the land, municipal officials and staff have a critically important role to play in protecting our water resources.

The purpose of these guidelines is to help municipalities and businesses select, prepare, and maintain appropriate snow disposal sites before the snow begins to accumulate through the winter.

RECOMMENDED GUIDELINES

These snow disposal guidelines address: (1) site selection; (2) site preparation and maintenance; and (3) emergency snow disposal.

1. SITE SELECTION

The key to selecting effective snow disposal sites is to locate them adjacent to or on pervious surfaces in upland areas away from water resources and wells. At these locations, the snow meltwater can filter in to the soil, leaving behind sand and debris which can be removed in the springtime. The following areas should be avoided:

- Avoid dumping of snow into any waterbody, including rivers, the ocean, reservoirs, ponds, or wetlands. In addition to water quality impacts and flooding, snow disposed of in open water can cause navigational hazards when it freezes into ice blocks.
- Do not dump snow within a Zone II or Interim Wellhead Protection Area (IWPA) of a public water supply well or within 75 feet of a private well, where road salt may contaminate water supplies.
- Avoid dumping snow on MassDEP-designated high and medium-yield aquifers where it may contaminate groundwater (see the next page for information on ordering maps from MassGIS showing the locations of aquifers, Zone II's, and IWPAs in your community).
- Avoid dumping snow in sanitary landfills and gravel pits. Snow meltwater will create more contaminated leachate in landfills posing a greater risk to groundwater, and in gravel pits, there is little opportunity for pollutants to be filtered out of the meltwater because groundwater is close to the land surface.
- Avoid disposing of snow on top of storm drain catch basins or in stormwater drainage swales or ditches. Snow combined with sand and debris may block a storm drainage system, causing localized flooding. A high volume of sand, sediment, and litter released from melting snow also may be quickly transported through the system into surface water.

Site Selection Procedures

1. It is important that the municipal Department of Public Works or Highway Department, Conservation Commission, and Board of Health work together to select appropriate snow disposal sites. The following steps should be taken:
2. Estimate how much snow disposal capacity is needed for the season so that an adequate number of disposal sites can be selected and prepared.
3. Identify sites that could potentially be used for snow disposal such as municipal open space (e.g., parking lots or parks).
4. Sites located in upland locations that are not likely to impact sensitive environmental resources should be selected first.
5. If more storage space is still needed, prioritize the sites with the least environmental impact (using the site selection criteria, and local or MassGIS maps as a guide).

MassGIS Maps of Open Space and Water Resources

If local maps do not show the information you need to select appropriate snow disposal sites, you may order maps from MassGIS (Massachusetts Geographic Information System) which show publicly owned open spaces and approximate locations of sensitive environmental resources (locations should be field-verified where possible). Different coverages or map themes depicting sensitive environmental resources are available from MassGIS on the map you order. At a minimum, you should order the Priority Resources Map. The Priority Resources Map includes aquifers, public water supplies, MassDEP-approved Zone II's, Interim Wellhead Protection Areas, Wetlands, Open Space, Areas of Critical Environmental Concern, NHESP Wetlands Habitats, MassDEP Permitted Solid Waste facilities, Surface Water Protection areas (Zone A's) and base map features. The cost of this map is \$25.00. Other coverages or map themes you may consider, depending on the location of your city or town, include Outstanding Resource Waters and MassDEP Eelgrass Resources. These are available at \$25.00 each, with each map theme being depicted on a separate map. Maps should be ordered from [MassGIS](http://www.mass.gov/eea/agencies/massdep/water/regulations/snow-disposal-guidance.html). Maps may also be ordered by fax at 617-626-1249 (order form available from the MassGIS web site) or mail. For further information, contact MassGIS at 617-626-1189.

2. SITE PREPARATION AND MAINTENANCE

In addition to carefully selecting disposal sites before the winter begins, it is important to prepare and maintain these sites to maximize their effectiveness. The following maintenance measures should be undertaken for all snow disposal sites:

- A silt fence or equivalent barrier should be placed securely on the downgradient side of the snow disposal site.
- To filter pollutants out of the meltwater, a 50-foot vegetative buffer strip should be maintained during the growth season between the disposal site and adjacent waterbodies.
- Debris should be cleared from the site prior to using the site for snow disposal.
- Debris should be cleared from the site and properly disposed of at the end of the snow season and no later than May 15.

3. EMERGENCY SNOW DISPOSAL

As mentioned earlier, it is important to estimate the amount of snow disposal capacity you will need so that an adequate number of upland disposal sites can be selected and prepared.

If despite your planning, upland disposal sites have been exhausted, snow may be disposed of near waterbodies. A vegetated buffer of at least 50 feet should still be maintained between the site and the waterbody in these situations. Furthermore, it is essential that the other guidelines for preparing and maintaining snow disposal sites be followed to minimize the threat to adjacent waterbodies.

Under extraordinary conditions, when all land-based snow disposal options are exhausted, disposal of snow that is not obviously contaminated with road salt, sand, and other pollutants may be allowed in certain waterbodies under certain conditions. In these dire situations, notify your Conservation Commission and the appropriate MassDEP Regional Service Center before disposing of snow in a waterbody.

Use the following guidelines in these emergency situations:

- Dispose of snow in open water with adequate flow and mixing to prevent ice dams from forming.
- Do not dispose of snow in saltmarshes, vegetated wetlands, certified vernal pools, shellfish beds, mudflats, drinking water reservoirs and their tributaries, Zone IIs or IWPA's of public water supply wells, Outstanding Resource Waters, or Areas of Critical Environmental Concern.
- Do not dispose of snow where trucks may cause shoreline damage or erosion.
- Consult with the municipal Conservation Commission to ensure that snow disposal in open water complies with local ordinances and bylaws.

FOR MORE INFORMATION

If you have questions or need assistance on snow disposal, you may contact one of MassDEP's Regional Offices:

Northeast Regional Office, Wilmington, 978-694-3249

Southeast Regional Office, Lakeville, 508-946-2714

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