



Understanding the Massachusetts Wetlands Protection Act Program

Wetland Basics for Non-ConComs

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Wetland Protection in MA

Wetlands Protection Act (WPA) M.G.L. Ch 131 §40

WPA Regulations 310 CMR 10.00.

- Public Interests Protected and Jurisdictional Areas
- Permitting and Approval Process
- Regulatory Exemptions and Limited Project Provisions
- Stormwater Management Under the WPA

Other Environmental Regulations

Public Interests Protected and Jurisdictional Areas



WPA Presumes Eight Public Interests are Protected by Wetlands

► Protection of

1. Public and Private Water Supply
2. Groundwater Supply
3. Fisheries
4. Wildlife Habitat
5. Land Containing Shellfish



Eight Public Interests Presumed Protected by Wetlands

► Prevention of

6. Pollution

7. Storm Damage

► Control of

8. Floods



Jurisdictional Areas - Inland Wetland Resources

- ✓ **Bank** (*includes inland beaches; includes constructed banks “composed of concrete, asphalt or other artificial impervious material”*)
- ✓ **Bordering Vegetated Wetland** (*wet areas bordering waterbodies that contain hydric soils, hydrophytic plants and evidence of hydrology*)
- ✓ **Land Under Waterbodies & Waterways** (*includes land “composed of concrete, asphalt or other artificial impervious material”*)



Jurisdictional Areas - Inland Wetland Resources (cont.)

- ✓ **Bordering Land Subject to Flooding** (*FEMA 100-year floodplain, or “maximum lateral extent of flood water which has been observed or recorded”*)
- ✓ **Isolated Land Subject to Flooding** (*isolated area that holds standing water to a volume of at least ¼ acre-feet and to an average depth of at least six inches, at least once a year*)
- ✓ **Riverfront Area** (*land within 200’ of Mean Annual High Water of rivers and perennial streams; 25’ in “Densely Developed Areas” as defined at 301 CMR 10.00*)



Jurisdictional Areas - Coastal Wetland Resources

- ✓ Land Under the Ocean
- ✓ Designated Port Areas
- ✓ Coastal Beaches (*includes Tidal Flats*)
- ✓ Coastal Dunes
- ✓ Barrier Beaches (*includes Coastal Beaches and Coastal Dunes*)
- ✓ Coastal Bank (*includes land composed of concrete, asphalt or other artificial impervious material*)



Jurisdictional Areas - Coastal Wetland Resources (cont.)

7. Rocky Intertidal Zones
8. Salt Marsh
9. Land Under Salt Ponds
10. Land Containing Shellfish (*includes areas closed to harvesting; represents an Outstanding Resource Water*)
11. Fish Runs
12. Land Subject to Coastal Storm Flowage (*FEMA 100-year coastal floodplain*)



Jurisdictional Areas - Buffer Zone = 100 feet from:

► Coastal Wetlands

- ❖ Beach
- ❖ Barrier Beach
- ❖ Rocky Intertidal Shore
- ❖ Dune
- ❖ Bank
- ❖ Salt Marsh

► Inland Wetlands

- ❖ Bank (*including beach*)
- ❖ Bordering Vegetated Wetlands

*See 10.24(1) or 10.53(1) for
work in the Buffer Zone*

No Buffer Zone to:

Land Under Water Bodies

Land Subject to Tidal Action

Land Subject to Coastal Storm Flowage

Land Subject to Flooding

Riverfront Area

Permitting and Approval Process



Activities Subject to Regulation Under Wetlands Protection Act

- ▶ Any activity in an inland or coastal wetland resource area that will remove, fill, dredge or alter the area requires a Notice of Intent filing.
- ▶ Activities within the buffer zone ... which, in the judgment of the issuing authority (**Conservation Commission**), will alter an Area Subject to Protection under the WPA is subject to regulation and requires the filing of a Notice of Intent.

“Alter” 10.04

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

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.

Permitting Process

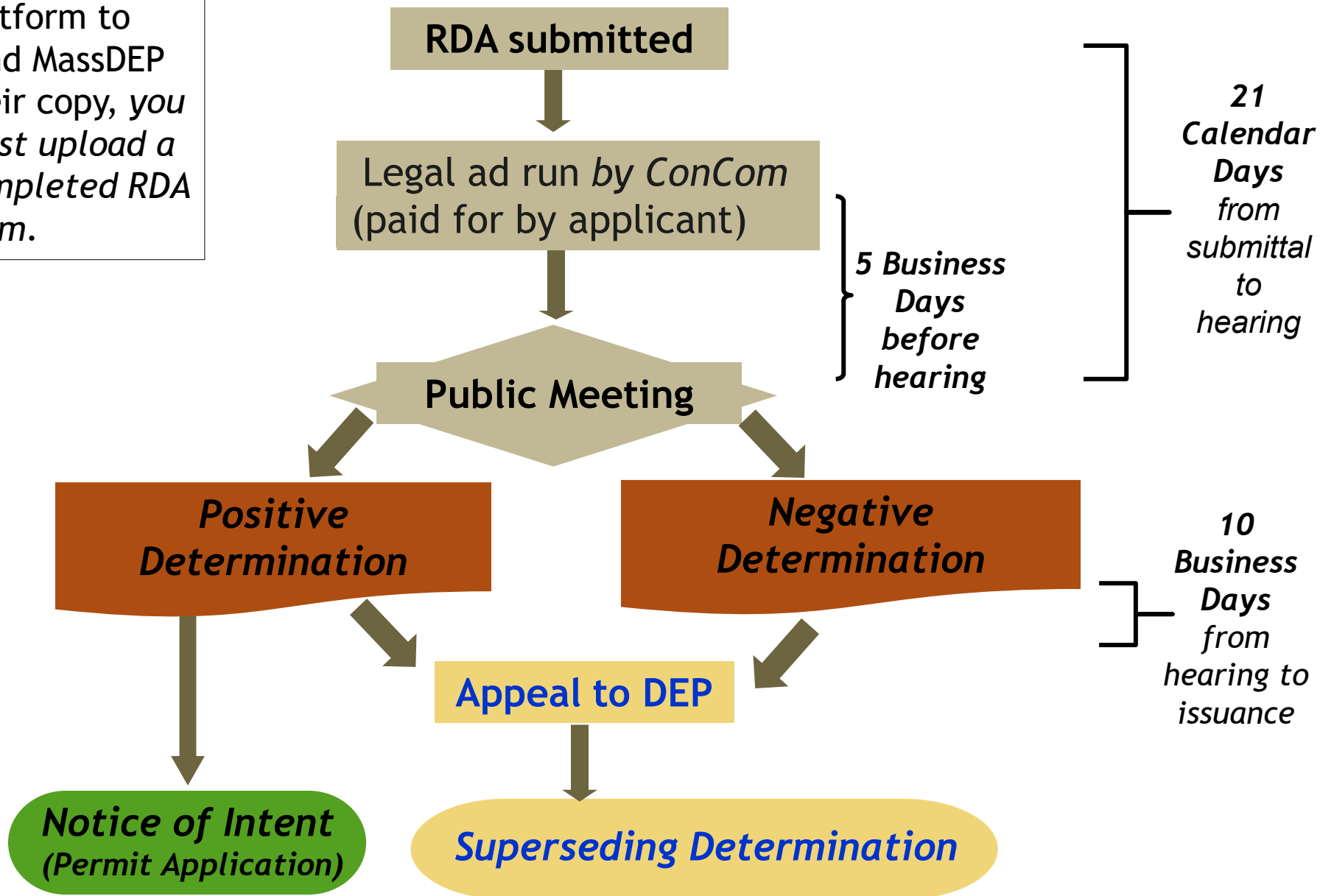
- ▶ Permit requests are made to municipal Conservation Commissions
- ▶ Copies sent to MassDEP (certified mail, hand delivery, or via eDEP)
- ▶ MassDEP provides administrative completeness reviews; posts technical comments, if warranted
- ▶ Municipal Conservation Commission issues decisions on the permit requests
- ▶ Appeals of Conservation Commission decisions made to MassDEP
- ▶ MassDEP can intervene (appeal) a ConCom decision

Request for Determination of Applicability (RDA)

- No State Filing Fee
- Applicant asks question(s) to determine:
 - If **area** is subject to jurisdiction of the WPA and regulations (*i.e., is area a jurisdictional wetland resource or Buffer Zone?*)
 - If **boundaries** of Wetland Resources Areas are accurate (*simple delineations only*)
 - If **activities** are subject to jurisdiction of the WPA and regulations (*e.g., is work exempt?*)
 - If **activities** are subject to a local Wetland Bylaw/Ordinance
- Determinations valid for 3 years, and may not be amended or extended

NOTE: If using the eDEP RDA Submittal Platform to send MassDEP their copy, you must upload a completed RDA form.

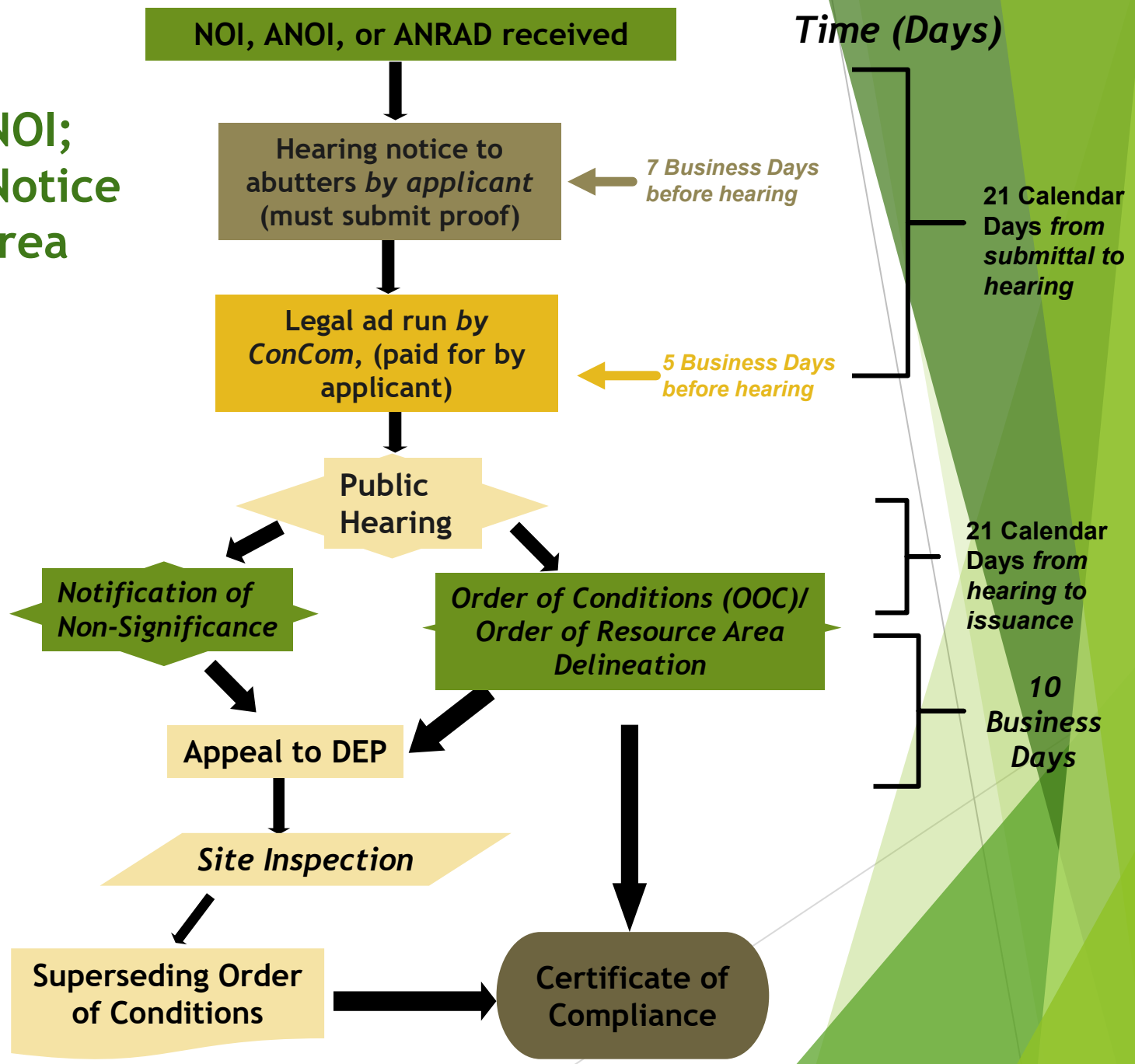
RDA Process



Notice of Intent (NOI)

- ▶ Notice of Intent (*permit application*) if the work will impact wetland resource area
- ▶ Filing Fees/Forms (*municipalities are fee exempt*)
- ▶ Plans and supporting documents:
 - ▶ USGS Locus map
 - ▶ Site Plans (existing and proposed conditions, including locations of jurisdictional resource areas)
 - ▶ Checklist for Stormwater Report and stormwater calculations
- ▶ Abutters are notified by applicant
- ▶ If Rare/Endangered Species May Be Present
Send NOI to NHESP

Process for:
NOI;
Abbreviated NOI;
Abbreviated Notice
of Resource Area
Delineation
(ANRAD)



Abbreviated Notice of Intent (WPA Form 4)

This form may only be used when all three of the following circumstances exist:

- a. the proposed work is within the Buffer Zone, or within Land Subject to Flooding, or within the Riverfront Area.
- b. the proposed work will disturb less than 1,000 square feet of the Buffer Zone and/or Land Subject to Flooding *OR* less than 1000 square feet of riverfront area, provided the work conforms to 310 CMR 10.58(4)(c)2.a.
- c. the proposed work will not require U.S. Army Corps of Engineer Section 10 or Section 404 permits, or a Chapter 91 license

Order of Conditions

- ▶ Issued by the Conservation Commission
- ▶ Approval based on *Performance Standards* for Wetland Resource Areas
- ▶ Valid for 3 years but can be extended if requested >30 days before expiration. Can be amended if no increase in wetland impacts.
- ▶ Exceptions to meeting Performance Standards:
 - Limited Projects
 - All presumptions are Overcome
 - Variance by DEP Commissioner

Order of Resource Area Delineation

- ▶ Issued by the Conservation Commission
- ▶ Decision (accurate, modified, inaccurate) based on *definitions* of Wetland Resource Areas
- ▶ Valid for 3 years. Can be extended if requested >30 days before expiration, and wetland expert confirms no change in delineation.

Wetlands Forms

<https://www.mass.gov/lists/wetlands-permitting-forms>

<https://edep.dep.mass.gov/eDEP/DEPLogin.aspx>

- ▶ **WPA Form 1:** *Request for Determination of Applicability*
- ▶ **WPA Form 3:** *Notice of Intent*
- ▶ **WPA Form 8A:** *Request for Certificate of Compliance*
- ▶ **Wetlands Fee Transmittal Form** (*municipal projects are fee exempt*)
- ▶ **Checklist for Stormwater Report**
- ▶ **Request for Departmental Action Fee transmittal form** (*for appeals of ConCom decisions*)

Web Site Resources

- ▶ [Wetlands Policies and Information](#)
- ▶ [Massachusetts Stormwater Handbook and Stormwater Standards](#)
- ▶ [MassMapper](#) (online GIS)
- ▶ [MassDOT Pictometry Viewer](#)
- ▶ [Rivers and Roads](#)
[UMmassTransportationCenter.org](#)
- ▶ [Culvert Replacement Municipal Assistance Grant Program](#)

Emergency Certificates (10.06)

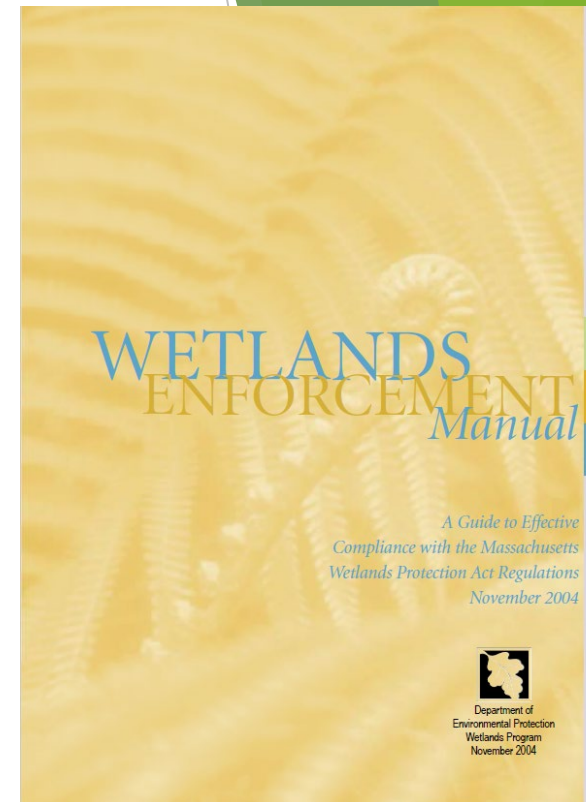
- ✓ Issued only for the protection of public health or safety
- ✓ An emergency must be declared in writing by a state or municipal official
- ✓ Only work needed to abate the emergency not everything that needs doing
- ✓ Sufficient information must be submitted for Commission to understand proposed work; work may be conditioned
- ✓ Issued within 24 hours of Declaration or by DEP
- ✓ NOT a substitute/shortcut for the permitting process or for after-the-fact approval of unauthorized activities



STRICT Time Limitation 30 days for emergency work, 60 days for Immediate Response Actions approved by the Bureau of Waste Site Cleanup. *Cannot be extended.*

Enforcement Orders (10.08)

- ▶ Used to **stop work** by violator, including municipal staff/contractors
- ▶ Used to **require restoration** of unauthorized disturbance
- ▶ Used to **require filing an NOI** for after-the-fact approval of work that meets performance standards
- ▶ Issued to the violator *and* the property owner (if different)



<https://www.mass.gov/doc/enforcement-manual-for-wetlands/download>

“Unless and Until”: 10.02(2)(d)

Activities Outside the Areas Subject to Protection under M.G.L. c. 131, § 40 and the Buffer Zone. Any activity proposed or undertaken outside the areas specified in 310 CMR 10.02(1) and outside the Buffer Zone is not subject to regulation under (the WPA) and **does not require the filing of a Notice of Intent unless and until that activity actually alters an Area Subject to Protection** under (the WPA).

In the event that the issuing authority determines that such activity **has in fact altered an Area Subject to Protection** under (the WPA), it may require the **filing of a Notice of Intent and/or issuance of an Enforcement Order** and shall impose such conditions on the activity or any portion thereof as it deems necessary to contribute to the protection of the interests identified in (the WPA).” *Emphasis added.*

Also discussed at **10.05(4)(d)** for NOIs and **10.05(6)(b)** for OOCs.

Regulatory Exemptions and Limited Project Provisions



Utility Exemption 10.02(2)(a)2

Applies to:

- 食 “activities conducted to maintain, repair or replace, **but not substantially change or enlarge...**
- 食 an existing and lawfully located structure or facility...
- 食 used in the service of the public and...
- 食 used to provide electric, gas, water, sewer, telephone, telegraph and other communication services.”

Utility exemption does NOT include stormwater infrastructure

The WPA uses the same words at M.G.L. Ch. 131 Sect. 40. ***But wait - there's more!***



Utility Exemption - Step 2

► Utility work is exempt **provided**

⌘ Work utilizes best practical measures to avoid or minimize impacts to wetland resource areas *outside the footprint of the structure or facility*

⌘ Project proponent claiming that work does not require the filing of a Notice of Intent has the burden of establishing that the work is not subject to Regulation

The municipal Conservation Commission decides if the burden has been overcome and work is exempt.



Minor Project Exemptions - 10.02(2)(b)1

- ▶ Minor activities ... within the buffer zone [or Riverfront Area, per 10.02(2)(a)1]... are not otherwise subject to regulation ... provided that the work is performed:
 - **solely within the buffer zone (or Riverfront Area),**
 - **as prescribed (in the 17 subparagraphs),**
 - **in a manner so as to reduce the potential for any adverse impacts to the resource area during construction, and with post-construction measures implemented to stabilize any disturbed areas.**
- ▶ **Factors (for the Commission) to consider when measuring the potential for adverse impacts to resource areas include the extent of the work, the proximity to the resource area, the need for erosion controls, and the measures employed to prevent adverse impacts to resource areas during and following the work.**

Common Exemption Categories

- a. Unpaved pedestrian walkways (with limits)
- b. Fencing (no barrier to wildlife movement); stonewalls; stacks of cordwood
- c. Vista pruning >50' from the MAHW or BVW, whichever is farther
- d. Plantings of native species of trees, shrubs, or groundcover (not turf lawns)
- e. Conversion of lawn to uses accessory to **residential structures** >50' from MAHW or BVW, whichever is farther (with limits), conversion of accessory uses at an existing single-family houses to lawn
- f. Conversion of impervious to vegetated surfaces (with erosion and sedimentation controls during construction)
- g. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design

There are more (utility work, roadwork, driveway repair, etc.) etc. **Make sure to read the entire paragraph** to confirm all requirements of that specific exemption are met.

*The municipal Conservation Commission
decides if the work is exempt.*

Riverfront Area Exemption - 10.58(6)(a)

- ▶ Any excavation, structure, road, clearing, driveway, landscaping, utility line, rail line, airport owned by a political subdivision, marine cargo terminal owned by a political subdivision, bridge over two miles long, septic system, or parking lot within the riverfront area **in existence on August 7, 1996.**
- ▶ Maintenance of such structures or areas is **allowed** [including any activity which maintains a structure, roads (**limited to repairs, resurfacing, repaving, but not enlargement**), clearing, landscaping, etc. in its existing condition] without the filing of a Notice of Intent for work within the riverfront area, **but not when such work is within other resource areas or their buffer zones** *except as provided in 310 CMR 10.58(6)(b).*
- ▶ **Changes in existing conditions which will remove, fill, dredge or alter the riverfront area are subject to 310 CMR 10.58, except that the replacement within the same footprint of structures destroyed by fire or other casualty is not subject to 310 CMR 10.58.**

Riverfront Area Exemption at 10.58(6)(b) and (c)

- ▶ (b) Certain minor activities as identified in 310 CMR 10.02(2)(b)1.
- ▶ (c) On-site sewage disposal systems in existence on August 7, 1996 and the repair or upgrade of existing systems in compliance with 310 CMR 15.000

The municipal Conservation Commission decides if the work is exempt.

What can the Commission ask for to assist their decision making?

Amount of information provided should be commensurate with the scope / complexity of work in resource areas

Sufficient to determine if the work is exempt:

- 食 Information showing that the work is “**maintenance**” not a substantial change/enlargement
- 食 Information on **best practical measures** to avoid or minimize impacts to wetland resource areas, *including alternatives considered* and/or the potential for adverse impacts to resource areas
- 食 **Other information** such as: plans, construction sequence and timelines, restoration details, oversight by a qualified environmental professional



Common Questions on WPA Regulatory Exemptions

Q: Can the Commission's decision on the whether a project is exempt be appealed to MassDEP?

A: No.

Q: Can the Commission require a WPA filing?

A: Yes, if they believe the work does not meet the exemption.

- ❖ Request for Determination of Applicability, or
- ❖ Notice of Intent

**The DoA or OOC can be appealed to
MassDEP**



Limited Projects

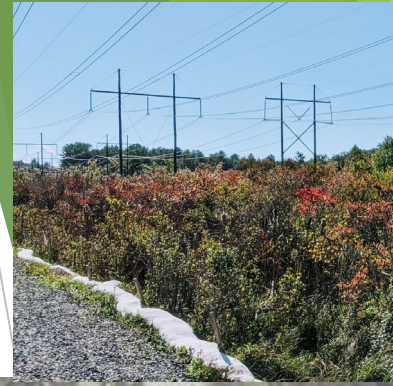
- ▶ Issuing Authority **may** issue an Order of Conditions permitting the limited projects listed in 10.24(7)(a) through (c), although *no project may be permitted which will have any adverse effect on specified habitat sites of Rare Species*.
- ▶ In determining *whether to exercise its discretion* the Issuing Authority **shall consider**
 - The **magnitude** of the alteration and the **significance** of the project to the interests of the WPA,
 - The availability of **reasonable alternatives** to the proposed activity, and
 - The extent to which **adverse impacts are minimized** and the extent to which **mitigation measures** including replication or restoration are provided

Coastal Limited Projects: 10.24(7)

- (a) The construction, reconstruction, operation and maintenance of the structures associated with and essential to an electric generating facility...
- (b) The construction, reconstruction, operation and maintenance of underground and overhead public utilities, **limited to electrical distribution or transmission lines, or communication, sewer, water and natural gas lines...**
- (c) Maintenance/improvement projects
 1. **Maintenance and improvement of existing public roadways** but limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving drainage systems
 2. **Maintenance, repair and improvement** (but not substantial enlargement except to reduce or eliminate a tidal restriction) **of structures**, such as buildings, piers, towers, headwalls, bridges and culverts which existed on 11/1/87.
 3. **Routine maintenance and repair of road drainage structures** including culverts and catch basins, drainage easements, ditches, watercourses and artificial water conveyances to ensure flow capacities which existed on 11/1/87.
 6. **Hazardous waste site cleanup projects**

Inland Limited Projects: 10.53(3)

- d) Overhead and underground **public utility projects**
- e) The construction and maintenance of a **new roadway or driveway ...** (*it goes on!*)
- f) **Maintenance and improvement of existing public roadways**, but limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving inadequate drainage systems
- i) Work to meet **stream crossing standards**
- j) **Catwalks, footbridges, wharves, docks, piers, boat houses duck blinds** provided, that structures are constructed on pilings or posts to permit the reasonably unobstructed flowage of water and adequate light to maintain vegetation



Inland Limited Projects (cont.)

- k) The routine maintenance and repair of **road drainage structures** including culverts and catch basins, drainage easements, ditches, watercourses and artificial water conveyances to ensure flow capacities which existed on 4/1/83
- q) **Hazardous waste site cleanup**



Ecological Restoration Notice of Intent 10.11 - 10.13

Six categories:

- ✓ Dam Removal
- ✓ Freshwater Stream Crossing Repair and Replacement
- ✓ Stream Daylighting
- ✓ Tidal Restoration Projects
- ✓ Rare Species Habitat Restoration
- ✓ Restoring Fish Passageways

If eligible, use Ecological Restoration Notice of Intent Form (WPA Form 3A)

Commission issues Ecological Restoration Order of Conditions (WPA Form 5A)



Ecological Restoration Limited Projects

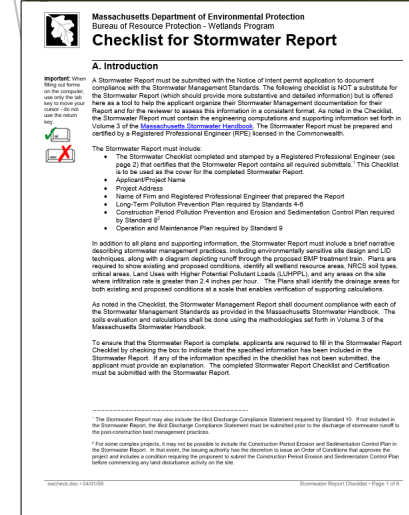
- *Only for use when ecological restoration is the primary purpose of the project*
- 10.27(8) for coastal resource areas:
 - ❖ Tidal Restoration Project.
 - ❖ Shellfish Habitat Restoration Project
 - ❖ Other Ecological Restoration Projects
- 10.53(4) for inland resource areas:
 - ❖ Dam Removal Projects
 - ❖ Freshwater Stream Crossing Repair and Replacement Projects
 - ❖ Stream Daylighting Projects
 - ❖ Tidal Restoration Projects
 - ❖ Other Restoration Projects

Stormwater Management under the WPA



Stormwater Management (SWM)

- MassDEP Stormwater Management Policy is enforced through Wetlands Protection Act Regulations. *Also in Section 401 Water Quality Certification regulations (314 CMR 9.00).*
- **This is in addition to requirements under the US EPA's MS4 Permit**
- MassDEP Stormwater Handbook last updated in 2008 (*will be updated again soon*) Download at <https://www.mass.gov/guides/massachusetts-stormwater-handbook-and-stormwater-standards>
- WPA Checklist for Stormwater Report must be submitted for each project not exempt from the stormwater regulations



SWM Standards 10.05(6)(k) - (q)

1. No New Direct Discharges
2. Control Peak Discharge Rates
3. Maximize Recharge to Groundwater
4. Remove 80% Total Suspended Solids
5. Specific Treatment for Land Uses with Higher Potential Pollutant Loadings (LUHPPL)
6. Specific Treatment for Protecting Critical Areas
7. Redevelopment Must Improve Conditions
8. Controls to Prevent Erosion During Construction
9. Operation and Maintenance Plan Required

SWM Applicability

Applies to all industrial, commercial, institutional, office, residential, and transportation projects, **EXCEPT**

- individual single-family house (SFH) project
- residential SFH and multi-family development/redevelopment of less than five units (e.g., four houses or two duplexes) unless discharging to a Critical Area
- **Emergency road repairs** (*non-emergency transportation project must meet SWM Standards*)

Applies to the *Maximum Extent Practicable* to:

- residential and multi-family development/redevelopment of less than five units discharging to a Critical Area
- residential and multi-family development/redevelopment of five to nine units unless discharging to a Critical Area
- Some marinas and boatyards
- Footpaths, bikepaths, and other non-motorized vehicle paths

Everyone else must comply fully with all SWM standards.

Construction Impacts Require Best Management Practices (BMPs)

1. **Erosion Controls.** *Keep soil from eroding*
2. **Sedimentation Controls.** *Keep eroded soil out of wetlands*
3. Limit placement/slope of fill
4. Stabilize soil stockpiles/surround with silt fence
5. Confine vegetation removal (require/restore vegetative buffers)
6. Phased clearing (not all at once!)
7. Any measures required by Issuing Authority

Which is more critical?



Be cautious of projects on steep slopes, on with highly erodible soils, and those very close to wetlands.

More on Erosion Controls vs. Sedimentation Controls

Erosion Controls = primary focus.

Examples: spreading hay or bark mulch, or stump grindings on exposed soils; temporary seeding with annual rye or other erosion control seed mixes; straw mats or coir fiber erosion control blankets.

Sedimentation Controls = last line of defense on site to keep eroded soil out of wetlands.

Examples: entrenched silt fence, staked haybales, staked silt socks, mulch or straw wattles, stone/rip rap check dams, temporary sedimentation swales and basins, silt sacks for manhole protection.

Field check site conditions at construction sites after heavy rainfall events (e.g., $<0.5''$ in 24 hours, back-to-back storm events). Many construction BMPs get overwhelmed.



Other Environmental Regulations



MA Endangered Species Act (MESA)

- ▶ For work in Estimated and Priority Habitat Regulated at 321 CMR 10.00 and 310 CMR 10.11 - 10.14, 10.37, 10.53(4), 10.58(4)(b) and 10.59
- ▶ MassWildlife issue a written determination letter
- ▶ MESA contacts: Melany.Cheeseman@mass.gov (north/central/western MA)

MA Environmental Policy Act (MEPA)

- ▶ If one of the MEPA thresholds is exceeded *and* the project requires a **state permit** or receives state funding, a MEPA filing will be required. (*locally-issued OOCs and herbicide licenses are not “state permits,” but an SOC is*).
- ▶ Example: alteration of $\geq \frac{1}{2}$ acres of LUWW *and* requiring a 401 WQC for dredging >100 CY of LUWW.
- ▶ MEPA contact: mepa@mass.gov. Visit <https://www.mass.gov/orgs/massachusetts-environmental-policy-act-office>

401 Water Quality Certificates

- ▶ Generally required for:
 - dredge of >100 cy of BVW, IVW or Land Under Water fill of >5,000 sf of BVW, IVW or Land Under Water
 - ANY amount of fill for real estate subdivision, unless a deed restriction is approved
 - ANY amount of dredge/fill of Outstanding Resource Waters
 - ANY amount of dredge/fill of Rare Species Habitat
 - ANY amount of dredge/fill of Salt Marsh
- ▶ Fill Project Contacts - NERO: Phil.DiPietro@mass.gov or Kyle.Lally@mass.gov
- ▶ Dredge Project Contacts: David.W.Wong@mass.gov or Derek.standish@mass.gov

It adds up quickly!
Removal/
repositioning
1" of sediment
from 1 acre =
134.4 CY of
dredged
material

Army Corps of Engineers: §404, Rivers & Harbors Act

- ▶ Permit is required for temporary and/or permanent work or structures in non-tidal navigable waters below the ordinary high water mark of rivers, streams, lakes or ponds
- ▶ Permit may also be required for work in a FEMA Floodway
- ▶ Contact: Paul Sneeringer Paul.J.Sneeringer@usace.army.mil

Chapter 91 - Public Waterfront Act

- ▶ Regulated at [310 CMR 9.00](#) and permitted by MassDEP Waterways staff in Boston, except for annual permits from local Harbor Master for seasonal docks
- ▶ Permit or license required for: work in flowed tidelands and land below the high water mark of:
 - [Great Ponds](#),
 - non-tidal portion of Merrimack River,
 - navigable non-tidal river/stream where public funds have been used for certain activities; and tidelands (except landlocked ones)
 - all filled lands below the natural high water mark of Great Ponds
 - Other specific waterways
- ▶ Common examples: docks, piers, seasonal floats, wharves, and buildings on pilings over wetlands or waterways
- ▶ Contact the MassDEP Waterways Program at DEP.Waterways@mass.gov

DEP Contact Information

► Northeast Regional Office (NERO)

Alicia.Geilen@mass.gov

617-519-7389

► Southeast Regional Office (SERO)

Andrew.Poynant@mass.gov

508-946-2845

► Central Regional Office (CERO)

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413-961-9583

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