

MACC Newsletter



Late Summer 1993

Volume XXII Number 5

Wetlands Regulatory Changes Since 1983

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Community Conservation
Since 1961

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Governor Weld Again Vetoes Wetlands Exemption Duxbury Beach Provision Added to Supplemental Budget

Governor Weld has for the second time vetoed an exemption to the Wetlands Protection Act for certain work on Duxbury Beach. A provision of the Massachusetts Fiscal Year (FY) 1994 budget, which was line item vetoed by the Governor, was subsequently added to the FY93 Supplemental budget. This rider, unrelated in any way to budget matters, would have allowed work to go forward on Duxbury Beach during appeals of Orders of Conditions issued by the Duxbury and Plymouth Conservation Commissions (see last issue of Newsletter). MACC has worked vigorously to defeat this proposal.

The legislation appears to have originated when an Order of Conditions for beach maintenance issued by the Duxbury Conservation Commission was appealed by a group of Duxbury Beach residents. The Southeast Regional Office of DEP initially determined that the residents did not have standing to appeal. DEP Boston subsequently overruled this decision. *(continued on back page)*

Wetlands Regulations Revised Again in June Many Recent Changes; More on the Way

DEP has issued a regulatory change intended to lower the filing fee for variance requests - in cases where a variance from the Wetlands Protection Act Regulations is the only way of avoiding a "constitutional taking" of property. This change, effective June 18, marks the fourth time the Wetlands Regulations have been amended in eight months.

Following a series of modifications in November of 1992, the ACEC provisions were revised in April [see page 3], and new Agricultural provisions were issued in May.

In the nearly ten year period since the Wetlands Regulations were "adopted" in their modern form in 1983, they had been amended on only two occasions: when wildlife habitat was added as a protected value under the Act and to include provisions for herbicide applications on rights-of-way in 1987; and when filing fees were instituted in 1989. *(continued on back page)*

SAVE THESE DATES

October 2 & 16
MACC/MACD Workshop:

CONTROLLING
SURFACE WATER
RUNOFF

October 30
MACC Conference:

WETLANDS
ENFORCEMENT

For Registration see page 6

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GOVERNMENT AFFAIRS



Fee Legislation Held in House

Filing Fees. H.2842, the Wetlands Filing Fee legislation, is in the House Committee on Bills in Third Reading. This MACC priority bill was successful in the first of two necessary votes in the House. A roll call vote followed the debate, and we now know there is some opposition. The names of Representatives voting in opposition were printed in the Early Summer 1993 Newsletter. H.2842 simplifies release of wetlands filing fee funds to Conservation Commissions following written approval of the selectmen or mayor. It replaces the present requirement for a vote of town meeting or city council.

This bill has moved further than in any previous year. MACC wants to see passage this year. If your legislator voted in opposition, urge him or her to bring the bill to the floor and to support it. MACC members in Rep. DiFilippi's district should contact his office. He is leading the opposition.

Design Review Fees. H.2841, also in House Third Reading, gives Commissions authority to collect reasonable fees (in addition to filing fees) from applicants for professional review of projects and plans under the Wetlands Act. Design review fees are quite common provisions of local wetland bylaws, and available to several other municipal boards. Also sponsored by Rep. Steven Angelo, H.2841 passed on a voice vote. We anticipate that legislators opposed to H.2842 also oppose H.2841.

No General Fund Support for NHESP

No funds for the Massachusetts Natural Heritage and Endangered Species Program (NHESP) were included in the final Fiscal Year (FY) 1994 state budget or the FY93 supplemental budget. MACC worked intensively throughout the budget process to gain legislative support when it became obvious that the program was in serious jeopardy. NHESP funding has depended to a great extent on revenues from the Non-Game Checkoff on the state income tax form since 1987. These contributions have steadily declined over the past several years.

There is some hope for alternative funding for the immediate future, but a long term source of general fund money is essential for this important agency to survive. MACC is working with other environmental organizations and sportsmen's groups to secure permanent funding.

River Protection Act Still in House

Having passed the Senate, the River Protection Act (H.1620) has moved to House Ways and Means. Calls to your Representatives are needed, especially if they are members of the Committee. Urge them to send H.1620 to the House floor for a vote.

The bill establishes a setback from certain rivers and streams to provide a buffer, protect water quality, and create a wildlife corridor. Variances may be granted by Conservation Commissions in cases of constitutional hardship. MACC is part of the Rivers Campaign, a coalition of environmental groups working to pass this bill. The legislation is supported by Governor Weld.

Golf Course Bill Held

Legislation to exempt 'normal maintenance and improvement' of golf courses from the Wetlands Act (H.1707) is being held by the Natural Resources and Agriculture Committee which had earlier voted to give a revised bill a favorable report. In June MACC and Massachusetts Audubon held a joint press conference at a public golf course to increase awareness of the legislation.

Opposition is mounting. The golf course industry is trying to create a green image and sensitively manage this important form of open space. The legislation would run counter to such a positive industry image. MACC opposes this legislation, in any form. We urge calls and letters to the Chairs of the Committee, Sen. Robert Durand and Rep. Steven Angelo.

Phosphate Reduction Bill is Law

Legislation to reduce phosphates in Massachusetts waters was signed into law by Governor Weld on July 30. Chapter 124 of the Acts of 1993 bans (with some exceptions) household cleaning and laundry products with more than trace amounts of phosphorus from being distributed, sold, or used in Massachusetts after July 1, 1994. Exemptions for agricultural operations and lead paint removal are included.

Industrial products can be exempted if no alternatives are available. Manufacturers of products sold in the Commonwealth must provide product content and research data relative to health and the environment, and must label the products regarding content. Fines of up to \$5000 per day can be imposed by the Department of Public Health.

Changes to the Wetlands Regulations Since 1983

Regulations for the Wetlands Protection Act (G.L. Chapter 131, section 40) were first adopted in 1974. Below is a summary of the changes made to these Regulations (310 CMR 10.00 - 10.99) since a major rewrite in 1983.

Effective Date	Topic	Section of 310 CMR 10 Added/Revised
1974	Regulations first adopted	-----
1974 - 1983	Various amendments	-----
April 1, 1983	Modern regulations promulgated <ul style="list-style-type: none"> • Part I (Regulations for All Wetlands) completely revised; minor changes made to Part II (Additional Regulations for Coastal Wetlands); and Part III (Additional Regulations for Inland Wetlands) added. • Established: definitions and boundaries for resource areas; jurisdiction over 100 foot buffer zone; and presumptions of significance and performance standards for each resource area. 	10.00 - 10.99
November 1, 1987	<ul style="list-style-type: none"> • Wildlife habitat provisions added (covering vertebrate animals). Include particular protection for rare vertebrate and invertebrate species habitat; and vernal pools. • Rights of Way (ROW) provisions added. Created presumption that herbicide applications on ROW according to plans approved by the Department of Food and Agriculture will not alter wetlands. 	10.01(2); 10.04; 10.37; 10.59; 10.60; and other sections 10.03(6); 10.05(3)
November 10, 1989	<ul style="list-style-type: none"> • Filing fees instituted for Notices of Intent and Appeals: Activities in each category (Fee amounts appear in 801 CMR 4.02) 	10.03(7)(c)
November 20, 1992	<ul style="list-style-type: none"> • Pond definition corrected • Revision of filing requirements relative to rare species habitat Includes form changes: Notice of Intent; Abbreviated Notice of Intent, and General Instructions for these. • Filing fee reductions for control of nuisance vegetation, new agriculture or aquaculture projects, raising or lowering of surface waters for lake drawdowns • Definitions numbered 1 - 95. (<i>Current Regulations do not reflect this change.</i>) • Prefaces of former revisions moved to end 	10.04 10.37; 10.59 10.99 10.03(7)(c) 10.04 Not numbered
April 23, 1993	<ul style="list-style-type: none"> • Elimination of 5000 square foot rule in Areas of Critical Concern (ACECs) 	10.55(4)(e)
May 21, 1993	<ul style="list-style-type: none"> Agriculture provisions revised including: <ul style="list-style-type: none"> • Definition of agriculture • Emergencies • New limited project 	10.04 10.06(6) 10.53(5)
June 18, 1993	<ul style="list-style-type: none"> • Variance fee for 'taking' claim decreased 	10.03(7)(e)

New ACEC Provisions Eliminate 5000 Square Foot Rule

DEP has strengthened the Wetland Regulations (310 CMR 10.00) for projects proposed under the Wetlands Protection Act in Areas of Critical Environmental Concern (ACECs). As of April 23, 1993 fresh water Bordering Vegetated Wetlands (BVWs) in any ACEC, whether coastal or inland, cannot be filled under 10.55(4)(b&c). This eliminates the rule which normally allows filling of up to 5000 square feet of BVW (or 500 square feet in a finger) as long as it is replicated. In other words, no fill is allowed. This change does not apply to "limited projects", including those which are water-dependent, or any to other section of the Regulations.

The DEP Wetlands Program

A Conservation Commission's Perspective



The following letter was sent to Environmental Affairs Secretary Trudy Coxé subsequent to a recent meeting between the Secretary and Cape Cod Conservation Commissions. MACC requested and received permission from the Falmouth Conservation Commission to reprint it.

MACC is interested in knowing how other Commissions feel about the issues raised here.

August 4, 1993

Dear Secretary Coxé,

The Falmouth Conservation Commission is recognized by many to be an extremely conscientious and hard working Commission. There is no doubt that the workload of Falmouth's Conservation Commission is one of the busiest in the state. We pride ourselves on being a dedicated and competent board, trying to the best of our ability to protect wetland resources. Our task has become increasingly difficult over the years. Even only a couple of years ago during the building "boom", marginal building lots involving wetlands were bypassed because of the additional time and expense required by legal paperwork and environmental permits. Now that development has already encompassed the majority of non-wetland lots, the pressure increases daily to develop the more marginal wetland lots. It becomes imperative that Conservation Commissions are not pressured into sacrificing wetlands resources for the sake of building or development. Yet this is the task we face on a weekly basis: permitting development, and mitigating its impact to the best of our ability.

Cape Cod is blessed with a unique environment of fragile wetland resources. A large part of the reason people choose to live or vacation here is because of the natural beauty, and this includes wetlands. The freshwater and salt ponds, coastal beaches, dunes, barrier beaches, salt marshes, and bogs are all part of the natural wetland scenery for which the Cape is highly famous. Many of these resources are becoming stressed and degraded. Conservation Commissions are provided legal tools for managing these

resources, i.e. M.G.L. 131, section 40, 310 CMR 10.00, and town wetland bylaws and Regulations. However, these tools are of little use unless they are consistently and strictly upheld and enforced. We do the very best that we can. Our greatest frustration, anger and disappointment is the lack of support we feel we receive from the DEP (Department of Environmental Protection). In the vast majority of cases appealed to the Southeast Region DEP Office in Lakeville, the state will issue a Superseding Order negating the action of the Falmouth Conservation Commission in protection of wetlands. We have found the DEP's interpretations of 310 CMR 10.00 often to be vague, inconsistent, and in some cases contradictory. The decisions rendered lean in favor of the developer or development, at the expense of, and further loss to, wetlands. One can't help but wonder if these decisions reflect a sort of bureaucratic laissez-faire, or even worse, political-interference in bureaucratic decisions to pressure leniency in the regulations' interpretation.

Conservation Commission members, and their professional staff, find this attitude and approach so often encountered with the DEP to be frustrating and demoralizing. Conscientious Commissioners, both past and present, become disillusioned with the task of wetlands protection and become less willing to serve out their tenures, or decline reappointment. In my tenure with this Commission, I can clearly state that the state agency most responsible for the greatest loss and degradation of wetlands is the DEP itself.

If the rapid loss and degradation of Cape Cod wetlands is going to be halted, it will take consistent interpretation of the state and local wetlands regulations and better communication, cooperation and wetlands enforcement between local Conservation Commissions and the DEP.

Recently, the Falmouth Conservation Commission has lost several appeals of the town wetland bylaw in Superior Court. This is incredibly frustrating, because despite having a strong local bylaw, the judges see that a DEP Superseding Order

has been issued on a case, and are influenced by that decision. When environmental wetland appeals come before a non-environmental judge (and most judges are), the case is handled as a property dispute case. The court system seems unable to cope with rendering decisions based on understanding environmental issues and regulations. Time after time, the judge follows the position of the DEP approval. As a result, the environment loses.

In September, 1992, Falmouth Conservation Commission members met and discussed issues with George Crombie, then the new Director of the SE regional DEP office. It was our understanding at that meeting that his policy was going to give strong support to local Conservation Commissions and their decisions. Additionally, Mr. Crombie indicated that technical assistance would be forthcoming from the regional office, and more consistency in review of appeals, with possibly one agent assigned to each town. Since that meeting, there has been no observable change in DEP policy or support, in the opinion of this Commission.

We would like to recommend a meeting that would bring together the Secretary of Environmental Affairs, the SE Regional DEP Director, and representation from Conservation Commissions on the Cape. This could be done through one of the quarterly meetings held at the Cape Cod Commission offices in Barnstable. It would provide a valuable forum to discuss the issues of critical environmental concern that Conservation Commissions face daily on the front lines of wetlands protection. It would strengthen the communication between the regional DEP and local Conservation Commissions, and work towards the perception of lack of support.

Thank you for your support in this matter.

Sincerely,

Cameron E. Gifford, Chairman
Pamela S. Truesdale, Administrator
Falmouth Conservation Commission

CALENDAR

September 17: **Programmatic General Permit (PGP) Information Session.** US Army Corps of Engineers. Covers new permit to authorize "minimal-impact" projects in wetlands and waterways. Corps Office, Waltham. All sessions 2:30-4:30 pm. For more information contact Monica Stillman (617) 745-8862. Additional dates and locations include: September 20: Auburn Town Hall, Auburn
September 23: Sandwich Town Library
September 24: Springfield Technical College, Putnam Hall, Springfield.

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

October 1-3: **Eco Expo.** World Trade Center, Boston. Environmental consumer products and services. For more information call (617) 484-4418.

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

October 2 & 16: **Controlling Surface Water Runoff Workshops.** MACC/MACD in association with SCS. Includes classroom instruction and field critique of sites. Bring a bag lunch. Held in four regional locations. See page 6 for details & registration.

October 30: **Wetlands Enforcement Conference.** MACC. Northeastern University, Burlington Campus. Instructors include Gregor McGregor, Esq.; John Rockwell; Ann Berwick, Office of Attorney General; Anne Kelly of the Mass. Environmental Strike Force. To register see page 6 or for more information call MACC.

November 6: **Ecological Restoration: A Northeastern Perspective.** New England Wild Flower Society. A symposium to discuss restoration practices for wetlands, forests, rare/endangered plant species, urban landscapes and habitat. Salem State College, 8:30 am - 4:40 pm. For registration call (508) 877-7630 or (617) 237-4924.

February 26, 1994
MACC Annual Meeting.
Holy Cross College, Worcester.

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



Variations from the Wetlands Act

Q. *What is a variance and who grants it?*

A. A variance is a type of exemption - a waiver of one or more provisions of the wetlands regulations which would normally apply to a project. The language is identical for coastal wetlands [10.36] and inland wetlands [10.58]. A variance can be granted only by the Commissioner of DEP.

Q. *What type of project might qualify for a variance?*

A. The regulations say variances are intended to be employed 'only in rare and unusual cases'. A project must meet all three of the following criteria: (1) no reasonable conditions can be imposed or no alternatives exist which would make the project comply with the regulations; AND (2) sufficient mitigation is planned; AND (3) there is an overriding public interest to the project OR without a variance a 'taking' of the property would occur. A project with 'public interest' is usually a government or public project such as a gas or utility line.

Q. *At what point in the permitting process can a variance be requested?*

A. There is a distinction between projects within a single community and those crossing several municipalities. In the former case a variance can only be requested after a project has received a Superseding Order of Conditions. Then the applicant can request an adjudicatory hearing or a variance or both.

For 'functionally related' projects in contiguous municipalities a variance may be requested before any Notice of Intent (NOI) is filed with the Conservation Commission. If a variance is granted for certain portions of the regulations, the applicant then files a NOI with each Conservation Commission. The Commission treats the filing in the usual manner except for those provisions which have been waived. Whatever conditions have been imposed by the Commissioner of DEP for the waived provisions are added to those developed by the Conservation Commission for the rest of the project.

Q. *What is the Conservation Commission's role in the actual variance procedure?*

A. The Commission must be notified when a variance has been requested. It may become a party, and should comment on the request within the 21 day time period. The DEP Commissioner's decision is appealable within ten days. The Conservation Commission should carefully review the decision. An adjudicatory hearing is held upon appeal. If a variance has been granted the Commission should decide whether it is warranted, and, if not, appeal the decision.

Sally A. Zielinski, Ph.D. Executive Director

Chapter 91 Amnesty Extended

The amnesty period under G.L. Chapter 91 has been extended for two years - until October 4, 1995. The three year amnesty was originally scheduled to end in October 1993. This change occurred through an outside section added to the Fiscal Year 1994 state budget as passed in July. Chapter 91 requires licenses for fill, structures, and dredging in present and former tidelands, great ponds, and most rivers and streams. Revised Regulations (310 CMR 9.00) were issued in 1990. These include amnesty provisions for the licensing of certain unauthorized fill and structures built prior to January 1, 1984. For information about this program call the Department of Environmental Protection, Division of Wetlands and Waterways, at (617) 292-5695.

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Lunch*

October 2:

Central Region: Shrewsbury Town Hall, Shrewsbury
Carl Gustafson, P.E., SCS State Conservation Engineer
Robert F. Daylor, President, Daylor Consulting Group, Inc.
Albert Averill, Jr., SCS Soil Survey Project Leader
Patricia V. Devine, SCS Civil Engineer

Southeast Region: N. Attleboro Jr. High School
Peter C. Fletcher, SCS Soil Survey Project Leader
Dennis J. Lowry, Principal Wetland Scientist, Fugro-McClelland
Laurence Boutiette, Jr., P.E., SCS Civil Engineer
Raymond P. Curran, Jr., SCS Civil Engineer

October 16:

Western Region: location to be announced
Carl Gustafson, P.E., SCS State Conservation Engineer
Albert Averill, Jr., SCS Soil Survey Project Leader
Patricia V. Devine, SCS Civil Engineer

Northeast Region: Topsfield Fairgrounds, Topsfield
Peter C. Fletcher, SCS Soil Survey Project Leader
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MACC Conference: WETLANDS ENFORCEMENT

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Included*

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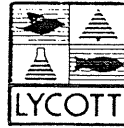
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Duxbury Veto (continued from front page)

After a lengthy delay of over two years a Superseding Order of Conditions (SOC) was issued a few weeks ago, upholding the Conservation Commission's Order of Conditions, and adding some conditions protecting rare species habitat. This SOC was not appealed. Work can now go forward, and the 'need' for any exemption has been removed. The exemption has been supported by Senator Brian McDonald and Representative Charles Mann.

Sally A. Zielinski, Ph.D. Executive Director

Wetlands Regulations Revised (continued from front page)

More changes are in the offing. Several new "limited projects" have already been proposed by DEP and undergone the required review under the Massachusetts Environmental Policy Act (MEPA). These "limited projects" include: lowering lake or pond water levels for dam safety reasons; removal of vegetation around airports; development and operation of new water supply wells; and capping of old landfills. All of these projects currently require a variance if more than 5000 square feet of wetland would be altered. Converting them to "limited projects" would place control of permitting with Conservation Commissions. Former Environmental Affairs Secretary Susan Tierney generally supported creation of these "limited projects" in her MEPA certificates. These four and possibly a fifth "limited project", for remediation of hazardous waste sites, are expected to be promulgated within the next year.

In addition, the forestry and aquaculture sections of the agricultural provisions are under review, and regulatory changes are likely.

Finally, DEP is considering amending the boundary definition for bordering vegetated wetlands. An advisory group which began working on a boundary delineation policy over two years ago, has recently been reconvened. Current efforts are focused on a possible regulatory change. A revised definition could allow hydric soils as well as vegetation and the water regime to be used in determining boundaries.

Sally A. Zielinski, Ph.D. Executive Director

POSITIONS AVAILABLE

Carlisle: Conservation Administrator (part-time) - 20 hrs/wk. Duties include administering the Wetlands Protection Act, performing site inspections, supporting Conservation Commission, managing conservation land, coordinating with other town boards and offices, supervising 15 hr/wk secretary. Requires degree in environmental field or related experience. Three years Wetlands Act experience strongly preferred. Send resume with salary history to: Conservation Commission, PO Box N, Carlisle, MA 01741.

Needham: Conservation Agent (part-time) - Immediate opening. Assisting the Conservation Commission with site visits; making recommendations regarding jurisdiction, compliance and enforcement; preparing agendas for meetings; preparation of Orders of Conditions and other documents; and maintaining files. Understanding of Wetlands Protection Act preferred. 9 1/2 hours a week, hours flexible. Apply in writing to: Needham Conservation Commission, Town Hall, Needham, MA 02192.

Hingham: Conservation Officer - Applicant should be college graduate skilled in Wetlands Protection Act enforcement, conservation land use practices, local government procedures, open space management, and funding sources. Send SASE and resume to: Executive Secretary, Town Hall, 7 East Street, Hingham, MA 02043.

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