



Department of Environmental Protection

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Wetlands Program Guidelines on Massachusetts Wetlands Protection Act Provisions Regarding the Application of Herbicides Along Rail Lines

Effective Date: June 13, 2022

DWW Guidelines #: 2022-01

Program Applicability: All MassDEP Bureau of Water Resources, Division of Wetlands and Waterways, Boston and Region Wetlands Program Staff, Municipal Conservation Commissions, and Rights-of-Way Vegetation Management Applicants.

Supersedes Guidance: None

Approved by: Stephanie Moura, Director – Division of Wetlands and Waterways

Purpose

These guidelines set forth MassDEP's mapping standards for herbicide use on Rights of Way Management projects associated with the Department of Agricultural Resources – Pesticide Bureau.

Statutory and Regulatory Background

M.G.L. c. 131, § 40: Wetlands Protection Act and 310 CMR 10.00.

M.G.L. c. 132B: Massachusetts Pesticide Control Act and 333 CMR 11.00

Background

These guidelines are being provided to the regulated community proposing to apply herbicides within railroad rights of way that are subject to regulation under the Massachusetts Wetlands Protection Act ("Act"), MGL c. 131, § 40, and to Conservation Commissions. The Massachusetts Wetlands Protection Regulations ("Regulations") at 310 CMR 10.00 include a presumption concerning the application of herbicides within the Buffer Zone resource area along rail lines.

Regulatory Standards

Three specific regulatory provisions are relevant to these guidelines:

1. 310 CMR 10.03(6)(b) addresses the presumption concerning application of herbicides:

“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.”

2. 310 CMR 10.05(3)(a)2. provides that:

“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: *Rights of Way Management*, 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. 310 CMR 10.58(6) provides an additional exemption for the application of herbicides in Riverfront Area (but in no other resource areas):

“Notwithstanding the Provisions of 310 CMR 10.58(1) through (5), Certain Activities or Areas Are ... Exempted from Requirements for the Riverfront Area:

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

in existing conditions which will remove, fill, dredge or alter the riverfront area are subject to 310 CMR 10.58, except that the replacement within the same footprint of structures destroyed by fire or other casualty is not subject to 310 CMR 10.58.”

Wetland Mapping Criteria for Vegetation Management Plans

Since the adoption of the Rights of Way management provisions, significant advances have occurred in GIS mapping technology and the adoption of wetland delineation data layers. In accordance with 310 CMR 10.05(3)(a)2., MassDEP is clarifying the best mapping standards for confirming the boundaries of resource areas and the Buffer Zone for filings associated with the application of herbicides within railroad rights of way. These guidelines are needed since many Requests for Determination of Applicability (RDA) submittals are incomplete when filed (e.g., lack maps depicting resource areas and Buffer Zone), and some Conservation Commissions have had difficulty accessing properties on which the work is proposed to confirm wetland resource area boundaries. This policy clarifies the plan submittal standards that will enable the issuing authority to undertake a delineation, the proper boxes to check on the RDA form (WPA Form 1), and what can typically be expected in a Determination of Applicability (WPA Form 2).

The USGS Quadrangle Sheets historically accepted by MassDEP and Conservation Commissions to comply with 310 CMR 10.05(3)(a)2. are not adequate plans for confirmation of the boundaries of wetland resource areas for the purposes of applying herbicides within the Buffer Zone pursuant to a Vegetation Management Plan because they do not adequately define the wetlands resource areas. As of the date of this guidance, MassDEP requests that Applicants adhere to the following guidelines:

- RDAs filed pursuant to 310 CMR 10.03(6)(b) should include plans at a scale of 1" =200' which clearly show the approximate resource area boundaries as informed by and interpreted from aerial photography and MassGIS.
- Maps should include the rail line, spray zones, and the following data layers:
 - “DEP Wetlands Detailed”;
 - “DEP Wetland Linear Features”;
 - “DEP Wetlands Hydrologic Connections”;
 - “DEP Wetlands Labels”;
 - “DEP Wetlands with Outlines”;
 - “[FEMA] Q3 Flood Zones (from Paper FIRMs, All Available Areas)”; and
 - “NHESP Estimated habitats of Rare Wildlife”
- The GIS-derived boundaries depicted on maps should include all resource areas defined within the regulations, as these invariably encompass terrestrial features, not just what are traditionally considered “wetlands and waterways” (e.g., Coastal Dune and Bordering Land Subject to Flooding).
- Resource areas derived via the desktop exercise outlined above should be field verified prior to submittal of an RDA, with any deletions or additions of resource areas supported by a brief narrative or plan notations.

- MassDEP acknowledges that the boundaries of Riverfront Area are not available on MassGIS. The depiction of this resource area on the plans is not required due to the exemption found in 310 CMR 10.58(6).

Proper Completion of WPA Form 1

The RDA should state: “The work proposed will be 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, and the Determination received will be submitted to the Department of Food and Agriculture as part of the Vegetation Management Plan.”

In addition, Applicants should check the following boxes on an RDA:

- Box b. whether the boundaries of resource area(s) depicted on plan(s) and/or map(s) referenced below are accurately delineated;

AND [if a subset of work is to occur in Riverfront Area but no other resource areas]

- Box c. whether the work depicted on plan(s) referenced below is subject to the Wetlands Protection Act:

Applicants should be aware that a Negative Determination is not required to conduct Vegetation Management Work provided the Determination confirms the resource area boundaries as accurate, and provided the project complies with the regulations at 310 CMR 10.05(3)(a)2. A typical Determination of Applicability (DOA) may have the following boxes checked:

- Box 2a. The boundary delineations of the following resource areas described on the referenced plan(s) are confirmed as accurate. Therefore, the resource area boundaries confirmed in this Determination are binding as to all decisions rendered pursuant to the Wetlands Protection Act and its regulations regarding such boundaries for as long as this Determination is valid.

OR

- Box 2b. The boundaries of resource areas listed below are not confirmed by this Determination, regardless of whether such boundaries are contained on the plans attached to this Determination or to the Request for Determination.

AND [if a subset of work is to occur in Riverfront Area but no other resource areas]:

- Box 5. The area described in the Request is subject to protection under the Act. Since the work described therein meets the requirements for the following

exemption, as specified in the Act and the regulations, no Notice of Intent is required.

Site Access for Commissions and MassDEP

Additionally, rail operators are advised that accommodations (training, transportation, etc.) must be provided to allow Conservation Commission members and their staff to inspect the rail line rights of way as part of the application process. Similar accommodations shall be made for Department staff if the DOA is appealed.

A handwritten signature in blue ink, appearing to read "Stephanie Moura".

/Signed/
Stephanie Moura
Director
Wetlands and Waterways Division