

# MACC Newsletter



Early Summer 1993

Volume XXII Number 4

## MACC Wetlands Enforcement Conference

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### Massachusetts Association of Conservation Commissions

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Since 1961*

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*MACC is a Member of the  
Environmental Federation  
of New England*

## SJC Invalidates Conservation Land Lease Rules Commissions Lack Sole Leasing Authority

This June the state's top court issued a decision invalidating an agricultural lease agreement which a town Conservation Commission had signed without the approval of town meeting. In *Cranberry Growers Service, Inc. v. Town of Duxbury* (415 Mass. 354, 1993) the Supreme Judicial Court (SJC) stated: "In the absence of town meeting vote authorizing the transaction, a town Conservation Commission has no authority to lease premises under its charge, even if the lease restricts use of the premises to conservation purpose". Essentially the court has decided that issuing a lease is a form of conveying an "interest" in conservation land to a party other than the town.

The SJC's further reasoning was that, while GL Chapter 40 allows the town, acting through town meeting, to lease lands, the Conservation Commission Act, GL Ch. 40, sec. 8c "neither explicitly nor implicitly authorizes a Conservation Commission, on its own, to lease land held for conservation purposes".

Some towns use "licenses" instead of leases, to avoid these problems. A license is a personal right to do something on someone else's land; it does not convey any property interest. Most licenses for agricultural use are short term and do not give the farmer exclusive use. The lease in this case ran for ten years; and the Cranberry Growers had a right to renew (which they exercised) for another ten years. So substantial a use could not have been disguised as a "license", whatever the wording.

In response to this ruling Conservation Commissions should reexamine their leases to determine whether a licensing agreement would be more appropriate or whether the existing lease should be ratified by town meeting.

The SJC declined to decide whether legislative approval of the town's leasing action is required by Article 97 of the state Constitution. This is because it was able to decide the case without reaching the constitutional issue. Therefore, the application of Article 97 remains uncertain although the Attorney General's Opinion on the subject [found in the MACC Handbook] indicates that Article 97 would apply. MACC will provide further guidance as to whether legislative approval of leases is required.

Alexandra D. Dawson, Esq. Chair, Legal Affairs

## Governor Vetoes Wetlands Exemption in Budget Would have Allowed Work During Appeals

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## Chipping Away at Wetlands Protection Efforts to Weaken State & Local Mechanisms Proliferate

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## Governor Vetoes Wetlands Exemption Budget Rider Would Have Allowed Work During Appeals

Using the power of the line item veto, Governor Weld on July 19 struck a section of the FY94 Massachusetts budget which would have weakened state and local wetlands protection. The "outside" section or rider would have allowed work to go forward on Duxbury Beach during appeals. It applied to permits issued under both the Wetlands Protection Act and local bylaws by the Duxbury or Plymouth Conservation Commissions, and would have affected appeals of state, local or court decisions, including DEP Superseding Orders.

MACC urged Governor Weld to veto the section because it allowed major development including road, building and parking lot construction to occur on a sensitive barrier beach while appeals were pending. This exemption would have made the appeals process meaningless. Construction could be complete before a final decision was made whether a project would harm important coastal resources. By then, water supplies might be damaged, adjacent properties flooded, and rare species and other wildlife habitat wiped out. MACC additionally objected to giving special treatment to project proponents - including private applicants - in two communities.

***This exemption would have made the appeals process meaningless.***

Duxbury is a barrier beach lying in both Duxbury and Plymouth. The legislation appears to have been stimulated by an Order of Conditions issued by the Duxbury Conservation Commission for work on and protection of the beach which was subsequently appealed by local residents. The Plymouth Conservation Commission opposed the exemption.

In addition to MACC, other opponents of the exemption included the Environmental Lobby, Massachusetts Audubon, the Executive Office of Environmental Affairs, the Department of Environmental Protection, and the Office of Coastal Zone Management.

This proposal was much broader than an exemption for Nauset Beach which Governor Weld allowed to become effective at the end of 1992. The Nauset exemption only applies to permits issued to municipal bodies, and does not allow construction of roads or buildings. Though the Governor did not sign that legislation, his failure to issue a formal veto allowed it to become law. When the Nauset exemption was on his desk, MACC cautioned the Governor that approval would lead to more and broader exemption requests.

The Duxbury exemption was one of three weakening amendments to the Wetlands Protection Act added to the Fiscal 1994 Budget on the floor of the House. All weakened wetlands protection, by eliminating proper project review and circumventing public process under the Wetlands Protection Act. Budget riders are an end run around the public process which other bills go through - they do not receive a public hearing. Three hundred and ninety riders were added to this budget!

Other amendments on the House floor included a provision to open all salt ponds to the ocean and one which would have allowed the state Highway Department to undertake any activities to "preserve" state roads and bridges on barrier beaches. In both cases local decisions were unappealable. The latter also exempted the Highway Department from all other state and local laws.

The Boston Globe, in a June 16 editorial, opposed all three proposals. MACC and Massachusetts Audubon held a joint press conference on June 22 to urge defeat of these exemptions as well as other proposals threatening protection of wetland resources (see article on page 4). Members response to MACC's June Legislative Action Alert, coupled with MACC visits to every Senate office, were instrumental in keeping two of these out of the Senate budget and in subsequently obtaining the veto.

Only the Duxbury provision was ultimately included in the Senate and therefore the conference committee budget which went to the Governor. The exemption was proposed in the House by Rep. Charles Mann of Hanson and in the Senate by Sen. Brian McDonald of Weymouth.

Sally A. Zielinski, Ph.D. MACC Executive Director

# Flaws and Loopholes in the New Agricultural Regulations

Robert Sherman    MACC Director    Agent Mashpee Conservation Commission

Recently promulgated revisions to the Wetlands Protection Act regulations regarding agriculture (Ag-Regs) greatly expand the list of activities farmers may pursue in and near wetlands - activities either not subject to Conservation Commission review or reviewed under greatly reduced jurisdiction.

These changes, at best, will test the abilities of Commissions to protect the eight interests of the Wetlands Act. At worst, they provide a haven for deceptive practices and are likely to result in unbridled destruction of wetlands.

Deficiencies in the new regulations include: many undefined or vague terms and phrases; the inability of the Commission to inspect, review or condition major projects; and mandatory approvals. Some of the problem areas are explained below.

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## Vague Terminology

- The word "reservoir" is used throughout the Ag-Regs. Yet it is nowhere defined or its scope described. Is a 100-acre pond, from which a 5-acre cranberry bog draws water a reservoir for that bog? If so, then how far away from the bog (and in the reservoir) may dredging occur (since dredging is considered normal maintenance). Also, what is the extent of such dredging?

- "Normal maintenance" does not include "placing substantial amounts of fill" in Bordering Land Subject to Flooding. How substantial is "substantial"? [10.04 Agr. (b)].

- "Producing or raising agricultural commodities for commercial purposes" is subject to the new regulations. But what does

"commercial" mean? If you sell one zucchini, are you a "commercial" farmer? If so, watch out: the number of farmers is about to increase exponentially in Massachusetts! [10.04 Agr. (a)]

***If you sell one zucchini, are you a "commercial" farmer?***

- What qualifies "agricultural storage and work areas" as such? What are the boundaries of such area? [10.04 Agr (a)].

- Are the maximum amounts of BVW that can be altered (under 10.04 Agr. (c)(2)(f)) one-time events, or can the applicant (farmer) "come back for additional bites"? This question was raised - with no definitive answer given - at the Middleborough Department of Environmental Protection (DEP) workshop on the new agricultural regulations.

## Normal Maintenance

"Normal maintenance" of land in agricultural use (LIAU) (10.04 Agr (b)) includes work that expands the realm of potentially damaging activities that are exempt. Some of these are described here.

- "Management of existing field edges". In (b)(5), if a "field edge" is truly a "field edge" why is there a need to go "100 feet from the land in production"? The removal of vegetation, even in Bordering Vegetated Wetlands (BVW), will have no scrutiny. The limitations on such vegetative removal is subject to limits [(5)(i) and (ii)], but there is no express authority for Commissions (or the Department of Environmental Protection) to monitor and enforce any such limits.

- In (b)(11) "maintaining the flow of existing waterways" is supposed to relate only to activities "without enlargement as to geographical extent" for LIAU. Yet LIAU means land within resource areas used in a manner related to and necessarily used in

the production of agricultural products. So, how far from land actually in production will alterations - for the purpose of maintaining flow (whatever those alterations might be) - take place in a river or stream?

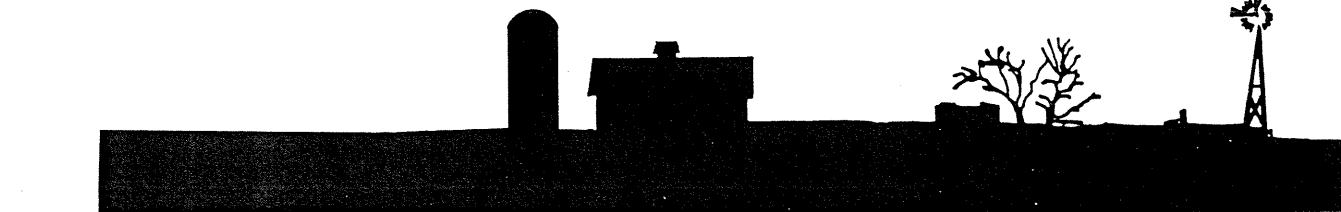
- Normal Maintenance allows for the expansion of reservoirs and ponds and the construction of tailwater recovery systems and by-pass canals/channels in BVWs. This represents actual loss of wetlands without any meaningful oversight by Commissions and/or the Department of Environmental Protection.

## Farm Conservation Plans

- Section (c)(2)(b) of 10.04 Agr., relating to work within Bordering Vegetated Wetlands, allows for review of a farm Conservation Plan (CP) under which such (above) proposed activities are described, but only to the extent that the Commission may comment on the "manner" in which the CP was prepared" (in compliance with the Memorandum of Understanding (MOU) between the DEP and The Soil Conservation Service (SCS)). But, if the Conservation Commission determines that the CP was not prepared in compliance with the MOU, it has no authority to require changes! According to

***...if the Conservation Commission determines that the farm Conservation Plan was not prepared in compliance with the MOU, it has no authority to require changes!***

the MOU "the Service agrees to revise its wetland boundary delineations to conform to any written comments of the Commission. The Service may consider, but need not adopt, any comments by the Commission other than wetlands boundary delineations." There are serious flaws here. What happens if the applicant (farmer) does not agree with a delineation change prompted by the Commission; (Continued on page 6)



## BYLAW BAROMETER

### Updating Exemptions for Agriculture

Robert Sherman MACC Director Agent Mashpee Conservation Commission

The article on page 3 describes some of the shortcomings, loopholes and problems with the recent changes to the Wetlands Protection Act and Regulations for agriculture (Ag Regs). Communities which agree that these are flawed may guard against wetlands loss through local wetland bylaws - instead of just waiting to see what happens. It may also be preferable to use these bylaw powers now, rather than be dragged into a contentious and litigious situation later!

Unless a wetlands bylaw contains language allowing some exemption for agriculture, activities in wetlands resource areas or the buffer zone are subject to the bylaw provisions. You can require filings for agricultural work in or within 100 feet of wetlands or other resource areas. You may, however, have or want to give some exemption to certain farming enterprises yet stop short of the "open door" provided by the recent revisions to the Ag-Regs.

Procedures for adopting and changing bylaw regulations vary. Towns which have an agricultural exemption and can change regulations (such as definitions) after holding a public hearing, might want (on an interim basis) to adopt definitions of "land in agricultural use" and "normal maintenance and improvement of land in agricultural use" as they were prior to the May 1993 revisions. These definitions far better balance wetlands protection and farming.

MACC is in the process of analyzing the new state regulations. The above changes will serve until we have time to glean what's worthy and throw out the flawed. MACC will then formulate recommendations for a balanced updated version of the agricultural regulations as well as model regulations for local bylaws. In the meantime, consider the above options and KEEP A WATCHFUL EYE. Also, please keep us informed of any situations where our predictions of abuse and wetlands loss - as a result of the new Ag-Regs - come true!

Note: If your local bylaw is tied strictly (in its definitions) to the State definitions, there is a problem - one that goes far beyond agricultural activities. MACC strongly advocates avoiding the tie-in to the definitions of the Act or Regulations. In the light of the Harwich court decision (see article below) your local bylaw is drastically weakened by this approach. MACC can provide our updated model bylaw, copies of court cases, and advice concerning bylaw matters. Call us!

***Unless a wetlands bylaw contains language allowing some exemption for agriculture, activities in wetlands resource areas or the buffer zone are subject to the bylaw provisions.***

### Message of the Harwich Decision: Don't Tie Bylaws to the Wetlands Act

In *DeGrace v. Conservation Commission of Harwich* (31 Mass. App. Ct. 132, 1991) the court dismissed an appeal of a decision under the Harwich Wetland Bylaw. The Conservation Commission had denied the applicant's request to build a house under both the WPA and the local wetlands bylaw. The applicant appealed both decisions. DEQE (now DEP) issued a Superseding Order allowing construction of the house.

The District Court, to which appeals under the Harwich bylaw are directed, upheld the Commission's decision. However, the Appellate Court then took up the case.

The Court decided that since the town bylaw specifically adopted and incorporated by reference the definitions section of the state Wetlands Act, the town thereby adopted and incorporated the definition section of the regulations promulgated by the Commonwealth pursuant to the Act. Since the Conservation Commission's Order of Conditions was not based on a bylaw which provides greater protection than the state Wetlands Act in defining resource areas, DEQE's decision was considered final.

### Chipping Away at Wetlands Protection

#### Exemptions for Golf Courses, Coastal Areas, and Other Special Interests Could Lead to a Wetlands Act That Pro- tects Nothing

Every year dozens of bills which would weaken the Wetlands Protection Act are filed in the Massachusetts legislature. This is nothing new. What is new is that in the last several years more and more of these changes have been approved.

First the exemption for agriculture was expanded. Then a localized exemption was allowed for beach management. This year we see golf course managers asking for an exemption for recreational activity and getting an approval from the Natural Resources Committee, and three coastal exemptions included in the state budget (see article on page 2).

The message the legislature is sending is that if you want an exemption all you need to do is ask. If this continues we will soon have a law which protects nothing. MACC believes that Governor Weld's veto of a wetlands exemption on July 19 MACC is an important one which will send a message to the legislature that he will not allow the Wetlands Act to be gutted.

Every exemption to wetlands protection programs which passes encourages similar and broader exemptions to be sought by project applicants, state agencies, special interest groups and individual municipalities. Each is part of an ongoing effort to chip away at a major law protecting water supplies and water quality, controlling storm damage and flooding, and preserving our sensitive fisheries resources and rare species.

Those who seek convenience or financial gain at public expense are taking advantage of hard economic times. They use the same arguments for regulatory relief as in good times. But now they are being listened to. Part of the strategy to weaken protection of wetlands appears to be to tie up the time of environmental organizations with fighting nasty proposals so that there is no time to work on positive ones.

MACC feels these attempts to chip away at Massachusetts wetland protection programs must stop. (Continued top of page 5)

(Continued from previous page)

Short sighted policy changes come at the expense of clean water and fisheries and wildlife habitat. When the economy turns around, and it will, the public will be aghast at what has been lost.

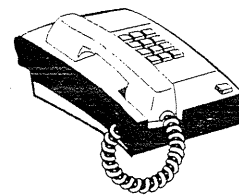
In an effort to call attention to this problem and halt such actions, MACC and Massachusetts Audubon held a joint press conference on June 22. The event took place at the Fresh Pond Municipal Golf Course in Cambridge to call particular attention to the bill which would exempt golf course maintenance and improvement projects from the Wetlands Protection Act.

Sally A. Zielinski, Ph.D.  
MACC Executive Director



## From the MACC Helpline...

MACC's Helpline is available to Conservation Commissions and other MACC members from 10-2 on Monday through Thursday. The Helpline assists with questions and problems related to all aspects of Commissions' responsibilities.



The Helpline number is (617) 489-3930

### Extensions of Orders of Conditions

- Q. Can an Order of Conditions (OOC) be extended beyond the initial three years?
- A. Yes, the Commission has the option of extending a permit. An OOC can be extended one or more times, for periods up to three years each.
- Q. Can an Order of Conditions which has expired be extended?
- A. No. Unless an extension is requested and granted prior to the expiration date, the OOC is void. The applicant must then refile to continue the project.
- Q. How should the Conservation Commission handle extension requests?
- A. Extension requests should be as carefully scrutinized as Notices of Intents (NOIs). The Commission should review the original order then visit the site and determine how far along the project is, whether construction is occurring according to the approved plan, whether wetland boundary delineations are correct, and whether special conditions are being met. If all is going well and the applicant just needs more time to complete the project, then an extension is appropriate. However, if necessary to protect the interests of the Act, the Commission may impose additional conditions or modify original ones. If the interests cannot be protected through these means, no extension should be given.
- Q. How is an extension granted?
- A. Extensions must be granted through a vote of the Commission at a public meeting, signed by a majority of the members, and recorded in the same way as the original order. Form 7 is used.
- Q. When should a request be denied?
- A. An extension request should be denied, and a new NOI required if: no work has begun (except if delays are unavoidable); new information indicates the interests of the Act are not being protected by the OOC; incomplete work has led to damage to the interests of the Act; or there is a violation of the OOC, Act, or Regulations. Extensions may also be denied if a wetland resource boundary delineation is incorrect, or if the regulations have been amended, e.g. to include wildlife habitat.

## Help MACC Help You!

As we begin a new Fiscal Year we look at how far we have come! After 6 years of effort MACC finally obtained a new Macintosh Computer and laser printer, providing us with full desktop publishing capability. The Newsletter now goes to the printer in camera ready form and we are able to prepare our publications catalog and various brochures in professional form ourselves. However, we still have many other needs - such as a fax machine. We have had approximately \$100 in donations towards our fax fund, but obviously have a way to go.

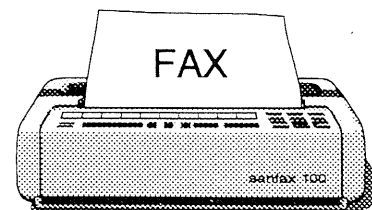
As you send in your membership renewals please remember us and donate as much as you can (you can designate funds for the fax or make a general donation - both are tax deductible).

**MEMBERSHIP DUES ARE OUR PRIMARY SOURCE OF REVENUE. THE MORE WE RECEIVE THE MORE WORKSHOPS AND OPPORTUNITIES FOR YOU!**

We also encourage Conservation Commission Staff and Associates to become individual members and enjoy the full benefits of membership (Conservation Commission dues do not include staff or associates).

As an individual member YOU WILL RECEIVE the MACC Newsletter (delivered to your home 8 times a year), 10% discount on publications, discounted workshop and Annual Meeting admission, as well as access to our Helpline.

Thank you in advance for your generosity and support.



# CALENDAR

July 31, Sept. 11, 25: **Tidal Mudflats and Estuarine Systems.** New England Wild Flower Society. Examine tidal mudflats and estuaries of the region's major river system. Fee: \$125. For registration call (508) 877-7630.

August 21: **Forest Field Day: New Ideas for the Landowner.** Notchview Reservation, Route 9, Windsor. Presented by Berkshire Conservation District & Trustees of Reservations. Learn about trail location, tools, blue-bird boxes, topography, habitat improvement and more. Wildlife, forestry, soils and wetlands presentations throughout the day. 10am-3pm. \$2. For more information call (413) 443-1776.

September 11: **Association of Massachusetts Wetland Scientists (AMWS) Technical Workshops** - Coastal Plain Ponds (daytime), Wetland Delineation Issues in Massachusetts (evening). Discussion presented by Donald Schall & Gary Hollands. Held in the Barnstable area. \$25 includes lunch. Limit 15. For more information contact Don Schall at (508) 888-3900.

September 25: **Floodplain Flora & Ecology.** New England Wild Flower Society. Field program. Focus on ecological relationships and identification of representative floodplain vegetation. Held in Concord along the floodplains of the Concord River. An overview of wetland functions and importance of river protection included. Taught by Sally Zielinski, Ph.D. MACC Executive Director. \$36. For registration call (508) 877-7630.

October 2: **Wetland Boundary Delineation using Aerial Photographs Technical Workshop.** AMWS. Ipswich River Wildlife Sanctuary, Topsfield. Given by Robert Arnold, Salem State College. Fore registration or info contact Rachael Freed (617) 935-2160.

October 2 & 16 : **Surface Water Runoff Workshop.** MACC. Workshop will be held in four regional locations. Watch your mail for details or call MACC for more information.

October 30: **Wetlands Protection Enforcement Conference.** MACC. Northeastern University, Burlington Campus. Instructors include Gregor McGregor, Esq., John Rockwell and others. Watch for details in the next Newsletter or call MACC for more information.

## Agriculture (Continued from page 3)

is the SCS revision then unassailable? If not, what is the process of adjudication?

- Why is the delineation process taken out of the hands of those most experienced (Commissions and DEP) and turned over to SCS which will need training (from an already overburdened DEP field staff) in order to learn how to delineate. It makes no sense!

## Emergencies

The Emergency section of the Regulations (10.06) is rampant with areas subject to abuse.

- In (a)(2), emergency work may be done (after notice) in response to damage due to a storm and/or "other sudden, unforeseen event". What meteorological thresholds are necessary for the classification of a "storm"? (Do April showers bring infinite powers?) And what is an "other unforeseen event"? This is so open-ended as to be ludicrous!

- In (6)(b), the Commission is granted the right to "conduct a site visit to view the work being performed under such notice and to confirm that the information in the notice is correct". That's nice, but what if the information is incorrect? There are no expressed provisions for the Commission to intervene if the information is incomplete and/or erroneous. In all other emergency work in 10.06 (not related to farming), DEP has the right to intervene. As written there is absolutely no semblance of checks and balances. Seemingly, a farmer has absolute authority under an "emergency".

*Experience has taught us that the more loopholes and flaws in a statute, the greater the frequency (and creativity) of abuse.*

## Limited Projects

10.53 is similarly flawed. Where else in the "limited projects" is it mandated that the Commission SHALL approve an activity, except for agriculture? Even worse is the fact that the Commission is forced to approve a project, but cannot require all the information it might find necessary to do a thorough review. (as in the "Requirement for Professional Services" on page 280.23 of the Notice of Intent).

## Conclusions

This article has discussed some of the flaws inherent to the new Ag-Regs. Especially threatening are the games that can be played with this new version. What is to stop

a developer of residential or commercial properties from "taking up farming" long enough to clear wetlands, then to decide his/her commercial (never defined) farming venture is not profitable, so why not turn the North 40 into house lots or a shopping mall? Experience has taught us that the more loopholes and flaws in a statute, the greater the frequency (and creativity) of abuse. These Ag-Regs are replete with such opportunities for mischief.

*MACC welcomes comments and responses to this article.*

*Note: The current wetlands regulations are dated May 21, 1993. A set was mailed to each Commission office. Pages 245 and 246 may be missing from some copies. However, these pages are unchanged. You can copy them from an old set and insert them. The date these pages should carry is November 10, 1989.*

## Helpful MACC Publications

**Legal Decisions Relevant to the Administration of the Massachusetts Wetlands Protection Act**  
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**MACC Model Wetland Protection Bylaw/Ordinance**  
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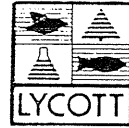
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**Wetlands Protection Act.** Current text of GL Ch.131, sec.40, the law on which the Wetlands Regulations are based. #006 \$ 2.00

**Wetlands Protection Act Regulations.** Department of Environmental Protection. 310 CMR 10.00-10.99. Revised May 21, 1993. Contains new agricultural provisions. Part I: For all wetlands. Part II: Coastal wetlands. Part III: Inland wetlands. Note: #002 and #003 include forms.

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**Wetlands Protection Program Policies.** Department of Environmental Protection policies interpreting the Wetlands Protection Act and Regulations 1982 -1992. Complete Set. #012A \$ 8.00

**A Guide to Understanding & Administering the Massachusetts Wetlands Protection Act.** Elizabeth A. Colburn, Ph.D., Editor. Massachusetts Audubon Society. Second Edition. 1992. #0155 \$ 18.00 [order form on page 6]

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