



HELP MACC WITH LEGISLATIVE ACTION

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Massachusetts Association of Conservation Commissions

Community Conservation Since 1961

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MACC is a Member of the Environmental Federation of New England

Abutter Notification to be Required under Wetlands Act Applicants Responsible for Notice and Costs

Effective April 13 applicants filing Notices of Intent under the Wetlands Protection Act will be required to notify abutters to project sites. Chapter 472 of the Acts of 1993, requiring abutter notification, was signed into law by Governor Weld at the end of the last legislative session.

The legislation is summarized as follows:

- Abutters include those immediately adjacent, across a road or water body, and in another municipality if within 100 feet of the boundary of the property where work is proposed

- The list of abutters is determined by the municipal assessors' tax list

- Notification must be given at the time a Notice of Intent (NOI) is filed - by hand delivery or certified mail

- Notification must be given by and is at the expense of the applicant

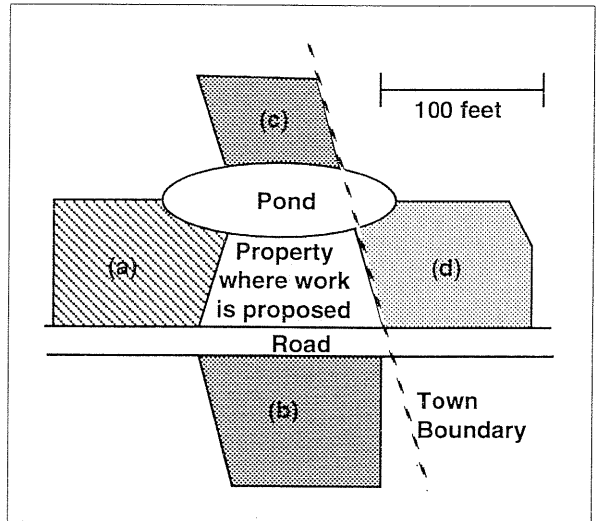
- The notice must tell abutters where they can read or get a copy of the NOI and how they can find out where and when the public hearing will be held

- The Conservation Commission must be given proof of delivery, e.g. signature of the landowner or mailing receipt cards

- Notice is not required for projects of the Massachusetts Highway Department.

DEP is in the process of drafting appropriate regulations for this provision. **Commissions have the opportunity to provide input at two different stages of the process: immediately, and when the draft regulations are issued and public hearings held.**

DEP and MACC are particularly interested in how the regulations can be written to meet the requirement that abutters have the opportunity to review the NOI and learn the date and place of the hearing. If all Conservation Commissions had permanent offices and full-time staff, the notification could have abutters examine the NOI and inquire about the date of hearing by contacting the Commission office at the city or town hall. **DEP wants to know how applicants file NOIs, how interested persons reach** (continued on page 5, Abutter)



Abutters include those within 100 feet of the property line where work is proposed: (a) adjacent; (b) across a road; (c) across a waterbody; (d) in another municipality.

\$4 Million Available for Self Help Grants
See page 2

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Five New Limited Projects Added to Wetlands Regulations

Amendments to the Wetlands Regulations creating five new limited projects (LPs) and changing emergency certification procedures became effective January 1. According to DEP, these provisions are intended to promote solid waste landfill closure, airport safety, dam safety, development of safe drinking water supplies from groundwater, and cleanup of releases of oil and hazardous materials. A packet of information mailed to each Conservation Commission in December includes: the preface to the new regulations, revised pages and the filing fee amounts. The new provisions are outlined below.

Landfill Closure LP [310 CMR 10.24(7)(c)(4) and 10.53(3)(p)]. Only landfills mandated for closure by DEP are eligible for limited project status.

Airport Tree Clearing LP [310 CMR 10.24(7)(c)(5) and 10.53(3)(n)]. Activities permitted under this LP are restricted to vegetation clearing activities around landing zones required to comply with Federal Aviation Administration (FAA) safety regulations. The LP does not apply to new airport facilities or expansions of existing airports.

Public Groundwater Supply LP [310 CMR 10.53(3)(o)]. LP covers exploration efforts for new supplies and also projects approved by DEP under the Water Supply Source Approval process (310 CMR 22.21) and/or the Water Management Act (G.L. Ch. 21G).

Dam Safety/Lake Drawdown LPs [310 CMR 10.53(3)(i)&(m)]. Amends existing LP to include dams and reservoirs. New LP applies to drawdowns in response to orders or recommendations from DEM Office of Dam Safety.

Releases of Oil and Hazardous Materials LP [310 CMR 10.06(3)&(7), 10.24(7)(c)(6) and 10.53(3)(q)]. New LP applies to response actions necessary to protect health, safety, public welfare and/or the environment, but which cannot meet regulatory standards without a variance. Revised emergency procedures eliminate delays in response.

Emergency Certification [310 CMR 10.06(5)]. Gives DEP authority to review Conservation Commission denials and failures to act on requests.

Self Help Money Available : Applications Due June 1

The Executive Office of Environmental Affairs (EOEA) is releasing \$4 million for the Self Help and Urban Self Help Programs. These funds were part of the 1987 Open Space Bond, and have been frozen for over four years. Both Programs are administered by EOEA's Division of Conservation Services (DCS). The Self Help Program provides funds for open space acquisitions, e.g. forests, wetlands, and rare species habitat. The Urban Self Help Program funds outdoor recreation facilities such as parks, playgrounds, golf courses, zoos and ski areas. Federal Land and Water Conservation Fund monies, administered by DCS, are also expected to be available - subject to congressional appropriation.

Applications for all programs are due June 1 and will be pooled. Reimbursement for up to 70% of a project's cost may be sought. However, the maximum award will be \$500 thousand, and the percentage available to a given community depends on its equalized valuation per capita decile rank. Communities must have current Open Space and Recreation (OS&R) Plans, and meet current anti-discrimination, housing and handicapped access requirements. Applications and regulations, as well as OS&R report requirements are available by calling Joel Lerner, Director, DCS at (617) 727-1552 x290.

Fate of 1993 Legislation Important to Commissions

BILLS MACC SUPPORTED

S.1620 River Protection. Passed Senate. Died in House Ways and Means. Refiled.

H. 2841 Design Review Fees. Died in House Committee on Bills in Third Reading. Refiled.

H.2842 Filing Fees. Passed House following defeat of proposed floor amendments. One successful vote in Senate. However, as clock ran out in early January, the bill was in Senate Committee on Bills in Third Reading. Refiled.

H. 3033 Anti-SLAPP. Passed Legislature. Vetoed by Governor. Refiled.

H.5534. Abutter Notification. Signed into law.

H.5568. Open Space Bond. Filed near end of year. Following a well attended public hearing in which support was overwhelmingly in favor of bill (with some modifications), it failed to clear the Natural Resources and Agriculture Committee. This was not unexpected since the bond is necessarily lengthy and complex. MACC strongly supported the bill however expressed concern over the low amount of funding proposed for the Self Help (continued on page 6, **Legislation**)

Governor Vetoes Anti-SLAPP Bill Help Needed to Move Refile

Legislation to discourage Strategic Litigation Against Public Participation (SLAPP suits) was passed by the legislature near the end of 1993 but vetoed by Governor Weld.

This important legislation facilitates dismissal of lawsuits based upon citizens' exercise of their constitutional rights to free speech and to petition the government. The bill was prepared and guided through the legislature by Rep. David Cohen with the assistance and support of the Massachusetts Civil Liberties Union, MACC, and other environmental groups.

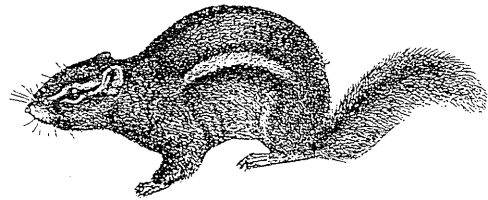
The anti-SLAPP legislation has been refiled for 1994 and is presently in the Joint Committee on the Judiciary. There are two identical bills: S.893 and H. 1520. MACC believes that since there is strong support in the legislature for anti-SLAPP legislation, if a bill can be passed early enough in the 1994 session, good potential exists for an override of a gubernatorial veto.

To assist in achieving quick passage, write to or call the committee and your senator and representative. All correspondence should be sent to: State House, Boston, MA 02133. The main phone number is (617) 722-2000. If you wish to be alerted at times when key actions are needed, fill in the MACC Legislative Action form below.

Methuen Authorized to Appoint Voting Alternate Commissioners

A Home Rule Petition from the City of Methuen has been approved by the legislature and signed by Governor Weld. Under H.5526 of 1993 the community may adopt an ordinance allowing the mayor to appoint up to two alternate Conservation Commissioners - with terms as established for other Commissioners under the Conservation Commission Act (G.L. Ch. 40 sec. 8c). When the Commission lacks a quorum for reasons of absence, inability to act, or conflict of interest, the chair may designate an alternate to sit on the board.

The Town of Mashpee has had a similar system of voting alternates in place since 1986 (Chapter 548 of the Acts of 1986). Voting alternates can only be established through a special act of the legislature creating an 'exception' from the Conservation Commission Act.



MACC Needs Your Help With Legislative Action

Each year MACC reviews thousands of bills which are filed with the Massachusetts Legislature. We identify and follow several dozen of these which are important to wetlands and open space protection and the interests of Conservation Commissions. We work to pass beneficial bills and stop detrimental legislation.

We need your help to enhance MACC's "clout" at critical times in the legislative process. We ask you to let us know, by filling out the form below, which bills you are interested in and willing to write letters or make calls to legislators. We will then contact you as the need arises, and provide you with appropriate materials and guidance.

MACC LEGISLATIVE ACTION

I would like to help with legislation important to wetlands and open space protection and the interests of Conservation Commissions. I am willing make phone calls and/or write letters to key legislators whenever possible. I realize these actions are often needed with short notice.

Name: _____ Daytime Phone: (____) _____ Fax: (____) _____

Address: _____ City/town: _____ Zip: _____

Conservation Commission: _____ Commissioner _____ Administrator/Agent

Please check those bills you are interested in working on:

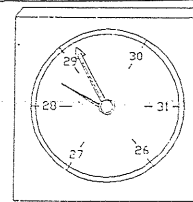
River Protection Anti-SLAPP Filing Fees Design Review Fees Open Space Bond

Other bill numbers or topics: _____

Send to MACC at 10 Juniper Road, Belmont, MA 02178. Call (617) 489-3930 if you have questions.

Bylaw Barometer:

So what Are Your New Year's Resolutions? (for your Wetlands Bylaw... and its Regulations)



Most of us make New Year's resolutions for ourselves (and hopefully keep them). What about your Wetlands Bylaw (and regulations¹): are they all that they can be? If not, you are missing a chance to offer significantly more protection to wetlands interests than the Wetlands Protection Act (the Act).

So here is a checklist to help your Commission decide if it has done all that it can to "give itself the tools" for truly enhanced wetlands protection. It is by no means an all-inclusive list, and we'd love to hear your comments and /or additions.

IN 1994, THE _____ CONSERVATION COMMISSION RESOLVES TO IMPROVE ITS WETLANDS PROTECTION BYLAW/REGULATIONS BY:

Bylaw

√ 1. Giving the Bylaw specific language that **empowers the Commission to adopt regulations (after a public hearing)**. Many Bylaws do not grant this authority to the Commission².

√ 2. Giving the Bylaw specific language that **sets it apart from the Act, i.e., states categorically that its provisions (including regulations) can be and are intended to be stricter/more protective than the Act**. Court decisions have struck down Commission decisions based on Bylaws that merely mimic the Act.²

√ 3. Giving the Bylaw specific language that **sets its definitions apart from those in the Act.*** Though some definitions could remain the same as in the Act, many of the Act's definitions are lacking in important ways. Definitions are not insignificant; they often can clarify and even expand jurisdiction and/or enhance performance standards.

√ 4. Giving the Bylaw specific language that **expands resource areas subject to protection (beyond those of the Act)**.² For example, does your bylaw (specifically) protect wetlands not bordering a waterbody. Does it protect vernal pools, mapped rare species areas? Note here, that you could extend these protections in your regulations if not in the body of the Bylaw. It is always, however, legally stronger to have provisions in the Bylaw rather than in the regulations.

√ 5. Giving the Bylaw specific language that **expands wetlands interests - sometimes called "wetland values"**.² For example, you can protect "recreation" (better define it, too!)

√ 6. Giving the Bylaw specific language that **confers upon the Commission (and staff) the right to enter property for enforcement purposes**.² Though the Grant Amendment to the Act says you do have entry rights, it is, in fact, limited legally. So are the Bylaw provisions, but Bylaw language adds strength for legitimate entry (for enforcement and other Bylaw administrative functions).

Regulations

√ 7. Adopting a regulation for **inland banks** that expands the topographic limit where extra protection is needed. For example, ours (in Mashpee) extends protection where slopes are steep (1:4 or greater) by defining the top of the bank as the point where (any) slope becomes less than 1:4. This has helped where alterations were proposed on steep slopes leading to waterbodies (or wetlands!) Unless unavoidable, we deny such alterations; where no alternative exists (usually on smaller lots), best available technologies must be employed for erosion control.

√ 8. Adding a **naturally vegetated buffer strip** requirement (between Resource Areas and altered areas).

√ 9. Adding **submittal requirements** to leave little doubt as to what you want to see on a plan and/or staked/delineated in the field.

√ 10. Adopting **filing fees**, such as **double/after-the-fact fees** for work started without a permit and a **reduction of (Town Bylaw) fees** for (true) resource area improvement work.

√ 11. Providing **procedural requirements** such as for abutter notification or Amended Order of Conditions. We (Mashpee) have a two-tiered Request for Determination of Applicability system, with a minimum fee and no (mailed) abutter notification for projects within the buffer zone that are of minimal scope/alteration.

√ 12. Specifying **replication requirements** that reflect the difficulty of successful replication, i.e., submittal requirements that demand specific information about the wetland proposed to be replaced and strict performance standards to recreate it not only in appearance, plant community, hydrological regime, and soils, but in function.

√ 13. Adding **Land Subject to Coastal Storm Flooding performance standards**. There are none (other than the State Building Code) in the state wetlands regulations; though provisions are being drafted for this resource area, they are some time away. In the meantime, a few towns (like Mashpee) have some (very necessary) standards in place.

√ 14. Adding **nutrient-loading requirements**. Some saltwater bays (especially those with large watersheds and small tidal exchange) have begun to show the unhealthy effects of too much nitrogen. Mashpee has adopted the first (we believe) Wetlands Bylaw limiting nitrogen (as nitrate) from septic systems. It's not a panacea, just a beginning, and not universally "popular" but popularity and resource protection do not always go "hand in hand".

Have fun with your **New Year's "Regulations"!**

Robert Sherman
MACC Director
Mashpee Conservation Agent

¹ Remember the distinction between your Bylaw and its regulations. The regulations "flesh out" the provisions of your bylaw. The Bylaw is a "tree", with its separate sections being the "branches". The regulations are the specifics, the "leaves" on the "branches". But just like a leaf must be attached to a branch a regulation must be derived from a specific section (or subsection) of the Bylaw.

² There is language in the MACC model bylaw for this provision.

MACC has a new Wetlands Bylaw & Regulations package to assist Commissions in writing, passing, updating & using local bylaws. \$12.00 plus \$3.00 shipping & handling. (Publication #011)

Filing Fee Bill Almost Passes

Legislation to release filing fee monies to Conservation Commissions upon the signature of the mayor or selectmen came very close to passage in 1993. The bill successfully passed the House and received one of two necessary votes in the Senate. We are confident that this legislation can be passed in 1994. The bill has been refiled and written testimony will be accepted at the public hearing before the Natural Resources and Agriculture Committee on April 5. Letters should be sent to the committee at State House Boston, MA 02133 and contact both your Senator and Representative and urge them to work to move the bill quickly.

Abutter (continued from front page)

the Commission with questions about hearing dates or to review NOIs in communities without an office or staff, and how Commissions think these regulations should be written.

There has previously been no requirement that abutters to project sites receive notice. Thus they frequently miss the opportunity to attend the public hearing and provide information and comment. Abutter notification requirements are found in many municipal bylaws and has been an important provision of the MACC model bylaw. Making the regulations as consistent as possible with local bylaw requirements is also a concern of MACC. **Commissions should call Mark Vershbow at DEP immediately with input on these matters (617/556-1180).**

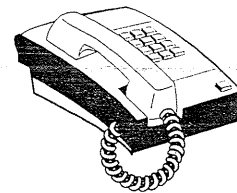
Final regulations may not be issued prior to the April 13 effective date of the legislation. However, DEP will be sending information to each Commission regarding how to proceed in the interim.

The legislation which was approved was substituted for a bill which would have required Conservation Commissions to provide and pay for abutter notification at municipal expense, not only for wetlands cases but for every agenda item related to land. MACC worked with the sponsor of the original bill, Representative Joan Menard, to achieve the substitution. The broader bill had already passed the legislature once and was vetoed following objection by MACC but had been refiled.

Sally A. Zielinski, Ph.D. 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

More on Filing Fees [See also Late Winter 1992/93 Helpline]

- Q. Are Highway Department projects exempt from Wetlands filing fees?*
- A. Filing fees under the Wetlands Protection Act must be paid by all applicants except: the federal government, the Department of Environmental Protection, and cities and towns. Thus the state Highway Department is not exempt from fees, but local highway departments are. Note: certain projects of the state Highway Department (bridge repair and replacement) are exempt from the Wetlands Act and, of course, no fees will be paid for these.
- Q. Where are fee exemptions listed?*
- A. Exemptions from fees are listed in the regulations which define the filing fee amounts (801 CMR 4.02). The Wetlands Act regulations (310 CMR 10.03(7)) list the categories to which each fee amount applies. If your Commission needs a copy of these regulations send a self addressed stamped envelope to MACC.
- Q. What is the appropriate wording for a town meeting warrant article to release filing fees from the Wetlands Protection Fund back to the Commission?*
- A. Sample warrant language is: "To see if the Town will vote to authorize the Conservation Commission to expend a sum of money from the 'Reserve for Appropriation for Wetlands Protection Fund' account, those sums collected pursuant to Chapter 287 section 54 of the Acts of 1989, which provides that the Town's share of the Notice of Intent Filing Fees under the Wetlands Protection Act shall be expended solely for the performance of its duties associated with administering the Act, or take any action thereon."

For complete information on Filing Fees obtain the new Wetlands Protection Program Filing Fee Packet available from MACC for \$3.00 plus 1.00 shipping and handling. (Publication #175)

Text of Abutter Notification Amendment (Chapter 472 of the Acts of 1993)

Section 1. Section 40 of chapter 131 of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting after the first paragraph the following paragraph:

Any person filing a notice of intention with a conservation commission shall at the same time give written notification thereof, by delivery in hand or certified mail, return receipt requested, to all abutters within one hundred feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and in another municipality or across a body of water. Said notification shall be at the applicant's expense, and shall state where copies of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the conservation commission.

Section 2. The notification required by Section 1 of this act shall not apply to projects of the department of highways.

CALENDAR

March 26: **Identifying Wetland Shrubs.** Mass. Audubon Wachusett Meadow Wildlife Sanctuary, Princeton. Learn to recognize wetland shrubs. To register call (508) 464-2712.

April/May: **Revised 401 Regulations Workshops.** DEP. One in each DEP region. For details contact Nancy Lin at (617) 556-1109.

May 7: **Vernal Pool Certification Workshop.** Mass. Audubon Wachusett Meadow Wildlife Sanctuary, Princeton. How to recognize and certify vernal pools. Includes certifying a vernal pool on-site. To register call (508) 464-2712.

MACC SPRING WORKSHOPS

May 14: **Wetland Plant Identification** MACC. Regional workshops through Massachusetts. Learn to recognize and classify wetland indicator plants as well as gain a basic understanding of wetland ecology. Cosponsored by Massachusetts Audubon.

Moosehill Wildlife Sanctuary, Sharon
Wellfleet Bay Wildlife Sanctuary, Wellfleet
Wachusett Meadow Wildlife Sanctuary, Princeton

Additional locations and dates to be announced in the next issue of the newsletter. \$15 for MACC and Audubon members/\$25 for non-members. See the next newsletter for complete registration information, or call MACC at (617) 489-3930.

May 21: **Advanced Wetland Delineation Techniques.** MACC, in cooperation with the Buzzards Bay Project. Learn the various methodologies of delineation. Morning classroom session and afternoon field work. Limit 15. Others will be put on a waiting list for a second session at a later date (those on waiting list will be notified of date). Lunch included. \$35 for MACC members/\$45 for non-members. See the next newsletter for complete registration information or call MACC at (617) 489-3930.

Legislation (continued from page 2)

Programs and the general shift of funds away from municipalities. (See article in Late Fall 1993 Newsletter.) Refiled.

BILLS MACC OPPOSED (in part)

H.3984 & H.3987 Joint Hearings. Died in the Committee on Bills in Third Reading in Senate.
H.5571 Transportation Bond. MACC took no position on the bill as a whole but continued to oppose exemptions from all environmental laws for 'bridge repair' projects.

MACCWest News

Lake Management

The MACCWest Office has recently had several inquiries about "lake management" - a term which usually means dealing with weeds in ponds used for swimming and boating. The problem is particularly severe, it seems, in western Massachusetts. The usual solutions proposed involve lake drawdowns (also favored to prevent spring flooding) and/or applications of herbicides.

Conservation Commissions get involved in lake management because the Wetlands Act, with fine impartiality, regulates any activity which destroys wetlands vegetation, even if the destruction is entirely intentional. Also, drawdowns and herbicides can damage the desirable flora and fauna of the lake. Many Commission are loath to reject lake management proposals, especially if they will combat noxious exotic weeds invading our innocent ponds. On the other hand, Commissions know perfectly well that if the conditions within the watershed which gave rise to all those weeds are not abated, the "treatment" will have to continue, year after year, with who knows what results.

Furthermore, the authority of a Commission to grant permission for any activity altering more than 5,000 square feet of vegetation or 500 feet of bank is confined to exemptions and "limited projects". There is currently no limited project which accurately covers this kind of work, a situation which certainly does not make our work easier.

The Water Resources Commission is developing a new lakes policy, and DEP is moving towards a new limited project on the subject. This limited project would require some level of scientific study appropriate to determining what work can be done on each specific problem lake with a minimum of disruption to its ecology, together with some commitment to long term management of the watershed.

Together with the Massachusetts Audubon Society, the Massachusetts Society of Municipal Conservation Professionals (MSMCP) and others, I will be working on behalf of MACC towards the best policy we can get, so that MACCWest can give truly knowledgeable advice.

Alexandra Dawson, Esq.
MACCWest Outreach Coordinator
Director of Legal Affairs

A "Dam" Nuisance

A town has been told it may be liable for damage done by flooding of a town pond onto private land. In **Tarzia v. Town of Hingham**, 35 Mass. App. Ct. 506, the appeals court reversed the decision of the trial judge who had essentially dismissed the case, and sent it back to trial on the basis of "nuisance".

The plaintiff landowner claimed that the town took no remedial action to remove a buildup of silt and vegetation in a town pond, and the water eventually overflowed the dam and damaged his land. He claimed that the town was liable for negligence and also created a "nuisance". (A nuisance is a condition created on one property which interferes with the use of another property).

Towns have traditionally been held not liable for claims of negligence when conduct which causes injury is characterized by discretion and judgement. The appeals court agreed this was one of those matters and dismissed that count. The town also claimed that the town was not liable for creating a nuisance because the damage resulted from a natural condition of the land. However, the appeals court disagreed because the land was artificially dammed and therefore not in a natural condition.

This decision, while it does not in itself establish any liability for Hingham, shows that anyone, even a governmental body, who owns a dam ought to take care of it, and in addition, it suggests that towns may be liable for failing to control siltation and vegetation which eutrophy ponds to the point they overflow. The new and revised limited projects for dam repair and drawdowns behind unsafe dams (see page 2) will help Commissions deal with these problems.

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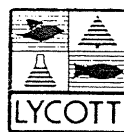
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IN OUR NEXT ISSUE...

**COMPLETE REGISTRATION INFORMATION FOR
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- Wetland Plant Identification
- Advanced Wetland Delineation Techniques

(see the Calendar section on page 6 of this issue for summary)

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