



MASSACHUSETTS ASSOCIATION of
CONSERVATION COMMISSIONS, Inc.

MACC Newsletter

Vol. XVII, No. 7

November, 1987

MACC 1988 ANNUAL MEETING
WILDLIFE: THE EIGHTH WONDER OF WETLANDS

Saturday, March 5, 1988 Holy Cross College
Agenda - Page 4 ; Registration Form - Page 5

FEDERAL COURT KILLS ATTLEBORO MALL

SOME GOOD NEWS FOR MACC

The important veto power of the United States Environmental Protection Agency under Section 404 of the Clean Water Act, to disapprove a specific project filling or otherwise harming wetlands, resulting in unacceptable impacts on fisheries, water supply or other important subjects, was reaffirmed by the Federal district court in Binghamton, New York. The Pyramid Corporation had sued EPA to challenge its Section 404 veto of its Attleboro Mall which would have dredged and filled or rechanneled 50 acres of Sweeden's Swamp in the City of Attleboro.

Secretary of Transportation Fred Salvucci has announced that the state will not pursue efforts to build a Route 2 bypass through Wendell State Forest. If the section of Route 2 which passes through Erving is to be replaced, the work will have to be done within that town. The Route 2 coalition, of which MACC is a member, has prepared a "Low Profile Alignment" for a limited access-road south of the present alignment in Erving. Presumably this will be the subject of an environmental impact report. The decision was apparently based on a reading of the federal "4-f" law which is particularly solicitous of public open space. The decision will prevent a segmentation of this state forest which would have cut off wildlife access to the Millers River. We applaud this protection of our precious public lands.

The conservation commission had allowed the work several years ago; the DEQE Regional Office reversed in the Superseding Order; the DEQE then reversed that position back again; the DEQE Commissioner, after a lengthy adjudicatory hearing, allowed the Mall to be built, ruling that the old Wetlands Protection Act regulations applied, not the new 1983 version; a Superior Court in Massachusetts reversed the DEQE; the Supreme Judicial Court reversed that decision, ruling that the Mall was legal under the logic of the Commissioners.

A high federal court, the first circuit court of appeals has upheld the Army Corps in its suit against Cumberland farms for illegal alteration of the Middleborough cedar swamp. The convenience store company was ordered to restore six hundred acres of wetlands and pay \$540,000 in fines, the largest civil penalty ever ordered under s. 404, the federal wetlands law.

(continued on page 7)

PRESIDENT'S MESSAGE

THE NEW WETLANDS REGULATIONS: WILDLIFE, FLOODPLAINS, AND HERBICIDES

I have attended one of the fall presentations by DEQE's Steve Pearlman on the new "wetlands wildlife" regulations; and while the presentation was a good one, I have to say the new regulations are a jungle! A veritable forest of exceptions, and exceptions to the exceptions, and special provisions superseding the whole system. The two areas most affected inland will be banks and floodplains. Personally, I have always considered banks to be reasonably well protected by the current regulations, which create enough presumptions of significance to prevent most heavy alterations such as rip rap. (Except of course for limited projects to protect existing structures and to allow stream crossing, not to mention exemptions for maintenance of farm fields.) But the new regulations will help protect floodplains, which under the present system are presumed significant only for flood control and storm damage prevention. In many towns, the only limitation now put on development in floodplains is that compensatory storage floodwaters must be supplied at the same elevation along the same reach of the stream. The good news is that the new regulations agree that floodplains do provide important habitat for wildlife.

The bad news is, that the regulations basically cover only the 10-year floodplain. How are we to find (or verify the developer's location of) the 10-year floodplain? FEMA is said to have 10-year flood data for most areas; but it does not appear on the flood insurance maps, which show only the 100 and 500-year floodplains. The 10 year storm is only 4.8 inches - so the 10-year storm is 2/3 of the 100-year storm and will flood a considerable area!

At this point, the floodplain regulations get so complex that at the (considerable) risk of overstipulating or even misinterpreting them, I have the following brief list of dos and don'ts relating to the use of the wildlife regulations only (all other presumptions and defenses still stand):

1. You can't use these new regulations to forbid work in altered areas in the floodplain, including lawns, golf courses, paved areas, gardens; but farmfields are not considered "altered."
2. The area of the floodplain to which the regulations apply is the 10-year floodplain or 100' from the bank or a bordering wetland, whichever is further from the water.
3. Beyond this protected area, there is no presumption of wildlife value in the floodplain unless Fisheries and Wildlife has certified a "vernal pond" (generally wet only two months a year), or Fisheries and Wildlife Natural Heritage and Endangered Species Program has identified a rare wildlife species occurrence there.
4. Within the protected area, the conservation commission must allow alteration of 10% of the "lot"* or 5000 square feet of floodplain, whichever is lesser (but not within mapped vernal pond or rare habitat).
5. If the developer wants to alter more than this amount of the protected area, he must produce evidence from a wildlife biologist. If work is allowed by the conservation commission, this excess lost area must be replicated; no replication over 10 acres is allowed.
6. Fisheries and Wildlife criteria, to be used in mapping vernal ponds will be mailed to commissions this January. Heritage maps of rare species occurrences have been mailed to commissions in early November.

* The regulations do not define a lot, but they do state that the 10% is a one-time bite and cannot be repeated on that lot. The matter of subdivision and resale is left to the inevitable confusion that will follow this primitive effort to deal with cumulative effects.

The wetlands regulations have also been amended to reduce conservation commission jurisdiction over use of herbicides on rights of way. As to railroads, commissions can expect to receive very short-shrift, one-time "emergency" applications to spray this fall. Thereafter, the railroad must adopt a 5-year Vegetation Management Plan (VMP) and a Yearly Operational Plan (YOP) under the Department of Food and Agriculture (DFA) regulations effective July 1987 (333 CMR 11.00). These regulations prohibit the use of herbicides within 10 ft. of a wetland and only allow specifically approved herbicides under controlled conditions to be applied within the 100 ft. to 10 ft. zone. The railroads will be allowed to spray after the commissions have determined the location of wetland areas. Thus conservation commissions will still issue Determinations of Applicability, but the railroads will not have to file any Notices of Intent. The situation is worse yet as regards utility spraying. The new regulations define use of herbicides as "normal maintenance" of electric utility rights of way and thus exempt from any commission regulations under the wetlands act. The DFA regulations do require VMPs and YOPs from electric utilities, but not for two years, and since the DFA regulations self destruct in two years if not reauthorized by DFA and DEQE, we may see no regulation at all. Not a cheery outcome to the enormous investment of time and effort MACC put into the herbicide cases in Leverett and Clinton.

Alexandra D. Dawson, Esq.

LEGAL BRIEFS

MORE GOOD NEWS!

Enforcement Disaster Narrowly Averted!

On September 4, 1987, the Massachusetts Appeals Court came down with a surprise decision in John Grant & Sons Co., Inc. Braintree had nailed Grant for six multiple violations of the Wetlands Protection Act and obtained a fine of \$87,500. On appeal, Judge Cass threw out the entire case, on the basis that Ch. 131 contained two separate fine penalties for violating the WPA, one found in the WPA and one found in a penalty catchall provision, s. 90. The higher fine under s. 40 was for \$1,000 a day or six months in jail. Apparently offended by the whole concept of white collar crime (he prefers injunctions), Judge Cass declared that the lack of certainty wiped out all the criminal penalties, high or low.

HOWEVER, on September 25, Ch. 174 of the Act of 1987 came into effect, establishing new civil and criminal penalties for DEQE. The new criminal fine under the WPA is a fine of not over \$25,000 or two years imprisonment, or both. Each day such violation continues shall be a separate offense. The s. 90 penalties were abolished.

One remaining question is, whether the appeals court has in effect declared wetlands violations before September 25 unpunishable. Since the Braintree decision is on appeal, we should assume that such crimes were not abolished. However, where possible, bring complaints under the new law.

MACC Newsletter

The DEQE has issued an interesting Superseding Order regarding road drainage in Barnstable. MDPW is altering drainage on seven miles of Route 28; it proposed to direct 10 million gallons a year of runoff into streams emptying into shellfish beds. Bacteria in road runoff have been shown to be partly responsible for shellfish closures in Cape estuaries. On appeal, the DEQE Order prohibited all new or expanded discharges into wetlands or buffer zones. An adjudicatory hearing has been requested. Please note that (1) the Division of Water Pollution Control may require permits for stormwater discharges into sensitive areas (314 CMR 3.04); (2) the new wetlands regulations amendments create a new category of "limited projects" for work in coastal wetlands involving widening of public roads and maintenance of existing road drainage (Ugh).

* * * * *

In a move to protect public wells, the DEQE has established an area of special protection around wellheads until "Zone II" areas have been mapped by a hydrogeologist. This interim protection covers a radius of one half mile from the public wellhead - a circle a mile across covering about 500 acres. Within this area, DEQE will not permit a groundwater discharge permit or a new landfill and may require special standards for sewer lines, NPDES discharge permits, and other discharges to ground or surface water permitted under the WPA.

MACC ANNUAL MEETING — WILDLIFE: THE EIGHTH WONDER OF WETLANDS

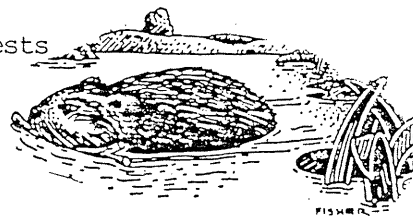
KEYNOTE SPEAKER: LIEUTENANT GOVERNOR EVELYN MURPHY

Saturday, March 5, 1988; 8:00 a.m. - 4:30 p.m.
Hogan Center, Holy Cross College, Worcester, MA

- 8:00 - 9:00 Registration and Coffee
- 9:00 - 10:00 Opening Session
 - Meeting - Election, Awards, etc.
 - Keynote Address - "Reversing Decline: Restoring a Degraded Environment"
- 10:15 - 11:45 Workshop Series A (Pick one from the following eight)

WILDLIFE

- 1. Wetland/Wildlife Habitat Regulations
- 2. Preserving Biological Diversity in Wetlands and Forests
- 3. Open Space Planning and Management for Wildlife



BASICS

- 4. Basics for New Commissioners

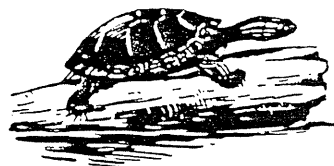
LEGAL

- 5. Nollan and First Church Decisions: The Taking Issue
- 6. Mock Trial on Wetlands Enforcement (Part I - Investigation and Preparation)

PLANNING AND REGULATING

- 7. Developing a Comprehensive Aquifer Management Program for Your Community
- 8. Boston Harbor Clean-up Impacts

- 11:45 - 12:45 Lunch - Group A
- Films and Exhibits - Group B



- 12:45 - 1:45 Lunch - Group B
- Films and Exhibits - Group A

- 2:00 - 3:30 Workshop Series B (Pick one from the following eight)

WILDLIFE

- 1. Wildlife Habitat Analysis under the New Regs
- 2. Endangered Species: Protection under the New Regs

BASICS

- 3. Writing an Effective Order or Conditions

LEGAL

- 4. Wetland Policy as Shaped by Recent DEQE Decisions
- 5. Mock Trial on Wetland Enforcement (Part Two - Testimony and Trial)



PLANNING AND REGULATING

- 6. Package Treatment Plants and Growth Planning
- 7. Safe Drinking Water Act; Implications for Watershed/Wellhead Protection?
- 8. Effective Techniques for Preserving Open Space

- 3:30 - 4:30 MACC President's Reception in Exhibit Hall

MACC 1988 ANNUAL MEETING REGISTRATION FORM

Registration Information:

- Advance registration is required. Payment or purchase order must accompany registration prior to deadline.
- No confirmations will be sent. Your cancelled check is your confirmation.
- Please register early, deadline is February 19, 1988. Late registrants are not guaranteed lunch.
- Please send a copy of the registration form to MACC when submitted to Town.
- Refund policy: NO REFUNDS AFTER FEBRUARY 19, 1988.

Name _____ Commission/Organization _____

Address _____ Phone _____

TOTAL ENCLOSED \$ _____; PURCHASE ORDER # _____; SUBMITTED FOR PAYMENT _____

Municipal Officials and Nonprofits:

\$ _____ for conference and luncheon for _____ person(s) at \$25 each

\$ _____ for seven registrants from same town at \$150 (one free!)

\$ _____ for conference only for _____ person(s) at \$18 each (no meal)

All Others:

\$ _____ for conference and luncheon for _____ person(s) at \$40 each

\$ _____ for conference only for _____ person(s) at \$33 each (no meal)

Please indicate choice of entree:

chicken and broccoli _____; vegetarian pasta _____

Please indicate first-choice workshop for each session:

Series A, workshop # _____; Series B, workshop # _____

For group registrations attach separate sheet listing names, entrees, workshops.

ANNUAL MEETING DONATIONS

_____ Yes! Include me in MACC's 1988 Annual Meeting Program Book as a Benefactor. Enclosed is my \$50 tax-deductible donation.

_____ Yes! Include me in MACC's 1988 Annual Meeting Program Book as a Sponsor. Enclosed is my \$25 tax-deductible donation.

_____ Yes! Include me in MACC's 1988 Annual Meeting Program Book as a Patron. Enclosed is my \$10 tax-deductible donation.

EXHIBITS AND AWARDS

_____ Our town wishes to have a community exhibit. Send information.

_____ Our business/organization wishes to receive information about exhibit space.

_____ We wish to nominate for MACC's Environmental Service Awards:

Name _____ Town _____

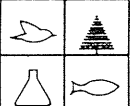
Please attach a brief description of nominee and reason for nomination.

Return to : MACC, Lincoln Filene Center, Tufts University, Medford, MA 02155

SPACE IS LIMITED - REGISTER EARLY - DEADLINE IS FEBRUARY 19, 1988

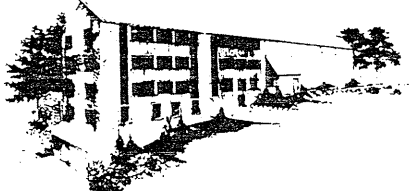


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ATTLEBORO (continued from page 1)

The Wetlands Protection Act is backstopped by the federal Clean Water Act with its Section 404 permit program administered by the United States Army Corps of Engineers. When a developer proposes a non-water dependent use filling a wetland, however, he must survive an "alternatives analysis" by the Corps justifying the filling. And EPA has a significant power to review and comment and effectively veto unacceptable fill projects.

Pyramid sued first in Boston to try to stop EPA Regional Administrator Michael Deland here in Boston from considering a veto, then sued in Washington, D.C. along the same lines, and finally brought suit in the home region of Pyramid. The trial before the Federal District Court was conducted several months ago and the recent ruling came in a 32-page decision.

MACC has been part of the Coalition to Save Sweeden's Swamp, raising money, conducting research, enlisting political support, and encouraging proper decisions by the District Office of the Corps and by EPA. The Corps in New England was overruled in Washington in a highly politicized agency review. Michael Deland accepted the Environmentalist of the Year Award from the MACC at our last Annual Meeting for his strong stand and strong efforts to have his recommendation embodied in the EPA veto of the Administrator in Washington.

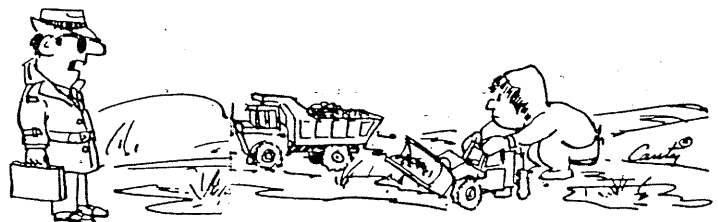
The case represents a very important precedent nationwide in support of the Section 404 program in general and the EPA veto power in particular. It recognizes the importance of the alternatives test whereby developments which do not need to be on or near the water must illustrate no good alternative. Promises of mitigation, such as replacing lost wetlands elsewhere, do not meet this test; mitigation is considered after the alternative test is applied. This legal nicety is an important feature of federal environmental law.

This case illustrates something else, about the Wetlands Protection Act in Massachusetts and about DEQE in administering it. Usually the Act is administered more stiffly in Massachusetts than Section 404 nationwide. This led EOEPA a few years ago to contemplate seeking delegation of Section 404 to the Commonwealth. This would have meant that Section 404 permits would have been virtually automatically granted for anything which received its Order of Conditions under the Act. Now we see how important it is to have Section 404 and the EPA veto power in reserve, to backstop the wetlands protection efforts here in Massachusetts.

MACC feels that DEQE, ordinarily a pretty aggressive environmental agency making competent decisions that are correct on the technical merits, was dead wrong on this one. Even when applying the old regulations, DEQE could have concluded, on the evidence presented that filling 25 acres of wetlands and "improving" 25 acres of additional wetlands did not adequately protect the interests in the Act. Remember that the Act in so many words requires the issuing authority to impose conditions to protect those interests. DEQE chose to do what it did presumably with the full knowledge of the consequences.

The consequences were that a federal agency recognized those wetland values that DEQE could not (the wildlife value in federal law, which was not in the Act at the time) and it took Republican officials in Washington to protect wetlands in Massachusetts. They were willing to stand up to Pyramid.

(continued on next page)



"HEY KID . . . EVER HEAR OF THE WETLANDS ACT?"

Controversy over Attleboro mall will test strength of environmental law

ATTLEBORO (continued)

We need Section 404 in effect in Massachusetts, in addition to the Act, for several reasons: DEQE cannot be everywhere and do everything; the wetland interests protectable under Section 404 using the Interstate Commerce Clause are many more than the eight interests now in the Act under the state police power; sometimes it takes evaluation by the independent EPA to identify the correct course in New England environmental protection; and the New England offices of the Corps of Engineers, Fish and Wildlife Service, and EPA contain people with some remarkable capability and commitment.

Pyramid may choose to appeal this decision to the United States Circuit court of Appeals in New York. We are confident the district court decision will stick. In any event we want to thank EPA and Michael Deland for aggressively and successfully defending the EPA veto.

Gregor I. McGregor, Esq.
MACC Government Affairs

LEGISLATIVE UPDATE

Two bills that should be of concern to Conservation Committees: H. 6053, the 1987 Transportation Bond Issue Bill has some very good provisions funding open space, bicycle paths, salt storage sheds and mass transportation. However, our appreciation is overshadowed by our concern over Sections 3g and 15. Section 3g would exempt repair and reconstruction (and perhaps all) bridge work from the WPA, MEPA and Ch. 91. Section 15 would exempt surveys, soundings, drillings, and examinations by MDPW from all environmental notification and review.

A second bill which passed the House and is now in Senate Steering and Policy Committee was reported in the Globe on Thursday, November 5th. H. 5763 would exempt a former clay pit in Gardner from the provisions of the WPA. It is bad public policy to make exemptions legislatively. The owner of the forty year old, four acre land has not gone through the variance process.

...L OUTLAY BILL PASSED THE SENATE!

...sletter

UPCOMING EVENTS

WATER: PLANNING FOR THE FUTURE

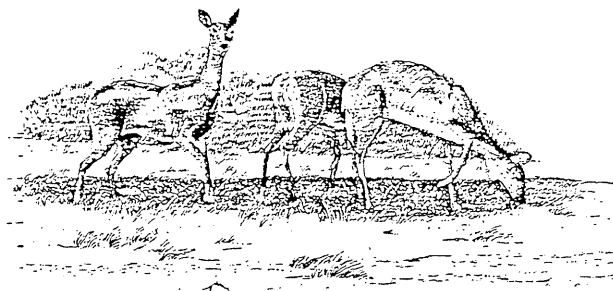
The Massachusetts Bay Marine Consortium will run a course on the future of our water supply, using Boston as a case study. Participants will search for answers to some of the pressing questions on water supply management by engaging in ongoing projects under the supervision of course faculty and state water officials.

January - May, 1988
MIT, 292 Main Street, East 38
Thursdays, 5:30 - 8:30
Fee: \$200 noncredit
Contact: Jay Kaufman, (617) 929-8675

NEEN CONFERENCE: TENTH ANNIVERSARY

Nancy Anderson reports that preparations for the tenth anniversary of the New England Environmental Conference have begun. Principal speakers at plenary sessions include Gregor I. McGregor, Esq., former President and present Chairman of Governmental Affairs of the MACC Board of Directors, who will address recent Supreme Court decisions on the "taking issue", Partha Sarathy, chairman of Education and Training for the International Union for Conservation of Nature (IUCN), and Dr. Patricia Baldi, Vice President of the National Audubon Society. Each year a workshop provides the opportunity for conservation commission members from the six state New England region meet and discuss issues confronted by commissions. MACC is a cosponsor of the conference, which drew over 1,000 people from throughout New England last year. Persons with suggestions for conference topics should contact Nancy Anderson.

Friday - Sunday, March 25-27
Tufts University
Contact: Nancy Anderson, (617) 381-3451



"ADOPT-A-STREAM WORKBOOK"

WHAT HAPPENED?

The Riverways staff and the Adopt-A-Stream Program of the Department of Fisheries, Wildlife and Environmental Law Enforcement are pleased to offer a new workbook written specifically for local groups and people who want to get directly involved in protecting and improving our rivers, streams, and brooks.

Because the Department's mandate is to protect habitat and open space for future generations, and because lands along rivers are some of the most important and productive for wildlife and fisheries, the Adopt-A-Stream program focuses on getting local residents involved in protecting those river resources in their own communities. The Workbook is designed to support local activity step by step to protect river lands and improve water quality in our rivers and streams.

The Riverways staff will be available to provide workshops also. For your copy of the Workbook or for further information, contact: Maria Van Dusen (617) 727-6278.

This was a very busy Fall with DEQE offering 16 workshops on the new Wildlife Habitat Regulations and four workshops on Site/Project Analysis. And MACC cut back on its usual regional fall workshops to offer two workshops. On Saturday, October 17th, we had an excellent turnout for the Advanced Wetland workshop in Lexington. However, we had to cancel the October 24th workshops on "Enforcement" and "Open Space Preservation Techniques".


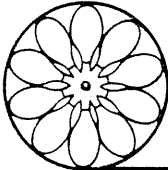
We had excellent speakers lined up and the Mt. Wachusett Community College is reported to be an excellent facility. What happened?

We need to hear from you. Were there just too many things going on? Is Gardner too out of the way? Were the topics not what you were looking for? Let us know. At this point we intend to return to smaller regional meetings for the fall.

MACC Staff

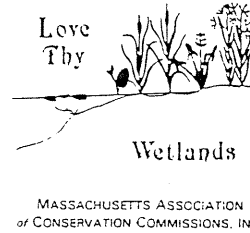
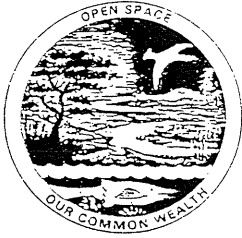
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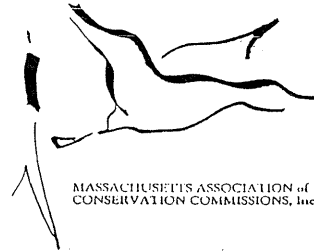
HOLIDAY GIFT GIVING WITH AN ENVIRONMENTAL CONSCIENCE

Conservation commissions are referred to as the "environmental conscience of the community." By giving an MACC tee shirt, bumper sticker, button, or publication you can spread your message about preservation of the environment.



- Increase open space acquisition

- Encourage wetland protection



- Tell others about MACC and the dedicated conservation commissions for which the organization works.

Refer to "From the Resource Center" on page 12 for gift ideas.



MACC HOLIDAY GIFTS ORDER FORMS

Your Name _____ Phone _____ Date _____

Address _____ City _____ State _____ Zip _____

Send gifts (or membership! ___\$15 commissioner, ___ \$25 others) to:
(We'll enclose a card to recipient in your name.)

Name _____ Phone _____

Address _____ City _____ State _____ Zip _____

<u>ITEM</u>	<u>SIZE</u>	<u>COLOR</u>	<u>QUANTITY</u>	<u>PRICE</u>

I have enclosed a check (made payable to MACC) for \$_____.

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