

WETLANDS ENFORCEMENT *Manual*

*A Guide to Effective
Compliance with the Massachusetts
Wetlands Protection Act Regulations
November 2004*



Department of
Environmental Protection
Wetlands Program
November 2004

From DEP's Commissioner

Dear Conservation Commissioners:

Thank you — for all your efforts on the front lines of wetlands protection throughout the Commonwealth. As a former Conservation Agent, I have the utmost appreciation and respect for the work you do every day. Since coming back to DEP as Commissioner, I am even more committed to increasing the effectiveness of Wetlands Protection.

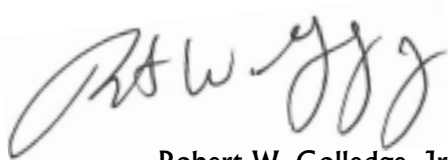
Through aerial reconnaissance and our wetlands mapping program, we have found that wetlands are being illegally filled throughout the state. We are taking swift action to bring those violators into compliance and sending a strong deterrence message to those who might think they can get away with it. We have assessed fines exceeding \$639,000 and required restoration of more than 25 acres of illegally filled wetlands, but we are by no means done with our enforcement efforts.

We are providing this manual to assist conservation commissions in effectively enforcing the Wetlands Protection Act. In providing this manual, DEP is reinforcing our partnership with conservation commissions. This manual reflects our continuing support to you on enforcement matters, not the end of DEP's commitment to conservation commissions and their work. An effective compliance and enforcement effort will continue to send a strong message — Wetlands are important to everyone in the Commonwealth! DEP wetlands scientists and lawyers are available to assist with questions on the largest and most complex cases. We all share a common goal of wetlands protection and by working together we can protect wetlands.

We have obtained funding to hire a full complement of circuit riders to help you do your job and provide technical assistance at times and locations that are convenient for you.

Again, thank you so much for your contribution to the Commonwealth's wetland resources.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. W. Golledge, Jr.", written in a cursive style.

Robert W. Golledge, Jr.
Commissioner

ACKNOWLEDGEMENT

This manual is designed to assist Conservation Commissions and other municipal officials in protecting wetlands resources. We hope this guidance will help you navigate through the maze of enforcement actions, from the simplest, least expensive methods to the more complex court actions.

This document was made possible by the knowledge and expertise of the following people:

The Author: Lois Bruinooge, MA DEP

The Editors, Reviewers, and Contributors: Mike Abell, Gillian Davies, Terry Eucker, Susan Gillan, Elizabeth Kimball, Esq., Lealdon Langley, Richard Lehan, Esq., Nancy Lin, Ann Lowery, Esq., Erik Mitchell, Dana Muldoon, Esq., Phil Nadeau, Lisa Rhodes, Elizabeth Sabounjian, Michael Stroman, Heidi Zisch, Esq., (MA DEP), and Ellen LeBrecque, Esq.

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Page Layout and Design: Sandy Rabb, MA DEP

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*Printable copies of this document can be downloaded from the following DEP Web site:
<http://www.mass.gov/dep/brp/ww/wwpubs.htm>. This information can also be obtained in alternate formats by contacting the ADA coordinator at 617/574-6872.*

The Commonwealth of Massachusetts

Mitt Romney, Governor

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Ellen Roy Herzfelder, Secretary

Department of Environmental Protection

Robert W. Gollidge, Jr., Commissioner

Bureau of Resource Protection

Cynthia Giles, Assistant Commissioner

Division of Watershed Management

Glenn Haas, Division Director

Wetlands/Waterways Program,

Lealdon Langley, Program Director

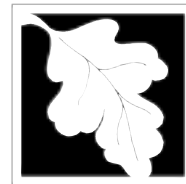
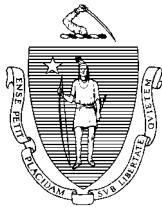


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Section

ONE

section one

introduction

Purpose: This manual is designed to assist conservation commissions, DEP staff, and other municipal officials in protecting wetland resources consistent with the Wetlands Protection Act (G.L. c.131, s.40) and Wetlands Regulations (310 CMR 10.00). This manual will guide you through a range of enforcement options, from the simplest methods to more complicated and time-consuming court actions. Although the manual discusses important legal concepts it is written for the layperson. This manual will assist you in understanding:

- conservation commission's jurisdiction;
- the types of violations that are enforceable under the Wetlands Protection Act and Wetlands Regulations;
- how to gather evidence; how to conduct a lawful site visit; how to issue an Enforcement Order;
- what options are available if a violator ignores your commission's orders; and
- your powers, duties, and limitations under Massachusetts and federal law.

New Computer Technology – GIS/Mapping Tools: While this manual updates the 1994 enforcement manual, many of the fundamental enforcement tools, legal powers, and responsibilities of conservation commissions have remained the same. The most promising development presented in this manual is the advent of computerized tools that can be used to track and document wetlands change over time – and thus can be used to detect and remedy violations. These tools, which are described in more detail in Section 2B, include a computer program that allows conservation commissions to map and catalog wetland areas, and to track the status of permit applications. In addition, the Department of Environmental Protection (DEP's) Wetlands Conservancy Program has been producing wetlands maps from color infrared aerial photographs. These maps are now available for most of the state, with the remainder of the state scheduled to be completed by the end of 2006. The maps can be used to "baseline" wetland areas as of a certain date. The photos will facilitate documentation of wetlands alterations by site visits or subsequent flyovers and can be an important enforcement tool.

Wetlands Reconnaissance Project: In January 2003, DEP, assisted by the National Oceanic and Atmospheric Administration (NOAA), developed a new semi-automated computer method that allowed for efficient analysis of all wetland alterations in the state. The process analyzes overlays of color digital orthophoto maps to identify all wetlands fill larger than ¼ acre in size. This is the first high-resolution systematic computerized analysis in the country for identification of wetlands loss in a state, and allows photo-analysts to readily identify wetlands filling since the previous aerial photos were taken. Identifying

wetlands alterations on desktop computers is an efficient way to identify possible violations. DEP is using this information to target its compliance and enforcement efforts.

In June 2004, DEP mailed CDs to 225 communities in its northeast, southeast, and central regions. The CDs contain a set of Wetlands Loss maps, supporting information on how to use the GIS files included for the maps, and tables for each town that give specific wetlands loss information in the community. A "Frequently Asked Questions" section has been developed and can be found on DEP's Web site at : <http://www.mass.gov/dep/brp/www/faqs.htm>.

In addition to providing ongoing technical information, DEP will continue to serve as partners and support conservation commissions as they take on difficult enforcement cases. Chapter 10 of this manual contains a list of other local, state, and federal agencies that may be consulted for advise on wetland enforcement strategies.

Legal Effect of the Wetlands Enforcement Manual: The guidance, policies, and procedures set forth in this Wetlands Enforcement Manual do not constitute final agency action, are intended solely as guidance for conservation commissioners and DEP employees in the exercise of enforcement discretion, and are not to be relied upon to create rights, duties, obligations, or defenses, implied or otherwise, enforceable at law or in equity, by any person. All information pertaining to statutes, regulations, and case law should be considered current only as to the date of publication. This guidance is not intended to, nor does it constitute "regulations" as that term is used in G.L. c.30A.



Section

TWO

section two

goals and priorities

Prompt and Continued Compliance: The primary goal of wetlands enforcement is to secure prompt and continued compliance with the Wetlands Protection Act (G.L. c.131, §40) and Regulations (310 CMR 10.00), and if applicable, your community's local bylaw or ordinance. While not always easy, enforcement does not have to be an overwhelming, frustrating task if your commission knows the law, sets enforcement priorities, develops an enforcement plan, and sticks to it.

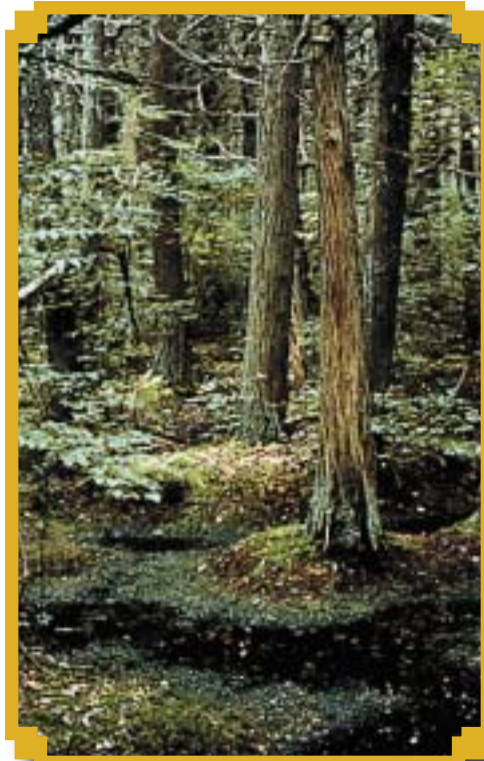
A. DEVELOP AN ENFORCEMENT ACTION PLAN

Analyze your Enforcement Problems: The first step is to spend part of your next commission meeting listing your most pressing enforcement problems. Do you spend months debating what enforcement steps to take? Do you spend week after week listening to homeowners tell you they didn't know their backyards were wetlands? Do you have a repeat offender that continually snubs your commission? Did your last Enforcement Order fail to elicit a response from the violator? Did the selectmen turn down your request for town counsel's assistance?

Try to make sense of these problems by analyzing their cause. Are you having trouble preventing violations because people simply do not know the law? Or are violations flagrant because the local development community isn't afraid of getting caught? Do you spend more time than necessary on wetlands enforcement because no one on the commission knows what options are available, and legal? Is your commission so overwhelmed that small violations can't be corrected before they become serious problems?

Enforcement Plan: Take these insights and turn them into priorities for action. Write them down - it's the start of your Enforcement Plan. Some of your priorities might include:

- Preventing violations from occurring in the first place;
- Remedying serious wetlands violations quickly; and
- Catching minor violations early and acting on them before they become serious.



All tactics and strategies flow from the ultimate enforcement goal of prompt and continued compliance, and from the priorities your commission has identified. In developing your Enforcement Plan, and in handling individual enforcement cases, keep in mind some of the general principles enunciated in DEP's Enforcement Response Guidance (available at www.mass.gov/dep/enf).

- Document the noncompliance;
- Achieve a prompt return to compliance;
- Remedy the adverse impacts of noncompliance;
- Escalate as appropriate based upon the conduct and compliance history of the violator and other relevant factors; and
- Impose sanctions that are credible and proportional to the nature and the severity of the offense and impose sanctions that are severe enough to deter future noncompliance.

Make sure that whatever strategies seem best for your community are written into an Enforcement Plan. This "Plan" doesn't need to be very long or formal - a one-page outline is fine - by setting your goals, priorities, and strategies down on paper, you already will have made enforcement easier. In addition, consider appointing one commission member as the "Enforcement Coordinator" for your commission. This person should be familiar with the options presented in this manual and feel comfortable enough to lead when enforcement is needed.

B. FOSTER VOLUNTARY COMPLIANCE

Set the stage for easy enforcement: If one of your commission's priorities is to prevent wetland violations from occurring in the first place, the tips and methods listed in this section can and should be implemented now. Time spent today implementing these suggestions will be more than repaid in the future as your commission reaps the benefits of good planning and efficient techniques. Most of the suggestions in this section can be incorporated into the commission's routine with little or no additional cost.

Be professional: Conduct commission affairs in a professional, business-like manner. This will let the community know that you are serious about wetlands protection and about enforcement of wetland laws. Learn and adhere to the rules of order. Keep detailed minutes of commission meetings and site visits. Many commissions tape record the meeting. Have agendas available for members of the audience. Invite audience participation when appropriate, but don't lose control of the meeting.

Know where your wetlands are located: Take advantage of new, computerized tools that can assist you in tracking your commission's wetlands permitting projects. One such tool can be found on DEP's Web site at www.mass.gov/dep/brp/ww/gisproj.htm. This project was

developed for use in the Ipswich River Watershed, but has been adapted for use by conservation commissions statewide. By downloading and accessing the MS Access© database found at the Web site, commissions can effectively manage the status of local permitting projects. This application gives commissions the capability to input, retrieve, and track all the information pertinent to a specific wetlands enforcement case. Detailed instructions and system requirements can be found at the Web site.

Next, make sure you have the Wetlands Conservancy maps for your town. More information about these maps is available at www.mass.gov/dep/brp/ww/files/wcpbroch.pdf. DEP's Wetlands Conservancy Program has been mapping the state's wetlands using aerial photography and photo interpretation to delineate wetland boundaries. As of the date of this manual (November 2004), these maps provide an invaluable enforcement tool and are now available for approximately 70 percent of the state and the remainder of the state is scheduled to be completed in 2006. The Program has been distributing these maps to communities for free upon completion.

The photos used in this inventory process are color infrared (CIR) aerial photos at a scale of 1 inch = 1,000 feet. The photos are viewed by experienced aerial photo-interpreters from the University of Massachusetts who use special magnifying equipment to delineate wetlands down to a minimum size of ¼ acre. The wetlands types identified in the inventory include salt marshes, wooded swamps, freshwater marshes, and barrier beaches. The map upon which the wetland delineations are displayed is an orthophoto map at a scale of 1 inch = 417 feet. This extremely accurate map is photo-based, delineates wetlands down to a size of 1/4 acre, and shows landscape features, such as roads and buildings on an individual parcel level. The delineations from the CIRs are transferred onto the orthophoto map.

The wetland boundaries shown on these maps cannot substitute for field delineations required under the Wetlands Protection Act. However, these maps can provide an excellent reference point for investigating illegal alterations.

Use the Wetlands Loss Map CDs sent to you by DEP to identify locations of filled wetlands described in Section 1. Check Commission records on these sites to see if permits were issued for these locations or

if enforcement action has been taken.

Investigate the sites further if they appear to be illegally filled and take enforcement action as described later in this manual where appropriate.

Finally, collect U.S. Geological Survey topographic maps,



Federal Emergency Management Agency floodplain maps, U.S. Soil Conservation Service soil maps, DEP wetlands restriction maps, DEP wetland loss maps, municipal wetland maps, and aerial photographs as general aids to determine wetland boundaries in town. The Earth Science Information Office at the University of Massachusetts/Amherst (www.umass.edu/tei/esio) is a good place to start your search for maps and aerial photographs.

Educate the community: Start building a foundation of community-wide awareness today. Townspeople will be more likely to support your efforts if they know that you exist and understand what you are trying to accomplish. Well-informed neighbors can alert you to potential violations, and will support your request for the resources necessary to do the job right. Publicize your activities, meetings, and site visits. Visit neighborhood groups, garden clubs, and civic organizations for short presentations to explain the work of your conservation commission. Get involved in the school system with river cleanups, nature walks, and other activities geared toward educating school children and their parents.

Often, the best resources for educating the public are the individuals who answer phones and questions at city or town halls. Commissioners should spend some time getting to know municipal employees, so they can provide citizens with basic wetlands information and applicable forms. A wetlands library is an important resource and should be made easily available to the public. This library should be posted on your community's web site if one exists. At a minimum it should contain copies of, or links to, the state and local wetland laws, regulations, policies, guidance documents, maps and plans of the community, field guides, and handbooks and manuals from the Massachusetts Association of Conservation Commissions (MACC) and the Massachusetts Audubon Society. The town's Web site should link to DEP's website, www.mass.gov/dep, which is also a valuable resource that contains all of the required forms and can save both citizens and the municipality time and expense.

Educate applicants (particularly homeowners): The regulations and terminology of the Wetlands Protection Act can be daunting for individual homeowners. Conservation commissioners and their agents should provide applicants with straightforward, easy-to-understand information on completing wetlands forms and identifying resource areas. One method of improving compliance is to allow potential applicants to be placed on the commission's agenda for an informal discussion before filing a Notice of Intent or Request for Determination of Applicability. This ten-minute informal conference helps landowners to assess the feasibility of their project. Public access to local commissioners is an important part of maintaining and improving compliance and transparency in administering the Wetlands Protection Act. It also ensures that Notices of Intent and Requests for Determinations of Applicability are filed with sufficient information.

Communicate with other municipal boards and departments: Meet with your fellow municipal officials and legal counsel to discuss the nature of wetlands protection, the type of violations encountered, and the typical need for fast action. Provide copies of the Wetlands Protection Act and Regulations, your local wetland bylaw or ordinance (along with any local regulations), and a copy of this enforcement manual. Ask for an annual briefing with your Board of Selectmen to highlight the activities of the Conservation Commission to garner their understanding and support in what you do. Provide board and council members with handouts describing local wetland resources so they can alert you to possible violations. Meet with municipal staff, such as the building inspector, engineers, and road department to familiarize them with wetland issues. Explain to the police chief when police services might be needed to assist the commission in enforcing wetland laws.



Use the media effectively: One of the best ways to educate the public is to get favorable press coverage. Invite members of the local press to cover your meetings, especially those meetings that you think are press worthy. Designate a commission member to be responsible for sending meeting agendas to local reporters, highlighting those items that might be of interest. It is also a good idea to periodically submit feature articles on wetlands issues and the activities of your conservation commission. Write letters to the editor, and suggest topics for formal editorials. Be patient with inexperienced reporters and explain your duties under state and local law again and again.

Remember that enforcement orders, permit applications, and the minutes of commission meetings are public documents. Local media should be encouraged to contact the commission for information on enforcement problems and to publish information about enforcement actions taken by the commission.

Draft simple press releases to publicize your enforcement activities. Future violators will not be deterred by your strong enforcement actions unless they know about them. For sample press releases, go to www.mass.gov/dep/pao.

Write Orders of Conditions that are virtually self-enforcing: Many violations can be prevented if the developer, contractor, and landowner

have a clear understanding of what is required before any work begins on site. This process begins with the filing of a good Notice of Intent (or Request for Determination of Applicability) that completely and accurately describes the wetland resources, boundaries, proposed work, and the measures that will be taken to meet performance standards. Your commission must understand exactly how the proposed work will be performed. Think about what could go wrong, and condition the project to avoid potential problems. Where feasible, projects should be sequenced so that mitigation and replication requirements are met before the start of construction activities. Establish explicit interim deadlines to ensure the project stays on track, and to catch small problems before they become overwhelming. You may require an applicant to have his/her contractor or engineer report to the commission periodically as the project proceeds. This ensures that the special conditions and mitigation measures are followed and is an excellent method of controlling projects. Tracking open Orders of Conditions in a “tickler system” will also provide you with a list of projects to check on either through site inspections or follow up letters. The database that was discussed earlier in this section may be helpful in tracking projects. (See www.mass.gov/dep/brp/ww/gisproj.htm.)

Make sure the Order of Conditions is recorded in the Registry of Deeds before work begins, so that subsequent owners of the property know what their obligations are. Each Order must be recorded in the Registry of the county where the land is located before any work commences on site (but after all appeal periods have lapsed). The applicant must notify your commission when the Order has been recorded by returning the bottom portion of the Order of Conditions form. If the applicant does not record the Order before commencing work, your commission may record the Order or issue an Enforcement Order that stops work until the applicant records the Order. There will be a fee for recording at the Registry of Deeds. In addition to ensuring the Order is recorded, commissions should develop a “tickler” system that tracks the term of the Order and alerts commissions as to when requests for Extensions or Certificates of Compliance will be required.

C. BE READY TO TAKE ENFORCEMENT IF YOU CAN'T ACHIEVE VOLUNTARY COMPLIANCE

Obtain sufficient evidence to prove your case: It is important to remember that your commission bears the burden of proof in an enforcement case to prove each element of a violation. For example, to bring a successful civil lawsuit, you might have to prove by a preponderance of the evidence that a specific person/entity conducted an activity that removed, filled, dredged, or altered a resource area or the buffer zone in violation of a specific statutory or regulatory requirement. (See Section 9 for more information on the burden of proof). Obtaining and documenting evidence is critical to the success of your enforcement efforts, and is described in more detail in Section 5.

Respond swiftly and consistently to any violations that do

occur: Be consistent, not arbitrary, when you take enforcement actions. Each commission member should be well educated as to his/her responsibilities and limitations under the law. Cite from the applicable law, regulation, or policy to justify your decisions. Never try to extend the legal authority granted to the commission. Provide an alleged violator the opportunity to present his/her case before escalating to more serious enforcement actions. Don't make idle threats, but be willing to escalate when necessary to prevent serious harm to the environment and to send a strong message to flagrant violators that their actions will not be tolerated.

Respect the limits of your authority: Municipal employees and officers (including conservation commission members and staff), acting within the scope of their employment or office, are given statutory protection from certain types of liability by the Massachusetts Tort Claims Act, G.L. c.258. In most cases the municipality, not the individual, will be held liable for negligent or wrongful acts or omissions caused by a conservation commission member or staff person acting within the scope of his/her office or employment. The Tort Claims Act does not protect commissioners if they act beyond the scope of their responsibilities as commission members. Personal liability may arise from acts or omissions that constitute a violation of any person's civil rights under federal or state law. Racial slurs, assault, and battery are examples of actions that are not protected and may result in personal liability for commissioners. Otherwise, commissioners who conduct themselves in a professional and fair manner should not be concerned about personal liability for their actions.

Learn how to access wetlands filing fees for enforcement-related activities: The Wetlands Protection Act and state fee regulations at 801 CMR 4.02 authorize the commission to collect filing fees to offset the costs of administering the Act. Guidelines for the handling, payment, and use of fee monies were issued by the Department of Revenue (DOR) in 1998 (IGR No. 98-101). These fees must be deposited in a separate municipal account and cannot be used for any purpose except administering the Wetlands Protection Act. The purpose of these fees is to give conservation commissions the resources necessary to carry out their duties under the Wetlands Protection Act, including enforcement-related activities, such as paying for technical and legal assistance, purchasing historic maps and aerial photographs, and conducting site inspections.

The Legislature passed a Special Act in 1998 authorizing conservation commissions to access filing fee monies without a town meeting or city council vote. Instead, written approval is required from your selectmen, town manager, or mayor. Chapter 194, §349 of the Acts of 1998 states:

Notwithstanding the provisions of any general or special law to the contrary, each city or town shall establish a wetlands protection fund for the deposit of all fees paid to the city or town under section 40 of chapter 131 of the General Laws.

The fund shall be expended by the conservation commission without further appropriation for the purpose of defraying the costs of administering and enforcing said section 40 of said chapter 131, but only with the written approval of the mayor in cities, or city manager in plan E cities, or the selectmen in towns, or the town manager in towns which have adopted the town manager form of government [emphasis added].

Learn how to access consultant review fees: The 2003 amendments to c.46 §36 of the Acts of 2003 gives conservation commissions the ability to require applicants to cover the cost of consultants that are needed to review wetlands projects and other related responsibilities. See Section 11, Appendix 8 for details on how commissions can exercise their rights regarding this amendment.





Section

THREE

section three

jurisdiction

The first step in determining whether a violation of the Wetlands Protection Act has occurred is to establish jurisdiction. To do this you must determine that both the activity and the resource area are regulated under the Wetlands Protection Act.

A. ACTIVITIES that remove, fill, dredge, or alter wetland resource areas are defined broadly in the Wetland Regulations (310 CMR 10.00). The commission has jurisdiction over:

... any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings, the construction or improvement of roads and other ways; the changing of run-off characteristics; the intercepting or diverging of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land. 310 CMR 10.04

This list is expanded further by the definitions of remove, fill, dredge, and alter:

Remove means to take away any type of material, thereby changing an elevation, either temporarily or permanently.

Fill means to deposit any material so as to raise an elevation, either temporarily or permanently.

Dredge means to deepen, widen or excavate, either temporarily or permanently.

Alter means to change the condition of any Area Subject To Protection.

Under G.L. c.131, §40, examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological, or chemical characteristics of the receiving water. 310 CMR 10.04.

Exempt Activities: Some activities that are conducted within resource areas or the buffer zone are not subject to review under the Wetlands Protection Act. Many of these activities, known as exemptions, are listed in the Wetlands Protection Act itself and include certain qualifying mosquito control work, some utility maintenance work, specified aquacultural and agricultural activities (including some activities related to cranberry bogs and forestry), and projects authorized by Special Act prior to 1973. The Wetlands Regulations provide more detail on many of these exemptions, as well as exemptions for other minor activities such as certain stormwater management projects (310 CMR 10.02(3)); specific minor activities in the buffer zone (310 CMR 10.02(2)(b) and 310 CMR 10.04 “Alter”); and certain other projects in the Riverfront Area (310 CMR 10.58(6)(b)).

The burden is on the person or entity claiming an exemption to prove that the activity they are conducting falls within the confines of the claimed exemption. Your commission should obtain sufficient information from the person or entity to be able to verify whether the activity is indeed exempt.

B. AREAS that are subject to protection under the Wetlands Protection Act are listed in the Wetlands Regulations at 310 CMR 10.02(1) as:

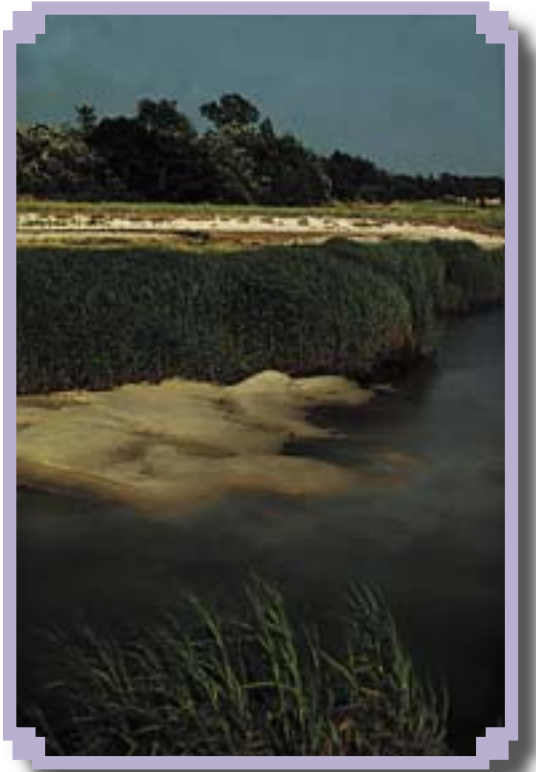
Areas Subject to Jurisdiction		
(a) Any bank - any freshwater wetland - any coastal wetland - any beach - any dune - any flat - any pond - any marsh - or any swamp	BORDERING ON	- the ocean - any estuary - any creek - any river - any stream - any pond - or any lake
(b) Land under any of the water bodies listed above (c) Land subject to tidal action (d) Land subject to coastal storm flowage (e) Land subject to flooding (f) Riverfront area		

Jurisdiction over activities within resource areas or the buffer zone: Commissions automatically have jurisdiction whenever a regulated activity is occurring or has occurred within one of the above-listed resource areas. Once discovered, unauthorized activities should be stopped pending your commission’s review. In addition, before any work begins in the 100-foot buffer zone around the resource areas listed in 1(a) above (i.e. bank, freshwater wetland, coastal wetland, beach, dune, flat, marsh, or swamp) the applicant must get approval for the activity through a negative determination, an Order of Conditions, or comply

with any other available regulatory provision for authorizing work in the buffer zone.

After-the-fact jurisdiction over activities outside resource areas and the buffer zone: Commissions may assert jurisdiction over an activity “outside” of resource areas and the buffer zone only if the activity has in fact altered a resource area. For example, if excavation work in an upland area causes soil to erode into a distant wetland, the commission may assert “after-the-fact” jurisdiction over the construction activity in the upland for the purpose of protecting the resource area (310 CMR 10.02(2)(c). Again, work should be stopped pending commission review.

Municipal jurisdiction under wetlands bylaw/ordinance: If your community has a wetland bylaw or ordinance, the commission’s jurisdiction may be defined more broadly than under the Wetlands Protection Act and Wetlands Regulations. Additional resource areas may be protected, and additional activities may be regulated. Commissions with wetland bylaws or ordinances have independent authority to assert jurisdiction over activities in or near resource areas. Determinations of Applicability, Orders of Conditions, Enforcement Orders, and other documents issued under local bylaws or ordinances should clearly state that they are being issued pursuant to local authority. In appropriate cases, jurisdiction under a bylaw or ordinance can be asserted concurrently with jurisdiction under the Wetlands Protection Act. If only one document (i.e. an Enforcement Order) is issued pursuant to both the Wetlands Protection Act and a local bylaw or ordinance, each law should be cited on the document’s face. Because wetland bylaws and ordinances are local responsibilities, DEP cannot assist conservation commissions in implementing, enforcing, or defending decisions issued under the bylaw provisions unrelated to the Wetlands Protection Act.





Section

FOUR

section four

types of violations

After you establish jurisdiction, you must determine which provisions or requirements of the Wetlands Protection Act and/or Wetlands Regulations have been violated.

The Wetlands Protection Act describes in broad terms the types of activities that constitute violations:

No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense... G.L. c.131, §40.

The Wetlands Regulations at 310 CMR 10.08(1) further specify the following violations:

- (a) failure to comply with a Final Order, such as failure to observe a particular condition or time period specified in the Order;
- (b) failure to complete work described in a Final Order, when such failure causes damage to the interests identified in G.L. c.131, §40; or
- (c) failure to obtain a valid Final Order or Extension Permit prior to conducting an Activity Subject to Regulation Under G.L. c.131, §40 as defined in 310 CMR 10.02(2).

In practical terms, applicants must obtain approval before conducting non-exempt activities in resource areas or the buffer zone, and must conduct all work in accordance with those approvals. Examples of the types of violations a commission might encounter include but are not limited to:

Unauthorized activity in a resource area: Any work in a resource area that has not been authorized by the commission or DEP should be stopped pending commission review. In some cases, the person doing the work may claim to be conducting the activity pursuant to an exemption from the Wetlands Protection Act. The commission should request appropriate documentation and proceed with enforcement if the information is not submitted within a reasonable time or if it does not adequately establish that the exemption applies.

Unauthorized activity in a buffer zone: At a minimum, an applicant must file a Request for Determination of Applicability prior to conducting activities within the buffer zone. Failure to request a Determination of Applicability or Notice of Intent prior to conducting work in the buffer zone establishes sufficient jurisdiction for the commission to take enforcement action.

Unauthorized activity after receipt of a Positive Determination of Applicability: In order to avoid confusion, your commission should double-check that an applicant understands his/her obligations upon receipt of a Positive Determination of Applicability. A Positive Determination of Applicability does not authorize any work, and an Order of Conditions must be obtained prior to proceeding. Activity that is mistakenly conducted after receipt of a Positive Determination is the same as unauthorized work in a resource area or the buffer zone and may result in the same type of enforcement.

Unauthorized activity beyond the scope of a Negative Determination of Applicability: Commissions sometimes issue Negative Determinations of Applicability with Conditions. The applicant must fully understand that your review is limited to only the particular activity and resource areas presented. Changes in the project, activity or location require further review. Conducting work beyond that contemplated in a Negative Determination of the Applicability is the same as unauthorized activity work in the buffer zone and may result in the same type of enforcement.

Unauthorized Activity, Expired Orders of Conditions: Permits that have expired cannot be extended. Applicants may only request an extension of an Order before it expires. The holder of an expired permit must submit a new Notice of Intent and receive a new Order of Conditions. Working pursuant to an expired Order is the same as working without a permit.

Violations of Orders of Conditions: This category includes a wide range of potential violations, from paperwork violations such as failure to submit progress reports, to substantive violations such as failing to control erosion and sedimentation. It also includes an applicant's failure to complete mitigation and replication measures required in the Order when those failures cause damage to the interests identified in the Wetlands Protection Act. (See 310 CMR 10.08(1)(b)). The more specific the Order of Conditions, the easier it will be to determine compliance. Failure to request a Certificate of Compliance upon completion of the project is also a violation of the Order of Conditions.



Violations of Superseding Orders of Conditions: Your conservation commission retains jurisdiction concurrently with DEP to enforce Superseding Orders of Conditions. Contact your DEP regional office immediately regarding any violations of a Superseding Order of Conditions. In addition, your commission should not hesitate to take enforcement action if necessary to prevent additional damage to wetland resource areas and/or to protect the interests of the Wetlands Protection Act.

Violations of Certificates of Compliance: Orders of Conditions typically include special conditions that require ongoing maintenance and/or monitoring of things such as stormwater management systems and wetlands replication areas. Commissions should ensure that these types of conditions are included as continuing conditions in the Certificate of Compliance and are properly recorded, so that subsequent landowners are put on notice of their obligations.

Leaving in place unauthorized fill, or otherwise failing to restore illegally altered land to its original condition: Each day that unauthorized fill remains in place, or the land is otherwise not restored, constitutes a separate violation of the Wetlands Protection Act. In some cases, the current landowner may be held responsible for removing unauthorized fill or otherwise restoring the property, even if the original alteration was caused by a previous landowner (See Section 9D).

Violations of Enforcement Orders: Violating an Enforcement Order constitutes a separate statutory violation. Each day that a violator fails to comply with an Enforcement Order is also a separate offense.



Section

FIVE

section five

gathering evidence

Your commission should attempt to gather as much information as possible in order to properly document a violation. Much information can and should be obtained prior to visiting the site. All information related to the violations should be placed in an enforcement file.

It is important to remember that your commission bears the burden of proof in an enforcement case. (See Section 9 for additional information on the burden of proof in civil and criminal cases). Obtaining and documenting evidence is critical to the success of your enforcement efforts.

A. PRIOR TO VISITING THE SITE

Citizen complaints: Note the date, time, and name of any individual who has complained or inquired about activities at a site. Anonymous complaints should be documented and the caller advised that his/her call will be treated with the same priority as other callers. The commission should make every effort to protect the identity of a caller that requests to remain anonymous.

Find out as much as you can from the caller about what is happening on the property. What wetlands and/or water bodies are/have been impacted? What activities are/have been undertaken? How long have the activities been going on? Are people and construction equipment currently working on site? Do you know who owns the property? Are any company names and/or logos visible on vehicles? Are you observing this activity from a public vantage point, or from your own property?

Telephone log: Document and date all phone conversations with, and messages left, for the violator and any other persons or agencies that may be involved with the site.

Review conservation commission records: Look for any information on previous activity at the site, whether permitted or not. If you have taken advantage of the new, computerized tools that can assist your commission in mapping and tracking wetlands changes, review your database. If you are not using the database from the GIS Project discussed in Section 2, do so before your next enforcement case. You can review this information on DEP's Web site at: www.mass.gov/dep/brp/ww/gisproj.htm.

Determine the nature and condition of the property as it existed before the suspected violation:

- Review the DEP Wetlands Conservancy maps for your town. More information about these maps is available in Section 1B and at www.mass.gov/dep/brp/ww/files/wcpbroch.pdf.

- Utilize U.S. Geological Survey topographic maps, Federal Emergency Management Agency floodplain maps, U.S. Natural Resource Conservation Service soil maps, DEP wetlands restriction maps, DEP Wetlands Loss maps, and municipal wetland maps as general aids to determine the wetland boundary prior to an illegal alteration. These resources should be consulted routinely, as they provide information that may not be obtainable through a site inspection.

- Old photographs from neighboring property may provide important information to determine how long fill has been on a site or the extent of violations. It is always worthwhile to ask neighbors for photographs (those with dates are most useful). Aerial photographs may also be available that will assist in documenting the past condition of the property. The Earth Science Information Office at the University of Massachusetts/Amherst (www.umass.edu/tei/esio) is a good place to start your search for maps and aerial photographs.

Request site access: See Section 6 for more information on obtaining consent to inspect the site, as well as your options if consent is denied.

B. DURING THE SITE INSPECTION

Document site access: The method used to obtain access for each site visit should be documented. This documentation should, at a minimum, consist of a written notation to the file that identifies who visited the site and when (date and time) and who authorized access (i.e. landowner, agent, construction worker, etc.). If consent has not been obtained, it is very important to document your attempts to gain access and the landowner's response. This information is required to apply to the court for an administrative inspection warrant.

Site observations: Describe the site and its location, the activities observed, any disturbance or fill, and record the date and names of each individual(s) making the observations. Draw



a sketch plan or mark up a map of the area to indicate resource areas and activities. It is recommended that you bring a compass, tape measure, camera, and note pad with you. A list of other useful items can be found in Section 11, Appendix 1.

Questions to ask: What is the ownership history of the property? Ask the landowner how long they have owned the property. What are the current and the past uses of the site? What events/activities occurred immediately prior to the suspected violations? Is the owner aware of Wetlands Protection Act requirements?

Identify resource areas: Identify as many resource areas as possible, and estimate preliminary boundaries (with the understanding that the exact boundaries may require more detailed analysis in the future.) Record resource area boundaries on at least a sketch plan. Note wetland indicator vegetation and soils information. The disturbed area should be measured with a measuring tape or estimated by pacing, and measured/estimated again at each subsequent site visit to ensure that violations have not continued. It is also useful to place flags or small stakes as markers.

Note the license/registration numbers and the company names of any vehicles at the site, and obtain professional license and registration information from individuals working at the site.

Photographs or videotapes taken at the site both before and after the violation are an important part of the record. Care should be taken to indicate the date and time of the photograph, what the photograph is purporting to show, and who the photographer was. Try to include a reference point for scale, such as a ruler or standing person, and include landmarks whenever possible. It may be difficult to enter digital images as evidence in court because of their ability to be manipulated.

C. AFTER THE SITE INSPECTION

Documents list: Create a list of all documents, plans, letters, notices, and orders that are pertinent to the site. All correspondence and minutes of conservation commission meetings that relate to the site should also be listed. It is also important to ask the violator if he/she has any documents that have been filed with or issued by any other local, state or federal board or agency. This list may contain documents from the Board of Health, Building Inspector, Planning Board, DEP, or U.S. Army Corps of Engineers. This list will help the commission to determine what other approvals or permits exist for the site. Violators sometimes wrongly assume or claim that their activities are approved or permitted by other boards.

Chronology of events: Based on the information above it is advisable to write a "Chronology of Events," that contains a narrative description of the key events and dates regarding the violation. This document should also cross reference all relevant documents/plans or photographs in the record. Violators are less likely to ignore enforcement actions that are supported by well-documented and detailed facts. Finally, thorough documentation helps avoid allegations of "arbitrary" or "capricious" decisions by the commission.



Section

SIX

section six

site visits

In order to establish whether an activity violates the Wetlands Protection Act and/or local bylaw or ordinance, your commission or agent usually will need to conduct a site inspection. A site visit is not subject to the Open Meeting Law and may be conducted by one or any number of commission members. In important cases the entire commission may visit the site together. For smaller projects or emergencies the job may be delegated to one member or the commission's agent. A suggested Enforcement/Compliance checklist is provided in Section 11, Appendix 1. Whenever possible, more than one person should conduct a site visit, especially in contentious situations.

A. STATUTORY AUTHORITY AND CONSTRAINTS

The **Wetlands Protection Act** contains language giving conservation commissions and DEP the authority to enter private land in order to carry out their duties under the Act:

The conservation commission and its agents, officers and employees and the commissioner of environmental protection and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section. G.L. c.131, §40.

Constitutional Cautions: However, this language is not the last word on the subject. Both the United States and Massachusetts Constitutions contain important safeguards that protect people from unreasonable searches and seizures and limit government's access onto private land without either consent or a search warrant.

Under the 4th Amendment to the United States Constitution, "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

Similarly, under Article XIV of the Massachusetts Constitution Declaration of Rights, "*Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions...*"

The Massachusetts Supreme Judicial Court reinforced the importance of constitutional protections with respect to site visits by conservation commissioners in its 1988 decision Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151 (1988). In that case, a conservation commissioner visited a site several times without permission of the owner. The court stated that the language of the Wetlands Protection Act could not be read to ignore constitutionally protected privacy rights. "A general grant to roam at will through all areas in a municipality

that are subject to [G.L. c.131,] §40 in search of unlawful conduct would present substantial constitutional questions. We are persuaded that the Legislature intended no such broad grant of authority.” *Id.* at 160.

The Judge excluded the evidence collected by the commission during the illegal site visits because the landowner’s constitutional rights were violated. This exclusionary rule acts as a remedy to protect alleged violators from unconstitutional searches. If your conservation commission unreasonably conducts a site visit (search or inspection) in violation of federal or state Constitutions, a Judge may exclude the evidence acquired during the site visit. The case could be dismissed if the remaining legally obtained evidence is insufficient to establish a violation.

(Note that the Wetlands Protection Act has been amended since the Grant decision so that certain other portions of the Grant decision are no longer applicable. For example, the Wetlands Protection Act was amended to include enforcement as a specific conservation commission duty after the Grant court found that commissions lacked enforcement authority.)

In light of constitutional requirements, how can a commission perform enforcement-related site visits?

- Obtain consent;
- View the site from abutting properties where you do have consent, or from publicly accessible areas including the air; or
- Obtain an administrative warrant.
- In extreme circumstances posing an imminent and substantial emergency that threatens public health or safety, contact DEP and the police prior to entering the site.



B. OBTAIN CONSENT

Commissioners should notify the owner, agent, or manager of a property of their intent to visit the site to inspect for a violation of the Wetlands Protection Act and request access during reasonable hours. Consent may be requested in person, by telephone, or by certified letter. It is important to document any conversations and confirm the name and title/function of the person authorizing consent. Only a person who has reasonable authority to do so, such as a landowner, agent, or a tenant, may give consent. Although commercial properties are often leased, a tenant can give valid consent to a search of the portion of the premises leased and occupied by him/her. In some instances, more than one person may be authorized to give consent (e.g. jointly owned property). Consent from any authorized party is sufficient to authorize entry.

First, go to the home or business during normal business hours and announce your presence. If there is no structure on the property, approach anyone working on the site and ask to be directed to the landowner or any other person in charge. Introduce yourself as a member or agent of the conservation commission and show some identification such as a badge or photo identification that references your official capacity, if possible. Explain that you are investigating work at the site to be sure it is not being carried out in violation of the Wetlands Protection Act and that you would like to conduct a site inspection. Be aware that workers on-site may need to contact the landowner and obtaining consent may take some time. If consent is given, you may then proceed with your inspection in a professional manner.

If the landowner or other person with whom you are speaking objects at any time to your investigation, either verbally or by his/her actions, DO NOT proceed with your site inspection. Ask if there might be a more convenient time to schedule a site visit. If the objection persists, for your own safety, as well as constitutional considerations, you should leave the property immediately. You may advise the landowner of your right to obtain a warrant if consent is denied, and that you may observe the property from abutting areas. Once you have been denied consent, you may proceed with your investigation only by observing any violations from off-site or by obtaining a warrant and returning to the site.

If you are unable to contact the landowner, either in person, by telephone, or by letter (be sure to keep a written log of your attempts to contact the landowner) because there is no one at the site or because you are unable to reasonably determine who the owner is, and the area of violation is not in public view, you should contact your town counsel to discuss your strategy for gaining access. While obtaining a warrant is always an option, town counsel may have an alternative recommendation, depending on the particular circumstances of the situation.

Consent during the permitting process: A landowner who files a Request for Determination, Notice of Resource Area Delineation, or Notice of Intent with the conservation commission should reasonably expect that the commission will conduct a site visit. However, in order to prevent confusion, it is a good idea to have an applicant provide you with written permission to view the site when the project is first presented to the commission. If permission to conduct a site visit prior to acting upon a Request for Determination is withheld, your commission can issue a Positive Determination and require a full Notice of Intent before any work proceeds on site. If permission to conduct a site investigation for acting upon a Notice of Resource Area Delineation or Notice of Intent is withheld, your commission can deny the landowner's application for lack of information.

Consent after the permit has issued (site access clauses): Every Order of Conditions contains a standard condition that allows the commission, its agent, or DEP to enter and inspect the site during

reasonable hours to evaluate compliance with the Order. However, because this general condition is one of numerous boilerplate conditions, your commission should ensure that the applicant has read and understood this provision (as well as all the other general conditions). The United States Supreme Court has expressed some concerns about the passive acceptance of boilerplate permit conditions in meeting 4th Amendment Constitutional requirements. Therefore, it is good practice to have the applicant specifically initial and date the access clause. It is also advisable to notify the landowner or agent prior to each site inspection after a permit has been issued. If at any time the landowner refuses to allow access, you should view the property from off-site or return with an administrative warrant.

C. OBSERVE FROM PUBLIC PROPERTY/ABUTTING PROPERTIES

Where possible, observe violations from public property or from private property where you have permission to be, such as on abutting land. Ask a neighbor if you may enter his/her property to observe the adjoining lot. You also may view violations from any vantage point where the public is not excluded, such as public streets, parking lots, sidewalks, public parks, etc. This includes the use of airplanes which may be worth the expense for investigating serious violations. You may also use binoculars or telephoto lenses. Keep notes of your observations and photographs made from such locations. If several ongoing violations occur or are suspected, it could be worth the additional expense to contract for aerial photographs at regular intervals. Historical aerial photos can also be obtained from a variety of sources. DEP's Wetlands Loss Detection Project is one good resource for aerial photos.

D. OBTAIN AN ADMINISTRATIVE WARRANT

A member or an agent of your commission may apply for a warrant and conduct an administrative inspection. For most enforcement actions, you will be seeking a civil administrative warrant. The standard for obtaining an administrative warrant is a more relaxed standard than the standard for obtaining a criminal search warrant. To obtain an administrative warrant, the conservation commission must demonstrate that the search is part of a neutral inspection scheme or the commission has specific evidence of an existing violation.

In order to obtain a criminal search warrant, you must meet the "probable cause" standard. This means that you must demonstrate to a magistrate or judge that you have reliable information leading you to believe that evidence of a violation of law will be found on the property to be searched. If you wish to pursue criminal prosecution of a violation, you will need to obtain a criminal search warrant through the District Attorney's office.

To obtain a civil administrative warrant, go to the civil, not the criminal, clerk's office of the local District or Superior Court. Make sure the clerk understands that you are seeking a civil warrant pursuant to your inspection and enforcement authorities under the Wetlands Protection Act. It is recommended that you bring a copy of the Wetlands Protection Act and local bylaw or ordinance with you when you apply for the warrant.

An affidavit is required which requires the original signature of at least one commission member or agent. The affidavit must contain the following information:

- A detailed description of the property including ownership, existence of any dwelling, and a description of that portion of the premises subject to the Wetlands Protection Act and local bylaw or ordinance;
- The preliminary information obtained by the conservation commission (including the source and reliability of that source) that gives the commission reason to believe a violation has occurred;
- A general description of what the conservation commission expects to observe on the site, and whether the commission expects to take any soil and/or vegetation samples;
- A description of any attempts to obtain consent and view the property from another lawfully attainable position off site; and
- A description of the commission's authority to enforce the law, citing appropriate sections of the Wetlands Protection Act and local bylaw or ordinance.

A sample application for an administrative warrant and a model affidavit in support of the administrative warrant is included in Section 11, Appendix 2. A judge or clerk magistrate will issue an administrative warrant if he/she finds you have demonstrated "administrative probable cause," Section 11, Appendix 3. The warrant will be limited in scope and time to an inspection under the Wetlands Protection Act and bylaw or ordinance. It will not grant the commission permission to roam the property at will, searching for violations of other local or state laws. However, observations of other violations made incident to the inspection can be used to take enforcement actions or obtain additional administrative warrants to investigate further.

Once the inspection is completed, you must return the warrant and the return form to the issuing court. If you are concerned about your personal safety during a site inspection, you may wish to contact your local police department so that they can accompany you during your inspection and prevent any breach of peace. A police officer also may be helpful in verifying that the commission conducted the site visit without violating any constitutional rights of the landowner. (Note: The police officer should not actively participate in the inspection.)

E. EMERGENCY SITUATIONS

In rare circumstances, activities in or near wetlands may pose a significant and imminent danger to the public health or safety. Some examples of emergencies include: a break in a revetment or pier, breach of a dam or roadway, a hazardous waste spill, or a truck accident. The U.S. Supreme Court has balanced the public interest of taking immediate action to remedy a threat to public health or safety against the constitutional rights of private citizens and has chosen to strike that balance in favor of the public. Consequently, in true emergencies it is reasonable to enter the property without consent and to conduct a warrantless inspection for the purpose of evaluating and remediating the emergency. Once the emergency has been abated, consent or a warrant is required to continue an investigation into possible violations. Observations made during the emergency can be used to take an enforcement action or to obtain an administrative warrant to investigate further. If the

commission has reason to believe there may be serious risks to public health or safety then the commission should immediately contact the local police and DEP prior to entering the site. Your local Board of Health should also be



contacted if the situation appears to affect a public health issue. Typically, serious public safety and health issues that arise from illegal dumping activities and hazardous waste spills will trigger many other state and federal environmental statutes.



Section

SEVEN

section seven

resolving minor violations

A. EDUCATE, EDUCATE, EDUCATE

A simple phone call to the property owner or site visit by the commission may be all that is needed to secure compliance with the Wetlands Protection Act and local bylaw or ordinance. In some cases the violation stems from ignorance of wetland protection laws, and education is the key to prompt and continued compliance. Many homeowners are not even aware that wetland resource areas are protected, much less how they are protected. For minor violations (e.g., those with little to no impact on resource areas, or where the violation is most likely an isolated event) the best enforcement results may be obtained by educating the violator about the reasons for wetlands protection and about the right way to proceed.

This doesn't mean you should always begin your enforcement efforts informally. For repeated or flagrant violations, or for those with severe and continuing resource area impacts, you may want to issue an immediate Enforcement Order (see Section 8). If these simple methods do not achieve compliance, do not be afraid to use more formal enforcement actions.

Phone calls/informal site visits: A phone call or visit from commission members

can be particularly effective when the activity is a small, home-improvement type of project that poses a very minor impact. Inform the person of the violation and give simple corrective steps that should be taken immediately to prevent further

damage. These might include the installation of hay bales, stabilization of the area with mulch, and voluntary suspension of all other work in the affected area. Make sure you give the violator explicit directions for carrying out these requests, and offer follow-up visits to the site to clear up any confusion.

Set a timeline for compliance in writing, and include instructions for completing commission paperwork. Typically, work should be stopped the day of the phone call or site visit; erosion controls should be put in place immediately (within 1-3 days); and the violator should be instructed to appear at the next commission meeting with at least a sketch of the



area (or better, an engineer's plan) and a description of the proposed project, as a prerequisite to filing a formal Request for Determination of Applicability or Notice of Intent, or comply with any other regulatory provision for authorizing work in the buffer zone. More serious violations that cannot meet the regulatory performance standards should be required to take corrective measures, rather than file a Request for Determination or Notice of Intent. (See Section 8 on Enforcement Orders.)

If you are met with resistance, then explain the serious consequences of wetland violations and explain what steps the commission may take to ensure compliance. Do not ruin your credibility with idle threats, but outline the facts of enforcement - the next step may include an Enforcement Order, which will officially stop all work within areas under the commission's jurisdiction. Let the violator know that continued noncompliance may lead to substantial fines.

Confirm all oral agreements in writing: Detailed notes from any telephone conversations or site visits should be included in the file, and the date and time of each should be recorded in a chronology. It is extremely important to send a confirmatory letter summarizing the important corrective measures, procedures, and deadlines established verbally.

B. VIOLATION NOTICES

For minor or suspected violations, another alternative is to issue a Violation Notice. A Violation Notice is a formal letter that notifies a property owner of a suspected violation and requests, but does not order, the landowner to stop an activity and contact the commission. Because a Violation Notice has no legal force and effect it does not require a high level of evidence of a violation prior to issuing. A landowner may also ignore this notice without legal consequence. However, it is helpful for building a record of minor violations and it may assist in gaining cooperation from the property owner. It may be particularly helpful in achieving compliance from those citizens who were not aware of the requirements of the Wetlands Protection Act and/or local bylaw or ordinance.

A Violation Notice should be written on commission letterhead, and at a minimum, it should contain the property location, parties it is issued to, the extent and type of activity that is observed in violation of the Wetlands Protection Act or local bylaw or ordinance, corrective measures, and deadlines for compliance. The Violation Notice should contain a brief summary of the commission's authority to enforce the Wetlands Protection Act and bylaw or ordinance, and should note the consequences of not responding. It should be signed by the agent or commission member that issues it, and it should be issued by certified mail, return receipt requested.

A Violation Notice should not be used for serious violations - severe and continuing damage to resource areas, repeated violations by the same individual or entity, or flagrant violations. Instead, an Enforcement Order should be the first response. An sample Violation Notice can be found in Section 11, appendix 4.



Section
EIGHT

section eight

enforcement orders

For some violations, your conservation commission may choose to immediately issue an Enforcement Order. An Enforcement Order has the legal force and effect of a “command” from the conservation commission and may order the property owner to cease and desist activity at a site, and if necessary, to stabilize and/or restore the area.

Factors to consider in deciding whether to issue an Enforcement Order include:

How harmful or immediate is the damage to the resource area or the public interests protected by the Wetlands Protection Act?

If resource areas are being (or have been) altered without approval, issue an Enforcement Order.

Will the violator voluntarily comply by stopping the activity?

If not, issue an Enforcement Order, if the area or activity is subject to jurisdiction.

Is there a potential for future violations on this site or by this individual?

If the project is large and complicated, and/or involves a lot of activity near resource areas, you may decide to issue an Enforcement Order to remedy minor problems before they become serious.

Is there a pattern of violations, or an intentional avoidance of the law? Has the violator been uncooperative in the past?

Issue an Enforcement Order, but be prepared to take additional enforcement action by consulting with your town counsel or DEP immediately.

Prompt enforcement actions can produce immediate and long-term compliance with the Wetlands Protection Act, but they also carry serious legal consequences. Therefore, the correct and accurate drafting of Enforcement Orders is essential. Issuing, drafting and serving an Enforcement Order should be done with the following points in mind:

A. AUTHORITY

Under the Wetlands Protection Act, “...a conservation commission and its agents, officers, and employees; the commissioner [of DEP], his agents and employees; environmental officers, and any officer with police powers may issue enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of this section may be ordered to restore property to its original condition and take other action deemed necessary to remedy such violations.”
G.L. c.131, §40.

The Wetland Regulations at 310 CMR 10.08(1) state: *“When the conservation commission, the Department or the Division of Law Enforcement of the Department of Fisheries, Wildlife and Environmental Law Enforcement (DLE) determines that an activity is in violation of G.L. c.131, §40, 310 CMR 10.00 or a Final Order, the conservation commission, Department or the DLE may issue an Enforcement Order on Form 9.”*

In practical terms, this means that your conservation commission and DEP equally are authorized and responsible for enforcing the Wetlands Protection Act and Regulations. (See also 310 CMR 10.08(2).) This means that a conservation commission, in its discretion, can enforce a DEP Superseding Order of Conditions. DEP, in its discretion, can enforce a conservation commission Order of Conditions. Both DEP and the conservation commission can pursue a violation where unauthorized work is being conducted in a resource area or the buffer zone without prior commission review.

Jurisdiction: You must have jurisdiction (see Section 3) under the Wetlands Protection Act or local bylaw or ordinance, so you must have some evidence that an activity subject to regulation is occurring in or near a resource area or the buffer zone (or has altered a resource area from a distance) prior to issuing an Enforcement Order. On the other hand, serious violations with continuing damage to resource areas should be addressed immediately even if you do not know all the details. For example, you may know that a wetland has been altered, but you may not know precisely where the boundary was before the alteration.

Bylaws: Violations of wetlands bylaws or ordinances must be distinguished from violations of the Wetlands Protection Act and noted clearly on the Enforcement Order.

B. DRAFTING AN ENFORCEMENT ORDER

All applicable information on the Enforcement Order (Form 9A) must be checked off and all narratives must be written with factual, clear, and unbiased language. Remember you are building a legal record that can be entered into evidence on an appeal and reviewed by a judge. Details are important, and facts should be double-checked. A newly revised Enforcement Order (Form 9) is being released concurrently with this Enforcement Manual and is included in Section 11, Appendix 5.



Responsible Parties: In most cases, the Enforcement Order should be addressed to the landowner, with copies to all other potentially responsible parties - developer, contractor, and subcontractors. Your goal now is to get everyone's attention, so that work is stopped and the site is stabilized. In some cases, you will not be able to determine the real property owner's name quickly enough to stop ongoing resource area damage, and you will have no choice but to issue an Enforcement Order to the contractors working on site. There will be time later when the violator appears at your commission's next meeting to sort out who is ultimately responsible for the violations, although if you can sort it out prior to issuance without losing much time, you should.

Property Description: Must be as precise as possible. If the Enforcement Order is issued against a subdivision (i.e. for roadway or drainage work), be sure to list all lot numbers that are affected.

Field Issuance: Enforcement Orders that are issued in the field should be kept as simple as possible:

- Stop all illegal activity within the conservation commission's jurisdiction immediately;
- Include a deadline by which the violator must notify the commission in writing of his/her intent to comply;
- Describe measures the violator must take to stabilize the site, plus staged deadlines for doing so;
- Require the violator to attend your next conservation commission meeting (provide details on date/time/location);
- Require the violator to delineate wetland resource area boundaries as they existed on the date of enforcement as well as prior to the unauthorized activity. Depending on the complexity of the site, you may need to give the violator reasonable time to hire a qualified professional to perform this work (but set a deadline); and
- Order the violator to take corrective action at the site in accordance with details to be discussed at the next conservation commission meeting. Your commission can decide at the meeting whether to require a Restoration Plan or a Notice of Intent. Differences between the two options are described below.

Service: Proper service of the Enforcement Order is an important legal requirement and must be documented accurately. This means that an Enforcement Order should be sent by certified mail, return receipt requested, or by hand delivery to each of the named parties. If it is hand delivered, the individual who delivered the document should sign the Enforcement Order and either obtain a receipt or draft an affidavit documenting service for the files. Any time an Enforcement Order is amended, the Amended Enforcement Order should also be properly served on the violator.

Provide an opportunity for the violator to be heard: Request that the alleged violator(s) appear at the next scheduled commission

meeting and include a review of the Enforcement Order on the agenda. Allow the alleged violator(s) an opportunity to be heard before the Enforcement Order is ratified by formal vote of the commission. This way, the commission can amend the Enforcement Order if necessary to reflect new information about responsible parties, compliance deadlines, and restoration measures. Offer to visit the site if necessary to clarify the commission's position, but don't let the site visit be cause for undue delay. If the alleged violator fails to appear for the meeting, note this fact in the minutes.

If not previously decided in the field, decide at your commission meeting whether to require submission of a Restoration Plan or a Notice of Intent. The new Enforcement Order (Form 9) allows the commission to choose either of these options. In either case, incorporate your decision and any additional, more specific requirements and deadlines into the Enforcement Order prior to ratification.

A carefully crafted Enforcement Order that requires a detailed Restoration Plan more likely will lead to success without further delays.

Enforcement Order requiring restoration: In many cases, ordering the violator to submit a Restoration Plan for commission approval rather than a Notice of Intent makes more sense. For example, if the unauthorized work can not likely be approved – the violator clearly has filled more than 5,000 square feet of bordering vegetated wetland, and no limited projects apply – then your commission should opt to require a Restoration Plan instead of a Notice of Intent. There are a number of advantages to this approach. If you require the violator to file a Notice of Intent, the violator might seize the opportunity and file a proposal to leave the fill in place. You will have no choice but to issue a denial that the violator can appeal to DEP. Restoration efforts most likely will stall as the appeals process takes its course. Instead, a carefully crafted Enforcement Order that requires a detailed Restoration Plan more likely will lead to success without further delays.

You may require the violator to submit a Restoration Plan prepared by a qualified professional. Be specific in your Enforcement Order about the nature and extent of restoration you are requiring, and include specific dates for submissions, construction, and compliance milestones. If the violator submits an acceptable Restoration Plan, you should require compliance by incorporating it as a dated attachment to the original Enforcement Order. You should also include any additional conditions that are necessary to ensure compliance with the Restoration Plan, (i.e., a condition that allows your commission to periodically visit the site to monitor compliance).

You may wish to follow the normal procedural requirements of the Notice of Intent process, such as newspaper publication and abutter notification, prior to approving the contents of a Restoration Plan. This will inform abutters about the nature and scope of additional work on the property, and will give them an opportunity to comment on the

Restoration Plan. Consult with town counsel about potential liability for the municipality before requiring that an Enforcement Order with a Restoration Plan be recorded.

Enforcement Order requiring a Notice of Intent: A Notice of Intent should be required whenever your commission decides that some or all of the unauthorized work can meet performance standards in the regulations can ultimately be approved. For example, a violator working in the buffer zone but not a resource area might be able to proceed with his/her project upon receipt of an Order of Conditions. Your Enforcement Order should include a specific deadline for filing the Notice of Intent. By requiring a Notice of Intent, your commission can: 1) obtain and approve an accurate wetland boundary, 2) obtain abutter comments through the required public notification; 3) properly condition the project through an Order of Conditions; 4) maintain a record in perpetuity by recording the Order in the Registry of Deeds; and 5) collect the appropriate application fees. In addition, by requiring a Notice of Intent your commission can ensure that the violator does not reap any benefits in time or money by avoiding the permit process.

Fines cannot be imposed in an Enforcement Order: Even though the Wetlands Protection Act and many local bylaws and ordinances contain penalty provisions, conservation commissions may not use an Enforcement Order to impose fines. The conservation commission



can impose fines under the Wetlands Protection Act only by going to court and getting a final judgment from a judge. The conservation commission can assess fines for violations of a bylaw or ordinance through the G.L. c.40, §21D process (see Section 10).

Ratification: A commissioner or commission agent may issue an Enforcement Order in a situation requiring immediate action. However, the Enforcement Order must be ratified by a majority vote of the commission at the next scheduled public meeting. (See 310 CMR 10.08(3)). Ratified means a formal vote by the conservation commission that approves and sanctions the action taken by the conservation agent or a member of the commission. The Enforcement Order can be ratified subject to any amendments made by the commission at its meeting after discussions with the violator. Failure to ratify the Enforcement Order may render it void. If your commission amends the Enforcement Order in the future (for example, to incorporate an acceptable Restoration Plan), be sure to ratify the Amended Enforcement Order prior to serving a copy upon the violator.

Withdrawing Enforcement Orders: If an Enforcement Order has been ratified but the commission later wishes to withdraw the Order, it must be done by a majority vote of the commission. A formal letter explaining the withdrawal should be sent to the violator by certified mail, return receipt requested, or by hand delivery.

Certificates of Compliance: Certificates of Compliance should be requested by the violator and issued by the commission when the work described in a Restoration Plan or Order of Conditions has been completed. Include a statement on the Certificate referencing the original Enforcement Order. Double-check and reference the correct lot numbers, particularly if the Enforcement Order was issued against a subdivision.

Appeals of enforcement orders: Enforcement Orders issued by a conservation commission can only be appealed to the Superior Court, not to DEP. Many appeals of Enforcement Orders will be brought pursuant to the “certiorari” statute, G.L. c.249, §4. Such appeals must be filed in Superior Court within sixty (60) days of the issuance of an Order. A certiorari proceeding is a limited review of the commission’s record – all proceeding notes, minutes and transcripts, plus information and documents obtained and issued by the commission. The burden of proof is on the plaintiff (i.e. the violator bringing the appeal) to show that the commission either failed to follow proper procedures, or that its decision was arbitrary or capricious or not based on substantial evidence.

An appeal of a commission’s order is a legal action against the municipality, not individual conservation commissioners. The municipality must defend it. It is imperative that you notify counsel as soon as you receive any legal documents or correspondence indicating that an appeal has or will be filed. Once a case has been filed in Superior Court, strict deadlines apply and a municipality’s failure to respond to the matter may result in a decision adverse to the commission. It is important to immediately assemble all records, notes, and minutes pertaining to the matter. Commissioners should then review the file and meet with counsel as soon as possible to summarize the events and proceedings. It is also important that you identify for counsel those violations that relate to the Wetlands Protection Act versus a local bylaw or ordinance.

Every effort should be made to discuss the availability of legal counsel with either the mayor or selectman. The Wetlands Protection Act and state finance regulations at 801 CMR 4.02 authorize the commission to collect filing fees to offset the costs of administering the Wetlands Protection Act, which includes defending decisions on appeal. See Section 2 for more information on accessing filing fees.



Section

NINE

section nine

civil and criminal court action

If a violator repeatedly or flagrantly has violated the Wetlands Protection Act or local bylaw or ordinance, or is causing serious, potentially irreparable harm to the environment, more serious legal action may be necessary. A lawsuit also may be the only way to command attention from a violator who has not or will not respond to commission phone calls and Enforcement Orders. It is a separate violation of the Wetlands Protection Act to “fail to comply with an Enforcement Order issued pursuant to this section.” G.L. c.131, §40.

If you decide to proceed with legal action, your case will be much stronger if you have followed the suggestions made in preceding sections for collecting facts, organizing the record, and building support from other municipal boards. If you have not followed these suggestions, it may be impossible to bring a legal action. In addition, if your conservation commission or other municipal boards have in any way allowed or condoned the illegal activity - by explicit or implicit approval of the illegal activity or by extreme delay in taking enforcement action after receiving evidence of the violation - then a judge’s view of the enforcement case may be adversely affected. The longer wetlands violations are allowed to continue, the less likely it will be that legal action will be effective.

This section explains the options available to conservation commissions in pursuing civil or criminal legal actions in response to serious violations of the Wetlands Protection Act. In addition to municipalities filing a civil lawsuit on behalf of its conservation commission, municipalities may request the applicable District Attorney's Office or the Attorney General to initiate a criminal prosecution. The Office of the Attorney General also has independent authority to initiate civil and criminal legal actions for the violations of the Wetlands Protection Act. For assistance in determining whether a violation may constitute criminal activity, please contact DEP's Environmental Strike Force. Also see Section 10 for information about contacting DEP for assistance.

A. CHOOSING BETWEEN CIVIL AND CRIMINAL ACTIONS

Legal action can be brought for a number of reasons: site restoration, completion of unfinished work, punishment, or deterrence. Civil or criminal litigation can be used to obtain corresponding remedies, from court orders requiring specific restoration work to the imposition of fines and jail sentences. The choice between civil or criminal litigation is determined by what the commission hopes to accomplish with the lawsuit.

The Wetlands Protection Act does not grant authority to conservation commissions to assess fines or penalties. Fines and penalties under the Wetlands Protection Act may only be assessed by a judge in a civil or

criminal proceeding (or by DEP using its administrative penalty authority described in Section 10C). The commission may, however, ask a judge to issue fines up to \$25,000 per violation, per day, in either a civil or criminal case.

Civil lawsuits generally are useful to compel compliance with a procedural requirement or permit condition under the Wetlands Protection Act or local bylaw or ordinance. In a civil lawsuit you can seek an injunction or similar court order to forbid action (a prohibitory injunction, for instance, halting wetland alterations) or to require action (a mandatory injunction, for instance, requiring filing a Notice of Intent or site restoration). Injunctive relief should be sought when the commission wants violations corrected and wetland resources protected. In addition, a civil action seeking penalties is appropriate to ensure that the violator does not reap any financial reward from noncompliance, and to deter future violations by both the violator and others. When necessary, the commission may seek a temporary restraining order from the court to immediately stop work on site.

Civil complaints are filed in Superior Court by town counsel on behalf of your municipality and conservation commission. Approval from the board of selectmen is typically necessary before the commission can utilize counsel's services. Your commission retains control of the lawsuit in the sense that it can work with and assist town counsel, but the town incurs all the costs. Civil lawsuits are won and lost at trial by convincing the judge or jury by a "preponderance of the evidence" that a defendant violated the Wetlands Protection Act or local bylaw or ordinance.

Criminal prosecutions, while rare, are appropriate when a chronic violator has not responded to civil actions, or when there has been serious harm to the public health or safety, particularly when the harm cannot be undone and hence there is no effective remedy through injunctive relief. Criminal complaints are more likely to be sought in cases of flagrant, malicious, or repetitive violations of the Wetlands Protection Act or local bylaw or ordinance that result in significant damage to the environment. The primary goals of criminal prosecution are punishment and deterrence. If convicted, the defendant will acquire a criminal record and be subject to fines, incarceration, and/or probation terms. The publicity that often accompanies criminal prosecution of environmental crimes has a significant deterrent effect on others who may consider violating the law or ignoring commission orders.

Although a criminal action can achieve both remedial and punitive results with respect to individual violations, civil issues (particularly involving the details of what work can or cannot be done on site) may remain unresolved after the conclusion of a criminal case. Therefore, it may be appropriate to initiate both civil and criminal actions against the same



individual for the same illegal activity. When the result of an illegal act constitutes a serious continuing threat to the environment resulting in irreparable harm, it may be advisable to ask town counsel to file a civil complaint and seek a temporary restraining order and/or a preliminary injunction to mitigate the harm while the criminal action is pending.

A criminal action can be initiated by anyone, simply by seeking a complaint in District Court. Criminal complaints can be sought for violations of the Wetlands Protection Act, local bylaw or ordinance (if criminal sanctions are authorized in the bylaw or ordinance) or both. If a criminal complaint issues, the action is prosecuted by the District Attorney's Office or the Attorney General's Office (or in some cases by attorneys specially appointed as Assistant District Attorney) on behalf of the Commonwealth of Massachusetts rather than on behalf of the conservation commission. Consultation with your town counsel is certainly appropriate and recommended. It may be appropriate to hire a special town counsel having specific expertise in criminal prosecution and/or environmental law. At trial, the prosecution must prove each element of the offense "beyond a reasonable doubt." This is a much higher standard of proof than that necessary in civil cases, where the allegation must be proved by a "preponderance of the evidence."



B. CIVIL LAWSUIT

In many cases, the commission's most effective action to stop a violator who has not responded to an Enforcement Order is to pursue a civil action in Superior Court. Town counsel (or city solicitor) must file a civil complaint against the violator on behalf of the commission and the municipality – and this means you will most likely need approval from the board of selectmen prior to utilizing your community's counsel. See Section 2 for suggestions that will improve your chances of obtaining prompt approval for legal services.

Town counsel may ask the court to grant specific relief while the lawsuit is pending, often in the form of an injunction. An **injunction** is a court order that requires the defendant to either stop an activity or to undertake affirmative action. Specific authority for seeking an injunction is contained in the Wetlands Protection Act:

"Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon petition of the attorney general, the commissioner [of DEP], a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth under the provisions of section seven of chapter two hundred and fourteen." G.L. c.131, § 40.

Municipalities may also invoke the “ten citizen suit statute,” G.L. c.214, §7A, when seeking an injunction to stop wetlands violations. Superior Courts in the Commonwealth have the powers to order injunctions. There are three types of injunctive relief: temporary restraining orders, preliminary injunctions, and permanent injunctions. A model complaint that can be used for all three injunctive reliefs noted in the following paragraphs can be found in Section 11, Appendix 6.

A **temporary restraining order (TRO)** is a type of injunction that is issued on short notice by a court before a trial has been conducted. It is a type of injunction used for emergencies. If a serious violation has occurred with continuing damage to the wetland resource area, and there has been no response to an Enforcement Order, counsel should seek a TRO. A motion (i.e. a request) for a TRO is filed with the court at the same time as the complaint initiating a lawsuit. A motion for a TRO is a serious matter and is given priority by the court. It will be heard quickly, and in some cases the court may issue a TRO without giving the violator a chance to appear and defend him/herself. The purpose of a TRO is to maintain the status quo by stopping activity for a short time (no more than ten days) until the court can have a hearing for a preliminary injunction where both parties present their cases. In order to secure a TRO without notice to the violator, the commission must demonstrate to the court in an affidavit or verified complaint that without the restraining order, there will be immediate and irreparable injury, loss, or damage to the public interests protected by the Wetlands Protection Act. If the court grants the TRO, the activities must cease until a preliminary injunction hearing is held. If a violator ignores a court order, a judge can imprison and/or fine the violator for contempt of court.

A **preliminary injunction** is another type of court order that preserves the status quo while the lawsuit is pending. A preliminary injunction not only may prohibit illegal acts but also may compel affirmative action. For example, a preliminary injunction could order the defendant to install erosion control measures or otherwise stabilize a site. Once an injunction is issued, its strength lies in the broad authority of a court to demand relief if the defendant violates the injunction. Like a TRO, an injunction is a court order, and the defendant would be in contempt of court for any violation and subject to criminal sanctions.

In most cases, a trial on the merits will not be heard until months after the preliminary injunction hearing. Without a preliminary injunction, illegal work may be completed in the interim and the case made moot or relief made more difficult.

To secure a preliminary injunction the commission must be able to demonstrate to the court that the commission is more likely to prevail on the merits of its case at trial than the defendant. In addition, the commission must prove that the public interest will be promoted by issuance of an injunction. In most civil actions, the person requesting a preliminary injunction must prove that “irreparable harm” will occur without it. However, when government agencies seek injunctions to enforce statutory violations, the court must instead examine the likelihood of the violation and how it affects the public interest. A judge

must find that the preliminary injunction promotes the public interests protected under the Wetlands Protection Act.

Often the issuance of a TRO or Preliminary Injunction resolves the case. For example, if an individual is working in a resource area without an Order of Conditions, and the court issues an injunction to stop work until all permits are obtained, the injunction will prevent or enjoin the violator from doing further work even though the trial may not be heard for many months.

Your attorney also may file a motion for a **real estate attachment** or lien to ensure that funds are available for restoration if the commission is ultimately successful with its lawsuit. The purpose of an attachment is to



preserve assets for collection of a potential judgment in a civil trial. A real estate attachment can act as a powerful incentive to resolve enforcement actions by the commission. In a situation where the violator has altered a resource area to such a degree that a restoration will be necessary, it may be worthwhile to discuss with

your counsel whether the costs of the restoration can be attached as a lien on the real estate. The burden of proof that the commission must show is fairly high: 1) there must be a reasonable likelihood of success on the merits of the case, and 2) it is unlikely that there are insurance monies available to cover the claim. (*See Rule 4.1 of the Massachusetts Rule of Civil Procedure.*) Both parties will have an opportunity to be heard on whether the real estate of the defendant should be encumbered. An attachment can interfere with or prevent the sale or re-finance of real estate; therefore, a judge must carefully weigh the merits of the evidence the commission presents at this stage

Once trial begins, your commission will need to prove each alleged violation by a preponderance of the evidence. In a civil lawsuit, the requested relief may be fines, up to \$25,000 per violation per day, or a permanent injunction requesting that certain actions be taken or not taken.

C. CRIMINAL PROSECUTION

A criminal action may be initiated by anyone. Any member of the public, including individual commission members or staff, may visit the district court with jurisdiction over the location where the violation occurred and fill out a request.

The application for the complaint is a brief statement describing the type and extent of the violation; name and address of the violator; location of the violation; date of the violation; and the law (Wetlands Protection Act and/or local bylaw or ordinance) that has been violated.

The person applying should indicate that this application has been approved by vote of the commission if applicable and should provide names and addresses of witnesses to the violation plus properly prepared photographs. If there is a permit, Violation Notice, Enforcement Order, or other relevant document, include a copy with the application.

Since a violation of the Wetlands Protection Act or bylaw or ordinance is a misdemeanor, a potential defendant usually will be entitled to a “**show cause hearing**” on the issue of whether or not a complaint should issue. At this hearing a clerk will hear evidence under oath from the person seeking the complaint and perhaps from the violator. If the clerk finds “**probable cause**” to believe that the person has committed the crime alleged, a complaint will issue. Probable cause means that there is a reasonable basis for believing that a crime was committed and that the alleged defendant did it.

After probable cause is determined and the complaint is issued, the District Attorney’s or Attorney General’s Office retains sole discretion in deciding whether and how to prosecute the criminal case. The District Attorney may seek assistance from your commission, but your commission has no authority to determine how or when the case will proceed.

After a complaint issues, the defendant will be given a date for **arraignment** in District Court. At the arraignment the defendant is given formal notice of the charges pending against him/her; the defendant enters a plea to the charges (guilty, not guilty, or nolo contendere, which means no contest); pre-trial conditions may be set; and a schedule for pre-trial options and the trial itself are set. At trial the prosecution must prove each element of the offense “beyond a reasonable doubt.” This is a much higher standard of proof than that necessary in civil cases, where the allegation must be proved by a “preponderance of the evidence.” A criminal defendant is entitled to constitutional protections that may not be applicable to civil cases. For example, in a criminal case the defendant has the right to remain silent, the right to counsel, and the right to confront witnesses.

If found guilty, the penalty typically imposed is a criminal fine, as much as \$25,000 per violation per day pursuant to the Wetlands Protection Act. A jail sentence of not more than two years is authorized under the Wetlands Protection Act, but a period of probation with “no same or similar violations” is a more likely outcome.

Be sure to build bridges of communication with the District Court staff and the office of the District Attorney. A criminal prosecution is not handled by your town counsel, except in unusual cases. An Assistant District Attorney will handle the prosecution. If you consult with the District Attorney before seeking a criminal complaint, you will have a much greater chance of success.

D. TWO-YEAR STATUTE OF LIMITATIONS

The Wetlands Protection Act is subject to time limits as are most legal matters. The law discourages the pursuit of “stale” violations, so a

court action to enforce a law must be brought within a specific period of years or the person may not be held legally accountable for his actions or inactions. The legal term for this time period is a “statute of limitations.”

Generally, a wetlands enforcement action against violators must be brought in court within **two years** of the violation. *“Actions and prosecutions under this chapter shall, unless otherwise expressly provided, be commenced within two years after the time when the cause of action accrued or the offence was committed.”* G. L. c.131, §91. Failure to bring a court action within this time period could limit your ability to prosecute a violation.

Section 91 means that when penalizing an entity for violations of the Wetlands Protection Act, the following restrictions apply:

- Administrative actions: Enforcement Orders must be issued within two (2) years of the violation.
- Civil action through the Office of the Attorney General: the civil complaint must be filed within two (2) years of the violation.
- Criminal Action through the Office of the Attorney General or District Attorney: the indictment/arraignment must issue within two (2) years of the violation.

In all instances, the enforcement action would include only those violations occurring in the two (2) years preceding the date the enforcement document is issued, complaint is filed, or indictment is handed down. Note that cases must be referred to the Attorney General sufficiently in advance of these deadlines to allow the Attorney General’s office time to prepare the case.

For the purpose of determining whether an enforcement action is barred by the statute of limitations, violations of the Wetlands Protection Act can be viewed as falling into three categories:

- Removing, filling, dredging, or altering any area subject to protection without authorization (Active Violations),
- Leaving fill in place or failing to restore illegally altered land (Passive or Continuing Violations), or
- Failing to comply with an enforcement order.

Active Violations: Each day that the active violation (i.e. putting fill in place, dredging, cutting, or otherwise altering) takes place is a separate violation that generates a different starting date for determining whether an enforcement action can be taken for that particular day. The time lines listed above apply to each violation.

Passive (Continuing) Violations: Although the Wetlands Protection Act is subject to a two-year statute of limitations, don’t despair if you discover unauthorized alterations or fill that was placed more than two years ago. Leaving unauthorized fill in place is a separate violation from the initial filling. Each day the fill remains in place is a separate offense. This means that for every day unauthorized fill remains in place, a new and separate violation occurs. Each of these violations generates a different starting date for determining when the statute of limitations

begins to run and consequently whether an enforcement action can be taken for that day of leaving fill in place. The time lines listed above apply to each violation. Because the violations continue until the fill is removed, DEP and/or the conservation commission may take enforcement action up until two years after the fill is removed. The enforcement action can include only violations (days that the fill was left in place) during the two years prior to the date the action was taken. This is a particularly important point to remember when using aerial photographs showing past violations.

It is important that your commission carefully review and document the history of the site when the alteration or fill appears to have taken place more than two years ago. Determining how long ago the resource area was filled is an important factual determination in pursuing not only the proper enforcement action but also the number of daily fines that can be assessed in court. Because “continuing violations” can present some complex issues, it is wise to discuss these types of violations with your town counsel for guidance early in an enforcement case.

Violation of an Order: Violation of an Enforcement Order (e.g. failing to remove fill after being ordered to do so) is another violation where each day that the Enforcement Order has not been complied with is a separate violation. Each day that the Enforcement Order has not been complied with is a new and separate violation. Each of these violations generates a different starting date for determining when the statute of limitation begins to run and consequently whether an enforcement action can be taken. The same time lines listed above apply to each violation.

Because the violations continue until the Enforcement Order is complied with, DEP and/or the conservation commission may take enforcement action up until two years after the Enforcement Order has been complied with. The enforcement action can include only violations during the two years prior to the date the action was taken.



Special Circumstances: The Wetlands Protection Act addresses two special circumstances where the rules are different from those listed above. These include instances where a property with an outstanding violation has been transferred to a new owner and instances where the DEP and the conservation commission have been notified of the presence of a violation.

Property Transfer: The Wetlands Protection Act contains a special statute of limitation for cases where property is transferred before an illegal alteration has been remedied.

"Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of [the Wetlands Protection Act] or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person." **G.L Chapter 131, §40.**

This means that if property transfers while a restoration or other Enforcement Order is outstanding, the new property owner must comply with it. If no Enforcement Order has been issued, the conservation commission has up to three (3) years following the recording of the deed or, in the case of inheritance, the date of death that caused the transfer, to issue an Order.

Once the conservation commission has issued an Order, the new property owner who fails to comply can be penalized for failing to comply with the Order, using the two (2) year statute of limitations for failure to comply with an Enforcement Order.

Commissions should make it a practice to ask a violator how long he/she has owned the property and note in the record the date it was purchased or transferred. Problem sites – those that have had numerous property transfers since the initial wetlands fill/alteration - should be discussed with your own counsel as soon as possible.

Conservation Commission and Department Given Notice of Violation: The Wetlands Protection Act contains a special provision that affects the calculation of a penalty for leaving fill in place or failing to restore illegally altered land.

"[A]ny person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter fails to comply with an Enforcement Order or Order of Conditions." **G.L Chapter 131, §40**

By notifying DEP and the conservation commission in writing of the presence of unauthorized fill or the presence of other unrestored

alterations, a person provides the DEP and the conservation commission with the opportunity to decide whether the fill needs to be removed or the alteration remedied. That person is not liable for penalties for failing to remove the fill or restore the alteration while the DEP and conservation commission make that decision. The person remains liable for penalties for leaving fill in place/failure to restore for the period preceding the date of notification. If the DEP or the conservation commission decide that the fill should be removed or the alteration restored, then they can issue an Enforcement Order. If the person fails to comply with the Enforcement Order or a subsequently issued Order of Conditions, the person would be liable for penalties for failure to comply with an Order in addition to the penalties for leaving fill in place/alteration preceding the date of notification.





Section

TEN

section ten

additional enforcement options

A. REVOKING AN ORDER OF CONDITIONS

On rare occasions a commission or DEP may elect to revoke an Order of Conditions. (*See 310 CMR 10.05(j)*) In most cases, your commission will be better served trying to gain compliance with an existing Order, rather than revoking it, as the Order provides the framework and standards that must be met. In those cases, an Enforcement Order or court action might better serve the goals of the commission. However, if the project under construction bears no resemblance to that permitted, or if the Order was obtained under fraudulent circumstances, consider revocation. Before revoking an Order of Conditions, your commission should consult with town counsel. You must hold a hearing, with proper notification to the violator, and permit the violator to be heard and represented by counsel.

B. ENFORCING A WETLAND BYLAW OR ORDINANCE USING THE G.L. c. 40, §21D TICKETING PROCEDURE

If your community has a local wetland bylaw or ordinance, another enforcement technique exists that can be used to bring about compliance before escalating to a lawsuit. Municipal governments can use a non-criminal “ticketing” procedure, authorized by G.L. c.40, §21D, to enforce local laws such as wetland bylaws or ordinances. As long as the appropriate municipal laws are in place, the ticketing procedure can be used as an alternative or as an additional enforcement tool. Any ordinance, bylaw, rule or regulation of any municipal office, board, or department may be enforced by this method as long as the violation is subject to a specific penalty. Typical environmental laws enforced by this method include wetland bylaws, ordinances, and regulations, conservation land rules and regulations, rubbish disposal and littering regulations, shellfish regulations, and zoning laws.

Use of the ticketing procedure allows an enforcement person to write a ticket that specifies a fee to be paid as a penalty for the violation of a local bylaw or ordinance. The violator must pay the ticket or request an appeal in writing to the district court. Any fines imposed under the provisions of this section shall enure to the city or town for such use as said city or town may direct. If appealed, a hearing will be held on the matter within twenty-one days.

The use of the non-criminal ticket has several advantages: it takes the “criminal” stigma away from enforcement efforts; it eliminates, for the most part, the need to prove a case in a trial setting; and because it is similar to the process employed for minor traffic violations, it is familiar to most people. On the other hand, this process will not restore the wetland to its original condition. You must still issue an Enforcement Order or take additional enforcement action to obtain restoration.

Implementing the Ticketing Statute: Existing municipal bylaws and ordinances typically provide for enforcement in a general way and do not include specific fines or name enforcement personnel. If your community wishes to use the ticketing procedure to enforce multiple bylaws or ordinances, it may be difficult to amend each individual law to include the required information. It may be easier to create a new bylaw or ordinance that authorizes use of the ticketing procedure and, at the same time references each municipal law that is to be enforced using the ticketing procedure, giving specific penalties and naming enforcement personnel by position.

Drafting the Bylaw or Ordinance: The ticketing provisions of the bylaw or ordinance must be specific and include the following information: whether the procedure is to be mandatory or optional; who the enforcement officials are by position (e.g. conservation commissioners, conservation agent, and/or police); and the specific penalties that apply to particular violations. For example, altering a wetland resource area without a permit could be fined at \$100 per violation and each day the violation continues may be considered a separate offense.

Forms: The forms for issuing tickets are created by the District Court and must be used. It is advisable to meet with the magistrate or court clerk prior to enacting a ticketing bylaw or ordinance in order to discuss and coordinate administrative procedures.

Issuing Wetlands Citations: It is important to note on the citation form a description of the violation and to complete a separate and more detailed incident report describing the violation, evidence observed or gathered, and witnesses. This information must be kept on file with the commission and made available to the court if there is an appeal concerning the violation.

Collecting the Fine: If twenty-one days have elapsed since a ticket was issued, and the person cited has not paid the fine or requested a hearing, the violator can be subject to a criminal complaint. For small violations it is recommended that a follow-up letter be sent to the violator, which clearly states that the violator is now subject to a criminal complaint.

If the violator responds by paying the fine, the matter is closed and no record of the case is entered with the court. If the violator requests a hearing, s/he must appear before the local district court. If the court finds that the offense was not committed, or that the person appearing did not commit it, the matter will be dismissed.



Otherwise, the court will order the payment of the fine and may impose additional penalties. If the violator pays the fine the matter will be disposed of without a criminal record.

If the violator does not respond to the citation, your commission should discuss with town counsel the suitability for requesting a criminal complaint. Egregious and repeat violations may warrant a criminal complaint. It is important to remember that the commission's records and file on the incident or the violator will be critical for a district attorney to prosecute your case.

C. RELATED STATE ENVIRONMENTAL PROTECTION AGENCIES

Department of Environmental Protection: DEP and the conservation commission are both authorized and responsible for enforcing the Wetlands Protection Act. If your commission is having particular difficulty in pursuit of an enforcement case, contact your DEP Regional Office for assistance. Conservation commissions can and should develop enforcement priorities and cases, however, DEP will support and advise commissions as needed. DEP regional offices and the Office of General Counsel are available to assist and answer questions on enforcement related matters.

DEP is most likely to take independent enforcement action if the violation is particularly egregious or the violator is continuing to damage wetland resource areas despite strong conservation commission enforcement actions. DEP may refer the case to the Environmental Strike Force. The Strike Force is an inter-agency unit comprised of staff from DEP, the Attorney General's Office, and the Executive Office of Environmental Affairs. The Strike Force is designed to identify and prosecute major environmental violators through civil and criminal actions brought by the Attorney General's office.

DEP also has the ability to unilaterally assess civil Administrative Penalties pursuant to G.L. c.21A, §16. This statute provides DEP with the power to assess penalties against violators of environmental laws or regulations through an administrative process. This ability sometimes provides a strong incentive for violators to comply with DEP Enforcement Orders. Administrative penalties can, and have, been assessed against wetland violators. Once DEP has assessed a penalty, the penalty can only be challenged first in an adjudicatory hearing then in court by the alleged violator.

Chapter 251, Acts of 2004, "An Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays in the Commonwealth" (the "Oil Spill Act"), was signed into law on August 4, 2004. This new state law further regulates vessels transporting oil into Massachusetts waters to prevent and address oil spills more effectively. The Oil Spill Act also enhances the state's enforcement authority by increasing a range of civil penalty amounts, including DEP administrative penalties, that may be assessed against parties responsible for oil spills and other discharges to Massachusetts waters,

including those that damage wetland resource areas. Information on the Oil Spill Act, including the enhanced penalty authority, can be found on DEP's Web site at <http://mass.gov/dep/bwsc/spillact.htm>. Conservation commissions should keep this new law in mind when evaluating the full scope of enforcement authority available to address discharges that damage wetland resource areas.

Major wetland violations may also constitute violations of additional statutes and regulations administered by DEP. The most common programs in which joint violations might occur are the 401 Water Quality Certification Program, the Chapter 91 Waterways Regulation Program, and the Wetlands Restriction Program. A list of DEP contact telephone numbers and addresses and other resources can be found in Section 11, Appendix 7.

Water Quality Certification: Under Section 401 of the federal Clean Water Act, anyone proposing any activity requiring a federal permit that will result in a discharge of dredged or fill materials to waters of the Commonwealth (including wetlands) is required to obtain a certification that the project will comply with applicable state water quality standards. DEP administers the state's Water Quality Certification Regulations at 314 CMR 9.00. Work that violates the Wetlands Protection Act may also violate the 401 Water Quality Certification Regulations. Commissions should notify the DEP Regional Office if 401 violations are suspected.

Chapter 91/Waterways Regulation Program: Chapter 91 authorizes DEP to regulate development in present or former tidelands, Great Ponds (naturally occurring ponds at least 10 acres in size), and certain rivers and streams. Adopted in 1866, Chapter 91 ensures that public rights to fish, fowl, and navigate are not unreasonably restricted and that unsafe or hazardous structures are repaired or removed. Chapter 91 also protects the waterfront property owner's ability to approach his/her land from the water. The Chapter 91 Regulations are found at 310 CMR 9.00. Conservation commissions should be aware of Chapter 91 licensing requirements, and should report any unauthorized work, change in use, structural alteration or violation of an Order of Conditions in a tideland, Great Pond, or river to the DEP Regional Office or the Waterways Regulation Program in Boston.



Coastal & Inland Wetland Restrictions/Wetlands Conservancy

Program: Under the Coastal Wetlands Restrictions Act, G.L. c.130, §105, and the Inland Wetlands Restriction Act, G.L. c.131, §40A restrictions have been imposed on development in certain wetland resource areas after local hearings with formal notice to landowners. Restrictions and maps are recorded in the Registry of Deeds. Restriction orders under these laws generally permit very few activities in restricted areas. The limited activities that are allowed include docks, boat channels, footbridges, floats, utilities, cultivation of shellfish and salt hay, beaches and recreation, and a driveway to unrestricted land of the same owner where other reasonable access is not available. Maintenance dredging also may be permitted. Most other uses including filling and dredging are prohibited. Wetland restriction order violations are enforced by DEP in conjunction with the Attorney General's Office. Any commission that suspects a wetland restriction order has been violated should contact the DEP Regional Office.

Attorney General: The Attorney General also has independent authority to bring nuisance actions against those whose action or inaction has injuriously affected the safety, health, or morals of the public. Examples related to wetlands protection include actions concerning navigable water obstructions, pollution that results in contamination of public wells or fisheries, and development that results in widespread flooding. The Attorney General can prosecute the case in either civil or criminal court. The typical remedy is an injunction to abate the nuisance.

D. CONTACTING FEDERAL AGENCIES FOR ASSISTANCE

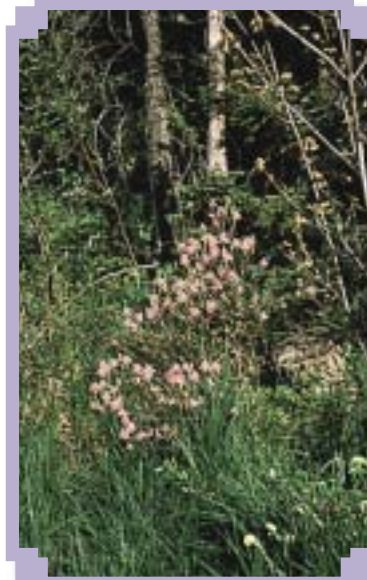
U.S. Army Corps of Engineers and Environmental Protection

Agency: The Corps and EPA share wetlands enforcement authority under Section 404 of the Federal Clean Water Act. Section 404 regulates the discharge of dredged or fill material into the waters of the United States, including wetlands. The Corps' Programmatic General Permit (available at www.nae.usace.army.mil) governs work in Massachusetts' wetlands that are under federal jurisdiction. While not identical, state and federal wetlands jurisdiction generally overlap. Therefore, work in violation of the Wetlands Protection Act may also be a violation under Section 404. Your commission should notify the Corps and EPA whenever unauthorized work is discovered in a wetland. The Corps generally will take the lead on permit violation cases, but unpermitted violations may be enforced by either agency. EPA has a form available on its web site for reporting wetlands violations. (See www.epa.gov/region1/compliance/enfwetlands.html).

E. CONTACTING OTHER LOCAL AGENCIES FOR ASSISTANCE

Board of Selectmen: This board (or your mayor or town manager) plays a critical role in enforcement cases because it controls access to conservation commission money and legal counsel. Educate your board about the commission's general enforcement priorities and strategies, and contact the board immediately upon initiating an enforcement action to ensure you will have the resources you need.

Board of Health: Municipal health boards play a vital role in protecting public health and the environment through their regulation of on site septic systems pursuant to 310 CMR 15.000 (known as "Title 5") and the regulation of solid waste disposal areas. Commissions and boards of health need to work in cooperation to understand each other's concerns and jurisdiction. Commissions should make information available to the health agent to make it easier to identify wetland resource areas. Discuss with the health agent how septic systems may be sited so as not to damage streams, lakes, wetlands, and coastal resources. It is an effective practice for conservation commissions to routinely review Title 5 permits in areas that contain wetland resource areas to prevent projects from moving forward without proper wetlands permits. Unpermitted fill in wetlands may also trigger solid waste disposal violations under the board of health's jurisdiction and should be reported to the board.



Planning Board: Responsibility for much municipal planning lies with the planning board. Not only can the planning board undertake comprehensive studies and prepare master plans, but it also regulates the development of subdivisions. Again, a close relationship between the commission and the planning board is advisable. Providing information and maps of resource areas will assist both the planning board and commission. Projects with potentially serious wetland impacts may be filed with the planning board months before they are filed with the conservation commission. If the planning board can identify wetland resources in the field, they can alert the commission to potential problems with a proposed subdivision. It is good practice for commissions to review and comment on subdivision plans prior to planning board approval, paying particular attention to resource area delineations, road crossings, and stormwater management systems within the commission's jurisdiction. Wetlands Protection Act violations, such as the failure to

properly construct a stormwater detention basin, also may violate the planning board's subdivision approval.

Building Inspector: The primary job of the building inspector is to ensure that all local projects are built in conformity with municipal zoning, including wetlands or floodplain zoning. The building inspector can provide the commission with valuable information concerning proposed and on-going developments, because he/she spends so much time in the field. It is advisable to provide building inspectors with maps of wetland resource areas. It is an effective practice for the conservation commission to routinely sign off on building permits in areas that contain resource areas. Typically, building inspectors would prefer that the commission determine whether a wetlands permit is required for the project. This practice will prevent projects moving forward without proper wetlands permits.

Zoning Board of Appeals: This board's role is to safeguard zoning bylaws or ordinances by hearing appeals. It may also grant special permits and variances. It is important that the conservation commission provide information to the zoning board to ensure that any variances do not inadvertently impact wetland resources. The board can include a requirement in its variances that all wetlands regulations and bylaws or ordinances must be met as a condition of the variance.

F. ENFORCEMENT ASSISTANCE FROM THE GENERAL PUBLIC

Private Nuisance Suits: If an individual can show that he/she has suffered special damages, different from the general public, he/she can bring an action for private nuisance in Superior Court. Private nuisance law prohibits the unreasonable use of property so as to substantially interfere with the use and enjoyment of another's property. Examples include actions involving flooding, drainage changes, water pollution, and drinking water contamination. A plaintiff who can show that he/she has suffered damage due to the defendant's action can recover money damages and request an injunction to abate the nuisance.

Citizen Suits: The "ten citizen statute," G.L. c.214, §7A, allows any ten citizens of the Commonwealth to bring a civil action for the purpose of enforcing any environmental statute, bylaw, ordinance, or regulation, the purpose of which is to prevent damage to the environment. To enforce a wetlands violation, the ten citizens might be commission members, neighbors, members of civic organizations, or individuals concerned about wetlands. The potential defendants are typically the developer and contractor who are doing the work. Written notice must be given to the defendants, the agency responsible for enforcing the statute, and the attorney general at least 21 days prior to filing the lawsuit unless

irreparable damage will result if immediate action is not taken. The statute specifically prohibits the recovery of damages, but authorizes the use of temporary restraining orders, injunctions, and other forms of equitable relief. Successful plaintiffs may recover costs and expert witness fees, but not attorney fees.

Massachusetts Association of Conservation Commissions (MACC):

The MACC has experience and expertise in handling violations of the Wetlands Protection Act and can be contacted for legal and technical advice.



Section
ELEVEN

section eleven

appendices

In this section, you will find examples of all the forms and models you may need to complete your job as a conservation agent. These forms are not all Department of Environmental Protection forms, and are so noted.

If you have any questions concerning the content of the sample forms, you can call the Wetlands Program (see Appendix 7) in your region.



appendix 1

WHAT TO BRING ON AN ENFORCEMENT AND/OR COMPLIANCE SITE VISIT

- _____ Consent obtained from landowner prior to visit
- _____ Project file (RFD, NOI, or Order, locus plans, site plans, replication plan, complaint notes, contractor contact information, area map/ air photos)
- _____ Notebook and waterproof pens
- _____ Blank data sheets
- _____ Tape measure (100')
- _____ Plant field guide
- _____ Magnifying glass
- _____ Camera, extra film, data cards, batteries
- _____ Soil auger for soil samples and munsell chart/shovel
- _____ Camera with telephoto lens (High-speed film (ASA 400 or 1000) will allow photographs in low light conditions (or digital if photo can be authenticated)
- _____ USGS topographical maps, FEMA floodplain maps, NRCS soil maps, or town wetlands maps that identify wetland resources in the suspect area
- _____ Aerial photographs or other photographs showing the area “before” the suspect violation, (e.g. DEP Wetland Loss Detection maps)
- _____ Binoculars
- _____ Collection bag for plant material/soils.
- _____ Small knife
- _____ Waterproof boots
- _____ Disposable plastic gloves
- _____ Cell phone/radio

appendix 2

COMMONWEALTH OF MASSACHUSETTS

[COUNTY NAME] COUNTY, ss.

District Court Department
[REDACTED] Division

APPLICATION FOR ADMINISTRATIVE WARRANT

Pursuant to the Massachusetts Wetlands Protection Act (G.L. c. 131, §40) and [local bylaw]

I, [Applicant's Name], being duly sworn, depose and say that:

PARTIES

- (1) Applicant, [Applicant's Name], is an [Applicant's Job Title], currently employed by the [Municipality] Conservation Commission.
- (2) [Company Name] (hereinafter "[Company Name]") is a [Massachusetts corporation] doing business as a [business activity of company] and operating at the buildings and grounds located at [address of company], [city], Massachusetts (hereinafter the "premises").

Or

[Person] (hereinafter "[Last Name]") is an [individual] residing at [address], [city], Massachusetts (hereinafter the "premises")

REGULATORY AUTHORITY

- (3) Pursuant to the **Massachusetts Wetlands Protection Act** (G.L. c. 131, §40) the [Municipality] Conservation Commission has responsibility for monitoring and enforcing restrictions concerning removal, filling, dredging, or altering of land bordering waters. Pursuant to G.L. c. 131, §40, the Department of Environmental Protection has published regulations at 310 CMR 10.000. Pursuant to [REDACTED] the [Municipality] Conservation Commission has enacted local wetlands by-laws.

ENTRY AND INSPECTION AUTHORITY

- (4) The [Municipality] Conservation Commission has authority to enter and inspect the premises pursuant to the **Massachusetts Wetlands Protection Act**, G.L. c. 131, §40, which states:

"The conservation commission and its agents, officers and employees and the commissioner of environmental protection and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section."

- (5) The [Municipality] Conservation Commission has authority to enter and inspect the premises pursuant to the [local ordinance], which states:

"XX"

REQUEST FOR WARRANT

- a) Based on information known to the [Municipality] Conservation Commission and sworn to in the attached affidavit of [Affiant's name], [Company name] is subject to regulation and inspection by the [Municipality] Conservation Commission under the Massachusetts Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder and the [local bylaw].

-
- (6) [Company name] has denied the [Municipality] Conservation Commission full access to the materials and information required by the [Municipality] Conservation Commission to ensure compliance with these laws and regulations and protect the public health and environment.
- (7) Based upon the foregoing circumstances, I seek an Administrative Warrant to enter the premises located at [Company Address] to conduct any or all of the following activities:
- a) Observe any violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40); the regulations promulgated thereunder and the [local bylaw].
 - b) Photograph and/or videotape any evidence of violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40, the regulations promulgated thereunder and the [local bylaw].
 - c) Review and/or copy any and all documents which may provide information as to violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder and the [local bylaw].
 - d) Examine soil characteristics by digging or augering the soil to delineate resource areas and sample materials in resource areas and their buffer zones which may provide information as to violations of the Massachusetts Wetlands Protection Act (G.L. c. 131, §40, the regulations promulgated thereunder and the [local bylaw].
- (8) Said inspection shall begin as soon as possible after the issuance of the Administrative Warrant and shall be completed with reasonable promptness, taking into consideration the scope and purpose of the inspection.
- (9) A prompt return shall be made to the Court no later than seven (7) days from the date of the issuance of the Administrative Warrant showing that the inspection has been completed.

THEREFORE, I respectfully request that the Court issue an Administrative Warrant authorizing me, [insert other inspector's names, if known], and any other [Municipality] Conservation Commission employees or agents necessary to complete the tasks enumerated above.

Signed under the penalties of perjury.

[Applicant's Name]

Date

On this ____ day of _____, 20__, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which were _____, to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) knowledge and belief.

My Commission Expires _____

COMMONWEALTH OF MASSACHUSETTS

[COUNTY NAME] COUNTY, ss.

District Court Department
[redacted] Division

AFFIDAVIT OF [Affiant's Name] IN SUPPORT OF
ADMINISTRATIVE WARRANT

I, [Affiant's Name], being duly sworn, depose and say:

- (1) I am a [Affiant's job title (i.e. conservation agent)], currently employed by the [Municipality] Conservation Commission (hereinafter "Con Com"). I have [college degree(s)]. I have been employed by the Con Com for [number of years] years. [Insert any other pertinent qualifications].
- (2) I am an authorized agent of the Con Com for the purpose of investigating and inspecting any records, condition, equipment, practice or property relating to the Con Com's duties under the Massachusetts Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder, and any other statutes, regulations, or by-laws or ordinances that the Con Com is authorized to enforce.
- (3) [Describe personal observations and information from sources.]
- (4) All of these conditions are, or reasonably could be, violations of laws or regulations enforced by the Con Com.
- (5) [Describe attempt to obtain permission for entry.]
- (6) [Describe any review of Con Com or other records, if applicable.]
- (7) My inability to inspect the premises, inspect records, and take photographs or videotapes prevented me from fully determining whether [Company name] was in violation of Massachusetts Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder, or any other law, regulation, by-law or ordinance enforced by the Con Com..
- (8) Under the circumstances as I have described them, I believe there is a reasonable and valid public interest in carrying out an administrative inspection of the premises located at [Company Address]. I believe an administrative inspection warrant is necessary to inspect, photograph, and/or videotape the premises of [Company name], to inspect and/or copy business records of [Company name], to examine soil characteristics by digging or augering the soil to delineate resource areas, and to sample materials in resource areas and their buffer zones which may provide information as to violations of the Massachusetts Wetlands Protection Act (G.L. c. 131, §40, the regulations promulgated thereunder and the [local bylaw]. [state any other purpose of inspection]

Signed under the penalties of perjury.

[redacted]
[Affiant's Name]

Date

Commonwealth of Massachusetts, County of [redacted], On this [day] of [month] [year]

Before me, the undersigned Notary Public, [name of document signer] proved to me through satisfactory evidence of identification, which was/were [description of evidence of identification] to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as a member of [city or town] Conservation Commission.

[Place seal and/or stamp here]

[Signature of Notary Public]
[Printed name of Notary Public]
[My commission expires date]

appendix 3

COMMONWEALTH OF MASSACHUSETTS

[COUNTY NAME] COUNTY, ss.

District Court Department
[] District

Warrant No.: _____

ADMINISTRATIVE WARRANT

Pursuant to Massachusetts Wetlands Protection Act (G.L. c. 131, §40) and [local bylaw]

TO THE [MUNICIPALITY] CONSERVATION COMMISSION AND ITS PERSONNEL OR DULY AUTHORIZED AGENTS:

Application having been made this _____ day of _____, 2002, before _____, for the issuance of an administrative warrant of entry, inspection, observation, photographing, and videotaping of evidence pursuant to the Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder, and the [local bylaw]; and the Court being satisfied that there has been sufficient showing that reasonable standards for conducting an administrative inspection have been satisfied.

We THEREFORE COMMAND YOU, to conduct, during normal business hours, an administrative inspection of the premises of [Company Name], which are located at [Company address], [City], Massachusetts. During this inspection you may:

- (1) Observe any violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40); the regulations promulgated thereunder and the [local bylaw].
- (2) Photograph and/or videotape any evidence of violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40, the regulations promulgated thereunder and the [local bylaw].
- (3) Review and/or copy any and all documents which may provide information as to violations of Massachusetts Wetlands Protection Act (G.L. c. 131, §40), the regulations promulgated thereunder and the [local bylaw].
- (4) Examine soil characteristics by digging or augering the soil to delineate resource areas and sample materials in resource areas and their buffer zones which may provide information as to violations of the Massachusetts Wetlands Protection Act (G.L. c. 131, §40, the regulations promulgated thereunder and the [local bylaw].

YOU ARE FURTHER AUTHORIZED TO bring other [Municipality] Conservation Commission employees or agents with you as you may require their assistance to conduct the administrative inspection authorized by this warrant.

WE FURTHER COMMAND YOU to begin said inspection as soon as practicable after the issuance of the Administrative Warrant, with reasonable promptness during normal business hours.

A PROMPT RETURN shall be made no later than seven (7) days from the date of issuance of the Administrative Warrant to the [County] County District Court Department, [] Division, showing that the inspection has been completed, provided that in the event there is need for additional time you are hereby authorized to request the court for an extension beyond said seven (7) days.

WITNESS, _____, Esquire, Justice of [County] County District Court, aforesaid, this ____ day of _____, 20__.

Justice of [County] County District Court

appendix 4

Violation Notice: For minor or suspected violations, another alternative is to the issuance of an Enforcement Order is the use of a Violation Notice as provided in the sample below. The Violation Notice puts a property owner on notice of a suspected violation, requests voluntary compliance, and helps build a record of minor violations in the event that further enforcement action is pursued.

Sample: Notice of Violation of the Massachusetts Wetlands Protection Act

[On Commission Letterhead]	
To:	[Name of Violator] Address of Violator
From:	[City or Town] Conservation Commission
Site Location:	[Address]
Certified Mail No. _____	
The Conservation Commission of [City or Town] has information that you or your agents may have violated the Massachusetts Wetlands Protection Act, G.L. c.131 §40 and its regulations at 310 CMR 10.00. The following activities [describe the extent and type of activity] may have impacted wetland resource areas and/or associated buffer zones. In order to determine whether a violation has occurred, we request that you comply with all of the following: Cease and desist from the following activities [describe] at the following locations [describe specific portions of the site or specify entire site]. Take the following measures to stabilize the site and prevent future violations of the Wetlands Protection Act [describe specific measures, such as erosion and sedimentation control]. Submit plans to the Conservation Commission by [date] that have been prepared by a professional. The plans should identify and quantify existing resource areas as well as identify and quantify resource areas that have been altered. Contact the Conservation Commission by [date] at [person, phone number] to arrange a site visit and/or attend the next Conservation Commission public meeting on [date] at [location]. If you do not understand the requirements of the Wetlands Protection Act, the Conservation Commission will provide information to assist you in complying with the law. The Wetlands Protection Act provides that: "No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense except that any person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter fails to comply with an enforcement order or order of conditions. Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation."	
Issued by: _____ [Signed Name]	
Printed Name: _____ [Printed Name]	Date: _____

appendix 5



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

DEP File Number: _____

WPA Form 9 – Enforcement Order

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. Violation Information

Important:
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



This Enforcement Order is issued by:

Conservation Commission (Issuing Authority)

Date

To:

Name of Violator

Address

1. Location of Violation:

Property Owner (if different)

Street Address

City/Town

Zip Code

Assessors Map/Plat Number

Parcel/Lot Number

2. Extent and Type of Activity (if more space is required, please attach a separate sheet):

B. Findings

The Issuing Authority has determined that the activity described above is in a resource area and/or buffer zone and is in violation of the Wetlands Protection Act (M.G.L. c. 131, § 40) and its Regulations (310 CMR 10.00), because:

☐ the activity has been/is being conducted in an area subject to protection under c. 131, § 40 or the buffer zone without approval from the issuing authority (e.g., a valid Order of Conditions or Negative Determination).



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 9 – Enforcement Order
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

B. Findings (cont.)

☐ the activity has been/is being conducted in an area subject to protection under c. 131, § 40 or the buffer zone in violation of an issuing authority approval (e.g., valid Order of Conditions or Negative Determination of Applicability) issued to:

Name _____ Dated _____

File Number _____ Condition number(s) _____

☐ The Order of Conditions expired on (date): _____ Date _____

☐ The activity violates provisions of the Certificate of Compliance.

☐ The activity is outside the areas subject to protection under MGL c.131 s.40 and the buffer zone, but has altered an area subject to MGL c.131 s.40.

☐ Other (specify):

C. Order

The issuing authority hereby orders the following (check all that apply):

☐ The property owner, his agents, permittees, and all others shall immediately cease and desist from any activity affecting the Buffer Zone and/or resource areas.

☐ Resource area alterations resulting from said activity shall be corrected and the resource areas returned to their original condition.

☐ A restoration plan shall be filed with the issuing authority on or before _____ Date _____

for the following:

The restoration shall be completed in accordance with the conditions and timetable established by the issuing authority.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 9 – Enforcement Order

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: _____

C. Order (cont.)

- ☐ Complete the attached Notice of Intent (NOI). The NOI shall be filed with the Issuing Authority on or before:

Date

for the following:

No further work shall be performed until a public hearing has been held and an Order of Conditions has been issued to regulate said work.

- ☐ The property owner shall take the following action (e.g., erosion/sedimentation controls) to prevent further violations of the Act:
- _____
- _____
- _____

Failure to comply with this Order may constitute grounds for additional legal action. Massachusetts General Laws Chapter 131, Section 40 provides: "Whoever violates any provision of this section (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both, such fine and imprisonment; or (b) shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation". Each day or portion thereof of continuing violation shall constitute a separate offense.

D. Appeals/Signatures

An Enforcement Order issued by a Conservation Commission cannot be appealed to the Department of Environmental Protection, but may be filed in Superior Court.

Questions regarding this Enforcement Order should be directed to:

Name

Phone Number

Hours/Days Available

Issued by:

Conservation Commission

Conservation Commission signatures required on following page.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 9 – Enforcement Order

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

D. Appeals/Signatures (cont.)

In a situation regarding immediate action, an Enforcement Order may be signed by a single member or agent of the Commission and ratified by majority of the members at the next scheduled meeting of the Commission.

Signatures:

_____	_____
_____	_____
_____	_____
_____	_____

Signature of delivery person or certified mail number

appendix 6

COMMONWEALTH OF MASSACHUSETTS

[**County Name**], ss.

SUPERIOR COURT
CIVIL ACTION NO.

CITY/TOWN OF [_____]	)	
	)	
Plaintiff,	)	
	)	<u>COMPLAINT</u>
v.	)	(INJUNCTIVE RELIEF
	)	REQUESTED)
	)	
	)	
[_____] CONSTRUCTION CORPORATION,	)	
[_____] , as trustee of the	)	
[_____] REALTY TRUST	)	
	)	
Defendants.	)	
_____	)	

Introduction

1. This is an action by the [**City/Town Name**] (the "**City/Town**"), for injunctive relief and civil penalties against the defendants for violating the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, the [**City/Town Bylaw**] and the regulations promulgated thereunder. The defendants have illegally altered protected wetlands by failing to use required erosion and sedimentation control methods at a residential subdivision development known as the [**Project Name**] Subdivision (the " _____ Subdivision"), at _____ Road, in _____, Massachusetts. As a result of this failure, the defendants discharged large amounts of sediment into protected wetlands in violation of the Wetlands Protection Act, and into the _____ River. These violations prevented the wetlands from fulfilling their function

of preventing pollution and flooding, and made these areas a hostile environment for the wildlife that depend on the wetlands for food and habitat.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this action, and authority to order the relief requested herein, pursuant to G.L. c. 131, § 40, and [**Home Rule citation if violations of local by-laws are to be pursued**].

Parties

3. The plaintiff is the [**City/Town**], appearing by and through the [**name of Counsel/Firm representing the city/town**].

5. [**City/Town of _____**] is an agency of the Commonwealth, with its principal office at [**City/Town Address**], and with the powers and duties set forth at [**Home Rule and bylaw/ordinance citation**].

6. _____ Construction Corporation (“**Company Name**”) is a corporation existing under the laws of Massachusetts, with a principal place of business at _____ Road, _____, Massachusetts. **Company Name** is a developer of the _____ Subdivision (the “_____ Subdivision”), a residential property development project located north of _____ Road, and east of _____ Road, off _____ Road in _____, Massachusetts. The _____ Subdivision is approximately 3/4 mile from the _____ River in _____.

7. The defendant [**Name**] (“**Defendant’s Name**”) is a natural person, residing at _____ Street, _____, Massachusetts. [**Defendant’s Name**] at all relevant times referenced herein was a trustee of the [_____ Realty Trust (the “Trust”), established in

writing and recorded at the _____ County Registry of Deeds in Book _____, Page _____. The Trust is, and at all times referenced herein was, the owner of the property where the _____ Subdivision is located.

8. The defendant _____ Company, Inc. (“**[Company Name]**”) is a corporation existing under the laws of Massachusetts, with a principal place of business at _____ Street, _____, Massachusetts. **[Company Name]** is, and at relevant times was, doing site work at the _____ Subdivision, including drain construction, excavation, and soil removal.

Facts

9. In or about fall **[year]**, the defendants began site preparation at the _____ Subdivision for the construction of a residential development.

10. On **[specific day]**, **[year]** and at various times thereafter, large quantities of runoff water (the “Runoff Water”) flowed from the _____ Subdivision into a catch basin (the “Catch Basin”) alongside _____ Road in **[City/Town]**.

11. The Runoff Water had high concentrations of sediment, caused by the defendants’ failure to use required erosion and sedimentation control practices at the _____ Subdivision.

12. The Runoff Water flowed from the Catch Basin to a drainage outfall pipe (the “Outfall Pipe”), and into a nearby drainage swale (the “Swale”).

13. The Runoff Water flowing from the Outfall Pipe into the Swale had high concentrations of sediment, caused by the defendants’ failure to use required erosion and sedimentation control practices at the _____ Subdivision.

14. The Runoff Water drained from the Swale into wetlands resource areas, including bordering vegetated wetland north of the **[adjacent road or other landmark]** (the “Bordering

Vegetated Wetland”).

15. The Runoff Water in the Bordering Vegetated Wetland had high concentrations of sediment, caused by the defendants’ failure to use required erosion and sedimentation control practices at the _____ Subdivision.

16. The Runoff Water then drained out of the Bordering Vegetated Wetland, into a stream channel (the “Stream Channel”).

17. The Runoff Water in the Stream Channel had high concentrations of sediment, caused by the defendants’ failure to use required erosion and sedimentation control practices at the _____ Subdivision.

18. On **[specific day]** **[year]** and at various times thereafter, the Runoff Water drained from the Stream Channel into the _____ River in **[City/Town]**.

19. At various times thereafter, the _____ River had high concentrations of sediment from the Runoff Water, as far as 1½ miles down river of where the Stream Channel drained into the _____ River, caused by the defendants’ failure to use required erosion and sedimentation control practices at the _____ Subdivision.

20. On **[specific day]**, **[year]**, _____ obtained an Order of Conditions, No. **[file number]** (the “Order of Conditions”), allowing the construction of a water detention pond in the buffer zone of the Bordering Vegetated Wetlands, to facilitate runoff management at the _____ Subdivision.

21. The Order of Conditions required certain erosion and sedimentation control practices, and required that if such practices failed, that any adverse impact immediately be rectified and that measures be implemented to control the problem.

22. On [specific day], [year] the [City/Town] issued [Types of Notices] under G.L. c. ___, § __ (the “City/Town Notices”), notifying the defendants of the Wetlands Protection Act violations resulting from their activities at the _____ Subdivision, and notifying them of the erosion and siltation control measures required to prevent further violations.

23. Notwithstanding the issuance of the [“Notices”], the defendants did not timely implement necessary erosion and siltation control measures, and did not timely submit plans for the removal of the sediment from the affected wetland resource areas.

24. As a result of the defendants’ activities, sediment was deposited throughout the subject wetlands resource areas.

25. The sedimentation problems resulting from the runoff at the _____ Subdivision inhibited the wetlands from fulfilling their functions of preventing storm damage and pollution, and providing flood control. This damage also makes these wetlands a hostile environment for the wildlife that depend on the wetlands vegetation for food and habitat.

First Cause of Action:

Violation of the Wetlands Protection Act,
G.L. c. 131, § 40

26. The [City/Town] repeats and realleges paragraphs 1 through 25 of this complaint, as if each had been pleaded here in full.

27. The Wetlands Protection Act provides that no person shall remove, fill, dredge, or alter any protected wetland, or cause, suffer, or allow such activity, without filing a notice of intent and obtaining an order of conditions or superseding order of conditions, from the appropriate Conservation Commission or from DEP permitting such work.

28. The Wetlands Protection Act further provides that no person shall fail to restore illegally altered wetland to its original condition.

29. At the time of the activities alleged herein, the Bordering Vegetated Wetland was a protected resource area under the Wetlands Protection Act.

30. At the time of the activities alleged herein, the Stream Channel and the _____ River contained bank and land under waterbodies and waterways, each a protected resource area under the Wetlands Protection Act.

31. By the activities described in paragraphs 10 through 19 above, which constitute altering a protected wetland, or causing, suffering or allowing such activity, without obtaining an order of conditions or a superseding order of conditions permitting the introduction of sedimentation into the protected wetland resource areas, the defendants violated the Wetlands Protection Act and the regulations promulgated thereunder.

32. By failing to restore the illegally altered protected wetlands to their original condition, the defendants have violated and continue to violate the Wetlands Protection Act and the regulations promulgated thereunder.

33. The Wetlands Protection Act provides for civil penalties of up to \$25,000 per day for each violation of the Wetlands Protection Act, and each day that a violation continues constitutes a separate offense.

[Optional: Second Cause of Action:

**Violation of the [City/Town] Bylaw,
Home Rule and by-law citation]**

[Enumerate violations of applicable local bylaw provisions; may use format provided in paragraphs 26-33 above to specify bylaw violations and applicable penalties].

WHEREFORE, the Commonwealth requests that the Court:

(i) issue a short order of notice for a hearing on the plaintiff's request for a preliminary injunction;

(ii) after a hearing, issue a preliminary injunction: (a) requiring that the defendants immediately implement an erosion and sedimentation control plan acceptable to [City/Town] to prevent further wetlands damage; and (b) requiring that within 30 days the defendants submit plans acceptable to [City/Town] for the restoration of the affected wetlands resource areas, including removal of sediments from the wetlands, and that the defendants implement those plans immediately once [City/Town] accepts them;

(iii) after trial, issue a permanent injunction incorporating the terms of the preliminary injunction as appropriate, and ordering the defendants to cease all activity at the _____ Subdivision that may result in the removing, filling, dredging, or altering of any protected wetland area or in the discharge of any pollutants into waters of the Commonwealth;

(iv) order each defendant to pay to the [City/Town] a civil penalty in the amount of \$_____ per day, for each violation of the Wetlands Protection Act;

(v) grant such other and further relief as is just and proper in the circumstances.

Dated: [Specific day], [year]

[CITY/TOWN OF _____]
[Attorney Name]
TOWN COUNSEL

By: [Attorney Name, Address, Phone Number]

appendix 7

DEP Regional Offices

Wetlands Program
One Winter Street, 6th floor
Boston MA, 02108
(617) 292-5500

Department of Environmental Protection
Northeast Regional Office
One Winter Street, 5th floor
Boston, MA 02108
(617) 654-6500

Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
(508) 946-2700

Department of Environmental Protection
Central Regional Office
627 Main Street
Worcester, MA 01608
(508) 792-7650

Department of Environmental Protection
Western Regional Office
436 Dwight Street
Springfield, MA 01103
(413) 784-1100; Fax: (413) 784-1149

DEP Wetland Conservancy Program
One Winter Street, 5th floor
Boston Ma 02108
(617) 292-5907

DEP Waterways Regulation Program
One Winter Street, 6th floor
Boston MA 02108
(617) 292-5500

DEP Wastewater Program
One Winter Street, 6th floor
Boston MA 02108
(617) 292-5500

DEP Environmental Strike Force

One Winter Street
Boston, MA 02108
1-888-VIOLATE (846-5283)
(617) 556-1000

Other Massachusetts Agencies

MEPA Unit

100 Cambridge Street, Suite 900
Boston MA 02114-2524
(617) 626-1020

Department of Fish and Game

251 Causeway Street
Suite 400
Boston MA 02114-2152
(617) 626-1590

DFG Inland Enforcement Bureau

183 Milk Street
Westboro MA 01581
(508) 366-6537 or 6420

DFG Coastal Enforcement Bureau

349 Lincoln Street
Building 45
Hingham MA 02043

Department of Conservation and Recreation

Division of Urban Parks and Recreation
251 Causeway Street
Suite 600
Boston MA 02114-2104
(617) 626-1250

**Attorney General's Office
Environmental Protection Division**

One Ashburton Place, Room 1902
Boston MA 02108
(617) 727-2200

Federal Agencies

U. S. Army Corps of Engineers
696 Virginia Road
Concord, MA 01742
(978) 318-8338 or 8335

**U. S. Environmental Protection Agency
Region One**

One Congress Street
Suite 1100
Boston, MA 02114
(617) 918-1111

County District Attorney Offices

Barnstable County
District Attorney
Barnstable Division
3231 Main Street
Barnstable, MA 02630
(508) 362-8113

Berkshire County
District Attorney
44 Bank Row
P.O. Box 1969
Pittsfield, MA 01202
(413) 443-5951

Bristol County
District Attorney
888 Purchase Street
P.O. Box 94
New Bedford, MA 02740
(508) 997-0711
(508) 999-6702

Dukes County
District Attorney
3231 Main Street
Barnstable, MA 02630
(508) 362-8113

Essex County
District Attorney
70 Washington Street
Fourth Floor
Salem, MA 01970
(508) 745-6610

Franklin County
District Attorney
One Court Square
Northampton, MA 01060
(413) 586-9225

Hampden County
District Attorney
Hall of Justice
50 State Street
Springfield, MA 01103

Hampshire County
District Attorney
55 Federal Street
Greenfield, MA 01301
(413) 774-3186

Middlesex County
District Attorney
Superior Court House
40 Thorndike Street
Cambridge, MA 02141
(617) 494-4050

Norfolk County
District Attorney
360 Washington Street
Dedham, MA 02026
(617) 329-5440

Nantucket County
District Attorney
Superior Court House
Barnstable, MA 02630
(508) 362-8113

Plymouth County
District Attorney
32 Belmont Street
Brockton, MA 02403
(508) 584-8120

Suffolk County
District Attorney
New Court House
Pemberton Square
Boston, MA 02108
(617) 725-8600

Worcester County
District Attorney
Court House
Worcester, MA 01608
(508) 775-8610

Non-Profits

**Massachusetts Association of Conservation
Commissions (MACC)**
10 Juniper Road
Belmont, MA 02178
(617) 489-3930

MACC Western Outreach Office
2 West Street
Hadley, MA 01035
(413) 584-2724

Massachusetts Audubon Society
208 South Great Road
Lincoln, MA 01773
(617) 259-9500



appendix 8

From the Massachusetts Association of Conservation Commission Newsletter, September /October 2003 - reprinted with permission from MACC

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 (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 organizations 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