

## **Revised Wetlands Regulations Streamline Procedures for Buffer Zone Area Beyond 50 Feet from Wetlands and Limit Appeal Rights**

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**T**he Massachusetts Department of Environmental Protection (“DEP”) has revised its wetlands regulations intended to streamline the process for certain work which is unlikely to have an adverse environmental effect and to limit appeal rights by opponents who may be seeking to delay a project. Both of these changes are welcome changes for developers. These changes will also allow DEP and local Conservation Commissions to direct their resources to more pressing areas, such as enforcement. The regulations are effective March 1, 2005. However, the changes regarding the streamlined process seem to have been adopted only on an experimental basis, since they are set to expire on March 1, 2008.

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### **Procedures Simplified for Buffer Zone Work Beyond 50 Feet from Resource Area**

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Since 1999, DEP has had a Policy in effect under which, based on DEP’s experience with activities in the buffer zone of wetlands resource areas, created a rebuttable “presumption” that projects occurring exclusively within the buffer zone which retained a 50-foot wide area of undisturbed vegetation along the wetlands resource area and met certain other criteria would be allowed to proceed under a Negative Determination of Applicability. This meant that the projects were required to file a Request for Determination of Applicability with a local Conservation Commission, but that the Conservation Commission would issue a determination that the proposed activity was unlikely to alter a wetlands resource. The “buffer zone” for most wetlands resource areas is the area extending 100 feet from the wetlands resources.

The new Regulations essentially codify the Policy as a formal regulation, establish standards for work in the buffer zone and simplify the procedure. The new procedure for work in the area 50-100 feet from the wetlands resources will now proceed according to the following steps:

- ***The proponent will submit an Abbreviated Notice of Resource Area Delineation, rather than a Request for Negative Determination of Applicability. In order to qualify for this new procedure, the applicant must show that the work meets the following criteria: (1) the work must be more than 50 feet away from wetlands resource areas; (2) the work must incorporate stormwater management; (3) the entire buffer zone must not border sensitive areas called Outstanding Resource Waters and must not contain estimated wildlife habitat for endangered species; and (4) the work must provide erosion control during construction.***
- ***Abutters are notified of the proposed Notice of Resource Area Delineation.***
- ***The Conservation Commission issues an Order of Resource Area Delineation which is recorded. The Order is subject to appeal as is also currently the case for all orders issued by a conservation commission. The Order will be valid for three years, and may be extended for up to an additional three years.***

Work which does not qualify for the new procedure will continue to be subject to the older process of the filing of a Determination of Applicability to clarify jurisdiction. In addition, the new regulations clarify that the potential for adverse effect on wetlands will vary with the extent of the work, the proximity to the resource area, and the characteristics of the buffer zone such as the presence of steep slopes.

The new procedures for an Abbreviated Notice of Resource Area Delineation, however, has only been adopted for a three year period, and will not apply to applications filed after March 1, 2008. Presumably, DEP will evaluate the experience of local Conservation Commissions during the three year period until March 1, 2008 in deciding whether to continue the streamlined procedure.

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### **Limitations Imposed on Adjudicatory Appeal Rights**

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The previous regulations extended adjudicatory appeal rights to all abutters as well as to ten citizen groups, whether or not they previously were a participant in the administrative proceedings. Since the adjudicatory appeal process is often lengthy, this created, in the opinion of many developers, an avenue for opponents to delay projects in cases which developers felt lacked true environmental concerns.

The new regulations limit adjudicatory appeal rights to opponents who can show that they are particularly aggrieved and who participated previously in the permit proceedings and to groups of ten residents who also participated previously in the permit proceedings. This revision will limit adjudicatory appeals to those who submitted written comments to the Conservation Commission during the hearing process and to those who submitted written comments to DEP before a Superseding Order or Determination is issued. However, although this change in the regulations will eliminate the "Johnny come latelys" from the adjudicatory appeal process, the ability to appeal a determination of the local Conservation Commission to DEP through a request to issue a Superseding Order or Determination is not being modified. Therefore, an abutter and any ten residents of a municipality will still be able to file a request with DEP to issue a Superseding Order or Determination, even if they did not participate in the hearing process itself.

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