



Buzzards Bay Project
National Estuary Program

Eric McLaughlin, Chairman
Falmouth Conservation Commission
59 Town Hall Square
Falmouth, MA 02540

August 24, 2004

RE: principles of RDA filings under the Wetlands Protection Act

Mr. McLaughlin:

During the Conservation Commission meeting on Wednesday August 18, it became apparent there were certain issues relating to the Buzzards Bay Project's filing of a Request for Determination of Applicability (RDA) under the Massachusetts Wetland Protection Act, which caused confusion among some of the Commission members. Consequently, I wish to summarize important aspects of the RDA process that may have a bearing on some of the policies adopted by the Falmouth Conservation Commission during their meetings.

The Buzzards Bay Project National Estuary Program filed an RDA under the state Wetlands Protection Act, and not under the local wetlands bylaw. This means that none of the rules of your local bylaw apply. It also means that your \$35 bylaw fee does not apply. There is no fee for submitting an RDA under the state law.

Anyone can file an RDA under the Massachusetts Wetlands Protection Act. They do not have to be the owner, or even a resident of the town. The Conservation Commission must respond to an RDA, irrespective of who submitted it, or for what reasons.

An RDA serves two main functions. First, it is used to enable owners to determine if a planned activity requires the filing of a wetlands permit (a "Notice of Intent"). Second, the RDA can also be used by abutters or any other person, to find out if an activity they have observed requires a wetland permit, or an after-the-fact filing of a permit. That is to say, this is one mechanism for citizens who observe apparent wetland violations, to bring it to the attention of a Conservation Commission. (Of course, in the case of overt wetland violations, citizens should immediately call both the Massachusetts Environmental Police at 888-VIOLATE and the Falmouth Conservation Agent to report the activity.)

The RDA is part of your "public meeting", and is not a "public hearing." This means that the Commission can preclude the public from speaking on the RDA filing if you desire, and this appears to be your policy. The Commission can also adopt a policy of allowing the applicant only 5 minutes to discuss their application as you have done.

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However, the Falmouth Conservation Commission has also adopted a policy of not allowing the applicant to speak if they do not have the permission of the property owner. In our opinion, this is poor public policy. This is because the person filing an RDA is only asking the Conservation Commission if the activity they have observed requires a wetland permit. It is a yes or no decision. Only two governmental bodies can make that determination in Massachusetts. They are the municipal Conservation Commission and the Massachusetts Department of Environmental Protection, if your decision is appealed. To deny the person who observes an apparent wetland violation a voice undermines the intent of the RDA process.

Furthermore, the Falmouth Conservation Commission's policy of encouraging the RDA applicant to develop a resolution with the owner or the person causing the wetlands disturbance is wholly inappropriate. First, the person conducting an activity will never agree to take a course of action to remedy a problem unless the Conservation Commission first decides the action was a violation of the Wetlands Protection Act. Second, in most cases, the applicant has neither the knowledge nor the expertise to suggest a solution compliant with state and local wetland regulations.

There also seemed to be confusion as to who should be the subject of the RDA. An RDA is filed for the activity that may or did cause alterations to wetlands. The "owner of the property" on the RDA form is the owner of the property where the activity in question takes place, not the owner of the wetlands if the impacts were "off site." On Gifford Street, the activity that caused the wetland alteration was the work by the Falmouth DPW on the town-owned road layout. The Town of Falmouth is the property owner. The fact that the wetlands are owned by Lawrence-Lynch, or anyone else, has no bearing on the RDA. The question asked by the Buzzards Bay Project's RDA filing is whether the wetland alterations caused by the Falmouth DPW work requires an after-the-fact Notice of Intent filing.

If an after-the-fact filing is required, the Conservation Commission should issue an Enforcement Order with a timeline to complete a Notice of Intent. The Enforcement Order is issued against the person who undertook the activity causing the wetland degradation, not the inadvertent property owner.

The importance of the points above can be illustrated by the following hypothetical example.

Suppose the owner of a shopping plaza expanded their parking lot and redirected flow to the boundary of their parcel. For this case, we can presume they were 100 feet from a wetland and the plaza owner did not file for a wetlands permit. Let us further suppose that the stormwater is causing erosion and a gully down a hill and into the pond of a neighbor. The neighbor could file an RDA with the Conservation Commission to determine if an after-the-fact filing is required for the unpermitted wetland alteration. The Commission should not ask the abutter to meet with the shopping plaza owner to find a resolution to the problem. The Commission need only make a decision as to whether a wetlands permit must now be filed, and if so, issue an enforcement order and direct a remedy consistent with the state and local wetland regulations.

In this hypothetical example, there are provisions of the state Wetlands Protection Act [310 CMR 10.02 (2) (c)] that allow the Conservation Commission to take enforcement action against the shopping plaza owner, even though the activity was outside the 100-foot wetlands buffer zone. The enforcement order is written against the shopping plaza owner, not against the resident with the gully in their yard. Generally, property owners impacted by a neighboring activity are more than agreeable to have the problem rectified and do not require an enforcement order.

The enforcement responsibility of the Commission can be illustrated by another example. If a citizen calls the police to report suspicious activity on a property next door, the police do not tell that citizen to go investigate the problem and come to an understanding with the person conducting the suspicious activity. Instead, the police investigate the activity, determine if there is any illegal activity, and take enforcement action if appropriate. Conservation Commissions have a similar responsibility. Sometimes you must act as the “wetlands police.” You must interpret the state and local wetland laws and determine if enforcement action is necessary.

I hope you and the other Conservation Commissioners find this information helpful.

Sincerely,

Joseph E. Costa, PhD
Executive Director

cc. Falmouth Board of Selectmen
Bill Owen, Falmouth DPW
Steve Pisch, Falmouth Engineering Department