

Summary of Proposed Amendments
310 CMR 10.00: Massachusetts Wetlands Protection Regulations
(November 2019)

The wetlands regulations at 310 CMR 10.00 establish procedures and standards for orders of conditions issued by local conservation commissions and MassDEP for work proposed in and around wetlands, pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40 (“Act”). MassDEP is proposing three minor regulation amendments. The first two amendments are in response to two recent adjudicatory appeal decisions regarding delivery of Orders of Conditions and Determinations of Applicability to MassDEP, and a clarification regarding abutter notice. The third amendment updates the wetlands plants species list.

Summary of Proposed Revisions.

Two recent adjudicatory appeals decisions highlighted issues with notification procedures within the wetlands regulations.

- o The first appeal highlighted a recurring problem for the Department when conservation commissions send copies of their decisions to the Department by mail. Delivery by regular mail does not provide proof that Orders and Determinations have been received by the Department and can put the Department in the position of learning about an Order after its deadline to appeal the Order has passed, effectively denying the Department its statutory opportunity to appeal. To resolve this issue, MassDEP proposes to amend 310 CMR 10.05(3)(b) and (6)(e) to require conservation commissions to submit Orders and Determinations to the Department through eDEP, or if submittal through eDEP is not possible, by certified mail, return receipt requested. The regulation also requires conservation commissions at the same time to issue the Orders or Determinations to the applicant by certified mail, return receipt requested to ensure proof of delivery or to deliver the Order or Determination by hand. The revision provides that if the conservation commission should, despite these requirements, issue an Order or Determination on different dates, the later date is the effective date of issuance. MassDEP proposes to clarify that email submittals are not acceptable. MassDEP proposes to amend the definition of “Date of Issuance” in 310 CMR 10.04 to align it with the new delivery requirements, and to clarify issuance of the Department’s superseding orders and determinations.
- o The second appeal revealed an ambiguity in the regulations as to whether an abutter who receives notice of a proposed project (Notice of Intent or NOI) is entitled to request Department action (*i.e.*, appeal) on a subsequent order issued for the project. MassDEP proposes to address this ambiguity by adding a sentence at 310 CMR 10.05(4)(a) to clarify that receiving notice of an NOI as an abutter does not automatically confer standing on that person to appeal orders regarding the project. The clarification includes a cross-reference to the part of the regulations that explain who has such standing. This clarification has no impact on the implementation of the wetlands regulations and does not change the status quo for either municipalities or the public.

Finally, the Department proposes to amend an outdated reference at 310 CMR 10.55(2)(c) to the National Wetland Plant List, which was published in 1988 by the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers. Titled the National List of Plant Species That Occur in Wetlands: Northeast (Region1), the list has been amended several times since 1988 to reflect changing nomenclature, modify the wetland indicator status, and remove species listed as upland. The most recent plant list, titled State of Massachusetts 2016 Wetland Plant List (published by the U.S. Army Corps of Engineers, 2016), includes region-specific information and is the authoritative list used by local, state, and federal entities and other stakeholders. Adoption of the 2016 national plant list will align the wetland regulations with current science, create consistent application of wetland regulations, remove confusion among local conservation commissions, state and federal agencies, the regulated community, and the public, while maintaining the plant species referenced in the Act.

Schedule. The Department plans to publish the proposed changes for public comment on November 29, 2019. Public hearings on the proposed regulations, under the provisions of M.G.L. Chapter 30, will be conducted at MassDEP's Central Regional Office in Worcester on January 8, 2020, and Boston Headquarters on January 9, 2020.