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**How to Avoid Getting Stuck in the Mud:
Subtleties in Wetlands Permitting**


*Association of Massachusetts Wetland Scientists
February 17, 2011*

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Presentation Overview


- **Procedural Technicalities**
- **Jurisdictional Nuances**
- **A Note on Federal Jurisdiction**

Disclaimer!




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Background




- Wetland Scientist with BSC (9+ years)
- Served as an Expert Witness in several matters
- Cross-exam by (current) DEP Commissioner Kimmell and office debates on Riverfront Area jurisdiction led me to law school



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Sources of Information

- MassDEP website
<http://www.mass.gov/dep/service/appeals.htm#decisions>
- Landlaw – DEP Reporter
- Social Law Library / Westlaw



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Field Data Forms

- Do I really need to fill out these forms?
- At least one DEP decision has held that failure to submit data forms was part of basis for insufficient information denial (310 CMR 10.05(6)(c))



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Field Data Forms (cont.)

- Data Forms v. Narrative (or other description)
- Data Forms are not necessarily better documentation, but they are recommended by the Handbook, which was adopted by Policy
- Law
 - Regulations
 - Policy / Guidance
 - Anything else!

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Denials


Denied because:

- the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. A description of the performance standards which the proposed work cannot meet is attached to this Order.
- the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).
- Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) _____ a linear feet

- Critical distinction between denial on merits and denial based on insufficient information
- Major implications on DEP's review of a Request for Superseding Order – 310 CMR 10.05(7)(h)
- Sufficient information is not the same as minimum submittal requirements

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ORAD Expiration



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 4B – Order of Resource Area Delineation
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

- If I file an NOI prior to the expiration of an ORAD, is the delineation still "fixed"?
- No – ORAD expires after 3 years. If an Order of Conditions has not issued by this expiration, the delineation could be subject to challenge
- But...(based on one decision) burden could shift to issuing authority (or third party) to prove that the delineation is no longer accurate

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Limited Projects

7b. Is any portion of the proposed activity eligible to be treated as a limited project subject to 310 CMR 10.24 (coastal) or 310 CMR 10.53 (inland)?

1 Yes No If yes, describe which limited project applies to this project: _____

2 Limited Project _____


- Limited projects are different for coastal/inland resource areas
- On NOI form, applicability of limited project provision should be listed, even if (in your opinion) it is not relevant/determinative
- "Notwithstanding the provisions of" – applies specifically to Resource Area performance standards
- Application to work in buffer zone; stormwater standards?



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Segmentation

- Recent DEP Decision
(In the Matter of Marrette & Sons, Inc./Mark Rioux)
- 5000 s.f. threshold applies to an Order of Conditions project; not a site
- It is possible to have multiple projects on a site that impact >5000 s.f.
- Compliance with a deed restriction issued pursuant to 401 WQC regulations is not an issue for adjudication under WPA
- MEPA/401 implications may arise
- Also, Commission/DEP discretion needs to be considered




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Coastal v. Freshwater




- Salt Marsh or BVW?



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Coastal v. Freshwater (cont.)


- Regulations – black line distinction between coastal and inland Resource Areas
- Reality – lots of transition areas
- 2010 DEP decision (*In the Matter of John Van Loan*) has very interesting implications:
 - Salinity of 0.5 ppt or less is freshwater
 - Spartina* is "dominant" in salt marshes in general; not specifically at a given site
 - Would does this mean for coastal "BVW's"?



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Coastal v. Freshwater (cont.)

- Riverfront Area – Significant debate in 97-98 about the mouth of river
 - No perfect scientific solution
 - Line on maps was selected as being only feasible means of implementation
- BLSF v. LSCSF
 - Some potential concerns about interpretation
 - Informal guidance: first restriction
 - Implications are significant due to lack of performance standards for LSCSF




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Bank




- 2010 SJC Decision
- Ten Local Citizen Group & another vs. New England Wind, LLC, & another, 457 Mass 222 (2010)
- Impact “on” Bank analyzed for span crossings of intermittent streams
- *Massachusetts River and Stream Crossing Standards* were key focus area



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Bank (cont.)

- Decisions address the calculation of Bank impacts (linear foot measurement along 1 or 2 banks)
- “Final” word on presence of LUW for intermittent streams?
- Grey area: How do you classify a stream that runs dry 5 out of 10 years?



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BVW – Altered Wetlands




- What to do when flagging historically altered areas?



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BVW – Altered Wetlands (cont.)


- Interesting decisions in 2009/2010 (*In the Matter of Symes Development*) discussed jurisdictional questions about a historically altered BVW
- Handbook – recommends use of hydric soils as an indicator; however, this is useful for areas where vegetation is altered
- What to do when vegetation, soils, and hydrology have been altered?
- Recommended decision asserted that regs require delineation of altered wetlands regardless of when alteration occurred
- Reviewed age of trees; dates of enactment as part of analysis



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BVW – Altered Wetlands (cont.)



- Final decision affirmed that delineation should have included historically altered wetlands; however, it did not adopt the analysis or conclusion that regs require delineation of altered wetlands regardless of date of alteration
- Altered wetlands are still an area of uncertainty
- Should a wetland scientist be responsible for examining historic filling, even if current conditions do not support wetland veg/soils/hydrology?
- Considerations beyond just date of enactment of WPA – reg dates, statute of limitations, laches, ownership changes
- Enforcement responsibility/roles



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Stormwater BVWs


- 2010 Decision (*In the Matter of Pyramid Mall of Hadley Newco, LLC*) determined that detention basis was a regulated BVW
- Drop inlet outfall structure is functional equivalent of a waterfall
- Stream starting as an artificial structure is still a stream



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Stormwater BVWs (cont.)


- Regulations:
 - Post 2008 systems do not create new Areas Subject to Protection or Buffer Zones
 - Maintenance of certain stormwater systems is not subject to regulation
 - Other work that may affect a stormwater system may be permitted through OOC/DOA
- SW Handbook:
 - Vol. 1, Ch 2: Addresses jurisdiction of post-2008 systems (“...the Wetlands Regulations, 310 CMR 10.02(2)(d)[sic], have been modified to provide that the installation of stormwater management systems designed and constructed on or after January 2, 2008 in accordance with the Stormwater Management Standards do not create any additional Wetland Resource Area or Buffer Zone.”)



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Stormwater BVWs (cont.)


- Regulation relating to pre-2008 systems should be clarified
- May be opportunities to retrofit existing systems to function better using LID technologies; should not require same level of review as other resource area alterations
- Systems constructed in the 80s/90s/early 00s (if constructed in uplands) should not by themselves create new jurisdiction



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A Brief Note on Federal Jurisdiction

- 2010 Decision from Delaware provides a good summary of Post-*Rapanos* decisions by federal courts
- Important to be familiar with the current guidance pertaining to the 2 tests for jurisdiction
- New guidance in the works?



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Questions/Comments?



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