

Writing Effective Orders of Conditions & Passing Local Wetland By-Laws



May 13, 2019

Massachusetts Maritime Academy
Bay State Conference Center



Agenda & Speakers

8:00 a.m. Check-in and Networking

8:30 a.m. Introduction - Maureen Thomas, BBC & Michele Girard, MACC

8:35 a.m. Writing Effective Orders of Conditions –

Andrea Langhauser, Assistant Planning Director, Easton

10:30 a.m. Introduction of Buzzards Bay Case Studies - Korrin Petersen, BBC

- Mattapoisett Case Study - Greg Bibler, Bibler Law Firm
- Westport Case Study - Jeremy Meisinger, Foley & Hoag

11:30 a.m. Passing Wetland Protection By-Laws & Regulations -Maureen Thomas

12:15 p.m. Wrap Up and Questions

Unit 105: Writing an Effective Order of Conditions

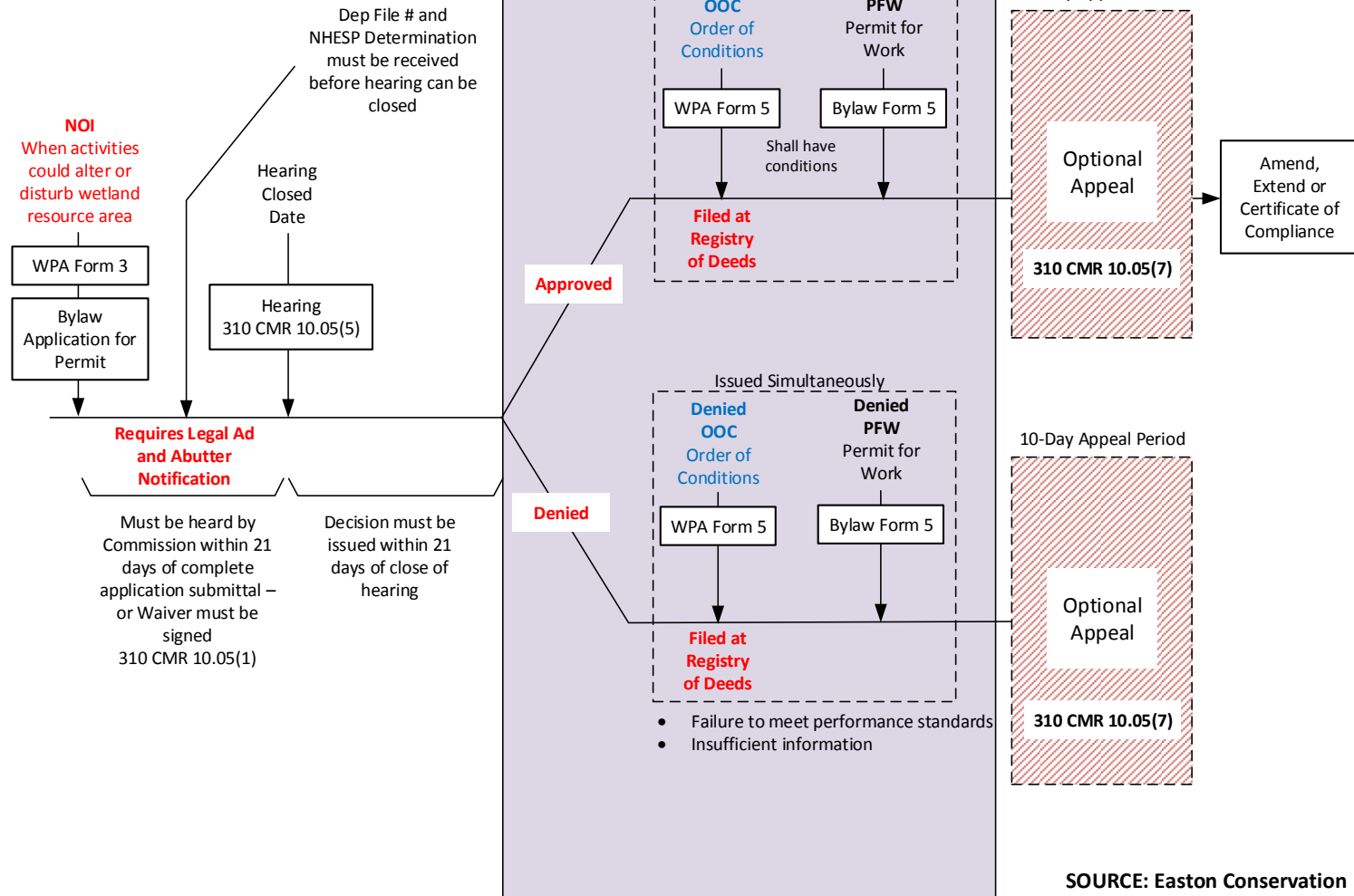
Fundamentals for Conservation Commissioners Certificate Program

Creation of This Unit Was Funded in Part with a Grant from The Massachusetts Environmental Trust.

Mass DEP Provided Clearwater Estates Materials For This Unit



NOTICE OF INTENT (NOI) 310 CMR 10.05 (4)



Order of Conditions (OOC)

Purposes of the OOC:

1. Protect Interests of the Act
2. Guide applicant & contractors
3. Gives commissions standards for enforcement



References:

310 CMR 10.05(6)-OOC

310 CMR 10.53(1)-General Conditions

Under 310 CMR 10.5(6) Order of Conditions (OOC)

APPROVE

- Area isn't significant to the Public Interests (use Form 6)
- Work is significant, approve and issue OOC protecting those Interests (OOC - use Form 5)
- Work meets eligibility for Ecological Restoration Project (Restoration OOC - use Form 5A)
- Resource Areas are delineated correctly (ORAD - use Form 4B)

DENY

- If insufficient information is provided to describe site or the work. List information lacking and why it is necessary.
- If work is found to have a negative effect on Interests (can't meet performance standards)
- Use Form 5A/5A, write 'DENIAL' on it



Orders of Conditions

310 CMR 10.05(6)(b) SHALL:

- Impose conditions necessary to meet performance standards upon work proposed in Buffer Zone or Resource Area
 - Impose conditions to control erosion and sedimentation
 - Impose conditions necessary to meet Stormwater Management Standards
 - Identify a clear Limit Of Work (LOW) to avoid unintended alterations
 - All point-source discharges SHALL provide BMPs to attenuate pollution
- Prohibit work that cannot be conditioned



General Provisions 310 CMR 10.53(1)

SHALL impose conditions to protect Interests of the Act

For Projects in Buffer Zones only, Con Coms MAY:

- Consider buffer zone characteristics
- Include limits on scope & location of work to avoid alteration
- Identify a clear L.O.W., and the preservation of natural vegetation
- Consider restoration of natural vegetation adjacent to resource area in a built environment



Parts of an Order of Conditions

DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP)

DEP Form 5

General Conditions (1-20)

CONSERVATION COMMISSION

Special Conditions:

- Findings
- Before Construction Conditions
- Case-specific Conditions
- Ongoing Conditions
- Perpetual Conditions



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Before Construction Conditions

During Construction Conditions

Case-specific Conditions

After Construction/Ongoing Conditions



Findings

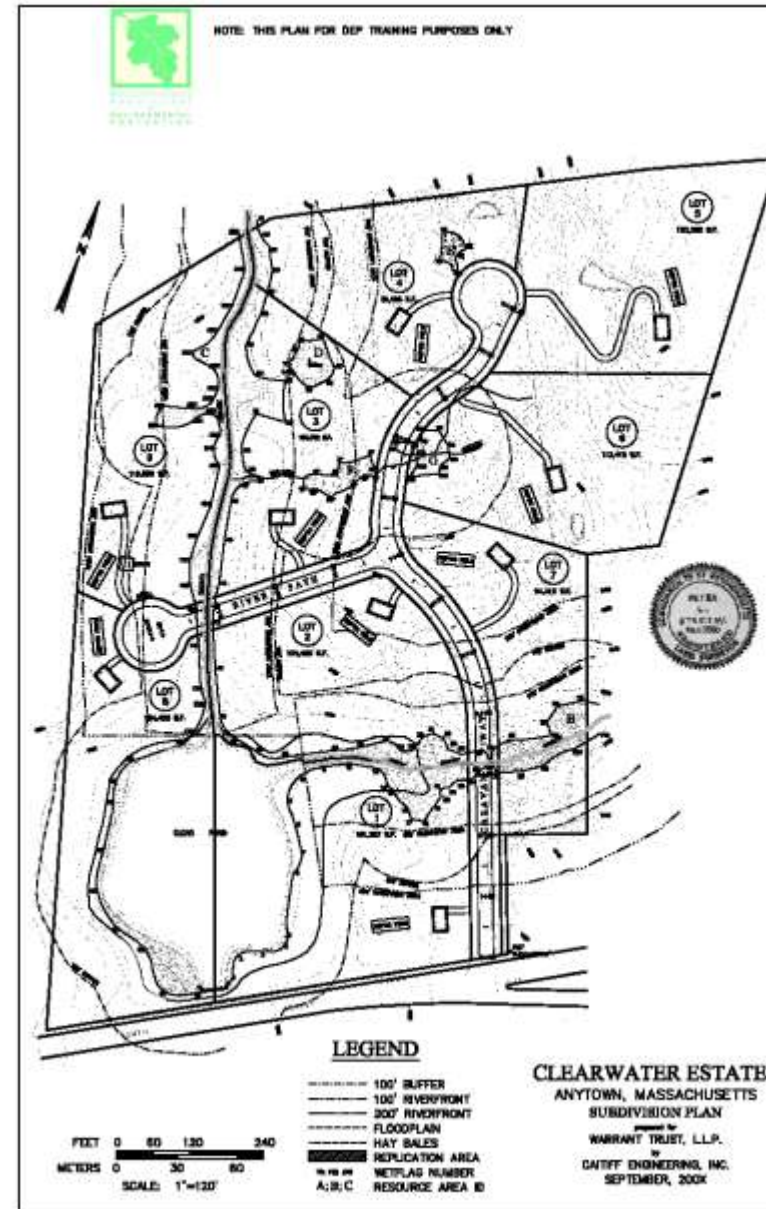
- Resource areas protected (use citations) and work regulated
- Any areas not approved (e.g. Bank is a resource area but not field delineated)
- All important matters (overcoming presumptions and “for the record”)
- “The commission determined that this area is particularly sensitive because.....”



Clearwater Estates

Assumes that site inspection, public hearing and project review were completed

Assumes this is the final approved plan



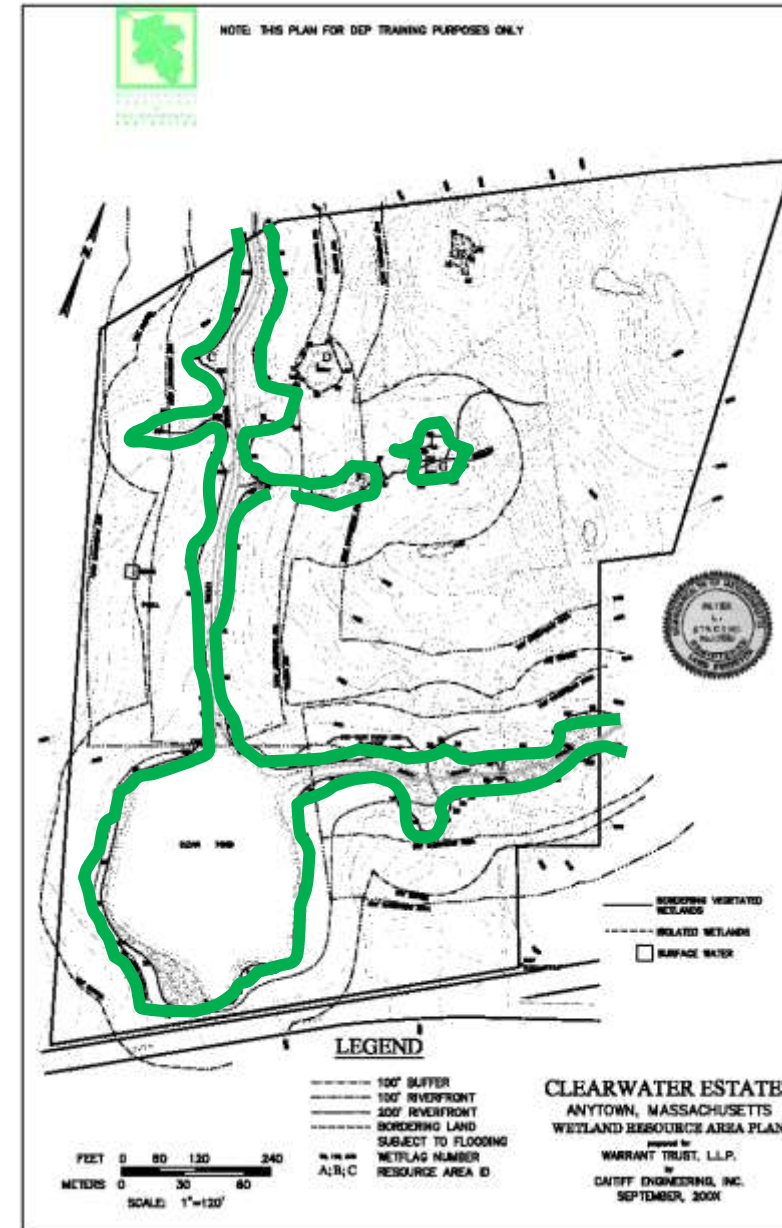
Identify Jurisdictional Areas

1. Bank -310 CMR 10.54
2. Land Under Waterbodies and Waterways (LUWW) -310 CMR 10.56
3. Bordering Vegetated Wetland (BVW) and buffer zone- 310 CMR 10.55
4. Bordering Land Subject to Flooding (BLSF) - 310 CMR 10.57
5. Isolated Land Subject to Flooding (ILSF) - 310 CMR 10.57
6. Riverfront Area - 310 CMR 10.58



BVW Finding Example

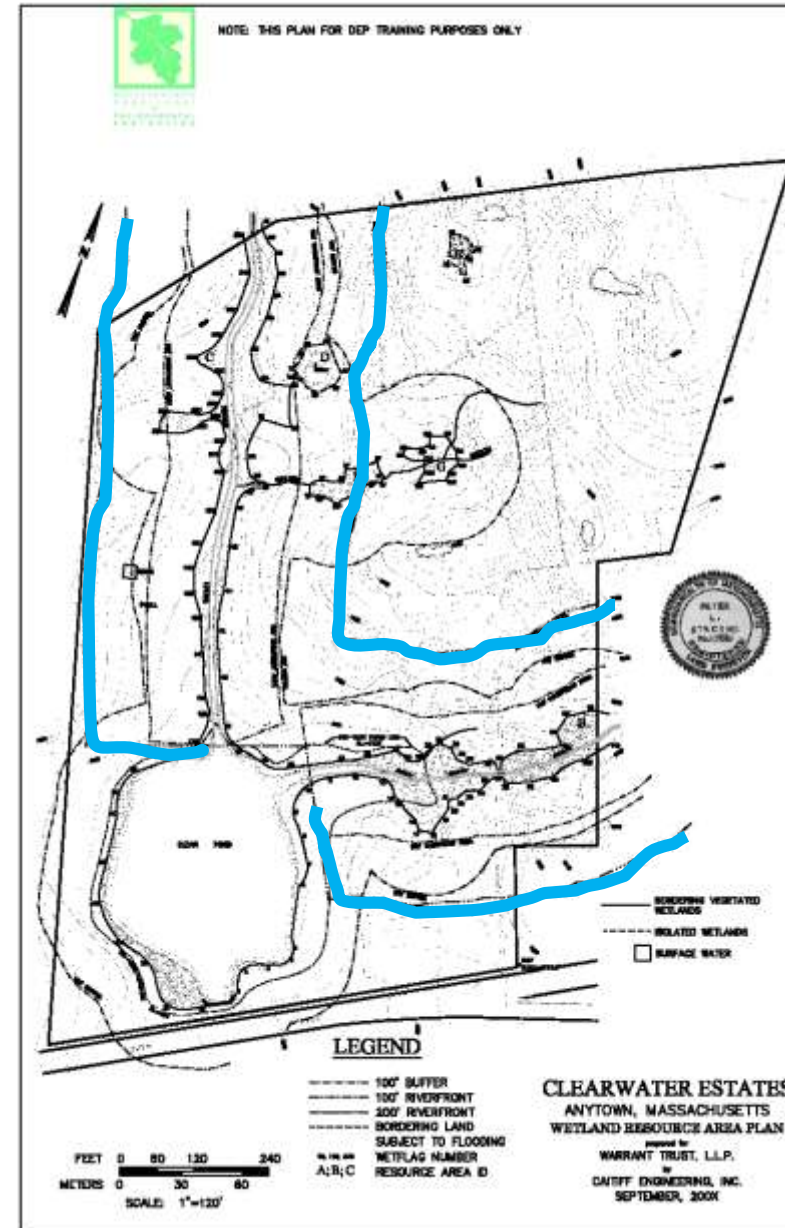
Bordering Vegetated Wetland (BVW) has been identified as a resource area, subject to protection under the Wetland Protection Act and Regulations 310 CMR 10.55 as shown on the final approved plans. The project alters and replicates XXXsf of BVW in locations as shown on the final approved plans.



Riverfront Finding Example

Riverfront Area to Rock Creek Brook and Trout Brook has been identified as a resource area, through the delineation of the mean annual high water mark, and is subject to protection under the Wetland Protection Act and Regulations 310 CMR 10.58.

Total Riverfront Area on the site is 6.6 acres (287,000) sf.



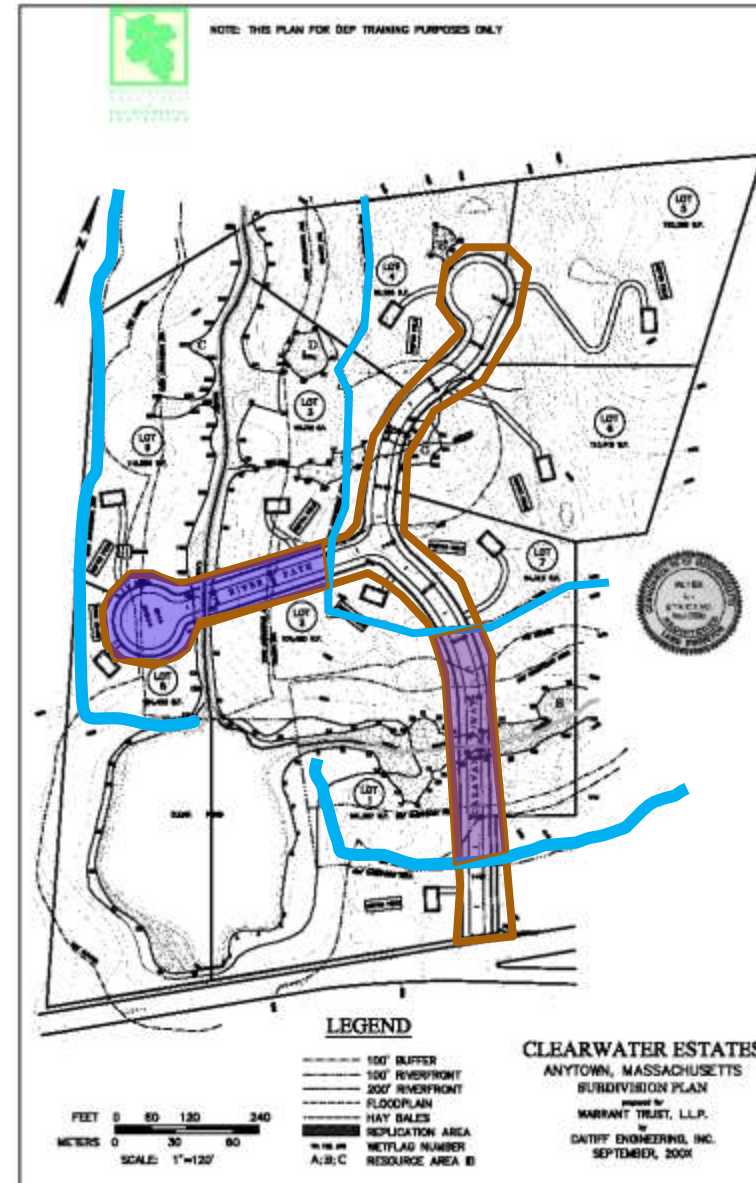
Riverfront Finding Example

Total Riverfront Area on the site is 6.6 acres (287,000 sf)

This project alters .50 acres (21,780 sf) of Riverfront Area.

Riverfront Area alteration is cumulative for all parcels subject to this Order of Conditions and shall be calculated cumulatively for all future permit applications to a maximum amount of .66 acres (28,700 sf) (10% of RA on the lot)

(any future work on house lots < 6,920 s.f.)



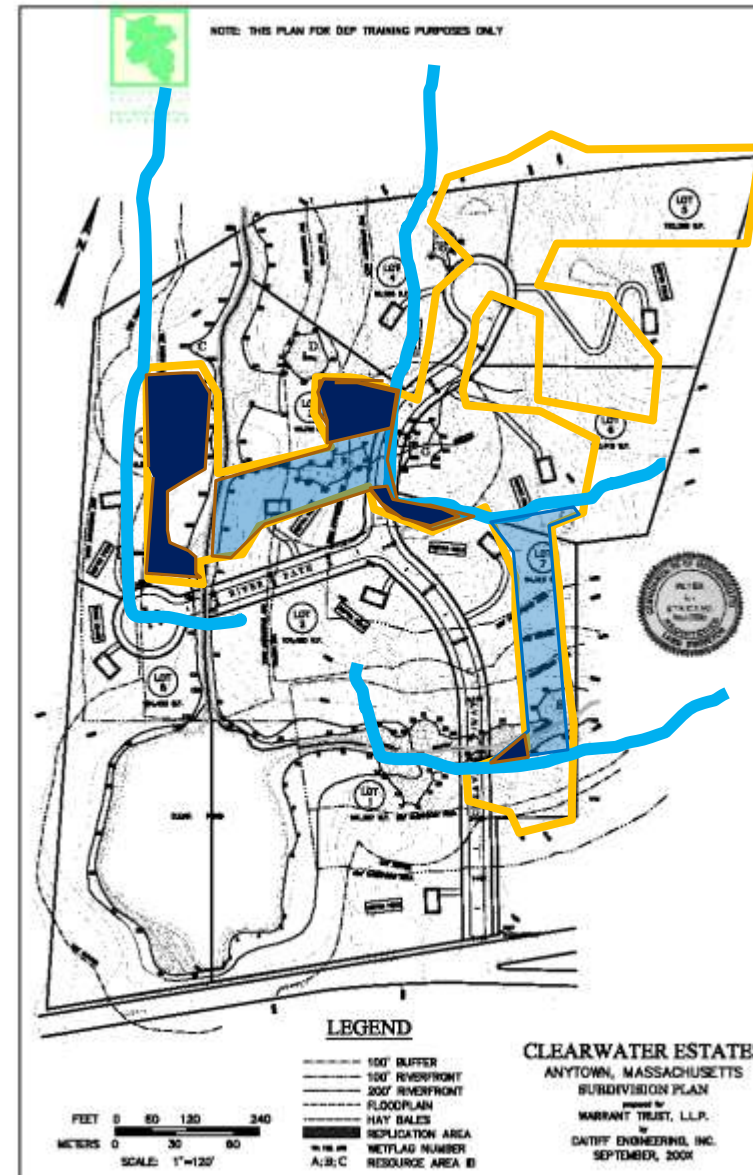
Riverfront Finding Example

Total Riverfront Area on the site is 6.6 acres (287,000) sf.

This project alters .50 acres (21,780) sf of Riverfront Area.

Riverfront Area alteration is cumulative for all parcels subject to this Order of Conditions and shall be calculated cumulatively for all future permit applications to a maximum amount of .66 acres (28,700) sf.

(any future work on house lots < 6,920 s.f.)



Isolated Wetland Finding

Determine if Isolated Wetland area

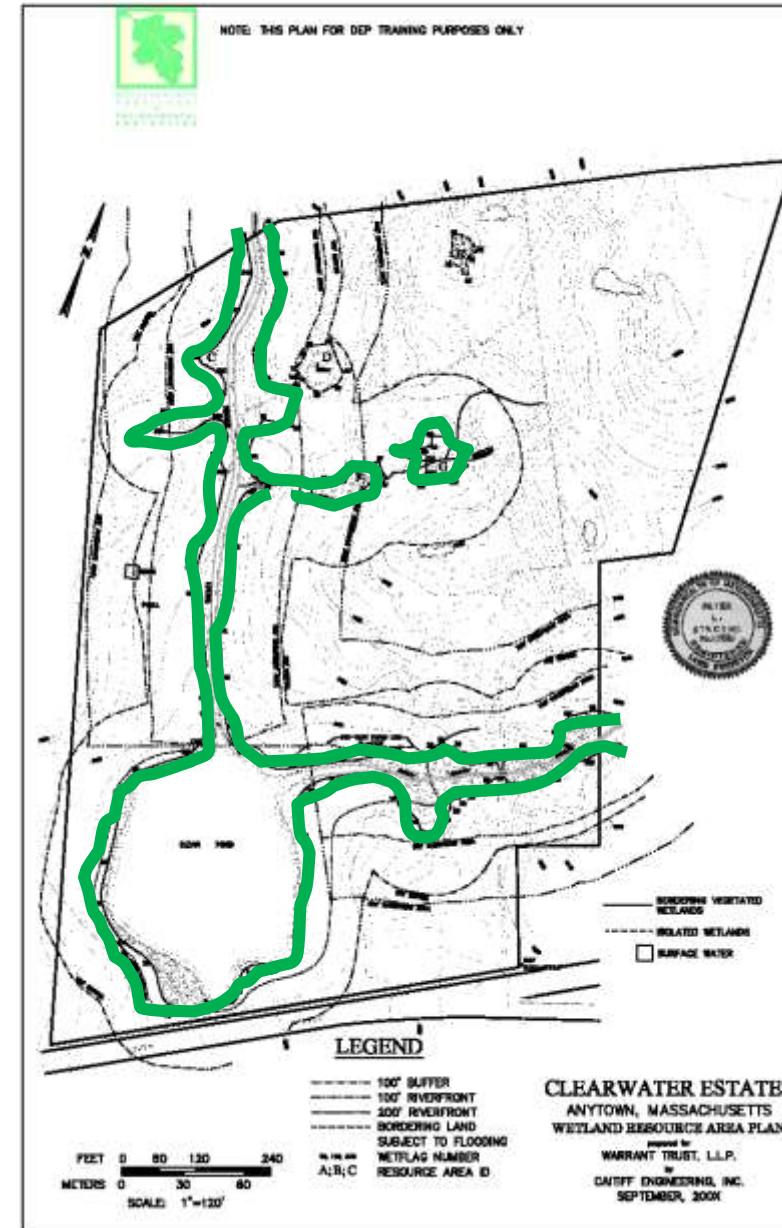
Is large enough to be considered ILSF -

- Holds at least $\frac{1}{4}$ acre foot of water

Has vernal pool habitat characteristics

- Confined basin, holds water at least 2 continuous months in most years, free of adult fish
- Mapped by the Natural Heritage & Endangered Species Program (NHESP)

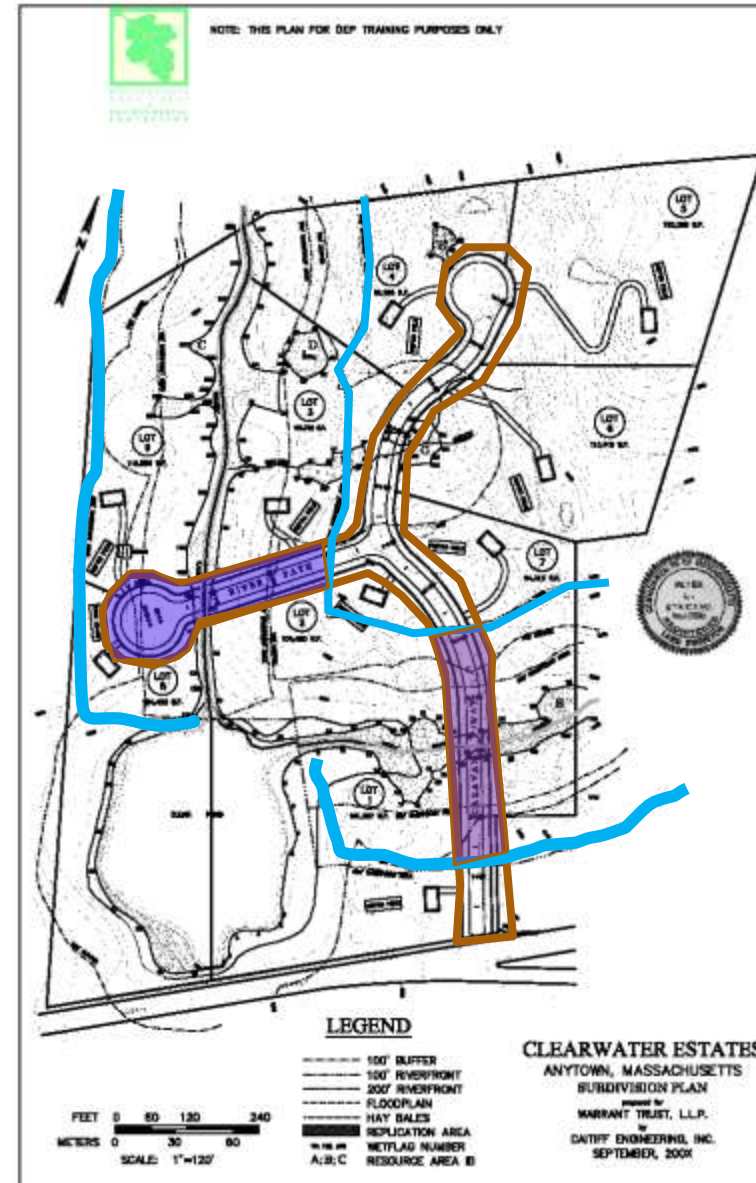
Cite: 310 CMR 10.57



Clearwater Estates Subdivision Plan

Example of Work Approved:

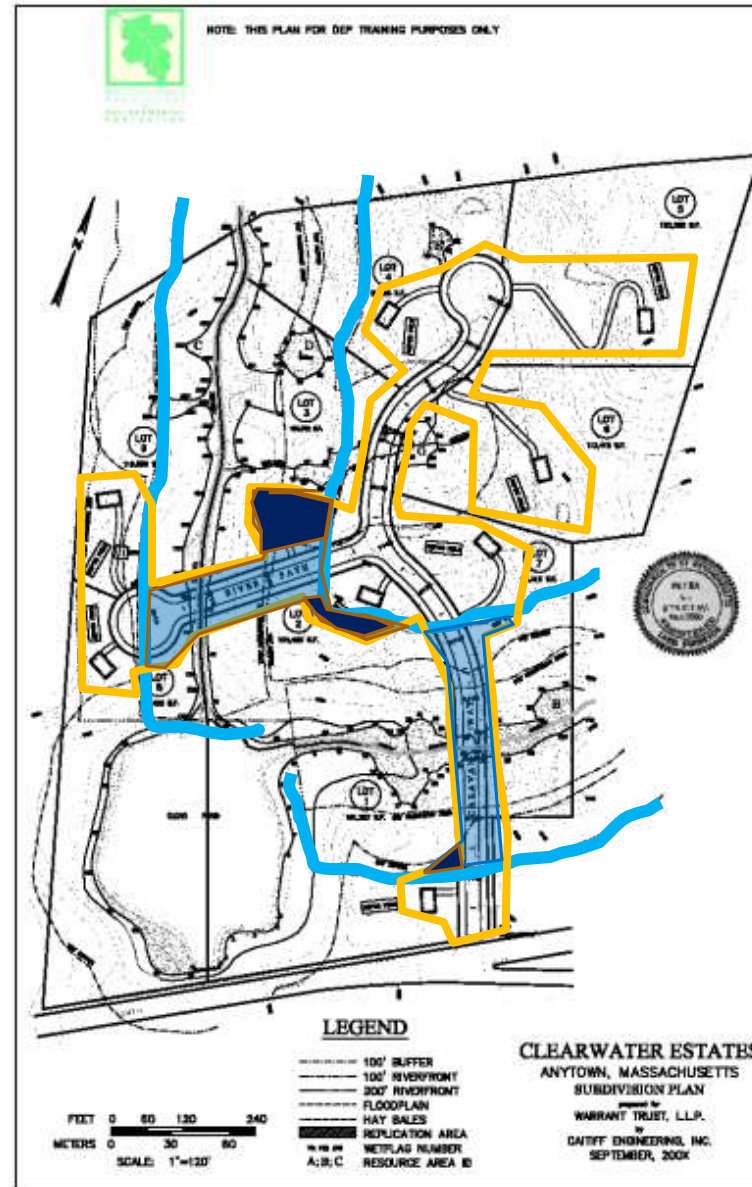
This permit authorizes the construction of the subdivision roads (Caravan Way and River Path), the associated storm water management system, installation of three box culverts at Rock Creek Brook (2) and Trout Brook (1), utilities and grading as shown on the Final Approved Plans. No other work is approved by this Order.



Clearwater Estates Subdivision Plan

Findings Example:

1. Separate permits are required for activities proposed on the individual house lots within Areas Subject to Jurisdiction.
2. Removal of vegetation and construction of impervious surfaces associated with work on individual house lots contribute to the overall drainage and storm water management system and are therefore, subject to this Order of Conditions.



Other Important Findings:

During Commission deliberation consider:

- Rare species habitat - NHESP has 30 days to comment
- ACECs – extra protection as performance standards
- Limited project & exemptions
- Wildlife habitat evaluation - note important findings in OOC
- Overcome a Presumption - document reasons in OOC
- Special circumstances allowing a 5-yr permit
- Stream intermittent or perennial

cite: 310 CMR 10.05(6)(d)



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Prior to Construction Conditions

During Construction Conditions

Case-specific Conditions

After Construction Conditions



Prior to Construction Conditions Examples

- Proof of recording of the OOC at the Registry of Deeds;
- Submit additional info (Revised Plan; Revised SWPPP pages regarding the contractor contact information; Phasing and Sequence Plan)
- Installation of Sediment control
- Preconstruction meeting between the applicant/owner, contractor, subcontractors and the Conservation Agent.
- Credentials of person monitoring construction



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Prior to Construction Conditions

During Construction

Case-specific Conditions

After Construction Conditions



During Construction Conditions

- Final plans & OOC available on-site at all times
- Required Con com inspections (be specific!)
- Maintenance of Erosion Control Barriers
- Construction entrance
- Staging and stockpile areas
- Monitoring and reporting of construction
- Final stabilization



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Administrative Conditions

During Construction Conditions

Case-specific Conditions

After Construction Conditions



Break



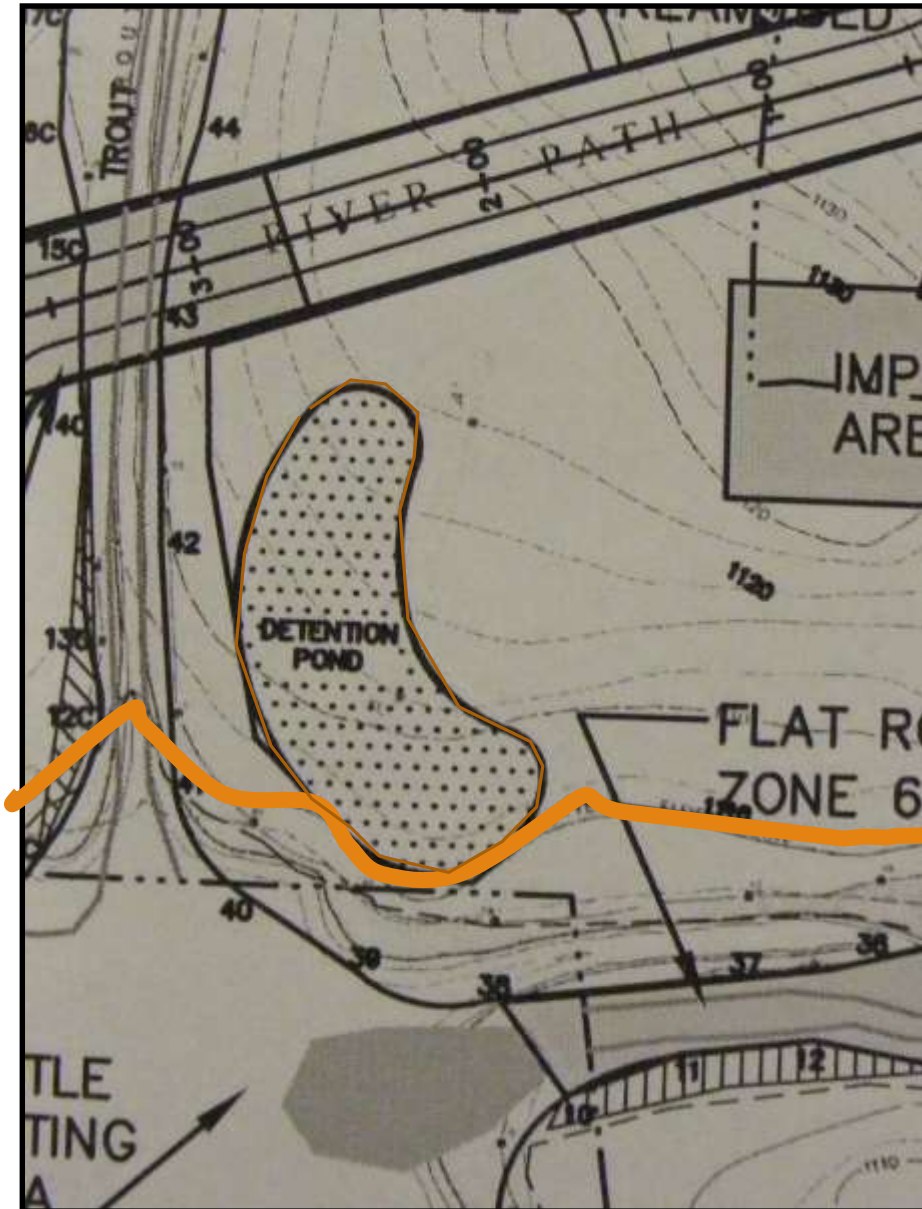
Replication Conditions

- Sediment controls
- Design and installation details
- Confirmation of elevations
- Placement of hydric soils
- Placement of plants and inorganic features
- During and post-replication monitoring
- Reporting requirements
- Invasive species control



Storm Water Management

- Jurisdiction -310 CMR 10.02(2)(C)
- Defined – 310 CMR 10.04
- Standards – 310 CMR 10.05(6)(b) & (k)-(q)
- HB Stormwater Special Topic 3 & HB 22.3.2
- OOC GC#18
- Engineer evaluation
- Operation and Maintenance short & long term



Storm Water Management

- Sediment controls
- Construction timing within overall construction sequence
- Stabilization
- When permitted to direct storm water
- Maintenance before town accepts the road
- Ongoing maintenance requirements



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Prior to Construction Conditions

During Construction

Case-specific Conditions

After Construction/Perpetual Conditions



After Construction Conditions Example

Upon completion of all proposed and approved work the owner/applicant shall complete the following:

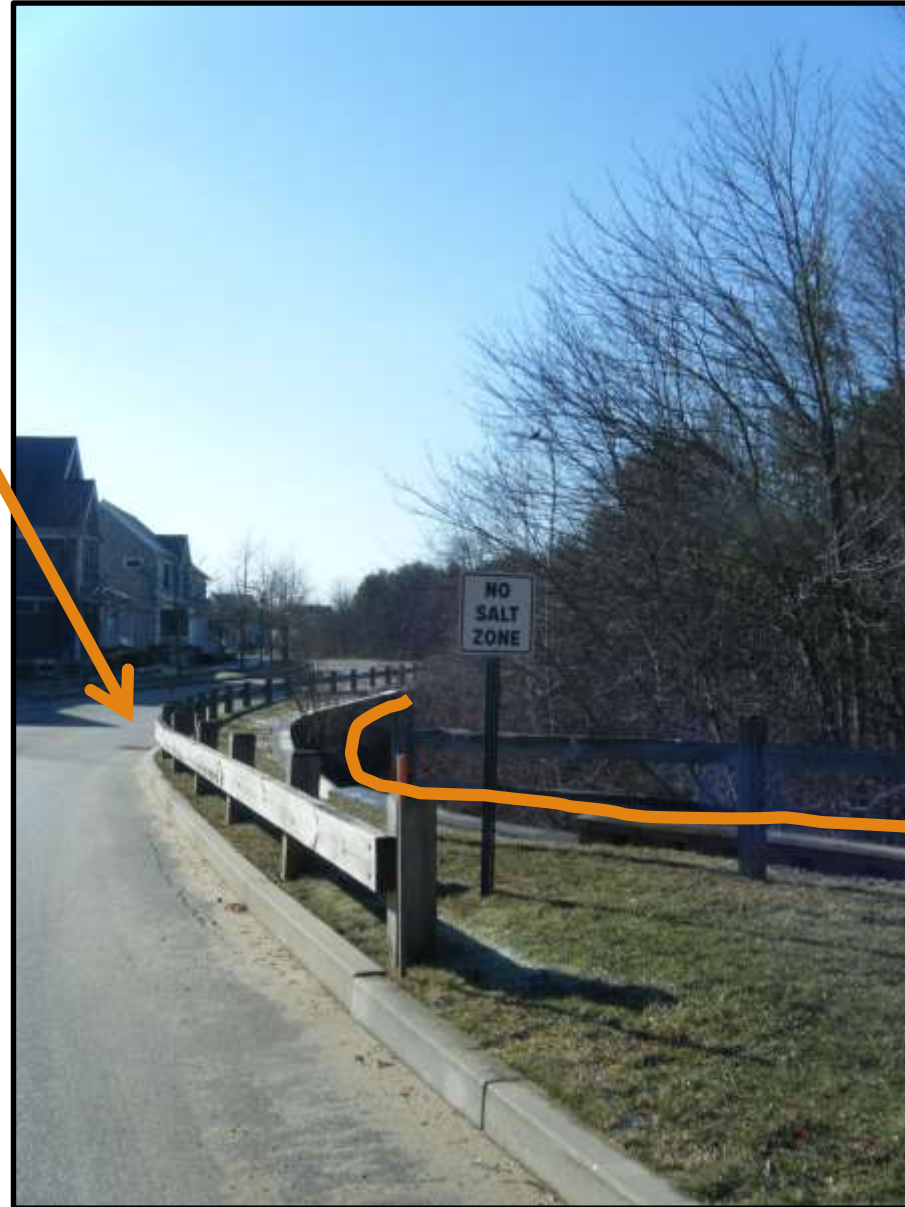
- Final stabilization & removal of erosion control barriers;
- Install all permanent visual barriers;
- Wetland replication reports (if applicable);
- Request for a Certificate of Compliance - submit As-Built Plans (be specific what you want on this) and Engineer's Compliance statement.
- Procedures for Partial COCs or temporary occupancy



Ongoing (Perpetual) Conditions

- Remain in perpetuity
- Must be identified as perpetual
- Conditions for the homeowner or business owner

Catch
basin



Wetland

Perpetual Conditions Example

- No Sodium Chloride
- No pesticides/fertilizers
- Responsibility to maintain stormwater management features
- No future work in the following areas (list them)
- No Discharge of pool water directly into a wetland



Tips for Writing OOC

- Must be based upon WPA Regulations, defensible & enforceable
- Comprehensive
- Straight-forward and clearly written
- Site specific and work specific
- Reasonable
- If including timeframes, be specific and reasonable
- The more detailed the plans, plan notes, sequence, etc., the fewer conditions may be needed



Example Conditions:

- **Good:** The applicant shall submit reports of the wetland restoration area annually.
- **Better:** A qualified wetland professional shall monitor the wetland restoration area and prepare written reports. The Applicant shall submit these reports to the Conservation Office 60 days after initial planting is completed and by October 1 for each of the following two years.



Break



Findings:

- ## Special Conditions:

- Limit of work
- Pre-construction site visit
- BOH approval

Ongoing condition:

- Visual barrier at limit of work in Riverfront Area
- Limitation on Riverfront Alteration in perpetuity

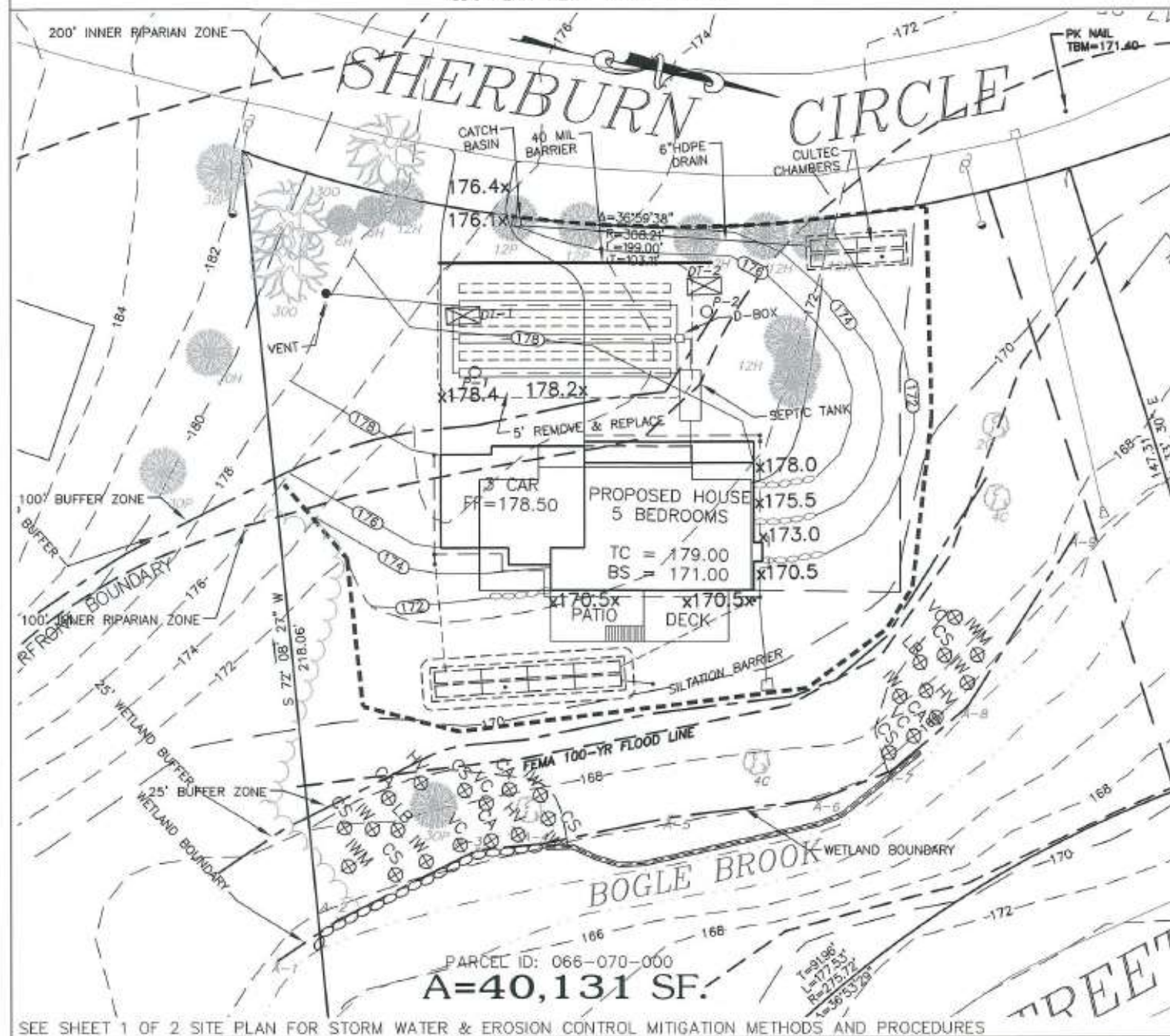




Perennial Stream – Lawn right to edge



Existing Cement Blocks are falling into river





Break-out Session



Group Work (Garage Addition)

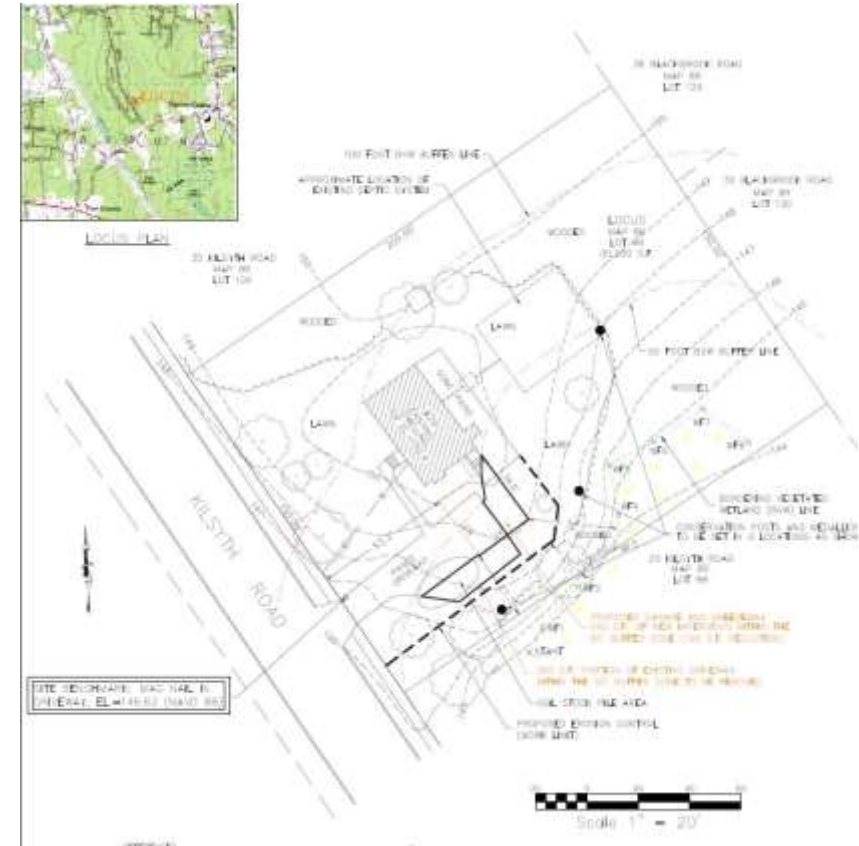
What work is proposed?

Where is the wetland?

What interests need to be protected?

How is wetland protected?

Other conditions needed?



Group Work (Septic System Upgrade in ACEC)

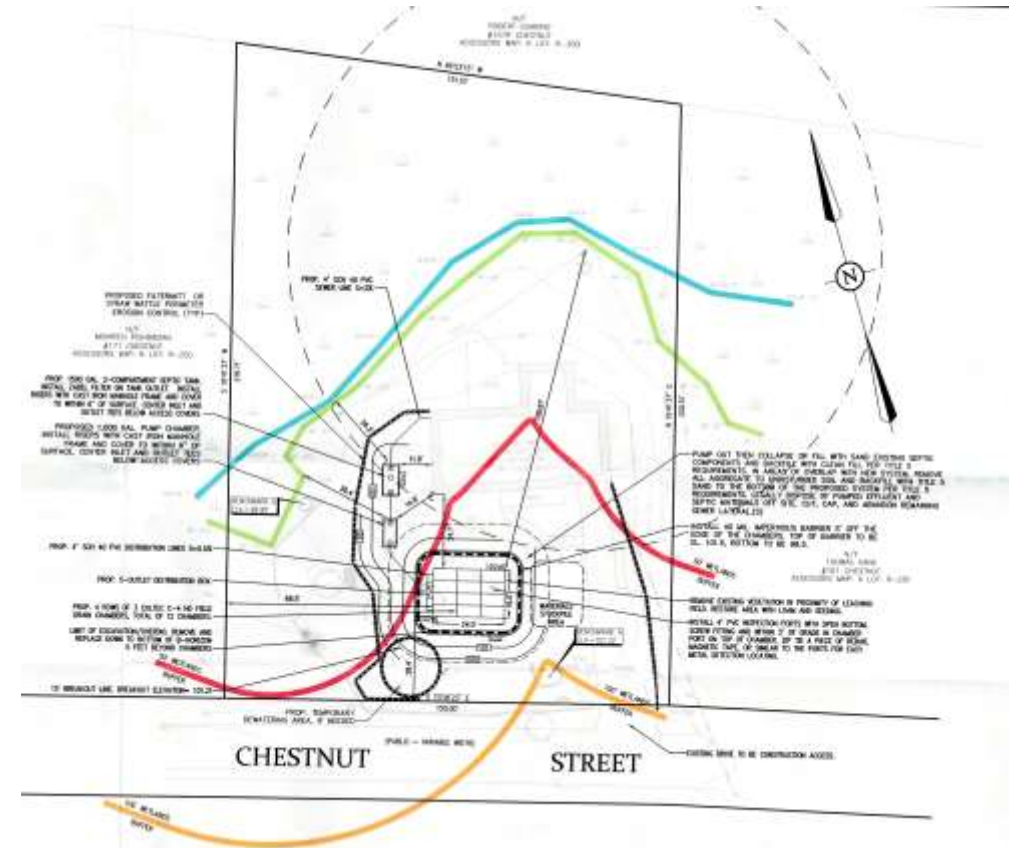
What work is proposed?

Where are the wetlands?

What interests need to be protected?

How is wetland protected?

Identify 2 conditions for OOC



Group Results

Come up with two conditions in each group
to ensure adequate protection of the
vegetated wetland.

Extra protections for an ACEC?



Preparing the Order of Conditions



Parts of an Order of Conditions

DEP Form 5 and General Conditions

Findings

Before Construction Conditions

During Construction Conditions

Case-specific Conditions

After Construction/Ongoing Conditions





Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 - Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

MassDEP File Number: **152-1525**
Easton Number: **1450**
City/Town: EASTON

A. General Information

1. From: **EASTON**
Conservation Commission

2. This issuance is for :

- a. ☒ Order of Conditions
b. ☐ Amended Order of Conditions
c. ☐ Denied Order of Conditions

3. To Applicant:

a. First Name: **First Name** b. Last Name: **Last Name** c. Organization:
d. Street Number: **Mail Address** e. Street Name: **KILSYTH RD**
f. City/Town: **SOUTH EASTON** g. State: **MA** h. Zip Code: **02375**

4. Property Owner (if different from applicant):

a. First Name: **Owner First Name** b. Last Name: **Owner Last Name** c. Organization:
d. Street Number: **Mailing Address** e. Street Name: **KILSYTH ROAD**
f. City/Town: **SOUTH EASTON** g. State: **MA** h. Zip Code: **02375**

5. Project Location:

a. Street Number: **Project Address** b. Street Name: **KILSYTH ROAD** c. City/Town: **EASTON**
d. Assessors Map/Plat Number e. Parcel/Lot Number
Latitude and Longitude, if known: f. Latitude: g. Longitude:

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):

a. County: **Bristol** b. Certificate Number (if registered land)
c. Book: **Deed Book No.** d. Page: **Deed Page No.**

7. Dates:

a. Date Notice of Intent Filed: **10/2/2017** b. Date Public Hearing Closed: **10/02/2017** c. Date of Issuance: **10/04/2017**

8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):

a. Plan Title: **Site Plan**
b. Prepared By: **Engineering Firm** c. Signed and Stamped by: **Name of PE or PLS**
d. Final Revision Date: **Rev Date** e. Scale: **1"=20'**
f. Additional Plan or Document Title
g. Date



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 - Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

MassDEP File Number: **152-1525**
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B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act:

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act. Check all that apply:

- a. ☐ Public Water Supply b. ☐ Land Containing Shellfish c. ☒ Prevention of Pollution
d. ☐ Private Water Supply e. ☐ Fisheries f. ☒ Protection of Wildlife Habitat
g. ☒ Groundwater Supply h. ☒ Storm Damage Prevention i. ☒ Flood Control

2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

- a. ☒ The following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

Denied because:

- b. ☐ The proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect these interests, and a final Order of Conditions is issued. A description of the performance standards which the proposed work cannot meet is attached to this Order.
c. ☐ The information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).

3. ☒ Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a)

a. linear feet **20**

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only) Resource Area Impact

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. <input type="checkbox"/> Bank	a. linear feet:	b. linear feet:	c. linear feet:	d. linear feet:
5. <input type="checkbox"/> Bordering Vegetated Wetland	a. square feet:	b. square feet:	c. square feet:	d. square feet:
6. <input type="checkbox"/> Land Under Waterbodies and Waterways	a. square feet: e. c/y dredged:	b. square feet: f. c/y dredged:	c. square feet:	d. square feet:
Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
7. <input type="checkbox"/> Bordering Land Subject to Flooding Cubic Feet Flood Storage	a. square feet: e. cubic feet:	b. square feet: f. cubic feet:	c. square feet: g. cubic feet:	d. square feet: h. cubic feet:





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- | | | | | |
|--|---|---|------------------------------------|------------------------------------|
| 8. <input type="checkbox"/> Isolated Land Subject to Flooding/Cubic Feet Flood Storage | a. square feet:
c. cubic feet: | b. square feet:
d. cubic feet: | e. cubic feet: | f. cubic feet: |
| 9. <input type="checkbox"/> Riverfront Area
Sq ft within 100 ft
Sq ft between 100-200 ft | a. total sq. feet
c. square feet:
g. square feet: | b. total sq. feet
d. square feet:
h. square feet: | e. square feet:
i. square feet: | f. square feet:
j. square feet: |

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

- | | | | | |
|-----|--|---|---|--|
| 10. | Designated Port Areas: Indicate size under Land Under the Ocean, below | | | |
| 11. | Land Under the Ocean | a. square feet:
c. c/y dredged: | b. square feet:
d. c/y dredged: | |
| 12. | Barrier Beaches: Indicate size under Coastal Beaches and/or Coastal Dunes below | | | |
| 13. | Coastal Beaches | a. square feet: | b. square feet: | c. cu yd nourishmt:
d. cu yd nourishmt: |
| 14. | Coastal Dunes | a. square feet: | b. square feet: | c. cu yd nourishmt:
d. cu yd nourishmt: |
| 15. | Coastal Banks | a. linear feet: | b. linear feet: | |
| 16. | Rocky Intertidal Shores | a. square feet: | b. square feet: | |
| 17. | Salt Marshes | a. square feet: | b. square feet: | c. square feet:
d. square feet: |
| 18. | Land Under Salt Ponds | a. square feet:
c. c/y dredged: | b. square feet:
d. c/y dredged: | |
| 19. | Land Containing Shellfish | a. square feet: | b. square feet: | c. square feet:
d. square feet: |
| 20. | Fish Runs | Indicate size under Coastal Banks, inland Bank, Land Under the Ocean, and/or Inland Land Under Waterbodies and Waterways, above | | |
| 21. | Land Subject to Coastal Storm Flowage | a. square feet: | b. square feet: | |
| 22. | Riverfront Area
Sq ft within 100 ft
Sq ft between 100-200 ft | a. total sq. foot
c. square feet:
g. square feet: | b. total sq. foot
d. square feet:
h. square feet: | e. square feet:
i. square feet:
f. square feet:
j. square feet: |
| 23. | Restoration/ Enhancement | a. square feet of BVW: | b. square feet of salt marsh | |

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
 - a. The work is a maintenance dredging project as provided for in the Act; or
 - b. The time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.



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City/Town: EASTON

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5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order. An Order of Conditions for a Test Project may be extended for one additional year only upon written application by the applicant, subject to the provisions of 310 CMR 10.05(11)(f).

6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Fian! Order of Conditions and the Order will expire on _____ unless extended in writing by the Department.

7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.
9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.

10. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words, "Massachusetts Department of Environmental Protection" [or, "MassDEP"] "File Number: **152-1525**"
11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.
12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
13. The work shall conform to the plans and special conditions referenced in this order.

14. Any change to the plans identified in Condition #12 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.
15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.
16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.
17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.





18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

NOTICE OF STORMWATER CONTROL AND MAINTENANCE REQUIREMENTS

19. The work associated with this Order (the "Project")

- (1) ☒ is not subject to the Massachusetts Stormwater Standards
(2) ☐ is subject to the Massachusetts Stormwater Standards.

If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:

- a. All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.
- b. No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
- I. all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
 - II. as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized.
 - III. any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10.
 - IV. all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition.
 - V. any vegetation associated with post-construction BMPs is suitably established to withstand erosion.
- c. The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement") for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMPs Operation and Maintenance Plan ("O&M Plan") and certifying the following:
- I. the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and
 - II. the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.



- d. Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.
- e. Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, and acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.
- f. The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.
- g. The responsible party shall:
- 1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location).
 - 2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request, and
 - 3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.
- h. All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
- i. Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
- j. The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
- k. Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.
- l. Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, attach a text document):

SEE ATTACHED

20. For Test Projects subject to 310 CMR 10.05(11), the applicant shall also implement the monitoring plan and the restoration plan submitted with the Notice of Intent. If the conservation commission or Department determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent or modify the project as directed by the conservation commission or the Department.





D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable? ☒ Yes ☐ No

2. The **Easton** Conservation Commission hereby finds (check one that applies):

a. ☐ that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw specifically:

1. Municipal Ordinance or Bylaw 2. Citation

Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

b. ☒ that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

EASTON Code of Bylaws Ch. 227

1. Municipal Ordinance or Bylaw 2. Citation

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.

The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):

SEE ATTACHED



E. Signatures

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

Please indicate the number of members who will sign this form.

This Order must be signed by a majority of the Conservation Commission.

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A

copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

1. Date of Issuance **Issue Date**

2. Number of Signers **No. Signers**

Signatures:

☐ By hand delivery on

☒ By certified mail, return receipt requested on **10-4-17**

F. Appeals

Article number 7011 0470 0003 786A 7062

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request of Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding





Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 - Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

MassDEP File Number: **152-1525**
Easton Number: **1450**
City/Town: EASTON

Page 9

means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.

G. Recording Information

Prior to commencement of work, this Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in

which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

EASTON

Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

EASTON

Conservation Commission

Please be advised that the Order of Conditions for the Project at:

Project Location **## KILSYTH ROAD** MassDEP File Number **152-1525**

Has been recorded at the Registry of Deeds of:

County Bristol Book Page

for:

Property Owner

and has been noted in the chain of title of the affected property in:

Book Page



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 - Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

MassDEP File Number: **152-1525**
Easton Number: **1450**
City/Town: EASTON

Page 10

In accordance with the Order of Conditions issued on:
Date

If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant: ☐ I do hereby certify under the pains & penalties of perjury that the information provided above is true and correct. Date: **10/2/2017**



Issuance of the OOC: Common Mistakes

Issued to applicant, with copy to DEP Regional Office, owner (if different) and representative (if applicable), within 21 days of closing the public hearing

FEBRUARY						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6	7
8	9 CLOSING HEARING	10 1	11 2	12 3	13 4	14 5
15 6	16 7	17 8	18 9	19 10	20 11	21 12
22 13	23 14	24 15	25 16	26 17	27 18	28 19
MARCH						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 20	2 21	3	4	5	6	7
8	9	10	11	12	13	14



Issuance of the OOC: Common Mistakes

Send copy to NHESP (under 310 CMR 10.59 if in Estimated Habitat), particularly if they commented with conditions



Denials

NOT MEETING PERFORMANCE STANDARDS

- List all reasons for denial
- Cite appropriate performance standards, sections of the Regs and consultant or engineering correspondence supporting denial.

LACK OF INFORMATION

- Findings: list number of public hearings, # of plan revisions, # requests for information and any other attempts to permit the project with conditions. [See DEP Policy 08-1](#)
- Add a Special Condition that itemizes all missing information to be submitted
- Add one that says no work is approved with this Denial OOC.



WPA and/or Bylaw

- Depends on municipality
- For both WPA & bylaw, emphasize “building the record” during the hearing, list in findings
- Conditions for bylaw should be separate from conditions under the Act. Simplifies issues in an appeal.



Minor changes or clerical errors within the limit of work that does not impact wetlands.



Resources

- MACC eHandbook/online
- DEP policies/guidance docs and Circuit Riders (certain regions)
- eDEP WIRE has drop down menu
- Peers
- Massachusetts Society of Municipal Conservation Professionals (MSMCP)
- Journal articles and newsletters or other guidance documents



Thank you!

MassDEP's Clearwater Estates materials, provided to MACC, were developed under U.S. EPA's Wetlands Program Development Grant, Section 104(b)(3) of the Federal Clean Water Act.

BSC Group, as contractor to MassDEP, updated the current version from 1987 and 1993 editions.

Special thanks to Jennifer Carlino, Michele Grzenda, and Andrea Langhauser for the creation of this presentation

Alanghauser@easton.ma.us

508-230-0643



Photo Credits: Jennifer Carlino & Michele Grzenda



WETLANDS PROTECTION: WRITING EFFECTIVE ORDERS OF CONDITIONS & PASSING LOCAL BY-LAWS TO BETTER PROTECT THE BAY

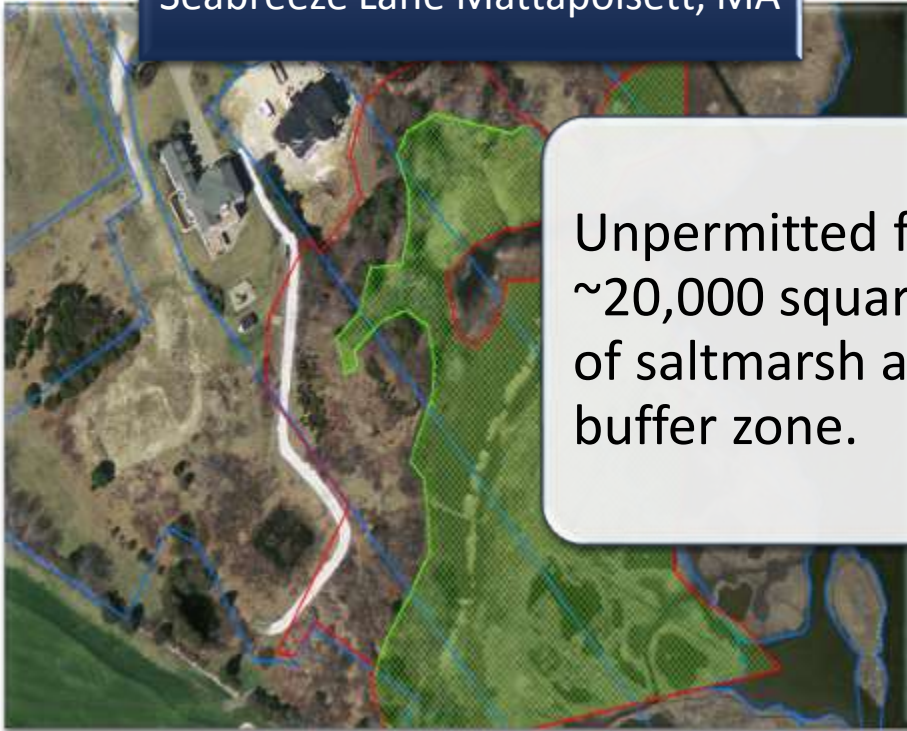
2019 DECISION MAKERS WORKSHOP

MAY 13, 2019



INTRODUCTION TO BUZZARDS BAY CASE STUDIES

Seabreeze Lane Mattapoisett, MA



Unpermitted fill of
~20,000 square feet
of saltmarsh and
buffer zone.

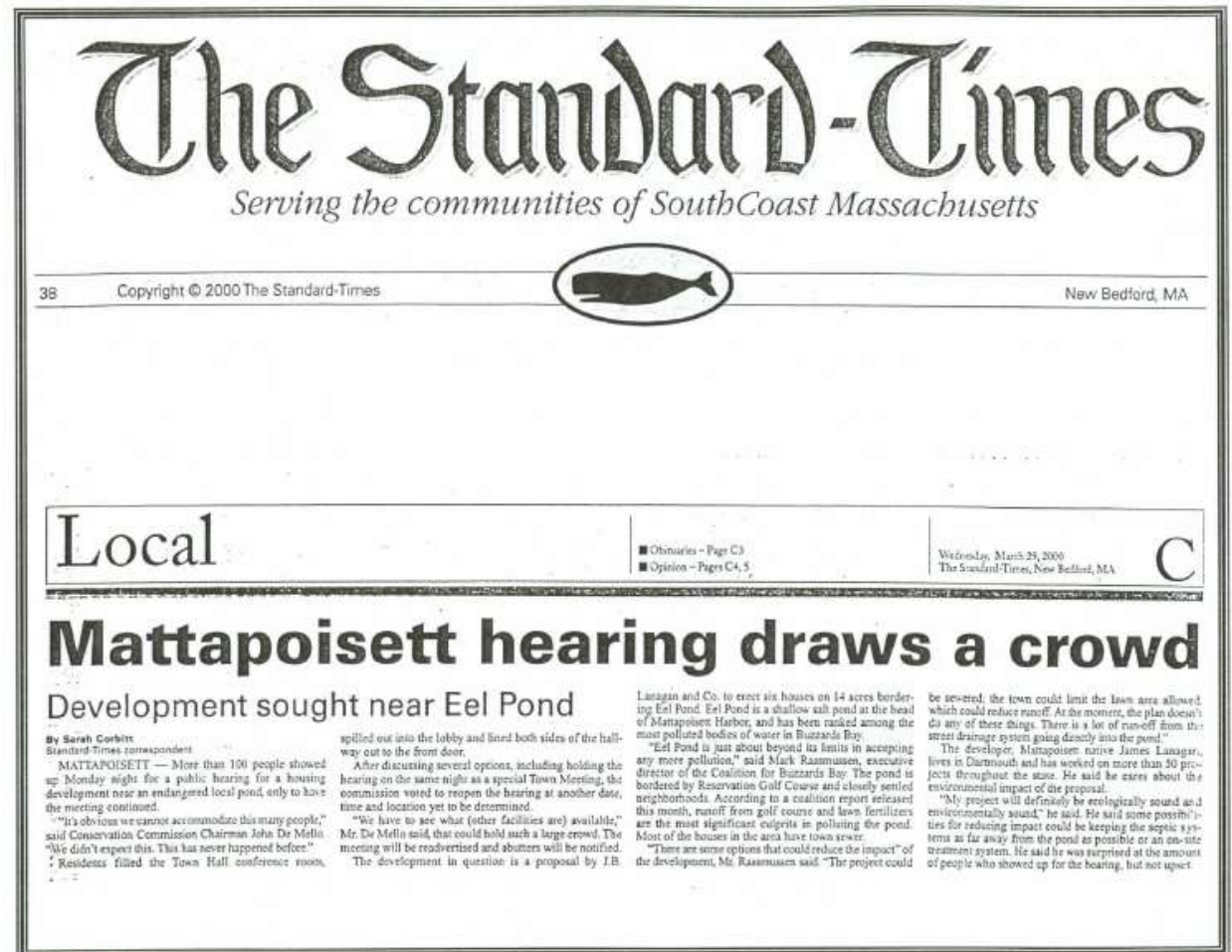
Angeline Brook Westport, MA



Construction &
Operation of public
water supply impact
on cold water fishery
habitat.

SEABREEZE LANE

- Coalition advocacy begins in 2000
- Eelpond is a nutrient impaired waterbody
- Secures Conditions in 2000 OOC:
 - Nitrogen Removing Septic
 - Limit Lawn Size to 10,000 square feet
 - 75 foot no touch



14 YEAR LOOK BACK

Seabreeze Lane 2001



Seabreeze Lane 2009



Seabreeze Lane 2014



ANGELINE BROOK

- Coalition Permanently Protected 100+ Acres Around Angeline Brook
- High Natural Resource Value
 - Rare and sensitive native brook trout habitat
- Protect Angeline Brook Baseflow

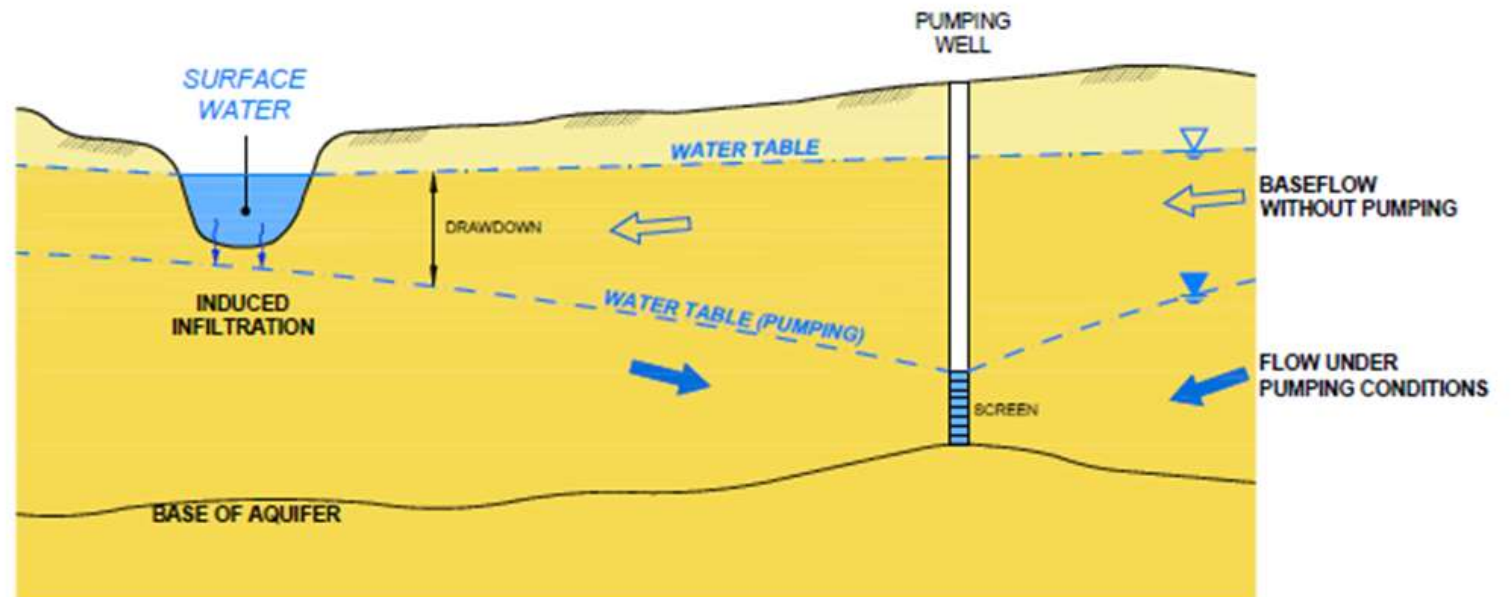


PROTECTING BASEFLOW

- Baseflow



- Temperature



ANGELINE BROOK



Mattapoissett Case Study

Gregory A. Bibler





Holmes's "Bad Man" Theory of The Law

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."

Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897)

Wetlands Chronology

Certificates of Compliance

- Construction "satisfactorily completed"
- No "continuing conditions"

2000
and
2004

"Perpetual" Orders of Condition

- 75-ft "no touch" zone
- Maximum 10,000 sq ft of lawn

2006

Flagrant Violations

- Massive clearing and filling in wetlands/buffer
- 24,000 sq ft new lawn

2012

Request for Determination

- Pool and deck outside 100 ft buffer
- Nothing within 75 ft zone

2012

Violations Detected

- Craigs admit violations
- Acknowledge "no touch zone" still in effect

2015

20 May 2010



15 June 2014



Procedural Shenanigans

Enforcement Order

- Restore to original condition
- No mention of "perpetual conditions"

May
2015

Proposed Notice of Intent

- "Readjust" 75-ft zone
- Keep 8,500 sq ft new lawn
- **NOI WITHDRAWN**

Sept
2015

2015 -
2018

Judicial Appeals

Mr. Craig loses appeals to Superior Court, Appeals Court, and SJC

Administrative Appeals

- Craigs' new NOI rejected
- DEP issues SOC, then stays adjudicatory appeal

2016 -
2017

More Appeals

- DEP lifts stay, then declares SOC moot
- More appeals?

2018 -
2019



Judicial Holdings

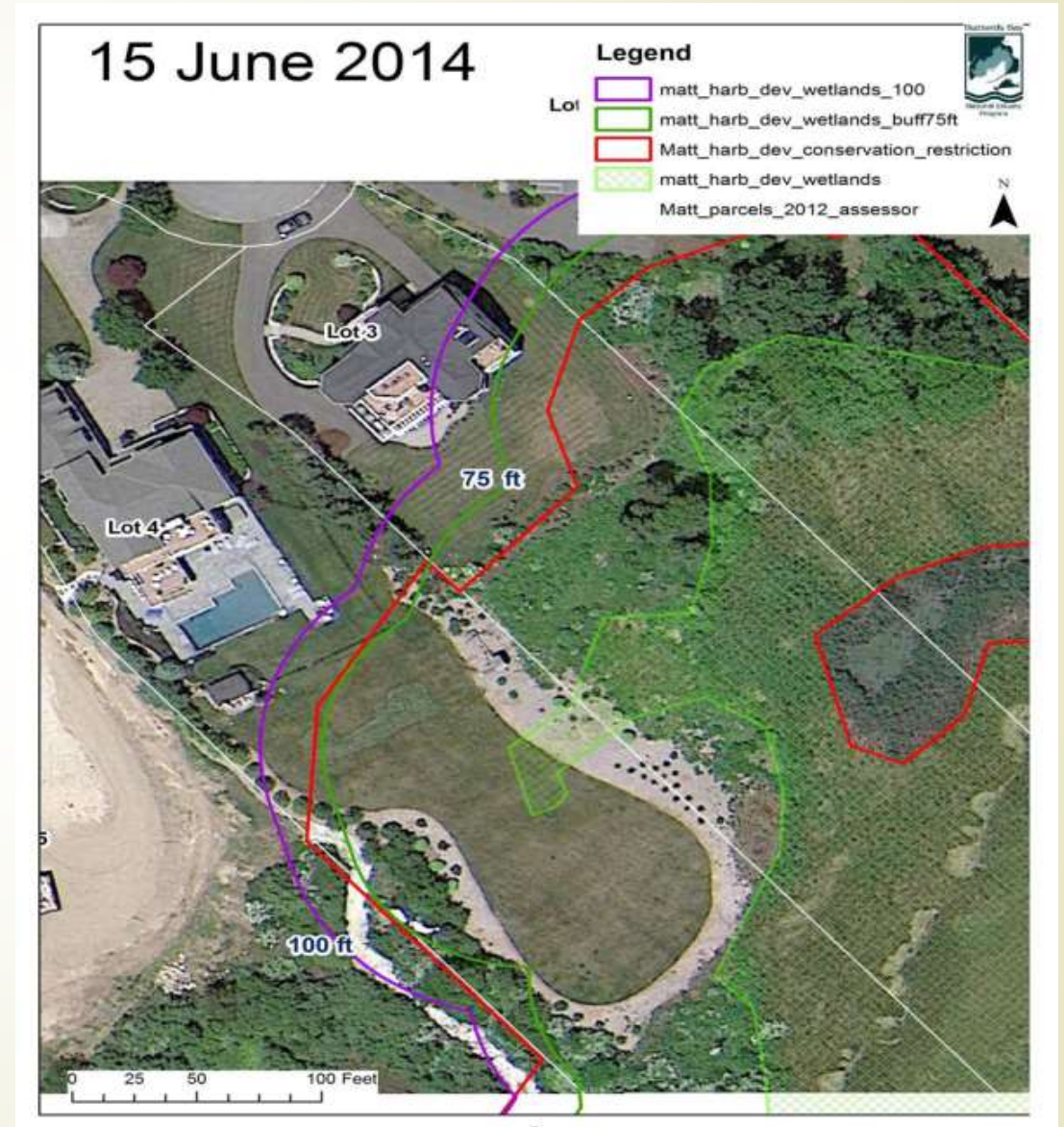
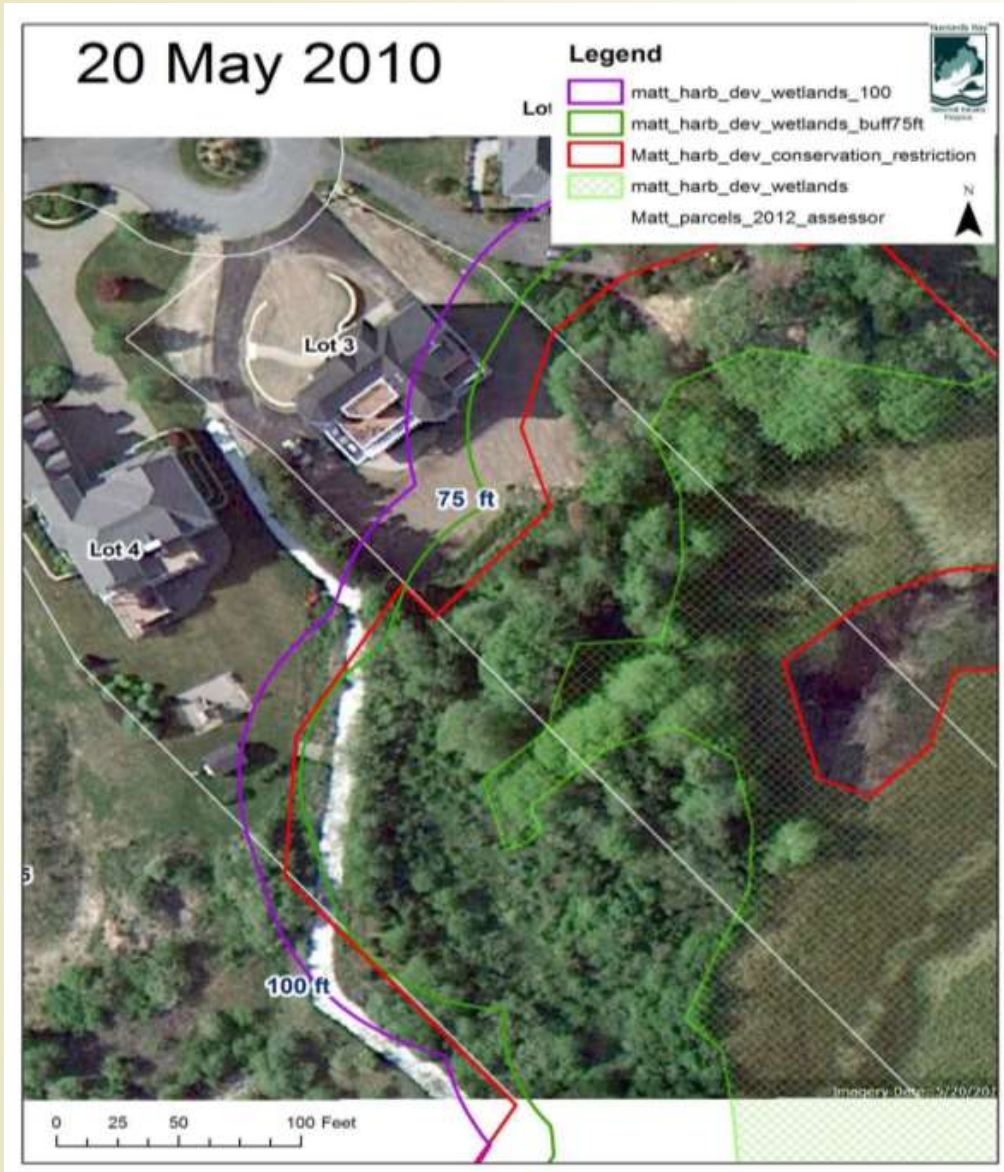
- ▶ Act expressly authorizes Commission to issue orders “to restore property to its original condition.” G.L. c. 131, § 40
- ▶ Commission issued its order pursuant to the Act, not based on “perpetual” conditions in the 2000 and 2004 orders
- ▶ Appeals Court acknowledged prohibitive “no touch” and lawn restrictions differ from affirmative “maintenance and monitoring” requirements, and therefore may not need to be referenced in certificates of compliance as continuing conditions. 310 CMR 10.05(9)(e)
- ▶ Commission should rule first on that issue before the Court will rule on it



Administrative Holdings

- DEP initially issued SOC, despite being put on notice of conflicting enforcement order and Superior Court decision upholding the order
- On appeal, Presiding Officer and Commissioner held:
 - “Department’s SOC can neither supplant a validly issued enforcement order nor usurp the power of the court which has upheld the order.”
 - The restoration proposed in the NOI and the SOC may meet wetlands **permitting** performance standards, but it would be insufficient to comply with the order
 - The SOC is now moot because the more comprehensive restoration that **must** be completed under the order necessarily includes any smaller scale restoration **permitted** by the SOC

Lessons Learned in Mattapoisett





Lessons Learned in Mattapoisett

➤ **Issue and Enforce the Order**

- DEP has no jurisdiction to review enforcement orders
- Court must uphold order unless it is “arbitrary and capricious”
- Court can issue injunctive relief and hold violator in contempt for failure to comply
- Given chance to submit NOI, violator will craft plan that may meet DEP’s performance standards but does not cure the violations. See *Wetlands Enforcement Manual*, § 8-4
- If violator does submit an NOI, Commission should ask DEP to issue its own enforcement order, not an SOC. See *DiCicco v. Dept. of Env. Protection*, 64 Mass. App. Ct. 423 (2005); *Matter of Jodi Dupras*, Docket No. WET-2012-026, 20 DEPR 84 (July 12, 2013)



Lessons Learned in Mattapoissett

➤ **Adopt and Implement Local By-Laws**

- “When a local conservation commission rests its decision on a wetlands by-law that provides greater protection than the act, its decision cannot be preempted by a DEP superseding order.” *Hobbs Brook Farm Property Co. Ltd. Partnership v. Conservation Commn. of Lincoln*, 65 Mass. App. Ct. 142, 149 (2005)
- In court, a commission’s interpretation of its own by-law is entitled to deference similar to that accorded to DEP’s interpretation of the Act and implementing regulations
- Consider adopting “ticketing” by-law to enable commission to impose fines and spur compliance. See G.L. c. 40, § 21D



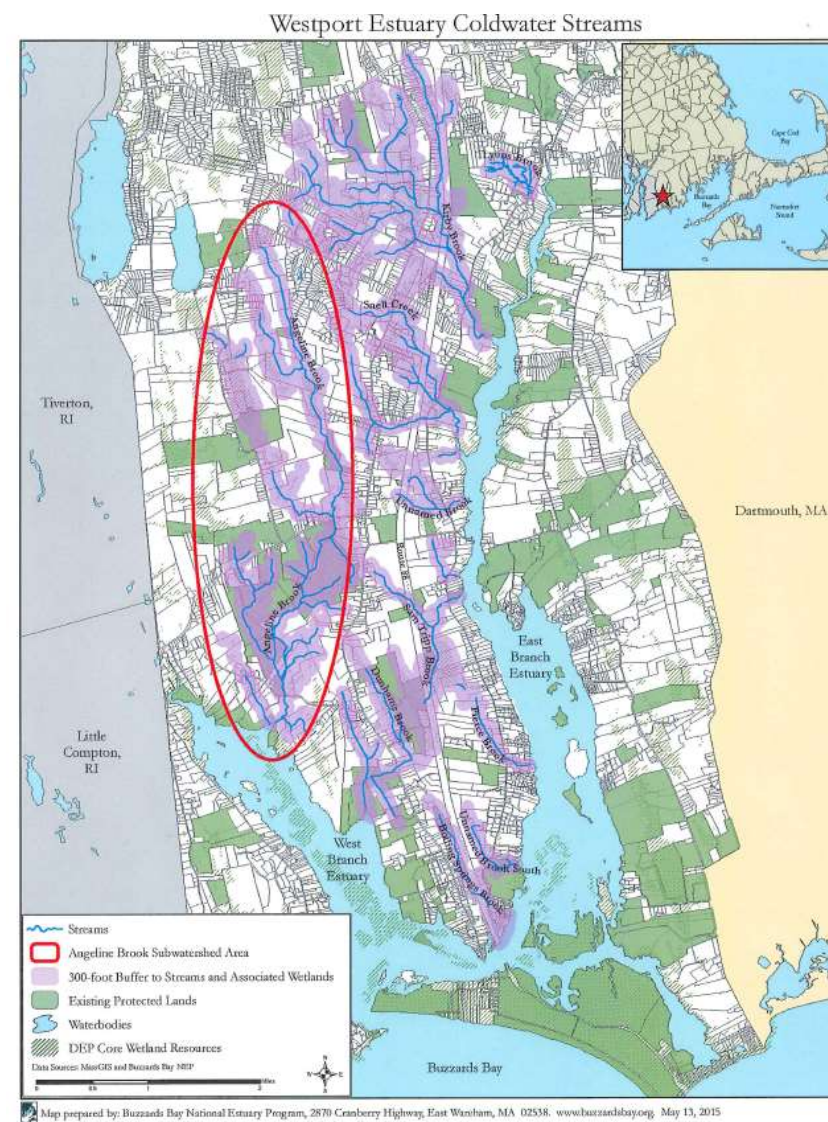
Lessons Learned in Mattapoisett

➤ **Police Perpetual Conditions**

- The Appeals Court strongly implied, but did not decide, that “perpetual” prohibitions do not have to be repeated in each certificate of compliance
- Best practice is to require clerks to reference all continuing conditions in each certificate of compliance – and establish procedures to ensure this practice is followed
- “Perpetual conditions” may be open to review upon submission of subsequent notices of intent
- Best practice is to implement conservation restrictions or other deed covenants, which run with the land and are not reviewable under Wetlands Act provisions

- OADR Docket No. Wet-2016-023, *In the Matter of Brian Corey*
- Facts Related to the Appeal
- Lessons for Conservation Commissions

- **Proceedings before the Conservation Commission**
- The Applicant in December 2015 filed a Notice of Intent with the Westport Conservation Commission for the installation of two wells for a public water supply within a bordering vegetated wetland.
- The Conservation Commission Agent's report recommended that the application not be approved, citing "lacking information for the Con Comm to render a decision," as well as the proximity of the project to "a cold water fishery critical habitat."
- In specific, the Agent noted that the Applicant had not provided basic information as to items such as the development that was proposed and the number of gallons per day of withdrawal.




- **Proceedings before the Conservation Commission**
- At the Conservation Commission hearing, the Commissioners echoed the Agent's concerns and asked the Applicant to provide clarification.
- One Commissioner moved to continue the matter so that the Applicant could provide additional information at a future meeting.
- When the motion was made, the Applicant immediately requested that the application be denied, instead of continuing the matter to a different day.
- The Conservation Commission agreed to the Applicant's request for a denial, and issued a WPA Form 5 – Order of Conditions stating that the application was denied, checking the box for "lack of information." Because the Applicant requested the denial at the hearing, the Conservation Commission did not include a list of missing information.

Approved subject to:

- a. ☐ The following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

Denied because:

- b. ☐ The proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**
- c. ☒ The information submitted by the applicant is not sufficient to describe the site, the work or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).** 


3. ☐ **Buffer Zone Impacts:** Shortest distance between limit of project disturbance and the wetland resource area specified in 310CMR10.02(1)(a).

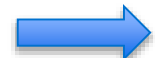

a. linear feet

- **Proceedings before MassDEP**
- The Applicant immediately sought a Superseding Order of Conditions from MassDEP, arguing that “the Commission has failed to enumerate and describe the specific deficiencies in the applicant’s filings,” and that “there are no deficiencies.”
- The Applicant attached to his appeal the Conservation Commission Agent’s report that included the agent’s questions, as well as answers to those questions. The Applicant’s answers were not presented the Conservation Commission at the hearing. (This was obvious, because the answers to the questions in the report referred to events that occurred at the hearing).
- MassDEP granted the request for a Superseding Order of Conditions, and described the project as involving “the construction of an access road and installation of a public water supply well.” The SOC advised the applicant that development of a public water supply well required a separate approval from MassDEP.

Dear Sir or Madam:

U.S.G.
SOLICITOR GENERAL

The project in question was denied by the Westport Conservation Commission after a hearing held on February 16, 2016. The decision of the Commission was issued in full on February 17, 2016, and delivered in hand to the applicant's representative (Engineer). Attached as Exhibit "A" is a copy of the full denial received by the applicant. A review of the denial (page 2, section 2 subsection c) shall disclose that it is insufficient on its face and fails to give adequate notice of deficiencies to the applicant pursuant to the requirements of 310 CMR 10.05 (6) (c), in that the Commission has failed to enumerate and describe the specific deficiencies in the applicant's filings. No reason beyond the checking of box C on page 2 was given. 

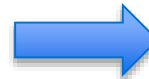
 Briefly, the applicant has filed an Notice of Intent pursuant to all requirements of 310 CMR. Included in their filings were all necessary engineered plans, alternatives analysis and descriptions of work. A site visit was held by the local agent on December 18, 2015, and an agent's report was issued. Subsequent to the issuance of the report, the applicant's engineer submitted revised plans (See Exhibit "B"), and addressed all of the local agent's questions in writing (See Exhibit "C"). No other information was requested prior to the meeting by the agent or commission. 

Conservation agent's report prior to hearing:

- What development is considered?
- Why two wells required for a 3.23 acre site?
- Replication plant species and frequency of plantings needed
- Is other parcels to be allowed to utilize the water supply?
- Public water supply is based on the number of gallons per day for a sewage disposal system that can be designed on lot meeting the regulations under title 5. What is the anticipated gallons per day for ANR Lot 4 (3.23 acres) given setback requirements and zoning bylaws?
- There are seven of the eight interests in the Act for protection for a BVW that need to be specifics on how this project will not adversely effect those interests. Please Specify
- Developable potential of a lot is not Conservation Commission concern under the WPA and should not be a factor

Exhibit C as submitted with request for SOC:

- What development is considered?
The proposed development for this site will be predicated upon (1) the zoning bylaws and site plan review required for any commercial development and (2) the yield of the well. Without a demonstrated sustainable yield value for the proposed well, any development plans are premature. (presented at hearing)
- Why two wells required for a 3.23 acre site?
In the case of a public water supply, there exists a necessity for an alternate water source should one supply source fail. Although two wells are shown, only one shall be in use at any given time (presented at hearing)
- Replication plant species and frequency of plantings needed
Provided as requested on the revised plan
- Is other parcels to be allowed to utilize the water supply?
At this time, no. The use of this well by abutters may or may not be considered, depending upon the yield (I don't recall this being asked or even brought forward for discussion)
- Public water supply is based on the number of gallons per day for a sewage disposal system that can be designed on lot meeting the regulations under title 5. What is the anticipated gallons per day for ANR Lot 4 (3.23 acres) given setback requirements and zoning bylaws?
As stated at the public hearing, less than 10,000 gpd, but as indicated above, the site development will be considered based upon the capabilities of the water source
- There are seven of the eight interests in the Act for protection for a BVW that need to be specifics on how this project will not adversely effect those interests. Please Specify
This proposal was submitted as a limited project. Despite the fact that less than 5,000 SF of BVW will be permanently altered, we do not believe that an alternative site that will provide an adequate wellhead protection zone for this proposed well exists on the 3.23 acre site. It should be duly noted that the applicant has as part of his purchase and sale agreement to



■ **The Appeal**

- The Buzzards Bay Coalition appealed the SOC, alleging that (1) the applicant had not provided sufficient information to evaluate the project's impact on Angeline Brook, and (2) the Applicant had disingenuously sought a denial on purpose, and then presented MassDEP with additional evidence the Applicant had purposely not provided to the Conservation Commission.
- The Buzzards Bay Coalition further argued that any technical violation of the regulations could not have prejudiced the Applicant, as he was clearly informed what information was sought by the Conservation Commission.

Following an in-depth review of the above-referenced file and in accordance with Massachusetts General Laws, Chapter 131, Section 40, the Department of Environmental Protection has issued the enclosed Superseding Order of Conditions ["SOC"]. The Department has reviewed this file in accordance with 310 CMR 10.05(7)(b) and has determined that sufficient information has been submitted with this Notice of Intent Application. This Order approves the proposed project subject to certain conditions. The Department has determined the project site to be significant to the following statutory interests of the Wetland Protection Act: ground water supply, private water supply, flood control, storm damage prevention, prevention of pollution and the protection of wildlife habitat. The enclosed Superseding Order of Conditions sets forth the special conditions deemed necessary by this Office in protecting the above-stated interests of the Act.

The proposed project involves the construction of an access road and installation of a public water supply well. Please be advised that in order to develop a new public water supply well, application for a permit must be made in accordance with BRP WS 13 [Exploratory Phase, Site Examination, Land Use Survey and Approval to Conduct Pumping Test]. Work also involves the construction of 3,234 square feet of a wetland replication area.

In the opinion of the Department, the reasons given here are sufficient to justify this Superseding Order of Conditions. However, the Department reserves the right, should there be further proceedings in this matter, to raise additional issues and present further evidence as may be appropriate.

■ The Appeal

- At the hearing, the Buzzards Bay Coalition presented expert testimony regarding the potential impacts of draw-downs on Angeline Brook from the Applicant's proposal.
- In briefing, the Buzzards Bay Coalition argued that the Applicant had disingenuously requested a denial in such a way that would allow him to seek an SOC by arguing that the Conservation Commission had not specified what information he was lacking.
- In its briefing, MassDEP took the positions that (1) the Conservation Commission had violated the regulations by not specifying what information was lacking, and (2) the SOC only authorized the installation of exploratory wells, not the operation of a public water supply.
- For this reason, the Buzzards Bay Coalition sought, in the alternative, for OADR to clarify what the SOC meant.

- **The Decision**
- The Office of Appeals and Dispute Resolution took over a year to issue a decision.
- The decision held that (1) the Conservation Commission erred in not attaching to the denial a description of the information that the Applicant failed to provide; (2) the SOC only authorized installation of exploratory wells; and (3) the Applicant would need to file a new Notice of Intent with the Conservation Commission for operation of a public water supply well.

- **MassDEP requires conservation commissions to follow its regulations to the letter, regardless of context.**
 - The upholding of the SOC turned on the fact that the Conservation Commission had not included a list of information lacking in the application as required by MassDEP's form and regulations.
 - This was so even though: (1) the Conservation Commission had informed the Applicant both verbally *and* in writing of the information lacking prior to the hearing; (2) the Applicant plainly knew exactly what information was lacking; and (3) the Applicant purposely requested a denial of the application to avoid dealing with the Conservation Commission.
 - By contrast, the ultimate ruling did not penalize the Applicant for various attempts to sidestep the regulations and other procedural irregularities.

- **It is important for conservation commissions to be vigilant regarding impacts to sensitive water bodies such as Angeline Brook.**
 - Evaluation of projects that propose to install, maintain, or operate public water supply wells requires attention to potential “hydrological changes to resource areas.” 310 CMR 10.53(3)(o), even areas that may not be adjacent.
 - These impacts may not be immediate or obvious, but are still an important part of a Conservation Commission’s review.
 - In the absence of Conservation Commission oversight, MassDEP may issue orders which are ambiguous or confusing, and that fail to protect nearby resource areas.

Passing Local Wetland Bylaws to Better Protect Buzzards Bay



BBC Decision Maker Workshops & MACC Fundamentals Certificate Training Program



www.savebuzzardsbay.org

Massachusetts Maritime Academy
Bay State Conference Center

May 13, 2019



www.maccweb.org

Why Pass a Local Wetland Protection Bylaw/Ordinance?

Opportunities

- Enhance wetland protection beyond the WPA & Regs.
- Protect additional interests & values
- Set local filing & consultant fees
- Clarify procedures & permitting standards
- Provide authority to adopt supporting regulations
- Legal advantages in cases of appeal



Responsibilities

- Drafting & finalizing wetland bylaws/ordinances
- Securing support for passage at Town Meeting/City Council
- Administration & enforcement
 - More administrative work
 - Additional review & consideration
 - Issuance of two separate permits

Types of Wetland Bylaws/Ordinances

Zoning (MGL Ch. 40A) – flood zones, aquifer protection districts

- Varying standards by district
- Administered only by Planning, Zoning, or Selectboard
- Power to adopt regulations not always provided
- 2/3 vote of town meeting/city council
- Subject to exemptions & grandfathering

Types of Wetland Bylaws/Ordinances

Non-Zoning (MGL Ch. 40 Sec. 21) – Home Rule Amendment

- Applies evenly across districts
- Administered by Conservation Commission
- Allows adoption of regulations
- Majority vote of town meeting/city council
- May charge fees
- No grandfathering
- No zoning map

Other Features of Wetland Bylaws/Ordinances

Detailed vs. general

Advantages of Detail	Disadvantages of Detail
Maps out implementation	Less flexible
Unambiguous	Needs more frequent updating
Provides more clout	Provides too much clout

Narrow focus vs. comprehensive

Advantages of Narrow Focus	Disadvantages of Narrow Focus
Easier to get approval	Limited purpose
Easier to implement	Limited impact

Adopting a Non-Zoning Wetlands Bylaw/Ordinance

Phase I

- Define goals & set objectives
- Make a plan with clear strategy, timeline, & team
- Identify all stakeholders
- Review existing models
- Draft bylaw
- Seek legal review & finalize draft
- Solicit public input & support from all stakeholders
- Finalize language for Town Meeting/City Council

Adopting a Non-Zoning Wetlands Bylaw/Ordinance

Phase II

- Continue gaining support
- Present to Town Meeting or City Council for Vote

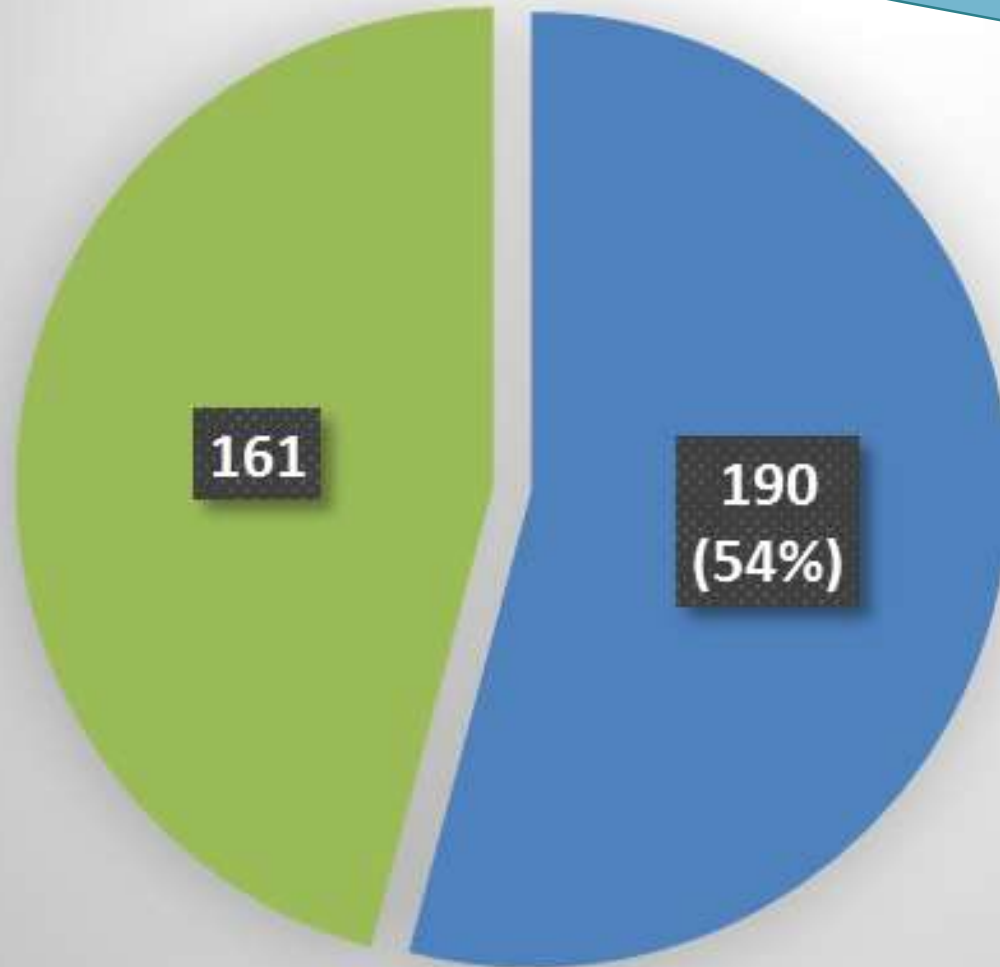
Phase III

- Attorney General 90-day review (non-zoning) or Mayor's signature on ordinance

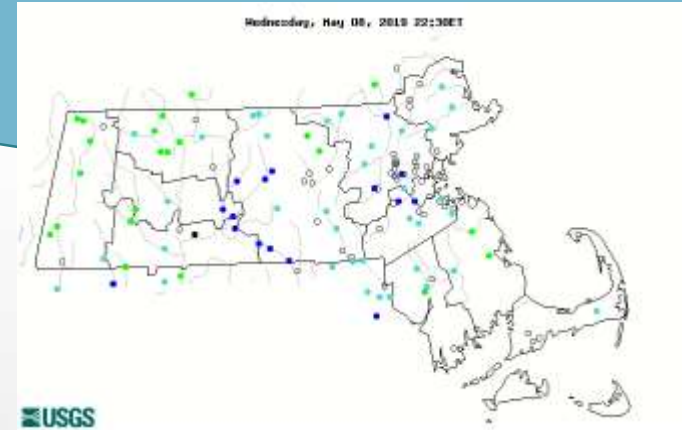
Phase IV

- Thank supporters
- Post-mortem/retrospective
- Implementation

Statewide Stats – Wetland Bylaws

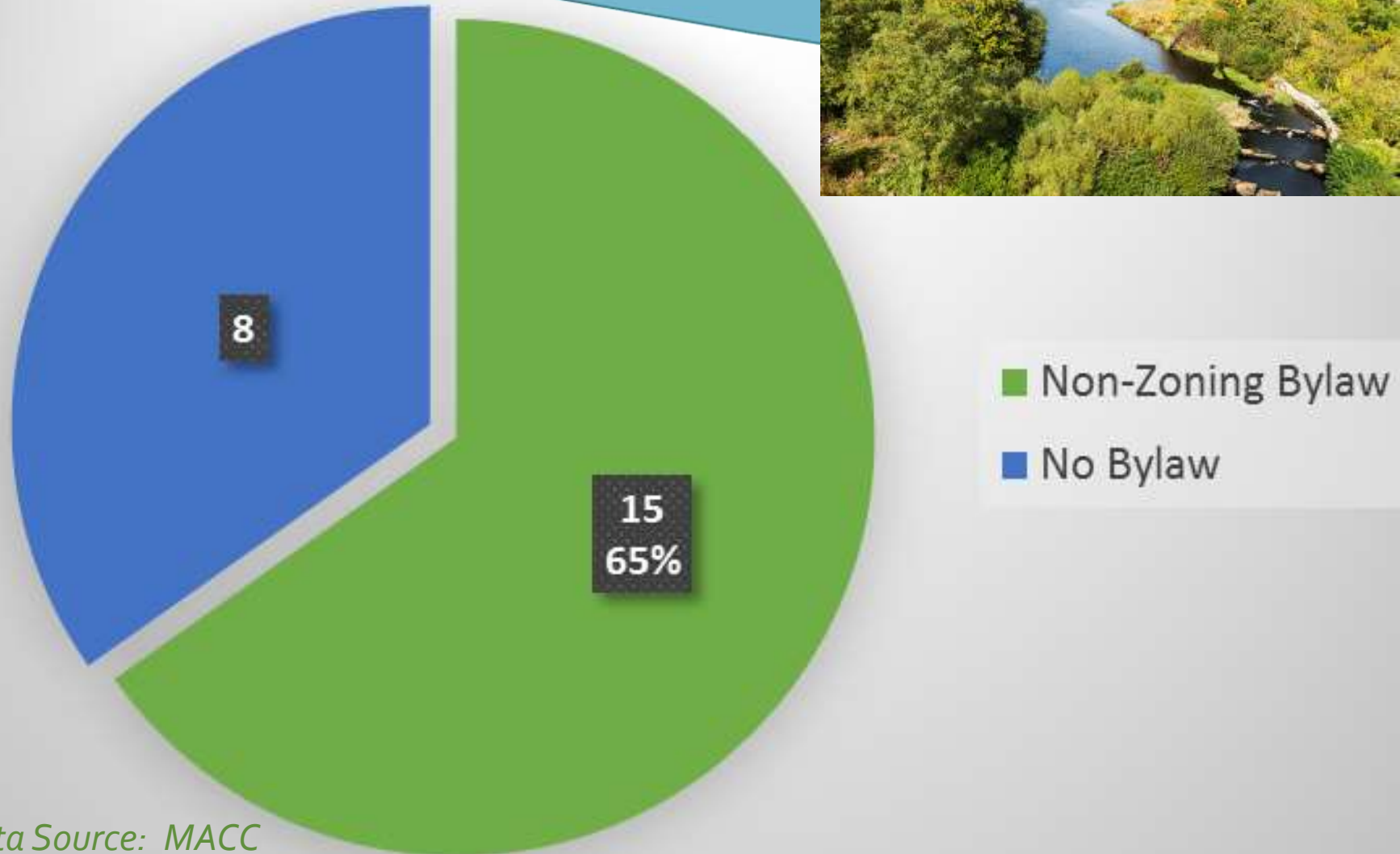


Data Source: MACC



- Towns with Bylaws
- Towns without Bylaws

Buzzards Bay Stats – Wetland Bylaws



Data Source: MACC

Why Pass Supporting Wetland Protection Regulations?



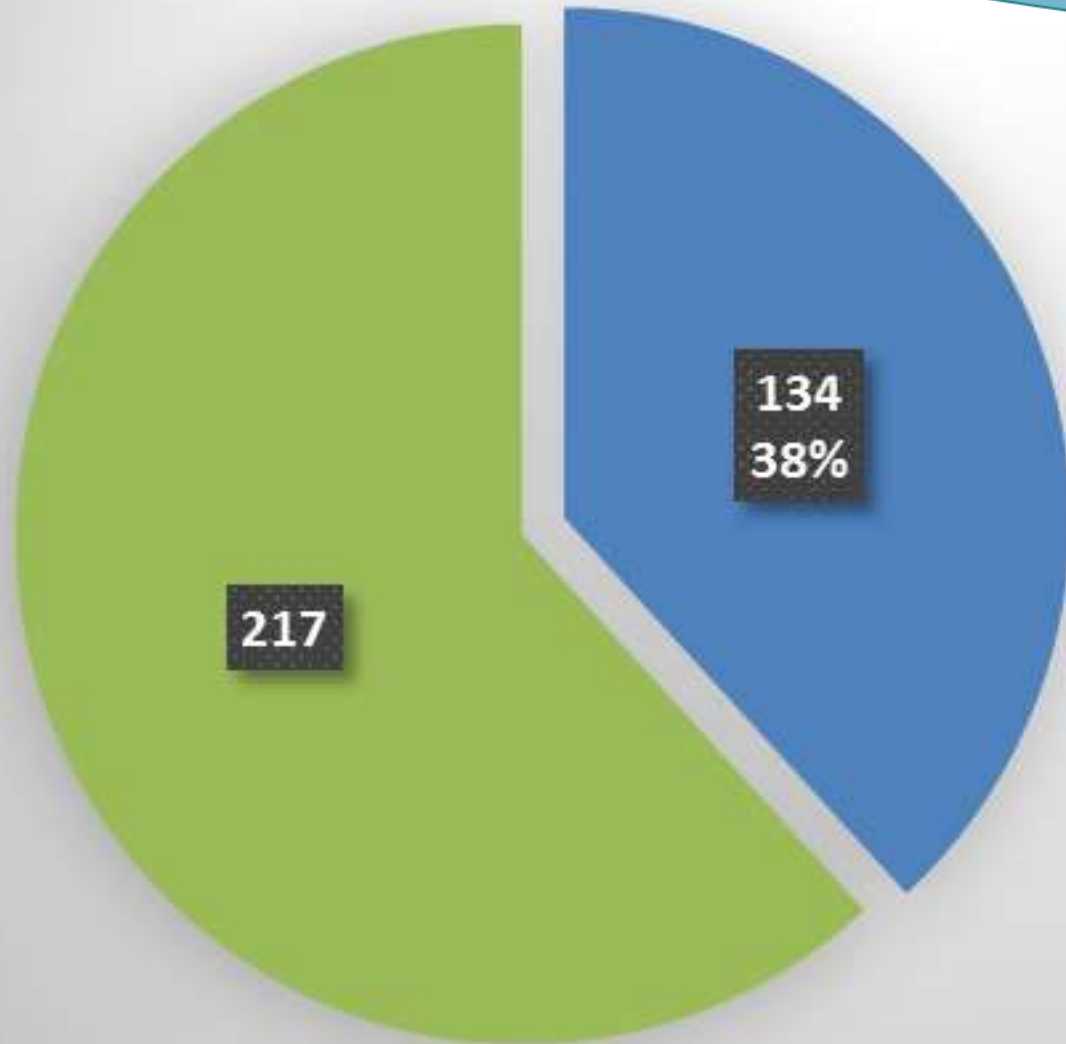
- *Who is responsible for what actions?*
- *What are our interests & values?*
- *Where are our most fragile wetland areas?*
- *When do we need outside consultants?*
- *Why is a resource area presumed significant?*
- *How do we implement the bylaw?*

Promulgating Supporting Regulations



- Must be authorized in bylaw/ordinance
- Commission holds duly advertised public hearing
- Review regulations from other communities
- Draft, legal review, finalize & vote to adopt
- Post on website & provide to key municipal departments, engineers, wetland scientists, etc.

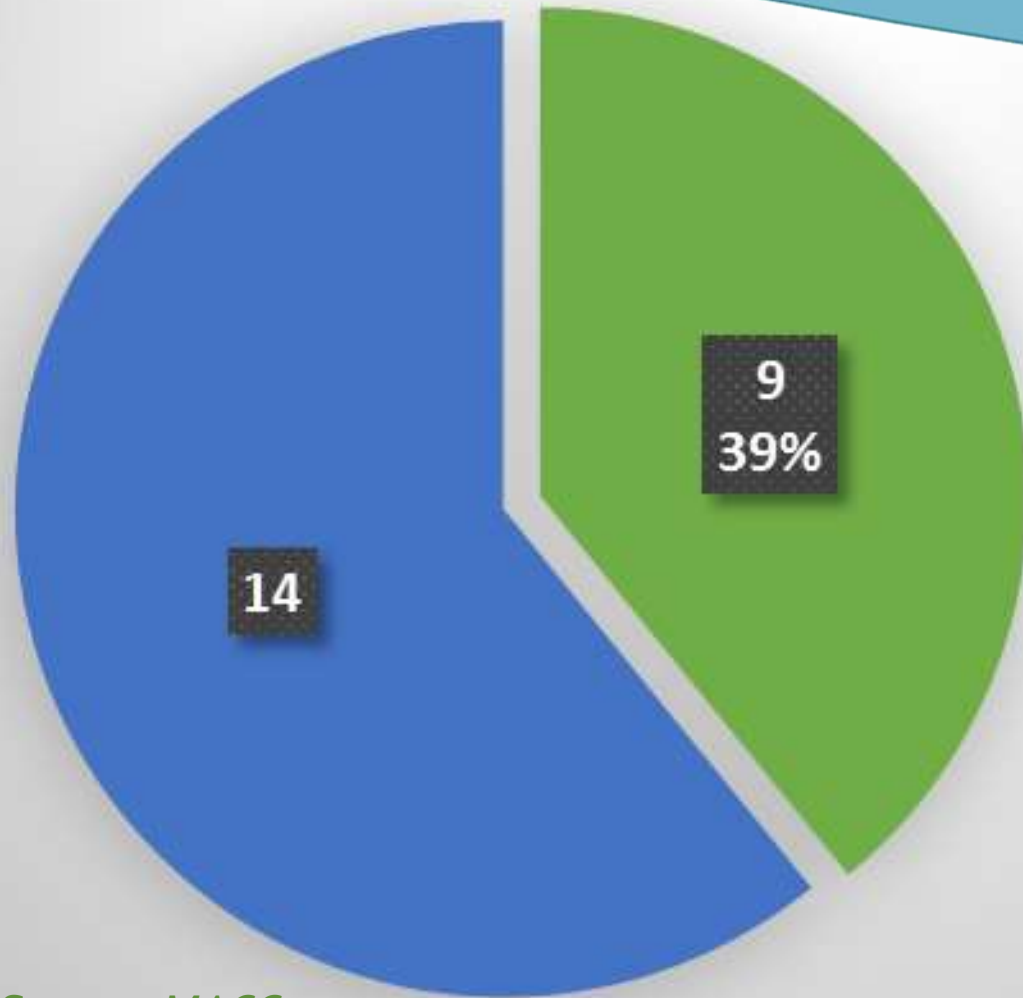
Statewide Stats – Wetland Regs.



- Towns with Regs.
- Towns without Regs.

Data Source: MACC

Buzzards Bay Stats – Wetland Regs.



- Regulations
- No Regulations

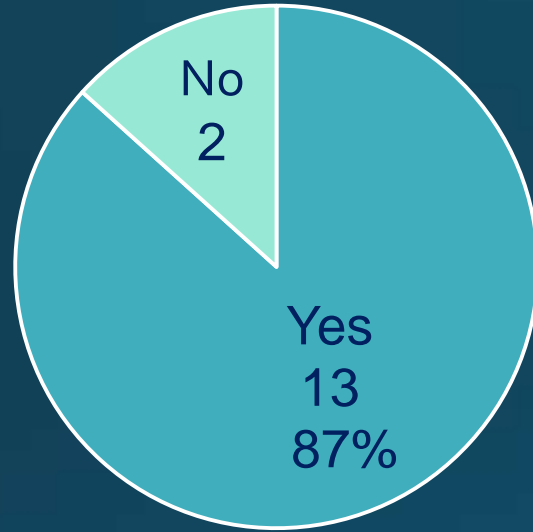
Data Source: MACC

Buzzards Bay Details

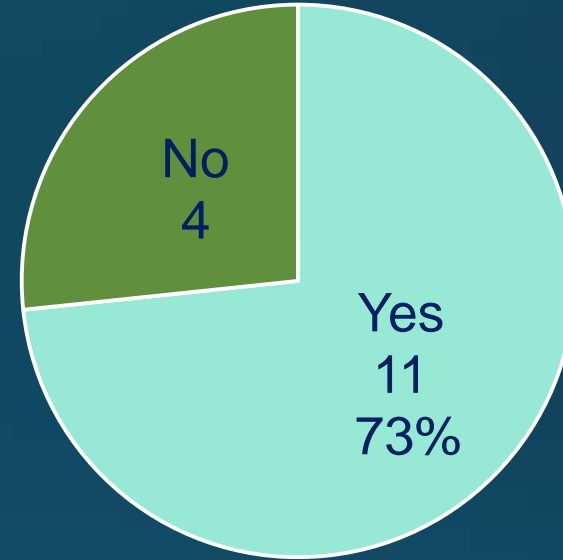
Acushnet	Marion
Aquinnah	Mattapoissett
Bourne	Middleborough
Carver	New Bedford
Chilmark	Oak Bluffs
Dartmouth	Plymouth
Fairhaven	Rochester
Fall River	Tisbury
Falmouth	Wareham
Freetown	West Tisbury
Gosnold	Westport
Lakeville	



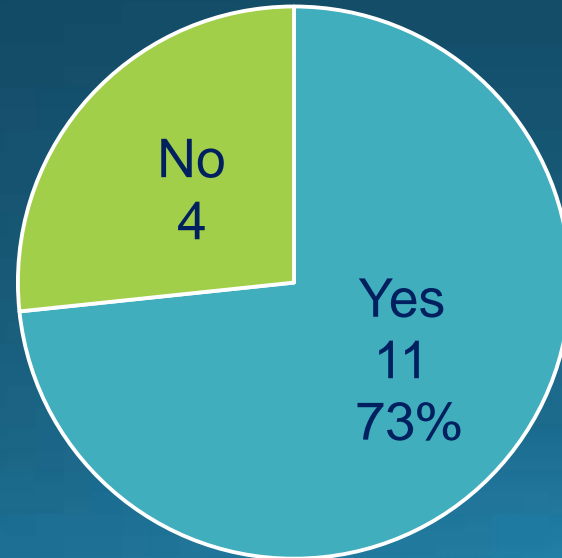
Expanded Buffer Zone



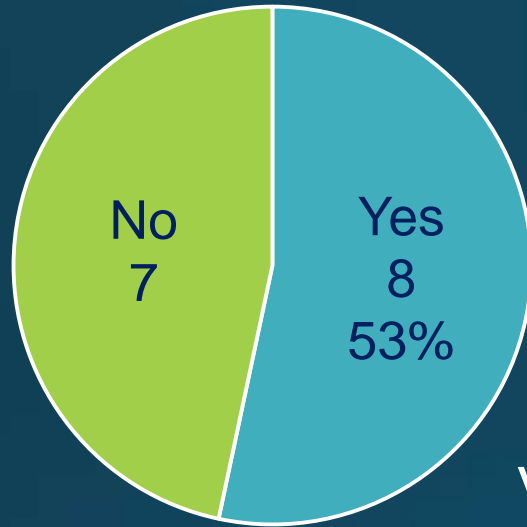
Buffer Zone Restrictions



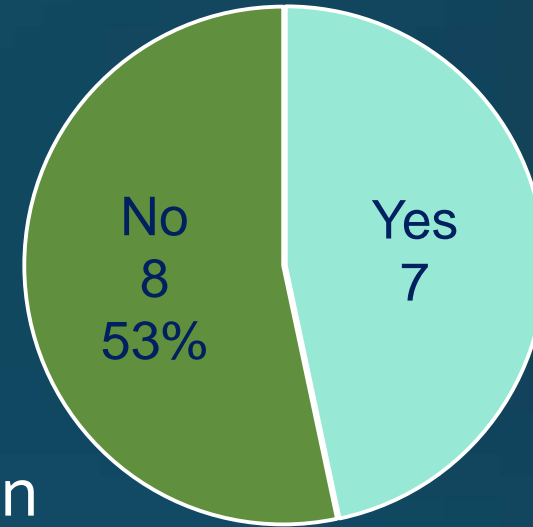
Added Fees



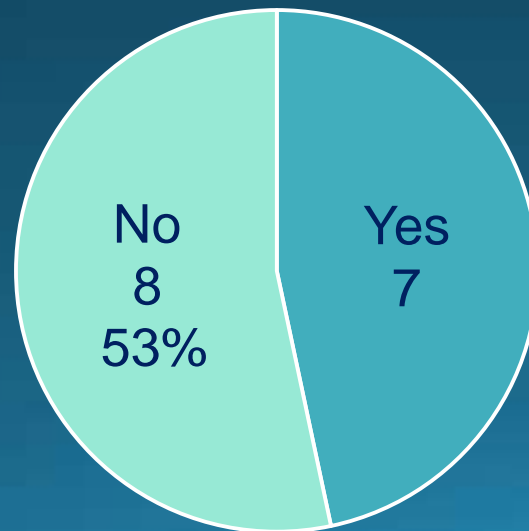
Isolated Wetlands Protected



Added Vernal Pool Protections



Vernal Pool Protection Beyond State WPA



Resources



- MACC's Environmental Handbook, Chapter 14
- MACC Model Bylaw & Others (MACC Electronic Resource Library)
<https://www.maccweb.org/page/ElecResLibrary>
- Regulations from other communities
- Peers
- Massachusetts Society of Municipal Conservation Professionals
- Town Counsel & MACC Attorneys

Questions?

