

310 CMR 10.00: WETLANDS PROTECTION

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10.01: Introduction and Purpose

(1) Introduction. 310 CMR 10.00 is promulgated by the Commissioner of the Massachusetts Department of Environmental Protection pursuant to the authority granted under The Wetlands Protection Act, M.G.L. c. 131, § 40. 310 CMR 10.00 shall complement M.G.L. c. 131, § 40, and shall have the force of law.

310 CMR 10.01 through 10.10 provide definitions and procedures. 310 CMR 10.01 through 10.10 pertains to both inland and coastal areas subject to protection under M.G.L. c. 131, § 40. 310 CMR 10.21 through 10.60 provide standards for work within those areas. 310 CMR 10.21 through 10.37 pertains only to coastal areas and 310 CMR 10.51 through 10.60 pertains only to inland areas. A project may be subject to regulation under 310 CMR 10.00 in which case compliance with all applicable regulations is required.

(2) Purpose. M.G.L. c. 131, § 40 sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection Under M.G.L. c. 131, § 40 are to be regulated in order to contribute to the following interests:

- protection of public and private water supply
- protection of ground water supply
- flood control
- storm damage prevention
- prevention of pollution
- protection of land containing shellfish
- protection of fisheries
- protection of wildlife habitat

The purpose of 310 CMR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c. 131, § 40. Applicants and issuing authorities shall use forms provided by the Department to implement 310 CMR 10.00.

310 CMR 10.00 is intended solely for use in administering M.G.L. c. 131, § 40; nothing contained herein should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by local by-law, ordinance or regulation.

10.02: Statement of Jurisdiction

(1) Areas Subject to Protection Under M.G.L. c. 131, § 40. The following areas are subject to protection under M.G.L. c. 131, § 40:

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

(2) Activities Subject to Regulation Under M.G.L. c. 131, § 40.

(a) Activities Within the Areas Subject to Protection Under M.G.L. c. 131, § 40. Any activity proposed or undertaken within an area specified in 310 CMR 10.02(1), which will remove, fill, dredge or alter that area, is subject to Regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent except:

- 1. minor activities within the riverfront area meeting the requirement of 310 CMR 10.02(2)(b)1. or 2.; and

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2. activities conducted to maintain, repair or replace, but not substantially change or enlarge an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other communication services, provided said work utilizes the best practical measures to avoid or minimize impacts to wetland resource areas outside the footprint of said structure or facility. A project proponent claiming that work to remove, fill, dredge or alter an area specified in 310 CMR 10.02(1) does not require the filing of a Notice of Intent has the burden of establishing that the work is not subject to Regulation under M.G.L. c. 131, § 40.

(b) Activities Within the Buffer Zone. Any activity other than minor activities identified in 310 CMR 10.02(2)(b)1. proposed or undertaken within 100 feet of an area specified in 310 CMR 10.02(1)(a) (hereinafter called the Buffer Zone) which, in the judgement of the issuing authority, will alter an Area Subject to Protection Under M.G.L. c. 131, § 40 is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent. [ See also 310 CMR 10.05(3)(a)2.] The areas subject to jurisdiction identified in 310 CMR 10.02(1)(b) through (f) do not have a buffer zone.

1. Minor activities within the buffer zone and outside any areas specified in 310 CMR 10.02(1)(a) through (e) are not subject to regulation under M.G.L. c. 131, § 40:

- a. Unpaved pedestrian walkways for private use;
- b. Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;
- c. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);
- d. Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;
- e. The conversion of lawn to uses accessory to residential structures such as decks, sheds, patios, and pools, provided the activity is located more than 50 feet from the mean annual high-water line within the riverfront area or from bordering vegetated wetland, whichever is farther, and erosion and sedimentation controls are implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);
- f. The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and
- g. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (*e.g.*, installation of monitoring wells, exploratory borings, sediment sampling and surveying).

2. Activities within the buffer zone of any inland resource area as specified in 310 CMR 10.51 through 10.60 and outside any areas specified in 310 CMR 10.02(1) are not subject to further regulation under M.G.L. c. 131, § 40, provided:

- a. The applicant certifies at the time of filing an Abbreviated Notice of Resource Area Delineation that any work will comply with 310 CMR 10.02(2)(b)2.a. through j. and, if not, the applicant will file a Notice of Intent or Request for Determination of Applicability and receive a negative Determination of Applicability or an Order of Conditions prior to any work;
- b. The boundary of any resource area specified in 310 CMR 10.02(1) adjacent to the project site is confirmed through an Order of Resource Area Delineation. The Order shall also confirm that the requirements of 310 CMR 10.02(2)(b)2.c., d., and e., are met;
- c. The buffer zone does not contain slopes greater than 15% prior to any work;
- d. The buffer zone does not contain estimated wildlife habitat which is identified on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife of the Natural Heritage and Endangered Species Program;
- e. The buffer zone where the work is proposed does not border an Outstanding Resource Water (*i.e.*, certified vernal pools, public water supplies or inland ACECs, as identified in 314 CMR 4.00);

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- f. At a minimum, no work, including any alteration for stormwater management, is proposed in the 50-foot wide area in the buffer zone along any resource area;
- g. The amount of impervious surface shall not exceed 40% of the area of the buffer zone between 50 and 100 feet from any resource area or the amount of existing impervious surface, whichever is greater, no impervious surface or any other alteration is allowed within the 50 foot area of the buffer zone along the resource area;
- h. Erosion and sedimentation controls are installed and maintained at the limit of work or at least 50 feet from the resource area, whichever is farther away, sufficient to prevent sediment from reaching resource areas during construction. The applicant shall provide written notification to the conservation commission one week prior to commencement of work to allow verification that erosion and sediment controls are properly installed.
- i. Stormwater is managed according to the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), and the conservation commission concurs. The Stormwater Management Plans shall also show that the requirements of 310 CMR 10.02(2)(b)2.f., g., and h. have been met and the conservation commission concurs. The applicant shall identify the type of project on the Abbreviated Notice of Resource Area Delineation to allow the conservation commission to verify the applicability of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q). If the conservation commission does not concur, it shall specify which of the Stormwater Management Standards or other requirements are not met, and the applicant shall file a Notice of Intent. Any stormwater management structures shall be operated and maintained as a continuing condition to ensure that the system functions as designed.
- j. No Notice of Intent or Request for Determination of Applicability may be filed for work within the 50-foot wide area in the buffer zone along the resource area during the three-year term of an Order of Resource Area Delineation, or any extended Order, or until the applicant receives a Certificate of Compliance, whichever is later. Subsequent work within the 50-foot wide area shall be subject to the provisions of 310 CMR 10.53(1).

3. Activities within the buffer zone which do not meet the requirements of 310 CMR 10.02(2)(b)1. and 2. are subject to preconstruction review through the filing of a Determination of Applicability to clarify jurisdiction or a Notice of Intent under the provisions of 310 CMR 10.05(4) and 310 CMR 10.53(1).

(c) Notwithstanding the provisions of 310 CMR 10.02(1) and (2)(a) and (b), the construction, operation, and/or maintenance of a stormwater management system designed, constructed, and installed in accordance with the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q) does not by itself create additional Area Subject to Protection Under M.G.L. c. 131, § 40 or additional Buffer Zone provided that:

- 1. the system was designed, constructed, and installed on or after January 2, 2008; and
- 2. if the system was constructed in an Area Subject to Protection Under M.G.L. c. 131, § 40 or Buffer Zone, the system was designed, constructed, and installed in accordance with all applicable provisions in 310 CMR 10.00.

(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 M.G.L. c. 131, § 40 and does not require the filing of a Notice of Intent unless and until that activity actually alters an Area Subject to Protection Under M.G.L. c. 131, § 40.

In the event that the issuing authority determines that such activity has in fact altered an Area Subject to Protection under M.G.L. c. 131, § 40, 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 M.G.L. c. 131, § 40.

(3) Notwithstanding the provisions of 310 CMR 10.02(1) and (2), the maintenance of a stormwater management system constructed from November 18, 1996 through January 1, 2008, in accordance with the Stormwater Management Standards, as provided in the Massachusetts Stormwater Policy, issued by the Department on November 18, 1996 or on or after January 2, 2008, in accordance with the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q) is not subject to Regulation under M.G.L. c. 131, § 40 provided that:

## 10.02: continued

- (a) if the system was constructed in an Area Subject to Protection Under M.G.L. c. 131, § 40 or associated Buffer Zone, the system was constructed in accordance with all applicable provisions of 310 CMR 10.00;
- (b) the work to maintain the stormwater management system is limited to maintenance of a stormwater management system as defined in 310 CMR 10.04; and
- (c) said work utilizes best practical measures to avoid and minimize impacts to wetland resource area outside the footprint of the stormwater management system.

Notwithstanding the provisions of 310 CMR 10.02(1) and (2), any bordering vegetated wetland, bank, land under water, land subject to flooding, or riverfront area created solely for the purpose of stormwater management shall not require the filing of a Notice of Intent to maintain the stormwater management system, provided that:

- 1. the work to maintain the stormwater management system is limited to the maintenance of a stormwater management system as defined in 310 CMR 10.04;
- 2. the stormwater management system was proposed in a Notice of Intent filed before January 2, 2008, and conforms to an Order of Conditions issued after April 1, 1983;
- 3. the area is not altered for other purposes; and
- 4. said work utilizes best practical measures to avoid and minimize impacts to wetland resource areas outside the footprint of the stormwater management system.

(4) Notwithstanding anything to the contrary in 310 CMR 10.00, work other than maintenance that may alter or affect a stormwater management system (including work to repair or replace the stormwater management system, and any change to the site that increases the total or peak volume of stormwater managed by the system, directs additional stormwater to the system, and/or increases the volume of stormwater exposed to land uses with higher potential pollutant loads) that was designed, constructed and installed in an Area Subject to Protection Under M.G.L. c. 131, § 40 or Buffer Zone, as described in 310 CMR 10.02(1) and (2)(a) through (d), after January 1, 2008, solely for the purpose of stormwater management, in accordance with the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), may be permitted through an Order of Conditions, Simplified Review Order of Resource Area Delineation, or Negative Determination of Applicability provided that the work:

- (a) at a minimum provides the same capacity as the original design to attenuate peak discharge rates, recharge the ground water, and remove total suspended solids;
- (b) complies with the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q); and
- (c) meets all the performance standards for any work that takes place in an Area Subject to Protection Under M.G.L. c. 131, § 40 or Buffer Zone as described in 310 CMR 10.02(1) and (2)(a) through (d).

(5) For purposes of 310 CMR 10.02(2)(c) and 10.02(4), the applicant has the burden of proving that the proposed project involves a stormwater management system designed, constructed and installed in accordance with the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q) and that the system was designed, constructed and installed on or after January 2, 2008. The applicant also has the burden of establishing whether said stormwater management system was installed in an Area Subject to Protection Under M.G.L. c. 131, § 40 or associated Buffer Zone, and, if so, the type of wetland resource area and its size. An applicant shall use the best evidence available to meet the burden of proof required. For purpose of 310 CMR 10.02(2)(c) and 10.02(4), the best evidence is the Order of Conditions, Order of Resource Area Delineation or Determination of Applicability for the project served by the stormwater management system together with the plans referenced in and accompanying such Order or Determination, and, if applicable, the Certificate of Compliance. If the best evidence is available, the date the system was designed shall be the date the Notice of Intent, Request for Determination or Notice of Resource Area Delineation was filed. If the best evidence is not available, the applicant shall rely on other credible evidence to meet the required burden of proof such as local approval of the stormwater management system along with the plans referenced in and accompanying said approval and the wetland conservancy maps and wetland change maps published by the Department on MassGIS.

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Commentary

The Department has determined that activities within Areas Subject to Protection Under M.G.L. c. 131, § 40 are so likely to result in the removing, filling, dredging or altering of those areas that preconstruction review is always justified, and that the issuing authority shall therefore always require the filing of a Notice of Intent for said activities.

The Department has determined that activities within 100 feet of those areas specified in 310 CMR 10.02(1)(a) are sufficiently likely to alter said areas that preconstruction review may be necessary. Therefore, a request for a Determination of Applicability must be filed for some activities within the Buffer Zone. The issuing authority shall then make a determination as to whether the activity so proposed will alter an Area Subject to Protection Under M.G.L. c. 131, § 40 and, if so, shall require the filing of a Notice of Intent for said activities. The issuing authority shall not require the filing of a Notice of Intent if it determines that the activity proposed within the Buffer Zone will not alter an Area Subject to Protection Under M.G.L. c. 131, § 40. The Department has established simplified review criteria for eligible activities within the buffer zone more than 50 feet from resource areas, based upon a determination that the eligibility requirements are sufficient to meet the requirements of 310 CMR 10.53(1) for protection of resource areas from work in the buffer zone.

10.02: continued

The Department has determined that activities outside the Areas Subject to Protection Under M.G.L. c. 131, § 40 and outside the Buffer Zone are so unlikely to result in the altering of Areas Subject to Protection Under M.G.L. c. 131, § 40 that preconstruction review is not required, and therefore the issuing authority shall not regulate said activities unless and until they actually result in the altering of an Area Subject to Protection Under M.G.L. c. 131, § 40.

10.03: General Provisions

(1) Burden of Proof.

(a) Any person who files a Notice of Intent to perform any work within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone has the burden of demonstrating to the issuing authority:

1. that the area is not significant to the protection of any of the interests identified in M.G.L. c. 131, § 40; or
2. that the proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § 40 by complying with the general performance standards established by 310 CMR 10.00 for that area.
3. that proposed work within the buffer zone will contribute to the protection of the interests identified in M.G.L. c. 131, § 40, except that proposed work which lies both within the riverfront area and within all or a portion of the buffer zone to another resource area shall comply with the performance standards for riverfront areas at 310 CMR 10.58. For minor activities as specified in 310 CMR 10.02(2)b.1. within the riverfront area or the buffer zone to another resource area, the Department has determined that additional conditions are not necessary to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(b) Any person who requests the issuing authority to regulate work taking place outside an Area Subject to Protection Under M.G.L. c. 131, § 40 and outside the Buffer Zone has the burden of demonstrating to the satisfaction of the issuing authority that the work has in fact altered an Area Subject to Protection Under M.G.L. c. 131, § 40.

(2) Burden of Going Forward. The burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken. This burden shall be upon the person contesting the Department's position when the Department has been requested to hold an adjudicatory hearing. In the event that under the provisions of 310 CMR 10.03 two or more persons have the burden of going forward, said burden may be placed on all or any number of them, in the discretion of the hearing officer.

(3) Presumption Concerning 310 CMR 15.000: Subsurface Disposal of Sanitary Sewage (Title 5). A subsurface sewage disposal system that is to be constructed in compliance with the requirements of 310 CMR 15.000 *Subsurface Disposal of Sanitary Sewage (Title 5)*, or more stringent local board of health requirements, shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40, but only if none of the components of said system is located within the following resource areas:

- (a) Coastal.
  1. coastal bank
  2. coastal beach
  3. coastal dune
  4. salt marsh
- (b) Inland.
 

1. wet meadows		creek
2. marsh	bordering	river
3. swamp	on any	stream
4. bog		pond
		lake

and only if the soil absorption system of said system is set back at least 50 feet horizontally from the boundary of said areas, as required by 310 CMR 15.211 (*Title 5*), or a greater distance as may be required by more stringent local ordinance, by-law or regulation. To protect wildlife habitat within riverfront areas, the soil absorption system shall not be located within 100 feet of the mean annual high-water line unless there is no alternative location on the lot which conforms to

## 10.03: continued

310 CMR 15.000 without requiring a variance as determined by the local Board of Health, with less adverse effects on resource areas.

This presumption, however, shall apply only to impacts of the discharge from a sewage disposal system, and not to the impacts from construction of that system, such as erosion and siltation from the excavation, placement of fill, or removal of vegetation. Impacts from construction shall be minimized by the placement of erosion and sedimentation controls during excavation, limiting the placement of fill, confining the removal of vegetation to that necessary for the footprint of the system, and taking other measures deemed necessary by the issuing authority.

The setback distance specified above shall be determined by measuring from the boundary of the area in question, from the contour at the mean annual flood elevation in inland areas, or from the top of a coastal bank or the contour at the highest spring tide elevation in coastal areas, whichever is further from the water body.

The setback distance specified above shall not be required for the renovation or replacement (but is required for the substantial enlargement) of septic systems constructed prior to the effective date of 310 CMR 10.00, provided no alternative location is available on the lot and such work has been approved by the local board of health or the Department, as required by law.

This presumption may be overcome only by credible evidence from a competent source that compliance with 310 CMR 15.000: *Subsurface Disposal of Sanitary Sewage (Title 5)* or more stringent local requirements will not protect the interests identified in M.G.L. c. 131, § 40.

(4) Presumption Concerning Point-source Discharges. If the Department has issued a permit pursuant to M.G.L. c. 21, § 43, in conjunction with a federal NPDES (National Pollutant Discharge Elimination System) permit for any new point-source discharge of pollutants, or will issue such a permit, prior to commencement of the discharge, the effluent limitations established in the permit shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40 with respect to the effects of the discharge on water quality. The permit and any subsequent amendments thereto shall be referenced in the Order and deemed incorporated therein.

This presumption shall apply only to impacts of the discharge from the source, and not to impacts from construction of the source.

This presumption may be overcome only by credible evidence from a competent source that said effluent limitations will not protect the interests identified in M.G.L. c. 131, § 40.

(5) Presumption of Significance. Each Area Subject to Protection Under M.G.L. c. 131, § 40 is presumed to be significant to one or more of the interests identified in M.G.L. c. 131, § 40. These presumptions are rebuttable and are set forth in 310 CMR 10.21 through 10.60.

For riverfront areas, the issuing authority may find that the presumptions of significance are partially rebutted as provided in 310 CMR 10.58(3).

(6) Presumption Concerning Application of Herbicides.

(a) Any application of herbicides within any Area Subject to Protection Under M.G.L. c. 131, § 40 or the Buffer Zone associated with a structure or facility which is:

1. existing and lawfully located;
2. used in the service of the public; and
3. used to provide electric, gas, water, telephone, telegraph and other telecommunication services

shall be presumed to constitute work performed in the course of maintaining such structure or facility, and shall be accorded the exemption of such work under M.G.L. c. 131, § 40, only if the application of herbicides to that structure or facility is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987.

(b) Any application of herbicides within the Buffer Zone, other than as provided in 310 CMR 10.03(6)(a), shall be presumed not to alter an Area Subject to Protection Under M.G.L. c. 131, § 40, only if the work is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987. This presumption shall apply only if the person proposing such activity has requested and obtained a determination of the boundaries of the Buffer Zone and Areas Subject to Protection Under M.G.L. c. 131, § 40 in accordance with 310 CMR 10.05(3)(a)1. and 2; and has submitted that determination as part of the Vegetation Management Plan.



10.03: continued

(c) Any application of herbicides for management of rights of way within a riverfront area not subject to 310 CMR 10.03 (6)(a) or (b), provided the area is outside any other resource area and qualifies under the provisions of 310 CMR 10.58(6)(a), shall be accorded an exemption of such work under M.G.L. c. 131, § 40, provided that the application of herbicides is performed in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*.

(7) Fees.(a) General Fee Provisions.

1. Notices of Intent. All Notices of Intent filed pursuant to 310 CMR 10.00 shall be accompanied by a filing fee, the amount of which shall be determined by 310 CMR 4.00 and a brief statement indicating how the applicant calculated the fee. 50% of any filing fee in excess of \$25.00 shall be made payable, by check or money order, to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box accompanied by the Notice of Intent Fee Transmittal Form. The remainder of said fee shall be made payable, by check or money order, to the city or town in which the work is proposed.

2. Requests for Action by the Department. Any person who files a Request for a Superseding Determination of Applicability (310 CMR 10.05(3)(c)), a Request for Superseding Order of Conditions or superseding Order of Resource Area Delineation (310 CMR 10.05(7)(a)), a Request for Adjudicatory Hearing (310 CMR 10.05(7)(j)), a Request to Intervene in any Adjudicatory Hearing (310 CMR 1.01(9)(a)), or a Request for a Variance, (310 CMR 10.05(10)), (*see* also 310 CMR 10.03(7)(e)), shall simultaneously submit a filing fee, in the amount specified by 310 CMR 4.00. All such fees shall be paid by check or money order payable to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box, accompanied by the Request for Departmental Action Fee Transmittal Form. A copy of the Request for Departmental Action Fee Transmittal Form and a copy of the check shall accompany the request for Departmental action.

(b) Specific Provisions for Notice of Intent Fees. In accordance with General Instructions for Completing a Notice of Intent and Abbreviated Notice of Intent, the minimum submittal requirements shall include payment of the filing fee specified in 310 CMR 10.03(7)(c). A conservation commission shall notify, in writing, the appropriate Department Regional Office and the applicant when the correct filing fee has not been paid to the city or town and the filing is therefore incomplete. Said notification shall specify the correct fee amount. The Department shall also notify, in writing, the applicant and the conservation commission when the fee due to the Department has not been paid to the Department and the filing is therefore incomplete. Said notification shall specify the fee due to the Department. The fee will be based on the initial project design as proposed in the Notice of Intent.

1. Disputes over Notice of Intent Filing Fees. Whenever the conservation commission or the Department determines that an inadequate fee has been paid, the time period for the conservation commission or the Department to act shall be stayed until the balance of the fee is paid.

a. Where, in the opinion of the conservation commission or the Department, less than the full filing fee has been included with the Notice of Intent, the Notice shall be deemed complete (assuming all other minimum submittal requirements have been met), and the stay shall be lifted, upon payment of the additional fee specified by the Department or the conservation commission. If the applicant has disputed all or a part of the balance of the fee, after issuance of a Final Order which resolves the fee dispute, in favor of the applicant any disputed funds paid by the applicant in excess of the filing fee as determined in the Final Order shall be paid to the applicant by the Commonwealth and the city or town.

b. In *lieu* of paying any disputed amount of the filing fee, the applicant may file a Request for Determination of Applicability under 310 CMR 10.05(3)(a), with sufficient information to enable the conservation commission to determine the extent of the area, or the type and extent of the activity, subject to protection under M.G.L. c. 131, § 40.

## 10.03: continued

When a Request For Determination of Applicability is filed by an Applicant to resolve a dispute over the filing fee, all proceedings under the Notice of Intent shall be stayed until all appeal periods for the Determination have elapsed or, if the Determination is appealed until all proceedings before the Department have been completed.

A Final Determination of Applicability as to the area, or the type and extent of the activity, subject to protection under M.G.L. c. 131, § 40 shall be binding on all parties and shall be used in calculating the fee.

(c) Activities Subject to Notice of Intent Fees. The following activity descriptions are intended to include all activities subject to filing of a Notice of Intent under M.G.L. c. 131 § 40. The fees imposed by 310 CMR 10.03 are applicable only to those activities subject to jurisdiction under M.G.L. c. 131, § 40. The fee for work proposed under a single Notice of Intent that involves more than one activity noted below, shall be determined by adding the fees for each of the proposed activities. When the work involves activities within the riverfront area as well as another resource area or the buffer zone, the fee shall be determined by adding an additional 50% of the fee calculated for activities in another resource area(s) or the buffer zone to another resource area for each of the proposed activities within the riverfront area. When the work involves activities within the riverfront area but no other resource area, the fee shall be determined by adding the fees for each of the proposed activities within the riverfront area.

1. Category 1.

- a. Any work on a single family residential lot including a house addition, deck, garage, garden, pool, shed, or driveway. Activities excluded from Category 1 include driveways reviewable under 310 CMR 10.53(3)(e) (See Category 2f); construction of an unattached single family house; and construction of a dock, pier, or other coastal engineering structure.
- b. Site preparation of each single family house lot, including removal of vegetation, excavation and grading, where actual construction of the house is not proposed under the Notice of Intent.
- c. Control of nuisance vegetation by removal, herbicide treatment or other means, from a resource area, on each single family lot, as allowable under 310 CMR 10.53(4).
- d. Resource improvement allowed under 310 CMR 10.53(4), other than removal of aquatic nuisance vegetation, as allowed under 310 10.53(4).
- e. Construction, repair, replacement or upgrading of a subsurface septic system or any part of such a system.
- f. Activities associated with installation of a monitoring well, other than construction of an access roadway thereto.
- g. New agriculture, including forestry on land in forest use (310 CMR 10.53(3)(r) and (s)), and aquacultural projects.

2. Category 2:

- a. Construction of each single family house (including single family houses in a subdivision), any part of which is in a buffer zone or resource area. Any activities associated with the construction of said house(s), including associated site preparation and construction of retention/detention basins, utilities, septic systems, roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e)(See Category 2f), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent. (For apartment/condominium type buildings see Category 3.)
- b. Parking lot of any size.
- c. The placement of sand for purposes of beach nourishment.
- d. Any projects reviewable under 310 CMR 10.24(7)(a) through (c).
- e. Any activities reviewable under 310 CMR 10.53(3)(d) and 310 CMR 10.53(3)(f) through (l), except for those subject to 310 CMR 10.03(7)(c)4.b. Where more than one activity is proposed within an identical footprint (*e.g.*, construction of a sewer within the footprint of a new roadway), only one fee shall be payable.
- f. Construction of each crossing for a driveway associated with an unattached single family house, reviewable under 310 CMR 10.53(3)(e).
- g. Any point source discharge.

## 10.03: continued

- h. Control of nuisance vegetation, other than on a single family lot, by removal, herbicide treatment or other means, reviewable under 310 CMR 10.53(4).
  - i. Raising or lowering of surface water levels for flood control or any other purpose.
  - j. Any other activity not described in Categories 1, 3, 4, 5 or 6 (e.g., the determination of whether a stream is perennial or intermittent).
  - k. The exploration for (but not development, construction, expansion, maintenance, operation or replacement of) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).
3. Category 3:
- a. Site preparation, for any development other than an unattached single family house(s), including the removal of vegetation, excavation and grading, where actual construction is not proposed in the Notice of Intent.
  - b. Construction of each building for any commercial, industrial, institutional, or apartment/condominium/townhouse-type development, any part of which is in a buffer zone or resource area. Any activities associated with the construction of said building, including associated site preparation and construction of retention/detention basins, septic systems, parking lots, utilities, point source discharges, package sewage treatment plants, and roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent.
  - c. Construction of each roadway or driveway, not reviewable under 310 CMR 10.53(3)(e), and not associated with construction of an unattached single family house.
  - d. Any activity associated with the clean up of hazardous waste, except as otherwise noted in Category 4, including excavation, destruction of vegetation, change in subsurface hydrology, placement of collection wells or other structures for collection and treatment of contaminated soil and/or water.
  - e. The development, construction, expansion, maintenance, operation, or replacement of (but not exploration for) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).
4. Category 4:
- a. Construction of each crossing for a limited project access roadway or driveway reviewable under 310 CMR 10.53(3)(e) associated with a commercial, industrial, or institutional development or with any residential construction (other than a roadway or driveway associated with construction of an unattached single family house).
  - b. Construction, modification, or repair of a flood control structure such as a dam, reservoir, tidegate, sluiceway, or appurtenant works.
  - c. Creation, operation, maintenance or expansion of a public or private landfill.
  - d. Creation, operation, maintenance or expansion of a public or private sand and/or gravel operation including but not limited to excavation, filling, and stockpiling.
  - e. Construction of new railroad lines or extensions of existing lines, including ballast area, placement of track, signals and switches and other related structures.
  - f. Construction, reconstruction, expansion, or maintenance of any bridge, except to gain access to a single family house lot.
  - g. Any alteration of a resource area(s) to divert water for the clean up of a hazardous waste site, for non-exempt mosquito control projects, or for any other purpose not expressly identified elsewhere in this fee schedule.
  - h. Any activities, including the construction of structures, associated with a dredging operation conducted on land under a waterbody, waterway, or the ocean. If the dredging is directly associated with the construction of a new dock, pier or other structure identified in Category 5, only the Category 5 fee shall apply.
  - i. Construction of, or the discharge from, a package sewage treatment plant.
  - j. Airport vegetation removal projects reviewable under 310 CMR 10.24(7)(c)5. and 10.53(3)(n).
  - k. Landfill closure projects reviewable under 310 CMR 10.24(7)(c)4. and 10.53(3)(p).
  - l. Any activities, including the construction of structures, associated with the assessment, monitoring, containment, mitigation, and remediation of, or other response to, a release or threat of release of oil and/or hazardous material reviewable under 310 CMR 10.24(7)(c)6. or 310 CMR 10.53(3)(q).

10.03: continued

5. Category 5: Construction, reconstruction, repair or replacement of docks, piers, revetments, dikes, or other engineering structures on coastal or inland resource areas, including the placement of rip rap or other material on coastal or inland resource areas.
  6. Category 6: The linear delineation (*e.g.* bordering vegetated wetland, riverfront area, bordering land subject to flooding) of each resource area under an Abbreviated Notice of Resource Area Delineation constitutes a separate activity. The fee associated with each resource area delineation proposed under an Abbreviated Notice of Resource Area Delineation shall be determined by adding the fees for each type of resource area delineation.
- (d) Requests for Action by the Department. Any person's request for action by the Department will not be deemed complete and time periods, if any, shall not commence, unless the person making the request has paid the appropriate filing fee specified in 801 CMR 4.02 (310).
- (e) Fees for Requests for Action by Department. The following requests for action by the Department are subject to the fees established in 310 CMR 4.00.
1. Request for a Superseding Determination of Applicability.
  2. Request for a Superseding Order of Conditions.
  3. Request for an Adjudicatory Hearing or for a Variance which is necessary to avoid an unconstitutional taking.
  4. Request to Intervene in an Adjudicatory Proceeding.
  5. Request for a Variance, except where necessary to avoid an unconstitutional taking.
- (f) Waivers and Exemptions. *See* 310 CMR 4.00 for provisions concerning waivers or exemptions from the requirements of 310 CMR 10.03(7).

10.04: Definitions

Abutter means the same as owner of land abutting the activity.

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

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

Aggrieved means the same as person aggrieved.

Agriculture. For the purposes of 310 CMR 10.04 the following words and phrases have the following meanings:

(a) Land in agricultural use means land within resource areas or the Buffer Zone presently and primarily used in producing or raising one or more of the following agricultural commodities for commercial purposes:

1. animals, including but not limited to livestock, poultry, and bees;
2. fruits, vegetables, berries, nuts, maple sap, and other foods for human consumption;
3. feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs; and
4. forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood, but not including the agricultural commodities described in 310 CMR 10.04(Agriculture)(a)1. through 3..

Additionally, land in agricultural use means land within resource areas or the Buffer Zone presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities, including but not limited to: existing access roads and livestock crossings; windbreaks; hedgerows; field edges; bee yards; sand pits; landings for forest products; fence lines; water management projects such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, and water storage systems; agricultural composting sites; agricultural storage and work areas; and land under farm structures.

Land in agricultural use may lie inactive for up to five consecutive years unless it is under a United States Department of Agriculture (USDA) contract for a longer term pursuant to the Conservation Reserves Program (the Food Securities Act of 1985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990; and 7 CFR 1410), or it is used for the forestry purposes described in 310 CMR 10.04(Agriculture)(b)14., 15., 16. and 17.). The issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use.

(b) Normal maintenance of land in agricultural use, which in all cases does not include placing substantial amounts of fill in Bordering Land Subject to Flooding or filling or dredging a Salt Marsh, means the following activities, without enlargement as to geographical extent, that are occurring on land in agricultural use, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04(Agriculture)(a), when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands, and when conducted in accordance with federal and state laws:

1. all crop management practices, not to include drainage in a Bordering Vegetated Wetland, customarily employed to enhance existing growing conditions, including but not limited to: tillage, trellising, pruning, mulching, shading, and irrigating; and all customary harvesting practices such as digging, picking, combining, threshing, windrowing, baling, curing, and drying;
2. the use of fertilizers, manures, compost materials, and other soil amendments; pesticides and herbicides; traps; and other such materials;
3. the repair or replacement of existing access roads and livestock crossings;
4. the maintenance of:
  - a. existing forest boundary lines up to five feet wide limited to cutting vegetation within the existing boundary lines;

## 10.04: continued

- b. windbreaks;
  - c. hedgerows; and
  - d. fire breaks on land maintained in forest use and owned by the Metropolitan District Commission, the Department of Environmental Management, or the Department of Fisheries, Wildlife, and Environmental Law Enforcement;
5. the management of existing field edges, limited to within 100 feet from the land in production, including the following practices:
- a. mowing;
  - b. burning;
  - c. brush cutting; and
  - d. removing trees.

The management of any field edge that falls within a Bordering Vegetated Wetland is not intended to allow the conversion of Bordering Vegetated Wetland into cropland. Therefore, the field management practices described in 310 CMR 10.04(Agriculture) (b)(5)a. through d. may occur in a Bordering Vegetated Wetland provided that:

- i. the cutting or removal of trees and understory vegetation shall not occur within 25 feet of the bank of a water body that is not managed within the land in production (field ditches, cross ditches, grass waterways, irrigation systems, and farm ponds are examples of managed water bodies) unless the trees or understory vegetation are removed to control alternative hosts but no more than 50% of the canopy may be removed, or except to maintain existing dikes;
  - ii. slash, branches, and limbs resulting from the cutting and removal operations shall not be placed within 25 feet of the bank of a water body that is not managed within the land in production; and
  - iii. no tilling, filling, excavation, or other change in the existing topography shall occur within the field edge;
6. the maintenance and repair of existing fences and the management of temporary fence lines;
7. the cleaning, clearing, grading, repairing, dredging, or restoring of existing man-made or natural water management systems such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, vents, and water storage systems, all in order to provide drainage, prevent erosion, provide more effective use of water, or provide for efficient use of equipment, and all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities;
8. the maintenance and repair of ongoing agricultural composting sites, storage areas, and work areas and the storage of fertilizers, pesticides, manures, compost materials, and other soil amendments, provided that such storage occurs only in the Buffer Zone or Bordering Land Subject to Flooding;
9. the repair and maintenance of existing farm structures;
10. the seeding of eroded or disturbed areas;
11. maintaining the flow of existing natural waterways;
12. the keeping of livestock and poultry and the management of beehives;
13. the cultivation of cranberries, including the following practices:
- a. the activities described in 310 CMR 10.04(Agriculture)(b)1. through 11.;
  - b. the application of sand to existing bogs and the excavation of sand from sand pits;
  - c. the repair and reconstruction of water control structures including flumes, pumps, dikes, and piping above and below the ground;
  - d. the regrading, including modification of drainage, and replanting of existing cranberry bogs;
  - e. the repair and replacement of dikes;
  - f. water harvesting activities; and
  - g. flooding and flood release;
14. the cutting and removal of trees for the purpose of selling the trees or any products derived therefrom, when carried out in accordance with a Forest Cutting Plan approved by the Department of Environmental Management (DEM) under the provisions of M.G.L. c. 132, §§ 40 through 46, and subject to the following:

## 10.04: continued

- a. the cutting and removal of trees within Bordering Vegetated Wetland shall be limited to no more than 50% of the basal area of the area to be cut and the work shall be conducted when the soil is frozen, dry or otherwise stable to support the equipment used;
  - b. except for the construction or maintenance of access described in 310 CMR 10.04(b)16., there shall be no filling, excavation, or other change in topography or hydrology of resource areas;
  - c. all soils that are exposed during or after any work described in 310 CMR 10.04(Agriculture)(b)14. shall be stabilized to prevent the soils from eroding into Bordering Vegetated Wetlands beyond the work area or into open water bodies, in accordance with the Massachusetts Forestry Best Management Practices Manual;
  - d. the person claiming the exemption shall submit by certified mail or hand delivery at the same time to the conservation commission and the appropriate DEM Regional Office not less than ten days prior to the commencement of the activity, a copy of the Forest Cutting Plan that describes the proposed cutting and removal of trees and any activity within resource areas or the Buffer Zone. The conservation commission shall have the opportunity to comment to DEM on the plan;
  - e. landings for forest products shall not be located in Bordering Vegetated Wetland or Bank; and
  - f. any Forest Cutting Plan that is not affirmatively approved by DEM under M.G.L. c. 132, §§ 40 through 46 but instead is deemed approved due to the expiration of some period of time following the submittal of the plan to DEM for approval shall not be considered "approved" by DEM for the purposes of 310 CMR 10.04.
15. notwithstanding the use of the words "for commercial purposes" in the first sentence of 310 CMR 10.04(Agriculture)(a), the cutting of trees within resource areas and the Buffer Zone by owners for their own use, not to exceed 5,000 board feet or ten cords of wood during any 12 month period without an approved Forest Cutting Plan or the cutting of trees within resources areas of greater than 5,000 board feet or ten cords but less than 10,000 board feet or 20 cords of wood during any 12 month period with an approved Forest Cutting Plan, provided that:
- a. after the cutting, the remaining trees in the resource area (and the Buffer Zone, if the activity is being conducted without an approved Forest Cutting Plan) shall be evenly distributed throughout the area where cutting occurred and the crown cover shall not be less than 50%. Crown cover is determined as the percent of the ground's surface that would be covered by a vertical projection of foliage from trees with a diameter at breast height of five inches or greater, where minor gaps between branches are disregarded and areas of overlapping foliage are counted only once;
  - b. the cutting and removal of trees shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment used;
  - c. the cutting, removal, or other destruction of trees and understory vegetation without a Forest Cutting Plan shall not occur within 25 feet of the Bank, except for the purpose of providing access for the activities described in 310 CMR 10.04(Agriculture)(b)15.;
  - d. the placement of slash, branches, and limbs resulting from the cutting and removal operations shall not occur within 25 feet of Bank;
  - e. no filling, excavation, or other change shall occur in the existing topography or hydrology of a resource area;
  - f. landings for forest products shall not be located in Bordering Vegetated Wetland or Bank; and
  - g. any Forest Cutting Plan that is not affirmatively approved by DEM under M.G.L. c. 132, §§ 40 through 46, but instead is deemed approved due to the expiration of some period of time following the submittal of the plan to DEM for approval shall not be considered "approved" by DEM for the purposes of 310 CMR 10.04.
16. the construction of new temporary access or the maintenance of existing legally constructed access for forestry activities described in 310 CMR 10.04(b)14. or 10.04(b)15. provided that:
- a. every practicable effort shall be made to avoid access, including stream crossings, and the construction of landings through and in resource areas;

## 10.04: continued

b. where access, including stream crossings, through resource areas cannot be avoided, every practicable effort shall be made to minimize impacts resulting from construction of new access including, but not limited to, maintaining and improving (but not enlarging) existing access. Activities shall be conducted when the soil is frozen, dry, or otherwise stable to support the equipment used;

c. where DEM has determined through its review and approval of the Forest Cutting Plan that access is impracticable without constructing new access or stream crossings:

i. access shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual;

ii. stream crossings shall be stabilized to prevent erosion using methods described in the Massachusetts Forestry Best Management Practices Manual. When crossings involve fill, culverts or other structures that will obstruct flow, they shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual to allow the unobstructed passage of existing flows for at least the 25 year storm;

iii. access or stream crossings shall be removed within one year of completion of the work described in the approved Forest Cutting Plan;

iv. following removal of access, the topography and site conditions shall be substantially restored to allow pre-existing vegetation to be reestablished; and

v. activities shall be conducted when the soil is frozen, dry, or otherwise stable to support the equipment used.

17. non-harvest management practices for forest products on land maintained in forest use limited to pruning, pre-commercial thinning or planting of tree seedlings.

(c) Normal improvement of land in agricultural use, which in all cases does not include filling or dredging a Salt Marsh, includes but is not limited to:

1. the following activities when they occur on land in agricultural use or when they occur within the Buffer Zone or Bordering Land Subject to Flooding that is not land in agricultural use, when they are directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04(Agriculture)(a), and when they are undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands and the activity is conducted in accordance with federal and state laws:

a. the installation of permanent fencing, windbreaks, hedgerows, or the cutting of vegetation to create forest boundaries up to five feet wide;

b. the installation of dikes within a cranberry bog;

c. the construction of farm structures, not including habitable dwellings, provided that the footprint of the farm structure does not exceed 4,000 square feet and no filling of Bordering Land Subject to Flooding occurs beyond the footprint of the building;

d. the squaring-off of fields and bogs, provided that the activity does not alter a Bordering Vegetated Wetland, there is no increase in the amount of land in production beyond the minimum increase necessarily resulting from making the boundary of any field or bog more regular, and no fill is placed within Bordering Land Subject to Flooding;

e. the construction of by-pass canals/channels and tail water recovery systems;

f. a change in commodity other than from maple sap production or forest products to any other commodity, provided that there is no filling of Bordering Vegetated Wetland and drainage ditches or the subsurface drainage system are not increased or enlarged;

g. the construction of a water management system such as a reservoir, farm pond, irrigation system, field ditch, cross ditch, canal/channel, grass waterway, dike, sub-surface drainage system, watering facility, water transport system, vent, or water storage system, or of a livestock access; and

h. the construction of composting and storage areas.

For the activities described in 310 CMR 10.04(Agriculture)(c)(1)d. through h. there shall be no net loss of flood storage capacity; and



## 10.04: continued

2. the reconstruction of existing dikes, the reconstruction and expansion of existing ponds and reservoirs, and the construction of tailwater recovery ponds and by-pass canals/channels occurring partly or entirely within a Bordering Vegetated Wetland, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04(Agriculture)(a), in accordance with the following:
- a. Prior to performing the work, the person claiming the exemption shall submit to the conservation commission for its review at a public meeting that portion of a certified farm Conservation Plan (CP) which relates to the work to be conducted in a Bordering Vegetated Wetland. The CP must be prepared in cooperation with the U.S.D.A. Natural Resource Conservation Service (NRCS), Memorandum of Understanding (MOU) between the Department and NRCS concerning CPs;
  - b. The conservation commission may, within 21 days of receiving the CP, provide the person claiming the exemption with written notification containing specific comments detailing the manner in which the CP has not been prepared in compliance with the terms of the MOU;
  - c. The person claiming the exemption shall provide SCS with a complete copy of the notification;
  - d. All revisions to the CP that relate to the delineation of Bordering Vegetated Wetlands shall be submitted to the conservation commission in accordance with 310 CMR 10.04(Agriculture)(c)(2);
  - e. All work shall be done in accordance with the CP; and
  - f. The maximum amount of Bordering Vegetated Wetland which may be altered by the above activities is:
    - i. 5,000 square feet for reconstruction of an existing dike;
    - ii. 10,000 square feet for expansion of an existing pond or reservoir;
    - iii. 10,000 square feet for construction of a tailwater recovery pond; and
    - iv. 5,000 square feet for construction of a by-pass canal/channel.

Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following:

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

Provided, that when the provisions of 310 CMR 10.03(6) and 10.05(3) or 333 CMR 11.03(9) have been met, the application of herbicides in the Buffer Zone in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Right of Way Management*, effective July 10, 1987, is not an alteration of any Area Subject to Protection Under M.G.L. c. 131, § 40.

Applicant means any person who files a Notice of Intent, or on whose behalf such a notice is filed.

Aquaculture.

- (a) Land in Aquacultural Use means land presently and primarily used in the growing of aquatic organisms under controlled conditions, including one or more of the following uses: raising, breeding or producing a specified type of animal or vegetable life including, but not limited to, finfish such as carp, catfish, black bass, flatfishes, herring, salmon, shad, smelt, sturgeon, striped bass, sunfishes, trout, whitefish, eel, tilapia; shellfish such as shrimp, crabs, lobster, crayfish, oysters, clams, periwinkles, scallops, mussels, squid; amphibians such as frogs; reptiles such as turtles; seaweeds such as irish moss and dulse; and edible freshwater plants.

10.04: continued

(b) Normal maintenance or improvement of land in aquacultural use means the following activities, when done in connection with the production of aquatic organisms as defined above: draining, flooding, heating, cooling, removing, filling, grading, compacting, raking, tilling, fertilizing, seeding, harvesting, filtering, rafting, culverting or applying chemicals in conformance with all state and federal laws; provided, however, that such activities are clearly intended to improve and maintain land in aquacultural use and that best available measures are utilized to ensure that there will be no adverse effect on wetlands outside the area in aquacultural use, and further provided that removing, filling, dredging or altering of a salt marsh is not to be considered normal maintenance or improvement of land in aquacultural use.

Area Subject to Protection Under M.G.L. c. 131, § 40 means any area specified in 310 CMR 10.02(1). It is used synonymously with Resource Area, each one of which is defined in greater detail in 310 CMR 10.21 through 10.66.

Bank (coastal) is defined in 310 CMR 10.30(2).

Bank (inland) is defined in 310 CMR 10.54(2).

Beach (barrier) is defined in 310 CMR 10.29(2).

Beach (coastal) is defined in 310 CMR 10.27(2).

Beach (inland): a naturally occurring inland beach means an unvegetated bank as defined in 310 CMR 10.54(2).

Best Available Measures means the most up-to-date technology or the best designs, measures or engineering practices that have been developed and that are commercially available.

Best Practical Measures means technologies, designs, measures or engineering practices that are in general use to protect similar interests.

Bordering means touching. An area listed in 310 CMR 10.02(1)(a) is bordering on a water body listed in 310 CMR 10.02(1)(a) if some portion of the area is touching the water body or if some portion of the area is touching another area listed in 310 CMR 10.02(1)(a) some portion of which is in turn touching the water body.

Bordering Vegetated Wetland is defined in 310 CMR 10.55(2).

Boundary means the boundary of an Area Subject to Protection Under M.G.L. c. 131, § 40. A description of the boundary of each area is found in the appropriate section of 310 CMR 10.00. For coastal areas, *see* 310 CMR 10.21 through 10.37; for inland areas, *see* 310 CMR 10.51 through 10.60.

Breeding areas mean areas used by wildlife for courtship, mating, nesting or other reproductive activity, and rearing of young.

Buffer Zone means that area of land extending 100 feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a).

Certificate of Compliance means a written determination by the issuing authority that work or a portion thereof has been completed in accordance with an Order. It shall be made on Form 8.

Coastal Wetlands are defined in M.G.L. c. 131, § 40, para. 6.

## 10.04: continued

Cold-water Fishery means waters in which the mean of the maximum daily temperature over a seven day period generally does not exceed 68°F (20°C) and, when other ecological factors are favorable (such as habitat) are capable of supporting a year round population of cold-water stenothermal aquatic life such as trout. Waters designated as cold-water fisheries by the Department in 314 CMR 4.00 and waters designated as cold-water fishery resources by the Division of Fisheries and Wildlife are cold-water fisheries. Waters where there is evidence based on a fish survey that a cold-water fish population and habitat exist are also cold-water fisheries. Cold-water fish include but are not limited to brook trout (*Salvelinus fontinalis*), rainbow trout (*Oncorhynchus mykiss*), brown trout (*Salmo trutta*), creek chubsucker (*Erimyzon oblongus*) and fallfish (*semotilus corporalis*).

Commissioner means the Commissioner of the Department of Environmental Protection pursuant to St. 1989, c. 240, § 101.

Conditions means those requirements set forth in a written Order issued by a conservation commission or the Department for the purpose of permitting, regulating or prohibiting any activity that removes, fills, dredges or alters an Area Subject to Protection Under M.G.L. c. 131, § 40. [See also 310 CMR 10.05(6).]

Confined Disposal Facility means a facility created in open water or wetlands consisting of confinement walls or berms built up or extending into existing land and is a “confined disposal facility” as defined in 314 CMR 9.02.

Conservation Commission means that body comprised of members lawfully appointed pursuant to M.G.L. c. 40, § 8C. For the purposes of M.G.L. c. 131, § 40 and 310 CMR 10.00, it shall also mean a mayor or board of selectmen, where no conservation commission has been established under M.G.L. c. 40, § 8C.

Creek means the same as a stream, as defined in 310 CMR 10.04

Critical Areas mean Outstanding Resource Waters as designated in 314 CMR 4.00, Special Resource Waters as designated in 314 CMR 4.00 recharge areas for public water supplies as defined in 310 CMR 22.02 (Zone Is, Zone IIs, and Interim Wellhead Protection Areas for ground water sources and Zone As for surface water sources), bathing beaches as defined in 105 CMR 445.000, cold-water fisheries and shellfish growing areas.

Date of Issuance means the date an Order is mailed, as evidenced by a postmark, or the date it is hand delivered.

Date of Receipt means the date of delivery to an office, home or usual place of business by mail or hand delivery.

Densely Developed Area means a riverfront area that has been designated by the Secretary of the Executive Office of Environmental Affairs at the request of a city or town, limited to an area of ten acres or more that is being utilized, or includes existing vacant structures or vacant lots formerly utilized as of January 1, 1944 or sooner, for intensive industrial, commercial, institutional, or residential activities or combinations of such activities, including, but not limited to the following: manufacturing, fabricating, wholesaling, warehousing, or other commercial or industrial activities; retail trade and service activities; medical and educational institutions; residential dwelling structures at a density of three or more per two acres; and mixed or combined patterns of the above. Land which is zoned for intensive use but is not utilized for such use as of January 1, 1997 shall not be designated as a densely developed area. Rivers within the municipalities identified in 310 CMR 10.58(2)(a)3.a. also have 25 foot riverfront areas.

Department means the Department of Environmental Protection, and shall include the Commissioner and any other person employed by said Department, pursuant to St. 1989, c. 240, § 101.

Designated Port is defined in 310 CMR 10.26(2).

10.04: continued

Determination.

(a) a Determination of Applicability means a written finding by a conservation commission or the Department as to whether a site or the work proposed thereon is subject to the jurisdiction of M.G.L. c. 131, § 40. It shall be made on Form 2.

(b) a Determination of Significance means a written finding by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40. It shall be made as part of the Order, on Form 5.

(c) a Notification of Non-significance means a written finding by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is not significant to any of the interests of M.G.L. c. 131, § 40. It shall be made on Form 6.

Direct Case - the evidence that a party seeks to introduce in support of its position, as well as any legal argument the party wishes to provide. The Direct Case may include, but is not limited to, statements under oath by lay witnesses and expert witnesses, technical reports, studies, memoranda, maps, plans, and other information that a party seeks to have the Presiding Officer review as part of the adjudicatory proceeding.

Disposal Site means a structure, well, pit, pond, lagoon, impoundment, ditch, landfill, or other place or area, excluding ambient air or surface water, where uncontrolled oil or hazardous material has come to be located as a result of any spilling, leaking, pouring, ponding, emitting, emptying, discharging, injecting, escaping, leaching, dumping, discarding or otherwise disposing of such oil or hazardous material and is a "disposal site" as defined in M.G.L.c. 21E.

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

Dune means coastal dune, as defined in 310 CMR 10.28(2).

Environmentally Sensitive Site Design means design that incorporates low impact development techniques to prevent the generation of stormwater and non-point source pollution by reducing impervious surfaces, disconnecting stormwater sheet flow paths and treating stormwater at its source, maximizing open space, minimizing disturbance, protecting natural features and processes, and/or enhancing wildlife habitat.

Estuary means:

(a) any area where fresh and salt water mix and tidal effects are evident; or

(b) any partially enclosed coastal body of water where the tide meets the current of any stream or river.

Extension Permit means a written extension of time within which the authorized work shall be completed. It shall be made on Form 7.

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

Final Order means the Order issued by the Commissioner after an adjudicatory hearing or, if no request for hearing has been filed, the Superseding Order or, if no request for a Superseding Order has been filed, the Order of Conditions.

Flat (tidal) is defined in 310 CMR 10.27(2)(b).

Flood Control means the prevention or reduction of flooding and flood damage.

Formerly or Presently Owned means owned by the same owner at any time on or after August 1, 1996.

Freshwater Wetlands are defined in M.G.L. c. 131, § 7, para. 7.

General Performance Standards means those requirements established by 310 CMR 10.00 for activities in or affecting each of the Areas Subject to Protection Under M.G.L. c. 131, § 40. They are found in 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60.

10.04: continued

Ground Water Supply means water below the earth's surface in the zone of saturation.

Historic Mill Complex means the mill complexes in, but not limited to, Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford in existence prior to 1946 and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on August 7, 1996. An historic mill also means any historic mill included on the Massachusetts Register of Historic Places. An historic mill complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas, and driveways) constructed before and existing after 1946, used for any type of manufacturing or mechanical processing and including associated structures to provide water for processing, to generate water power, or for water transportation.

Illicit Discharge means a discharge that is not entirely comprised of stormwater. Notwithstanding the foregoing, an illicit discharge does not include discharges from the following activities or facilities: firefighting, water line flushing, landscape irrigation, uncontaminated ground water, potable water sources, foundation drains, air conditioning condensation, footing drains, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated water from swimming pools, water used for street washing and water used to clean residential buildings without detergents.

Important Wildlife Habitat Functions mean important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.

Interests Identified in M.G.L. c. 131, § 40 means public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of fisheries, and protection of wildlife habitat.

Issuing Authority means a conservation commission, mayor, the selectmen or the Department, whichever is applicable.

Lake means any open body of fresh water with a surface area of ten acres or more, and shall include great ponds.

Land Containing Shellfish is defined in 310 CMR 10.34(2).

Land Subject to Coastal Storm Flowage means land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.

Land Subject to Flooding is defined in 310 CMR 10.57(2).

Land Subject to Tidal Action means land subject to the periodic rise and fall of a coastal water body, including spring tides.

Land Under Salt Ponds is defined in 310 CMR 10.33(2).

Land Under Water Bodies and Waterways means the bottom of, or land under, the surface of the ocean or any estuary, creek, river, stream, pond, or lake. Land under the ocean and estuaries is further defined in 310 CMR 10.25(2); land under inland water bodies is further defined in 310 CMR 10.56(2).

Land Uses with Higher Potential Pollutant Loads mean the following land uses: land uses identified in 310 CMR 22.20B(2), 310 CMR 22.20C(2)(a) through (k) and (m), 310 CMR 22.21(2)(a)1. through 8., and 310 CMR 22.21(2)(b)1. through 6.; areas within a site that are the location of activities that are subject to an individual National Pollutant Discharge Elimination System (NPDES) permit or the NPDES Multi-sector General Permit; auto fueling facilities (gas stations); exterior fleet storage areas; exterior vehicle service and equipment cleaning areas; marinas and boatyards; parking lots with high intensity use; confined disposal facilities and disposal sites.

10.04: continued

Landowner - the owner of record of land or an interest in land that is subject of a Reviewable Decision.

Lot means an area of land in one ownership, with definite boundaries.

Low Impact Development Techniques mean innovative stormwater management systems that are modeled after natural hydrologic features. Low impact development techniques manage rainfall at the source using uniformly distributed decentralized micro-scale controls. Low impact development techniques use small cost-effective landscape features located at the lot level.

Maintenance of a Stormwater Management System means the work to keep a stormwater management system functional and in good repair so that it may continue to operate as originally designed. Maintenance of a stormwater management system does not include work that:

- (a) reduces the capacity of the system to treat stormwater, provide recharge or attenuate peak flow;
- (b) increases the total and peak volume of the stormwater managed by the system;
- (c) directs additional stormwater discharges to the system; or
- (d) results in reduced use of above ground stormwater best management practices.

Major or Complex - means an appeal of a Reviewable Decision issued for work in a resource area that will be so designated due to the complexity or novelty of the issues, the magnitude of the project, the potential for environmental harm or benefit, significant public interest or public financing or other relevant consideration, as determined by the Commissioner or a Presiding Officer.

Majority means more than half of the members of the conservation commission then in office.

Marsh is defined in M.G.L. c. 131, § 40, para. 10.

Meadow (or Wet Meadow) is defined in M.G.L. c. 131, § 40, para. 9.

Mean Annual High-water Line is defined at 310 CMR 10.58(2).

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 6 through 62H, and 301 CMR 11.00: *General Application and Administration Environmental Code, Title 1*.

Migratory areas mean those areas used by wildlife moving from one habitat to another, whether seasonally or otherwise.

Mitigation means rectifying an adverse impact by repairing, rehabilitating or restoring the affected resource area or compensating for an adverse impact by enhancing or providing replacement resource areas.

Notice of Intent means the written notice filed by any person intending to remove, fill, dredge or alter an Area Subject to Protection under M.G.L. c. 131, § 40. It shall be made on Form 3 or 4.

Ocean means the Atlantic Ocean and all contiguous waters subject to tidal action.

Order means an Order of Conditions, Order of Resource Area Delineation, Superseding, Order or Final Order, whichever is applicable.

Order of Conditions means the document issued by a conservation commission containing conditions which regulate or prohibit an activity. It shall be made on Form 5.

Owner of Land Abutting the Activity means the owner of land sharing a common boundary or corner with the site of the proposed activity in any direction, including land located directly across a street, way, creek, river, stream, brook or canal.

10.04: continued

Party to any proceeding before the Department means the applicant, the conservation commission and the Department, and pursuant to 310 CMR 10.05(7)(a) may include the owner of the site, any abutter, any person aggrieved, any ten residents of the city or town where the land is located and any ten persons pursuant to M.G.L. c. 30A, § 10A.

Person Aggrieved means any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

Plans means such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, deemed necessary by the issuing authority to describe the site and/or the work, to determine the applicability of M.G.L. c. 131, § 40 or to determine the impact of the proposed work upon the interests identified in M.G.L. c. 131, § 40. [See also General Instructions for Completing Notice of Intent (Form 3) and Abbreviated Notice of Intent (Form 4).]

Pond (coastal) means Salt Pond as defined in 310 CMR 10.33(2).

Pond (inland) means any open body of fresh water with a surface area observed or recorded within the last ten years of at least 10,000 square feet. Ponds may be either naturally occurring or man-made by impoundment, excavation, or otherwise. Ponds shall contain standing water except for periods of extended drought. Periods of extended drought for purposes of 310 CMR 10.00 shall be those periods, in those specifically identified geographic locations, determined to be at the “Advisory” or more severe drought level by the Massachusetts Drought Management Task Force, as established by the Executive Office of Environmental Affairs and the Massachusetts Emergency Management Agency in 2001, in accordance with the Massachusetts Drought Management Plan (MDMP).

Notwithstanding the above, the following man-made bodies of open water shall not be considered ponds:

- (a) basins or lagoons which are part of wastewater treatment plants;
- (b) swimming pools or other impervious man-made basins; and
- (c) individual gravel pits or quarries excavated from upland areas unless inactive for five or more consecutive years.

Prevention of Pollution means the prevention or reduction of contamination of surface or ground water.

Private Water Supply means any source or volume of surface or ground water demonstrated to be in any private use or demonstrated to have a potential for private use.

Project Purpose means the general, functional description of an activity proposed within the riverfront area (e.g., construction of a single family house, expansion of a commercial development).

Protection of Fisheries means protection of the capacity of an Area Subject to Protection Under M.G.L. c. 131, § 40:

- (a) to prevent or reduce contamination or damage to fish; and
- (b) to serve as their habitat and nutrient source. Fish includes all species of fresh and salt water finfish and shellfish.

See also the definition of Marine Fisheries contained in 310 CMR 10.23(15).

Protection of Land Containing Shellfish means protection of the capacity of an Area Subject to Protection Under M.G.L. c. 131, § 40:

- (a) to prevent or reduce contamination or damage to shellfish; and
- (b) to serve as their habitat and nutrient source.

See also the definitions of Shellfish and Land Containing Shellfish in 310 CMR 10.34(2).

10.04: continued

Public Water Supply means any source or volume of surface or ground water demonstrated to be in public use or approved for water supply pursuant to M.G.L. c. 111, § 160 by the Division of Water Supply of the Department, or demonstrated to have a potential for public use.

Rare Species mean those vertebrate and invertebrate animal species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 10.60.

Redevelopment Redevelopment means replacement, rehabilitation, or expansion of existing structures, improvement of existing roads or reuse of degraded or previously developed areas for purposes of 310 CMR 10.58, governing work in the riverfront area. For purpose of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), redevelopment is defined to include the following projects:

- (a) maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving;
- (b) development, rehabilitation, expansion and phased projects on previously developed sites provided the redevelopment results in no net increase in impervious area; and
- (c) remedial projects specifically designed to provide improved stormwater management such as projects to separate storm drains and sanitary sewers and stormwater retrofit projects.

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

Request for Determination of Applicability means a written request made by any person to a conservation commission or the Department for a determination as to whether a site or work thereon is subject to M.G.L. c. 131, § 40. It shall be submitted on Form 1.

Resource Area means any of the areas specified in 310 CMR 10.25 through 10.35 and 310 CMR 10.54 through 10.58. It is used synonymously with Area Subject to Protection Under M.G.L. c. 131, § 40, each one of which is enumerated in 310 CMR 10.02(1).

Reviewable Decision - A MassDEP decision that is a superseding order of condition or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance.

River means any natural flowing body of water that empties to any ocean, lake, pond, or other river and which flows throughout the year. River is defined further at 310 CMR 10.58(2).

Riverfront Area is defined at 310 CMR 10.58(2).

Rocky Intertidal Shore is defined in 310 CMR 10.31(2).

Salt Marsh is defined in 310 CMR 10.32(2).

Shellfish Growing Area means land under the ocean, tidal flats, rocky intertidal shores and marshes and land under salt ponds when any such land contains shellfish. Shellfish growing areas include land that has been identified and shown on a map published by the Division of Marine Fisheries as a shellfish growing area including any area identified on such map as an area where shellfishing is prohibited. Shellfish growing areas shall also include land designated by the Department in 314 CMR 4.00 as suitable for shellfish harvesting with or without depuration. In addition, shellfish growing areas shall include shellfish growing areas designated by the local shellfish constable as suitable for shellfishing based on the density of shellfish, the size of the area and the historical and current importance of the area for recreational and commercial shellfishing.

Shelter means protection from the elements or predators.

Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. Within the context of the protection of the riverfront area, no significant adverse impact means the level of protection of the performance standards provided under 310 CMR 10.58.



## 10.04: continued

Spring Tides means those tides which occur with the new and full moons, and which are perceptibly higher and lower than other tides.

State-listed species mean the same as rare species, as defined in 310 CMR 10.04.

Storm Damage Prevention means the prevention of damage caused by water from storms, including, but not limited to, erosion and sedimentation, damage to vegetation, property or buildings, or damage caused by flooding, water-borne debris or water-borne ice.

Stormwater Best Management Practice means a structural or nonstructural technique for managing stormwater to prevent or reduce non-point source pollutants from entering surface waters or ground waters. A structural stormwater best management practice includes a basin, discharge outlet, swale, rain garden, filter or other stormwater treatment practice or measure either alone or in combination including without limitation any overflow pipe, conduit, weir control structure that:

- (a) is not naturally occurring;
- (b) is not designed as a wetland replication area; and
- (c) has been designed, constructed, and installed for the purpose of conveying, collecting, storing, discharging, recharging or treating stormwater.

Nonstructural stormwater best management practices include source control and pollution prevention measures.

Stormwater Management System means a system for conveying, collecting, storing, discharging, recharging or treating stormwater on-site including stormwater best management practices and any pipes and outlets intended to transport and discharge stormwater to the ground water, a surface water or a municipal separate storm sewer system.

Stream means a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection Under M.G.L. c. 131, § 40. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not flow throughout the year (*i.e.*, which is intermittent) is a stream except for that portion upgradient of all bogs, swamps, wet meadows and marshes.

Superseding Determination means a determination of applicability, of significance or of non-significance, as the case may be, issued by the Department. It shall be made on Form 2.

Superseding Order means a document issued by the Department containing conditions which regulate or prohibit an activity. It shall be made on Form 5.

Surface Waters means all waters other than ground water within the jurisdiction of the Commonwealth including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, and coastal waters.

Swamp is defined in M.G.L. c. 131, § 40, para. 8.

Vernal pool habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection Under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1). These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non-breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma maculatum*), and are important habitat for other wildlife species.

Vista Pruning means the selective thinning of tree branches or understory shrubs to establish a specific "window" to improve visibility. Vista pruning does not include the cutting of trees which would reduce the leaf canopy to less than 90% of the existing crown cover and does not include the mowing or removal of understory brush.

10.04: continued

Wastewater Residuals Landfill means a facility or part of a facility approved by the Department for the disposal of wastewater residuals into or on land, but not including a site where wastewater residuals are land applied in accordance with 310 CMR 32.00.

Water-dependent Uses mean those uses and facilities which require direct access to, or location in, marine, tidal or inland waters and which therefore cannot be located away from said waters, including but not limited to: marinas, public recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an upland site, crossings over or under water bodies or waterways (but limited to railroad and public roadway bridges, tunnels, culverts, as well as railroad tracks and public roadways connecting thereto which are generally perpendicular to the water body or waterway), and any other uses and facilities as may further hereafter be defined as water-dependent in 310 CMR 9.00.

Waters of the Commonwealth means all waters within the jurisdiction of the Commonwealth, including without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, coastal waters and ground waters.

Wildlife means all mammals, birds, reptiles and amphibians and, for the purposes of 310 CMR 10.37 and 10.59, all vertebrate and invertebrate animal species which are officially listed by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 8.00 as endangered, threatened, or of special concern.

Wildlife Habitat is defined in M.G.L. c. 131, § 40, para. 14.

Work means the same as activity.

10.05: Procedures

(1) Time Periods. All time periods of ten days or less specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed using business days only. In the case of a determination or Order, such period shall commence on the first day after the date of issuance and shall end at the close of business on the tenth business day thereafter. All other time periods specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed on the basis of calendar days, unless the last day falls on a Saturday, Sunday or legal holiday, in which case the last day shall be the next business day following.

(2) Actions by Conservation Commission. Where M.G.L. c. 131, § 40 states that a particular action (except receipt of a request or notice) is to be taken by the conservation commission, that action is to be taken by more than half the members present at a meeting of at least a quorum. A quorum is defined as a majority of the members then in office.

Where M.G.L. c. 131, § 40 states that an order or notification shall be signed by a majority of the conservation commission, that action is to be taken by a majority of the members then in office, who need not convene as a body in order to sign, provided they met pursuant to the open meeting law, M.G.L. c. 39, §§ 23A through 23C, when voting on the matter.

Where M.G.L. c. 131, § 40 states that the conservation commission is to receive a request or notice, conservation commission means a member of the conservation commission or an individual designated by the conservation commission to receive such request or notice.

(3) Determinations of Applicability.

(a) Requests for Determination of Applicability.

1. Any person who desires a determination as to whether M.G.L. c. 131, § 40 applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40, may submit to the conservation commission by certified mail or hand delivery a Request for a Determination of Applicability, Form 1. To obtain confirmation of a delineated boundary of bordering vegetated wetlands and other resource areas on the site to establish the extent of the buffer zone and resource areas prior to filing a Notice of

## 10.05: continued

Intent for proposed work, an applicant generally should file an Abbreviated Notice of Resource Area Delineation. Alternatively, the boundary of bordering vegetated wetland (or other resource areas) may be determined through the filing of a Notice of Intent. For work within riverfront areas, an applicant may submit to the conservation commission by certified mail or hand delivery a Request for Determination of Applicability to identify the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2., including sufficient information to enable the conservation commission to determine the applicable scope.

2. Any person who proposes to perform work within the Buffer Zone shall submit to the conservation commission either a Notice of Intent for such work or a Request for Determination of Applicability. Said request shall include sufficient information, as required on Form 1, to enable the conservation commission to find and view the area and to determine whether the proposed work will alter an Area Subject to Protection Under M.G.L. c. 131, § 40. Applicants may use the Abbreviated Notice of Resource Area Delineation to confirm the boundaries of resource areas and the buffer zone and to certify that the requirements of 310 CMR 10.02(2)(b)2. have been met for waiver of review for activities in the buffer zone.

Any person who proposes to apply herbicides in the Buffer Zone pursuant to the presumption of 310 CMR 10.03(6)(b) shall be required only to submit a request for determination of the boundaries of the Buffer Zone and the Areas Subject to Protection Under M.G.L. c. 131, § 40. Such Request for Determination shall be submitted prior to the filing of the Vegetation Management Plan, as required by 333 CMR 11.00, on maps of a scale which will enable the issuing authority to find and delineate those Areas Subject to Protection Under M.G.L. c. 131, § 40 identified in 310 CMR 10.02(1)(a) through (c) and the Buffer Zone identified in 310 CMR 10.02(2) within the vicinity of the project area.

3. A request for a Determination of Applicability shall include certification that the Department and the owner of the area subject to the request, if the person making the request is not the owner, have been notified that a determination is being requested under M.G.L. c. 131, § 40.

(b) Determination of Applicability.

1. Within 21 days after the date of receipt of the Request for a Determination of Applicability, the conservation commission shall issue a Determination of Applicability, Form 2. Notice of the time and place of the public meeting at which the determination will be made shall be given by the conservation commission at the expense of the person making the request not less than five days prior to such meeting, by publication in a newspaper of general circulation in the city or town in which the land is located, and by mailing a notice to the person making the request, the owner, the board of health and the planning board of said city or town. Notice shall also be given in accordance with the open meeting law, M.G.L. c. 39, § 23B. Said determination shall be signed by a majority of the conservation commission, and copies thereof shall be sent by the conservation commission to the Department, to the person making the request, and to the owner. Delivery of the copy to the person making the request shall be by hand delivery or certified mail, return receipt requested. Said determination shall be valid for three years from the date of issuance, except that a determination of the boundaries of the Areas Subject to Protection Under M.G.L. c. 131, § 40 and the Buffer Zone which are to apply to such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Rights of Way Management*, effective July 10, 1987, shall be valid throughout the effective duration of the Vegetation Management Plan.

2. The conservation commission shall find that M.G.L. c. 131, § 40 applies to the land, or a portion thereof, if it is an Area Subject to Protection Under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(1). The conservation commission shall find that M.G.L. c. 131, § 40 applies to the work, or portion thereof, if it is an Activity Subject to Regulation Under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2). The conservation commission shall identify the scope of alternatives to be evaluated, if requested, for work within riverfront areas under 310 CMR 10.58(4)(c)2..

3. A Notice of Intent which is filed as a result of a positive determination, whether such determination is made by the Department or a conservation commission, shall be filed with the conservation commission, and all of the procedures set forth in 310 CMR 10.05(4) shall apply.

10.05: continued

(c) Appeal to the Department. Following a positive or negative Determination of Applicability, the identification of the scope of alternatives for work within the riverfront area, or the failure of a conservation commission to make a determination within 21 days, any person specified in 310 CMR 10.05(7) may, within ten days, request the Department to issue a Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7). The Department shall issue its determination within 35 days from receipt of such request.

(d) Work Pending Appeal of Determination.

1. Upon a positive Determination of Applicability by a conservation commission, work may not proceed until the Department or the Commissioner issues a negative determination, or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elapsed, except that a Notice of Intent shall not be required for the application of herbicides in accordance with 310 CMR 10.03(6).

2. Upon a positive Determination of Applicability by the Department, work may not proceed until the Commissioner issues a negative determination or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elapsed.

3. Upon a positive Determination of Applicability by the Commissioner, work may not proceed until a judicial determination is made that the proposed work is not subject to M.G.L. c. 131, § 40 or until a Notice of Intent has been filed and a final order has been issued and recorded, and all administrative appeal periods have elapsed.

4. Upon a negative Determination of Applicability by a conservation commission or upon the failure of a conservation commission to act within the 21 day time period, and where the Department has been requested to issue a Superseding Determination of Applicability but has failed to do so within 35 days, work may proceed at the owner's risk upon notice to the Department and to the conservation commission.

5. Upon a negative Determination of Applicability by the Department, work may proceed at the owner's risk even if a request for an adjudicatory hearing has been made.

6. Upon a negative Determination of Applicability by the Commissioner after an adjudicatory hearing, work may proceed at the owner's risk even if a petition for judicial review has been filed.

7. Upon a positive Determination of Applicability by a conservation commission, the Department, or the Commissioner which identifies the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2. for work within the riverfront area, work may not proceed until a Notice of Intent has been filed and a final Order has been issued and recorded and all administrative appeal periods have elapsed.

(4) Notices of Intent.

(a) Any person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection Under M.G.L. c. 131 § 40 shall file a Notice of Intent on Form 3 and other application materials in accordance with the submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3) and Abbreviated Notice of Intent (Form 4)*. If the applicant and landowner are not the same, an applicant shall obtain written permission from the landowner(s) prior to filing a Notice of Intent for proposed work, except for work proposed on Great Ponds or Commonwealth tidelands. Two copies of the completed Notice of Intent with supporting plans and documents shall be sent by certified mail or hand delivery to the conservation commission, and one copy of the same shall be sent concurrently in like manner to the Department.

## 10.05: continued

Concurrent with the filing of the Notice of Intent, the applicant also shall provide notification to all abutters and any property owner within 100 feet of the property line of the land where the activity is proposed including if separated from that land by a public or private street or a body of water and not unreasonably distant from the project site. The applicant shall provide notification at the mailing addresses shown on the most recent applicable tax list from the municipal assessor. Notification shall be at the applicant's expense. The notification shall state where copies of the Notice of Intent may be examined or obtained and where information on the date, time, and location of the public hearing may be obtained. To ensure compatibility with local procedures, applicants must comply with any rules of the local conservation commission pertaining to the location for examining or obtaining the Notice of Intent and information about the hearing. The applicant shall notify abutters in writing by hand delivery or certified mail, return receipt requested, or by certificates of mailing. Mailing at least seven days prior to the public hearing shall constitute timely notice. The applicant shall present either the certified mail receipts or certificate of mailing receipts for all abutters at the beginning of the public hearing. The presentation of the receipts for all abutters identified on the tax list shall constitute compliance with abutter notification requirements. The conservation commission shall determine whether the applicant has complied with abutter notification requirements. The Department will dismiss Requests for Action based on allegations of failure to comply with abutter notification requirements, absent a clear showing by an abutter seeking Department action that the applicant failed to notify the abutter.

(b) For certain purposes, other forms of Notices may be used.

1. For certain projects, applicants may at their option use the Abbreviated Notice of Intent. This latter form may only be used when all three of the following circumstances exist:

- a. the proposed work is within the Buffer Zone, as defined in 310 CMR 10.04, or within Land Subject to Flooding, as defined in 310 CMR 10.57(2) or within the Riverfront Area, as defined in 310 CMR 10.58.
- b. the proposed work will disturb less than 1000 square feet of surface area within 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 license from the Division of Waterways pursuant to M.G.L. c. 91.

2. To establish the extent of bordering vegetated wetland and/or other resource areas on land subject to protection under M.G.L. c. 131, § 40, applicants may use the Abbreviated Notice of Resource Area Delineation for the confirmation of a delineated boundary of bordering vegetated wetlands and/or other resource areas on the site, prior to filing a Notice of Intent for proposed work. Alternatively, the boundary of bordering vegetated wetland or other resource areas may be determined through the filing of a Notice of Intent.

3. To confirm the boundaries of resource areas and certify that the requirements of 310 CMR 10.02(2)(b)2. will be met for activities in the Buffer Zone, applicants shall use the Abbreviated Notice of Resource Area Delineation. When an applicant obtains an Order of Resource Area Delineation for a project eligible for simplified review under 310 CMR 10.02(2)(b)2. that requires concurrence that the stormwater management plan conforms to the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q) and that the requirements of 310 CMR 10.02(2)(b)2. f, g, and h. have been met, the applicant shall submit the stormwater management plans and any subsequent plan revisions to the conservation commission. The conservation commission shall act within 30 days and either concur that the stormwater management plan conforms to the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q) and the requirements of 310 CMR 10.02(2)(b)2.f., g., and h. have been met or not concur, specifying which of the Stormwater Management Standards or other requirements are not met and direct the applicant to file a Request for Determination of Applicability or a Notice of Intent.

## 10.05: continued

(c) Upon receipt of the application materials referred to in 310 CMR 10.05(4)(a), the Department shall issue a file number. The designation of a file number shall not imply that the plans and supporting documents have been judged adequate for the issuance of an Order, but only that copies of the minimum submittal requirements contained in the General Instructions have been filed.

(d) In the event that only a portion of a proposed project or activity lies within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone, and the remainder of the project or activity lies outside those areas, only that portion within those areas must be described in the detail called for by the General Instructions and Form 3 and 4; provided, however, that in such circumstances the Notice of Intent shall also contain a description and calculation of peak flow and estimated water quality characteristics of discharge from a point source (both closed and open channel) when the point of discharge falls within an Area Subject to Protection Under M.G.L. c. 131, § 40 or within the Buffer Zone.

Notwithstanding the foregoing, when the issuing authority has determined that an activity outside the Areas Subject to Protection Under M.G.L. c. 131, § 40 and outside the Buffer Zone has in fact altered an Area Subject to Protection Under M.G.L. c. 131, § 40, it may require such plans, supporting calculations and other documentation as are necessary to describe the entire activity.

(e) The requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee (established under M.G.L. c. 23B, § 5A), said applicant shall be deemed to have applied for all permits obtainable at the time of filing.

(f) If the issuing authority rejects a Notice of Intent because of a failure to obtain or apply for all permits, variances and approvals required by local by-law, it shall specify in writing the permit, variance or approval that has not been applied for. A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority. In the absence of such a ruling, other evidence may be accepted.

(g) A Notice of Intent shall expire where the applicant has failed to diligently pursue the issuance of a Final Order in proceedings under 310 CMR 10.00. A Notice of Intent shall be presumed to have expired two years after the date of filing unless the applicant submits information showing that (a) good cause exists for the delay of proceedings under 310 CMR 10.00; and (b) the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay. No Notice of Intent shall be deemed expired under 310 CMR 10.05 when an adjudicatory hearing is pending and when the applicant has provided all information necessary to continue with the prosecution of the case. Notwithstanding the provisions contained in 310 CMR 10.10, 310 CMR 10.05(4)(g) shall apply to any Notice of Intent whenever filed.

(h) The issuing authority may require that supporting plans and calculations be prepared and stamped by a registered professional engineer (PE) when, in its judgment, the complexity of the proposed work warrants this professional certification. The issuing authority may also require the preparation of supporting materials by other professionals including, but not limited to, registered landscape architect, registered land surveyor, environmental scientist, geologist or hydrologist when in its judgment the complexity of the proposed work warrants the relevant specialized expertise. The issuing authority may require a delineation or a certification under 310 CMR 10.02(2)(b)2. in an Abbreviated Notice of Resource Area Delineation to be performed by a professional with relevant specialized expertise.















































































































































































