

MACC Newsletter



Early Summer 1995

Volume XXIV Number 4

MACC FALL CONFERENCES WETLAND BUFFER ZONES

OCTOBER 14
NORTHEASTERN UNIVERSITY
BURLINGTON

NOVEMBER 11
WESTFIELD STATE COLLEGE

Self Help Programs Threatened by Open Space Bond Amendment

Partial Package Passes House

The Self Help Problem

Nearly two years after it was originally filed, the Open Space Bond passed the House by a unanimous vote of 155-0 on June 27. However, amendments to the Self Help and Urban Self Help sections of the bill would require that the Commonwealth hold title to all lands purchased with this funding. MACC and the entire Open Space Bond Coalition strongly oppose this change and are advocating for restoration of the original bond language.

MACC believes that a requirement of state ownership is a bad idea and could destroy the

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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*

How the "Takings" Bill in Congress Will Destroy Environmental Protection in Massachusetts

To sustain any decent future for Massachusetts, we need to sustain our natural resources, our communities, our quality of life, and the public health and safety. To do this we need to sustain not just our land conservation programs, but also our environmental protection programs. In short, we need to sustain our federal, state and local environmental and land use laws and regulations.

To do this, we need to sustain the United States Constitution as we know it, that is, to leave the so-called "taking clause" of the Fifth Amendment as it was written over 200 years ago and has worked well since.

Bills now in Congress (H.R. 925 and S. 605), sponsored by the Republicans as part of their Contract With America (which I think should be called the "Contract On America") would undo those 200 years of "taking doctrine," ignore 200 years of jurisprudence, and

(continued on page 4, Takings)

MACC COASTAL WORKSHOPS

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For advertising rates and membership information call MACC at (617) 489-3930.

Massachusetts House Delegation Scores 84 Percent on Environmental Votes under "Contract"

The League of Conservation Voters (LCV) has issued a score card of the votes of the U.S. House of Representatives on environmental issues during the first One Hundred Days under the so-called Contract with America. The 10-member Massachusetts delegation voted pro-environment on key issues 84 percent of the time.

Scores were based on 10 votes on legislation which would have a major effect on environmental protection: suspending federal rule-making, onerous risk assessment-cost benefit requirements, rescission of past appropriations, and redefining the concept of "taking" to vastly increase property rights.

The "taking" vote was double weighted because it was so environmentally harmful and far reaching. Absences were counted as votes against the environment. Reps. Kennedy and Neal each missed one vote and Rep. Moakley missed three (possibly related to his recent illness).

On all but one vote, anti-environment forces prevailed.

Overall the Massachusetts House members averaged 84 percent. There were clear party differences with the eight Democratic members averaging 91 percent and the two Republicans 55 percent.

Legislator	Percent	State	Percent
Rep. Peter Blute (R)	55	Connecticut	68
Rep. Barney Frank (D)	100	Maine	41
Rep. Joseph Kennedy (D)	91	Massachusetts	84
Rep. Edward Markey (D)	100	New Hampshire	0
Rep. Martin Meehan (D)	91	Rhode Island	96
Rep. Joseph Moakley (D)	64	Vermont	100
Rep. Richard Neal (D)	82		
Rep. John Olver (D)	100		
Rep. Gerry Studds (D)	100		
Rep. Peter Torkildsen (R)	55		

Scores of state delegations ranged from 0 to 100 percent. Massachusetts ranked third among the six New England states. New Hampshire was one of five states, and the only one in New England, which scored zero. Vermont achieved the only perfect score.

LCV is a bi-partisan environmental organization based in Washington D.C. which helps elect members of Congress who will "vote for the earth," and holds them accountable by issuing score cards.

Sally A. Zielinski, Ph.D.

Executive Director

Rugosa Rose *Rosa rugosa*



Sketch from the book *Plants in Wetlands*
by Charles B. Redington

Conservation Commissions and Title 5

Commissions should be interested in Title 5 and local Board of Health regulations because of the clear connection between water quality and septic systems. However, most of us are too busy to go poking around in other boards' routine work. Therefore, most Commissions will interface directly with the new Title 5 in one of two ways.

First comes remediation of existing systems. If a septic system fails in the traditional sense, or fails to pass the new inspection criteria at time of sale or change of use, it has to be repaired. A technical failure such as a crushed pipe can be fixed without moving the system. However, some systems will have to be relocated because they don't work where they are or because they violate present required setbacks or both. The minimum Title 5 setback for wetlands is 50 feet; so is the setback for (non-drinking water) surface water. So many failed systems will be

remediated or moved around within the 100-foot Wetlands Act buffer; and this will require a wetlands permit or at least a Determination of Applicability.

If a Board of Health approves a system which it believes is at least 50 feet from a wetland and the Conservation Commission disagrees on the wetlands line, the Commission will prevail.

A Conservation Commission need not give a variance just because a health board does so; and a Commission cannot allow a system within a wetland because there is no "limited project" allowing this use.

Where new systems are concerned, the new Title 5 is not that different from the old in its relation to the Wetlands Act. Boards of

Health can still approve new systems a minimum of 50 feet from wetlands if local Board of Health regulations do not provide a larger setback. All such systems within our 100-foot buffer will, of course, require wetlands permits; but Commissions' review is limited because health board approval creates a presumption under the wetlands regulations, that the system is a good one, so the Commission basically looks only at construction impacts. The new Title 5 does provide one new safeguard: If a Board of Health approves a system which it believes is at least 50 feet from a wetland and the Conservation Commission disagrees on the wetlands line, the Commission will prevail. This could be handled informally or could be the subject of a Determination of Applicability.

Alexandra D. Dawson, J.D.
MACC Director of Legal Affairs

Soils: A Short Course

The Wetlands Protection Act Regulations have now been revised so that wetland boundaries may be delineated by using soils in addition to vegetation. While vegetation alone will continue to be used in areas where the wetland boundary is abrupt, Commissions will be presented with an increasing amount of information on soils, particularly in areas where the vegetation is transitional. Therefore, an understanding of the basic characteristics of soils within both wetlands and uplands will be an asset to Commissions in their evaluation of wetland boundaries.

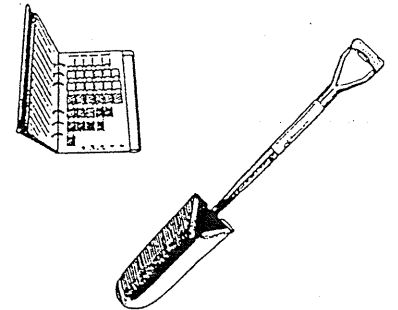
The color of a soil is indicative of the hydrology to which the soil is subjected during the growing season. In very wet areas, a thick layer of black organic material often lies at the surface of the soil. However, when examining a wetland boundary, it is usually necessary to look at the soil's color within the "B" horizon, which is located below the darker "A" horizon on the surface. In Massachusetts, the color of the "B" horizon is usually associated with the presence or absence of iron.

After the glaciers retreated from the Commonwealth some 10,000 years ago, the material that was left behind contained a large percentage of quartz, which is gray in color. In uplands, the particles of quartz became

coated with oxidized iron ("rust") over time, and the result is the brown or orange colored "B" horizon that is typical in well-drained areas. However, in wetlands a process called gleization occurs, which strips the iron from the surface of the quartz particles, returning the soil to its original gray color. In a very wet soil, the surface layer will be very dark black, due to high organic content, while the horizon immediately beneath will be a uniform gray. In wetlands that are periodically saturated and aerated, alternating gray and orange spots called mottles ("Redoxymorphic features" in soil scientist jargon) are formed.

Evaluating the color of a soil is done by comparing the soil with a book of color chips called the Munsell Soil Color Charts. The Munsell Charts identify color as a function of three components, but it is the "chroma," defined as the strength of the color, which is commonly used to determine a soil's moisture regime. In loamy soils, which are typical throughout the interior of Massachusetts, a certain percentage of gray mottles (of chroma 2 or less) is usually required just below the "A" horizon for a soil to be considered hydric.

While this is all fairly straightforward in theory, **deciding exactly how many, what**



color, and at what depth mottles will qualify a soil as being "hydric" has been debated for years. To help solve this problem, a recent document called *Field Indicators for Identifying Hydric Soils in New England* was developed with funding from the EPA. This manual lists the characteristics that qualify various types of soil as hydric, and hence indicative of a wetland, and will no doubt become the standard guide for hydric soil determinations throughout New England.

While the estimation of a soil's hydrology may not be difficult in loamy soils, there are other soil types which are more problematic to correctly evaluate. In sandy soils, typical of the Cape and the Islands as well as glacial outwash deposits throughout the interior of the state, gray mottles may not develop even in areas that are saturated almost year-round. In these areas, a mucky

(continued on page 6, *Soils*)

Takings, (continued from page 1)

redraw the line at the outer limit of governmental power to regulate and restrict actions on private property. The bills would tilt the present balance toward landowner rights (and the rights of businesses on land) and away from the rights of the public to be healthy and safe. These bills would provide for government payments to landowners whose property values are reduced by federal environmental regulations.

The radical bill H.R. 925, entitled the Private Property Protection Act of 1995, was passed overwhelmingly in the House in March, and is now in the Senate as part of H.R. 9, the House's omnibus regulatory reform bill. It would require federal agencies to compensate private property owners for federal regulatory actions, under certain listed laws, that reduce the fair market value of their properties by 20 percent or more. Compensation would have to be paid even if a section of land, rather than the entire property, were diminished in value by this amount. If the lost value were more than 50 percent, the owner could force the federal government to buy the property for its fair market value.

The bills would tilt the present balance toward landowner rights (and the rights of businesses on land) and away from the rights of the public to be healthy and safe.

This law would set up such a compensation scheme for Section 404 of the Federal Clean Water Act, the Endangered Species Act, the Food Security Act (with its important "Swampbusters" provision), and the water rights entitlements in the Reclamation Act, Federal Land Policy Management Act, and Forest and Rangeland Renewable Resources Planning Act.

To see how radical indeed this legal change would be, imagine the U. S. Army Corps of Engineers now routinely requiring Clean Water Act Section 404 permits for filling federal wetlands and waterbodies, implementing rules requiring demonstration of "no net loss" by avoidance, minimizing and mitigating impacts, and defining the wetland jurisdiction boundary by a federal manual. And imagine EPA's Section 404 guidelines now in regulations to protect fisheries, wildlife, and water supplies, and the

occasional EPA vetoes of 404 permits for projects not protecting them. And imagine the Corps granting permits allowing most of the proposed shopping centers, industrial parks, subdivisions, and marinas, but not all of them (conserving wetlands on at least 20 percent of the land).

Then imagine an office newly-created in the Corps of Engineers where unhappy applicants could file administrative claims for money, based on demonstrating that these existing rules, these permit denials, or routine permit conditions diminish property value over the 20 percent threshold. Imagine how many landowners, developers, farmers, and industries would seek such money. Also imagine the bogus applicants who would propose filling or dredging projects knowingly violating these federal rules, then filing their fake claims. Then imagine them forcing arbitration or suing when the Corps or EPA disagrees with their claims, refuses to pay as much as they seek, or lacks the money to do so. Then imagine them winning that money from federal courts because this would be a legally binding entitlement under the Private Property Protection Act of 1995.

The Senate's version of the "takings" legislation is S. 605, introduced in March by Senator Dole with 35 co-sponsors, entitled the Omnibus Property Rights Act of 1995, and creating what amounts to a Property Owners' Bill of Rights.

The Senate bill is even more radical than that of the House, although it sets a higher "devaluation threshold" than the House — with compensation paid in cases where regulation causes a loss in value of one-third (33 percent) or greater — and although it does not explicitly require the purchase of private property by government (through inverse condemnation) where the loss is greater than one-half (50 percent). Although an agency may, at its option, buy the land for its fair market value before the offending regulation took effect.

The Senate measure goes beyond that of the House, by covering all federal agencies and their rules, by providing compensation for loss of personal property, not just real estate value, and by imposing onerous procedures for agencies to review proposed actions for their potential impact on private property. This includes a "takings impact analysis," an estimate of federal takings liability, and an evaluation of alternatives.

Dangerously, it also makes its requirements apply equally to state (as well as

federal) agencies implementing programs or receiving federal funding, even though the money for compensation would in all cases be paid by the federal government.

Further, this Senate measure would entitle aggrieved property owners to sue, giving them standing in federal courts to litigate almost any perceived infringement of their rights, with attorneys fees awarded to those who prevail.

The Senate measure goes beyond that of the House, by covering all federal agencies and their rules, by providing compensation for loss of personal property, not just real estate value, and by imposing onerous procedures for agencies to review proposed actions for their potential impact on private property.

Under both the Senate and the House bills, the money for compensation to landowners would come directly out of the budget of the agency that promulgated the regulation challenged. The real purpose of these measures thus seems not to be to authorize payments to the landowners, but rather to prevent passage or active implementation or enforcement of environmental regulations in the first place.

Both measures authorize federal agencies to sue one another for contribution, if the "taking" for which one agency must pay compensation was the result of requirements imposed by another agency.

President Clinton announced on April 21 that he intends to veto any "takings" bill which Congress might pass. It seems unlikely that Congress would be able to override the veto, at least in the current forms of these bills, so redrafting probably will occur.

Imagine what would happen if such laws were enacted in Massachusetts. And imagine the Wetlands Protection Act, with its virtual ban on destruction of salt marshes and fresh marshes and its limits on work in flood-prone areas. Or the Superfund imposing liability for cleaning up disposal sites and releases of oil and hazardous materials. Or the Hazardous Waste Management Act with regulations on generating, storing, trans-

(continued on next page)

porting, treating and disposing of hazardous wastes. Or the Massachusetts Clean Air Act requiring permits for small and large emission sources. Or the state Clean Water Act regulating discharges to groundwater as well as surface waters. Or the Water Management Act requiring registration of large water withdrawals, which must be approved by the Water Resource Commission. Or the Interbasin Transfer Act requiring state approval for moving water between watersheds. Or the Massachusetts Environmental Policy Act (MEPA) requiring comprehensive environmental analysis, including alternatives, for many private (as well as public) projects, resulting in Certificates by the EOE Secretary imposing conditions that projects be carried out as promised and expected. Or the Tidelands and Waterways Statutes, on the books for more than 100 years, requiring state approval for dredging and filling and other development along the waterfront (both inland and coastal) in order to protect the reserved public rights of "fishing, fowling and navigation" which date back more than 300 years to the Colonial Ordinances.

Presently, compensation is paid a landowner under the Fifth Amendment doctrine against "unconstitutional takings without compensation," when the property is seized by government (called eminent domain), when government actions and activities physically restrict the use of property (called inverse condemnation), when government enters private property (called an easement or other physical intrusion), and when government regulation goes too far by outright prohibition of all practical, economic uses (called a regulatory taking). A landowner challenging a government rule or claiming such compensation commences a suit in court.

H.R. 925 instead would create an "entitlement program" with landowner claims going direct to federal agencies and compensation obtained administratively, with forced arbitration or review in court, instead of plaintiff landowners having to prove "taking" in court in front of a jury or judge.

S. 605 would create this "corporate welfare program" plus burden federal agencies with impossible technical and economic jurisdiction for their rules.

Gone would be the presumption of the validity and need for federal statutes and regulations. Gone would be the benefit of

the doubt favoring permit and license decisions. Gone would be the legal rule that compensation is due only when there is total prohibition on all reasonable land use. Gone would be the courts balancing the impact of the restriction on the landowner against the need for protection of public health and safety. Gone would be the requirement that a plaintiff in court prove that the lost land value were "more likely than not" the result of government action.

Dangerously, it also makes its requirements apply equally to state (as well as federal) agencies implementing programs or receiving federal funding,

Instead we as taxpayers would pay businesses not to pollute, landowners not to fill wetlands, site owners to clean up hazardous wastes, landowners not to destroy endangered species, chemical users to reduce their toxins, mine operators to protect water supplies, agribusiness not to suck water supplies dry, farmers to use other pesticides and herbicides, manufacturers to switch to less polluting methods, developers to incorporate proper drainage practices, air polluters to meet the emission rules, and water polluters to obey their permits.

Of course, the actual purpose of the Private Property Protection Act in the House, the Property Owner's Bill of Rights in the Senate, and the bills under consideration in the states, is not to pay property owners. The propaganda about payment by federal and state agencies is just to get the public to think this legislation is good. The real purpose is to chill federal, state, and local government use of the power to protect the public health, safety, welfare, and morals. Under the U.S. Constitution this is known as the "interstate commerce power," the basis for almost all modern federal environmental protection and public health laws. At the state level, this is known as the "police power," the basis for virtually all of the state environmental and health laws plus city and town (as well as county) land use laws and environmental and health regulations.

If this legislation, H.R. 925 or S. 605, were to pass the Congress over veto of the President so as to become the law of Massachu-

setts (which is after all part of the United States), or if similar state laws were to pass in Massachusetts, what can be the future of the Commonwealth, our natural resources, our unique character, the health of our citizens, the health of our economy, and the health of our state and local environmental laws?

How will you like living in your new nation?

Gregor I. McGregor, Esq.
MACC Vice President
McGregor & Shea, P.C.

Ed. Note: MACC strongly opposes these "takings" bills and encourages letters to Sens. Kerry and Kennedy, as well as to President Clinton requesting that he veto such legislation should it reach his desk. Address letters to: Honorable Edward Kennedy and John Kerry, U.S. Senate, Washington, D.C. 20510; President William J. Clinton, White House, Washington, D.C. 20500.

CALENDAR

Sept. 16: **Floodplain Ecology.** N.E. Wildflower Society. Concord, MA. Focus on the natural history, ecological relationships, and functions of river systems, identification of representative vegetation and importance of river protection. Primarily in the field, includes a slide presentation. Limit 15. Fee: \$37 members/ \$44 nonmembers. For information call (508) 877-7630 ext. 3303 or (617) 237-4924 ext. 3303.

MACC COASTAL WORKSHOPS Protecting Waters in the Coastal Zone — Controlling Nonpoint Source Pollution

Saturday, Sept. 23, 1995
Three locations: Essex,
Quincy and Mashpee
Half-day workshop looking at nonpoint source pollution in the three Mini Bays areas.

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Saturday, Oct. 14, 1995
Northeastern University
Burlington Campus
Saturday, Nov. 11, 1995
Westfield State College
Third annual day-long conference offered at two convenient locations this year.

Self Help programs for the following reasons:

- **Most communities would not take advantage of the program.** Concerns about outside control over the land and too many strings attached to acquisitions would make Self Help funding unappealing. MACC suspects that the real purpose of requiring state ownership is for the state not to spend Self Help money.
- **Self Help would cease to exist.** State ownership would subvert the intent of the Self Help programs — assisting cities and towns in establishing municipal open space. Self Help would in effect become a misnomer — no longer a grants program but a system of municipalities recommending lands to the state for acquisition.
- **Cities and towns would be expected to manage state lands at municipal expense.** Communities might quickly conclude that, if the state owns the land, municipal resources should not be expended, and the state should manage it. Given the sad state of staffing and infrastructure at our state parks because of ongoing budget problems, communities could not be optimistic about state management.
- **Conservation Commissions would probably lose the ability to determine rules and regulations for use of the land.** The state would likely assert the right to determine rules and regulations for use of the land — removing present Conservation Commission control. These are more appropriately and better administered at the local level by people who live and work near the land.
- **It is not fair for the state to own 100 percent of a parcel of land when it has only contributed part of the cost.** Many parcels are acquired through a combination of federal, state and local monies. The House seems to feel that where it puts its money, the state should have majority interest. Yet most Self Help funding constitutes only a fraction of the cost of a parcel. The regulations in fact set strict limits on the percentage of a project's cost the state can reimburse — based on population and per capita income. In many cases communities would have to grant the state ownership of land largely paid for by the community.

- **The legislation doesn't specify which state agency would hold title.** Without advance specification it would likely be the Division of Capital Planning and Operations rather than an environmental agency. Furthermore, the state agency which owned the land could be burdened with the responsibility for rules, regulations, security, enforcement and other headaches.
- **Leases and sales could occur without local approval.** State ownership raises the risk of inappropriate transfers of parcels to other uses. While such change would require (and likely receive) legislative approval, Conservation Commission and other local consent would not be needed.
- **Municipal liability would be increased.** The state as owner would not likely purchase appropriate insurance (the state is self insured) leaving city and town officials at risk of liability for money damages in the case of injuries and other problems.

Bond Funds Crucial

The Open Space Bond is critical to the protection of the Commonwealth's land and water resources — for acquisition of open space, restoration of degraded habitat, improvement of state park infrastructure, GIS and conservancy mapping, and marine monitoring. It funds both the Agricultural Preservation Restriction and Self Help programs. When first filed the bill included only \$7 million for each Self Help program. MACC played a major role in increasing funding to the present level of \$25 million each for Self Help and Urban Self Help.

Before releasing the bill this summer, the House Ways and Means Committee added \$100 million in hazardous waste cleanup funds, but removed funding for land use planning and education grants and coastal monitoring. These provisions were added back in via floor amendments offered by new Natural Resources and Agriculture Committee Chair, Rep. Barbara Gray. With the addition of the hazardous waste monies and additional floor amendments, the bill now totals \$550 million.

In order to report out a bill before the summer recess the Ways and Means Committee did not include certain sections of the bond it wants to study further, such as a "trust" or OSPREY program and amendments to the conservation restriction stat-

utes. The Committee has promised to report out the rest of the bill in the fall.

What You Can Do

MACC strongly supports the Open Space Bond (now H.5206) with amendments to remove the requirement that the state hold title to Self Help lands. We urge Conservation Commissions to contact your state senator and to urge your selectmen/mayor and planning boards to also write or call. Even if the language is removed from the bill ultimately passed by the Senate, a House-Senate conference committee will negotiate all differences between the two versions. Then it will be imperative to contact your state representative as well.

Sally A. Zielinski, Ph.D.
Executive Director

Soils, (continued from page 3)

upper horizon, coupled with any mottling below, may be enough to qualify a soil as hydric. Similarly, there are many areas in the Connecticut River Valley where the parent material is composed of red sandstone rather than the gray quartz. In these soils, gray mottles may never form, despite continuous saturation.

Like boundaries that are delineated based upon vegetation alone, the accuracy of wetland lines flagged using soils and vegetation will depend upon the individual wetland delineator. Commissions should always use common sense when presented with information on soils. For example, while an occasional obligate wetland plant will be found in non-hydric soils, a wetland boundary that runs through the middle of a dense area of skunk cabbage should be reviewed with a very skeptical eye. However, once the basic principles of hydric soil interpretation are understood, Commissions will have an additional tool at their disposal in their implementation of the Act and Regulations.

Ward W. Smith
Wetland and Soil Scientist
Valley Environmental Services

Ed. note: New wetland boundary regulations became effective June 30. In many cases the boundary is based on both vegetation and indicators of wetland hydrology. Hydric soil is one such indicator.

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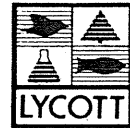


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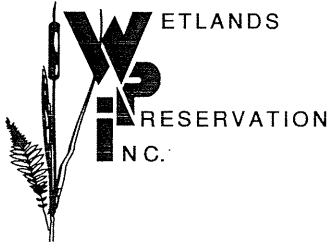
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