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Conservation Commissions Gain Consultant Fees

Advantages ~ Requirements ~ How to Set Up

After many years of MACC effort, a recent revision was made to state law that provides Conservation Commissions with an important new tool that will enhance their professionalism and increase consistency of important decisions. Commissions can now require applicants to cover the cost of engineers, wetlands scientists, wildlife biologists or other experts in cases where they are needed to review proposed projects under the Wetlands Protection Act, wetlands bylaws/ordinances, and affecting municipal conservation land.

Consultant or design review fees for Commissions are included in the municipal relief package signed into law by Lieutenant Governor Kerry Healy on July 31 and effective immediately (see § 36 of Chapter 46 of the Acts of 2003). Planning, health and zoning boards have had this authority for over a decade under G.L. Ch. 44 § 53G. That section has been amended to include Conservation Commissions by adding the Conservation Commission Act

(Continued on page 3) Commissions Gain Fees

MACC 2004 ANNUAL ENVIRONMENTAL CONFERENCE

~
March 6th
Holy Cross College
Worcester



DEP Commissioner Bob Golledge and Assistant Commissioner for the Bureau of Resource Protection Cynthia Giles at recent MACC Board of Directors Meeting. See page 8 for information about DEP's on-going restructuring.

MACC 2003 Fall Conference

Saturday
October 18
Northeastern University
Burlington

BUFFER ZONES

Saturday
November 1
Crowne Plaza Hotel
Pittsfield

SCIENCE, LAW AND SOLUTIONS YOU CAN USE

MACC

Massachusetts Association of
Conservation Commissions
Community Conservation Since 1961

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For advertising rates and membership information call MACC at 617.489.3930.

DEP Issues Revised NOI Form Use Required after January 1st

The Department of Environmental Protection just announced that an improved electronic version of the Notice of Intent (NOI) application form (WPA form 3) is now available on DEP's web site: <http://www.state.ma.us/dep/brp/ww/wwforms.htm#permits>.

The new and improved NOI form is based on past comments from Commissions and Departmental staff. The document was reformatted to make the application more user-friendly and easier for Commissions and DEP to find critical information to evaluate NOI submittals. However, it is NOT substantially different from the previous NOI forms Conservation Commissions have been reviewing. Applicants should start using the revised form now. Old forms will be accepted until the end of December 2003. **Only the new form should be accepted from applicants beginning January 1, 2004.**

Your Commission should begin receiving more hard copy versions of the improved NOI form as you receive wetland project submittals in the upcoming months. DEP is also working on an electronic version of the Order of Conditions form that will be available on their web site later this fall. Commissions will be informed as soon as it becomes available. For questions, contact Steven Pearlman at 617-556-1190 or by e-mail at: Steven.Pearlman@state.ma.us.



Correction to Recent DEP Mailing

A letter sent on September 26, 2003 to all Conservation Commissions from DEP's Lealdon Langley regarding DEP's new "e-NOI" initiative contained an incorrect Web address. As noted in the above article, to download or print a copy of the revised Notice of Intent form from DEP's Web site, the correct address is: <http://www.state.ma.us/dep/brp/ww/wwforms.htm#permits>

The other Web site location listed in the 9/26/03 letter (<https://edep.dep.mass.gov/DEPHome.aspx>) cannot be used by commissions to download or print the NOI form. This site can only be used by businesses (including consultants) registered with the state. Such businesses can go to this site, fill out an NOI online and submit it electronically to DEP. A hard copy of the completed NOI also must be printed out by the business, signed, and submitted as a hard copy to the Conservation Commission. Again, the blank NOI form itself cannot be downloaded or printed from this "E-DEP" Web site location.

Steve Pearlman
DEP Bureau of Resource Protection

Model Rules For Hiring Outside Consultants Under GL Ch. 44 § 53G

As provided by GL Ch. 44 § 53G, the [name of municipality] Conservation Commission may impose reasonable fees for the employment of outside consultants, engaged by the Conservation Commission, for specific expert services deemed necessary by the Commission to come to a final decision on an application submitted to the Conservation Commission pursuant to the requirements of the Wetlands Protection Act (GL Ch. 131 § 40), the [municipality] non-zoning wetlands bylaw [ordinance], Conservation Commission Act (GL Ch. 40 § 8C), or any other state or municipal statute, bylaw [ordinance] or regulation, as they may be amended or enacted from time to time.

Funds received by the Conservation Commission pursuant to these rules shall be deposited with the town [city] treasurer who shall establish a special account for this purpose. Expenditures from this special account may be made at the direction of the Conservation Commission without further appropriation as provided in GL Ch. 44 § 53G. Expenditures from this account shall be made only in connection with the review of a specific project or projects for which a consultant fee has been collected from the applicant.

Specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, hydrogeologic and drainage analysis, impacts on municipal conservation lands, and environmental or land use law. The consultant shall be chosen by, and report only to, the Commission and/or its Administrator.

The Conservation Commission shall give written notice to the applicant of the selection of an outside consultant, which notice shall state the identity of the consultant, the amount of the fee to be charged to the applicant, and a request for payment of said fee in its entirety. Such notice shall be deemed to have been given on the date it is mailed or delivered. No such costs or expenses shall be incurred by the applicant if the application or request is withdrawn within five days of the date notice is given.

The fee must be received in its entirety prior to the initiation of consulting services. The Commission may request additional consultant fees if necessary review requires a larger expenditure than originally anticipated or new information requires additional consultant services. Failure by the applicant to pay the consultant fee specified by the Commission within ten (10) business days of the request for payment shall be cause for the Commission to determine that the application is administratively incomplete (except in the case of an appeal). The Commission shall state such in a letter to the applicant, copied to the DEP. No additional review or action

shall be taken on the permit request until the applicant has paid the requested fee. *Alternative language, for inclusion in bylaw regulations only:* Failure by the applicant to pay the consultant fee specified by the Commission within ten (10) business days of the request for payment shall be cause for the Commission to deny the permit application.

The applicant may appeal the selection of the outside consultant to the selectboard [city council], who may disqualify the outside consultant selected only on the grounds that the consultant has a conflict of interest or does not possess the minimum required qualifications. The minimum qualifications shall consist of either an educational degree or three or more years of practice in the field at issue or a related field. Such an appeal must be in writing and received by the selectboard [city council] and a copy received by the Conservation Commission, so as to be received within ten (10) days of the date consultant fees were requested by the Conservation Commission. The required time limits for action upon the application shall be extended by the duration of the administrative appeal.

Commissions Gain Fees (Continued from page 1)

(G.L. Ch. 40 § 8C) to the list of enabling statutes.

Until now Commissions could only impose consultant or project review fees through a wetlands bylaw/ordinance or special act of the legislature. This change also removes the need for municipalities with wetlands bylaws/ordinances to go to the town meeting/city council each year to reauthorize their consultant fee revolving funds.

As we understand it, Commissions were not included originally because wetlands filing fees were being increased at that time. Recognizing that filing fees alone would not provide Conservation Commissions with sufficient resources to carry out their responsibilities, MACC filed legislation to include Commissions shortly after Ch. 44 § 53G was created.

This change was a long time in coming (thirteen years). Many individuals and organization have provided important support and help, and MACC wishes to extend our appreciation. We particularly thank Senator Pam Resor for including the provision in the municipal relief package and Rep. Marie Parente, then House Chair of the Local Affairs Committee, who recognized the need for this authority for Conservation Commissions statewide and led the effort the past several years. We also thank Rep. Mary Jane Simmons and former State Rep. Steven Angelo. They and their capable staffs, and the Massachusetts Audubon Society and Environmental League of Massachusetts have been key to passage of the legislation.

MACC has developed Model Rules for consultant fees (see this page). The discussion below is intended to clarify Commissions' new authority and to emphasize the legal requirements. The Commission should carefully read the

statute for a complete understanding (see page 5).

When Consultants Are Appropriate

The legislation is broad. Commissions can hire consultants relative to carrying out any of their legal responsibilities (regulatory, management, or otherwise).

The ability to hire consultants will provide Commissions with major help in administering the Wetlands Protection Act and wetlands bylaws/ordinances. For example, consultants may be needed to review certain elements of Requests for Determinations of Applicability, Abbreviated Notices of Resource Area Delineation, Notices of Intent, Requests for Certificates of Compliance, requests to extend or amend permits, and any other submissions.

Services needed might include checking wetland delineations; reviewing field work or literature on an issue; advising whether the requirements of the laws and regulations are or can be met by the project; drafting a permit including special conditions; attending site visits, meetings and hearings; checking compliance for a permit amendment or extension; and/or advising the Commission relative to an appeal. Consultants may be needed to, for example, review resource area boundaries, check stormwater runoff or other calculations, determine the presence of rare species, or review wildlife habitat evaluations required of projects exceeding the regulatory thresholds for such evaluations.

It is important to note that consultants can also be hired relative to the Commission's land acquisition and management responsibilities. Examples include when a Commission is asked to convert dedicated open space under its control to another use such as when a private company wants to place a cell tower on Commission land; a group asks to use conservation land for a major event or new activity; a landowner proposes a Conservation Restriction on his or her property; and/or the Commission is involved in evaluating a potential land acquisition for the municipality.

MACC recommends that Conservation Commissions use this broad power judiciously. Consultants are most likely to be needed for large, complex or controversial projects, or when the Commission lacks the skills or resources needed to make an informed decision on a project.

The Commission Must Adopt Written Rules

The statute requires that the Commission have written rules relative to the hiring of consultants. Adoption of rules does not require approval of any other municipal entity. To foster good relations with the public MACC recommends that the Commission hold a public hearing to accept comments on its draft rules. The final rules should be adopted by a vote of the Commission at one of its regular meetings. Similar procedures should be followed when revising the rules. The rules must not conflict with the statute. They should be available at all Commission meetings.

MACC recommends that communities with Wetlands Bylaws adopt these rules both separately and under the bylaw.

Dedicated Fund; Collecting and Handling Fees

Money paid by applicants must be placed in a dedicated (revolving) fund, set up by the municipal treasurer. Interest accumulated by the fund remains with the fund. The Commission needs no other authorization to engage and pay the consultants.

This money is project specific. Upon completion of the project any excess must be returned to the applicant along with any interest accrued. The Commission must make a report of the account available to the applicant.

The municipal accountant must prepare a report of the account annually, provide it to the selectboard/mayor and town meeting/city council, be sure it is included in the municipality's annual report, and send a copy of the report to the bureau of accounts.

MACC strongly advises that applicants be required to pay the fee prior to any work by the consultant. Any other course of action is risky, e.g. the applicant may withdraw a Notice of Intent or refuse to pay if he/she disagrees with the consultant's conclusions or the Commission's decision. In those circumstances, if the Commission does not have a specific appropriation for consultant services, the consultant's contract with the Commission will be unenforceable and the consultant will not get paid; if there is a specific appropriation, the Commission may be liable to pay for those services. Having the funds on deposit will ensure that the consultant will not feel constrained in giving advice that may be adverse to the approval of the project.

Choosing a Consultant and Determining Fees

The statute refers to hiring outside consultants. Presumably this means someone outside the Commission and probably the municipality's government. Consultants selected must meet minimum criteria listed in the statute, i.e. have at least a degree or three years experience in the field in which the Commission is seeking the consultant's help or in a related field.

Planning, health and zoning boards, and Commissions that have consultant fees in their wetlands bylaws, sometimes issue a Request for Proposals (RFP) and develop a list of acceptable consultants in various areas of expertise (engineer, botanist, wildlife biologist, etc.). They then choose from that list when a project needing a consultant arises or choose one consultant in each area that they regularly hire. For a large project they may issue a separate RFP.

For a given project the Commission may want to obtain estimates from several consultants. The Commission should be clear about the scope of services it is requesting. It is best to have it in writing, e.g. "review wetland boundaries, attend the public hearing, provide advice via telephone, draft special conditions".

Uniform procurement (G.L. Chapter 30B) requirements must be followed when hiring consultants. Procurements for less than \$5,000 simply need to be based on “sound business practices”; the Commission may select whom it wishes. Those from \$5,000 but less than \$25,000 require at least three written or oral quotes, though local requirements might be stiffer; the person or firm offering the lowest quote for the work needed must be selected. Be careful, therefore, whom you call for quotes.

Hiring of consultants may be subject to formal bidding requirements depending on the nature and cost of the services to be obtained. Commissions should consult with their municipal counsel or chief procurement officer about the applicability of any bidding requirements for a consultant contract, should find out if the municipality has any standard contract formats, and should consult with municipal counsel as to whether their consultants are subject to any State Ethics Act requirements or limitations.

The statute only requires that the fees be “reasonable”. The Commission may include a consultant fee schedule such as that found in MACC’s model wetlands bylaw - a schedule based on project cost. (See the *Environmental Handbook for Massachusetts Conservation Commissioners* Section 19.4.1, 2002 updates to the 1997 edition).

Appeals

The applicant can appeal only the choice of consultant and then only on the basis that the consultant has a conflict of interest or does not have the required qualifications. The work required of the consultant, or the amount of the fee, are not appealable. The appeal is to the local select board or city council, which must act within one month or the Commission’s choice stands. The applicant has the right to pursue the matter in court, but again only regarding the choice of consultant.

When consultants are engaged relative to a Wetlands Protection Act filing, such an administrative appeal to the select board or city council stops the clock on the project until the appeal is resolved.

Refusal of Payment

If the applicant refuses payment of fees for the employment of outside consultants pursuant to a permit request, the permit application is administratively incomplete and the Commission should declare such and take no further action on the permit request until payment is rendered. Commissions with local wetlands bylaws also have the option of adopting regulations specifying that a permit request may be denied for lack of payment (see related article “Model Rules for Hiring Outside Consultants Under GL Ch. 44 § 53G”).

Sally A. Zielinski Ph.D. P.W.S.
Former MACC Executive Director
Member, Board of Directors

Employment of Outside Consultants

Text of Chapter 44 § 53G as Amended by § 36 of Chapter 46 of the Acts of 2003

Notwithstanding the provisions of section fifty-three, any city or town that provides by rules promulgated under § 8C of chapter 40, § 9 or 12 of chapter 40A, § 21 of chapter 40B, § 81Q of chapter 41 or § 31 of chapter 111 for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account. Such rules shall provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an application by a municipal permit granting board shall be extended by the duration of the administrative appeal. In the event that no decision is made by the city council or the town board of selectmen within one month following the filing of the appeal, the selection made by the municipal permit granting authority shall stand. Such an administrative appeal shall not preclude further judicial review, if otherwise permitted by law, on the grounds provided for in this section. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. The special account, including accrued interest, if any, shall be expended at the direction of the authorized board or authority without further appropriation; provided, however, that such funds are to be expended by it only in connection with carrying out its responsibilities under the law. Any excess amount in the account attributable to a specific project, including any accrued interest, at the completion of said project shall be repaid to the applicant or to the applicant’s successor in interest and a final report of said account shall be made available to the applicant or to the applicant’s successor in interest. The municipal accountant shall submit annually a report of said special account to the chief elected body and chief administrative official of the municipality for their review. Said report shall be published in the city or town annual report. The municipal accountant shall submit annually a copy of said report to the director of the bureau of accounts.

MACC 2003 Fall Conference

BUFFER ZONES

Science, Law and Solutions You Can Use

Saturday ~ October 18 ~ Northeastern University ~ Burlington

Saturday ~ November 1 ~ Crowne Plaza Hotel ~ Pittsfield

AGENDA

8:00 am	Registration; Coffee and Donuts	11:30	Lunch
8:30	Welcome	12:30 pm	Site-Specific Buffer Zone Protection <ul style="list-style-type: none">• Minimizing Disturbance and Setting the Limit of Work• Evaluating and Requiring Design Alternatives• Applying Appropriate Performance Standards
8:35	Introduction and Overview		
8:45	Why Are Buffer Zones Important? <ul style="list-style-type: none">• The State of the Science• Functions and Values• The Best References/Sources of Information	1:30	Q/A; Break
9:45	Q/A; Break	1:45	Reality: Problems, Solutions, Successes <ul style="list-style-type: none">• Common Problems and Arguments Commissions Face <i>Dramatization</i>• Sample Special Conditions for Buffer Zones• Specific Bylaw Provisions/Regulations That Have Worked <i>Examples</i>
10:15	How Can You Legally Protect Buffer Zones? <ul style="list-style-type: none">• Relevant Laws, Policies, and Regulations• Wetlands Protection Act Regulations vs. Wetlands Bylaws• Legal Precedents: DEP Cases and ALJ Decisions	2:45	Q/A; Summary
11:15	Q/A	3:00	Adjourn

Note: The Fall Conference qualifies for 2 elective credits in MACC's Advanced Certificate Program.

SPEAKERS

(Partial List)

BURLINGTON

Gregor McGregor, Esq., Moderator/Speaker
Robert Buchsbaum, Ph.D., Speaker
Patrick Garner, PWS, Speaker

PITTSFIELD

Shepley Evans, Moderator
Ingeborg Hegemann, PWS, Speaker
Scott Jackson, Wildlife Biologist, Speaker
Alexandra Dawson, J.D., Speaker

FALL CONFERENCE REGISTRATION 2003

REGISTRATION FEE

MACC Members \$80* • Non-members \$110

Registration fee includes morning coffee and pastries, lunch, refreshments and course materials.

*Member fee applies to Conservation Commissioners, the principal Commission staff person, and other individual and corporate members of MACC.

Name: _____

Commission/Organization: _____

Address: _____ Indicate if Work or Home

City/State/Zip: _____

Phone with Area Code: (w) _____ (h) _____

E-mail: (for confirmation & directions) _____

PLEASE CHECK ONE: Burlington Pittsfield **Amount Enclosed \$** _____

Please enclose check and mail to: MACC, 10 Juniper Rd., Belmont, MA 02478.

Confirmation with directions will be sent via e-mail.

Cancellation must be received in writing (mail, fax, e-mail) at least 2 business days prior to conference. No refund or credit for less than 2 days notice. Credit may be applied to future programs. A \$10 processing fee will be deducted.

MACC Fall 2003 Training Program Offerings

~ Fundamentals for Conservation Commissioners ~

Saturday, October 18
Northeastern University, Burlington
 Morning: **Unit 5** • Afternoon: **Unit 6**

Saturday, November 1
Crowne Plaza Hotel, Pittsfield
 Morning: **Unit 1** • Afternoon: **Unit 2**

Saturday, November 22
Quabog High School, Warren
 Morning: **Unit 5** • Afternoon: **Unit 6**

Friday, December 12
New England Wild Flower Society, Framingham
 Morning: **Unit 7** • Afternoon: **Unit 8**

FUNDAMENTALS UNITS

- Unit 1** Overview of Conservation Commissions
- Unit 2** Participating in an Effective Meeting
- Unit 3** Fundamentals of the Wetlands Protection Act
- Unit 4** Plan Review & Site Visit Procedures
- Unit 5** Wetland Types: Their Functions and Values
- Unit 6** Writing an Effective Order of Conditions
- Unit 7** Open Space Planning and Protection Techniques
- Unit 8** Managing Conservation Lands

GENERAL FUNDAMENTALS AGENDA

- 8:30 - 9:00 a.m.** Check-in
- 9:00 - 11:30 a.m.** Morning Unit
- 11:30 - 12:30 p.m.** Lunch Break
- Afternoon Unit Check-in
- 12:30 - 3:00 p.m.** Afternoon Unit
- 4:00 p.m. for Unit 4

Times may vary slightly. Confirmations with exact times and directions will be sent via e-mail. Units may be taken individually or in pairs and in any order.

Bring your lunch unless otherwise noted. For October 18 and November 1 sessions, lunch will be available (sign up in advance) for an additional \$10. Morning refreshments and lunchtime beverages included at all sessions.

MACC Members \$35 per unit (\$70 for full day)
Non-members \$50 per unit (\$100 for full day)

~ Advanced Training Program ~

Saturday, November 22 8:45 a.m. - 3:15 p.m.
Quabog High School, Warren

“Wetlands Ecology & Conservation Biology”

MACC Members \$75 • Non-members \$105

MACC Fall Training Program 2003 Registration

Name _____
 Commission/Organization _____
 Address _____ Work _____ Home _____
 City/State/Zip _____ Daytime phone _____
 E-mail _____ Fax _____

Please enclose a check and mail to: MACC, 10 Juniper Road, Belmont, MA 02478. Member Fee applies to Conservation Commissioners, the principal Commission Staff person, and other individual and corporate members of MACC. Non-members may receive member rate by joining MACC. Call for details: 617.489.3930. Cancellation must be received in writing (mail, fax, e-mail) at least 2 business days prior to a session. No refund or credit for less than 2 days notice. Credit may be applied to future programs. A \$10 processing fee will be deducted.

Fundamentals for Conservation Commissioners

(MACC Members \$35 per Unit; Non-members \$50)

Saturday • October 18	Morning: Unit 5 _____	Afternoon: Unit 6 _____	\$ _____
Saturday • November 1	Morning: Unit 1 _____	Afternoon: Unit 2 _____	\$ _____
Saturday • November 22	Morning: Unit 5 _____	Afternoon: Unit 6 _____	\$ _____
Friday • December 12	Morning: Unit 7 _____	Afternoon: Unit 8 _____	\$ _____
	I want to buy lunch on either 10/18 or 11/1 (\$10)		\$ _____

Advanced Training Program

(MACC Members \$75, Non-members \$105)

Saturday • November 22 • 8:45 a.m. - 3:15 p.m.
“Wetlands Ecology & Conservation Biology” \$ _____

TOTAL ENCLOSED \$ _____

Restructuring at DEP

As many of you are well aware, DEP has suffered continued cuts in their budget and staffing over the past few years, and the situation continues to grow worse, with about 60 additional DEP staff taking early retirement this fall. Overall, staffing is down 24% since December, 2001, as nearly 300 positions have been eliminated and the agency's operating budget has been cut by \$19 million dollars. The Wetlands Program has only 31 full time employees responsible for overseeing a program that must process 8,500 applications per year. While local Conservation Commissions shoulder the bulk of the load for project reviews, DEP is trying hard to reduce the amount of time it expends on wetlands permitting and appeals, particularly for projects with relatively lower amounts of impact.

DEP's efforts to realign staff time are motivated not only by hard fiscal realities but also due to concerns regarding the need for more compliance and enforcement activity. DEP has been using aerial photos and GIS to analyze wetland loss over the past decade, and is finding an alarming amount of unpermitted wetland alterations and fill in some locations. The data on this wetlands loss analysis is anticipated to be released in approximately 6 months.

To address these trends and concerns, DEP has been working with an advisory committee to analyze options for streamlining work on projects with lesser environmental impacts in order to spend its permit time on environmentally important cases and to shift more staff effort to compliance, enforcement, and technical assistance to Conservation Commissions. MACC is an active participant in this committee.

Meanwhile, DEP is also moving toward electronic processing of permits, with e-filing of Notices of Intent, Orders of Conditions, etc. Putting these documents into electronic format has the added benefit, beyond saving DEP staff time, of providing the basis for a database of wetland permits. This will enable analyses of permitting facts and trends that have been desired for years but is not available with paper filing systems.

MACC supports DEP's efforts to increase program efficiency so long as resource protection is not undermined and work is not merely shifted to local Conservation Commissions. We will be watchdogging the agency closely to make sure that savings in DEP Wetlands Program staff time are indeed shifted to enforcement and technical assistance, and not lost to further cutbacks or shifts into other DEP program areas.

Heidi Ricci
Senior Environmental Policy Specialist
Massachusetts Audubon Society
MACC Board Member

Massachusetts Environmental Trust Gives Grant to MACC to Revamp its Fundamentals Training Program

The Massachusetts Environmental Trust (MET) has awarded a \$35,000, two-year grant to MACC to revise and update its successful eight-unit *Fundamentals for Conservation Commissioners* Training Program. Seven years ago, MET also generously supported MACC in launching the training program. The goal of the *Fundamentals* program is to give Conservation Commissioners and their staff the skills and knowledge needed to protect water quality, wetlands, and other natural resources effectively – a task they are legally mandated to do. With more than 1,300 participants to date, *Fundamentals for Conservation Commissioners* is now recognized statewide as essential training for Conservation Commissioners. For more information about the Massachusetts Environmental Trust, visit its Web site at www.MassEnvironmentalTrust.org.

National Fish and Wildlife Foundation Gives Grant to MACC, RIACC for Commissioner Training and Wetlands Bylaw Database

The National Fish and Wildlife Foundation (NFWF) has awarded a \$20,000 grant to MACC for the creation of a Conservation Commission Training Program for Rhode Island Conservation Commissioners (through RIACC) and the creation of a Wetlands Bylaw Database (at MACC). This project will enhance local protection of natural resources in Rhode Island and Massachusetts by providing key tools for the volunteer municipal environmental leaders who protect wetlands, wildlife, and open space. Prior to releasing the funds, NFWF requires grant recipients to raise twice the grant amount in matching funds (\$40,000 in this case). MACC and RIACC are currently working toward securing sufficient funds to qualify for the release of the NFWF grant funds and to initiate this important project.

The Nancy Anderson Award

This past Spring, MACC announced the creation of the Nancy Anderson Award at its Annual Environmental Conference at Holy Cross College in Worcester.

The award will be given to honor an environmental leader best exemplifying the leadership, advocacy, inspiration, teaching or citizen action of the former MACC President, Nancy W. Anderson, and will be presented in her memory. The Award will be given from time to time in future years as appropriate candidates are identified.

As Chair of the Reading Conservation Commission for many years, Nancy accomplished a great deal including directing the preparation of the Town Conservation Plan. She implemented Town acquisition of 800 acres of land; prepared and presented zoning bylaws with the League of Women Voters to protect floodplains and wetlands and introduced the Conservation Director position that has become a permanent part of Town government in many cities and towns. She also crafted model flood plain zoning bylaw provisions with the Massachusetts Federation of Planning Boards; and became the conservation conscience for the Town of Reading for which she was honored in 1984 with the dedication of Anderson Meadow.

Working at Tufts University, Nancy became the founder and organizer of the New England Environmental Network and its annual conference in 1979. By 1993 the network had evolved into one of the largest, most popular environmental conferences in the United States.

After retiring, Nancy presented a popular course on Environmental Awareness at the Senior College of the University of Southern Maine in Portland. The course was a study of environmental science and politics on the local, state, national, and world levels, on the theme of how citizens can become more effective in bringing about environmental protection for future generations.

In 1994 Nancy was appointed Chair of the North American Regional Committee of the Commission on Education and Communication of the World Conservation Union (IUCN), in Switzerland. She also served on the Advisory Committee for the United Nations Environmental Fellows Program, continuing her long association with the education efforts of the UN's Environment Program (UNEP).

MACC distinguishes this Nancy Anderson Award from our annual Environmental Service Awards. It will be given only at those times the Board of Directors identifies a person with success in sustained environmental leadership, staying power, creative thinking, personal relationships, fairness to all, love of our planet, and a moral certainty in the goodness of all things great and small.

President's Message

Origins

I live by a small hill known locally as Marble Hill, likely named so because of the tight tills. There is evidence of an old foundation, a small hand quarry, and hundreds of linear feet of stone walls. Several glacial erratics and bedrock outcrops are visible in the woods, and every early summer, wildflowers burst from the earth-filled crevices in some of these rocks. A portion of the west-facing slope of Marble Hill supports broad stands of tall dark hemlocks



There is also every kind of wetland. I have come across eastern box turtles, listened to the chilling howls of hunting coyotes, and watched the silent passage of fox. I have observed egg masses. The peepers find all the temporary pools and sing us through the night. But it's the quacking frogs that crack me up. A quacking frog! Unbelievable.

This is where I come from. My perspective, as your new President, is to understand and apply the science behind the magic of surficial geology, river morphology, and wetland ecosystems. To the extent that science can be applied to and practiced in light of regulatory and policy development, I trust that MACC will assist Conservation Commissions and regulatory agencies.

I am pleased to be able to serve MACC as its President. My goal is to keep MACC involved in advocating for open space and wetland protection which is becoming more and more important as governmental changes continue. I would like to see MACC continue to assist DEP in developing policy, implementing regulations, and conducting training. I would also like to see MACC continue to work cooperatively with other groups and associations, including the environmental and development communities, to discuss issues and work jointly on areas of common interest.

I encourage all Commissions to engage MACC in dialog on key issues, and to provide us input and feedback. We are your Association. We work for you. And lastly, please support MACC by renewing your dues and answering our Annual Appeal as generously as you can. This is a critical year. Thank you for your confidence in electing me as your President.

Ingeborg E. Hegemann
MACC President

The Role of the Alternatives Analysis in Riverfront Area NOIs

There is some confusion statewide about the role of the alternatives analysis in Notices of Intent that propose work within the riverfront area. Most Conservation Commissions and applicants are aware of the Riv-



ers Protection Act regulations at 310 CMR 10.58. Most also know that review of proposed work within a riverfront area involves an alternatives analysis and a limit to the total area within the riverfront area that can be altered (the “No Significant Adverse Impact” rule). However, not all Conservation Commissions and applicants know that consideration of the alternatives analysis should come first, and should be followed by consideration of land area altered within the riverfront area only if the applicant has proven that the project should be allowed within the riverfront area.

At too many Commission hearings, the role of the alternatives analysis is relegated to one of attempting to decrease alteration within the riverfront area, without really focusing on whether any work has to be allowed within the riverfront area in the first place. This is especially true in the second 100 feet from the river, which some Commissions and applicants treat much the same as the 100-foot buffer zone to BVW. However, the regulations are clear at 310 CMR 10.58.4.3 (page 399):

“The purpose of evaluating project alternatives is to locate activities so that impacts to the riverfront area are avoided to the extent practicable. Projects within the scope of alternatives must be evaluated to determine whether any are practicable. As much of a project as feasible shall be sited outside the riverfront area. If siting of a project entirely outside the riverfront area is not practicable, the alternatives shall be evaluated to locate the project as far as possible from the river”.

The definition of “practicable” is at 310 CMR 10.58.4.C and should be read in its entirety. In essence, practicable means the alternative is “obtainable and feasible” – an alternative is not practicable if it is (or, in certain circumstances, was) unavailable, would not meet the project’s purpose, or would be so expensive as to be infeasible. First an applicant has to prove that a project **must** be located within the riverfront area, because there are no practicable

alternative locations outside of the riverfront area. If that level of proof is achieved, the applicant must then prove that there is no practicable location for the project within the riverfront area that is further away from the river. Conservation Commissions should not move on to other issues, such as whether the project meets the No Significant Adverse Impact rule, until they are satisfied that a full and proper alternatives analysis has been completed.

Kenneth Pruitt, M.F.S., M.A.
MACC Executive Director

Can Commissions Have Voting “Alternates”?

Some Conservation Commissions and/or their appointing authorities have considered the creation of positions called “Alternates,” hoping to bestow upon them the right to vote at Commission meetings under certain circumstances (for example, when a quorum cannot otherwise be formed). Unfortunately, unless the state legislature has passed special legislation allowing your municipality to have voting alternates on its Conservation Commission, such rights do not exist and cannot be granted by a municipality. Please refer to the *Environmental Handbook for Massachusetts Conservation Commissioners* Section 3.1, 2002 updates to the 1997 edition, for additional information.

Conservation Commissions do have the right to hire staff and paid consultants as well as seek out and use the talents of volunteers who wish to provide assistance. Many Commissions have appointed “Associates” as unpaid consultants (The Conservation Commission Act states that Conservation Commissions – not the appointing authority – have the right to choose their own consultants). The only way these rights can be modified is through a municipal charter. In municipalities with charters, Conservation Commissions are advised to check with city or town counsel prior to appointing or hiring consultants.

Such Associates (or whatever title consultants are given) do not have voting rights, nor should they participate in Commission deliberations beyond providing information and opinions. MACC advises Commissions not to locate Associates at the same table as voting members during public meetings or hearings, to avoid confusion by applicants and the public. MACC also encourages Conservation Commissions to create “job descriptions” for Associates that specifically state what they can and cannot do, again to avoid confusion. Please refer to the *Environmental Handbook for Massachusetts Conservation Commissioners* Section 3.4, 2002 updates to the 1997 edition, for additional information.

Kenneth Pruitt, M.F.S., M.A.
MACC Executive Director

DEP's Position on Wetlands Delineation Fees

In recent months DEP has received questions concerning wetlands delineation filing fees as they relate to the Notice of Intent (NOI), Request for a Determination of Applicability (RDA) and Abbreviated Notice of Resource Area Delineation (ANORAD). The main point of confusion relates to whether Conservation Commissions, as part of NOI reviews, can assess wetland fees for the project (as specified in the category of activities for wetland fees at 310 CMR 10.03(7)(c)) as well as a BVW delineation fee (as specified as a separate fee category in the above regulations). The DEP's position on this point is that if a project (including the wetland delineation) is presented to the Conservation Commission as part of an NOI, the only fees that should be collected are the NOI fees based on Category 1-5 activities. Category 6 (wetland delineation) fees should not be added to the NOI fee; rather Category 6 fees should only be applied to ANORAD applications.

Prior to creation of the ANORAD, wetland fees were only required of NOI applications; no fees were associated with RDA applications. The ANORAD process was developed to address a number of issues raised by Conservation Commissions, applicants, MACC and others. The primary objective of the ANORAD was two-fold. First, this procedure was intended to provide fees to Conservation Commissions for the time spent on wetland delineation review. Second, the ANORAD was designed to improve the wetland delineation process, in exchange for the new fees, for applicants seeking confirmation of wetland delineations *first*, prior to designing a project.

By establishing separate wetland delineation fees, a secondary objective of the ANORAD process is to encourage applicants to file complete (i.e. resource delineations and project design) projects, thus avoiding delineation fees, as part of the NOI process. As established, NOI filing fees were developed to cover the review of *all project related activities* including wetland resource area delineations. As noted in the wetlands filing fee regulations pertaining to the Category 2 (single family homes) and Category 3 (non-single family homes) projects, such activities shall not be subject to additional fees (e.g. separate wetland delineation fees) if all said activities are reviewed under a single NOI.

If Commissions determine that the current filing fees do not adequately cover the actual time of project review, Commissions should consider a different fee structure under a local wetlands bylaw that better reflects the actual cost of project review in a given community. Alternatively, Commissions may invoke provisions of Section 36 of Chapter 46 of the Acts of 2002 (see article on front page) that authorizes Commissions to collect fees from applicants for consultant or project review services under the Wetlands Protection Act.

Michael J. Stroman
Wetlands Program Chief
Department of Environmental Protection

MACC Welcomes Maureen Febiger as New Education Coordinator



Maureen Febiger recently joined MACC as its new Education Coordinator. She has had experience in the area of non profit environmental organizations, and is currently serving as Vice Chairman of the Wellesley Natural Resources Commission and as a Town Meeting member. Two years ago under her chairmanship, the Town of Wellesley passed a local Wetlands Protection Bylaw and the Community Preservation Act. Ms. Febiger recently completed a Masters in Education in Instructional Design at UMass Boston. She also holds a Masters degree in Urban Affairs from Washington University. Maureen lives in Wellesley with her husband Christian. They have two grown daughters, Kathryn and Julia.

New Wetland Buffer Zone Assessment Tool Available

Conservation Commissions and others now have available a free new tool to assess the importance of wetland buffer zones to specific species of wildlife. A UMASS Amherst report "Buffer Zones and Beyond: Wildlife Use of Wetland Buffer Zones and their Protection under the Massachusetts Wetlands Protection Act" (2001) is now available as a pdf file online at: www.umass.edu/umext/nrec/pages/biodiver.html. Click on "Online Resources."

The report covers 65 species of reptiles, amphibians, mammals, and birds that are dependent on freshwater wetlands. Of the 65 species, 77% were found to require upland habitat up to 100 feet from the edge of the wetland, 58.5 % use the area 200 feet from the edge, and 52% use areas beyond 200 feet from the wetland edge.

The report is designed to assist Conservation Commissions, land managers and developers identify which upland areas are critical for the survival of specific species of wetland dependent wildlife. It will be especially useful to Conservation Commissions in towns that have adopted wetland by-laws that offer more protection to wetland buffer zones than is afforded by state wetland laws and regulations.

Joseph S. Larson, Ph.D.
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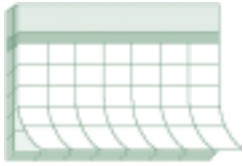
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CORRECTION

An error was made in the May/August 2003 Newsletter. The web address provided to download the "Environmental Permitting in Massachusetts" guide by the MA. Office of Coastal Zone Management had one extra letter. The correct address is: www.state.ma.us/czm/envpermittoc.htm.



CALENDAR

Oct. 8. **“Cultural and Natural Resources: Integrating Public Enjoyment and Protection Goals”** The Trustees of Reservations. Boylston, MA. Call 978.537.4458 X307.

Oct. 18. **Fundamentals for Conservation Commissioners.** Units 5, 6. Northeastern University, Burlington. See page 7 for details and registration or visit www.maccweb.org.

Oct. 18. **MACC Fall Conference “Buffer Zones: Science, Law and Solutions You Can Use”** Northeastern University, Burlington. See page 6 for details or visit www.maccweb.org.

Oct. 20-24. **“Wetlands 2003: Landscape Scale Wetland Assessment and Management”** Association of State Wetland Managers, hosted by NH Dept. of Environmental Services. Nashua, NH. Call 518.872.1804 or visit www.aswm.org.

Oct. 24. **“Resource Classification & Performance Standards”** AMWS. Swampscott, MA. www.amws.org.

Nov. 1. **Fundamentals for Conservation Commissioners.** Units 1, 2. Crowne Plaza Hotel, Pittsfield. See page 7 details and registration or visit www.maccweb.org.

Nov. 1. **MACC Fall Conference “Buffer Zones: Science, Law and Solutions You Can Use”** Crowne Plaza Hotel, Pittsfield. See page 6 for details or visit www.maccweb.org.

Nov. 7. **“Problem Soils”** AMWS. Ipswich, MA or Newton, N.H. www.amws.org.

Nov. 15. **AMWS Annual Meeting. “Biodiversity of New England Wetlands: Past, Present, and Future”.** Marlboro, MA. www.amws.org.

Nov. 22. **Fundamentals for Conservation Commissioners.** Units 5, 6. Quabog High School, Warren. See page 7 for details and registration or visit www.maccweb.org.

Nov. 22. **Advanced Training Program - “Wetlands Ecology & Conservation Biology.”** Quabog High School Warren. See page 7 for details and registration or visit www.maccweb.org.

Dec. 12. **Fundamentals for Conservation Commissioners.** Units 7, 8. New England Wild Flower Society. See page 7 for details and registration or visit www.maccweb.org.

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