



MYSTIC RIVER WATERSHED ASSOCIATION
20 ACADEMY STREET, SUITE 203
ARLINGTON, MA 02476

William Harkins
Office of Budgetary & Legislative Affairs
MA DEP
One Winter, 2d floor
Boston MA 02108

Re: Proposed Changes to 310 CMR: Wetlands Protection Act Regulations

Dear Mr. Harkins:

The Mystic River Watershed Association (MyRWA) is a non-profit membership organization dedicated to preserving and restoring the natural resources of the Mystic River watershed. The watershed includes some or all of 21 municipalities in the Boston metropolitan region.

The Wetlands Protection Act and associated regulations are critical tools in efforts to protect and restore water quality in Massachusetts. MyRWA endorses the Department of Environmental Protection's desire to deploy its resources effectively and efficiently, especially in light of recent severe state budget cuts. **We believe that the proposed changes to the Wetlands Protection Act regulations, as they currently stand, represent a dangerous weakening of the regulatory program, however, and will not achieve the goals DEP is hoping for. Unless significant changes are made, as described below, MyRWA opposes the proposed package of revisions to the regulations.**

COMMENTS ON BUFFER ZONE WAIVER OF REVIEW

Overview

Using expedited review as an incentive to encourage more protective proposals by applicants is a very good idea in concept. The incentives approach has the potential to encourage more protection for wetlands where it can be achieved than could be reasonably imposed in every case. For the incentives approach to achieve that goal, however, the following conditions must apply:

- (1) the higher standard (in this case, no intrusion in the first 50 feet of the buffer) must be permanent, and not subject to later reversal,
- (2) there should not be any loss in environmental protection that would offset the intended gains in protection, and

- (3) the conditions imposed to qualify for the incentive (in this case, the standards that must be met in the 51-100 foot section of the buffer) must be unambiguous and easy to monitor and verify.

The current proposal fails all three of these conditions, as described below.

In addition, the proposed simplified review is not appropriate for many areas where the first 50 feet of the buffer zone has already been degraded by poor past land use decisions, and is not serving as effective protection to the adjacent resource area. The underlying assumption of the proposal is that preserving the existing value of the first 50 feet will guarantee that the buffer zone in its entirety will adequately protect the resource area, even with less Conservation Commission review and oversight. This is simply not the case in many circumstances.

The protection of the first 50 ft of buffer must be permanent.

As the proposed regulation is currently written, applicants could take advantage of the waiver of review for projects in the 51-100 ft buffer area, and later come back with a proposal for the first 50 ft. of the buffer zone. The advisory committee discussed using conservation restrictions to prevent development of the first 50 ft. in perpetuity, as a condition for the waiver. MyRWA opposes any incentive based on protection of the first 50 ft. of buffer unless that area is permanently protected from development.

The regulations must prevent any loss of environmental protection from the buffer zone as a whole.

The current proposal is likely to result in actual reduced protection of resource areas from the 51-100 ft. buffer zone, and not just a simplified review process. The proposed process and conditions do not ensure that adequate standards will be applied in the outer buffer zone. First, as discussed below, the qualitative requirements for stormwater management and erosion and sedimentation control are too ambiguous to be enforced effectively. Second, there are no criteria or requirements for other common buffer zone requirements that ensure protection of resource areas.

Whether additional protection of the first 50 ft. would justify this loss of protection in the outer buffer zone depends on the conditions at each site. MyRWA opposes the waiver of review provision unless additional conditions and standards are applied to the outer buffer zone to ensure that it continues to provide adequate protection to the resource area. The following are examples of conditions MyRWA would recommend: (1) that no waiver be allowed in buffer zones with steep slopes; (2) that there be a limit on the portion of the outer buffer zone that can be impervious; (3) that there be no stockpiling of soil, snow or materials within 100 feet of the resource area; (4) that equipment for fuel storage and refueling operations be located greater than 100 ft. from the limits of the resource area; (5) that there be no underground storage of fuel or other hazardous materials on the property within the buffer zone; (6) that certain information, including a complete construction plan, be submitted to the Conservation Commission and maintained at the site; and (7) that the Conservation Commission be notified before

construction begins. A useful place to start for such a list of requirements is the list of special conditions provided in section 19.3 of the Massachusetts Association of Conservation Commissions' *Environmental Handbook for Massachusetts Conservation Commissioners*. The goal of this conditions list would be to specify standard conditions required to ensure that there is no degradation of the outer buffer zone that would reduce the functioning of the buffer zone overall.

The conditions related to stormwater management and erosion and sedimentation control during construction are too vague. Allowing the buffer waiver based on the applicant's certification of compliance with the state's Stormwater Policy and with erosion and sedimentation controls is not sufficient.

Applicants often assert that their site plans will comply with the state's Stormwater Policy and Conservation Commissions find otherwise. This is especially true for redevelopment projects, when applicants often assert that they are required simply to make some improvement in stormwater management. (In fact, redevelopment sites should meet the requirements for new developments to the maximum extent practicable, which requires that applicants explicitly justify any design that falls short of the standards for new developments.) The proposed rule would shift the burden of proof to Conservation Commissions by requiring that they justify their non-concurrence.

Conservation Commissions may also have a hard time judging whether they concur with the applicants' certification regarding compliance with the Stormwater Policy, depending on what information the applicant is required to provide to obtain an Order of Resource Area Delineation (ORAD). It is hard to imagine judging the adequacy of a stormwater management plan without detailed information on the entire site plan. Without an ability to perform an independent review of the stormwater management plan, there is no way for a Conservation Commission to know whether it concurs with the applicant's certification. Much more information on what applicants will be required to provide, along with copies of the relevant forms, is needed before the comment period on this aspect of the proposed regulations should be closed.

Similarly, whether erosion and sedimentation controls during construction will be adequate is a matter of judgment. This condition should not be stated as a performance standard and subject only to the applicant's certification. As argued below, specific requirements should be imposed as conditions for the waiver of review.

The conditions for qualifying for a waiver of review should be explicit and easily enforced. Waiver of review should not be provided without a comprehensive list of explicit conditions that could easily be monitored and enforced by Conservation Commissions. Otherwise, the proposed regulations put a huge burden on local authorities responsible for enforcing the Wetlands Protection Act. In the event of problems, Commissions would have to make the case that erosion and sedimentation controls are not adequate without any specific list of conditions the applicant is supposed to be complying with. Most likely, it would never be possible to enforce these requirements

unless significant erosion and sedimentation did occur – an after-the-fact approach that is much less protective and effective than prevention of damage in the first place.

Application of a buffer zone waiver of review should be limited to naturally-vegetated sites. Trading off increased protection of the first 50 ft. for reduced review of the outer buffer zone does not make sense where the first 50 ft. is already degraded and is not functioning to protect the resource area. Conservation Commissions' conditions in such cases often require improvements in the buffer zone, to correct poor past practices. Achieving these improvements would not be possible under the proposed regulations. A waiver of review should only be used for sites that have intact, naturally-vegetated buffer zones to begin with.

This proposal will place additional burdens on the municipalities, and will not result in more consistent application of buffer zone requirements across the state. With reduced protection under the Wetlands Protection Act, cities and towns will rely more on local ordinances and bylaws to protect the functioning of buffer zones. This is likely to result in less, not more, consistent requirements across the state.

This proposal will increase incentives to use 40B provisions to avoid local ordinances and bylaws. As currently written, the proposed waiver of review will increase incentives for developers to propose 40B projects. These projects are subject to less review under local ordinances and bylaws, leaving the Wetlands Protection Act provisions as the primary safeguard against the environmental impacts of these projects. An increase in such projects would no doubt result in more need for state review of municipal challenges to 40B projects, offsetting the hoped-for savings in DEP permit reviews.

There are other ways to reduce unnecessary review by DEP.

MyRWA sympathizes with the DEP's need to use its limited resources effectively to prevent further wetlands loss, and recognizes that reducing unnecessary or frivolous appeals under the Wetlands Protection Act may help achieve that goal. The proposed changes to the procedures for filing appeals should go a long way toward reducing the problem of frivolous appeals.

In addition, the advisory committee originally identified the need to address the lack of clear standards for work in the buffer zone as way to reduce the workload of the Wetlands Program. There are other ways to make buffer zone standards clearer, and thus reduce appeals. More guidance is needed on specific conditions that are needed to protect buffer zone functioning, based on recent research on the role of buffer zones. This guidance would help both applicants and Conservation Commissions understand current best practices and would reduce disputes about buffer zone requirements.

MyRWA concurs with other comments submitted by the Massachusetts Association of Conservation Commissions (MACC). In particular, MyRWA agrees with the MACC comments on:

- Support for the narrative language in the Preface and at 10.53(1).
- Application of the 10.53(1) language to coastal regulations as well.

- The need for a DEP tracking system and review of the results.
- Conservation Commission access rights prior to and during construction of waiver projects.
- Procedures to prevent segmentation of projects.

Summary: MyRWA opposes the proposed Buffer Zone Waiver of Review provisions, without substantial changes to ensure that buffer zones will continue to provide adequate protection to resource areas.

COMMENTS ON EXPANSION OF MINOR ACTIVITIES

MyRWA strongly opposes the proposed additions to the list of minor activities that could be undertaken in the Riverfront Protection Area or on Land Subject to Flooding without a review or permit. Any activities exempt from permits should be truly minor. **No activities should be allowed in Land Subject to Flooding without a permit**, for reasons presented in MACC's comments. Minor activities in the Riverfront Protection Area should include a **one-time** exemption for projects that **do not involve any excavation or foundation work** up to **no more than 10 percent** of the area of the pre-existing structure. Without these restrictions, applicants could keep returning for significant additions involving major construction equal to 20 percent of an ever-growing structure. The provision should also be **limited to single-family residential structures**, not all residential structures, which can include very large buildings. Furthermore, the exemption **should not apply in densely-developed areas** with a 25 ft. Riverfront Areas, which cannot afford to have additional activity in the very limited riverfront areas without careful oversight. Finally, this exemption **should continue to be limited to houses in existence on August 7, 1996**. Any new exemptions beyond these limited cases should subject to more extensive evaluation and public comment.

Summary: MyRWA opposes the expansion of the exemption for "minor activities" in the proposed form. Any expansion should apply only to truly minor activities.

COMMENT ON INCREASED FEES FOR REQUESTS FOR A SUPERSEDING ORDER OF CONDITIONS

MyRWA opposes increasing the filing fee for Requests for Superseding Order of Condition of \$500. This fee would be a significant burden on many citizen groups and abutters in the Mystic River Watershed. Creating this barrier to filing a request presents an environmental justice problem, contrary to the state's Environmental Justice Policy seeking meaningful participation for all citizens in the state's environmental decision-making. MyRWA proposes a \$100 filing fee for Requests for Superseding Order of Condition.

MOUTH OF COASTAL RIVER

MyRWA questions the location of the Mouth of the River delineation for the Mystic River and Chelsea Creek (also known as Chelsea River). The line on the proposed map would eliminate Riverfront Protection Act jurisdiction for substantial portions of the

waterfront of East Boston and Charlestown. The delineation should be made farther south of the proposed line, where the banks are no longer parallel. MyRWA requests that more time be allowed for comment on the Mouth of the River delineations, and that DEP provide an explanation of the proposed delineations on each of the current maps – i.e. that DEP state which of the criteria support choice of the proposed location in each case. It is not clear to MyRWA why the line was proposed as it is, based on our reading of Criteria A through F.

COMMENTS ON OTHER PROVISIONS

Beyond our specific comments, MyRWA concurs with the comments submitted by MACC on other aspects of the proposed regulations, including MACC’s comments on Abutter Notification, the Order of Resource Area Delineation Time Extensions, Appeals and Adjudicatory Hearings, Standing, Variance Appeals, Site Visits on Appeals to DEP, Wetland Fees, and sequencing for Discretionary Fills.

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MyRWA applauds the DEP's efforts to create positive incentives for better wetlands protection, and to find ways to make the Wetlands Protection Act program more efficient and effective for all involved. As indicated in these comments, MyRWA opposes a number of the proposed revisions in their current form and (along with MACC) supports others. We urge DEP to repropose the regulations, after considering MyRWA’s and others’ comments.

Thank you for the opportunity to comment on this important matter.

Sincerely,

Nancy Hammett
Executive Director