



Buzzards Bay Project

National Estuary Program

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

August 2, 2004

RE: Failure to obtain necessary permits for Gifford Street roadwork, BBP request for determination, and Falmouth Wetland Regulations permit application policies for the DPW

Mr. McLaughlin:

During a visit to the Conservation Commission office in June, to discuss the wetland regulation brochures the Buzzards Bay Project was preparing for the Commission, I inquired with Mark Kasprzyk about the road construction by the Falmouth Department of Public Works on Gifford Street. I was specifically interested in the work north of Jones Road, alongside what is called Sols Pond on topographic maps, abutting the Woodbriar Golf Course property diagonally across from the Falmouth Department of Public Works Facility, and across the Lawrence Lynch Corporation sand and gravel operation (Figures 1 and 2). The road surface on Gifford Street had been pulverized and mixed with the unconsolidated base materials¹. Furthermore, the road appeared to have been moved westward, widened, and a new sidewalk was installed along the bank of a pond, with some loss of vegetation (one to two feet) along the edge of the pond bank.

I expressed concerns about the roadwork to Mr. Kasprzyk because the road had remained a loose mixture of gravel, soil and road debris for several weeks. Furthermore, heavy rains had washed these sediments and silt into the pond during heavy rains at the end of May 2004. This activity was apparently observed by Conservation Commission staff as well, and attached are May 28 photographs that I obtained last week from the Conservation Commission office (Figures 3-12). I observed the pond had become milky gray in its entirety at the time. In July, when the pond levels had dropped, I observed noticeable sediment “deltas” at the ends of three pipes from Gifford Street (Figures 13-15), opposite the still unfinished road grates (Figure 16).

¹ The Gifford Street work extended nearly 2 miles between Jones Road and Brick Kiln Road. The contributing drainage area to Sols Pond from Gifford Street appears to be at least several hundred feet to 2000 feet of Gifford Street depending upon underground drainage systems present.



It also appeared that hay bales and a silt curtain were installed *after* the heavy rains and erosion occurred at the site. Mr. Kasprzyk confirmed that Conservation Commission Administrator Margaret Emslie requested the town DPW to install the hay bales and silt curtain after the storm runoff occurred. I have since learned that when the road surface was pulverized, the catch basins may have been sealed or blocked at the time of the rain². However, when rainwater began accumulating on the road, the bank to the pond, which forms a berm to the road, was purportedly breached by one of the town's contractors working with the DPW.

I asked Mr. Kasprzyk for a copy of the wetland permit and order of condition issued for the roadwork. Mr. Kasprzyk indicated that he believed the work was done under a "blanket" order of condition for "road maintenance" issued to the DPW by the Conservation Commission. When I asked to see the "blanket" order of conditions, Mr. Kasprzyk provided me with a 1994 order of conditions. This 1994 order appeared to have been renewed for several years, but Mr. Kasprzyk could not find any recent renewals.

On July 26, I returned and met Ms. Emslie to deliver the brochures, and further inquired about the permit for the Gifford Street work. She informed me that in fact the blanket road maintenance permit for the DPW had in fact not been renewed for several years, and no permit was issued for the roadwork on Gifford Street, and no plans were submitted to the Conservation Commission.

When I further inquired as to DPW activities, it became apparent that Falmouth DPW seldom filed for any state wetland permits (or even Requests for Determinations) for road activity, and only seldom received even administrative orders under the local wetlands bylaw. This problem appears to have arisen because of past questionable policies adopted by the town with respect to the state and local Wetland Regulations, and exacerbated by the adoption of a flawed blanket "road maintenance" permit issued to the DPW in the 1990s.

The failure of the DPW to file a permit for this project contributed to the observed wetland impacts. As part of the permit process, engineering designs for this project, an engineer stamped site plan would have been prepared that included surveyed property boundaries, flagged wetland boundaries, stormwater designs and treatments to meet the required 80% sediment and suspended solids removal to the pond required by the state, or the more stringent requirements required under the town bylaw³. Construction best management practices would have also been required, which might have include the use of silt socks in catch basins, which would have avoided the street flooding and breaching of the pond bank. However, apparently none of these activities were performed as required under the State Wetlands Protection Act or Town bylaw.

Below I explicitly address each of the policy issues that the town should address.

² Purportedly the basins were filled with sediments and non-operating, although July photographs (Figure 13 and 14) by the Buzzards Bay Project show both old and new sediment accumulations in front of the discharge pipes.

³ Because of the close proximity of this road to the town DPW facility, and Lawrence Lynch sand and gravel operation, it is subject to high sediment loads. Stormwater treatment at this site will likely require a combination of swirl separators followed by infiltration. Leaching catch basin would quickly fail at this site.

Flawed Repair Work Blanket Permit

There is no provision in either federal, state, local wetland laws and regulations to issue a “blanket permit” for unknown unspecified future work at unspecified locations. We are unaware of any municipal Conservation Commission in the area having issued such a permit. Such a permit violates two fundamental tenants of the government permitting process. First, projects are always site and project specific, and must involve the review of specific designs and plans, which includes property boundaries and wetland delineation. These designs and plans are the documents that must be reviewed. In a 2003 legal opinion by Town Counsel Frank Duffy Jr. to DPW director William Owens on January 31, 2003 about the Falmouth DPW’s road maintenance Order of Conditions, Mr. Duffy correctly notes that the Order of Conditions must identify a locus, plan or recordable entity (Memorandum attached, see item 1⁴). A “blanket” road maintenance Order of Conditions is not recordable because it does not identify a particular site or project⁵.

The second fundamental principal undermined by a blanket permit is that it denies the public and abutters the right to know about and comment upon a project. The state regulations create an unbiased public process that enables appeals of determinations by abutters or ten citizens in the town. The blanket permit undermines the public comment and appeal process. There is always the potential that the conservation commission could make an inappropriate decision, thus without an appeals process or public hearings, some wetlands may not receive adequate protection.

Apparently the Town recognized in 2001 or 2002 that there was no legal basis for such a “blanket” permit. Therefore, it appears that none of the work by the Falmouth DPW between 1994 and 2001 complied with permit filing requirements under the Massachusetts Wetlands Protection Act. Moreover, the permit was renewed in one year (2000 or 2001) despite the fact that it had expired. This is in violation of the regulations, and DEP’s website is quite explicit that expired permits cannot be extended.

More important than whether or not permits were obtained for these projects is the fact that the Conservation Commission and its staff were denied the opportunity to review engineering designs for stormwater treatment. Therefore it is not apparent if Falmouth DPW roadway projects during the past decade have complied with applicable state and local stormwater treatment requirements. Considering that Falmouth faces many stormwater related water problems like shellfish bed closures, and sediment accumulation in freshwater ponds from road runoff, it is important that both the state and local stormwater treatment regulations are enforced.

Request for Determinations not being made

Even if the DPW or Conservation Commission does not believe a permit is required, the DPW is not exempt from filing a Request for Determination of Applicability from either the state law or the town bylaw wherever there is a likelihood that stormwater discharges would increase or other

⁴ The Memorandum’s item 1 may have a typographical error and should read “ because it does [not] identify a locus, plan, or other recordable entity...”

⁵ This Memorandum hints that it may be difficult to record orders of conditions for roads. However, there is no exemption to filing under the Massachusetts Wetland Protection Act and obtaining a permit just because it may be difficult to file an Order of Conditions with a Registry of Deeds.

potential impacts of stormwater are plausible. An RDA would also require the Conservation Commission to hold a public meeting to discuss the project and potential impacts or lack of impacts of the roadwork. This was explicitly emphasized in the January 31, 2003 legal opinion by Town Counsel Frank Duffy Jr. to DPW director William Owens (2003 Memorandum attached, see item 3). The Request for Determination of Applicability process as noted above is a fundamental process that not only enables public involvement, but also gives the Conservation Commission the opportunity to determine whether a permit is required. Under the local wetlands bylaw, RDAs require notification of abutters in writing of the proposed work.

Also, Mr. Duffy advised the town DPW to use the word “repair” in their RDA applications because of his belief that repairs do not require permits (issuance of Orders of Conditions) based upon a particular 1985 legal case. However, the use of the word “repair” in an RDA application does not automatically require the Conservation Commission to issue a “negative determination” to an RDA request, and they should always use a common sense approach to evaluate impacts, including increased stormwater discharges, which always require the filing of a Notice of Intent.

Another problem contributing to the lack of permit filing may have resulted from the fact that some DPW staff may be confusing legal advice stating that “no permit is needed” (that is, no Notice of Intent need to be filed to obtain an Order of Conditions), with the process of asking the Conservation Commission whether a permit is needed (filing a Request for Determination of Applicability) to make that determination. As Mr. Duffy noted, the RDA process should be followed, and this process helps to legally protect the town.

Administrative Orders must be properly applied

Under the local bylaw, the Conservation Administrator or Conservation Commission may provide administrative approval of a project and preclude the filing of an RDA under the local bylaw. It is important that the town recognize that even if a project receives an Administrative Approval under the local bylaw, the DPW must still file an RDA under the state regulations.

The Commission should also carefully review the town wetlands bylaw regulations pertaining to administrative review (FWR 10.05 Procedures (3) Administrative Review). The criteria for administrative review is quite rigorous, and though not requested in this case by the DPW, pavement replacement projects like the one on Gifford Street would not meet the criteria on several counts. The town should also recognize that Falmouth’s stormwater regulations are much more stringent than the state regulations. These requirements cannot be waived through an Administrative Order under the town regulations.

Policy review needed for enforcement of the wetland regulations

The facts surrounding this case illustrate that there are systematic problems with the issuance of wetlands permits for municipal roadwork conducted by the Town of Falmouth Department of Public Works. We recommend that the Board of Selectmen, DPW, and Conservation Commission meet to resolve these issues. The town is now subject to a Phase II stormwater permit, which includes Gifford Street, and the activities on Gifford Street were clearly inconsistent with the terms of your permit. This also needs to be discussed.

The Falmouth Conservation Commission members are appointed to enforce the state and local wetlands laws. Buzzards Bay Project staff have observed the Falmouth Conservation Commission diligently enforcing these laws and regulations whether the applicant is a commercial developer or a residential land owner. We have seen, in the case of lesser infractions, enforcement orders issued and fines levied by the Commission. It is our opinion that this project will require a permit, and that stormwater designs and treatment systems will need to be developed and installed to meet the state and local stormwater regulations. The failure of the Conservation Commission to take action in this case, even two months after the unpermitted discharges is troubling. It also gives the appearance to other applicants of a double standard in the town's wetland permitting process when the applicant is the Department of Public Works.

Our comments should not be construed to suggest that the DPW should file a Request for Determination for every activity in the buffer zone. It is hard to imagine how repairing potholes, replacing broken guard rails, sealing cracks, and even adding a bituminous layer on a street in a buffer zone (without excavating or demolishing the underlayer) would require a Notice of Intent, and therefore it may be reasonable to assume that a negative determination would be received in response to a Request for Determination of Applicability. Consequently, many DPWs do not file for these activities. However, any activity that creates sediments or loosens soils (like the Gifford Street reconstruction) should always require at least the submission of a Request for Determination, because there is the *possibility* of that sediments or contaminated stormwater may be discharged to wetlands (or any activity that may destroy, alter, or fill a wetland, or further degrade water quality due to stormwater). An RDA should be filed, even if the "footprint" of a project is the same, if there is the potential for the volume, rate or quality of the stormwater discharge to change for the worse, as by adding new catch basins and expanding a drainage network.⁶

The activities of municipal Public Works Department have the potential to do more harm, or do more good, than any other enterprise in the town. In the 21st century, the reality is that all applicants, even municipal DPWs must prepare detailed site plans, engineering designs, and implement stormwater treatment to meet state and local wetland regulations. While the town may not have had improving water quality at Sols Pond as a high priority, nor had it set aside funds for stormwater treatment at the site, the act of moving the road, installing a sidewalk with curb and expanding impervious area, and reducing the vegetation along the bank all require the filing of a Notice of Intent, and consequently required the design and installation of a stormwater treatment system. Stormwater treatment to reduce sediments is particularly important at this site because it is clear this pond has received a considerable sediment load for years from the DPW facility and Lawrence Lynch sand and gravel operation. When the Town of Falmouth budgets funds for sidewalk installation and roadwork like this one near surface waters and wetlands, it must recognize these stormwater treatment improvements are now required by the state wetland regulations. Consequently the town must budget funds for these stormwater treatment systems.

⁶ At Gifford Street, the catch basins were reported to work poorly and some stormwater infiltrated slowly at the site, or into the bermed vegetated area. The sidewalks were installed with curbs, eliminating infiltration along the road margins, and the catch basins. The catch basins were cleaned, and the road now discharges considerably more stormwater and sediments to the pond, which is continuing to infill. Even if the "footprint" were the same the same in this case (it is not), a Notice of Intent would still need to be filed because of the potential for adverse stormwater impacts.

Request for Determination for the Gifford Street work

Attached to this letter is a Request for Determination under the State Wetlands Protection Act from the Buzzards Bay Project.⁷ We explicitly do not request a RDA under the Town Wetlands Bylaw and regulations.

As required under the Massachusetts State Wetlands Protection Act, I am requesting a hearing within 21 days. If the commission fails to act in that period, the RDA will be appealed.

Please note that the filing of this Request for Determination of Applicability does not preclude any separate actions by the Department of Environmental Protection, including enforcement actions, should they deem fit.

Sincerely,

Joseph E. Costa, PhD
Executive Director

cc. Falmouth Board of Selectmen
Falmouth DPW
Falmouth Engineering Department
DEP-SERO

⁷ Under the Massachusetts Wetlands Protection Act, any citizen or group may file a RDA.

Figure 1. USGS Topographic map (Falmouth Quadrangle) showing locus of work area in the buffer zone.

Prepared by the Buzzards Bay Project, July 30, 2004.

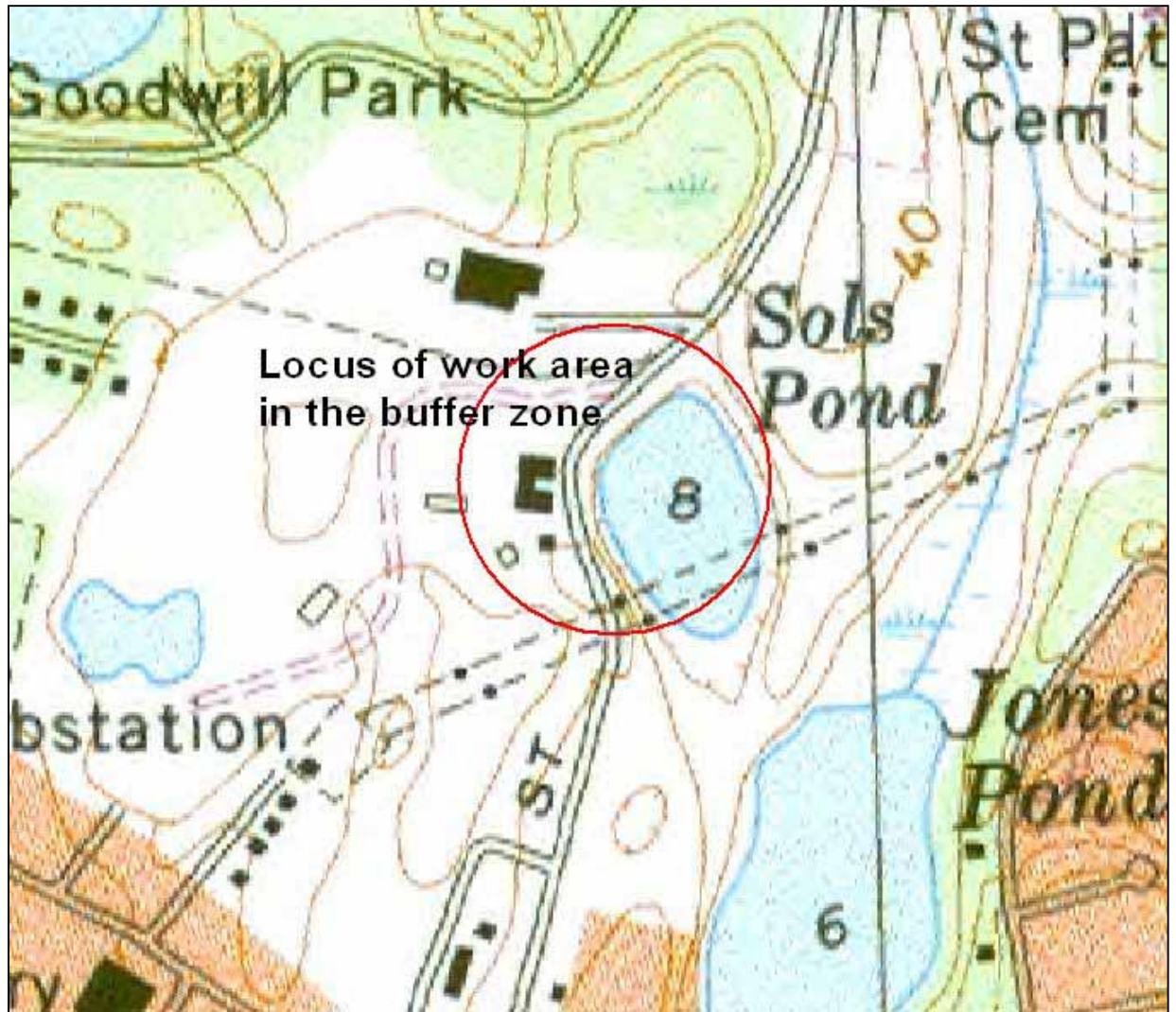


Figure 2. Orthographic photograph of site locus with parcel boundaries⁸.
Prepared by the Buzzards Bay Project, July 30, 2004.



⁸ Parcel boundaries from Falmouth GIS department. Disclaimer: "The Town of Falmouth makes no claims, no representations and no warranties, express or implied, concerning the validity (express or implied), the reliability or the accuracy of the GIS data and/or GIS products furnished by the Town, including the implied validity of any uses of such data. Parcel lines are graphic representations only."

Figure 3. Photograph of site taken 5/28/04 by Conservation Commission staff showing Gifford Street. to pond bank area, facing south.



Figure 4. Photograph of site taken 5/28/04 by Conservation Commission staff showing westward facing view of runoff into Sols Pond.



Figure 5. Photograph of site taken 5/28/04 by Conservation Commission staff showing second westward facing view of runoff and sediments into Sols Pond.



Figure 6. Photograph of site taken 5/28/04 by Conservation Commission staff showing accumulation of silt and sediments Sols Pond, near filled stormwater pipe.

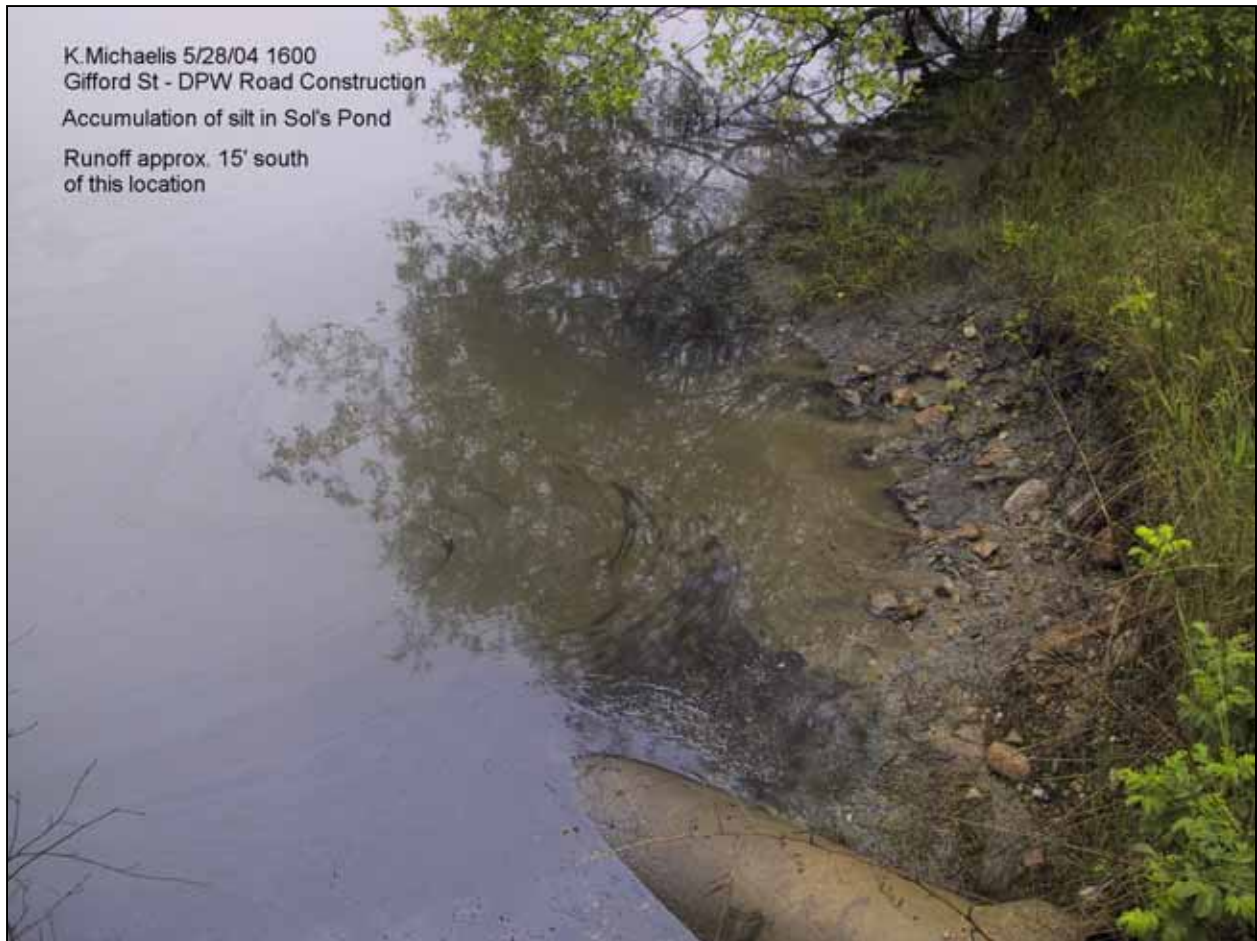


Figure 7. Photograph of site taken 5/28/04 by Conservation Commission staff showing some runoff silt and sediments near erosional bank along Sols Pond.



Figure 8. Photograph of site taken 5/28/04 by Conservation Commission staff showing a second view of accumulation of silt and sediments Sols Pond.



Figure 9. Photograph of site taken 5/28/04 by Conservation Commission staff showing strong mud and water flow near breach of road berm at Sols Pond.



Figure 10. Photograph of site taken 5/28/04 by Conservation Commission staff showing a third view of accumulation of silt and sediments Sols Pond.



Figure 11. Photograph of site taken 5/28/04 by Conservation Commission staff showing northeast view of a breach area in buffer zone berm along Sols Pond.



Figure 12. Photograph of site taken 5/28/04 by Conservation Commission staff showing northeast view of a breach area in buffer zone berm along Sols Pond.

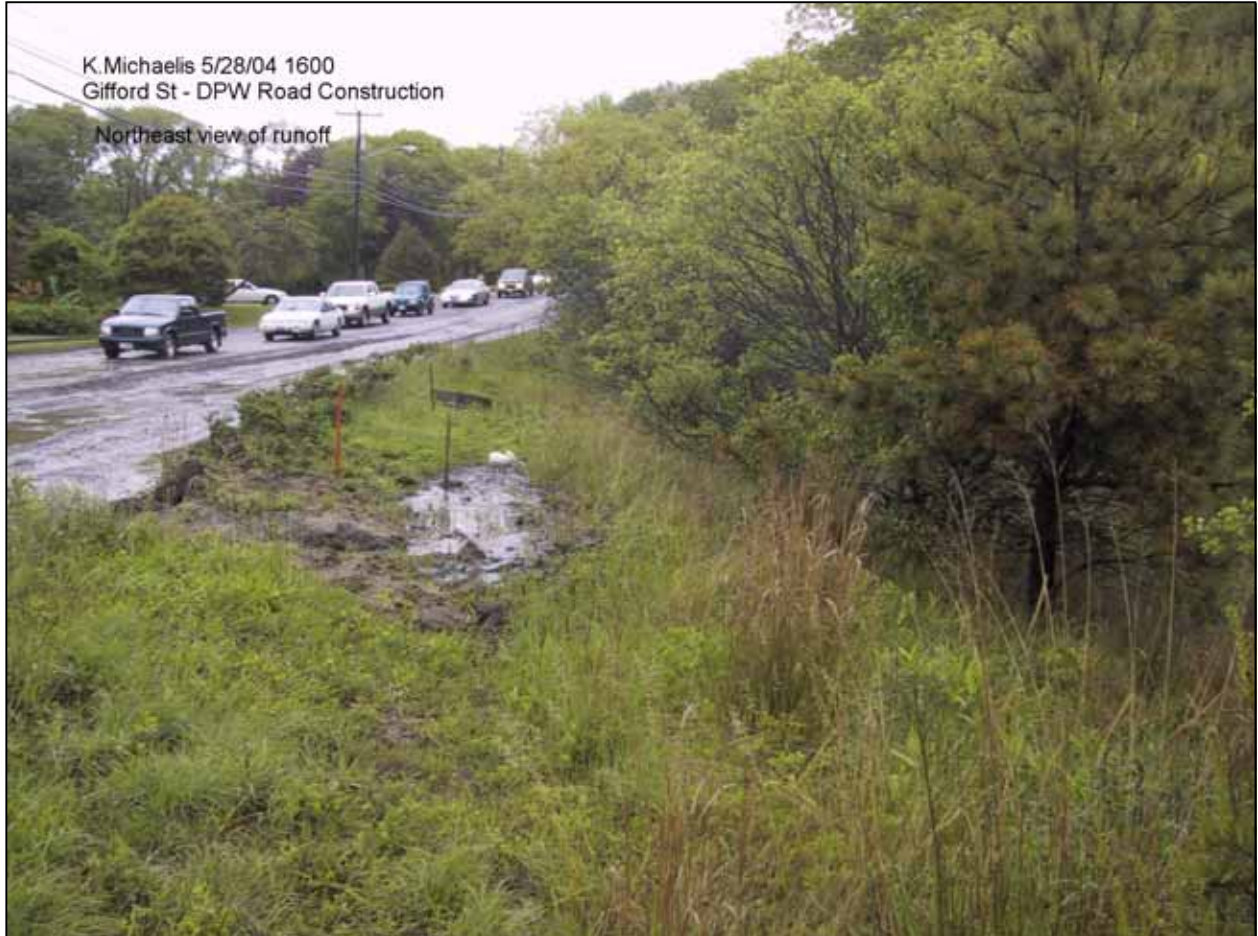


Figure 13. Photograph taken July 26, 2004 by the Buzzards Bay Project. showing a lowered pond level, the old stormwater pipe buried from years of stormwater accumulation, and new sediments continuing to wash into the pond from the newly reformed discharge area.



Figure 14. Photograph taken July 26, 2004 by the Buzzards Bay Project during low water pond conditions at Sols Pond along Gifford Street showing a sediment outwash “delta” near one of three observed discharge pipes from the road.



Figure 15. Photograph taken July 26, 2004 by the Buzzards Bay Project during low water pond conditions at Sols Pond along Gifford Street showing a wider view of two sediment outwash deltas (arrows) in front of two of the Gifford Street Discharges from years of sediment discharges into the pond. Note that new sediments appear in the photograph from both the May 28 rainfall, and later discharges after the water level lowered, as evidenced by the gully in the newly exposed areas.



Figure 16. Photograph taken July 26, 2004 by the Buzzards Bay Project showing existing road conditions in the vicinity of the grates at the discharge points to the ponds.

