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310 CMR 10.00: WETLANDS PROTECTION

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10.01: Introduction and Purpose

(1) Introduction. 310 CMR 10.00 is promulgated by the Commissioner of the Massachusetts Department of Environmental Protection pursuant to the authority granted under The Wetlands Protection Act, M.G.L. c. 131, § 40. 310 CMR 10.00 shall complement M.G.L. c. 131, § 40, and shall have the force of law.

310 CMR 10.01 through 10.10 provide definitions and procedures. 310 CMR 10.01 through 10.10 pertains to both inland and coastal areas subject to protection under M.G.L. c. 131, § 40. 310 CMR 10.21 through 10.60 provide standards for work within those areas. 310 CMR 10.21 through 10.37 pertains only to coastal areas and 310 CMR 10.51 through 10.60 pertains only to inland areas. A project may be subject to regulation under 310 CMR 10.00 in which case compliance with all applicable regulations is required.

(2) Purpose. M.G.L. c. 131, § 40 sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection under M.G.L. c. 131, § 40 are to be regulated in order to contribute to the following interests:

-protection of public and private water supply
-protection of ground water supply
-flood control
-storm damage prevention
-prevention of pollution
-protection of land containing shellfish
-protection of fisheries
-protection of wildlife habitat

The purpose of 310 CMR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c. 131, § 40. Applicants and issuing authorities shall use forms provided by the Department to implement 310 CMR 10.00.

310 CMR 10.00 is intended solely for use in administering M.G.L. c. 131, § 40; nothing contained in 310 CMR 10.00 should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by local by-law, ordinance or regulation.

10.02: Statement of Jurisdiction

(1) Areas Subject to Protection under M.G.L. c. 131, § 40. The following areas are subject to protection under M.G.L. c. 131, § 40:

(a) Any bank, any freshwater wetland, any coastal wetland, any beach, any dune, any flat, any marsh, or any swamp bordering on the ocean, any estuary, any creek, any river, any stream, any pond, or any lake

(b) Land under any of the water bodies listed above
(c) Land subject to tidal action
(d) Land subject to coastal storm flowage
(e) Land subject to flooding
(f) Riverfront area.

(2) Activities Subject to Regulation under M.G.L. c. 131, § 40.

(a) Activities Within the Areas Subject to Protection under M.G.L. c. 131, § 40. Any activity proposed or undertaken within an area specified in 310 CMR 10.02(1), which will remove, fill, dredge or alter that area, is subject to Regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent except:

1. minor activities within the riverfront area meeting the requirement of 310 CMR 10.02(2)(b)1. and 2.; and

10.02: continued

2. activities conducted to maintain, repair or replace, but not substantially change or enlarge an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, sewer, telephone, telegraph and other communication services, provided said work utilizes the best practical measures to avoid or minimize impacts to wetland resource areas outside the footprint of said structure or facility. A project proponent claiming that work to remove, fill, dredge or alter an area specified in 310 CMR 10.02(1) does not require the filing of a Notice of Intent has the burden of establishing that the work is not subject to Regulation under M.G.L. c. 131, § 40.

(b) Activities Within the Buffer Zone. Any activity other than minor activities identified in 310 CMR 10.02(2)(b)2. proposed or undertaken within 100 feet of an area specified in 310 CMR 10.02(1)(a) (hereinafter called the Buffer Zone) which, in the judgment of the issuing authority, will alter an Area Subject to Protection under M.G.L. c. 131, § 40 is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent. (*See* also 310 CMR 10.05(3)(a)2.). The areas subject to jurisdiction identified in 310 CMR 10.02(1)(b) through (f) do not have a buffer zone.

1. Minor activities, as described in 310 CMR 10.02(2)(b)2., within the buffer zone and outside any areas specified in 310 CMR 10.02(1)(a) through (e) are not otherwise subject to regulation under M.G.L. c. 131, § 40 provided that the work is performed: solely within the buffer zone, as prescribed in 310 CMR 10.02(2)(b)2.a. through q., in a manner so as to reduce the potential for any adverse impacts to the resource area during construction, and with post-construction measures implemented to stabilize any disturbed areas. Factors to consider when measuring the potential for adverse impacts to resource areas include the extent of the work, the proximity to the resource area, the need for erosion controls, and the measures employed to prevent adverse impacts to resource areas during and following the work.

2. The following minor activities, provided that they comply with 310 CMR 10.02(2)(b)1., are not otherwise subject to regulation under M.G.L. c. 131, § 40:

a. Unpaved pedestrian walkways less than 30 inches wide for private use and less than three feet wide for public access on conservation property;

b. Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;

c. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a Riverfront Area or from Bordering Vegetated Wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);

d. Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;

e. The conversion of lawn to uses accessory to residential structures such as decks, sheds, patios, pools, replacement of a basement bulkhead and the installation of a ramp for compliance with accessibility requirements, provided the activity, including material staging and stockpiling is located more than 50 feet from the mean annual high-water line within the Riverfront Area, Bank or from Bordering Vegetated Wetland, whichever is farther, and erosion and sedimentation controls are implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);

f. The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction;

g. Activities that are temporary in nature, have negligible impacts, and are necessary

for planning and design purposes (*e.g.*, installation of monitoring wells, exploratory borings, sediment sampling and surveying and percolation tests for septic systems provided that resource areas are not crossed for site access);

h. Installation of directly embedded utility poles and associated anchors, push braces or grounding mats/rods along existing paved or unpaved roadways and private roadways/driveways, and their existing maintained shoulders, or within existing railroad rights-of-way, provided that all work is conducted within ten feet of the road or driveway shoulder and is a minimum of ten feet from the edge of the Bank or Bordering Vegetated Wetland and as far away from resource areas as practicable, with no additional tree clearing or substantial grading within the buffer zone, and provided that all vehicles and machinery are located within the roadway surface during work;

10.02: continued

i. Installation of underground utilities (*e.g.*, electric, gas, water) within existing paved or unpaved roadways and private roadways/driveways, provided that all work is conducted within the roadway or driveway and that all trenches are closed at the completion of each workday;

j. Installation and repair of underground sewer lines within existing paved or unpaved roadways and private roadways/driveways, provided that all work is conducted within the roadway or driveway and that all trenches are closed at the end of completion of each workday;

k. Installation of new equipment within existing or approved electric or gas facilities when such equipment is contained entirely within the developed/disturbed existing fenced yard;

l. Installation of access road gates at public or private road entrances to existing utility right-of-way access roads, provided that all vehicles and machinery are located within the roadway surface during work;

m. Removal of existing utility equipment (poles, anchors, lines) along existing or approved roadways or within existing or approved electric, water or gas facilities, provided that all vehicles and machinery are located within the roadway surface during work;

n. Vegetation cutting for road safety maintenance, limited to the following:

i. Removal of diseased or damaged trees or branches that pose an immediate and substantial threat to driver safety from falling into the roadway;

ii. Removal of shrubbery or branches to maintain clear guardrails; such removal shall extend no further than six feet from the rear of the guardrail;

iii. Removal of shrubbery or branches to maintain sight distances at existing intersections; such removal shall be no farther than five feet beyond the "sight triangles" established according to practices set forth in *American Association of State Highway and Transportation Officials (AASHTO) A Policy on Geometric Design of Highways and Streets, 2011*, 6th edition, and such removal is a minimum of ten feet from a resource area, other than Riverfront Area; and

iv. Removal of shrubbery, branches, or other vegetation required to maintain the visibility of road signs and signals.

Cuttings of shrubs and branches from mature trees will be performed with suitable horticultural equipment and methods that do not further damage the trees. To prevent the possible export of invasive plants, cut vegetation should be chipped and evenly spread on site, provided the chips are spread outside the buffer zone, and raked to a depth not to exceed three inches, clear of all drainage ways. Alternatively, all cuttings and slash shall be removed from the site and properly disposed;

o. Installation, repair, replacement or removal of signs, signals, sign and signal posts and associated supports, braces, anchors, and foundations along existing paved roadways and their shoulders, provided that work is conducted as far from resource areas as practicable, and is located a minimum of ten feet from a resource area, any excess soil is removed from the project location, and any disturbed soils are stabilized as appropriate;

p. Pavement repair, resurfacing, and reclamation of existing roadways within the right-of-way configuration provided that the roadway and shoulders are not widened, no staging or stockpiling of materials, all disturbed road shoulders are stabilized within 72 hours of completion of the resurfacing or reclamation, and no work on the drainage system is performed, other than adjustments and/or repairs to respective

structures within the roadway;

q. The repair or replacement of an existing and lawfully located driveway servicing not more than two dwelling units provided that all work remains within the existing limits of the driveway and all surfaces are permanently stabilized within 14 days of final grade.

3. Activities within the buffer zone which do not meet the requirements of 310 CMR 10.02(2)(b)1. and 2. are subject to preconstruction review through the filing of a Determination of Applicability to clarify jurisdiction or a Notice of Intent under the provisions of 310 CMR 10.05(4) and 10.53(1).

10.02: continued

(c) Notwithstanding the provisions of 310 CMR 10.02(1) and (2)(a) and (b), stormwater management systems designed, constructed, installed, operated, maintained, and/or improved as defined in 310 CMR 10.04 in accordance with the *Stormwater Management Standards* as provided in the *Stormwater Management Policy (1996)* or 310 CMR 10.05(6)(k) through (q) do not by themselves constitute Areas Subject to Protection under M.G.L. c. 131, § 40 or Buffer Zone provided that:

1. the system was designed, constructed, installed, and/or improved as defined in 310 CMR 10.04 on or after November 18, 1996; and
2. if the system was constructed in an Area Subject to Protection under M.G.L. c. 131, § 40 or Buffer Zone, the system was designed, constructed, and installed in accordance with all applicable provisions in 310 CMR 10.00.

(d) Activities Outside the Areas Subject to Protection under M.G.L. c. 131, § 40 and the Buffer Zone. Any activity proposed or undertaken outside the areas specified in 310 CMR 10.02(1) and outside the Buffer Zone is not subject to regulation under M.G.L. c. 131, § 40 and does not require the filing of a Notice of Intent unless and until that activity actually alters an Area Subject to Protection under M.G.L. c. 131, § 40. In the event that the issuing authority determines that such activity has in fact altered an Area Subject to Protection under M.G.L. c. 131, § 40, it may require the filing of a Notice of Intent and/or issuance of an Enforcement Order and shall impose such conditions on the activity or any portion thereof as it deems necessary to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(3) Notwithstanding the provisions of 310 CMR 10.02(1) and (2), the maintenance of a stormwater management system constructed and/or improved as defined in 310 CMR 10.04 from November 18, 1996 through January 1, 2008, in accordance with the *Stormwater Management Standards*, as provided in the *Massachusetts Stormwater Policy*, issued by the Department on November 18, 1996 or on or after January 2, 2008, in accordance with the *Stormwater Management Standards* as provided in 310 CMR 10.05(6)(k) through (q) is not subject to regulation under M.G.L. c. 131, § 40 provided that:

(a) if the system was constructed in an Area Subject to Protection under M.G.L. c. 131, § 40 or associated Buffer Zone, the system was constructed in accordance with all applicable provisions of 310 CMR 10.00;

(b) the work to maintain the stormwater management system is limited to maintenance of a stormwater management system as defined in 310 CMR 10.04; and

(c) said work utilizes best practical measures to avoid and minimize impacts to wetland resource area outside the footprint of the stormwater management system.

Notwithstanding the provisions of 310 CMR 10.02(1) and (2), any bordering vegetated wetland, bank, land under water, land subject to flooding, or riverfront area created solely for the purpose of stormwater management shall not require the filing of a Notice of Intent to maintain the stormwater management system, provided that:

1. the work to maintain the stormwater management system is limited to the maintenance of a stormwater management system as defined in 310 CMR 10.04;
2. the stormwater management system was proposed in a Notice of Intent filed before January 2, 2008, and conforms to an Order of Conditions issued after April 1, 1983;
3. the area is not altered for other purposes; and
4. said work utilizes best practical measures to avoid and minimize impacts to wetland resource areas outside the footprint of the stormwater management system.

(4) Notwithstanding anything to the contrary in 310 CMR 10.00, work other than maintenance that may alter or affect a stormwater management system (including work to repair or replace

the stormwater management system, and any change to the site that increases the total or peak volume of stormwater managed by the system, directs additional stormwater to the system, and/or increases the volume of stormwater exposed to land uses with higher potential pollutant loads) that was designed, constructed, installed and/or improved after November 18, 1996, as defined in 310 CMR 10.04, and if constructed in an Area Subject to Protection under M.G.L. c. 131, § 40 or Buffer Zone, as described in 310 CMR 10.02(1) and (2)(a) through (d), the system was constructed in accordance with all applicable provisions of 310 CMR 10.00, solely for the purpose of stormwater management, in accordance with the *Stormwater Management Standards* as provided in the *Stormwater Management Policy (1996)* or 310 CMR 10.05(6)(k) through (q), may be permitted through an Order of Conditions, or Negative Determination of Applicability provided that the work:

10.02: continued

(a) at a minimum provides the same capacity as the original design to attenuate peak discharge rates, recharge the ground water, and remove total suspended solids;
(b) complies with the *Stormwater Management Standards* as provided in 310 CMR 10.05(6)(k) through (q); and
(c) meets all the applicable performance standards for any work that expands the existing stormwater management system into an Area Subject to Protection under M.G.L. c. 131, § 40 or Buffer Zone as described in 310 CMR 10.02(1) and (2)(a) through (d).

(5) For purposes of 310 CMR 10.02(2)(c) and (4), the applicant has the burden of proving that the proposed project involves a stormwater management system designed, constructed, installed, operated, maintained and/or improved as defined at 310 CMR 10.04 in accordance with the Stormwater Management Standards as provided in the *Stormwater Management Policy (1996)* or 310 CMR 10.05(6)(k) through (q) and that the system was designed, constructed, installed and/or improved on or after November 18, 1996. The applicant also has the burden of establishing whether said stormwater management system was installed in an Area Subject to Protection under M.G.L. c. 131, § 40 or associated Buffer Zone, and, if so, that the system was constructed in accordance with all applicable provisions of 310 CMR 10.00. An applicant shall use the best evidence available to meet the burden of proof required. For purposes of 310 CMR 10.02(2)(c) and (4), the best evidence is the Order of Conditions, Order of Resource Area Delineation or Determination of Applicability for the project served by the stormwater management system together with the plans referenced in and accompanying such Order or Determination, and, if applicable, the Certificate of Compliance. If the best evidence is available, the date the system was designed shall be the date the Notice of Intent, Request for Determination or Notice of Resource Area Delineation was filed. If the best evidence is not available, the applicant shall rely on other credible evidence to meet the required burden of proof such as local approval of the stormwater management system along with the plans referenced in and accompanying said approval and any wetland conservancy maps and wetland change maps for the relevant time period published by the Department on MassGIS.

Commentary

The Department has determined that activities within Areas Subject to Protection under M.G.L. c. 131, § 40 are so likely to result in the removing, filling, dredging or altering of those areas that preconstruction review is always justified, and that the issuing authority shall therefore always require the filing of a Notice of Intent for said activities.

The Department has determined that activities within 100 feet of those areas specified in 310 CMR 10.02(1)(a) are sufficiently likely to alter said areas that preconstruction review may be necessary. Therefore, a request for a Determination of Applicability must be filed for some activities within the Buffer Zone. The issuing authority shall then make a determination as to whether the activity so proposed will alter an Area Subject to Protection under M.G.L. c. 131, § 40 and, if so, shall require the filing of a Notice of Intent for said activities. The issuing authority shall not require the filing of a Notice of Intent if it determines that the activity proposed within the Buffer Zone will not alter an Area Subject to Protection under M.G.L. c. 131, § 40.

The Department has determined that activities outside the Areas Subject to Protection under M.G.L. c. 131, § 40 and outside the Buffer Zone are so unlikely to result in the altering of Areas Subject to Protection under M.G.L. c. 131, § 40 that preconstruction review is not required, and therefore the issuing authority shall not regulate said activities unless and until they actually result in the altering of an Area Subject to Protection under M.G.L. c. 131, § 40.

10.03: General Provisions

(1) Burden of Proof.

(a) Any person who files a Notice of Intent to perform any work within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone has the burden of demonstrating to the issuing authority:

1. that the area is not significant to the protection of any of the interests identified in M.G.L. c. 131, § 40; or

2. that the proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § 40 by complying with the general performance standards established by 310 CMR 10.00 for that area.

10.03: continued

3. that proposed work within the buffer zone will contribute to the protection of the interests identified in M.G.L. c. 131, § 40, except that proposed work which lies both within the riverfront area and within all or a portion of the buffer zone to another resource area shall comply with the performance standards for riverfront areas at 310 CMR 10.58. For minor activities as specified in 310 CMR 10.02(2)b.1. within the riverfront area or the buffer zone to another resource area, the Department has determined that additional conditions are not necessary to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(b) Any person who requests the issuing authority to regulate work taking place outside an Area Subject to Protection under M.G.L. c. 131, § 40 and outside the Buffer Zone has the burden of demonstrating to the satisfaction of the issuing authority that the work has in fact altered an Area Subject to Protection under M.G.L. c. 131, § 40.

(2) Burden of Going Forward. The burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken. This burden shall be upon the person contesting the Department's position when the Department has been requested to hold an adjudicatory hearing. In the event that under the provisions of 310 CMR 10.03 two or more persons have the burden of going forward, said burden may be placed on all or any number of them, in the discretion of the hearing officer.

(3) Presumption Concerning 310 CMR 15.000: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage*. A subsurface sewage disposal system that is to be constructed in compliance with the requirements of 310 CMR 15.000: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage*, or more stringent local board of health requirements, shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40, but only if none of the components of said system is located within the following resource areas:

(a) Coastal.
1. coastal bank;
2. coastal beach;
3. coastal dune;
4. salt marsh.

(b) Inland.

1. wet meadows		creek;
2. marsh	bordering	river;
3. swamp	on any	stream;
4. bog		pond;
		lake.

and only if the soil absorption system of said system is set back at least 50 feet horizontally from the boundary of said areas, as required by 310 CMR 15.211: *Minimum Setback Distances*, or a greater distance as may be required by more stringent local ordinance, by-law or regulation. To protect wildlife habitat within riverfront areas, the soil absorption system shall not be located within 100 feet of the mean annual high-water line unless there is no alternative location on the lot which conforms to 310 CMR 15.000: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site*

Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage without requiring a variance as determined by the local Board of Health, with less adverse effects on resource areas.

This presumption, however, shall apply only to impacts of the discharge from a sewage disposal system, and not to the impacts from construction of that system, such as erosion and siltation from the excavation, placement of fill, or removal of vegetation. Impacts from construction shall be minimized by the placement of erosion and sedimentation controls during excavation, limiting the placement of fill, confining the removal of vegetation to that necessary for the footprint of the system, and taking other measures deemed necessary by the issuing authority.

10.03: continued

The setback distance specified above shall be determined by measuring from the boundary of the area in question, from the contour at the mean annual flood elevation in inland areas, or from the top of a coastal bank or the contour at the highest spring tide elevation in coastal areas, whichever is further from the water body.

The setback distance specified above shall not be required for the renovation or replacement (but is required for the substantial enlargement) of septic systems constructed prior to the effective date of 310 CMR 10.00, provided no alternative location is available on the lot and such work has been approved by the local board of health or the Department, as required by law.

This presumption may be overcome only by credible evidence from a competent source that compliance with 310 CMR 15.000: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage* or more stringent local requirements will not protect the interests identified in M.G.L. c. 131, § 40.

(4) Presumption Concerning Point-source Discharges. If the Department has issued a permit pursuant to M.G.L. c. 21, § 43, in conjunction with a federal NPDES (National Pollutant Discharge Elimination System) permit for any new point-source discharge of pollutants, or will issue such a permit, prior to commencement of the discharge, the effluent limitations established in the permit shall be presumed to protect the eight interests identified in M.G.L. c. 131, § 40 with respect to the effects of the discharge on water quality. The permit and any subsequent amendments thereto shall be referenced in the Order and deemed incorporated therein.

This presumption shall apply only to impacts of the discharge from the source, and not to impacts from construction of the source.

This presumption may be overcome only by credible evidence from a competent source that said effluent limitations will not protect the interests identified in M.G.L. c. 131, § 40.

(5) Presumption of Significance. Each Area Subject to Protection under M.G.L. c. 131, § 40 is presumed to be significant to one or more of the interests identified in M.G.L. c. 131, § 40. These presumptions are rebuttable and are set forth in 310 CMR 10.21 through 10.60.

For riverfront areas, the issuing authority may find that the presumptions of significance are partially rebutted as provided in 310 CMR 10.58(3).

(6) Presumption Concerning Application of Herbicides.

(a) Any application of herbicides within any Area Subject to Protection under M.G.L. c. 131, § 40 or the Buffer Zone associated with a structure or facility which is:

1. existing and lawfully located;
2. used in the service of the public; and
3. used to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services

shall be presumed to constitute work performed in the course of maintaining such structure or facility, and shall be accorded the exemption of such work under M.G.L. c. 131, § 40, only if the application of herbicides to that structure or facility 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.

(b) 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.

(c) Any application of herbicides for management of rights of way within a riverfront area not subject to 310 CMR 10.03(6)(a) or (b), provided the area is outside any other resource area and qualifies under the provisions of 310 CMR 10.58(6)(a), shall be accorded an exemption of such work under M.G.L. c. 131, § 40, provided that the application of herbicides 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*.

10.03: continued

(7) Fees.

(a) General Fee Provisions.

1. Notices of Intent. All Notices of Intent filed pursuant to 310 CMR 10.00 shall be accompanied by a filing fee, the amount of which shall be determined by 310 CMR 4.00: *Timely Action Schedule and Fee Provisions* and a brief statement indicating how the applicant calculated the fee. 50% of any filing fee in excess of $25.00 shall be made payable, by check or money order, to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box accompanied by the Notice of Intent Fee Transmittal Form. The remainder of said fee shall be made payable, by check or money order, to the city or town in which the work is proposed.

2. Requests for Action by the Department. Any person who files a Request for a Superseding Determination of Applicability (310 CMR 10.05(3)(c)), a Request for Superseding Order of Conditions or superseding Order of Resource Area Delineation (310 CMR 10.05(7)(a)), a Request for Adjudicatory Hearing (310 CMR 10.05(7)(j)), a Request to Intervene in any Adjudicatory Hearing (310 CMR 1.01(9)(a)), or a Request for a Variance, (310 CMR 10.05(10)), (*see* also 310 CMR 10.03(7)(e)), shall simultaneously submit a filing fee, in the amount specified by 310 CMR 4.00: *Timely Action Schedule and Fee Provisions*. All such fees shall be paid by check or money order payable to the Commonwealth of Massachusetts and shall be sent to the DEP Lock Box, accompanied by the Request for Departmental Action Fee Transmittal Form. A copy of the Request for Departmental Action Fee Transmittal Form and a copy of the check shall accompany the request for Departmental action.

(b) Specific Provisions for Notice of Intent Fees. In accordance with General Instructions for Completing a Notice of Intent and Abbreviated Notice of Intent, the minimum submittal requirements shall include payment of the filing fee specified in 310 CMR 10.03(7)(c). A conservation commission shall notify, in writing, the appropriate Department Regional Office and the applicant when the correct filing fee has not been paid to the city or town and the filing is therefore incomplete. Said notification shall specify the correct fee amount. The Department shall also notify, in writing, the applicant and the conservation commission when the fee due to the Department has not been paid to the Department and the filing is therefore incomplete. Said notification shall specify the fee due to the Department. The fee will be based on the initial project design as proposed in the Notice of Intent.

1. Disputes over Notice of Intent Filing Fees. Whenever the conservation commission or the Department determines that an inadequate fee has been paid, the time period for the conservation commission or the Department to act shall be stayed until the balance of the fee is paid.

a. Where, in the opinion of the conservation commission or the Department, less than the full filing fee has been included with the Notice of Intent, the Notice shall be deemed complete (assuming all other minimum submittal requirements have been met), and the stay shall be lifted, upon payment of the additional fee specified by the Department or the conservation commission. If the applicant has disputed all or a part of the balance of the fee, after issuance of a Final Order which resolves the fee dispute, in favor or the applicant any disputed funds paid by the applicant in excess of the filing fee as determined in the Final Order shall be paid to the applicant by the Commonwealth and the city or town.

b. In *lieu* of paying any disputed amount of the filing fee, the applicant may file a Request for Determination of Applicability under 310 CMR 10.05(3)(a), with sufficient information to enable the conservation commission to determine the extent of the area, or the type and extent of the activity, subject to protection under

M.G.L. c. 131, § 40.

When a Request for Determination of Applicability is filed by an Applicant to resolve a dispute over the filing fee, all proceedings under the Notice of Intent shall be stayed until all appeal periods for the Determination have elapsed or, if the Determination is appealed until all proceedings before the Department have been completed.

A Final Determination of Applicability as to the area, or the type and extent of the activity, subject to protection under M.G.L. c. 131, § 40 shall be binding on all parties and shall be used in calculating the fee.

10.03: continued

(c) Activities Subject to Notice of Intent Fees. The following activity descriptions are intended to include all activities subject to filing of a Notice of Intent under M.G.L. c. 131, § 40. The fees imposed by 310 CMR 10.03 are applicable only to those activities subject to jurisdiction under M.G.L. c. 131, § 40. The fee for work proposed under a single Notice of Intent that involves more than one activity noted below, shall be determined by adding the fees for each of the proposed activities. When the work involves activities within the riverfront area as well as another resource area or the buffer zone, the fee shall be determined by adding an additional 50% of the fee calculated for activities in another resource area(s) or the buffer zone to another resource area for each of the proposed activities within the riverfront area. When the work involves activities within the riverfront area but no other resource area, the fee shall be determined by adding the fees for each of the proposed activities within the riverfront area.

1. Category 1.

a. Any work on a single family residential lot including a house addition, deck, garage, garden, pool, shed, or driveway. Activities excluded from Category 1 include driveways reviewable under 310 CMR 10.53(3)(e) (*See* Category 2f.); construction of an unattached single family house; and construction of a dock, pier, or other coastal engineering structure.

b. Site preparation of each single family house lot, including removal of vegetation, excavation and grading, where actual construction of the house is not proposed under the Notice of Intent.

c. Control of nuisance vegetation by removal, herbicide treatment or other means, from a resource area, on each single family lot, as allowable under 310 CMR 10.53(4).

d. Resource improvement allowed under 310 CMR 10.53(4), other than removal of aquatic nuisance vegetation, as allowed under 310 10.53(4).

e. Construction, repair, replacement or upgrading of a subsurface septic system or any part of such a system.

f. Activities associated with installation of a monitoring well, other than construction of an access roadway thereto.

g. New agriculture, including forestry on land in forest use (310 CMR 10.53(3)(r) and (s)), and aquacultural projects.

2. Category 2.

a. Construction of each single family house (including single family houses in a subdivision), any part of which is in a buffer zone or resource area. Any activities associated with the construction of said house(s), including associated site preparation and construction of retention/detention basins, utilities, septic systems, roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e) (*See* Category 2f.), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent. (For apartment/condominium type buildings *See* Category 3.)

b. Parking lot of any size.

c. The placement of sand for purposes of beach nourishment.

d. Any projects reviewable under 310 CMR 10.24(7)(a) through (c).

e. Any activities reviewable under 310 CMR 10.53(3)(d) and (f) through (l), except for those subject to 310 CMR 10.03(7)(c)4.b. Where more than one activity is proposed within an identical footprint (*e.g.*, construction of a sewer within the footprint of a new roadway), only one fee shall be payable.

f. Construction of each crossing for a driveway associated with an unattached single

family house, reviewable under 310 CMR 10.53(3)(e).

g. Any point source discharge.

h. Control of nuisance vegetation, other than on a single family lot, by removal, herbicide treatment or other means, reviewable under 310 CMR 10.53(4).

i. Raising or lowering of surface water levels for flood control or any other purpose.

j. Any other activity not described in Categories 1, 3, 4, 5 or 6 (*e.g.*, the determination of whether a stream is perennial or intermittent).

k. The exploration for (but not development, construction, expansion, maintenance, operation or replacement of) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).

l. Test projects pursuant to 310 CMR 10.05(11).

10.03: continued

3. Category 3.
a. Site preparation, for any development other than an unattached single family house(s), including the removal of vegetation, excavation and grading, where actual construction is not proposed in the Notice of Intent.
b. Construction of each building for any commercial, industrial, institutional, or apartment/condominium/townhouse-type development, any part of which is in a buffer zone or resource area. Any activities associated with the construction of said building, including associated site preparation and construction of retention/detention basins, septic systems, parking lots, utilities, point source discharges, package sewage treatment plants, and roadways and driveways other than those roadways or driveways reviewable under 310 CMR 10.53(3)(e), shall not be subject to additional fees if all said activities are reviewed under a single Notice of Intent.
c. Construction of each roadway or driveway, not reviewable under 310 CMR 10.53(3)(e), and not associated with construction of an unattached single family house.
d. Any activity associated with the clean up of hazardous waste, except as otherwise noted in Category 4, including excavation, destruction of vegetation, change in subsurface hydrology, placement of collection wells or other structures for collection and treatment of contaminated soil and/or water.
e. The development, construction, expansion, maintenance, operation, or replacement of (but not exploration for) public water supply wells or wellfields derived from groundwater, reviewable under 310 CMR 10.53(3)(o).
4. Category 4.
a. Construction of each crossing for a limited project access roadway or driveway reviewable under 310 CMR 10.53(3)(e) associated with a commercial, industrial, or institutional development or with any residential construction (other than a roadway or driveway associated with construction of an unattached single family house).
b. Construction, modification, or repair of a flood control structure such as a dam, reservoir, tidegate, sluiceway, or appurtenant works.
c. Creation, operation, maintenance or expansion of a public or private landfill.
d. Creation, operation, maintenance or expansion of a public or private sand and/or gravel operation including but not limited to excavation, filling, and stockpiling.
e. Construction of new railroad lines or extensions of existing lines, including ballast area, placement of track, signals and switches and other related structures.
f. Construction, reconstruction, expansion, or maintenance of any bridge, except to gain access to a single family house lot.
g. Any alteration of a resource area(s) to divert water for the clean up of a hazardous waste site, for non-exempt mosquito control projects, or for any other purpose not expressly identified elsewhere in this fee schedule.
h. Any activities, including the construction of structures, associated with a dredging operation conducted on land under a waterbody, waterway, or the ocean. If the dredging is directly associated with the construction of a new dock, pier or other structure identified in Category 5, only the Category 5 fee shall apply.
i. Construction of, or the discharge from, a package sewage treatment plant.
j. Airport vegetation removal projects reviewable under 310 CMR 10.24(7)(c)5. and 10.53(3)(n).
k. Landfill closure projects reviewable under 310 CMR 10.24(7)(c)4. and 10.53(3)(p).
l. Any activities, including the construction of structures, associated with the assessment, monitoring, containment, mitigation, and remediation of, or other

response to, a release or threat of release of oil and/or hazardous material reviewable under 310 CMR 10.24(7)(c)6. or 10.53(3)(q).

5. Category 5. Construction, reconstruction, repair or replacement of docks, piers, revetments, dikes, or other engineering structures on coastal or inland resource areas, including the placement of rip rap or other material on coastal or inland resource areas.

6. Category 6. The linear delineation (*e.g.* bordering vegetated wetland, riverfront area, bordering land subject to flooding) of each resource area under an Abbreviated Notice of Resource Area Delineation constitutes a separate activity. The fee associated with each resource area delineation proposed under an Abbreviated Notice of Resource Area Delineation shall be determined by adding the fees for each type of resource area delineation.

10.03: continued

(d) Requests for Action by the Department. Any person's request for action by the Department will not be deemed complete and time periods, if any, shall not commence, unless the person making the request has paid the appropriate filing fee specified in 801 CMR 4.02: *Fees of Licenses, Permits, and Services to Be Charged by State Agencies* (310).

(e) Fees for Requests for Action by Department. The following requests for action by the Department are subject to the fees established in 310 CMR 4.00: *Timely Action Schedule and Fee Provisions*.

1. Request for a Superseding Determination of Applicability.
2. Request for a Superseding Order of Conditions.
3. Request for an Adjudicatory Hearing or for a Variance which is necessary to avoid an unconstitutional taking.
4. Request to Intervene in an Adjudicatory Proceeding.
5. Request for a Variance, except where necessary to avoid an unconstitutional taking.

(f) Waivers and Exemptions. *See* 310 CMR 4.00: *Timely Action Schedule and Fee Provisions* for provisions concerning waivers or exemptions from the requirements of 310 CMR 10.03(7).

10.04: Definitions

Abutter means the same as owner of land abutting the activity.

Act means the Wetlands Protection Act, M.G.L. c. 131, § 40.

Activity means any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings; the construction or improvement of roads and other ways; the changing of run-off characteristics; the intercepting or diverging of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land.

Aggrieved means the same as person aggrieved.

Agriculture. For the purposes of 310 CMR 10.04 the following words and phrases have the following meanings:

(a) Land in Agricultural Use means land within resource areas or the Buffer Zone presently and primarily used in producing or raising one or more of the following agricultural commodities for commercial purposes:

1. animals, including but not limited to livestock, poultry, and bees;
2. fruits, vegetables, berries, nuts, maple sap, and other foods for human consumption;
3. feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs; and
4. forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood, but not including the agricultural commodities described in 310 CMR 10.04: Agriculture(a)1. through 3.

Additionally, land in agricultural use means land within resource areas or the Buffer Zone presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities, including but not limited to: existing access roads and livestock crossings; windbreaks; hedgerows; field edges; bee yards; sand pits; landings for forest products; fence lines; water management projects such as reservoirs, farm ponds, irrigation

systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, and water storage systems; agricultural composting sites; agricultural storage and work areas; and land under farm structures.

Land in agricultural use may lie inactive for up to five consecutive years unless it is under a United States Department of Agriculture (USDA) contract for a longer term pursuant to the Conservation Reserves Program (the Food Securities Act of 1985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990; and 7 CFR 1410), or it is used for the forestry purposes described in 310 CMR 10.04: Agriculture(b)14. through 17. The issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use.

10.04: continued

(b) Normal Maintenance of Land in Agricultural Use, which in all cases does not include placing substantial amounts of fill in Bordering Land Subject to Flooding or filling or dredging a Salt Marsh, means the following activities, without enlargement as to geographical extent, that are occurring on land in agricultural use, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands, and when conducted in accordance with federal and state laws:

1. all crop management practices, not to include drainage in a Bordering Vegetated Wetland, customarily employed to enhance existing growing conditions, including but not limited to: tillage, trellising, pruning, mulching, shading, and irrigating; and all customary harvesting practices such as digging, picking, combining, threshing, windrowing, baling, curing, and drying;
2. the use of fertilizers, manures, compost materials, and other soil amendments; pesticides and herbicides; traps; and other such materials;
3. the repair or replacement of existing access roads and livestock crossings;
4. the maintenance of:
   a. existing forest boundary lines up to five feet wide limited to cutting vegetation within the existing boundary lines;
   b. windbreaks;
   c. hedgerows; and
   d. fire breaks on land maintained in forest use and owned by the Metropolitan District Commission, the Department of Environmental Management, or the Department of Fisheries, Wildlife, and Environmental Law Enforcement;
5. the management of existing field edges, limited to within 100 feet from the land in production, including the following practices:
   a. mowing;
   b. burning;
   c. brush cutting; and
   d. removing trees.

   The management of any field edge that falls within a Bordering Vegetated Wetland is not intended to allow the conversion of Bordering Vegetated Wetland into cropland. Therefore, the field management practices described in 310 CMR 10.04: Agriculture (b)(5)a. through d. may occur in a Bordering Vegetated Wetland provided that:
   i. the cutting or removal of trees and understory vegetation shall not occur within 25 feet of the bank of a water body that is not managed within the land in production (field ditches, cross ditches, grass waterways, irrigation systems, and farm ponds are examples of managed water bodies) unless the trees or understory vegetation are removed to control alternative hosts but no more than 50% of the canopy may be removed, or except to maintain existing dikes;
   ii. slash, branches, and limbs resulting from the cutting and removal operations shall not be placed within 25 feet of the bank of a water body that is not managed within the land in production; and
   iii. no tilling, filling, excavation, or other change in the existing topography shall occur within the field edge;
6. the maintenance and repair of existing fences and the management of temporary fence lines;
7. the cleaning, clearing, grading, repairing, dredging, or restoring of existing man-made or natural water management systems such as reservoirs, farm ponds, irrigation systems,

field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, water transport systems, vents, and water storage systems, all in order to provide drainage, prevent erosion, provide more effective use of water, or provide for efficient use of equipment, and all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities;

8. the maintenance and repair of ongoing agricultural composting sites, storage areas, and work areas and the storage of fertilizers, pesticides, manures, compost materials, and other soil amendments, provided that such storage occurs only in the Buffer Zone or Bordering Land Subject to Flooding;

9. the repair and maintenance of existing farm structures;

10.04: continued

10. the seeding of eroded or disturbed areas;
11. maintaining the flow of existing natural waterways;
12. the keeping of livestock and poultry and the management of beehives;
13. the cultivation of cranberries, including the following practices:
    a. the activities described in 310 CMR 10.04: Agriculture(b)1. through 11.;
    b. the application of sand to existing bogs and the excavation of sand from sand pits;
    c. the repair and reconstruction of water control structures including flumes, pumps, dikes, and piping above and below the ground;
    d. the regrading, including modification of drainage, and replanting of existing cranberry bogs;
    e. the repair and replacement of dikes;
    f. water harvesting activities; and
    g. flooding and flood release;
14. the cutting and removal of trees for the purpose of selling the trees or any products derived therefrom, when carried out in accordance with a Forest Cutting Plan approved by the Department of Environmental Management (DEM) under the provisions of M.G.L. c. 132, §§ 40 through 46, and subject to the following:
    a. the cutting and removal of trees within Bordering Vegetated Wetland shall be limited to no more than 50% of the basal area of the area to be cut and the work shall be conducted when the soil is frozen, dry or otherwise stable to support the equipment used;
    b. except for the construction or maintenance of access described in 310 CMR 10.04(b)16., there shall be no filling, excavation, or other change in topography or hydrology of resource areas;
    c. all soils that are exposed during or after any work described in 310 CMR 10.04: Agriculture(b)14. shall be stabilized to prevent the soils from eroding into Bordering Vegetated Wetlands beyond the work area or into open water bodies, in accordance with the Massachusetts Forestry Best Management Practices Manual;
    d. the person claiming the exemption shall submit by certified mail or hand delivery at the same time to the conservation commission and the appropriate DEM Regional Office not less than ten days prior to the commencement of the activity, a copy of the Forest Cutting Plan that describes the proposed cutting and removal of trees and any activity within resource areas or the Buffer Zone. The conservation commission shall have the opportunity to comment to DEM on the plan;
    e. landings for forest products shall not be located in Bordering Vegetated Wetland or Bank; and
    f. any Forest Cutting Plan that is not affirmatively approved by DEM under M.G.L. c. 132, §§ 40 through 46 but instead is deemed approved due to the expiration of some period of time following the submittal of the plan to DEM for approval shall not be considered "approved" by DEM for the purposes of 310 CMR 10.04.
15. notwithstanding the use of the words "for commercial purposes" in the first sentence of 310 CMR 10.04: Agriculture(a), the cutting of trees within resource areas and the Buffer Zone by owners for their own use, not to exceed 5,000 board feet or ten cords of wood during any 12 month period without an approved Forest Cutting Plan or the cutting of trees within resources areas of greater than 5,000 board feet or ten cords but less than 10,000 board feet or 20 cords of wood during any 12 month period with an approved Forest Cutting Plan, provided that:
    a. after the cutting, the remaining trees in the resource area (and the Buffer Zone,

if the activity is being conducted without an approved Forest Cutting Plan) shall be evenly distributed throughout the area where cutting occurred and the crown cover shall not be less than 50%. Crown cover is determined as the percent of the ground's surface that would be covered by a vertical projection of foliage from trees with a diameter at breast height of five inches or greater, where minor gaps between branches are disregarded and areas of overlapping foliage are counted only once;

b. the cutting and removal of trees shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment used;

10.04: continued

c. the cutting, removal, or other destruction of trees and understory vegetation without a Forest Cutting Plan shall not occur within 25 feet of the Bank, except for the purpose of providing access for the activities described in 310 CMR 10.04: Agriculture(b)15.;

d. the placement of slash, branches, and limbs resulting from the cutting and removal operations shall not occur within 25 feet of Bank;

e. no filling, excavation, or other change shall occur in the existing topography or hydrology of a resource area;

f. landings for forest products shall not be located in Bordering Vegetated Wetland or Bank; and

g. any Forest Cutting Plan that is not affirmatively approved by DEM under M.G.L. c. 132, §§ 40 through 46, but instead is deemed approved due to the expiration of some period of time following the submittal of the plan to DEM for approval shall not be considered "approved" by DEM for the purposes of 310 CMR 10.04.

16. the construction of new temporary access or the maintenance of existing legally constructed access for forestry activities described in 310 CMR 10.04: Agriculture(b)14. or 15. provided that:

a. every practicable effort shall be made to avoid access, including stream crossings, and the construction of landings through and in resource areas;

b. where access, including stream crossings, through resource areas cannot be avoided, every practicable effort shall be made to minimize impacts resulting from construction of new access including, but not limited to, maintaining and improving (but not enlarging) existing access. Activities shall be conducted when the soil is frozen, dry, or otherwise stable to support the equipment used;

c. where DEM has determined through its review and approval of the Forest Cutting Plan that access is impracticable without constructing new access or stream crossings:

i. access shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual;

ii. stream crossings shall be stabilized to prevent erosion using methods described in the Massachusetts Forestry Best Management Practices Manual. When crossings involve fill, culverts or other structures that will obstruct flow, they shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual to allow the unobstructed passage of existing flows for at least the 25 year storm;

iii. access or stream crossings shall be removed within one year of completion of the work described in the approved Forest Cutting Plan;

iv. following removal of access, the topography and site conditions shall be substantially restored to allow pre-existing vegetation to be reestablished; and

v. activities shall be conducted when the soil is frozen, dry, or otherwise stable to support the equipment used.

17. non-harvest management practices for forest products on land maintained in forest use limited to pruning, pre-commercial thinning or planting of tree seedlings.

(c) Normal Improvement of Land in Agricultural Use, which in all cases does not include filling or dredging a Salt Marsh, includes but is not limited to:

1. the following activities when they occur on land in agricultural use or when they occur within the Buffer Zone or Bordering Land Subject to Flooding that is not land in agricultural use, when they are directly related to production or raising of the agricultural

commodities referenced in 310 CMR 10.04: Agriculture(a), and when they are undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands and the activity is conducted in accordance with federal and state laws:

a. the installation of permanent fencing, windbreaks, hedgerows, or the cutting of vegetation to create forest boundaries up to five feet wide;

b. the installation of dikes within a cranberry bog;

c. the construction of farm structures, not including habitable dwellings, provided that the footprint of the farm structure does not exceed 4,000 square feet and no filling of Bordering Land Subject to Flooding occurs beyond the footprint of the building;

10.04: continued

d. the squaring-off of fields and bogs, provided that the activity does not alter a Bordering Vegetated Wetland, there is no increase in the amount of land in production beyond the minimum increase necessarily resulting from making the boundary of any field or bog more regular, and no fill is placed within Bordering Land Subject to Flooding;

e. the construction of by-pass canals/channels and tail water recovery systems;

f. a change in commodity other than from maple sap production or forest products to any other commodity, provided that there is no filling of Bordering Vegetated Wetland and drainage ditches or the subsurface drainage system are not increased or enlarged;

g. the construction of a water management system such as a reservoir, farm pond, irrigation system, field ditch, cross ditch, canal/channel, grass waterway, dike, sub-surface drainage system, watering facility, water transport system, vent, or water storage system, or of a livestock access; and

h. the construction of composting and storage areas.

For the activities described in 310 CMR 10.04: Agriculture(c)(1)d. through h. there shall be no net loss of flood storage capacity; and

2. the reconstruction of existing dikes, the reconstruction and expansion of existing ponds and reservoirs, and the construction of tailwater recovery ponds and by-pass canals/channels occurring partly or entirely within a Bordering Vegetated Wetland, when directly related to production or raising of the agricultural commodities referenced in 310 CMR 10.04: Agriculture(a), in accordance with the following:

a. Prior to performing the work, the person claiming the exemption shall submit to the conservation commission for its review at a public meeting that portion of a certified farm Conservation Plan (CP) which relates to the work to be conducted in a Bordering Vegetated Wetland. The CP must be prepared in cooperation with the U.S.D.A. Natural Resource Conservation Service (NRCS), Memorandum of Understanding (MOU) between the Department and NRCS concerning CPs;

b. The conservation commission may, within 21 days of receiving the CP, provide the person claiming the exemption with written notification containing specific comments detailing the manner in which the CP has not been prepared in compliance with the terms of the MOU;

c. The person claiming the exemption shall provide SCS with a complete copy of the notification;

d. All revisions to the CP that relate to the delineation of Bordering Vegetated Wetlands shall be submitted to the conservation commission in accordance with 310 CMR 10.04: Agriculture(c)2.;

e. All work shall be done in accordance with the CP; and

f. The maximum amount of Bordering Vegetated Wetland which may be altered by the above activities is:

i. 5,000 square feet for reconstruction of an existing dike;

ii. 10,000 square feet for expansion of an existing pond or reservoir;

iii. 10,000 square feet for construction of a tailwater recovery pond; and

iv. 5,000 square feet for construction of a by-pass canal/channel.

Alter means to change the condition of any Area Subject to Protection under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following:

(a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;

(b) the lowering of the water level or water table;
(c) the destruction of vegetation;
(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

Provided, that when the provisions of 310 CMR 10.03(6) and 10.05(3) or 333 CMR 11.03(9) have been met, the application of herbicides in the Buffer Zone in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: *Right of Way Management*, effective July 10, 1987, is not an alteration of any Area Subject to Protection under M.G.L. c. 131, § 40.

10.04: continued

Applicant means any person who files a Notice of Intent, or on whose behalf such a notice is filed.

Aquaculture.

(a) Land in Aquacultural Use means land presently and primarily used in the growing of aquatic organisms under controlled conditions, including one or more of the following uses: raising, breeding or producing a specified type of animal or vegetable life including, but not limited to, municipal shellfish propagation, finfish such as carp, catfish, black bass, flatfishes, herring, salmon, shad, smelt, sturgeon, striped bass, sunfishes, trout, whitefish, eel, tilapia; shellfish such as shrimp, crabs, lobster, crayfish, oysters, clams, periwinkles, scallops, mussels, squid; amphibians such as frogs; reptiles such as turtles; seaweeds such as irish moss and dulse; and edible freshwater plants.

(b) Normal Maintenance or Improvement of land in aquacultural use means the following activities, when done in connection with the production of aquatic organisms as defined above: draining, flooding, heating, cooling, removing, filling, grading, compacting, raking, tilling, fertilizing, seeding, harvesting, filtering, rafting, culverting or applying chemicals in conformance with all state and federal laws; provided, however, that such activities are clearly intended to improve and maintain land in aquacultural use and that best available measures are utilized to ensure that there will be no adverse effect on wetlands outside the area in aquacultural use, and further provided that removing, filling, dredging or altering of a salt marsh is not to be considered normal maintenance or improvement of land in aquacultural use.

Area Subject to Protection under M.G.L. c. 131, § 40 means any area specified in 310 CMR 10.02(1). It is used synonymously with Resource Area, each one of which is defined in greater detail in 310 CMR 10.21 through 10.66.

Bank (Coastal) is defined in 310 CMR 10.30(2).

Bank (Inland) is defined in 310 CMR 10.54(2).

Beach (Barrier) is defined in 310 CMR 10.29(2).

Beach (Coastal) is defined in 310 CMR 10.27(2).

Beach (Inland), a naturally occurring inland beach, means an unvegetated bank as defined in 310 CMR 10.54(2).

Best Available Measures means the most up-to-date technology or the best designs, measures or engineering practices that have been developed and that are commercially available.

Best Practical Measures means technologies, designs, measures or engineering practices that are in general use to protect similar interests.

Bordering means touching. An area listed in 310 CMR 10.02(1)(a) is bordering on a water body listed in 310 CMR 10.02(1)(a) if some portion of the area is touching the water body or if some portion of the area is touching another area listed in 310 CMR 10.02(1)(a) some portion of which is in turn touching the water body.

Bordering Vegetated Wetland is defined in 310 CMR 10.55(2).

Boundary means the boundary of an Area Subject to Protection under M.G.L. c. 131, § 40. A description of the boundary of each area is found in the appropriate section of 310 CMR 10.00. For coastal areas, *see* 310 CMR 10.21 through 10.37; for inland areas, *see* 310 CMR 10.51 through 10.60.

Breeding Areas mean areas used by wildlife for courtship, mating, nesting or other reproductive activity, and rearing of young.

10.04: continued

Buffer Zone means that area of land extending 100 feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a).

Certificate of Compliance means a written determination by the issuing authority that work or a portion thereof has been completed in accordance with an Order. It shall be made on Form 8.

Coastal Wetlands are defined in M.G.L. c. 131, § 40, para. 6.

Cold-water Fishery means waters in which the mean of the maximum daily temperature over a seven day period generally does not exceed 68ºF (20ºC) and, when other ecological factors are favorable (such as habitat) are capable of supporting a year round population of cold-water stenothermal aquatic life such as trout. Waters designated as cold-water fisheries by the Department in 314 CMR 4.00: *Massachusetts Surface Water Quality Standards* and waters designated as cold-water fishery resources by the Division of Fisheries and Wildlife are cold-water fisheries. Waters where there is evidence based on a fish survey that a cold-water fish population and habitat exist are also cold-water fisheries. Cold-water fish include but are not limited to brook trout (*Salvelinus fontanilis*), rainbow trout (*Oncorhynchus mykiss*), brown trout (Salmo trutta), creek chubsucker (*Erimyzon oblongus*) and fallfish (*semotilus corporalis*).

Combined Application means an application that may serve as a Notice of Intent pursuant to 310 CMR 10.00, an application for a 401 Water Quality Certification pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*, and/or an application for a Chapter 91 license, permit or other written approval for a water-dependent use, pursuant to 310 CMR 9.00: *Waterways*. Notwithstanding the foregoing, a Combined Application may not serve as an application for an annual permit for a mooring, float, raft or small structure accessory to a residence in accordance with 310 CMR 9.07: *Activities Subject to Annual Permit*, an application for a Chapter 91 license for a small structure accessory to a residence in accordance with the simplified process set forth in 310 CMR 9.10: *Simplified Procedures for Small Structures Accessory to Residences* or the certification submitted as an application for a General License in accordance with 310 CMR 9.29: *Permitting of Test Projects*.

Combined Permit means a decision issued in response to a Combined Application that serves as two or more of the following: a Superseding Order of Conditions issued pursuant to 310 CMR 10.00; a 401 Water Quality Certification issued pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*; and/or a Chapter 91 permit, license or other written approval issued pursuant to 310 CMR 9.00: *Waterways*.

Commissioner means the Commissioner of the Department of Environmental Protection pursuant to St. 1989, c. 240, § 101.

Conditions means those requirements set forth in a written Order issued by a conservation commission or the Department for the purpose of permitting, regulating or prohibiting any activity that removes, fills, dredges or alters an Area Subject to Protection under M.G.L. c. 131, § 40. (*See* also 310 CMR 10.05(6).)

Confined Disposal Facility means a facility created in open water or wetlands consisting of

confinement walls or berms built up or extending into existing land and is a "confined disposal facility" as defined in 314 CMR 9.02: *Definitions*.

Conservation Commission means that body comprised of members lawfully appointed pursuant to M.G.L. c. 40, § 8C. For the purposes of M.G.L. c. 131, § 40 and 310 CMR 10.00, it shall also mean a mayor or board of selectmen, where no conservation commission has been established under M.G.L. c. 40, § 8C.

Creek means the same as a stream, as defined in 310 CMR 10.04

10.04: continued

Critical Areas mean Outstanding Resource Waters as designated in 314 CMR 4.00, Special Resource Waters as designated in 314 CMR 4.00: *Massachusetts Surface Water Quality Standards* recharge areas for public water supplies as defined in 310 CMR 22.02: *Definitions* (Zone Is, Zone IIs, and Interim Wellhead Protection Areas for ground water sources and Zone As for surface water sources), bathing beaches as defined in 105 CMR 445.000: *Minimum Standards for Bathing Beaches (State Sanitary Code: Chapter VII*), cold-water fisheries and shellfish growing areas.

Dam means for the purposes of 310 CMR 10.11 through 310 CMR 10.14, 310 CMR 10.24(8), and 10.53(4) any artificial barrier placed across a watercourse that raises or has the potential to raise the level of water or which impounds and/or diverts water.

Date of Issuance means the date an Order is mailed, as evidenced by a postmark, or the date it is hand delivered.

Date of Receipt means the date of delivery to an office, home or usual place of business by mail or hand delivery.

Densely Developed Area means a riverfront area that has been designated by the Secretary of the Executive Office of Energy and Environmental Affairs at the request of a city or town, limited to an area of ten acres or more that is being utilized, or includes existing vacant structures or vacant lots formerly utilized as of January 1, 1944 or sooner, for intensive industrial, commercial, institutional, or residential activities or combinations of such activities, including, but not limited to the following: manufacturing, fabricating, wholesaling, warehousing, or other commercial or industrial activities; retail trade and service activities; medical and educational institutions; residential dwelling structures at a density of three or more per two acres; and mixed or combined patterns of the above. Land which is zoned for intensive use but is not utilized for such use as of January 1, 1997 shall not be designated as a densely developed area. Rivers within the municipalities identified in 310 CMR 10.58(2)(a)3.a. also have 25 foot riverfront areas.

Department means the Department of Environmental Protection, and shall include the Commissioner and any other person employed by said Department, pursuant to St. 1989, c. 240, § 101.

Designated Port is defined in 310 CMR 10.26(2).

Determination.

(a) a Determination of Applicability means a written finding by a conservation commission or the Department as to whether a site or the work proposed thereon is subject to the jurisdiction of M.G.L. c. 131, § 40. It shall be made on Form 2.

(b) a Determination of Significance means a written finding by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40. It shall be made as part of the Order, on Form 5.

(c) a Notification of Non-significance means a written finding by a conservation commission, after a public hearing, or by the Department, that the area on which the proposed work is to be done, or which the proposed work will alter, is not significant to any of the interests of M.G.L. c. 131, § 40. It shall be made on Form 6.

Direct Case means the evidence that a party seeks to introduce in support of its position, as well as any legal argument the party wishes to provide. The Direct Case may include, but is not limited to, statements under oath by lay witnesses and expert witnesses, technical reports, studies, memoranda, maps, plans, and other information that a party seeks to have the Presiding Officer review as part of the adjudicatory proceeding.

Disposal Site means a structure, well, pit, pond, lagoon, impoundment, ditch, landfill, or other place or area, excluding ambient air or surface water, where uncontrolled oil or hazardous material has come to be located as a result of any spilling, leaking, pouring, ponding, emitting, emptying, discharging, injecting, escaping, leaching, dumping, discarding or otherwise disposing of such oil or hazardous material and is a "disposal site" as defined in M.G.L. c. 21E.

10.04: continued

Dredge means to deepen, widen or excavate, either temporarily or permanently, land below the mean high tide line in coastal waters and below the high water mark for inland waters. The term dredge shall not include activities in Bordering or isolated vegetated wetlands.

Dune means coastal dune, as defined in 310 CMR 10.28(2).

Ecological Restoration Project means a project whose primary purpose is to restore or otherwise improve the natural capacity of a Resource Area(s) to protect and sustain the interests identified in M.G.L. c. 131, § 40, when such interests have been degraded or destroyed by anthropogenic influences. The term Ecological Restoration Project shall not include projects specifically intended to provide mitigation for the alteration of a Resource Area authorized by a Final Order or Variance issued pursuant to 310 CMR 10.00 or a 401 Water Quality Certification issued pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* other than projects implemented pursuant to a US Army Corps of Engineers-approved in-lien fee program.

Ecological Restoration Limited Project means an Ecological Restoration Project that meets the eligibility criteria set forth in 310 CMR 10.24(8) or 10.53(4).

Estimated Habitat Map of State-listed Rare Wetlands Wildlife means the map of the estimated habitats of state-listed rare wetlands wildlife published by the Natural Heritage and Endangered Species Program (the Program or NHESP) in accordance with 321 CMR 10.12: *Delineation of Priority Habitat of State-listed Species*.

Environmentally Sensitive Site Design means design that incorporates low impact development techniques to prevent the generation of stormwater and non-point source pollution by reducing impervious surfaces, disconnecting stormwater sheet flow paths and treating stormwater at its source, maximizing open space, minimizing disturbance, protecting natural features and processes, and/or enhancing wildlife habitat.

Estuary means:

(a) any area where fresh and salt water mix and tidal effects are evident; or

(b) any partially enclosed coastal body of water where the tide meets the current of any stream or river.

Extension Permit means a written extension of time within which the authorized work shall be completed. It shall be made on Form 7.

Fill means to deposit any material so as to raise an elevation, either temporarily or permanently.

Final Order means the Order issued by the Commissioner after an adjudicatory hearing or, if no request for hearing has been filed, the Superseding Order or, if no request for a Superseding Order has been filed, the Order of Conditions.

Flat (Tidal) is defined in 310 CMR 10.27(2)(b).

Flood Control means the prevention or reduction of flooding and flood damage.

Formerly or Presently Owned means owned by the same owner at any time on or after August 1, 1996.

Freshwater Wetlands are defined in M.G.L. c. 131, § 7, para. 7.

General Performance Standards means those requirements established by 310 CMR 10.00 for activities in or affecting each of the Areas Subject to Protection under M.G.L. c. 131, § 40. They are found in 310 CMR 10.25 through 10.35, 10.37, and 10.54 through 10.60.

10.04: continued

Ground Water Supply means water below the earth's surface in the zone of saturation.

Historic Mill Complex means the mill complexes in, but not limited to, Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford in existence prior to 1946 and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on August 7, 1996. An historic mill complex also means any historic mill included on the *Massachusetts Register of Historic Places*. An historic mill complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas, and driveways) constructed before and existing after 1946, used for any type of manufacturing or mechanical processing and including associated structures to provide water for processing, to generate water power, or for water transportation.

Illicit Discharge means a discharge that is not entirely comprised of stormwater. Notwithstanding the foregoing, an illicit discharge does not include discharges from the following activities or facilities: firefighting, water line flushing, landscape irrigation, uncontaminated ground water, potable water sources, foundation drains, air conditioning condensation, footing drains, individual resident car washing, flows from riparian habitats and wetlands, dechlorinated water from swimming pools, water used for street washing and water used to clean residential buildings without detergents.

Important Wildlife Habitat Functions mean important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.

Innovative Technology means technology that has not been commercially deployed or is in limited deployment in Massachusetts, and includes, but is not limited to, energy technology that obtains energy from the ocean, waterway, or conditions associated with the ocean or waterway, or other forms of renewable energy technology.

Interests Identified in M.G.L. c. 131, § 40 means public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of fisheries, and protection of wildlife habitat.

Issuing Authority means a conservation commission, mayor, the selectmen or the Department, whichever is applicable.

Lake means any open body of fresh water with a surface area of ten acres or more, and shall include great ponds.

Land Containing Shellfish is defined in 310 CMR 10.34(2).

Land Subject to Coastal Storm Flowage means land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.

Land Subject to Flooding is defined in 310 CMR 10.57(2).

Land Subject to Tidal Action means land subject to the periodic rise and fall of a coastal water body, including spring tides.

Land under Salt Ponds is defined in 310 CMR 10.33(2).

Land under Water Bodies and Waterways means the bottom of, or land under, the surface of the ocean or any estuary, creek, river, stream, pond, or lake. Land under the ocean and estuaries is further defined in 310 CMR 10.25(2); land under inland water bodies is further defined in 310 CMR 10.56(2).

10.04: continued

Land Uses with Higher Potential Pollutant Loads mean the following land uses: land uses identified in 310 CMR 22.20B(2), 22.20C(2)(a) through (k) and (m), 22.21(2)(a)1. through 8., and (b)1. through 6.; areas within a site that are the location of activities that are subject to an individual National Pollutant Discharge Elimination System (NPDES) permit or the NPDES Multi-sector General Permit; auto fueling facilities (gas stations); exterior fleet storage areas; exterior vehicle service and equipment cleaning areas; marinas and boatyards; parking lots with high intensity use; confined disposal facilities and disposal sites.

Landowner means the owner of record of land or an interest in land that is subject of a Reviewable Decision.

Linear-shaped Project, for purposes of 310 CMR 10.05(4), means a project that is substantially longer than it is wide and is a project for the construction, reconstruction, or substantial enlargement of facilities that will be used in the service of the public to provide electric, gas, sewer, water, telephone, telegraph and other communication services, a project by a public agency or authority for the construction, reconstruction, expansion, repair or maintenance of public roads, bike paths or other paths for pedestrians, or public railways.

Lot means an area of land in one ownership, with definite boundaries.

Low Impact Development Techniques mean innovative stormwater management systems that are modeled after natural hydrologic features. Low impact development techniques manage rainfall at the source using uniformly distributed decentralized micro-scale controls. Low impact development techniques use small cost-effective landscape features located at the lot level.

Maintenance of a Stormwater Management System means the work to keep a stormwater management system functional and in good repair so that it may continue to operate as originally designed. Maintenance of a stormwater management system does not include work that:

(a) reduces the capacity of the system to treat stormwater, provide recharge or attenuate peak flow;
(b) increases the total and peak volume of the stormwater managed by the system;
(c) directs additional stormwater discharges to the system; or
(d) results in reduced use of above ground stormwater best management practices.

Major or Complex means an appeal of a Reviewable Decision issued for work in a resource area that will be so designated due to the complexity or novelty of the issues, the magnitude of the project, the potential for environmental harm or benefit, significant public interest or public financing or other relevant consideration, as determined by the Commissioner or a Presiding Officer.

Majority means more than half of the members of the conservation commission then in office.

Marsh is defined in M.G.L. c. 131, § 40, para. 10.

Massachusetts Erosion and Sediment Control Guidelines means the *Massachusetts Erosion and Sediment Control Guidelines for Urban and Suburban Areas* originally prepared by the Franklin, Hampden, and Hampshire Conservation Districts in 1997, for the Massachusetts Executive Office of Environmental Affairs State Commission for Conservation of Soil, Water and Related Resources, the Massachusetts Department of Environmental Protection, the U.S. Environmental

Protection Agency, Region I, and the Natural Resources Conservation Service, United States Department of Agriculture and reprinted in May 2003.

Massachusetts River and Stream Crossing Standards or the Stream Crossing Standards means the standards developed by the River and Stream Continuity Partnership as corrected on March 8, 2012.

Meadow (or Wet Meadow) is defined in M.G.L. c. 131, § 40, para. 9.

Mean Annual High-water Line is defined at 310 CMR 10.58(2).

10.04: continued

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 6 through 62H, and 301 CMR 11.00: *General Application and Administration Environmental Code, Title 1*.

Migratory Areas mean those areas used by wildlife moving from one habitat to another, whether seasonally or otherwise.

Mitigation means rectifying an adverse impact by repairing, rehabilitating or restoring the affected resource area or compensating for an adverse impact by enhancing or providing replacement resource areas.

Notice of Intent means the written notice filed by any person intending to remove, fill, dredge or alter an Area Subject to Protection under M.G.L. c. 131, § 40. It shall be made on Form 3 or 4.

Ocean means the Atlantic Ocean and all contiguous waters subject to tidal action.

Openness Ratio means the cross-sectional area of a structure opening divided by crossing length when measured in consistent units. For a box culvert, the openness ratio equals (height x width)/length. For crossing structures with multiple cells or barrels openness is calculated separately for each cell or barrel. The embedded portion of a culvert is not included in the calculation of the cross-sectional area.

Order means an Order of Conditions, Order of Resource Area Delineation, Superseding, Order or Final Order, whichever is applicable.

Order of Conditions means the document issued by a conservation commission containing conditions which regulate or prohibit an activity. It shall be made on Form 5.

Outstanding Resource Water means a surface water of the Commonwealth so designated in the Massachusetts Surface Water Quality Standards at 314 CMR 4.00: *Massachusetts Surface Water Quality Standards*.

Owner of Land Abutting the Activity means the owner of land sharing a common boundary or corner with the site of the proposed activity in any direction, including land located directly across a street, way, creek, river, stream, brook or canal.

Party to any proceeding before the Department means the applicant, the conservation commission and the Department, and pursuant to 310 CMR 10.05(7)(a) may include the owner of the site, any abutter, any person aggrieved, any ten residents of the city or town where the land is located and any ten persons pursuant to M.G.L. c. 30A, § 10A.

Person Aggrieved means any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

Plans means such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, deemed necessary by the issuing authority to describe the site and/or the

work, to determine the applicability of M.G.L. c. 131, § 40 or to determine the impact of the proposed work upon the interests identified in M.G.L. c. 131, § 40. (*See* also General Instructions for Completing Notice of Intent (Form 3) and Abbreviated Notice of Intent (Form 4).)

Pond (Coastal) means Salt Pond as defined in 310 CMR 10.33(2).

10.04: continued

Pond (Inland) means any open body of fresh water with a surface area observed or recorded within the last ten years of at least 10,000 square feet. Ponds may be either naturally occurring or human-made by impoundment, excavation, or otherwise. Ponds shall contain standing water except for periods of extended drought. Periods of extended drought for purposes of 310 CMR 10.00 shall be those periods, in those specifically identified geographic locations, determined to be at the "Advisory" or more severe drought level by the Massachusetts Drought Management Task Force, as established by the Executive Office of Energy and Environmental Affairs and the Massachusetts Emergency Management Agency in 2001, in accordance with the Massachusetts Drought Management Plan (MDMP).

Notwithstanding the above, the following human-made bodies of open water shall not be considered ponds:

(a) basins or lagoons which are part of wastewater treatment plants;
(b) swimming pools or other impervious human-made basins; and
(c) individual gravel pits or quarries excavated from upland areas unless inactive for five or more consecutive years.

Practicable means available and capable of being done after taking into consideration costs, existing technology, proposed use, logistics and potential adverse consequences (*e.g.*, degradation of Rare Species habitat, increased flood impacts to the built environment) in light of the overall project purposes and is permittable under existing federal and state statutes and regulations.

Prevention of Pollution means the prevention or reduction of contamination of surface or ground water.

Primary Frontal Dune or Primary Dune means a continuous or nearly continuous mound or ridge of sediment with relatively steep seaward and landward slopes immediately landward and adjacent to the beach and subject to erosion and overtopping from high tides and waves during coastal storms. The Primary Frontal Dune is the dune closest to the beach. The inland limit of the Primary Frontal Dune occurs at the point where there is a distinct change from a relatively steep slope to a relatively mild slope.

Private Water Supply means any source or volume of surface or ground water demonstrated to be in any private use or demonstrated to have a potential for private use.

Project Locus means the lot on which an applicant proposes to perform an activity subject to regulation under M.G.L. c. 131, § 40.

Project Purpose means the general, functional description of an activity proposed within the riverfront area (*e.g.*, construction of a single family house, expansion of a commercial development).

Project Site means the area within the Project Locus that comprises the limit of work for activities, including but not limited to, the dredging, excavating, filling, grading, the erection, reconstruction or expansion of a building or structure, the driving of pilings, the construction or improvement of roads or other ways, and the installation of drainage, stormwater treatment, environmentally sensitive site design practices, sewage and water systems.

Protection of Fisheries means protection of the capacity of an Area Subject to Protection under

M.G.L. c. 131, § 40:

(a) to prevent or reduce contamination or damage to fish; and

(b) to serve as their habitat and nutrient source. Fish includes all species of fresh and salt water finfish and shellfish.

See also the definition of Marine Fisheries contained in 310 CMR 10.23(15).

Protection of Land Containing Shellfish means protection of the capacity of an Area Subject to Protection under M.G.L. c. 131, § 40:

(a) to prevent or reduce contamination or damage to shellfish; and

(b) to serve as their habitat and nutrient source.

See also the definitions of Shellfish and Land Containing Shellfish in 310 CMR 10.34(2).

10.04: continued

Public Water Supply means any source or volume of surface or ground water demonstrated to be in public use or approved for water supply pursuant to M.G.L. c. 111, § 160 by the Division of Water Supply of the Department, or demonstrated to have a potential for public use.

Rare Species mean those vertebrate and invertebrate animal species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 10.60.

Redevelopment means replacement, rehabilitation, or expansion of existing structures, improvement of existing roads or reuse of degraded or previously developed areas for purposes of 310 CMR 10.58, governing work in the riverfront area. For purpose of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), redevelopment is defined to include the following projects:

(a) maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving;

(b) development, rehabilitation, expansion and phased projects on previously developed sites provided the redevelopment results in no net increase in impervious area; and

(c) remedial projects specifically designed to provide improved stormwater management such as projects to separate storm drains and sanitary sewers and stormwater retrofit projects.

Remove means to take away any type of material, thereby changing an elevation, either temporarily or permanently.

Request for Determination of Applicability means a written request made by any person to a conservation commission or the Department for a determination as to whether a site or work thereon is subject to M.G.L. c. 131, § 40. It shall be submitted on Form 1.

Resource Area means any of the areas specified in 310 CMR 10.25 through 10.35 and 10.54 through 10.58. It is used synonymously with Area Subject to Protection under M.G.L. c. 131, § 40, each one of which is enumerated in 310 CMR 10.02(1).

Restoration Order of Conditions means an Order of Conditions issued pursuant to 310 CMR 10.05(6) and 10.14 for a project that meets the eligibility criteria set forth in 310 CMR 10.13.

Reviewable Decision means a MassDEP decision that is a superseding order of condition or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance.

River means any natural flowing body of water that empties to any ocean, lake, pond, or other river and which flows throughout the year. River is defined further at 310 CMR 10.58(2).

Riverfront Area is defined at 310 CMR 10.58(2).

Rocky Intertidal Shore is defined in 310 CMR 10.31(2).

Salt Marsh is defined in 310 CMR 10.32(2).

Severe Weather Emergency Declaration is a declaration issued by the Commissioner, following

a destructive weather event, which authorizes widespread emergency recovery, debris cleanup, or roadway or utility repair, necessary for the protection of the health or safety of the residents of the Commonwealth, without filing a Notice of Intent or requesting an emergency certification or authorization pursuant to 310 CMR 10.06(1) through (7).

Sediment, for the purpose of dredging, means all inorganic or organic matter including detritus situated under tidal waters below the mean high water line as defined in 310 CMR 10.23, and for inland waters, below the upper boundary of a bank, as defined in 310 CMR 10.54(2).

10.04: continued

Shellfish Growing Area means land under the ocean, tidal flats, rocky intertidal shores and marshes and land under salt ponds when any such land contains shellfish. Shellfish growing areas include land that has been identified and shown on a map published by the Division of Marine Fisheries as a shellfish growing area including any area identified on such map as an area where shellfishing is prohibited. Shellfish growing areas shall also include land designated by the Department in 314 CMR 4.00: *Massachusetts Surface Water Quality Standards* as suitable for shellfish harvesting with or without depuration. In addition, shellfish growing areas shall include shellfish growing areas designated by the local shellfish constable as suitable for shellfishing based on the density of shellfish, the size of the area and the historical and current importance of the area for recreational and commercial shellfishing.

Shellfish Suitability Area means an area located within land containing shellfish and identified on maps prepared in May 2011 by the Massachusetts Division of Marine Fisheries with input from local Shellfish Constables and commercial fishermen as suitable for shellfish. The areas covered include sites where shellfish have been observed since the mid 1970s but may not currently support shellfish and thus represent both existing and potential shellfish habitat areas.

Shelter means protection from the elements or predators.

Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. Within the context of the protection of the riverfront area, no significant adverse impact means the level of protection of the performance standards provided under 310 CMR 10.58.

Special Flood Hazard Area means the area of land in the flood plain that is subject to a 1% chance of flooding in any given year as determined by the best available information, including, but not limited to, the currently effective or preliminary Federal Emergency Management Agency (FEMA) Flood Insurance Study or Rate Map (except for any portion of a preliminary map that is the subject of an appeal to FEMA) for Land Subject to Coastal Storm Flowage, the Velocity Zone as defined in 310 CMR 10.04, and the Flood Insurance Study for Bordering Land Subject to Flooding as defined in 310 CMR 10.57.

Spring Tides means those tides which occur with the new and full moons, and which are perceptibly higher and lower than other tides.

State-listed Species mean the same as rare species, as defined in 310 CMR 10.04.

Storm Damage Prevention means the prevention of damage caused by water from storms, including, but not limited to, erosion and sedimentation, damage to vegetation, property or buildings, or damage caused by flooding, water-borne debris or water-borne ice.

Stormwater Best Management Practice means a structural or nonstructural technique for managing stormwater to prevent or reduce non-point source pollutants from entering surface waters or ground waters. A structural stormwater best management practice includes a basin, discharge outlet, swale, rain garden, filter or other stormwater treatment practice or measure either alone or in combination including without limitation any overflow pipe, conduit, weir control structure that:

(a) is not naturally occurring;
(b) is not designed as a wetland replication area; and

(c) has been designed, constructed, and installed for the purpose of conveying, collecting, storing, discharging, recharging or treating stormwater.

Nonstructural stormwater best management practices include source control and pollution prevention measures.

Stormwater Management System means a system for conveying, collecting, storing, discharging, recharging or treating stormwater on-site including stormwater best management practices and any pipes and outlets intended to transport and discharge stormwater to the ground water, a surface water or a municipal separate storm sewer system.

10.04: continued

Stormwater Management System Improvement means:

(a) expansion of a stormwater management system beyond its existing geographic footprint to provide treatment for additional stormwater volume, provide additional groundwater recharge or enhance groundwater recharge or pollutant removal capability such as the addition of treatment train components; or

(b) modification to, or addition of, features within the existing geographic footprint of a stormwater management system to enhance groundwater recharge or pollutant removal capability, such as modifying outlet control structures.

Stream means a body of running water, including brooks and creeks, which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection under M.G.L. c. 131, § 40. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not flow throughout the year (*i.e.*, which is intermittent) is a stream except for that portion upgradient of all bogs, swamps, wet meadows and marshes.

Superseding Determination means a determination of applicability, of significance or of non-significance, as the case may be, issued by the Department. It shall be made on Form 2.

Superseding Order means a document issued by the Department containing conditions which regulate or prohibit an activity. It shall be made on Form 5.

Surface Waters means all waters other than ground water within the jurisdiction of the Commonwealth including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, and coastal waters.

Swamp is defined in M.G.L. c. 131, § 40, para. 8.

Test Project means the installation or deployment of water dependent Innovative Technology in situ for purposes of evaluating its performance and environmental effects.

Velocity Zone or V-zone also known as the Coastal High Hazard Area means an area within the Special Flood Hazard Area that is subject to high velocity wave action from storms or seismic sources. The Velocity Zone Boundaries are determined by reference to the currently effective or preliminary Flood Insurance Rate Map (FIRM) prepared by the Federal Emergency Management Agency (FEMA), whichever is more recent (except for any portion of a preliminary map that is the subject of an appeal to FEMA), or at a minimum to the inland limit of the Primary Frontal Dune, whichever is farther landward.

Vernal Pool Habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1). These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma macultum*), and are important habitat for other wildlife species.

Vista Pruning means the selective thinning of tree branches or understory shrubs to establish a

specific "window" to improve visibility. Vista pruning does not include the cutting of trees which would reduce the leaf canopy to less than 90% of the existing crown cover and does not include the mowing or removal of understory brush.

Wastewater Residuals Landfill means a facility or part of a facility approved by the Department for the disposal of wastewater residuals into or on land, but not including a site where wastewater residuals are land applied in accordance with 310 CMR 32.00: *Land Application of Sludge and Septage*.

10.04: continued

Water-dependent Uses mean those uses and facilities which require direct access to, or location in, marine, tidal or inland waters and which therefore cannot be located away from said waters, including but not limited to: marinas, public recreational uses, navigational and commerical fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an upland site, crossings over or under water bodies or waterways (but limited to railroad and public roadway bridges, tunnels, culverts, as well as railroad tracks and public roadways connecting thereto which are generally perpendicular to the water body or waterway), and any other uses and facilities as may further hereafter be defined as water-dependent in 310 CMR 9.00: *Waterways*.

Waters of the Commonwealth means all waters within the jurisdiction of the Commonwealth, including without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, coastal waters and ground waters.

Wildlife means all mammals, birds, reptiles and amphibians and, for the purposes of 310 CMR 10.37 and 10.59, all vertebrate and invertebrate animal species which are officially listed in 321 CMR 8.00: *Endangered Wildlife and Wild Plants* as endangered, threatened, or of special concern.

Wildlife Habitat means an Area Subject to Protection under M.G.L. c. 131, § 40, which due to its plant community, composition and structure, hydrologic regime or other characteristics provides important food, shelter, migratory or overwintering areas or breeding areas for wildlife.

Wildlife Specialist means an individual with at least a masters degree in wildlife biology or ecological science from an accredited college or university, or other competent professional with at least two years experience in wildlife habitat evaluation.

Work means the same as activity.

10.05: Procedures

(1) Time Periods. All time periods of ten days or less specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed using business days only. In the case of a determination or Order, such period shall commence on the first day after the date of issuance and shall end at the close of business on the tenth business day thereafter. All other time periods specified in M.G.L. c. 131, § 40 and 310 CMR 10.00 shall be computed on the basis of calendar days, unless the last day falls on a Saturday, Sunday or legal holiday, in which case the last day shall be the next business day following.

(2) Actions by Conservation Commission. Where M.G.L. c. 131, § 40 states that a particular action (except receipt of a request or notice) is to be taken by the conservation commission, that action is to be taken by more than half the members present at a meeting of at least a quorum. A quorum is defined as a majority of the members then in office.

Where M.G.L. c. 131, § 40 states that an order or notification shall be signed by a majority of the conservation commission, that action is to be taken by a majority of the members then in office, who need not convene as a body in order to sign, provided they met pursuant to the open meeting law, M.G.L. c. 39, §§ 23A through 23C, when voting on the matter.

Where M.G.L. c. 131, § 40 states that the conservation commission is to receive a request

or notice, conservation commission means a member of the conservation commission or an individual designated by the conservation commission to receive such request or notice.

(3) Determinations of Applicability.

(a) Requests for Determination of Applicability.

1. Any person who desires a determination as to whether M.G.L. c. 131, § 40 applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40, may submit to the conservation commission by certified mail or hand delivery a Request for a Determination of Applicability, Form 1. To obtain confirmation of a delineated boundary of bordering vegetated wetlands and other resource areas on the site to establish the extent of the buffer zone and resource areas prior to filing a Notice of

10.05: continued

Intent for proposed work, an applicant generally should file an Abbreviated Notice of Resource Area Delineation. Alternatively, the boundary of bordering vegetated wetland (or other resource areas) may be determined through the filing of a Notice of Intent. For work within riverfront areas, an applicant may submit to the conservation commission by certified mail or hand delivery a Request for Determination of Applicability to identify the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2., including sufficient information to enable the conservation commission to determine the applicable scope.

2. Any person who proposes to perform work within the Buffer Zone shall submit to the conservation commission either a Notice of Intent for such work or a Request for Determination of Applicability. Said request shall include sufficient information, as required on Form 1, to enable the conservation commission to find and view the area and to determine whether the proposed work will alter an Area Subject to Protection under M.G.L. c. 131, § 40. Applicants may use the Abbreviated Notice of Resource Area Delineation to confirm the boundaries of resource areas and the buffer zone.

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. A request for a Determination of Applicability shall include certification that the Department and the owner of the area subject to the request, if the person making the request is not the owner, have been notified that a determination is being requested under M.G.L. c. 131, § 40.

(b) Determination of Applicability.

1. Within 21 days after the date of receipt of the Request for a Determination of Applicability, the conservation commission shall issue a Determination of Applicability, Form 2. Notice of the time and place of the public meeting at which the determination will be made shall be given by the conservation commission at the expense of the person making the request not less than five days prior to such meeting, by publication in a newspaper of general circulation in the city or town in which the land is located, and by mailing a notice to the person making the request, the owner, the board of health and the planning board of said city or town. Notice shall also be given in accordance with the open meeting law, M.G.L. c. 39, § 23B. Said determination shall be signed by a majority of the conservation commission, and copies thereof shall be sent by the conservation commission to the Department, to the person making the request, and to the owner. Delivery of the copy to the person making the request shall be by hand delivery or certified mail, return receipt requested. Said determination shall be valid for three years from the date of issuance, except that a determination of the boundaries of the Areas Subject to Protection under M.G.L. c. 131, § 40 and the Buffer Zone which are to apply to 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, shall be valid throughout the effective duration of the Vegetation Management Plan.

2. The conservation commission shall find that M.G.L. c. 131, § 40 applies to the land, or a portion thereof, if it is an Area Subject to Protection under M.G.L. c. 131, § 40 as

defined in 310 CMR 10.02(1). The conservation commission shall find that M.G.L. c. 131, § 40 applies to the work, or portion thereof, if it is an Activity Subject to Regulation under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2). The conservation commission shall identify the scope of alternatives to be evaluated, if requested, for work within riverfront areas under 310 CMR 10.58(4)(c)2.

3. A Notice of Intent which is filed as a result of a positive determination, whether such determination is made by the Department or a conservation commission, shall be filed with the conservation commission, and all of the procedures set forth in 310 CMR 10.05(4) shall apply.

10.05: continued

(c) Appeal to the Department. Following a positive or negative Determination of Applicability, the identification of the scope of alternatives for work within the riverfront area, or the failure of a conservation commission to make a determination within 21 days, any person specified in 310 CMR 10.05(7) may, within ten days, request the Department to issue a Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7). The Department shall issue its determination within 35 days from receipt of such request.

(d) Work Pending Appeal of Determination.

1. Upon a positive Determination of Applicability by a conservation commission, work may not proceed until the Department or the Commissioner issues a negative determination, or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elasped, except that a Notice of Intent shall not be required for the application of herbicides in accordance with 310 CMR 10.03(6).

2. Upon a positive Determination of Applicability by the Department, work may not proceed until the Commissioner issues a negative determination or until a Notice of Intent has been filed, a final order has been issued and recorded, and all administrative appeal periods have elapsed.

3. Upon a positive Determination of Applicability by the Commissioner, work may not proceed until a judicial determination is made that the proposed work is not subject to M.G.L. c. 131, § 40 or until a Notice of Intent has been filed and a final order has been issued and recorded, and all administrative appeal periods have elapsed.

4. Upon a negative Determination of Applicability by a conservation commission or upon the failure of a conservation commission to act within the 21 day time period, and where the Department has been requested to issue a Superseding Determination of Applicability but has failed to do so within 35 days, work may proceed at the owner's risk upon notice to the Department and to the conservation commission.

5. Upon a negative Determination of Applicability by the Department, work may proceed at the owner's risk even if a request for an adjudicatory hearing has been made.

6. Upon a negative Determination of Applicability by the Commissioner after an adjudicatory hearing, work may proceed at the owner's risk even if a petition for judicial review has been filed.

7. Upon a positive Determination of Applicability by a conservation commission, the Department, or the Commissioner which identifies the scope of alternatives to be evaluated under 310 CMR 10.58(4)(c)2. for work within the riverfront area, work may not proceed until a Notice of Intent has been filed and a final Order has been issued and recorded and all administrative appeal periods have elapsed.

(4) Notices of Intent.

(a) Any person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection under M.G.L. c. 131 § 40 shall file a Notice of Intent on Form 3 and other application materials in accordance with the submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3)*. If the applicant is not a landowner of the Project Locus, the applicant shall obtain written permission from a landowner(s) prior to filing a Notice of Intent for proposed work, except for work proposed on Great Ponds or Commonwealth tidelands. Two copies of the completed Notice of Intent with supporting plans and documents shall be sent by certified mail or hand delivery to the conservation commission, and one copy of the same shall be sent concurrently in like manner to the Department. If the project requires a 401 Water Quality Certification pursuant to

314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or is a water-dependent use project that requires a permit, license or written approval pursuant to 310 CMR 9.00: *Waterways* the applicant may file a Notice of Intent that is a Combined Application. In that event, an additional copy of the Combined Application shall be sent to the Department's Boston Office.

10.05: continued

Concurrent with the filing of the Notice of Intent, the applicant shall provide notification to all Abutters. Notwithstanding the foregoing, the requirement to provide Abutter notification is subject to the following limits. An applicant is required to provide notification to an Abutter whose Lot is separated from the Project Locus by a public or private street or body of water only if the Abutter's Lot is within 100 feet from the property line of the Project Locus. An applicant who proposes work solely within Land under Water Bodies or Waterways, or solely within a Lot with an area greater than50 acres, is required to provide notification only to Abutters whose Lot is within one hundred feet from the Project Site. An applicant proposing a Linear- shaped Project greater than 1,000 feet in length is required to provide notification only to Abutters whose Lot is within 1,000 feet from the Project Site. Abutter notification is not required for projects proposed by the Massachusetts Department of Transportation Highway Division pursuant to St. 1993, c. 472 as approved on January 13, 1994. The applicant shall provide notification at the mailing addresses shown on the most recent applicable tax list from the municipal assessor. Notification shall be at the applicant's expense. The notification shall state where within the municipality copies of the Notice of Intent may be examined or obtained and where information on the date, time, and location of the public hearing may be obtained. To ensure compatibility with local procedures, applicants must comply with any rules of the local conservation commission pertaining to the location for examining or obtaining the Notice of Intent and information about the hearing. The applicant shall provide written notification to all Abutters required to be notified by hand delivery or certified mail, return receipt requested, or by certificates of mailing. Mailing at least seven days prior to the public hearing shall constitute timely notice. The applicant shall present either the certified mail receipts or certificate of mailing receipts for all Abutters at the beginning of the public hearing. The presentation of the receipts for all abutters required to be notified as identified on the tax list shall constitute compliance with Abutter notification requirements. The conservation commission shall determine whether the applicant has complied with Abutter notification requirements. The Department will dismiss Requests for Action based on allegations of failure to comply with Abutter notification requirements, absent a clear showing by an Abutter seeking Department action that the applicant failed to notify the Abutter. An applicant submitting a Notice of Intent for a project that is also subject to 310 CMR 9.00: *Waterways* and/or 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* may provide joint public notice by appending to the public notice required by 310 CMR 9.13: *Public Notice and Participation Requirements* and/or 314 CMR 9.05: *Submission of an Application*, as applicable, notification that a Notice of Intent is pending before the issuing authority, provided the notification complies with 310 CMR 10.05(4). An applicant may provide a joint public notice, even if the Notice of Intent is not a Combined Application.

(b) For certain purposes, other forms of Notices may be used.

1. For certain projects, applicants may at their option use the Abbreviated Notice of Intent. This latter form may only be used when all three of the following circumstances exist:

a. the proposed work is within the Buffer Zone, as defined in 310 CMR 10.04, or within Land Subject to Flooding, as defined in 310 CMR 10.57(2) or within the Riverfront Area, as defined in 310 CMR 10.58.

b. the proposed work will disturb less than 1,000 square feet of surface area within the Buffer Zone and/or Land Subject to Flooding or less than 1000 square feet of riverfront area, provided the work conforms to 310 CMR 10.58(4)(c)2.a.

c. the proposed work will not require U.S. Army Corps of Engineer Section 10 or

Section 404 permits, or a license from the Division of Waterways pursuant to M.G.L. c. 91.

2. To establish the extent of bordering vegetated wetland and/or other resource areas on land subject to protection under M.G.L. c. 131, § 40, applicants may use the Abbreviated Notice of Resource Area Delineation for the confirmation of a delineated boundary of bordering vegetated wetlands and/or other resource areas on the site, prior to filing a Notice of Intent for proposed work. Alternatively, the boundary of bordering vegetated wetland or other resource areas may be determined through the filing of a Notice of Intent.

10.05: continued

3. To confirm the boundaries of resource areas applicants shall use the Abbreviated Notice of Resource Area Delineation.

(c) Upon receipt of the application materials referred to in 310 CMR 10.05(4)(a), the Department shall issue a file number. The designation of a file number shall not imply that the plans and supporting documents have been judged adequate for the issuance of an Order, but only that copies of the minimum submittal requirements contained in the General Instructions have been filed.

(d) In the event that only a portion of a proposed project or activity lies within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone, and the remainder of the project or activity lies outside those areas, only that portion within those areas must be described in the detail called for by the General Instructions and Form 3 and 4; provided, however, that in such circumstances the Notice of Intent shall also contain a description and calculation of peak flow and estimated water quality characteristics of discharge from a point source (both closed and open channel) when the point of discharge falls within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone.

Notwithstanding the foregoing, when the issuing authority has determined that an activity outside the Areas Subject to Protection under M.G.L. c. 131, § 40 and outside the Buffer Zone has in fact altered an Area Subject to Protection under M.G.L. c. 131, § 40, it may require such plans, supporting calculations and other documentation as are necessary to describe the entire activity.

(e) The requirement under M.G.L. c. 131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others, building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee (established under M.G.L. c. 23B, § 5A), said applicant shall be deemed to have applied for all permits obtainable at the time of filing.

(f) If the issuing authority rejects a Notice of Intent because of a failure to obtain or apply for all permits, variances and approvals required by local by-law, it shall specify in writing the permit, variance or approval that has not been applied for. A ruling by the municipal agency within whose jurisdiction the issuance of the permit, variance or approval lies, or by the town counsel or city solicitor, concerning the applicability or obtainability of such permit, variance or approval shall be accepted by the issuing authority. In the absence of such a ruling, other evidence may be accepted.

(g) A Notice of Intent shall expire where the applicant has failed to diligently pursue the issuance of a Final Order in proceedings under 310 CMR 10.00. A Notice of Intent shall be presumed to have expired two years after the date of filing unless the applicant submits information showing that (a) good cause exists for the delay of proceedings under 310 CMR 10.00; and (b) the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay. No Notice of Intent shall be deemed expired under 310 CMR 10.05 when an adjudicatory hearing is pending and when the applicant has provided all information necessary to continue with the prosecution of the case.

Notwithstanding the provisions contained in 310 CMR 10.10, 310 CMR 10.05(4)(g) shall apply to any Notice of Intent whenever filed.

10.05: continued

(h) The issuing authority may require that supporting plans and calculations be prepared and stamped by a registered professional engineer (PE) when, in its judgment, the complexity of the proposed work warrants this professional certification. The issuing authority may also require the preparation of supporting materials by other professionals including, but not limited to, registered landscape architect, registered land surveyor, environmental scientist, geologist or hydrologist when in its judgment the complexity of the proposed work warrants the relevant specialized expertise. The issuing authority may require a delineation in an Abbreviated Notice of Resource Area Delineation to be performed by a professional with relevant specialized expertise. If the Notice of Intent is a Combined Application, the supporting plans and calculations shall also conform to the requirements of 310 CMR 9.11(3)(b) and 314 CMR 9.05(1): *Application Requirements* to the extent they are applicable.

(5) Public Hearings by Conservation Commissions.

(a) A public hearing shall be held by the conservation commission within 21 days of receipt of the minimum submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3), Abbreviated Notice of Intent (Form 4)* and Abbreviated Notice of Resource Area Delineation, and shall be advertised in accordance with M.G.L. c. 131, § 40 and the requirements of the open meeting law, M.G.L. c. 39, § 23B.

(b) Public hearings may be continued as follows:

1. without the consent of the applicant to a date, announced at the hearing, within 21 days, of receipt of the Notice of Intent;

2. with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or

3. with the consent of the applicant for a period not to exceed 21 days after the submission of a specified piece of information or the occurrence of a specified action. The date, time and place of said continued hearing shall be publicized in accordance with M.G.L. c. 131, § 40, and notice shall be sent to any person at the hearing who so requests in writing.

(6) Orders of Conditions Regulating Work and Orders of Resource Area Delineation.

(a) Within 21 days of the close of the public hearing, the conservation commission shall either:

1. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is not significant to any of the interests identified in M.G.L. c. 131, § 40, and shall so notify the applicant and the Department on Form 6;

2. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40, and shall issue an Order of Conditions for the protection of said interest(s), on Form 5. If the issuing authority also determines that the project meets the eligibility criteria for issuance of a Restoration Order of Conditions set forth in the applicable provisions of 310 CMR 10.00, the Order of Conditions for the project shall be a Restoration Order of Conditions; or

3. make a determination that bordering vegetated wetland and other resource areas subject to jurisdiction have been identified and delineated according to the definitions in 310 CMR 10.00 and shall issue an Order of Resource Area Delineation to confirm or modify the delineations submitted. The Order of Resource Area Delineation shall be effective for three years.

The standards and presumptions to be used by the issuing authority in determining whether an area is significant to the interests identified in M.G.L. c. 131, § 40, are found in 310 CMR 10.21 through 10.37 (for coastal wetlands) and 10.51 through 10.60 (for inland wetlands).

(b) The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

10.05: continued

The Order shall impose conditions only upon work or the portion thereof that is to be undertaken within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone. The Order shall impose conditions to control erosion and sedimentation within resource areas and the Buffer Zone. The Order shall impose conditions setting limits on the quantity and quality of discharge from a point source (both closed and open channel), when said limits are necessary to protect the interests identified in M.G.L. c. 131, § 40; provided, however, that the point of discharge falls within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone, and further provided that said conditions are consistent with the limitations set forth in 310 CMR 10.03(4).

Notwithstanding the foregoing, when the issuing authority has determined that an Activity outside the Areas Subject to Protection under M.G.L. c. 131, § 40 and outside the Buffer Zone has in fact altered an Area Subject to Protection under M.G.L.c. 131,§ 40, it shall impose such conditions on any portion of the activity as are necessary to contribute to the protection of the interests identified in M.G.L.c. 131, § 40.

When the issuing authority determines that a project meets the eligibility criteria for a Restoration Order of Conditions, the issuing authority shall impose only the conditions set forth in the applicable provisions of 310 CMR 10.00 for that Restoration Order of Conditions. A Restoration Order of Conditions may reference the plans and specifications approved by the issuing authority. If the Department issues a Combined Permit, the Department may append to the Restoration Order of Conditions any conditions that the Department has authority to impose pursuant to 310 CMR 9.00: *Waterways* and 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* to the extent they are applicable. The requirement that an Order shall impose conditions only upon work or the portion thereof that is to be undertaken within an Area Subject to Protection under M.G.L. c. 131, § 40, or within the Buffer Zone does not restrict the authority of the Department to append to a Combined Permit any conditions that the Department has the authority to impose under 310 CMR 9.00: *Waterways* and 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* to the extent they are applicable.

(c) If the conservation commission finds that 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 M.G.L. c. 131, § 40, it may issue an Order prohibiting the work. The Order shall specify the information which is lacking and why it is necessary.

(d) Except as provided in M.G.L. c. 131, § 40 for maintenance dredging, an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-significance shall be valid for three years from the date of its issuance; provided, however, that the issuing authority may issue an Order for up to five years where special circumstances warrant and where those special circumstances are set forth in the Order. An Order of Resource Area Delineation shall be valid for three years, and may be extended by the issuing authority for one or more years up to three years each under 310 CMR 10.05(8) upon written confirmation by a professional with relevant expertise that the resource area delineations remain accurate.

(e) The Order or Notification of Non-significance shall be signed by a majority of the conservation commission and shall be mailed by certified mail (return receipt requested) or hand delivered to the applicant or his or her agent or attorney, and a copy mailed or hand delivered at the same time to the Department. If the Order imposes conditions necessary to meet any performance standard contained in 310 CMR 10.37 or 10.59, a copy shall be mailed or hand delivered at the same time to the Massachusetts Natural Heritage and Endangered

Species Program.

(f) A copy of the plans describing the work and the Order shall be kept on file by the conservation commission and by the Department, and shall be available to the public at reasonable hours.

10.05: continued

(g) Prior to the commencement of any work permitted or required by the Final Order, including a Final Order of Resource Area Delineation, or Notification of Non-significance, the Order or Notification shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the final order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the final order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. Certification of recording shall be sent to the issuing authority on the form at the end of Form 5. If work is undertaken without the applicant first recording the Order, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Order of Conditions.

(h) Notwithstanding the provisions contained in 310 CMR 10.10(1) and (3), any Order of Conditions not containing an expiration date, issued for work proposed in a Notice of Intent filed under M.G.L. c. 131, § 40 prior to November 18, 1974, shall expire on April 17, 1986.

(i) An Order of Conditions does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of property rights.

(j) Failure to comply with conditions stated in the Order and with all related statutes and other regulatory measures shall be deemed cause to revoke or modify the Order of Conditions.

(k) No Area Subject to Protection under M.G.L. c. 131, § 40 other than bordering land subject to flooding, isolated land subject to flooding, land subject to coastal storm flowage, or riverfront area may be altered or filled for the impoundment or detention of stormwater, the control of sedimentation or the attenuation of pollutants in stormwater discharges, and the applicable performance standards shall apply to any such alteration or fill. Except as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L. c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone shall be provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook:

1. No new stormwater conveyances (*e.g.* outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth.

2. Stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates. This Standard may be waived for discharges to land subject to coastal storm flowage as defined in 310 CMR 10.04.

3. Loss of annual recharge to ground water shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from the pre-development conditions based on soil type.

This Standard is met when the stormwater management system is designed to infiltrate the required recharge volume as determined in accordance with the Massachusetts Stormwater Handbook.

4. Stormwater management systems shall be designed to remove 80% of the average annual post-construction load of Total Suspended Solids (TSS). This Standard is met

when:

a. Suitable practices for source control and pollution prevention are identified in a long-term pollution prevention plan and thereafter are implemented and maintained;

b. Structural stormwater best management practices are sized to capture the required water quality volume determined in accordance with *Massachusetts Stormwater Handbook*; and

c. Pretreatment is provided in accordance with the *Massachusetts Stormwater Handbook*.

10.05: continued

5. For land uses with higher potential pollutant loads, source control and pollution prevention shall be implemented in accordance with the Massachusetts Stormwater Handbook to eliminate or reduce the discharge of stormwater runoff from such land uses to the maximum extent practicable. If through source control and/or pollution prevention, all land uses with higher potential pollutant loads cannot be completely protected from exposure to rain, snow, snow melt and stormwater runoff, the proponent shall use the specific structural stormwater BMPs determined by the Department to be suitable for such use as provided in the Massachusetts Stormwater Handbook. Stormwater discharges from land uses with higher potential pollutant loads shall also comply with the requirements of the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53, and the regulations promulgated thereunder at 314 CMR 3.00: *Surface Water Discharge Permit Program*, 314 CMR 4.00: *Massachusetts Surface Water Quality Standards* and 314 CMR 5.00: *Ground Water Discharge Permit Program*.

6. Stormwater discharges within the Zone II or Interim Wellhead Protection Area of a public water supply and stormwater discharges near or to any other critical area require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by the Department to be suitable for managing discharges to such area as provided in the Massachusetts Stormwater Handbook. A discharge is near a critical area, if there is a strong likelihood of a significant impact occurring to said area, taking into account site-specific factors. Stormwater discharges to Outstanding Resource Waters and Special Resource Waters shall be removed and set back from the receiving water or wetland and receive the highest and best practical method of treatment. A "storm water discharge" as defined in 314 CMR 3.04(2)(a) or (b) to an Outstanding Resource Water or Special Resource Water shall comply with 314 CMR 3.00: *Surface Water Discharge Permit Program* and 314 CMR 4.00: *Massachusetts Surface Water Quality Standards*. Stormwater discharges to a Zone I or Zone A are prohibited, unless essential to the operation of the public water supply.

7. A redevelopment project is required to meet the following Stormwater Management Standards only to the maximum extent practicable: Standard 2, Standard 3, and the pretreatment and structural stormwater best management practice requirements of Standards 4, 5 and 6. Existing stormwater discharges shall comply with Standard 1 only to the maximum extent practicable. A redevelopment project shall also comply with all other requirements of the Stormwater Management Standards and improve existing conditions.

8. A plan to control construction related impacts including erosion, sedimentation and other pollutant sources during construction and land disturbance activities (construction period erosion, sedimentation and pollution prevention plan) shall be developed and implemented.

9. A long-term operation and maintenance plan shall be developed and implemented to ensure that the stormwater management system functions as designed.

10. All illicit discharges to the stormwater management system are prohibited.

(l) The Stormwater Management Standards shall not apply to:

1. A single-family house;

2. Housing development and redevelopment projects comprised of detached single-family dwellings on four or fewer lots, provided that there are no stormwater discharges that may potentially affect a critical area;

3. Multi-family housing development and redevelopment projects, with four or fewer units, including condominiums, cooperatives, apartment buildings and townhouses,

provided that there are no stormwater discharges that may potentially affect a critical area; and

4. Emergency repairs to roads or their drainage systems.

(m) The Stormwater Management Standards shall apply to the maximum extent practicable to the following:

1. Housing development and redevelopment projects comprised of detached single-family dwellings on four or fewer lots that have a stormwater discharge that may potentially affect a critical area;

2. Multi-family housing developments and redevelopment projects with four or fewer units, including condominiums, cooperatives, apartment buildings, and townhouses, that have a stormwater discharge that may potentially affect a critical area;

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3. Housing development and redevelopment projects comprised of detached single-family dwellings, on five to nine lots, provided there is no stormwater discharge that may potentially affect a critical area; and

4 Multi-family housing development and redevelopment projects, with five to nine units, including condominiums, cooperatives, apartment buildings and townhouses, provided there is no stormwater discharge that may potentially affect a critical area.

5. Marinas and boatyards provided that the hull maintenance, painting and service areas are protected from exposure to rain, snow, snowmelt, and stormwater runoff; and

6. Footpaths bikepaths and other paths for pedestrian and/or nonmotorized vehicle access.

(n) For phased projects the determination of whether the *Stormwater Management Standards* apply is made on the entire project as a whole including all phases. When proposing a development or redevelopment project subject to the *Stormwater Management Standards*, proponents shall consider environmentally sensitive site design that incorporates low impact development techniques in addition to stormwater best management practices.

(o) Project proponents seeking to demonstrate compliance with some of all of the Stormwater Management Standards to the maximum extent practicable shall demonstrate that:

1. They have made all reasonable efforts to meet each of the Standards;

2. They have made a complete evaluation of possible stormwater management measures including environmentally sensitive site design and low impact development techniques that minimize land disturbance and impervious surfaces, structural stormwater best management practices, pollution prevention, erosion and sedimentation control and proper operation and maintenance of stormwater best management practices; and

3. If full compliance with the Standards cannot be achieved, they are implementing the highest practicable level of stormwater management.

(p) Notwithstanding anything to the contrary in 310 CMR 10.00, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects subject to regulation under M.G.L. c. 131, § 40, including site preparation, construction, and redevelopment, and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L. c. 131, § 40, or within the Buffer Zone, for which a Notice of Intent or Notice of Resource Area Delineation has been filed prior to January 2, 2008 shall be managed according to the *Stormwater Management Standards* as set forth in the Stormwater Policy issued by the Department on November 18, 1996.

(q) Compliance with the *Stormwater Management Standards* set forth in 310 CMR 10.05(6)(k) through (q) does not relieve a discharger of the obligation to comply with all applicable Federal, State, and local laws, regulations and permits including without limitation all applicable provisions of 310 CMR 10.00, 314 CMR 3.00: *Surface Water Discharge Permit Program*, 4.00: *Massachusetts Surface Water Quality Standards*, 5.00: *Ground Water Discharge Permit Program*, 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*, local land use controls adopted to comply with 310 CMR 22.21: *Ground Water Supply Protection* or the NPDES General Permit for Small Municipal Separate Storm Sewer Systems, the requirements of the NPDES General Stormwater permits such as the Construction General Permit, and the Multi-sector General Permit.

(7) Requests for Actions by the Department (Appeals).

(a) The following persons may request the Department to act:

1. the applicant;

2. the owner, if not the applicant;
3. any person aggrieved by a Determination or an Order;
4. any owner of land abutting the land on which the work is to be done;
5. any ten residents of the city or town where the land is located; and
6. the Department.

(b) Any person(s) permitted to request the Department to act under 310 CMR 10.05(7)(a) may request the Department to issue a Superseding Determination of Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has:

1. issued a Determination of Applicability (Form 2);

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2. issued a Notification that an area is not significant to any interest identified in M.G.L. c. 131, § 40 (Form 6);

3. issued an Order of Conditions allowing, conditioning or prohibiting work (Form 5) or an Order of Resource Area Delineation; or

4. failed to hold a public hearing or issue an Order, Notification or Determination within the time period required by M.G.L. c. 131, § 40.

Where the Department is requested to issue a Superseding Determination or Order of Conditions, the conservation commission shall be a party to all agency proceedings and hearings before the Department.

(c) A request for a Superseding Order or Determination shall be made in writing and shall be sent by certified mail or hand delivered within ten days of issuance of the Order, Determination or Notification which is being appealed. When the basis of such request is the conservation commission's failure to act, the request may be made at any time up to 70 days after the expiration of the period within which the conservation commission was to have acted. Said request shall state clearly and concisely the objections to the Order, Determination or Notification which is being appealed and, in the case of a request for a Superseding Order, how the Order of Conditions or Notification of Non-significance issued by the conservation commission is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in M.G.L. c. 131, § 40. When the Order is a Restoration Order of Conditions, the basis of the request is limited to claim(s) that the applicant did not comply with one or more of the applicable procedural requirements of 310 CMR 10.05 and/or the conservation commission issued the Restoration Order of Conditions in contravention of one or more of the applicable eligibility criteria. The request for Department action shall specifically identify any procedural requirements and eligibility criteria that the person requesting Department action alleges have not been met.

(d) All requests for the Department to act shall be sent to the appropriate Regional Office of the Department. A copy of the request shall at the same time be sent by certified mail or hand delivered to the conservation commission and the applicant, if he is not the appellant.

(e) Within 35 days from receipt of such a request, the Department shall issue a Superseding Determination of Applicability (Form 2) or a Notification that an area is not significant to any interest identified in M.G.L. c. 131, § 40 (Form 6).

(f) Within 70 days from receipt of such a request, the Department shall issue a Superseding Order unless either of the following apply, or in the event that both apply, whichever is later:

1. compliance with M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00 is required, in which case the Department shall issue a Superseding Order within 40 days of the issuance of a statement by the Secretary of the Executive Office of Energy and Environmental Affairs that the applicant has complied with M.G.L. c. 30, §§ 6 through 62H and 301 CMR 11.00: *MEPA Regulations*;

2. the Department has requested additional plans, information or documentation pursuant to 310 CMR 10.05(7)(g), in which case the Department shall issue a Superseding Order within 40 days of receipt of such plans, information, or documentation, or of the failure of the applicant to comply with such request.

(g) The Department shall notify the applicant within 30 days of receipt of a request for the Department to act if additional information or documentation is necessary to make its determination; provided, however, that further information may be requested should the information supplied in response to the original notification so require. When requested to issue a Superseding Order of Resource Area Delineation, the Department shall limit its review to the resource area delineations. The Department shall consider the objections to the resource area delineations stated in the request. The Department may affirm an Order of

Resource Area Delineation based upon a conclusion that the Order of Resource Area Delineation substantially conforms to the locations identified by the Department through a site inspection.

(h) When the request for a Superseding Order concerns an Order prohibiting work and issued pursuant to 310 CMR 10.05(6)(c), the Department shall limit its review to the information submitted to the conservation commission. If the Department determines that insufficient information was submitted, it shall affirm the denial and instruct the applicant to refile with the conservation commission and include the appropriate information. If the Department determines that sufficient information was submitted, it shall so inform the applicant and the conservation commission, and shall proceed to issue a Superseding Order as provided in 310 CMR 10.05.

10.05: continued

(i) After receipt of a request for a Superseding Determination or Order, the Department may conduct an informal meeting and may conduct an inspection of the site. In the event an inspection is conducted, all parties shall be invited in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, § 40. Any party presenting information as a result of such a meeting shall provide copies to the other parties.

Based upon its review of the Notice of Intent, the Order, any informal meeting or site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. The Superseding Order shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 and stormwater standards set forth at 301 CMR 10.05(6)(k) for the protection of those interests. The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests. The Department may issue a Superseding Order which affirms the Order issued by the conservation commission. The Department shall issue a Restoration Order of Conditions as the Superseding Order of Conditions in the event it determines that the project meets the eligibility criteria for a Restoration Order of Conditions. If the applicant submitted a Combined Application for a project that requires a 401 Water Quality Certification pursuant to 314 CMR *9.00: 401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*, or a water-dependent use project that requires a Chapter 91 license, permit or other written approval pursuant to 310 CMR 9.00: *Waterways*, the Department may issue a Combined Permit that serves as the Superseding Order of Conditions, the 401 Water Quality Certification, and/or the Chapter 91 permit, license or other written approval, whichever is applicable, provided the Department determines that the project meets the requirements for obtaining such Order, Certification, permit, license or other written approval.

(j) Administrative Hearings.

1. Timely Filings. Papers required or permitted to be filed under 310 CMR 10.05 must be filed with the Department, at the address designated in the Reviewable Decision, within the timelines specified in 310 CMR 10.05. Papers shall be considered filed as set forth in 310 CMR 1.01(3): *Time*.

2. Appeal Notice.

a. Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision. Previously participating in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision. The Appeal Notice must be filed with the Department with a copy sent to the appropriate regional Department office by certified mail or hand delivered within ten days after the date of issuance of the Reviewable Decision, and a copy thereof must at the same time be sent by certified mail or hand delivered to the conservation commission (if not filed by the conservation commission) and to the applicant (if not filed by the applicant). The Appeal Notice shall also be served by certified mail or hand delivered on any person that requested the action by the Department that

resulted in the Reviewable Decision. In the event that the entity that requested the action is a ten resident group, the Appeal Notice shall be served on the designated representative of the ten resident group, whose name and contact information shall be included in the Reviewable Decision. Any party listed in 310 CMR 10.05(7)(j)2.a. that fails to timely file an Appeal Notice pursuant to 310 CMR 10.05, shall be deemed to have waived its right to appeal the Reviewable Decision.

b. The Appeal Notice shall include all of the following:

i. the Petitioner's complete name, address, phone number, fax number and email address and, if represented, counsel's name, address, phone number, fax number and email address, and if a ten resident group, the same information for the group's designated representative.

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ii. the department's wetlands file number, if applicable, the name of applicant and address of the project.

iii. if filed by an aggrieved person, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved;

iv. if filed by a ten resident group, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)(a);

v. a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision. In the event that the Reviewable Decision is a Superseding Order of Conditions that is a Restoration Order of Conditions, the appeal is limited to a claim that the applicant did not comply with one or more of the applicable procedural requirements of 310 CMR 10.05 and/or the Department issued the Reviewable Decision in contravention of one or more of the applicable eligibility criteria. The notice of claim shall specifically identify the procedural requirements and eligibility criteria that the person requesting an adjudicatory hearing alleges have not been met;

vi. a copy of the Reviewable Decision appealed and a copy of the underlying Conservation Commission decision if the Reviewable Decision affirms the Conservation Commission decision; and

vii. if asserting that a matter is Major or Complex, a statement requesting that the Presiding Officer make a designation of Major or Complex, with specific reasons supporting the request.

c. An Appeal Notice that does not contain all of the information required in 310 CMR 10.05(7)(j)1.b. may be dismissed.

d. Within five business days of receipt of a written request by any potential party, the applicant shall make all documents submitted to the department in support of the Reviewable Decision, including but not limited to the notice of intent, plan of record, or other information, available to any person who states that they intend to appeal or intervene. In the case of a ten resident group, or a group intervening pursuant to M.G.L. c. 30A, the applicant need only make one copy available to the group's designated representative.

e. Within five days of the receipt by the applicant and/or property owner of a written request by any person who has filed an appeal or intervened, and/or such person's consultants, attorneys, or other representatives, shall be allowed to visit the site with the property owner, upon reasonable conditions of the applicant and/or property owner. The purpose of a site visit shall be related solely to the Reviewable Decision under appeal and shall be specifically identified by the requesting party. The person requesting the site visit may request a later date for the site visit, which shall be reasonably accommodated by the applicant and/or property owner.

f. The Department, the conservation commission, the petitioner, the applicant, and any interveners pursuant to 310 CMR 10.05(7)(j) shall be deemed to be parties to the proceeding and are entitled to service of all documents filed in the proceeding, and shall be included in a certificate of service to accompany all filings in accordance with 310 CMR 1.01(4)(f).

g. No work shall be undertaken until all administrative appeal periods from a Reviewable Decision have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.

h. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)3.b., *sua sponte,* and provide a prompt ruling to the parties; or if in response to a motion, within ten days of the filing of such motion.

3. Petitioner's Direct Case.

a. A Party who has timely filed an Appeal Notice must file with the Department and serve a copy on all parties its Direct Case no later than 45 days after the Prescreening Conference.

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b. The Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.

c. In its Direct Case, the Petitioner must establish the legal and factual basis for its position on the issues identified by the Presiding Officer in the pre-screening report. Failure to do so will result in a waiver of Petitioner's Direct Case for that issue. In addition, the Direct Case at a minimum shall include:

i. a description of the subject matter of the Reviewable Decision;

ii. credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).

4. Respondents' Direct Case. A party that seeks to support or defend the Reviewable Decision shall file and serve on all parties a Direct Case within 30 days of the filing of the Petitioner's Direct Case. A responding party shall be deemed to be a "Respondent".

a. Response Content: The response shall at a minimum include:

i. A rebuttal to the Petitioner's Direct Case setting forth the legal and factual basis supporting the Reviewable Decision, including relevant statutory and regulatory citations and evidentiary support consisting of credible evidence from a competent source;

ii. any affirmative defenses and evidentiary support for them, including but not limited to the defense of lack of standing; and

iii. if asserting that a matter is Major or Complex, a statement requesting that the Presiding Office make designation of Major or Complex, with specific reasons supporting the request.

5. Intervention and Intervenors' Direct Case.

a. Pursuant to M.G.L. c. 30A, § 10A, a group of ten citizens may intervene in a proceeding by filing and serving on all parties a Motion to Intervene within 21 days of the filing of the Appeal Notice. The Motion to Intervene shall provide the names, addresses, phone and fax numbers and email address of each of the members of the ten citizens group, and a certification under oath by each member that they consent to the Motion to Intervene, and authorize the group representative to act for the member. The Motion shall also designate a representative who shall represent the group and receive documents on its behalf. Upon filing a Motion in conformance with 310 CMR 10.05(7)(j)5.a., the ten citizen group shall be deemed a party, subject to disqualification if the Presiding Officer determines that the group does not consist of at least ten consenting citizens.

b. A person who claims that he or she is substantially and specifically affected by the proceeding, may intervene by filing and serving on all parties a Motion to Intervene within 21 days of the filing of the Appeal Notice. The Motion must include a statement demonstrating that the moving party is substantially and specifically affected, in accordance with 310 CMR 1.01(7)(d): *Intervenors*. Upon filing a Motion in conformance with 310 CMR 10.05(7)(j)5., the moving party shall be deemed a party, subject to disqualification if the Presiding Officer determines that the moving party is not substantially and specifically affected.

c. An intervenor that contests the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)3. no later than the due date of Petitioner's Direct Case. An intervenor that supports the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)4. no later than the due date of the Respondent's Direct Case.

d. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)5., *sua sponte*, and provide a prompt ruling

to the parties, or if in response to a motion within ten days of the filing of such motion.

6. Rebuttal. The Petitioner or an Intervenor aligned with the Petitioner may file and serve on all parties rebuttal evidence no later than seven days after the filing of the Direct Case by the Respondent or any Intervenor aligned with the Respondent. The rebuttal evidence shall be limited to countering evidence submitted in a Respondent's or Intervenor's Direct Case in support of the Reviewable Decision.

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7. Pre-screening and Hearing

a. Upon receipt of the Appeal Notice, the Presiding Officer will schedule a prescreening conference to be conducted pursuant to 310 CMR 1.01(5)(a)15., and will send notice to all parties. Such prescreening conference will presumptively occur not more than 30 days after the Appeal Notice is filed. As used in this regulation, "presumptively" means that the time-line is binding, absent extraordinary circumstances in which case the Presiding Officer has authority to extend the time-line.

b. Upon receipt of the Appeal Notice, the Department will schedule a hearing and will send notice to all parties. A hearing will be presumptively held within 120 days after the Appeal Notice is filed.

c. Intervenors who subsequently intervene shall promptly receive the notice, but intervention shall not change the schedule of the pre-screening conference or the hearing.

d. Parties may file motions regarding jurisdictional defects such as standing or timeliness by a date set by the presiding officer before the prescreening. Motions for directed verdict or summary decision may be filed by a date set by the presiding officer at the prescreening. Motions will not change the schedule of the prescreening conference or the hearing.

e. Upon notice to the parties, the Presiding Officer may provide an opportunity for a simplified hearing conducted pursuant to 310 CMR 1.01(8)(a): *Simplified Hearing*.

f. If the Presiding Officer determines an appeal to be Major or Complex, she will adjust the schedule either by extending it up to 30 days, or by taking the matter ahead of other cases.

g. All parties must attend and be prepared to discuss settlement and the narrowing of issues at the pre-screening conference. At the conclusion of the pre-screening conference or shortly thereafter, the Presiding Officer shall prepare and circulate a prescreening conference report, for any appeal not resolved in prescreening. The prescreening conference report shall contain a list of issues that are in dispute and which are legally relevant, and that are to be addressed in the parties' direct and rebuttal cases.

h. The Presiding Officer shall conduct a hearing. At the hearing, the parties' Direct Cases shall consist of, and be limited to, the evidence contained in their respective Direct Cases and rebuttal evidence, subject to evidentiary rulings of the Presiding Officer. The primary function of the hearing shall be cross-examination of witnesses and, at the Presiding Officer's discretion an oral closing argument. The hearing shall be limited to one day, unless the Presiding Officer finds that there is good cause for a longer hearing.

8. Final Action. The Presiding Officer shall issue a written recommended decision, not more than 30 days after the close of hearing, that shall include findings on the contested issues. The Commissioner shall issue a final written decision consistent with 310 CMR 1.01(14)(b), presumptively within six months of the Reviewable Decision, or in the case of an appeal deemed Major or Complex in which the schedule was extended, within seven months of the Reviewable Decision. Should a party request a tentative decision, the request shall be governed by 310 CMR 1.01(14)(a).

9. Relationship to Other Rules of Adjudicatory Proceedings.

a. To the extent there is conflict between the regulations governing wetland appeals set forth in 310 CMR 10.04 and 10.05(7)(j), on the one hand, and the Rules of Adjudicatory Proceedings set forth in 310 CMR 1.01: *Adjudicatory Proceeding*

Rules for the Department of Environmental Protection, on the other hand, the former shall prevail.

b. The following regulations shall apply to wetland appeals: 310 CMR 1.01(1) through (5), (6)(c), (f) through (k); (8); (10); (12)(a), (c), (d); (13)(a) through (c), (e) through (h), (j), (l) through (n); (14)(b) through (g) and 1.03: *Miscellaneous Provisions Applicable to All Adjudicatory Proceedings*.

10. Coordination of Appeals. The Department may coordinate adjudicatory hearings under 310 CMR 10.05(7)(j), 310 CMR 9.17: *Appeals*, and 314 CMR 9.10: *Appeals* or other administrative appeals.

10.05: continued

a. If a 401 Water Quality Certification been issued pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or a permit, license or other written approval has been issued pursuant to 310 CMR 9.00: *Waterways*, the Department may exclude issues solely within the jurisdiction of 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or 310 CMR 9.00: *Waterways* at an adjudicatory hearing held under 310 CMR 10.05(7)(j).

b. If an adjudicatory hearing has been requested in accordance with 310 CMR 9.17: *Appeals* and/or 314 CMR 9.10: *Simplified Procedures for Small Structures Accessory to Residences*, or another administrative appeal, the Department may consolidate the proceedings.

c. In the event that the Department has issued a Combined Permit that serves as a Superseding Order of Conditions and/or a 401 Water Quality Certification issued pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or a permit, license or other written approval issued pursuant to 310 CMR 9.00: *Waterways*, the appeal may include issues solely within the jurisdiction of 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or 310 CMR 9.00: *Waterways* only as follows: The appeal may include issues solely within the jurisdiction of 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*, only if the appeal has been requested in accordance with the requirements of 314 CMR 9.10: *Simplified Procedures for Small Structures Accessory to Residences*. The appeal may include issues solely within the jurisdiction of 310 CMR 9.00: *Waterways*, only if the appeal has been requested in accordance with the requirements of 310 CMR 9.17: *Appeals*.

(k) No work shall be undertaken until all administrative appeal periods from an Order or Notification of Non-significance have elapsed or, if such an appeal has been taken, until all proceedings before the Department have been completed.

(8) Extensions of Orders of Conditions and Orders of Resource Area Delineations.

(a) The issuing authority may extend an Order for one or more periods of up to three years each, except as otherwise provided in 310 CMR 10.05(11)(f) (extensions for Test Projects). Any extension granted by the issuing authority shall be made on Form 7. The request for an extension shall be made to the issuing authority at least 30 days prior to expiration of the Order.

(b) The issuing authority may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work or a new Abbreviated Notice of Resource Area Delineation in the following circumstances:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;

2. where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in M.G.L. c. 131, § 40; or

3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131, § 40;

4. where work has been done in violation of the Order or 310 CMR 10.00; or
5. where a resource area delineation or certification under 310 CMR 10.02 (2)(b)2. in an Order of Resource Delineation is no longer accurate.

(c) If issued by the conservation commission, the Extension Permit shall be signed by a majority of the commission. A copy of the Extension Permit shall be sent to the conservation commission or the Department, whichever is appropriate, by the issuing authority.

(d) The Extension Permit shall be recorded in the Land Court or the Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 7. If work is undertaken without the applicant so recording the Extension Permit, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Extension Permit.

10.05: continued

(9) Certificates of Compliance.

(a) Upon completion of the work described in a Final Order of Conditions, but not later than the three year term of an Order of Resource Area Delineation or any extension thereunder, the applicant shall request in writing the issuance of a Certificate of Compliance stating that the work has been satisfactorily completed. Upon written request by the applicant, a Certificate of Compliance shall be issued by the issuing authority within 21 days of receipt thereof, and shall certify on Form 8 that the activity or portions thereof described in the Notice of Intent and plans has been completed in compliance with the Order. If issued by the Conservation Commission, the Certificate of Compliance shall be signed by a majority of the commission. A copy of the Certificate of Compliance shall be sent to the conservation commission or the Department, whichever is appropriate, by the issuing authority.

(b) Prior to the issuance of a Certificate of Compliance, a site inspection shall be made by the issuing authority, in the presence of the applicant or the applicant's agent. If the Department is the issuing authority, it shall notify the conservation commission of the request and the date of the site inspection.

(c) If the issuing authority determines, after review and inspection, that the work has not been done in compliance with the Order, it may refuse to issue a Certificate of Compliance. Such refusal shall be issued within 21 days of receipt of a request for a Certificate of Compliance, shall be in writing and shall specify the reasons for denial.

(d) If a project has been completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect or land surveyor, a written statement by such a professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Order shall accompany the request for a Certificate of Compliance.

(e) If the final order contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue. The Certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the Order.

(f) The Certificate of Compliance shall be recorded in the Land Court or Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 8. Upon failure of the applicant to so record, the issuing authority may do so.

(10) Variance.

(a) The Commissioner may waive the application of any regulation(s) in 310 CMR 10.21 through 10.60 when he or she finds that:

1. there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.60;
2. that mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the interests identified in M.G.L. c. 131, § 40; and
3. that the variance is necessary to accommodate an overriding community, regional, state or national public interest; or that it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation.

(b) Procedure. A request for a variance shall be made in writing and shall include, at a minimum, the following information:

1. a description of alternatives explored that would allow the project to proceed in compliance with 310 CMR 10.21 through 10.60 and an explanation of why each is unreasonable;
2. a description of the mitigating measures to be used to contribute to the protection of

the interests identified in M.G.L. c. 131, § 40; and

3. evidence that an overriding public interest is associated with the project which justifies waiver of 310 CMR 10.21 through 10.60, or evidence that the Superseding Order so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

The request for a variance shall be sent to the Department by certified mail or hand delivered and a copy thereof shall at the same time be sent by certified mail or hand delivered to the conservation commission and any other parties.

10.05: continued

The Department will place a notice in the *Environmental Monitor* published by the Massachusetts Environmental Policy Act Office of the Executive Office of Energy and Environmental Affairs to solicit public comments on the request. The Department shall conduct a public hearing on a request for a variance. After reviewing the information submitted with the request for a variance and any other information submitted by any party within the public comment period, the Commissioner shall issue a decision as to whether to grant the variance. Within ten days of the date of issuance of the Commissioner's decision on the variance, any person who submitted comments during the public comment period may, according to the procedures specified in 310 CMR 10.05(7)(j), request an adjudicatory hearing on the decision. On a request for a variance based on overriding public interest, the Commissioner may dismiss the request to hold an adjudicatory hearing if the request repeats matters adequately considered in the variance decision, renews claims or arguments previously raised, or attempts to raise new claims or arguments not raised during the public comment period. On a request for a variance to avoid restrictions that would constitute an unconstitutional taking, the Commissioner shall hold an adjudicatory hearing. If an adjudicatory hearing is held, the applicant has the burden of demonstrating that the project meets the criteria necessary for a variance. Other parties to the adjudicatory hearing may introduce evidence either in favor of or opposing the request for a variance.

For projects in which all of the proposed work will be undertaken on land within the boundaries of one city or town, the request for a variance shall not be filed until the applicant first files a Notice of Intent with the Conservation Commission. The Commission shall review the project in accordance with the procedures set forth in 310 CMR 10.01 through 10.10 and issue an Order of Conditions consistent with 310 CMR 10.21 through 10.60. Within ten days of the issuance of the Order of Conditions, the applicant may request the Department to issue a Superseding Order. The Department staff shall review the project in accordance with the procedures set forth in 310 CMR 10.01 through 10.10 and shall issue a Superseding Order consistent with the provisions of 310 CMR 10.21 through 10.60. Within ten days of the issuance of the Superseding Order, the applicant may request an adjudicatory hearing on that order and/or a variance under 310 CMR 10.05(10) according to the procedure previously described.

For projects in which the proposed work will be undertaken on land within the boundaries of more than one city or town, the applicant may file a request for a variance directly with the Commissioner, with a copy to each affected conservation commission. If, after public notice, the Commissioner finds that a project meets the variance criteria, he shall specify which regulation(s) has been waived and what general requirements or conditions must be met to satisfy the variance criteria listed in 310 CMR 10.05(10)(a). The applicant shall then file a Notice of Intent with the appropriate conservation commissions in accordance with the procedures contained in 310 CMR 10.01 through 10.10. The conservation commissions shall issue Orders of Conditions consistent with all provisions of 310 CMR 10.21 through 10.60 except those waived by the Commissioner and containing any additional conditions or requirements imposed by the Commissioner in the variance. The usual procedures contained in 310 CMR 10.01 through 10.10 for requesting Superseding Orders and adjudicatory hearings remain applicable.

Commentary

310 CMR 10.05(10), which provides that the Commissioner may waive the application of one or more of the regulations on the basis of overriding public benefit is intended to be employed only in rare and unusual cases. The provision authorizing a variance request directly

to the Commissioner for projects on land within more than one city or town is intended to apply to projects that involve functionally related work in several contiguous towns (*e.g.*, transportation and energy transmission facilities) and to provide for a single uniform determination concerning alternative locations and the other variance criteria.

10.05: continued

(11) Permitting of Test Projects.

(a) General. The purpose of 310 CMR 10.05(11) is to establish procedures for permitting Test Projects to promote the development of potential new renewable energy technologies and other Innovative Technologies. Innovative Technologies must be proven through field testing before any large scale commercial deployment can occur in order to develop the data and information needed to support siting and full-scale deployment in a cost-effective manner. 310 CMR 10.05(11) will facilitate and encourage the development, testing and demonstration of Innovative Technologies, including water dependent renewable energy technologies, through review procedures for Test Projects. Given their limited scope and duration, these projects are expected to have minimal adverse environmental impacts and, therefore, are permittable under 310 CMR 10.05(11), provided that the applicant provides for adequate post-installation monitoring to identify any unanticipated adverse environmental impacts that occur in the course of the project. The issuing authority may require the alteration or removal of the project if the monitoring study or other information indicates that the project has unexpected or more than minimal adverse environmental impacts. Pre-application consultation with the issuing authority is recommended. Proposed Test Projects that do not meet the eligibility criteria in 310 CMR 10.05(11)(b) may be permitted provided they meet all applicable requirements of 310 CMR 10.24 through 10.35 for projects in coastal resource areas and 310 CMR 10.54 through 10.58 and 10.60 for projects in inland resource areas.

(b) Eligibility Criteria. Notwithstanding the provisions of 310 CMR 10.24 through 10.35, 10.53 through 10.58, and 10.60, the issuing authority may issue an Order of Conditions, and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40, to permit Test Projects (although no such project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37 and 10.59) provided:

1. the applicant documents the readiness of the device or technology for in situ testing with the results of laboratory testing, modeling, technical evaluations, or similar forms of supporting material;
2. the structures associated with the project will not be located in specified habitat sites of Rare Species located within a resource area or Buffer Zone;
3. the structures associated with the project are not located within a salt marsh or seagrass bed; and
4. any structures associated with the project can be easily and quickly removed with minimal disruption to resource areas.

(c) Application Requirements. For the purpose of authorizing eligible Test Projects pursuant to 310 CMR 10.05(11), the following provisions shall apply:

1. In *lieu* of plans prepared by a Registered Professional Engineer or Registered Land Surveyor a Notice of Intent for a Test Project may include documentation that appropriate laboratory testing and/or modeling has occurred and show the proposed location of the project on a plan designating all project components by coordinates referenced to the Massachusetts State Plane Coordinate System.
2. In addition to the documentation provided in 310 CMR 10.11(c)1., a Notice of Intent for a Test Project shall include the following:
   a. a description of the device or technology to be tested and the purpose of the project;
   b. a description of the installation process and schedule for installation, testing, and removal of the devices, technologies and associated equipment;
   c. a demonstration that the project complies with the eligibility requirements of

310 CMR 10.05(11)(b)1. through 4.;

d. a plan for the restoration of all disturbed resource areas to pre-existing conditions and a schedule for completing the restoration before the Order of Conditions expires;

e. an environmental monitoring plan sufficiently broad to ensure the project meets all applicable regulatory standards; and

f. a plan for prompt removal of the components of the project if the Department or conservation commission determines that the project threatens public health, safety or the environment.

10.05: continued

(d) Order of Conditions. At a minimum, the Order of Conditions authorizing a Test Project pursuant to 310 CMR 10.05(11) shall require the applicant to implement the monitoring plan and the restoration plan submitted with the Notice of Intent as approved by the issuing authority. The Order of Conditions shall also provide that if the Department or the conservation commission determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent as approved by the issuing authority, or modify the project as directed by the conservation commission or the Department.

(e) Term. Notwithstanding the provisions of 310 CMR 10.05(6)(b), an Order of Conditions for a Test Project issued under 310 CMR 10.05(11) shall be valid for no more than one year.

(f) Extension Permits. An Order of Conditions for a Test Project issued in accordance with 310 CMR 10.05(11) may be extended for one additional year upon written application by the applicant in accordance with 310 CMR 10.05(8)(a), The issuing authority may deny a request for an extension, if it determines that: the project objectives have not been advanced during the initial term; the continuation of the project would not adequately protect public health, safety, or the environment; or the extension should be denied based on the one or more of the circumstances identified in 310 CMR 10.05(8)(c). An extension permit issued for a Test Project in accordance with 310 CMR 10.05(11) is subject to the provisions of 310 CMR 10.05(8)(d) and (e).

(g) Appeals. The provisions governing Department action and adjudicatory hearings set forth in 310 CMR 10.05(7) shall apply to decisions authorizing Test Projects pursuant to 310 CMR 10.05(11). In the event that the Department issues a Superseding Order of Conditions denying a Test Project on the ground that it does not meet the eligibility criteria set forth in 310 CMR 10.05(11)(b), the applicant may file a Notice of Intent seeking authorization for the Test Project under the applicable provisions of 310 CMR 10.24 through 10.37, 10.53 through 10.58 and 10.60 in *lieu* of requesting an adjudicatory hearing.

10.06: Emergencies

(1) Unless authorized by a Severe Weather Emergency Declaration issued by the Commissioner pursuant to 310 CMR 10.06(8), any person requesting permission to do an emergency project shall specify why the project is necessary for the protection of the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof is to perform the project or has ordered the project to be performed. If the project is certified to be an emergency by the conservation commission or the Commissioner, the certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency. A site inspection shall be made prior to certification.

(2) An emergency certification shall be issued only for the protection of public health or safety.

(3) The time limitation for performance of emergency work shall not exceed 30 days, or 60 days for Immediate Response Actions approved by the Bureau of Waste Site Cleanup (BWSC) of the Department of Environmental Protection in accordance with the provisions of 310 CMR 40.0410: *Immediate Response Actions*, unless written approval of the Commissioner is obtained.

(4) A copy of an emergency certification shall be sent to the Department when it is issued by a conservation commission, and to the conservation commission when it is issued by the Department.

(5) The Department may, on its own motion or at the request of any person, review: an emergency certification issued by a conservation commission and any work permitted thereunder; a denial by a conservation commission of a request for emergency certification; or

the failure by a conservation commission to act within 24 hours of a request for emergency certification. Such review shall not operate to stay the work permitted by the emergency certification unless the Department specifically so orders. The Department's review shall be conducted within seven days of: issuance by a conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification. If certification was improperly granted, or the work allowed thereunder is excessive or not required to protect the health and safety of citizens of the Commonwealth, the Department may revoke the emergency certification, condition the work permitted thereunder, or take such other action as it deems appropriate.

10.06: continued

(6) Agricultural Emergencies

(a) Notwithstanding the provisions of 310 CMR 10.06(1) through (4), any person may undertake work for the emergency agricultural activities described in 310 CMR 10.06(6)(g) when necessary to:

1. eliminate an imminent threat to land in agricultural use;
2. restore land in agricultural use that has been damaged due to a storm or other sudden, unforeseen event; or
3. provide an emergency agricultural water source when the existing agricultural water source suddenly and unforeseeably has been rendered unusable or unavailable.
4. eradicate an infestation of Asian longhorned beetles (*Anoplophora glabripennis*) in response to an order or regulation issued by the United States Department of Agriculture (USDA) pursuant to 7 USC §§ 7701 *et seq.* (the Plant Protection Act), or the Department of Conservation and Recreation (DCR) pursuant to M.G.L. c. 132, § 11.

(b) Written notice of any work undertaken as an emergency activity under 310 CMR 10.06(6) must be received by the conservation commission and mailed to the Department within three days after the work has commenced or within three days after the end of the emergency event, whichever is sooner. Such notice shall state the name of the person performing the work, the name of the property owner (if different), the property and the location on the property where the work is to be performed, the exact nature of the emergency and of the work which is to be performed, and when the work was begun and when it is expected to be completed. The commission may, at its discretion, conduct a site visit to view the work being performed under such notice and to confirm that the information in the notice is correct.

(c) When an emergency is caused by a storm, any work undertaken as an emergency activity under 310 CMR 10.06(6) must commence within 30 days following the storm event which caused the agricultural emergency.

(d) Any work undertaken as an emergency activity under 310 CMR 10.06(6) shall be completed within 30 days from the commencement of such work unless written approval for a later completion date is given by the Commissioner.

(e) No work under 310 CMR 10.06(6) shall be allowed within estimated habitat which is indicated on the most recent Estimated Habitat Maps of State-listed Rare Wetlands Wildlife published by the Natural Heritage and Endangered Species Program of the Massachusetts Division of Fisheries and Wildlife.

(f) Work under 310 CMR 10.06(6) shall not fill or dredge a Salt Marsh.

(g) Only the following emergency activities are allowed under 310 CMR 10.06(6)(a):

1. The installation of stream bank stabilization measures, provided that:
   a. such activity is carried out in accordance with Soil Conservation Service best management practices;
   b. no more than 100 linear feet of bank are altered per storm event, and no more than 200 linear feet of new rip rap or gabions are placed on the bank of a stream under 310 CMR 10.06(6) cumulatively; and
   c. after the 200 foot threshold has been reached the placement of additional rip rap or gabions following future storm events shall require the filing of a Notice of Intent.
2. The removal of storm debris, including trees, brush, branches, and cobbles, that were deposited in a stream channel during the storm event, provided that:
   a. after the material is removed it is not placed on a bank or in a Bordering Vegetated Wetland;
   b. Soil Conservation Service best management practices are followed; and
   c. removal of material from a stream is limited to 100 linear feet per storm event.

3. The development of an emergency agricultural water source where the existing agricultural water source suddenly has been rendered unusable because of contamination, sudden diversion, or other unforeseen circumstances. Where an emergency agricultural water supply is required:

a. the work shall be conducted so that impacts to Bordering Vegetated Wetland are minimized and all impacts, including excavation, access, and any other alterations to Bordering Vegetated Wetland, shall not exceed 2,000 square feet;

b. the size of the water supply shall be limited to that necessary to provide the amount of water required to abate the emergency, but not to exceed 2,000 square feet;

10.06: continued

c. a Notice of Intent shall be filed if the agricultural water supply is to be used for more than 60 days, in which case the agricultural water supply shall comply with existing performance standards under 310 CMR 10.53(3)(a), (b), and (g); and

d. all work shall comply with the Water Management Act, M.G.L. c. 21G.

4. The removal of trees, including stumps, and the application of pesticides to trees and soil within an area defined by USDA or DCR in an order or regulation to eradicate an infestation of Asian longhorned beetles, notwithstanding the provisions of 310 CMR 10.06(6)(d) or (e), provided that the work is conducted as follows:

a. The provisions of 310 CMR 10.06(6)(g)4. shall apply to USDA or DCR, if those agencies are performing eradication work, or to other persons if authorized or ordered by DCR to undertake eradication activity, in areas subject to regulation under M.G.L. c. 131, § 40. For the purposes of 310 CMR 10.06(6)(g)4., these agencies or persons shall be defined as authorized persons. At least 14 days prior to beginning work in any municipality, an authorized person shall submit to the conservation commission and MassDEP's regional office a GIS orthographic photo or map showing all resource areas in which work is to be conducted within the municipal boundaries, including wetland or stream crossings to gain access to work areas or Estimated Habitats for State-listed Rare Wetlands Wildlife, along with a proposed schedule or phasing plan for the eradication activities. If work is proposed within an Estimated Habitat, an authorized person shall provide the above described photo or map to the Natural Heritage and Endangered Species Program (NHESP) at the same time it is submitted to the conservation commission and MassDEP.

b. At least three days before beginning work at a specific site, an authorized person shall submit to the conservation commission and MassDEP's regional office a plan on a USGS or other map of at least 1=5:000 scale showing the work in the designated area as well as skid roads, stream and wetland crossings, landings and the general location of erosion control measures. An authorized person shall provide the name and contact information of an on-site supervisor responsible for compliance with the wetland related requirements of the harvest, including maintenance of the erosion control measures. MassDEP, a designated representative of the conservation commission and the authorized person shall conduct a site inspection at least 48 hours before beginning the work, to explore access options, proposed activity in resource areas, erosion controls, and final stabilization with the intent to minimize wetland impacts, unless MassDEP and the designated representative of the conservation commission determine, after a review of the plan, that a site visit is not necessary. If work is proposed within an Estimated Habitat, USDA, DCR or any person authorized or ordered by DCR to undertake eradication activity shall provide the above described map to the NHESP and the contact information for an on-site supervisor at the same time the information is provided to the conservation commission and MassDEP and shall also provide the NHESP with reasonable advance notice of any site inspection of the proposed work area.

c. Storage of materials and equipment shall be on paved surface or otherwise stable surface, outside resource areas, buffer zones, vernal pools, and the Zone I and Zone A of public water supply sources. Fuels, lubricants or hazardous materials shall not be stored, transferred between containers or mixed, and machinery shall not be refueled, in or within 100 feet of a resource area, vernal pool or the Zone I or Zone A of a public water supply.

d. Landings, access roads, and skid roads shall be located carefully to avoid steep slopes, resource areas, vernal pools, and stream crossings whenever possible. Access roads shall be stable and minimize site disturbance including impacts to vegetation,

soil, topography, hydrology and soils.

e. Stream crossings shall be avoided whenever possible. If temporary crossings are unavoidable, the crossing structures shall be removed at the end of the operation, and the site, banks, and approaches shall be stabilized**.** All crossings shall be made at right angles to the channel, and the approaches to a stream crossing shall be stabilized continuously both during the logging operation and after completion. At least one water bar shall be installed directly uphill from a crossing to prevent water moving down a skid road from reaching a stream. The water bar shall be reinforced as needed during the course of the work. The approaches may be corduroyed with poles to prevent rutting and the churning of soil. Erosion controls shall be placed in the skid road at the approach to a stream crossing at the end of the day.

10.06: continued

f. When operating in a resource area, harvesters shall concentrate skidding in a few well-defined corridors, use cable and winch as much as possible, and fell trees away from resource areas to facilitate winching them out. Harvesters shall use best efforts to avoid damaging non-targeted trees during eradication efforts. Harvesters shall use brush or corduroy to minimize ground pressure and rutting, shall reduce hitch volumes to minimize rutting, and shall use Best Management Practices (BMPs) to minimize sediment transport. Machinery shall not operate in a resource area unless the ground is dry, frozen, or otherwise stable enough to support it. In some limited situations where work is proposed in less than stable conditions and where, subject to approval by the conservation commission or the Department, tree removal requires heavy equipment operation in wetlands, the equipment shall either have low ground pressure (<3 psi), or shall not be located directly on wetland soils and vegetation. Equipment shall be placed on swamp mats that are adequate to support the equipment in such a way as to minimize disturbance of wetland soil and vegetation.

g. Vehicles and heavy equipment shall not be operated on the banks of water-bodies. For all work along a stream bank, minimize disturbance and discharge of soil to the waterway. Stabilization measures shall be implemented including placement of rock, mulch, seed, erosion control fabric, re-plantings, and/or other measures as appropriate based upon the area of disturbance. Rip-rap shall not be used unless MassDEP and the conservation commission determine that other means of stabilization are not practicable. If stump removal results in bank destabilization, then a means to stabilize the bank shall be performed.

h. Effective erosion controls (BMPs) shall be utilized to prevent discharge of sediments to resource areas, including silt fencing, temporary berms, stone dikes, and rip-rap. Brush or slash shall be placed on skid roads and seed where vulnerable to erosion. Landings shall be smoothed and graded. Exposed soils shall be seeded or mulched to prevent erosion. Tire tracks and ruts shall be smoothed along the access path.

i. Upon completion of harvesting, temporary skidder bridges shall be removed, and the authorized person shall ensure that fords and other stream crossings are left in a stable and free-flowing condition. All temporary structures (*e.g.*, culverts, bridges) shall be removed from resource areas. All unnatural debris generated by the eradication activity such as cans, papers, discarded tires and metal parts shall be removed. An authorized person shall not be responsible for the removal of any solid waste or trash that was on the site prior to the eradication effort. Incidental, remaining wood debris shall be left in place to promote rapid decay. Restore original grade of disturbed areas.

j. Bare soil in buffer zones shall be reseeded with a fast-growing non-invasive grass and disturbed wetland soils shall be reseeded with a wetland native seed mix and wetland species saplings to prevent establishment of invasive species. Reseeding shall take place within ten days of grading in spring, summer and fall months, or if grading activity takes place in winter, at the beginning of the following spring. Erosion control barriers shall be removed as soon as possible once the site is stabilized, but stabilization and removal shall occur no later than after the first growing season following completion of the work.

k. MassDEP and a designated representative of the conservation commission may inspect sites to ensure the effectiveness of erosion control and revegetation and reseeding efforts. Within one year of eradication efforts, individual sites shall be inspected by the authorized person, MassDEP and the conservation commission to

determine the adequacy of erosion control and revegetation and reseeding efforts if a conservation commission and/or MassDEP have reason to believe that erosion control, reseeding and revegetation efforts at that site have been unsuccessful.

l. Pesticides shall be handled and applied in accordance with the provisions of 333 CMR 12.00: *Protection of Groundwater Sources of Public Drinking Water Supplies from Non-point Source Pesticide Contamination* and 13.00: *Standards for Application*.

10.06: continued

(7) Notwithstanding any other requirement of 310 CMR 10.06, Immediate Response Actions receiving oral approval from the Bureau of Waste Site Cleanup (BWSC) of the Department of Environmental Protection pursuant to 310 CMR 40.0420(2), or initiated up to 24 hours prior to notification to and oral approval by BWSC pursuant to 310 CMR 40.0420(7) and (8), may commence before requesting the conservation commission to issue an emergency certification under 310 CMR 10.06, so long as such request is made within 24 hours after BWSC has orally approved commencement of the Immediate Response Action. Once a request for emergency certification has been made pursuant to 310 CMR 10.06(7), work that commenced before such filing may continue pending a decision on the request by the conservation commission. Such work may also continue pending a decision on a request for Departmental review unless the request has not been filed with the Department within one business day of: issuance by the conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification.

(8) In the event of a destructive weather event requiring widespread recovery efforts, debris cleanup or roadway or utility repair, the Commissioner may issue a Severe Weather Emergency Declaration that allows emergency-related work necessary for the protection of the health or safety of the residents of the Commonwealth to occur without filing a Notice of Intent or a request for an emergency certification or authorization pursuant to 310 CMR 10.06(1) through (7). The Severe Weather Emergency Declaration shall describe:

(a) the types of work allowed without filing a notice of intent;

(b) any general mitigating measures to condition the work that may be required in performing such work;

(c) any notification or reporting requirements;

(d) the geographic area of the Declaration's effect; and

(e) the period of time the Declaration shall be in effect which shall not be longer than 90 days, unless extended by the Commissioner.

The Declaration may include other conditions or limitations as deemed appropriate by the Commissioner. The Commissioner may revise or revoke the Severe Weather Emergency Declaration as he or she deems appropriate to further recovery efforts and protect public health and safety. If the Commissioner deems it necessary for the completion of recovery efforts, he or she may extend the duration of a Severe Weather Emergency Declaration for a period not to exceed 90 days. An extension may include a revision of the elements listed in 310 CMR 10.06(8)(a) through (d) as deemed appropriate to further recovery efforts. A Severe Weather Emergency Declaration and any extension, revision, or revocation thereof, shall be sent electronically to all conservation commissions in the geographic area of the Declaration's effect, shall be posted on the Department's website at hhtp://www.mass.gov/eea/agencies/massdep and shall be made widely available to the general public through appropriate channels for emergency communications. A Declaration shall not affect the Department's ability to enforce any general or special law or regulation that is not altered by a Severe Weather Emergency Declaration, or enforce the terms of such a Declaration.

10.07: Compliance with M.G.L. c. 30, §§ 61 through 62H

(1) The Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, may require an applicant to file an Environmental Notification Form (ENF) and possibly an Environmental Impact Report (EIR) for the proposed work, prior to the Department's issuance of a Superseding Order. *See* 301 CMR 11.00: *MEPA Regulations*.

(2) If said filing is required, the Department shall so notify the applicant upon receipt of the request for the Department to act. If within 70 days of the request for the Department to act the applicant has not filed an ENF, the Department may issue a Superseding Order prohibiting the project; provided, however, that such an order shall not issue if the Executive Office of Energy and Environmental Affairs determines that the filing of an ENF is not required.

(3) In determining total surface area for purposes of M.G.L. c. 30, §§ 6 through 62H wetlands threshold set forth in 301 CMR 11.25(2) and 11.26(7)(a), only those portions of the Areas Subject to Protection under M.G.L. c. 131, § 40 specified in 310 CMR 10.02(1), not including the Buffer Zone, which will be removed, filled, dredged or altered shall be considered.

10.08: Enforcement Orders

(1) When the conservation commission, the Department or the Office of Law Enforcement of the Executive Office of Energy and Environmental Affairs determines that an activity is in violation of M.G.L. c. 131, § 40, 310 CMR 10.00 or a Final Order, the conservation commission, Department or the Office of Law Enforcement may issue an Enforcement Order. Violations include:

(a) failure to comply with a Final Order, Final Determination, Emergency Declaration, or Emergency Certification, such as failure to observe a particular condition or time period specified in the Order, Declaration, or Certification;

(b) failure to complete work described in a Final Order or Final Determination, Emergency Declaration, or Emergency Certification when such failure causes damage to the interests identified in M.G.L. c. 131, § 40;

(c) failure to obtain a valid Final Order or Extension Permit prior to conducting an Activity Subject to Regulation under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2);

(d) making any false, inaccurate, or misleading statements in any certification filed under 310 CMR 10.00, including any certification that the requirements of 310 CMR 10.02(2)(b)2. will be met.

(e) failure to comply with any certification on project plans or eligibility under 310 CMR 10.02(2)(b)2.

(f) leaving in place unauthorized fill or otherwise fail to restore illegally altered land to its original condition, or the continuation of any other activity in violation of M.G.L. c. 131, § 40.

The conservation commission, its members and agents, and Department employees may enter upon privately owned land for the purpose of performing their duties under M.G.L. c. 131, § 40, subject to constitutional limitations.

(2) A Final Order, Emergency Declaration, or Emergency Certification may be enforced by either the conservation commission or the Department regardless of which is the issuing authority. The members, officers, employees and agents of the conservation commission and the Department may enter upon privately owned land for the purpose of performing their duties under M.G.L. c. 131, § 40, and 310 CMR 10.00.

(3) An Enforcement Order issued by a conservation commission shall be signed by a majority of the commission. In a situation requiring immediate action, an Enforcement Order may be signed by a single member or agent of the commission, if said Order is ratified by a majority of the members at the next scheduled meeting of the commission.

10.09: Severability

If any provision of any part of 310 CMR 10.00 or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 310 CMR 10.00.

10.10: Effective Date

(1) 310 CMR 10.01 through 10.10 and 10.51 through 10.60 shall take effect on April 1, 1983 and shall apply to all Notices of Intent filed on or after that date and any subsequent procedures related to such filings made on or after that date. 310 CMR 10.01 through 10.10 and 10.51 through 10.60 shall not apply to any Notice of Intent filed prior to the effective date of 310 CMR 10.00, or to any extensions of any Order of Conditions the Notice of Intent for which was filed prior to said effective date, except as otherwise provided in 310 CMR 10.05(4)(g) and (h).

(2) The effective date of 310 CMR 10.21 through 10.37 is August 10, 1978. 310 CMR 10.21 through 10.37 shall not apply to any Notice of Intent filed prior to August 10, 1978, or to any extensions to an Order of Conditions when the Notice of Intent upon which such Order was based was filed prior to August 10, 1978.

(3) All proceedings and actions commenced under M.G.L. c. 131, § 40 prior to the effective date of 310 CMR 10.00 shall remain in full force and effect under the prior applicable regulations, except as otherwise provided in 310 CMR 10.05(4)(g) and (6)(h).

10.10: continued

(4) The amendments to 310 CMR 10.00 concerning application of herbicides to rights of way contained in 310 CMR 10.03(6), 10.04: Alter, 10.05(3)(a)2., (b)1. and (d)1. shall be effective on July 10, 1987.

(5) The amendments to 310 CMR 10.00 published in the Massachusetts Register on October 16, 1987, concerning primarily the protection of wildlife habitat, shall take effect on November 1, 1987, and shall apply to all Notices of Intent filed on or after that date and any subsequent procedures related to such filing made on or after that date. The amendments to 310 CMR 10.00, concerning primarily the protection of wildlife habitat, shall not apply to any Notice of Intent filed prior to November 1, 1987, or to any extensions of any Order of Conditions the Notice of Intent for which was filed prior to November 1, 1987, except as otherwise provided in 310 CMR 10.05(4)(g) and (6)(h). All proceedings and actions commenced under M.G.L. c. 131, § 40 prior to November 1, 1987, and shall remain in full force and effect under the prior applicable regulations, except as otherwise provided in 310 CMR 10.05(4)(g) and (6)(h).

(6) The amendment to 310 CMR 10.55 concerning work in Bordering Vegetated Wetlands that are within an Area of Critical Environmental Concern contained in 310 CMR 10.55(4)(e) shall be effective on April 23, 1993, and shall not apply to any Notice of Intent filed prior to the effective date.

(7) The amendments to 310 CMR 10.00 concerning normal maintenance and improvement of land in agricultural use contained in 310 CMR 10.04: Agriculture10.06(6), and 10.53(5) shall be effective on May 21, 1993, and shall not apply to any Notice of Intent filed prior to the effective date.

(8) The provisions of 310 CMR 10.03(7)(c)2.k., 3.e., and 4.j. through l., 10.06(7), 10.24(7)(c)4. through 6., 10.53(3)(m) through (q), and the revisions to 310 CMR 10.03(7)(c)2.e., and 4.b., 10.06(3) and (5), and 10.53(3)(i) promulgated on December 3, 1993, shall take effect on January 1, 1994. They shall not apply to any Notice of Intent filed before January 1, 1994, nor to any extensions to an Order of Conditions when the Notice of Intent upon which such Order was based was filed prior to that date.

(9) The effective date of 310 CMR 10.55(1) and (2) is June 30, 1995.

(10) The revisions to 310 CMR 10.02 through 10.05, 10.21, 10.53, 10.58, and 10.60 to incorporate St. 1996, c. 258 amendments to M.G.L. c. 131, § 40, and the deletion of 310 CMR 10.99, shall be effective on October 6, 1997 and shall apply to Requests for Determination of Applicability and Notices of Intent filed after that date. Applicants who have received an Order of Conditions before August 7, 1996 or filed a Notice of Intent before August 7, 1996 and received a Final Order of Conditions before August 7, 1997, or later pending resolution of an adjudicatory hearing, shall not be subject to the requirements of 310 CMR 10.58 for the work permitted by the Order. A Determination of Applicability issued before August 7, 1996 is valid only for the resource areas specified in the Determination and not for the riverfront area.

(11) The amendments to 310 CMR 10.00 concerning drought (found at 310 CMR 10.04: Pond; 310 CMR 10.58(2)(a)1.f.) and perennial and intermittent streams (found at 310 CMR 10.58(2)(a)) shall take effect on December 20, 2002 and shall not apply to any Request for Determination of Applicability, Abbreviated Notice of Resource Area Delineation, Abbreviated

Notice of Intent, or Notice of Intent filed prior to the effective date.

(12) The provisions of 310 CMR 10.00 promulgated in 2005 shall take effect on March 1, 2005. They shall not apply to any Notice of Intent or and Notice of Resource Area Delineation filed prior to March 1, 2005.

(13) The revised procedures for wetland appeals set forth 310 CMR 10.05(7)(j) take effect on October 31, 2007 and shall apply to all wetland appeals for which a notice of claim is filed on or after October 31, 2007.

10.10: continued

(14) The amendments to 310 CMR 10.00 concerning Combined Applications, Combined Permits, Restoration Order of Conditions, Ecological Restoration Limited Projects and procedures for filing a Notice of Intent shall apply to Notices of Intent filed on or after October 24, 2014.

10.11: Actions Required Before Submitting a Notice of Intent for an Ecological Restoration Project

An applicant shall take the following actions before filing a Notice of Intent for an Ecological Restoration Project that meets the eligibility criteria for a Restoration Order of Conditions set forth in 310 CMR 10.13 or for approval as an Ecological Restoration Limited Project pursuant to 310 CMR 10.24(8) or 10.53(4).

(1) At least 14 days prior to the filing a Notice of Intent for an Ecological Restoration Project, the applicant shall submit written notification of the proposed filing for publication in the Environmental Monitor. At a minimum, the written notification shall contain a brief description of the proposed project, the anticipated date of submission of the Notice of Intent, the name and address of the conservation commission that will review the Notice of Intent and shall state where copies of the Notice of Intent may be examined or obtained and where information on the date, time, and location of the public hearing may be obtained.

(2) If the project will impact an area located within estimated habitat which is indicated on the most recent *Estimated Habitat Map of State-listed Rare Wetlands Wildlife* published by the Natural Heritage and Endangered Species Program (the Program), the applicant shall obtain a written preliminary determination from the Program as to whether the Rare Species identified on the aforementioned map are likely to continue to be located on or near the project and, if so, whether the Resource Area to be altered by the proposed project is in fact part of the habitat of the Rare Species. If the Program issues a preliminary determination that the Resource Area that would be altered by the proposed project is in fact within the habitat of a Rare Species, the preliminary determination shall identify the Rare Species whose habitat would be altered and recommend any changes or conditions that are necessary to ensure that the project will have no short or long term adverse effect on the habitat of the local population of the Rare Species or the project will be carried out in accordance with a habitat management plan that has been approved in writing by the Natural Heritage and Endangered Species Program and submitted with the Notice of Intent.

(3) If the project will occur within a coastal waterbody with a restricted Time of Year, as identified in Appendix B of the Division of Marine Fisheries Technical Report TR 47 *Marine Fisheries Time of Year Restrictions (TOYs) for Coastal Alteration Projects* dated April 2011, the applicant shall obtain a written determination from the Division of Marine Fisheries as to whether the proposed work requires a TOY restriction, and if so, the written determination shall specify the recommended TOY restriction and any other recommended conditions on the proposed work.

(4) If the project may affect a diadromous fish run as identified in the Division of Marine Fisheries Technical Reports TR 15 through 18, dated 2004, the applicant shall obtain a written determination from the Division of Marine Fisheries as to whether the design specifications and operational plan for the project are compatible with the passage requirements of the fish run.

(5) If the project involves silt-generating, in-water work that will impact a non-tidal perennial

river or stream, the in-water work shall either occur between May 1st and August 30th or the applicant shall obtain a determination from the Division of Fisheries and Wildlife as to whether the proposed work requires a TOY restriction, and if so, the written determination shall specify the recommended TOY restriction and any other recommended conditions on the proposed work.

(6) If the Ecological Restoration Project involves dredging of 100 cubic yards or more in a Resource Area or dredging of any amount in an Outstanding Resource Water, the applicant shall obtain a Water Quality Certification pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* prior to submitting a Notice of Intent.

10.12: Notice of Intent for an Ecological Restoration Project

A Notice of Intent for an Ecological Restoration Project that meets the eligibility criteria for a Restoration Order of Conditions set forth in 310 CMR 10.13, or for approval as an Ecological Restoration Limited Project in accordance with 310 CMR 10.24(8) or 10.53(4), shall comply with the requirements of 310 CMR 10.12(1) and (2).

(1) At a minimum, a Notice of Intent for an Ecological Restoration Project shall include the following:

(a) the project's ecological restoration goals;

(b) the location of the Ecological Restoration Project;

(c) the construction sequence for completing the project;

(d) a map of the Areas Subject to Protection under M.G.L. c. 131, § 40, that will be temporarily or permanently altered by the project or include habitat for Rare Species, Habitat of Potential Regional and Statewide Importance, eel grass beds, or Shellfish Suitability Areas;

(e) an evaluation of any flood impacts that may affect the built environment, including without limitation, buildings, wells, septic systems, roads or other man-made structures or infrastructure as well as any proposed flood impact mitigation measures;

(f) a plan for invasive species prevention and control;

(g) any preliminary written determinations obtained from the Natural Heritage and Endangered Species Program in accordance with 310 CMR 10.11(2);

(h) any Time of Year restrictions and/or other conditions recommended by the Division of Marine Fisheries or the Division of Fisheries and Wildlife in accordance with 310 CMR 10.11(3) through (5);

(i) proof that notice was published in the Environmental Monitor as required by 310 CMR 10.11(1);

(j) a certification by the applicant under the penalties of perjury that the project meets the eligibility criteria set forth in 310 CMR 10.13, 10.24(8) or 10.53(4), whichever is applicable;

(k) if the Ecological Restoration Project involves the construction, repair, replacement or expansion of infrastructure, an operation and maintenance plan to ensure that the infrastructure will continue to function as designed;

(l) If the project involves dredging of 100 cubic yards or more or dredging of any amount in an Outstanding Resource Water, a Water Quality Certification issued by the Department pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*;

(m) if the Ecological Restoration Project involves work on a stream crossing, information sufficient to make the showing required by 310 CMR 10.24(10) for work in a coastal resource area and 310 CMR 10.53(8) for work in an inland resource area; and

(n) if the Ecological Restoration Project involves work on a stream crossing, baseline photo-points that capture longitudinal views of the crossing inlet, the crossing outlet and the upstream and downstream channel beds during low flow conditions. The latitude and longitude coordinates of the photo-points shall be included in the baseline data.

(2) If the Notice of Intent for an Ecological Restoration Project is a Combined Application that serves as the application for a license, permit or other written approval for a water-dependent use project pursuant to 310 CMR 9.00: *Waterways*, the Notice of Intent shall also state:

(a) whether the project has the potential to impact any docks, piers or boat ramps and, if so, describe the nature of those impacts and any necessary mitigation;

(b) whether the project involves any structures that have been authorized under Chapter 91;

and

(c) whether the project has the potential to impact private water supply wells including agricultural or aquacultural wells or surface water withdrawal points.

(3) Notwithstanding the provisions of 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., and 10.60, a person submitting a Notice of Intent for an Ecological Restoration Project that meets the requirements of 310 CMR 10.12(1) and (2) is exempt from the requirement to perform a wildlife habitat evaluation in accordance with 310 CMR 10.60.

10.13: Eligibility Criteria for Restoration Order of Conditions

Notwithstanding the provisions of 310 CMR 10.25 through 10.35, 10.54 through 10.58, and 10.60, an Ecological Restoration Project shall be permitted by a Restoration Order of Conditions provided that the project meets all applicable eligibility criteria in 310 CMR 10.13. Ecological Restoration Projects permitted by a Restoration Order of Conditions may result in the temporary or permanent loss of Resource Areas and/or the conversion of one Resource Area to another when such loss and/or conversion is necessary to the achievement of the project's ecological restoration goals.

(1) An Ecological Restoration Project shall be permitted by a Restoration Order of Conditions if it meets all of the following eligibility criteria:

(a) The project is an Ecological Restoration Project as defined in 310 CMR 10.04, is a project type listed in 310 CMR 10.13(2) through (7), and the applicant has submitted a Notice of Intent that meets all applicable requirements of 310 CMR 10.12.

(b) The project will further at least one of the interests identified in M.G.L. c. 131, § 40.

(c) The project will not have any short-term or long-term adverse effect, as identified by the procedures established by 310 CMR 10.11, on specified habitat sites of Rare Species located within the Resource Areas that may be affected by the project or will be carried out in accordance with a habitat management plan that has been approved in writing by the Natural Heritage and Endangered Species Program and submitted with the Notice of Intent.

(d) To the maximum extent practicable, the project will:

1. avoid adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that can be avoided without impeding the achievement of the project's ecological restoration goals;

2. minimize adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that are necessary to the achievement of the project's ecological restoration goals; and

3. utilize best management practices such as erosion and siltation controls and proper construction sequencing to prevent and minimize adverse construction impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40

(e) The project will not have significant adverse effects on the interests of flood control and storm damage prevention in relation to the built environment (*i.e.*, the project will not result in a significant increase in flooding or storm damage affecting buildings, wells, septic systems, roads or other human-made structures or infrastructure).

(f) If the project will involve the dredging of 100 cubic yards of sediment or more or dredging of any amount in an Outstanding Resource Water, the Notice of Intent includes a Water Quality Certification issued by the Department in accordance with 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*.

(g) The project will not substantially reduce the capacity of a Resource Area to serve the habitat functions identified in 310 CMR 10.60(2). A project will be presumed to meet this eligibility criteria if the project as proposed in the Notice of Intent will be carried out in accordance with any time of year restrictions or other conditions recommended by the Division of Marine Fisheries for coastal waters, and by the Division of Fisheries and Wildlife for inland waters in accordance with 310 CMR 10.11(3) through (5). As set forth in 310 CMR 10.12(3), a person submitting a Notice of Intent for an Ecological Restoration Project that meets the requirements of 310 CMR 10.12(1) and (2) is exempt from the requirement to perform a wildlife habitat evaluation in accordance with 310 CMR 10.60.

(h) If the Ecological Restoration Project involves work on a stream crossing, the stream crossing has been designed in accordance with 310 CMR 10.24(10) for work in coastal

resource areas and 310 CMR 10.53(8) for work in inland resource areas, as applicable.

(i) The Ecological Restoration Project will not result in a discharge of dredged or fill material within 400 feet of the high water mark of a Class A surface water (exclusive of its tributaries) unless the project is conducted by a public water system under 310 CMR 22.00: *Drinking Water* or a public agency or authority for the maintenance or repair of existing public roads or railways in accordance with 314 CMR 4.06(1)(d)1.

(j) The Ecological Restoration Project will not result in a discharge of dredged or fill material to a vernal pool certified by the Division of Fisheries and Wildlife.

(k) The Ecological Restoration Project will not result in a point source discharge to an Outstanding Resource Water.

10.13: continued

(l) The Ecological Restoration Project will not involve the armoring of a Coastal Dune or Barrier Beach.

(2) Additional Eligibility Criteria for Dam Removal Projects. If the Ecological Restoration Project is a dam removal project, the project shall be presumed to meet the eligibility criteria set forth in 310 CMR 10.13(1)(d), if the project is consistent with the Department's guidance entitled *Dam Removal and the Wetlands Regulations*, dated December 2007. If the Ecological Restoration Project is a dam removal project, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the project meets all of the following eligibility criteria:

(a) The project will not involve the removal of a dam that was constructed or is managed for flood control by a municipal, state or federal agency

(b) The project will not adversely impact public water supply wells or water withdrawals permitted or registered under the Water Management Act, M.G.L. c. 21G, and 310 CMR 36.00: *Massachusetts Water Resources Management Program* within the reach of the stream impacted by the impoundment.

(c) The project will not adversely impact private water supply wells including agricultural or aquacultural wells or surface water withdrawal points.

(d) The project provides for the removal of the full vertical extent of the dam such that no remnant of the dam will remain at or below the streambed as determined prior to commencement of the dam removal project, or if such determination cannot be made at that time, as determined during construction of the project.

(e) The project provides for the removal of enough of the horizontal extent of the dam such that after removal no water will be impounded during the 500 year flood event.

(f) The project will not involve a hydroelectric facility requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license.

(g) The applicant has obtained from the Department of Conservation and Recreation Office of Dam Safety a written determination that the dam is not subject to the jurisdiction of the Office under 302 CMR 10.00: *Dam Safety*, a written determination that the dam removal does not require a permit under 302 CMR 10.00: *Dam Safety* or a permit authorizing the dam removal in accordance with 302 CMR 10.00: *Dam Safety* has been issued.

(h) If the project is exempt from the requirement to obtain a license or permit under 310 CMR 9.05(3)(n), the project will not have an adverse effect on navigation or on any docks, piers or boat ramps authorized under 310 CMR 9.00: *Waterways*.

(3) Additional Eligibility Criteria for Freshwater Stream Crossing Repair and Replacement Projects. If the Ecological Restoration Project is a freshwater stream crossing repair or replacement project, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the project meets all of the following eligibility criteria:

(a) The width of the structure will be at least 1.2 times bankfull width to facilitate the movement of fish and other aquatic organisms and wildlife species that may utilize riparian corridors.

(b) The structure will be an open-bottom span where practicable or if an open-bottom span is not practicable, the structure bottom will be embedded in a substrate that matches the substrate of the stream channel and that shall be designed to maintain continuity of aquatic and benthic elements of the stream including appropriate substrates and hydraulic characteristics within the culvert (water depths, turbulence, velocities, and flow patterns).

(c) The structure will have an Openness Ratio of at least 0.82 feet, or as close to 0.82 feet

as is practicable.

(4) Additional Eligibility Criteria for Stream Daylighting Projects. If the Ecological Restoration Project is a stream daylighting project, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the project meets all of the following eligibility criteria:

10.13: continued

(a) The project will meet the applicable performance standards for Bank, 310 CMR 10.54, and Land under Water Bodies and Waterways, 310 CMR 10.56. As set forth in 310 CMR 10.12(3), a person submitting a Notice of Intent that meets the requirements of 310 CMR 10.12 (1) and (2) for a stream daylighting project is exempt from the requirement to perform a wildlife habitat evaluation in accordance with 310 CMR 10.60, notwithstanding the provisions of 310 CMR10.54(4)(a)5., 10.56(4)(a)4., and 10.60.

(b) To the maximum extent practicable, the project is designed to include the revegetation of all disturbed areas with noninvasive indigenous species appropriate to the site.

(5) Additional Eligibility Criteria for Tidal Restoration Projects. If the Ecological Restoration Project is a Tidal Restoration Project designed to restore tidal flow that has been restricted or blocked by a man-made structure, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the project meets all of the following eligibility criteria:

(a) If the project will involve work in a Coastal Dune and/or a Coastal Beach, the project meets the applicable performance standard(s) at 310 CMR 10.27 and/or 10.28.

(b) The project will not include a new or relocated tidal inlet/breach through a Barrier Beach or additional armoring of a Barrier Beach, but may include the modification, replacement or enlargement of an existing culvert or inlet through a Barrier Beach.

(c) The project will not involve installation of new water control devices (*i.e.*, tide gates, flash boards and adjustable weirs) or a change in the management of existing water control devices, when the existing or proposed function of said devices is to prevent flooding or storm damage impacts to the built environment, including without limitation, buildings, wells, septic systems, roads or other human-made structures or infrastructure.

(d) The project's physical specifications are compatible with passage requirements for diadromous fish runs identified at the project location by the Division of Marine Fisheries.

(6) Additional Eligibility Criteria for Rare Species Habitat Restoration. If the Ecological Restoration Project is a Rare Species habitat restoration project, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the project meets all of the following eligibility criteria:

(a) The project is exempt from review under 321 CMR 10.00: *Massachusetts Endangered Species Act Regulations* as a project that involves the active management of Rare Species habitat for the purpose of maintaining or enhancing the habitat for the benefit of Rare Species. A project that involves the active management of Rare Species habitat and is exempt from review under 321 CMR 10.00: *Massachusetts Endangered Species Act Regulations* may include without limitation the mowing, cutting, burning or pruning of vegetation or the removal of exotic or invasive species.

(b) The project is carried out in accordance with a Habitat Management Plan that has been approved in writing by the Natural Heritage and Endangered Species Program and submitted with the Notice of Intent.

(7) Additional Eligibility Criteria for Restoring Fish Passageways. If the Ecological Restoration Project involves the restoration or repair of a fish passageway as identified by the Division of Marine Fisheries in its Marine Fisheries Technical Reports, TR 15 through 18, dated 2004, the Ecological Restoration Project shall be approved by a Restoration Order of Conditions, provided that in addition to the eligibility criteria set forth in 310 CMR 10.13(1), the applicant has submitted a Fishway Permit Application to the Division of Marine Fisheries, pursuant to M.G.L.

c. 130, §§ 1 and 19, and 322 CMR 7.01(4)(f) and (14)(m), and the fish passageway will be operated and maintained in accordance with an Operation and Maintenance Plan approved by the Division of Marine Fisheries.

10.14: Restoration Order of Conditions

If after reviewing a Notice of Intent for an Ecological Restoration Project, the issuing authority determines that the Ecological Restoration Project meets the eligibility criteria in 310 CMR 10.13(1) and the applicable provisions of 310 CMR 10.13(2) through (7), the issuing authority shall issue a Restoration Order of Conditions that contains the general conditions set forth in 310 CMR 10.14(1), and all applicable special conditions set forth in 310 CMR 10.14(2) through (7). The Restoration Order of Conditions may reference the plans and specifications for the Ecological Restoration Project approved by the issuing authority. If the Restoration Order of Conditions is issued in response to a Combined Application for an Order of Conditions pursuant to 310 CMR 10.00, a 401 Water Quality Certification pursuant to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*, and/or a Chapter 91 license, permit or other written approval pursuant to 310 CMR 9.00: *Waterways*, the Department may append to the Restoration Order of Conditions any conditions that the Department has authority to impose pursuant to 310 CMR 9.00: *Waterways* and/or 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*. A Restoration Project Order of Conditions is subject to the provisions of 310 CMR 10.05 that apply to any Order of Conditions except as expressly provided otherwise in 310 CMR 10.00.

(1) General Conditions Applicable to all Ecological Restoration Projects. The Restoration Order of Conditions shall contain the following general conditions:

(a) Failure to comply with all conditions stated herein and with all related statutes and other regulatory measures shall be deemed cause to revoke or modify this Restoration Order of Conditions.

(b) This Restoration Order of Conditions does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.

(c) This Restoration Order of Conditions does not relieve the permittee or any other person of the necessity of complying with all applicable federal, state or local statutes, ordinances, bylaws or regulations.

(d) The work authorized under this Restoration Order of Conditions shall be completed within three years from the date of issuance of this General Order unless the General Order is extended in accordance with 310 CMR 10.05(6)(d) or by operation of law.

(e) This Restoration Order of Conditions may be extended by the issuing authority for one or more periods of up to three years upon application to the issuing authority at least 30 days prior to the expiration date of this Restoration Order.

(f) Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, trees, ashes, refrigerators, motor vehicles or parts of any of the foregoing.

(g) This Restoration Order of Conditions is not final until all administrative appeal periods from this Restoration Order have elapsed or if such an appeal has been taken, until all proceedings before the Department have been completed.

(h) No work shall be undertaken until the Restoration Order of Conditions has become final and has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located within the chain of title to the affected property. In the case of recorded land, the Final Restoration Order of Conditions shall also be noted in the Registry's Grantor index under the name of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Issuing Authority prior to commencement of the work.

(i) A sign that is not less than two square feet or more than three square feet shall be displayed at the site. The sign shall bear the words "Massachusetts Department of Environmental Protection" and include the File Number.
(j) Where the Department is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before the Department.
(k) Upon completion of the work described herein, the applicant shall submit a Request for a Certificate of Compliance to the issuing authority.
(l) The work shall conform to the plans and special conditions referenced in this Restoration Order of Conditions.

10.14: continued

(m) Any change to the plans approved in this Restoration Order of Conditions shall require the applicant to inquire of the Issuing Authority in writing whether the change is significant enough to require the filing of a new Notice of Intent.

(n) Representatives of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Restoration Order of Conditions at reasonable hours to evaluate compliance with the conditions set forth in this Restoration Order of Conditions and may require the submittal of any data deemed necessary by the Conservation Commission or the Department for that evaluation.

(o) This Restoration Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Restoration Order of Conditions and to any contractor or other person performing work conditioned by this Order.

(p) Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland or Salt Marsh, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the issuing authority.

(q) All sedimentation barriers shall be maintained in good repair, until all disturbed areas have been fully stabilized with vegetation or other means. During construction, the applicant or his or her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the issuing authority. The Issuing Authority reserves the right to require any additional erosion and/or damage prevention controls it deems necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

(r) The project shall be conducted in accordance with any preliminary written determination obtained from the Natural Heritage and Endangered Species Program as set forth in 310 CMR 10.11(2) and any time of year restrictions or other conditions recommended in writing by the Division of Marine Fisheries (for projects in coastal Resource Areas) and the Division of Fisheries and Wildlife (for projects in inland Resource Areas) as set forth in 310 CMR 10.11(3) through (5).

(s) The applicant shall implement the plan submitted with the Notice of Intent as approved by the Issuing Authority to prevent and control invasive species.

(t) If the project involves the dredging of 100 cubic yards or more in a Resource Area or dredging of any amount in an Outstanding Resource Water, the dredging and Dredged Material management shall be performed in accordance with the Water Quality Certification submitted with the Notice of Intent.

(u) If the project involves infrastructure, the owner shall operate and maintain the infrastructure in accordance with the operation and maintenance plan submitted with the Notice of Intent as approved by the Issuing Authority. Implementation of the operation and maintenance plan as approved by the Issuing Authority shall be a continuing condition that shall be set forth in the Certificate of Compliance.

(2) Special Conditions for Dam Removal Projects. If the Ecological Restoration Project involves dam removal, the Restoration Order of Conditions shall contain the following special conditions in addition to the general conditions set forth in 310 CMR 10.14(1):

(a) An as-built plan and a written statement from a registered professional engineer or other environmental professional expert in ecological restoration certifying substantial compliance with the design plan and construction specifications approved in the Restoration Order of Conditions shall be submitted to the Issuing Authority within 90 days of completion of the dam removal.

(b) The applicant shall monitor the dam removal site during the first two years following completion of the dam removal. Said monitoring shall include a topographic survey of the longitudinal profile and stream cross-sections from downstream of the former dam through the upstream end of the former impoundment. The survey reference point shall comprise a permanent marker or recoverable survey point with known coordinates, such as a fixed point shown on the as-built plan, an existing bench mark, or a new benchmark. That marker should be identified or referenced on the plans and on the as-built plans. The applicant shall establish at least two photo-points for pre- and post-restoration monitoring at the dam removal site. At least one photo-point location shall be chosen to document a view of the dam pre-restoration and to document the same site after the dam is removed. A second location shall be chosen to document a view of the impoundment pre- and post-restoration. Photos shall be taken for two years after the dam removal is completed.

10.14: continued

(c) The applicant shall submit a report detailing the results of this monitoring within six months of the completion of the two year post-construction monitoring period, or within 30 months after the dam removal is complete whichever is sooner. The report shall include a comparison of post-restoration survey data with pre-restoration survey data as illustrated by the photos taken during the monitoring period.

(3) Special Conditions for Freshwater Stream Crossing Repair and Replacement Projects. If the Ecological Restoration Project involves freshwater crossing repair or replacement, the Restoration Order of Conditions shall contain the following special conditions in addition to the general conditions set forth in 310 CMR 10.14(1):

(a) An as-built plan and/or a written statement from a registered professional engineer or other environmental professional expert in ecological restoration certifying substantial compliance with the design plans and construction specifications approved in the Restoration Order of Conditions shall be completed within 90 days of completion of construction. The as-built plan shall include the dimensions of the structure, the invert elevation of the upstream and downstream ends of the structure and the road or other surface elevation above the structure.

(b) The applicant shall monitor the site by collecting sufficient data within 12 months after construction is complete to evaluate the effect of the structure. At a minimum, when a Certificate of Compliance is requested, the applicant shall provide post-construction photo-points that capture longitudinal views of the crossing inlet, the crossing outlet and the upstream and downstream channel beds during low flow conditions. The photo-points shall be located at the same geographic photo-point latitude and longitude coordinates as required in the Notice of Intent per 310 CMR 10.12(1)(n). The applicant shall submit a report to the Issuing Authority detailing the results of this monitoring within 18 months after construction is complete. The report shall include a comparison of the post-restoration data with pre-restoration data.

(4) Special Conditions for Stream Daylighting Projects. If the Ecological Restoration Project involves stream daylighting, the Restoration Order of Conditions shall include the following special conditions in addition to the general conditions set forth in 310 CMR 10.14(1):

(a) An as-built plan and a written statement from a registered professional engineer or other environmental professional expert in ecological restoration certifying substantial compliance with the design plan and construction specifications approved in the Restoration Order of Conditions shall be submitted to the Issuing Authority within 90 days of completion of the project. At a minimum, when a Certificate of Compliance is requested, the applicant shall provide post-construction photo-points that capture longitudinal views of the upstream and downstream channel beds of the daylighted reach during low flow conditions.

(b) The applicant shall conduct photo-point monitoring by establishing at least three photo-points for pre- and post-restoration monitoring at the stream daylighting site. One photo-point location shall be chosen to document the upstream end of the site and one photo-point location shall be chosen to document the downstream end of the site. A third photo-point shall be chosen to document conditions in the restored channel. Photos shall be taken during high flow and low (summer) flow of each year during the two years following completion of the project.

(c) Within 30 months after the completion of the project, the applicant shall submit a report describing the ecological changes observed at the project site during the two years following completion of the project, as illustrated by the photos.

(5) Special Conditions for Tidal Restoration Projects. If the Ecological Restoration Project involves restoration of tidal influence, the Restoration Order of Conditions shall contain the following special conditions in addition to the general conditions set forth in 310 CMR 10.14(1):

(a) If the project is a culvert or bridge replacement or repair project, an as-built plan and a written statement from a registered professional engineer or other environmental professional expert in ecological restoration certifying substantial compliance with the design plans and construction specifications approved in the Restoration Order of Conditions shall be submitted to the Issuing Authority within 90 days of completion of construction. The as-built plan shall include the dimensions of the structure, the invert elevation of the upstream and downstream ends of the structure and the road or other surface elevation above the structure.

10.14: continued

(b) The applicant shall monitor pre- and post-construction tidal conditions upstream and downstream of the tidal restriction with water level readings measured at an interval no greater than every ten minutes over a minimum of a one-week period that includes a spring tide. Pre- and post-construction water level readings shall be taken at approximately the same locations and shall be referenced to the same vertical elevation datum. The applicant shall prepare a report detailing the results of this monitoring within 12 months after construction is complete. The report shall include and compare pre- and post-construction tidal elevation monitoring data to assess attainment of the project's predicted post-restoration tidal conditions.

(6) Special Conditions for Rare Species Habitat Restoration. If the Ecological Restoration Project is a Rare Species Habitat Restoration Project, the Restoration Order of Conditions shall in addition to the general conditions set forth in 310 CMR 10.14(1) include the following special conditions:

(a) An as-built plan and a written statement from a registered professional engineer or other environmental professional expert in ecological restoration certifying substantial compliance with the design plan, construction specifications, and the Habitat Management Plan submitted with the Notice of Intent as approved in the Restoration Order of Conditions shall be submitted to the Issuing Authority within 90 days of completion of the project.

(b) The applicant shall establish at least two photo-points for pre- and post-restoration monitoring at the project site. Photos shall be taken for two years after construction is complete. Within 30 months of completion of the project, the applicant shall submit to the Issuing Authority a report describing the ecological changes observed at the project site as illustrated by the photos.

(7) Special Conditions for Fish Passageway Restoration Projects. If the Ecological Restoration Project involves the repair or replacement of a fish passageway, the Restoration Order of Conditions shall in addition to the general conditions set forth in 310 CMR 10.14(1) contain the following special conditions:

(a) The property owner is responsible for maintaining and repairing the fishway in good condition so that it will support safe and efficient fish passage in accordance with an operation and maintenance plan approved by the Division of Marine Fisheries. This requirement is a continuing condition that shall be set forth in the Certificate of Compliance.

(b) A post-construction project summary using surveys, a narrative and photographs as needed, that confirm the fishway slope and entrance and exit elevations shall be submitted to and approved by the Division of Marine Fisheries, prior to submittal of a request for a Certificate of Compliance.

10.21: Introduction

310 CMR 10.21 through 10.37 apply to all work subject to M.G.L. c. 131, § 40, M.G.L. c. 131, § 40, which will alter, dredge, fill, or remove any coastal beach, coastal dune, tidal flat, coastal wetland, land subject to coastal storm flowage, coastal bank, land subject to tidal action, or land under an estuary, under a salt pond, under the ocean or under certain streams, ponds, rivers, lakes or creeks within the coastal zone that are anadromous/catadromous fish runs. This Part is in addition to and does not change the provisions set forth in 310 CMR 10.01 through 10.10. 310 CMR 10.21 through 10.37 are intended to ensure that development along the coastline is located, designed, built and maintained in a manner that protects the public interests in the coastal resources listed in M.G.L. c. 131, § 40. The proponent of the work must

submit sufficient information to enable the issuing authority to determine whether the proposed work will comply with 310 CMR 10.21 through 10.37. Any proposed work may be subject to the requirements of sections concerning coastal beaches, coastal dunes and land containing shellfish. Thus, in order to determine which provisions apply to a proposed project, 310 CMR 10.00 must be read in its entirety. 310 CMR 10.21 through 10.37 are divided into 16 sections, 44 of which deal with specific coastal resources. Each coastal resource section begins with a preamble. In addition, the requirements for protection of the riverfront area in 310 CMR 10.58 apply within the coastal resource areas. The riverfront area may overlap other coastal resource areas and the performance standards for each resource area must be met. 310 CMR 10.24(7) applies to riverfront areas within coastal resource areas. The Preamble identifies the interests

10.21: continued

of M.G.L. c. 131, § 40 to which that resource is or is likely to be significant and describes the characteristics or factors of the resource which are critical to the protection of the interest to which the resource is significant. 310 CMR 10.21 through 10.37 are in the form of performance standards and shall be interpreted to protect those characteristics and resources to the maximum extent permissible under M.G.L. c. 131, § 40.

The performance standards are intended to identify the level of protection the issuing authority must impose in order to contribute to the protection of the interests of M.G.L. c. 131, § 40. It is the responsibility of the issuing authority to order specific measures and requirements for each proposed project which will ensure that the project is designed and carried out consistent with the required level of protection. Such authority must then issue an Order of Conditions which is understandable and enforceable.

10.22: Purpose

310 CMR 10.21 through 10.37 are promulgated pursuant to M.G.L. c. 131, § 40 and are intended to implement it. They are further intended to establish criteria and standards for the uniform and coordinated administration of the provisions of M.G.L. c. 131, § 40; to ensure coordination between the Department and other Executive Office of Energy and Environmental Affairs agencies; and to ensure consideration by the Department of relevant policies, laws or programs of other Executive Office of Energy and Environmental Affairs agencies. 310 CMR 10.21 through 10.37 is, in addition, intended to be consistent with and form a part of the Commonwealth's Coastal Zone Management Program as it has been promulgated and defined by 301 CMR 21.00: *Coastal Zone Management Program Federal Consistency Review Procedures*. 310 CMR 10.21 through 10.37, however, are adopted independently under M.G.L. c. 131, § 40 and would remain in full force and effect in the absence of 301 CMR 20.00: *Coastal Zone Management Program*.

The interpretation and application of 310 CMR 10.21 through 10.37 shall be consistent with the policies of 301 CMR 20.00: *Coastal Zone Management Program* to the maximum extent permissible under M.G.L. c. 131, § 40. M.G.L. c. 21A, § 2 establishes the CZM policies as part of 301 CMR 20.00, and the Department recognizes these policies as state environmental policy, which it will carry out in accordance with M.G.L. c. 21A, § 2. Specifically, 301 CMR 20.99: *Severability*, Coastal Hazards Policy #1, and #2, Energy Policy #1, Habitat Policy #1, Ocean Resources Policy #1, Ports and Harbors Policy #1, #2 and #3, Protected Areas Policy #1 and Water Quality Policy #1 and #2 are applicable to the administration of M.G.L. c. 21A, § 2, but the provisions of the more specific regulations contained in the following sections shall govern, unless the Secretary, pursuant to the conflict resolution procedures of M.G.L. c. 21A, 301 CMR 20.00 of the CZM Regulations, has resolved any conflict and has determined that the CZM policies should or should not apply.

10.23: Additional Definitions for 310 CMR 10.21 through 10.37

The definitions contained in 310 CMR 10.23 apply to and are valid for 310 CMR 10.21 through 10.37. The following definitions are for terms used throughout 310 CMR 10.21 through 10.37. Other terms that are used only in specific sections of 310 CMR 10.21 through 10.37 are defined in those sections.

Act means the Wetlands Protection Act, M.G.L. c. 131, § 40.

Adverse Effect means a greater than negligible change in the resource area or one of its

characteristics or factors that diminishes the value of the resource area to one or more of the specific interests of M.G.L. c. 131, § 40, as determined by the issuing authority. Negligible means small enough to be disregarded.

Applicant means any person giving notice of intention to remove, fill, dredge or alter under M.G.L. c. 131, § 40.

Area of Critical Environmental Concern (ACEC) means an area which has been so designated by the Secretary in accordance with 301 CMR 12.00: *Areas of Critical Environmental Concern*. The term Area for Preservation or Restoration (APR) shall be synonymous with ACEC, as provided in the CZM Regulations.

10.23: continued

Building means any residential, commercial, industrial, recreational or other similar structure. For the purposes of 310 CMR 10.00, building may be interpreted to include a large, substantial structure such as a utility tower.

Coastal Engineering Structure means, but is not limited to, any breakwater, bulkhead, groin, jetty, revetment, seawall, weir, riprap or any other structure that is designed to alter wave, tidal or sediment transport processes in order to protect inland or upland structures from the effects of such processes.

Coastal Zone means that area defined in 301 CMR 20.02: *Definitions*.

DMF means the Division of Marine Fisheries.

Grain Size means a measure of the size of a material or rock particle that makes up sediment.

Improvement Dredging means any dredging under a license in an area which has not previously been dredged or which extends the original dredged width, depth, length or otherwise alters the original boundaries of a previously dredged area.

Interests of the Act means the following eight interests specified in M.G.L. c. 131, § 40: public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish and protection of fisheries and wildlife habitat.

Issuing Authority means either a conservation commission or the Department, as appropriate.

Littoral Processes means the movement of sediment, including gravel, sand or cobbles, along the coast caused by waves or currents.

Maintenance Dredging means dredging under a license in any previously dredged area which does not extend the originally-dredged depth, width, or length but does not mean improvement dredging or backfilling.

Marine Fisheries means any animal life inhabiting the ocean or its adjacent tidal waters or the land thereunder that is utilized by man in a recreational and/or commercial manner or that is part of the food chain for such animal life.

Mean High Water Line means the line where the arithmetic mean of the high water heights observed over a specific 19-year metonic cycle (the National Tidal Datum Epoch) meets the shore and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce.

Mean Low Water Line means the line where the arithmetic mean of the low water heights observed over a specific 19-year metonic cycle (the National Tidal Datum Epoch) meets the shore and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce.

Minimize means to achieve the least amount of adverse effect that can be attained using best available measures or best practical measures, whichever is referred to in the pertinent section.

"Best available measures" means the most up-to-date technology or the best designs, measures or engineering practices that have been developed and that are commercially available. "Best Practical Measures" means technologies, designs, measures or engineering practices that are in general use to protect similar interests.

NPDES (National Pollutant Discharge Elimination System) Permit means the permit issued jointly by the federal and state governments, in accordance with 33 U.S.C. 1342 and M.G.L. c. 21, § 43, regulating liquid discharges from a point source.

Productivity means the rate of biomass production over a period of time.

10.23: continued

Resource Area means any coastal bank; coastal wetland; coastal beach; coastal dune; tidal flat; or any land under the ocean or under an estuary or under a salt pond; land subject to tidal action or coastal 100 year storm flowage; or land under certain streams, ponds, rivers, lakes, or creeks within the coastal zone that are anadromous/catadromous fish runs.

Secretary means the Secretary of Energy and Environmental Affairs.

Significant. A resource area shall be found to be significant to an interest of M.G.L. c. 131, § 40 when such resource area plays a role in the provision or protection, as appropriate, of public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, land containing shellfish, fisheries, and/or wildlife habitat.

Turbidity means the amount of particulate matter suspended in water.

Water Circulation means the pattern of water movement in coastal waters.

10.24: General Provisions

(1) If the issuing authority determines that a resource area is significant to an interest identified in M.G.L. c. 131, § 40 for which no presumption is stated in the Preamble to the applicable section, the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests. For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of M.G.L. c. 131, § 40. Where a buffer zone has already been developed, the issuing authority may consider the extent of existing development in its review of subsequent proposed work and, where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to the resource area to protect the interests of M.G.L. c. 131, § 40. The purpose of preconstruction review of work in the buffer zone is to ensure that adjacent resource areas are not adversely affected during or after completion of the work.

(2) When the issuing authority determines that a project in one resource area would adversely affect another resource area, the issuing authority shall impose such conditions as will protect the interest to which each resource are significant to the same degree as required in 310 CMR 10.00 concerning each resource area.

(3) A determination which finds that a resource area is not significant to an interest to which it is presumed in 310 CMR 10.21 through 10.37 to be significant, or is significant to an interest to which it is presumed to be not significant, shall be made on Form 7. No such determination shall be effective unless a copy of this form and the accompanying written explanation for the determination required by 310 CMR 10.00 is sent on the day of issuance to the appropriate regional office of the Department.

(4) (a) 310 CMR 10.21 through 10.37 do not change the requirement of any other Massachusetts statute or by-law. A proposed project must comply with all applicable requirements of other federal, state and local statutes and by-laws, in addition to meeting the requirements of 310 CMR 10.00. Examples of such laws which may be applicable are the Coastal Restrictions Act (M.G.L. c. 130, § 105), the Ocean Sanctuaries Act (M.G.L. c. 132A, §§ 13 through 16 and 18), the Mineral Resources Act (M.G.L. c. 21, §§ 54 through 58), the Massachusetts Clean Water Act (M.G.L. c. 21, §§ 26 through 53), the Waterways laws (M.G.L. c. 91), the Massachusetts Environmental Policy Act (M.G.L. c. 30, §§ 61 through 62H), the act establishing the Martha's Vineyard Commission (St. 1974, c. 637) and the Scenic Rivers Act (M.G.L. c. 21, § 2. 17B).

10.24: continued

(b) When the site of a proposed project is subject to a Restriction Order which has been duly recorded under the provisions of M.G.L. c. 130, § 105, such a project shall conform to 310 CMR 10.21 through 10.37.

(c) If an NPDES permit for any new point-source discharge has or will be obtained prior to the commencement of the discharge, the effluent limitations established in such permit shall be deemed to satisfy the water quality standards established in any section of 310 CMR 10.21 through 10.37 relative to the effects of the new point-source discharge on water quality. Such effluent limitations shall be incorporated or shall be deemed to be incorporated into the Order of Conditions.

(5) (a) When any area subject to 310 CMR 10.21 through 10.37 has been designated an Area of Critical Environmental Concern by the Secretary of Energy and Environmental Affairs pursuant to 301 CMR 20.00: *Coastal Zone Management Program*, and when the Secretary has made a finding of the significance of the area to one or more interests of M.G.L. c. 131, § 40, the issuing authority shall presume that such area is significant to those interests.

(b) When any portion of a designated Area of Critical Environmental Concern is determined by the Issuing Authority to be significant to any of the interests of M.G.L. c. 131, § 40, any proposed project in or impacting that portion of the Area of Critical Environmental Concern shall have no adverse effect upon those interests, except as provided under 310 CMR 10.25(4) for maintenance dredging, under 310 CMR 10.11 through 10.14, 10.24(8) and 10.53(4) for Ecological Restoration Projects, and under 310 CMR 10.25(3) for improvement dredging conducted by a public entity for the sole purpose of the maintenance o r restoration of historic, safe navigation channels or turnaround basins of a minimum length, width, and depth consistent with a Resource Management Plan adopted by the municipality(ies) and approved by the Secretary of the Executive Office of Energy and Environmental Affairs.

(6) Where any section of 310 CMR 10.00 provides that a proposed project "may be permitted" in certain circumstances, no such project shall be undertaken until all of the usual procedures required by M.G.L. c. 131, § 40 and 310 CMR 10.21 through 10.37 have been followed and a Final Order has been issued approving the work. The Issuing Authority shall impose such conditions on such projects as may be necessary to contribute to the protection of the interests of M.G.L. c. 131, § 40. Notwithstanding the foregoing, when the Issuing Authority determines that a project meets the eligibility criteria for a Restoration Order of Conditions, the Issuing Authority shall impose only the conditions set forth in the applicable provisions of 310 CMR 10.00. As set forth in 310 CMR 10.05(6)(b)., a Restoration Order of Conditions may reference the plans and specifications approved by the Issuing Authority. If the Department is the Issuing Authority for a project that is the subject of a Combined Application, the Department may attach to the Restoration Order of Conditions any conditions that the Department has authority to impose pursuant to 310 CMR 9.00: *Waterways* and 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* to the extent they are applicable.

(7) Notwithstanding the provisions of 310 CMR 10.25 through 10.35, the Issuing Authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40, permitting the limited projects listed in 310 CMR 10.24(7)(a) through (c), although no such project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37. In determining whether to exercise its discretion to approve the limited projects listed in 310 CMR 10.24(7)(a) through (c), the Issuing Authority shall consider the following factors: the

magnitude of the alteration and the significance of the project to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, and the extent to which adverse impacts are minimized and the extent to which mitigation measures including replication or restoration are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. Adverse effects to be minimized include without limitation any adverse impacts on the relevant interests of M.G.L. c. 131, § 40, due to changes in wave action or sediment transport or adjacent coastal banks, coastal beaches, coastal dunes, salt marshes or barrier beaches. The provisions of 310 CMR 10.24(7)(a) through (c) are not intended to prohibit the Issuing Authority from imposing such additional conditions as are necessary to contribute to the interests of M.G.L. c. 131, § 40 where the indicated minimizing measures are not sufficient.

10.24: continued

(a) The construction, reconstruction, operation and maintenance of the following structures associated with and essential to an electric generating facility may be permitted as a limited project pursuant to 310 CMR 10.24(7) provided the project is proposed to be constructed and operated in accordance with all applicable provisions of 310 CMR 10.24(1) through (6), (7)(a)1. through 6., and (9) and (10):

1. Conduits for cooling water intake or discharge, which may be emplaced by trenching with a minimum depth of four feet of cover below original grade, except where they traverse salt ponds, salt marshes and barrier beaches, in which cases they may be emplaced only by tunneling;

2. Headwalls and other essential structures appurtenant to 310 CMR 10.24(7)(a)1., except that these structures may not be constructed in salt marshes, salt ponds or barrier beaches;

3. Pipelines or other conduits for the transmission of utilities essential to the facility (water, fuel, sewage, and power), which may be emplaced by trenching with a minimum depth of four feet of cover below original grade, or which may be carried above grade on pilings or similar supports, but only if the applicant demonstrates that there will be no adverse effect on the resource area by the construction, operation, and maintenance of such pipelines or other conduits. If such pipelines or conduits are emplaced through a resource area which adverse effects are required to be minimized by 310 CMR 10.25 through 10.35, then that standard shall be applied, except that in no case shall fuel or sewage lines be operated or be designed to be operated so that they will have an adverse effect on the resource area.

4. Structures necessary for navigation, berthing and protection of such vessels and vessel movements as may be necessary to the operation of the facility, but only on coastal banks, coastal beaches, rocky intertidal shores or land under the ocean;

5. Structures for maritime dependent accessory activities essential to the facility, but only on coastal banks, coastal beaches, rock intertidal shores or land under the ocean;

6. Coastal engineering structures necessary to the protection of such other structures as may be permitted under 310 CMR 10.24, but only on coastal banks, coastal beaches, rocky intertidal shores, or land under the ocean;

(b) The construction, reconstruction, operation and maintenance of underground and overhead public utilities, limited to electrical distribution or transmission lines, or communication, sewer, water and natural gas lines, may be permitted as a limited project pursuant to 310 CMR 10.24(7) provided that the project complies with all applicable provisions of 310 CMR 10.24(1) through (6), (9) and (10), and (7)(b)1. through 9.:

1. For local distribution or connecting lines not reviewed by the Energy Facilities Siting Council, the Issuing Authority determines that alternative routes with fewer adverse effects are not physically or legally feasible;

2. Adverse effects during construction are minimized using the best available measures, which may include such equipment as Bailey bridges and helicopters;

3. The surface vegetation and contours of the area are substantially restored;

4. When a trench is made in a Salt Marsh, all spoil is removed from the Salt Marsh upon excavation. Clean sand or other appropriate material shall be used to restore the level of the trench to that of the surrounding undisturbed Salt Marsh. The surface vegetation shall be restored substantially to its original condition by immediately transplanting appropriate marsh plant nursery stock once construction is completed. Baffles of concrete, clay or other non porous material shall be placed in the trench, if necessary, to prevent groundwater excursion. During the first growing season, periodic maintenance of the marsh restoration area shall be required and shall include at least the replacement of non surviving transplants and the removal of all deposits of debris and organic litter.

During construction, equipment such as Bailey bridges and helicopters shall be used to minimize, using best available measures, the adverse effects of construction on the Salt Marsh. All vehicles shall be used only on swamp mats or in such a way as to prevent tire marks, trenches, or ruts;

5. No utility shall traverse a Salt Marsh unless the applicant has shown that any thermal influence on the Salt Marsh of such line subsequent to the project being completed will not alter the natural freezing and thawing patterns of the top 24 inches of the Salt Marsh surface. Thermal sand, concrete or other suitable material may be used to backfill the trench to a point no less than 24 inches below grade. Above this level, clean sand shall be used to restore the level of the trench to that of the surrounding undisturbed Salt Marsh;

10.24: continued

6. No permanent access roads shall be permitted except in Designated Port Areas; and

7. All sewer lines shall be constructed so as to be watertight so as to prevent inflow and leakage.

8. All fuel lines shall be double cased and watertight so as to prevent inflow and leakage.

9. The conduits or structures shall be designed to minimize, using the best available measures, adverse effects on the relevant interests of M.G.L. c. 131, § 40 due to changes in wave action or sediment transport or adjacent coastal banks, coastal beaches, coastal dunes, salt marshes or barrier beaches.

(c) The following projects may be permitted as a limited project pursuant to 310 CMR 10.24(7) provided the project complies with all applicable provisions of 310 CMR 10.24(1) through (6) and (9) and (10):

1. Maintenance and improvement of existing public roadways, but limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving drainage systems.

2. The maintenance, repair and improvement (but not substantial enlargement except when necessary to reduce or eliminate a tidal restriction) of structures, including buildings, piers, towers, headwalls, bridges and culverts which existed on November 1, 1987.

3. The routine maintenance and repair of road drainage structures including culverts and catch basins, drainage easements, ditches, watercourses and artificial water conveyances to insure flow capacities which existed on November 1, 1987.

4. The closure of landfills when undertaken to comply with the requirements of 310 CMR 19.000: *Solid Waste Management*; provided, however, that:

a. a project design alternative analysis shall be prepared in accordance with 310 CMR 19.150: *Landfill Assessment Requirements*; and

b. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable:

i. hydrological changes to resource areas shall be minimized;

ii. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

iii. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

iv. no access road, assessment or monitoring device, or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

v. temporary structures and work areas in resource areas, such as access roads and assessment and monitoring devices, shall be removed within 30 days of the Department's written determination that the closure of the facility has been completed in accordance with the closure permit. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods.

Temporary structures, work areas, and alterations to resource areas are those that no longer are necessary to fulfill the requirements of 310 CMR 19.000: *Solid Waste Management*;

vi. except for direct impacts to resource areas caused by the final cap and cover on the landfill, no changes in the existing topography or the existing soil and surface water levels shall be permitted, except for those resulting from temporary access roads;

vii. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment used; and

viii. such projects shall not include the construction of new landfills or the expansion or modification of existing landfills.

10.24: continued

5. Airport vegetation removal projects; provided, however, that:
a. such projects must be undertaken in order to comply with Federal Aviation Administration (FAA) Regulation Part 77 (14 CFR Part 77), FAA Advisory Circular 150/5300-13 (Navigational Aids and Approach Light Systems), and FAA Order 6480.4 (Air Traffic Control Tower Siting Criteria), all as amended, or to comply with the airport approach regulations set forth in M.G.L. c. 90, §§ 40A through 40I;
b. such projects must be undertaken at airports that are managed by the Massachusetts Port Authority (Massport) or that are subject to certification by the Massachusetts Aeronautics Commission (MAC);
c. the requirement outlined in 310 CMR 10.24(7)(c)5.a. must be certified in writing by the FAA or by the MAC;
d. such projects shall not include the construction of new airport facilities or the expansion or relocation of existing airport uses;
e. notices of Intent filed for such projects shall:
i. delineate the vegetation requiring removal;
ii. delineate the affected resource areas;
iii. identify the proposed method for removal of vegetation and analyze alternatives. At a minimum, the alternatives analysis shall include: an alternative (based on a Federal Aviation Administration waiver or airport operation changes) that does not alter resource areas, which will provide baseline data for evaluating other alternatives; an assessment of impacts to resource areas resulting from mechanical methods of vegetation removal, including the use of both large and small equipment; and an assessment of impacts to resource areas resulting from chemical methods of vegetation removal;
iv. quantify the likely impacts to wildlife habitat and water quality;
v. evaluate possible mitigation measures, including but not limited to an assessment of erosion and sedimentation controls, wetland restoration, wetland replication, on-site and off-site wetland enhancement, herbicide application guidelines, spill containment plans, development restrictions and monitoring; and
vi. propose a five-year airport vegetation management plan. The vegetation management plan shall, at minimum, contain a purpose and goals statement, identify all airport protective zones, identify proposed vegetation management areas within the protective zones, and identify and prioritize future vegetation removal projects. Updated vegetation management plans shall be provided for each Notice of Intent filed after the expiration of the most recent five-year vegetation management plan period;
f. where such projects require the filing of a Notice of Intent in more than one municipality, the Notice of Intent filed in each municipality shall describe the total impacts to resource areas proposed for the entire project;
g. in addition to existing notice requirements contained in 310 CMR 10.00, for projects pursuant to 310 CMR 10.24(7)(c)5. copies of each Notice of Intent shall be filed simultaneously with the Massachusetts Department of Food and Agriculture, the Massachusetts Historical Commission, the Massachusetts Department of Environmental Management (Areas of Critical Environmental Concern Program), and the Division of Water Supply in the Department of Environmental Protection; and
h. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent

practicable:

i. hydrological changes to resource areas shall be minimized;

ii. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

iii. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

iv. no access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

10.24: continued

v. no change in the existing surface topography or the existing soil and surface water levels shall occur except for temporary access roads;

vi. temporary structures and work areas in resource areas, such as access roads, shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods;

vii. work in resource areas shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used; and

viii. slash, branches, and limbs resulting from cutting and removal operations shall not be placed within 25 feet of the bank of any water body.

6. Assessment, monitoring, containment, mitigation, and remediation of, or other response to, a release or threat of release of oil and/or hazardous material in accordance with the provisions of 310 CMR 40.0000: *Massachusetts Contingency Plan* and the following general conditions (although no such measure may be permitted which is designed in accordance with the provisions of 310 CMR 40.1020: *Background Levels of Oil and Hazardous Material* solely to reduce contamination to a level lower than that which is needed to achieve "No Significant Risk" as defined in 310 CMR 40.0006(12)):

a. There are no practicable alternatives to the response action being proposed that are consistent with the provisions of 310 CMR 40.0000: *Massachusetts Contingency Plan* and that would be less damaging to resource areas. The alternatives analysis shall include the following:

i. an alternative that does not alter resource areas, which will provide baseline data for evaluating other alternatives; and

ii. an assessment of alternatives to both temporary and permanent impacts to resource areas.

A "Comprehensive Remedial Action Alternative" that is selected in accordance with the provisions of 310 CMR 40.0851 through 40.0869 shall be deemed to have met the requirements of 310 CMR 10.24(7)(c)6.a.; and

b. Such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable:

i. hydrological changes to resource areas shall be minimized;

ii. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of resource areas in accordance with standard U.S.D.A. Soil Conservation Service methods;

iii. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, §40;

iv. no access road, assessment or monitoring device, or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

v. temporary structures and work areas in resource areas, such as access roads and assessment and monitoring devices, shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be

substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods. Temporary structures, work areas, and alterations to resource areas are those that no longer are necessary to fulfill the requirements of 310 CMR 40.0000: *Massachusetts Contingency Plan*; and

vi. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

10.24: continued

7. The construction of a new access roadway, or the improvement, repair and/or replacement of an existing access roadway, needed to transport equipment to a renewable energy project site, provided that it is carried out in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority. Such projects shall be designed, constructed, implemented, operated, and maintained to meet all of the following standards to the maximum extent practicable:

a. The work is limited to the following coastal resource areas or portions thereof: the portion of Land Subject to Coastal Storm Flowage that is outside the Velocity Zone, Designated Port Areas, and Banks of or Land under the Ocean, Ponds, Streams, Rivers, Lakes or Creeks that Underlie an Anadromous/Catadromous Fish Run.

b. Hydrological changes to resource areas shall be minimized.

c. Best management practices shall be used to minimize adverse impacts during construction. An applicant shall be presumed to use best management practices to minimize adverse impacts during construction if he or she implements erosion and sediment controls in accordance with the *Massachusetts Erosion and Sediment Control Guidelines*. This presumption may be rebutted by credible evidence from a competent source.

d. No access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity.

e. No change in the existing surface topography or the existing soil and surface water levels shall occur except for temporary access roads.

f. Temporary structures and work areas in resource areas shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion. Surface areas shall be presumed to be stabilized to prevent erosion if the applicant implements the procedures set forth in the *Massachusetts Erosion and Sediment Control Guidelines*. This presumption may be rebutted by credible evidence from a competent source.

g. Work in resource areas shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

h. Slash, branches, and limbs resulting from cutting and removal operations shall not be placed within 25 feet of the bank of any water body.

(8) Ecological Restoration Limited Project.

(a) Notwithstanding the requirements of 310 CMR 10.25 through 10.35, 10.54 through 10.58, and 10.60, the Issuing Authority may issue an Order of Conditions permitting an Ecological Restoration Project listed in 310 CMR 10.24(8)(e) as an Ecological Restoration Limited Project and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40, provided that:

1. The Issuing Authority determines that the project is an Ecological Restoration Project as defined in 310 CMR 10.04;

2. If the project will impact an area located within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife published by the Natural Heritage and Endangered Species Program (Program), the applicant has obtained a preliminary written determination from the Program in

accordance with 310 CMR 10.11(2) that the project will not have any adverse long-term and short-term effects on specified habitat sites of Rare Species or the project will be carried out in accordance with a habitat management plan that has been approved in writing by the Natural Heritage and Endangered Species Program and submitted with the Notice of Intent;

3. The applicant demonstrates that the project will be carried out in accordance with any time of year restrictions or other conditions recommended by the Division of Marine Fisheries for coastal waters and the Division of Fisheries and Wildlife in accordance with 310 CMR 10.11(3);

10.24: continued

4. If the project is located in a Coastal Dune or Barrier Beach, the applicant has demonstrated that s/he has avoided and minimized armoring of the Coastal Dune or Barrier Beach to the maximum extent practicable; and

5. The applicant demonstrates that the project complies with all applicable provisions of 310 CMR 10.24(1) through (6) and (9) and (10).

(b) An Ecological Restoration Project permitted as an Ecological Restoration Limited Project in accordance with 310 CMR 10.24(8) may result in the temporary or permanent loss of Resource Areas and/or the conversion of one Resource Area to another when such loss is necessary to the achievement of the project's ecological restoration goals.

(c) As set forth in 310 CMR 10.12(3), a person submitting a Notice of Intent for an Ecological Restoration Limited Project in accordance with 310 CMR 10.12(1) and (2) is exempt from the requirement to perform a wildlife habitat evaluation in accordance with the requirements of 310 CMR 10.60, notwithstanding the provisions of 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., and 10.60.

(d) In determining whether to approve a project as an Ecological Restoration Limited Project, the issuing authority shall consider the following:

1. the condition of existing and historic Resource Areas proposed for restoration including evidence of the extent and severity of the impairment(s) that reduce the capacity of said Resource Areas to protect and sustain the interests identified in M.G.L. c. 131, § 40;

2. the magnitude and significance of the benefits of the Ecological Restoration Project in improving the capacity of the affected Resource Areas to protect and sustain the other interests identified in M.G.L. c. 131, § 40; and

3. the magnitude and significance of the impacts of the Ecological Restoration Project on existing Resource Areas that may be modified, converted and/or lost and the interests for which said Resource Areas are presumed significant in 310 CMR 10.00, and the extent to which the applicant will:

a. avoid adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that can be avoided without impeding the achievement of the project's ecological restoration goals;

b. minimize adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that are necessary to the achievement of the project's ecological restoration goals; and

c. utilize best management practices such as erosion and siltation controls and proper construction sequencing to avoid and minimize adverse construction impacts to resource areas and the interests identified in M.G.L. c. 131, § 40.

(e) Types of Ecological Restoration Limited Projects. The following projects may be permitted as Ecological Restoration Limited Projects in accordance with 310 CMR 10.24(8)(a) through (d):

1. Tidal Restoration Project. A project that will restore tidal flow and that does not meet all the eligibility criteria set forth in 310 CMR 10.13 may be permitted as an Ecological Restoration Limited Project provided that in addition to the criteria set forth in 310 CMR 10.24(8)(a) through (d), the project including any proposed flood mitigation measures will not significantly increase flooding or storm damage impacts to the built environment, including without limitation, buildings, wells, septic systems, roads or other human-made structures or infrastructure.

2. Shellfish Habitat Restoration Project. A project to emplace cultch or other substrate for the purpose of restoring shellfish habitat may be permitted as an Ecological Restoration Limited Project provided that in addition to the criteria set forth in 310 CMR

10.24(8)(a) through (d) the following criteria are met:

a. The applicant has received a Special Projects Permit from the Division of Marine Fisheries or, if a municipality, has received a shellfish propagation permit; and

b. The project is made of cultch (*e.g.*, shellfish shells from oyster, surf or ocean clam) or is a structure manufactured specifically for shellfish enhancement (*e.g.*, reef blocks, reef balls, racks, floats, rafts, suspended gear).

10.24: continued

3. Other Ecological Restoration Projects. An Ecological Restoration Project that is not listed in 310 CMR 10.24(8)(e)1. and 2. may be permitted as an Ecological Restoration Limited Project provided the project meets the criteria set forth in 310 CMR 10.24(8)(a) through (d). Such projects include but are not limited to the restoration, enhancement, or management of Rare Species habitat, the restoration of hydrologic and habitat connectivity, the removal of aquatic nuisance vegetation to impede eutrophication, the thinning or planting of vegetation to improve habitat value, fill removal and regrading, riparian corridor re-naturalization, river floodplain re-connection, in-stream habitat enhancement, remediation of historic tidal wetland ditching, eel grass restoration, invasive species management, and the installation of fish passage structures.

(9) The Notice of Intent for any projects involving the construction, repair, replacement or expansion of public or private infrastructure shall include an operation and maintenance plan to ensure that the infrastructure will continue to function as designed. Implementation of the operation and maintenance plan as approved by the issuing authority shall be a continuing condition that shall be set forth in the Order of Conditions and the Certificate of Compliance.

(10) Any person proposing replacement of an existing stream crossing shall demonstrate to the issuing authority that the impacts of the crossing have been avoided where possible, and when not possible, have been minimized and that mitigation measures have been provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. An applicant will be presumed to have made this showing if the project is designed as follows:

(a) If the project includes replacement of an existing non-tidal crossing that is part of an Anadromous/Catadromous Fish Run, pursuant to 310 CMR 10.35, the applicant demonstrates to the satisfaction of the issuing authority that the crossing complies with the Massachusetts Stream Crossing Standards to the maximum extent practicable.

(b) If the project includes replacement of an existing tidal crossing that restricts tidal flow, the applicant demonstrates to the satisfaction of the issuing authority that tidal restriction will be eliminated to the maximum extent practicable.

This presumption may be rebutted by credible evidence from a competent source that the impacts of the project have not been avoided, minimized or mitigated to the maximum extent practicable.

At a minimum, in evaluating the potential to comply with the standards to the maximum extent practicable the applicant shall consider site constraints in meeting the standard, undesirable effects or risk in meeting the standard, and the environmental benefit of meeting the standard compared to the cost, by evaluating the following:

- The potential for downstream flooding;
- Upstream and downstream habitat (in-stream habitat, wetlands);
- Potential for erosion and head-cutting;
- Stream stability;
- Habitat fragmentation caused by the crossing;
- The amount of stream mileage made accessible by the improvements;
- Storm flow conveyance;
- Engineering design constraints specific to the crossing;
- Hydrologic constraints specific to the crossing;
- Impacts to wetlands that would occur by improving the crossing;
- Potential to affect property and infrastructure; and
- Cost of replacement.

10.25: Land under the Ocean

(1) Preamble. Land under the ocean is likely to be significant to the protection of marine fisheries and, where there are shellfish, to protection of land containing shellfish.[1] Nearshore areas of land under the ocean are likely to be significant to storm damage prevention, flood control, and protection of wildlife habitat.

Land under the ocean provides feeding areas, spawning and nursery grounds and shelter for many coastal organisms related to marine fisheries. Nearshore areas of land under the ocean help reduce storm damage and flooding by diminishing and buffering the high energy effects of storms. Submerged bars dissipate storm wave energy. Such areas provide a source of sediment for seasonal rebuilding of coastal beaches and dunes. Nearshore areas of land under the ocean also provide important food for birds. For example, waterfowl feed heavily on vegetation (such as eel grass, widgeon grass, and macrophytic algae) and invertebrates (such as polychaetes and mollusks) found in estuaries and other shallow submerged land under the ocean.

When a proposed project involves the dredging, removing, filling or altering of a nearshore area of land under the ocean, the issuing authority shall presume that the area is significant to the interests specified above.

When a proposed project involves the dredging, removing, filling or altering of land under the ocean beyond the nearshore area, the issuing authority shall presume that such land is significant to the protection of marine fisheries and, where there are shellfish, to the protection of land containing shellfish and that it is not significant to storm damage prevention, flood control or protection of wildlife habitat.

These presumptions may be overcome only upon a clear showing that the area or land does not play a role in the protection of marine fisheries or wildlife habitat, land containing shellfish, storm damage prevention or flood control, as appropriate, and if the issuing authority makes a written determination to such effect.

When land under the ocean underlies an anadromous/catadromous fish run, 310 CMR 10.35(1) through (4) shall apply. When land under the ocean is in a designated port area, 310 CMR 10.26(1) through (4) shall apply. When land under the ocean is land containing shellfish, 310 CMR 10.34(1) through (7) shall apply.

When nearshore areas of land under the ocean are significant to storm damage prevention or flood control, the bottom topography of such land is critical to the protection of those interests.

When nearshore areas or other land under the ocean is significant to the protection of marine fisheries or wildlife habitat, the following factors are critical to the protection of such interests:

(a) water circulation;
(b) distribution of sediment grain size;
(c) water quality;
(d) finfish habitat; and
(e) important food for wildlife.

(2) Definitions.

Land under the Ocean means land extending from the mean low water line seaward to the boundary of the municipality's jurisdiction and includes land under estuaries.

Nearshore Areas of land under the ocean means that land extending from the mean low water line to the seaward limit of a municipality's jurisdiction, but in no case beyond the point where the land is 80 feet below the level of the ocean at mean low water. However, the nearshore area

[1] For regulations concerning land containing shellfish, *see* 310 CMR 10.34.

shall extend seaward only to that point where the land is 30 feet below the level of the ocean at mean low water for municipalities bordering Buzzard's Bay and Vineyard Sound (west of a line between West Chop, Martha's Vineyard and Nobska Point, Falmouth), 40 feet below the level of the ocean at mean low water for Provincetown's land in Cape Cod Bay, and 50 feet below the level of the ocean at mean low water for Truro's and Wellfleet's land in Cape Cod Bay.

WHEN LAND UNDER THE OCEAN OR NEARSHORE AREAS OF LAND UNDER THE OCEAN ARE FOUND TO BE SIGNIFICANT TO THE PROTECTION OF MARINE FISHERIES, PROTECTION OF WILDLIFE HABITAT, STORM DAMAGE PREVENTION OR FLOOD CONTROL, 310 CMR 10.25(3) THROUGH (7) SHALL APPLY:

10.25: continued

(3) Improvement dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects on such interests caused by changes in:

(a) bottom topography which will result in increased flooding or erosion caused by an increase in the height or velocity of waves impacting the shore;

(b) sediment transport processes which will increase flood or erosion hazards by affecting the natural replenishment of beaches;

(c) water circulation which will result in an adverse change in flushing rate, temperature, or turbidity levels; or

(d) marine productivity which will result from the suspension or transport of pollutants, the smothering of bottom organisms, the accumulation of pollutants by organisms, or the destruction of marine fisheries habitat or wildlife habitat.

(4) Maintenance dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects on such interests caused by changes in marine productivity which will result from the suspension or transport of pollutants, increases in turbidity, the smothering of bottom organisms, the accumulation of pollutants by organisms, or the destruction of marine fisheries habitat or wildlife habitat.

(5) Projects not included in 310 CMR 10.25(3) or (4) which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(6) Projects not included in 310 CMR 10.25(3) which affect land under the ocean shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries habitat or wildlife habitat caused by:

(a) alterations in water circulation;

(b) destruction of eelgrass (*Zostera marina*) or widgeon grass (*Rupia maritina*) beds;

(c) alterations in the distribution of sediment grain size;

(d) changes in water quality, including, but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants; or

(e) alterations of shallow submerged lands with high densities of polychaetes, mollusks or macrophytic algae.

(7) Notwithstanding the provisions of 310 CMR 10.25(3) through (6), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.26: Designated Port Areas

(1) Preamble. Land under the ocean in designated port areas is likely to be significant to marine fisheries, storm damage prevention and flood control. In designated port areas, salt marshes, coastal dunes, land under salt ponds, coastal beaches, tidal flats, barrier beaches, rocky intertidal shores and land containing shellfish are not likely to be significant to marine fisheries, storm damage prevention or flood control.

Many species of marine fisheries, including anadromous fish, may inhabit port areas. Anadromous fish may need to be able to pass through port areas to inland spawning areas or to

the sea. Other species frequently feed in designated port areas due to high nutrient concentrations in the waters and the tidelands.

Designated port areas, which are portions of developed harbors, are usually located in estuaries. Relatively high concentrations of contaminants, from vessel discharges and point and non-point source discharges, are likely to occur in port areas. Water circulation patterns tend to distribute pollution throughout the estuary, and to other areas which are likely to be significant to other interests of M.G.L. c. 131, § 40. Land forms in designated port areas have been greatly altered from their natural shape, and coastal engineering structures often have replaced natural protection for upland areas from storm damage and flooding.

10.26: continued

Land under the ocean often provides support for such structures. Some proposed activities may alter wave and current patterns so as to affect the stability of such structures or the depths or configurations of navigation channels.

Where a proposed project involves dredging, filling, removing, or altering land under the ocean in designated port areas, the issuing authority shall presume that the area is significant to marine fisheries, storm damage prevention and flood control. These presumptions may be overcome only upon a clear showing that land under the ocean in designated port areas does not play a role in the protection of marine fisheries, storm damage prevention or flood control, or that a salt marsh, coastal dune, land under a salt pond, coastal beach, tidal flat, barrier beach, rocky intertidal shore or land containing shellfish, in designated port areas, does play a role in marine fisheries, storm damage prevention or flood control, and if the issuing authority makes a written determination to such effect.

When a proposed project in a designated port area is on land under the ocean which is determined to be significant to marine fisheries, the following factors are critical to the protection of such interests:

(a) water circulation; and

(b) water quality.

When a proposed project in a designated port area is on land under the ocean which is determined to be significant to storm damage prevention or flood control, the ability of such land to provide support for adjacent coastal or human-made structures is critical to the protection of such interests.

(2) Definition.

Designation of Port Areas means those areas designated in 301 CMR 25.00: *Designation of Port Areas*.

WHEN LAND UNDER THE OCEAN IN DESIGNATED PORT AREAS IS FOUND TO BE SIGNIFICANT TO THE PROTECTION OF MARINE FISHERIES, STORM DAMAGE PREVENTION OR FLOOD CONTROL, 310 CMR 10.26(3) AND (4) SHALL APPLY:

(3) Projects shall be designed and constructed, using best practical measures, so as to minimize adverse effects on marine fisheries caused by changes in:

(a) water circulation;

(b) water quality, including, but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(4) Projects shall be designed and constructed, using the best practical measures, so as to minimize, adverse effects on storm damage prevention or flood control caused by changes in such land's ability to provide support for adjacent coastal banks or adjacent coastal engineering structures.

10.27: Coastal Beaches

(1) Preamble. Coastal beaches, which are defined to include tidal flats, are significant to storm damage prevention, flood control and the protection of wildlife habitat. In addition, tidal flats are likely to be significant to the protection of marine fisheries and where there are shellfish, to

land containing shellfish.[2]

Coastal beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions.

Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves.

A coastal beach at any point serves as a sediment source for coastal areas downdrift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore.

[2] For regulations concerning land containing shellfish *see* 310 CMR 10.34.

10.27: continued

Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by human-made structures reduce the ability of the coastal beach to perform these functions.

A number of birds also nest in the coastal berm, between the toe of a dune and the high tide line. In addition, isolated coastal beaches on small islands are important as haul out areas for harbor seals.

Tidal flats are likely to be significant to the protection of marine fisheries and wildlife habitat because they provide habitats for marine organisms such as polychaete worms and mollusks, which in turn are food sources for fisheries and migratory and wintering birds. Coastal beaches are extremely important in recycling of nutrients derived from storm drift and tidal action. Vegetative debris along the drift line is vital for resident and migratory shorebirds, which feed largely on invertebrates which eat the vegetation. Below the drift line in the lower intertidal zone are infauna (invertebrates such as mollusks and crustacea) which are also eaten by shore birds.

Tidal flats are also sites where organic and inorganic materials may become entrapped and then returned to the photosynthetic zone of the water column to support algae and other primary producers of the marine food web.

When a proposed project involves the dredging, filling, removing, or altering of a coastal beach, the issuing authority shall presume that the coastal beach is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a coastal beach does not play a role in storm damage prevention, flood control, or protection of wildlife habitat, or that tidal flats do not play a role in the protection of marine fisheries or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When coastal beaches are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:

(a) volume (quantity of sediments) and form; and
(b) the ability to respond to wave action.

When coastal beaches are significant to the protection of marine fisheries or wildlife habitat, the following characteristics are critical to the protection of those interests:

(a) distribution of sediment grain size;
(b) water circulation;
(c) water quality; and
(d) relief and elevation.

When tidal flats are in a designated port area, 310 CMR 10.26(1) through (4) shall apply. When tidal flats are significant to land containing shellfish, 310 CMR 10.34(1) through (8) shall apply.

(2) Definitions.

Coastal Beach means unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing human-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

Tidal Flat means any nearly level part of a coastal beach which usually extends from the mean low water line landward to the more steeply sloping face of the coastal beach or which may be separated from the beach by land under the ocean.

WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(3) THROUGH (7) SHALL APPLY:

(3) Any project on a coastal beach, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.

10.27: continued

(4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:

(a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume. In evaluating necessity, coastal engineering, physical oceanographic and/or coastal geologic information shall be considered.

(b) Immediately after construction any groin shall be filled to entrapment capacity in height and length with sediment of grain size compatible with that of the adjacent beach.

(c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

(5) Notwithstanding 310 CMR 10.27(3), beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

WHEN A TIDAL FLAT IS DETERMINED TO BE SIGNIFICANT TO MARINE FISHERIES OR THE PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(6) SHALL APPLY:

(6) In addition to complying with the requirements of 310 CMR 10.27(3) and (4), a project on a tidal flat shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries and wildlife habitat caused by:

(a) alterations in water circulation;

(b) alterations in the distribution of sediment grain size; and

(c) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(7) Notwithstanding the provisions of 310 CMR 10.27(3) through (6), no project may be permitted which will have any adverse effect on specified habitat sites or rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.28: Coastal Dunes

(1) Preamble. All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach, also known as the Primary Frontal Dune as defined in 310 CMR 10.04, in any area are per se significant to storm damage prevention and flood control. The Coastal High Hazard Area or Velocity Zone extends at a minimum to the inland limit of the Primary Frontal Dune along the open coast. Coastal dunes are also often significant to the protection of wildlife habitat.

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding.

A number of birds, most commonly terns and gulls, nest at the base or sides of dunes. In some dune systems other birds also nest in the interdunal area, the species being determined by the plant community structure, topography, and hydrologic regime of the area. In a few dune systems, wet meadows or vernal pool habitats occur, which serve as important feeding areas for a wide variety of bird species.

When a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect.

10.28: continued

When a coastal dune is significant to storm damage prevention, flood control or the protection of wildlife habitat, the following characteristics are critical to the protection of those interest(s):

(a) the ability of the dune to erode in response to coastal beach conditions;
(b) dune volume;
(c) dune form, which must be allowed to be changed by wind and natural water flow;
(d) vegetative cover;
(e) the ability of the dune to move landward or laterally; or
(f) the ability of the dune to continue serving as bird nesting habitat.

(2) Definition.

Coastal Dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

WHEN A COASTAL DUNE IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL OR THE PROTECTION OF WILDLIFE HABITAT, 310 10.28(3) THROUGH (6) SHALL APPLY:

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;
(b) disturbing the vegetative cover so as to destabilize the dune;
(c) causing any modification of the dune form that would increase the potential for storm or flood damage;
(d) interfering with the landward or lateral movement of the dune;
(e) causing removal of sand from the dune artificially; or
(f) interfering with mapped or otherwise identified bird nesting habitat.

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28(3)(b) through (e). Such an accessory project may include, but is not limited to, a small shed or a small parking area for residences. It shall not include coastal engineering structures.

(5): The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

(a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;
(b) fencing and other devices designed to increase dune development; and
(c) plantings compatible with the natural vegetative cover.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37.

10.29: Barrier Beaches

(1) Preamble. Barrier beaches are significant to storm damage prevention and flood control and are likely to be significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, the protection of land containing shellfish.[3]

[3] For regulations concerning land containing shellfish *see* 310 CMR 10.34.

10.28: continued

Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds and fresh water marshes and ponds, which are in turn important to marine fisheries and protection of wildlife habitat. Barrier beaches and the dunes thereon are also important to the protection of wildlife habitat in the ways described in 310 CMR 10.27(1) (Coastal Beaches) and 10.28(1) (Coastal Dunes).

Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action. The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash and tidal inlet deposition. Barrier beaches in Massachusetts undergo a landward migration caused by the landward movement of sediment by wind, storm wave overwash and tidal current processes. The continuation of these processes maintains the volume of the landform which is necessary to carry out the storm and flood buffer function.

When a proposed project involves removal, filling, dredging or altering of a barrier beach, the issuing authority shall presume that the barrier beach, including all of its coastal dunes, is significant to the interest(s) specified above. This presumption may be overcome only upon a clear showing that a barrier beach, including all of its coastal dunes, does not play a role in storm damage prevention, flood control, or the protection of marine fisheries, wildlife habitat, or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When a barrier beach is significant to storm damage prevention and flood control, the characteristics of coastal beaches, tidal flats and coastal dunes listed in 310 CMR 10.27(1) and 10.28(1) and their ability to respond to wave action, including storm overwash sediment transport, are critical to the protection of the interests specified in 310 CMR 10.29.

(2) Definition.

Barrier Beach means a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system. A barrier beach may be joined to the mainland at one or both ends.

(3) When a Barrier Beach Is Determined to Be Significant to Storm Damage Prevention, Flood Control, Marine Fisheries or Protection of Wildlife Habitat. 310 CMR 10.27(3) through (6) (coastal beaches) and 10.28(3) through (5) (coastal dunes) shall apply to the coastal beaches and to all coastal dunes which make up a barrier beach.

(4) Notwithstanding the provisions of 310 CMR 10.29(3), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.30: Coastal Banks

(1) Preamble. Coastal banks are likely to be significant to storm damage prevention and flood control. Coastal banks that supply sediment to coastal beaches, coastal dunes and barrier beaches are per se significant to storm damage prevention and flood control. Coastal banks that, because of their height, provide a buffer to upland areas from storm waters are significant to storm damage prevention and flood control.

Coastal banks composed of unconsolidated sediment and exposed to vigorous wave action serve as a major continuous source of sediment for beaches, dunes, and barrier beaches (as well as other land forms caused by coastal processes). The supply of sediment is removed from banks

by wave action, and this removal takes place in response to beach and sea conditions. It is a naturally occurring process necessary to the continued existence of coastal beaches, coastal dunes and barrier beaches which, in turn, dissipate storm wave energy, thus protecting structures of coastal wetlands landward of them from storm damage and flooding.

Coastal banks, because of their height and stability, may act as a buffer or natural wall, which protects upland areas from storm damage and flooding. While erosion caused by wave action is an integral part of shoreline processes and furnishes important sediment to downdrift landforms, erosion of a coastal bank by wind and rain runoff, which plays only a minor role in beach nourishment, should not be increased unnecessarily. Therefore, disturbances to a coastal bank which reduce its natural resistance to wind and rain erosion cause cuts and gullys in the bank, increase the risk of its collapse, increase the danger to structures at the top of the bank and decrease its value as a buffer.

10.30: continued

Bank vegetation tends to stabilize the bank and reduce the rate of erosion due to wind and rain runoff. Pedestrian and vehicular traffic damages the protective vegetation and frequently leads to gully erosion or deep "blowouts" on unconsolidated banks. Therefore, any project permitted by 310 CMR 10.30 should incorporate, when appropriate, elevated walkways.

A particular coastal bank may serve both as a sediment source and as a buffer, or it may serve only one role.

When a proposed project involves dredging, removing, filling, or altering a coastal bank, the issuing authority shall presume that the area is significant to storm damage prevention and flood control. This presumption may be overcome only upon a clear showing that a coastal bank does not play a role in storm damage prevention or flood control, and if the issuing authority makes a written determination to that effect.

When issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes or barrier beaches, the ability of the coastal bank to erode in response to wave action is critical to the protection of that interest(s).

When the issuing authority determines that a coastal bank is significant to storm damage prevention or flood control because it is a vertical buffer to storm waters, the stability of the bank, *i.e.*, the natural resistance of the bank to erosion caused by wind and rain runoff, is critical to the protection of that interest(s).

(2) Definition.

Coastal Bank means the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

WHEN A COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT SUPPLIES SEDIMENT TO COASTAL BEACHES, COASTAL DUNES OR BARRIER BEACHES, 310 CMR 10.30(3) THROUGH (5) SHALL APPLY:

(3) No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effective date of 310 CMR 10.21 through 10.37 or constructed pursuant to a Notice of Intent filed prior to the effective date of 310 CMR 10.21 through 10.37 (August 10, 1978), including reconstructions of such buildings subsequent to the effective date of 310 CMR 10.21 through 10.37, provided that the following requirements are met:

(a) a coastal engineering structure or a modification thereto shall be designed and constructed so as to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and

(b) the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.

(c) protective planting designed to reduce erosion may be permitted.

(4) Any project on a coastal bank or within 100 feet landward of the top of a coastal bank, other than a structure permitted by 310 CMR 10.30(3), shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

(5) The Order of Conditions and the Certificate of Compliance for any new building within 100 feet landward of the top of a coastal bank permitted by the issuing authority under M.G.L. c. 131, § 40 shall contain the specific condition: 310 CMR 10.30(3), promulgated under M.G.L. c. 131, § 40, requires that no coastal engineering structure, such as a bulkhead, revetment, or seawall shall be permitted on an eroding bank at any time in the future to protect the project allowed by this Order of Conditions.

WHEN A COASTAL BANK IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION OR FLOOD CONTROL BECAUSE IT IS A VERTICAL BUFFER TO STORM WATERS, 310 CMR 10.30(6) THROUGH (8) SHALL APPLY:

10.30: continued

(6) Any project on such a coastal bank or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

(7) Bulkheads, revetments, seawalls, groins or other coastal engineering structures may be permitted on such a coastal bank except when such bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes, and barrier beaches.

(8) Notwithstanding the provisions of 310 CMR 10.30(3) through (7), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.31: Rocky Intertidal Shores

(1) Preamble. Rocky intertidal shores are likely to be significant to storm damage prevention, flood control, protection of marine fisheries and wildlife habitat and where there are shellfish, protection of land containing shellfish.[4]

Rocky shore environments are habitats for macroalgae and marine invertebrates and provide protection to and food for, larger marine organisms such as crabs, lobsters, and such fish species as winter flounder, as well as a number of birds. Most marine plants and animals found in rocky shore environments are uniquely adapted to survive there and cannot survive elsewhere. Harbor seals also use rocky intertidal shores, such as rock outcroppings or isolated shores of small islands, as haul out areas.

When a proposed project involves the filling, removing or altering of a rocky intertidal shore, the issuing authority shall presume that such shore is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a rocky intertidal shore does not play a role in storm damage prevention, flood control, protection of marine fisheries or wildlife habitat, and where there are shellfish, protection of land containing shellfish and if the issuing authority makes a written determination to such effect.[4]

When a rocky intertidal shore is determined to be significant to storm damage prevention, flood control, or protection of wildlife habitat the form and volume of exposed intertidal bedrock and boulders are critical to the protection of those interests.

When a rocky intertidal shore is significant to the protection of marine fisheries or wildlife habitat, water circulation and water quality are critical to the protection of those interests.

(2) Definition.

Rocky Intertidal Shores means naturally occurring rocky areas, such as bedrock or boulder-strewn areas between the mean high water line and the mean low water line.

(3) When a Rocky Intertidal Shore Is Determined to Be Significant to Storm Damage Prevention, Flood Control, or Protection of Wildlife Habitat, any proposed project shall be designed and constructed, using the best practical measures, so as to minimize adverse effects on the form and volume of exposed intertidal bedrock and boulders.

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[4] For regulations concerning land containing shellfish, *see* 310 CMR 10.34.

(4) When a Rocky Intertidal Shore is Determined to Be Significant to the Protection of Marine Fisheries or Wildlife Habitat, any proposed project shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on water circulation and water quality. Water quality impacts include, but are not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(5) Notwithstanding the provisions of 310 CMR 10.31(3) and (4), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.32: Salt Marshes

(1) Preamble. Salt marshes are significant to protection of marine fisheries, wildlife habitat, and where there are shellfish, to protection of land containing shellfish, and prevention of pollution and are likely to be significant to storm damage prevention and ground water supply.

A salt marsh produces large amounts of organic matter. A significant portion of this material is exported as detritus and dissolved organics to estuarine and coastal waters, where it provides the basis for a large food web that supports many marine organisms, including finfish and shellfish as well as many bird species. Salt marshes also provide a spawning and nursery habitat for several important estuarine forage finfish as well as important food, shelter, breeding areas, and migratory and overwintering areas for many wildlife species.

Salt marsh plants and substrate remove pollutants from surrounding waters. The network of salt marsh vegetation roots and rhizomes binds sediments together.

The sediments absorb chlorinated hydrocarbons and heavy metals such as lead, copper, and iron. The marsh also retains nitrogen and phosphorous compounds, which in large amounts can lead to algal blooms in coastal waters.

The underlying peat also serves as a barrier between fresh ground water landward of the salt marsh and the ocean, thus helping to maintain the level of such ground water.

Salt marsh cord grass and underlying peat are resistant to erosion and dissipate wave energy, thereby providing a buffer that reduces wave damage.

When a proposed project involves the dredging, filling, removing or altering of a salt marsh, the issuing authority shall presume that such area is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a salt marsh does not play a role in the protection of marine fisheries or wildlife habitat, prevention of pollution, ground water supply, or storm damage prevention, and if the issuing authority makes a written determination to such effect.

When a salt marsh is significant to one or more of the interests specified above, the following characteristics are critical to the protection of such interest(s):

(a) the growth, composition and distribution of salt marsh vegetation, (protection of marine fisheries and wildlife habitat, prevention of pollution, storm damage prevention);

(b) the flow and level of tidal and fresh water (protection of marine fisheries and wildlife habitat, prevention of pollution); and

(c) the presence and depth of peat (ground water supply, prevention of pollution, storm damage prevention).

(2) Definitions.

Salt Marsh means a coastal wetland that extends landward up to the highest high tide line, that is, the highest spring tide of the year, and is characterized by plants that are well adapted to or prefer living in, saline soils. Dominant plants within salt marshes typically include salt meadow cord grass (*Spartina patens*) and/or salt marsh cord grass (*Spartina alterniflora*), but may also include, without limitation, spike grass (*Distichlis spicata*), high-tide bush (*Iva frutescens*), black grass (*Juncus gerardii*), and common reedgrass (*Phragmites*). A salt marsh may contain tidal creeks, ditches and pools.

Spring Tide means the tide of the greatest amplitude during the approximately 14-day tidal cycle. It occurs at or near the time when the gravitational forces of the sun and the moon are in phase (new and full moons).

WHEN A SALT MARSH IS DETERMINED TO BE SIGNIFICANT TO THE PROTECTION OF MARINE FISHERIES, THE PREVENTION OF POLLUTION, STORM

DAMAGE PREVENTION OR GROUND WATER SUPPLY, 310 CMR 10.32(3) THROUGH (6) SHALL APPLY:

(3) A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects on productivity. 310 CMR 10.32(3) shall not be construed to prohibit the harvesting of salt hay.

10.32: continued

(4) Notwithstanding the provisions of 310 CMR 10.32(3), a small project within a salt marsh, such as an elevated walkway or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each day, may be permitted if such a project complies with all other applicable requirements of 310 CMR 10.21 through 10.37.

(5) Notwithstanding the provisions of 310 CMR 10.32(3), a project which will restore or rehabilitate a salt marsh, or create a salt marsh, may be permitted in accordance with 310 CMR 10.11 through 10.14, 10.24(8), and/or 10.53(4).

(6) Notwithstanding the provisions of 310 CMR 10.32(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37.

10.33: Land under Salt Ponds

(1) Preamble. Land under salt ponds is significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, to the protection of land containing shellfish.[5]

Land under salt ponds provides an excellent habitat for marine fisheries. The high productivity of plants in salt ponds provides food for shellfish, crustaceans and larval and juvenile fish. Salt ponds also provide spawning areas for shellfish and are nursery areas for crabs and fish. In addition to the many birds which feed on fish found in salt ponds, waterfowl also eat invertebrates such as mollusks and crustaceans, which in turn depend on bottom sediment and vegetation. Some bird species also eat *rupia* and eel grass which may be rooted in land under salt ponds.

When a proposed project involves the dredging, filling, removing or altering of land under a salt pond, the issuing authority shall presume that such land is significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, to the protection of land containing shellfish. This presumption may be overcome only upon a clear showing that land under a salt pond does not play a role in the protection of marine fisheries or wildlife habitat or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When land under a salt pond is significant to the protection of marine fisheries or wildlife habitat, the following factors are critical to the protection of that interest:

(a) water circulation;
(b) distribution of sediment grain size;
(c) freshwater inflow;
(d) productivity of plants; and
(e) water quality.

(2) Definition.

Salt Pond means a shallow enclosed or semi-enclosed body of saline water that may be partially or totally restricted by barrier beach formation. Salt ponds may receive freshwater from small streams emptying into their upper reaches and/or springs in the salt pond itself.

WHEN LAND UNDER A SALT POND IS DETERMINED TO BE SIGNIFICANT TO THE

[5] For regulations concerning land containing shellfish, *see* 310 CMR 10.34.

PROTECTION OF MARINE FISHERIES OR WILDLIFE HABITAT, 310 CMR 10.33(3) THROUGH (5) SHALL APPLY:

(3) Any project on land under a salt pond, on lands within 100 feet of the mean high water line of a salt pond, or on land under a body of water adjacent to a salt pond shall not have an adverse effect on the marine fisheries or wildlife habitat of such a salt pond caused by:

(a) alterations of water circulation;

(b) alterations in the distribution of sediment grain size and the relief or elevation of the bottom topography;

(c) modifications in the flow of fresh and/or salt water;

(d) alterations in the productivity of plants, or

10.33: continued

(e) alterations in water quality, including, but not limited to, other than normal fluctuations in the level of dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants.

(4) Notwithstanding the provisions of 310 CMR 10.33(3), activities specifically required and intended to maintain the depth and the opening of the salt pond to the ocean in order to maintain or enhance the marine fisheries or for the specific purpose of fisheries management, may be permitted.

(5) Notwithstanding the provisions of 310 CMR 10.33(3) and (4), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.34: Land Containing Shellfish

(1) Preamble. Land containing shellfish is found within certain of the resource areas under the jurisdiction of M.G.L. c. 131, § 40. "Land containing shellfish" is also specifically one of the interests of M.G.L. c. 131, § 40. The purpose of 310 CMR 10.34 is to identify those resource areas likely to contain shellfish, to provide criteria for determining the significance of land containing shellfish, and to establish regulations for projects which will affect such land.

Land containing shellfish is, under 310 CMR 10.34(3), significant to the protection of marine fisheries as well as to the protection of the interest of land containing shellfish.

Shellfish are a valuable renewable resource. The maintenance of productive shellfish beds not only assures the continuance of shellfish themselves, but also plays a direct role in supporting fish stocks by providing a major food source. The young shellfish in the planktonic larval stage that are produced in large quantities during spring and summer are an important source of food for the young stages of marine fishes and many crustaceans.

When a resource area is found to be significant to the protection of land containing shellfish under 310 CMR 10.34(3), and is, therefore, also significant to marine fisheries the following factors are critical to the protection of those interests:

(a) shellfish;
(b) water quality;
(c) water circulation; and
(d) the natural relief, evaluation or distribution of sediment grain size of such land.

(2) Definitions.

Land Containing Shellfish means land under the ocean, tidal flats, rocky intertidal shores, salt marshes and land under salt ponds when any such land contains shellfish.

Shellfish means the following species: Bay scallop (*Argopecten irradians*); Blue mussel (*Mytilus edulis*); Ocean quahog (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria merceneria*); Razor clam (Ensis directus); Sea clam (*Spisula solidissima*); Sea scallop (*Placopecten magellanicus*); Soft shell clam (*Mya arenaria*).

Shellfish Constable means the official in a city or town, whether designated a constable, warden, natural resources officer, or by some other name, in charge of enforcing the laws regulating the harvest of shellfish.

(3) Significance. Land containing shellfish shall be found significant to the protection of land containing shellfish and to the protection of marine fisheries when it has been identified and mapped as follows:

(a) by the conservation commission or the Department in consultation with the Division of Marine Fisheries and based upon maps and designations of the Division of Marine Fisheries; or

(b) by the conservation commission or the Department, based upon maps and written documentation of the shellfish constable or the Department. In making such identification and maps the following factors shall be taken into account and documented: the density of shellfish, the size of the area and the historical and current importance of the area to recreational or commercial shellfishing.

10.34: continued

WHEN A RESOURCE AREA, INCLUDING LAND UNDER THE OCEAN, TIDAL FLATS, ROCKY INTERTIDAL SHORES, SALT MARSHES, OR LAND UNDER SALT PONDS IS DETERMINED TO BE SIGNIFICANT TO THE PROTECTION OF LAND CONTAINING SHELLFISH AND THEREFORE TO THE PROTECTION OF MARINE FISHERIES, 310 CMR 10.34(4) THROUGH (8) SHALL APPLY:

(4) Except as provided in 310 CMR 10.34(5), any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land caused by:

(a) alterations of water circulation;
(b) alterations in relief elevation;
(c) the compacting of sediment by vehicular traffic;
(d) alterations in the distribution of sediment grain size;
(e) alterations in natural drainage from adjacent land; or
(f) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of salinity, dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants.

(5) Notwithstanding the provisions of 310 CMR 10.34(4), projects which temporarily have an adverse effect on shellfish productivity but which do not permanently destroy the habitat may be permitted if the land containing shellfish can and will be returned substantially to its former productivity in less than one year from the commencement of work, unless an extension of the Order of Conditions is granted, in which case such restoration shall be completed within one year of such extension.

(6) In the case of land containing shellfish defined as significant in 310 CMR 10.34(3)(b) (*i.e.*, those areas identified on the basis of maps and designations of the Shellfish Constable), except in Areas of Critical Environmental Concern, the issuing authority may, after consultation with the Shellfish Constable, permit the shellfish to be moved from such area under the guidelines of, and to a suitable location approved by, the Division of Marine Fisheries, in order to permit a proposed project on such land. Any such project shall not be commenced until after the moving and replanting of the shellfish have been commenced.

(7) Notwithstanding 310 CMR 10.34(4) through (6), projects approved by the Division of Marine Fisheries that are specifically intended to increase the productivity of land containing shellfish may be permitted. Aquaculture projects approved by the appropriate local and state authority may also be permitted.

(8) Notwithstanding the provisions of 310 CMR 10.34(4) through (7), no project may be permitted which will have any adverse effect on specified habitat of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.35: Banks of or Land under the Ocean, Ponds, Streams, Rivers, Lakes, or Creeks that Underlie an Anadromous/Catadromous Fish Run ("Fish Run")

(1) Preamble. The banks of and land under the ocean, ponds, streams, rivers, lakes or creeks that underlie an anadromous/catadromous fish run are significant to protection of marine fisheries.

Anadromous and catadromous fish ("the fish") are renewable protein resources that provide

recreational, aesthetic and commercial benefits. In addition, throughout their life cycle such fish are important components of freshwater, estuarine, and marine environments and are food sources for other organisms.

The spawning migrations of such fish also provide a direct link between marine and freshwater ecosystems. This link plays a role in maintaining the productivity of fisheries.

When a proposed project involves the dredging, filling, removing or altering of a bank of a fish run, or land under the ocean, or under a pond, stream, river, lake or creek which is a fish run, the issuing authority shall presume that such bank or land is significant to the protection of marine fisheries. This presumption is rebuttable and may be overcome only upon a clear showing that such bank or land does not play a role in the protection of marine fisheries, and if the issuing authority makes a written determination to that effect.

10.35: continued

When such a bank of a fish run, or land under the ocean or under a pond, stream, river, lake or creek which is a fish run is significant to the protection of marine fisheries, the following factors are critical to the protection of such interest:

(a) the fish;
(b) accessibility of spawning areas;
(c) the volume or rate of the flow of water within spawning areas and migratory routes; and
(d) spawning and nursery grounds.

(2) Definitions.

Anadromous Fish means fish that enter fresh water from the ocean to spawn, such as alewives, shad and salmon.

Anadromous/Catadromous Fish Run means that area within estuaries, ponds, streams, creeks, rivers, lakes or coastal waters, which is a spawning or feeding ground or passageway for anadromous or catadromous fish and which is identified by the Division of Marine Fisheries or has been mapped on the Coastal Atlas of the Coastal Zone Management Program. Such fish runs shall include those areas which have historically served as fish runs and are either being restored or are planned to be restored at the time the Notice of Intent is filed. For the purposes of 310 CMR 10.21 through 10.37, such fish runs shall extend inland no further than the inland boundary of the coastal zone.

Catadromous Fish means fish that enter salt water from fresh water to spawn, such as eels.

WHEN SUCH LAND OR BANK IS DETERMINED TO BE SIGNIFICANT TO THE PROTECTION OF MARINE FISHERIES, 310 CMR 10.35(3) THROUGH (5) SHALL APPLY:

(3) Any project on such land or bank shall not have an adverse effect on the anadromous or catadromous fish run by:

(a) impeding or obstructing the migration of the fish, unless DMF has determined that such impeding or obstructing is acceptable, pursuant to its authority under M.G.L. c. 130, § 19;
(b) changing the volume or rate of flow of water within the fish run; or
(c) impairing the capacity of spawning or nursery habitats necessary to sustain the various life stages of the fish.

(4) Unless otherwise allowed by DMF pursuant to M.G.L. c. 130, § 19, dredging, disposal of Dredged Material or filling in a fish run shall be prohibited between March 15th and June 15th in any year.

(5) Notwithstanding the provisions of 310 CMR 10.35(3), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

(6) Any person proposing a new stream crossing of a Fish Run shall demonstrate to the issuing authority that there are no practicable alternatives to the crossing, that the impacts of the crossing have been minimized and that mitigation measures have been provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. An applicant will be presumed to have made this showing if the project is designed as follows:

(a) If the project includes the construction of a new non-tidal crossing, the applicant

demonstrates to the satisfaction of the issuing authority that the crossing complies with the Massachusetts Stream Crossing Standards by consisting of a span or embedded culvert in which, at a minimum, the top of the structure is above the elevation of the top of the bank and the structure spans the channel width by a minimum of 1.2 times the bankfull width.

(b) If the project includes the construction of a new tidal crossing, the applicant demonstrates to the satisfaction of the issuing authority that the project is designed in a manner that does not restrict tidal flow over the full natural tidal range by consisting of a span or embedded culvert in which, at a minimum, the top of the structure is above the elevation of the top of the bank and the structure spans the channel width by a minimum of 1.2 times the bankfull width.

10.35: continued

This presumption that the impacts of the crossing have been avoided, minimized and that mitigation measures have been provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40 may be rebutted by credible evidence from a competent source.

(10.36: Reserved. Variance Provision is Found at 310 CMR 10.05(10))

10.37: Estimated Habitats of Rare Wildlife (for Coastal Wetlands)

If a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program (hereinafter referred to as the Program), a fully completed copy of the Notice of Intent (including all plans, reports, and other materials required under 310 CMR 10.05(4)(a) and (b)) for such project shall be sent to the Program via the U.S. Postal Service by express or priority mail (or otherwise sent in a manner that guarantees delivery within two days). Such copy shall be sent no later than the date of the filing of the Notice of Intent with the issuing authority. Proof of timely mailing or other delivery to the Program of the copy of such Notice of Intent shall be included in the Notice of Intent which is submitted to the issuing authority and sent to the Department's regional office.

Estimated Habitat Maps shall be based on the estimated geographical extent of the habitats of all state-listed vertebrate and invertebrate animal species for which a reported occurrence within the last 25 years has been accepted by the Program and incorporated into its official data base.

Within 30 days of the filing of such a Notice of Intent with the issuing authority, the Program shall determine whether any state-listed species identified on the aforementioned map are likely to continue to be located on or near the site of the original occurrence and, if so, whether the area to be altered by the proposed project is in fact part of such species' habitat. Such determination shall be presumed by the issuing authority to be correct. Any proposed project which would alter a resource area that is not located on the most recent Estimated Habitat Map (if any) provided to the conservation commission, shall be presumed not to be within a rare species' habitat. Both of these presumptions are rebuttable and may be overcome upon a clear showing to the contrary. If the issuing authority fails to receive a response from the Program within 30 days of the filing of such a Notice of Intent, a copy of which was received by the Program in a timely manner, it shall issue its Order of Conditions based on available information; however, the fact that a proposed project would alter a resource area that is located on an Estimated Habitat Map shall not be considered sufficient evidence in itself that such project is in fact within the habitat of a rare species.

If the Program determines that a resource area which would be altered by a proposed project is in fact within the habitat of a state-listed species, it shall provide in writing to the applicant and to the Conservation Commission and the Department, the identification of the species whose habitat would be altered by the proposed project, and all other relevant information which the Program has regarding the species' location and habitat requirements, insofar as such information may assist the applicant and the issuing authority to determine whether the project is or can be designed so as to meet the performance standard set in 310 CMR 10.37.

Notwithstanding 310 CMR 10.24(7) and 10.25 and 10.27 through 10.35, if a proposed project is found by the issuing authority to alter a resource area which is part of the habitat of a state-listed species, such project shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species. A determination of whether or not a proposed project will have such an adverse effect shall be made by the issuing authority. However, a written opinion of the Program on whether or not a proposed project will have such

an adverse effect shall be presumed by the issuing authority to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary.

The conservation commission shall not issue an Order of Conditions under 310 CMR 10.05(6) regarding any such project for at least 30 days after the filing of the Notice of Intent, unless the Program before such time period has elapsed has either determined that the resource area(s) which would be altered by the project is not in fact within the habitat of a state-listed species or, if it has determined that such resource area(s) is in fact within rare species habitat, rendered a written opinion as to whether the project will have an adverse effect on that habitat.

10.37: continued

Notwithstanding any other provision of 310 CMR 10.37, should an Environmental Impact Report be required for a proposed project under the M.G.L. c. 60, §§ 6 through 62H, as determined by 301 CMR 11.00: *MEPA Regulations* the performance standard established under 310 CMR 10.37 shall only apply to proposed projects which would alter the habitat of a rare species for which an occurrence has been entered into the official data base of the Massachusetts Natural Heritage and Endangered Species Program prior to the time that the Secretary of the Executive Office of Energy and Environmental Affairs has determined, in accordance with the provisions of 301 CMR 11.09(4), that a final Environmental Impact Report for that project adequately and properly complies with the M.G.L. c. 30, §§ 6 through 62H (unless, subsequent to that determination, the Secretary requires supplemental information concerning state-listed species, in accordance with the provisions of 301 CMR 11.17: *Transition Rules*).

10.51: Introduction

310 CMR 10.51 through 10.60 applies to all work which will remove, fill, dredge or alter any bank, bordering vegetated wetland, land under water bodies and waterways, land subject to flooding or riverfront area. 310 CMR 10.51 through 10.60 pertains to inland (as opposed to coastal) wetlands, and is promulgated in addition to 310 CMR 10.01 through 10.10 and 10.21 through 10.37. A project may be subject to regulation under both 310 CMR 10.01 through 10.10 and 10.21 through 10.37, in which case compliance with all applicable regulations is required.

310 CMR 10.51 through 10.60 is grouped into five resource areas. Each section begins with a Preamble which specifies the interests identified in M.G.L. c. 131, § 40 to which that resource area is or is likely to be significant. The next subsection defines the resource area and describes the characteristics of that area which are critical to the protection of the interests so identified. The next subsection sets forth the presumptions concerning the significance of the resource area. The last subsection contains the general performance standards to be applied to any work that will remove, fill, dredge or alter the resource area.

10.52: Purpose

310 CMR 10.51 through 10.60 is intended to establish criteria and standards for the uniform and coordinated administration of the provisions of M.G.L. c. 131, § 40. It is intended to ensure that development in and near inland wetlands is sited, designed, constructed and maintained in a manner that protects the public interests identified in M.G.L. c. 131, § 40 and served by these resource areas.

310 CMR 10.51 through 10.60 is intended to ensure coordination between the divisions of the Department and between the Department and other Executive Office of Energy and Environmental Affairs agencies; and to ensure consideration by the Department of relevant policies, laws or programs of other Executive Office of Energy and Environmental Affairs agencies. 310 CMR 10.51 through 10.60 is, in addition, intended to be consistent with and form a part of the Commonwealth's Coastal Zone Management Program as it has been promulgated and defined by 301 CMR 20:00: *Coastal Zone Management Program* issued pursuant to M.G.L. c. 21A. 310 CMR 10.51 through 10.60, however, is adopted independently under M.G.L. c. 131, § 40 and would remain in full force and effect in the absence of 301 CMR 20.00.

310 CMR 10.51 through 10.60 is intended to notify both persons proposing work in Areas Subject to Protection Under M.G.L. c. 131, § 40 and those regulating that work as to the performance standards that should be applied. These standards are intended to identify the level of protection that the issuing authority must impose in order to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. It is the responsibility of the person proposing work

to design and complete his project in conformance with these performance standards. It is the responsibility of the issuing authority to impose such conditions on a proposed project as to ensure that the project is designed and completed in a manner consistent with these standards.

10.53: General Provisions

(1) If the Issuing Authority determines that a Resource Area is significant to an interest identified in M.G.L. c. 131, § 40 for which no presumption is stated in the Preamble to the applicable section, the Issuing Authority shall impose such conditions as are necessary to contribute to the protection of such interests. For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. The potential for adverse impacts to Resource Areas from work in the Buffer Zone may increase with the extent of the work and the proximity to the Resource Area. The Issuing Authority may consider the characteristics of the Buffer Zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on Resource Areas. Conditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of Resource Areas. The Issuing Authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the Resource Area and/or other measures commensurate with the scope and location of the work within the Buffer Zone to protect the interests of M.G.L. c. 131, § 40. Where a Buffer Zone has already been developed, the Issuing Authority may consider the extent of existing development in its review of subsequent proposed work and, where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of M.G.L. c. 131, § 40. The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work.

(2) When the site of a proposed project is subject to a Restriction Order which has been duly recorded under the provisions of M.G.L. c. 131, § 40A, such a project shall conform to both the provisions contained in that Order and 310 CMR 10.51 through 10.60.

(3) Notwithstanding the provisions of 310 CMR 10.54 through 10.58 and 10.60, the Issuing Authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40 permitting the following limited projects (although no such project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.59). In determining whether to exercise its discretion to approve the limited projects listed in 310 CMR 10.53(3), the Issuing Authority shall consider the following factors: the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(a) Work on land to be used primarily and directly in the raising of animals, including but not limited to dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals or on land to be used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals; and work on land to be used primarily and directly in the raising of fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flowers, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs; or on land to be used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products, provided they are carried out in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority:

1. there shall occur no change in the existing topography or the existing soil and surface water levels of the area;

2. all fertilizers, pesticides, herbicides and other such materials shall be used in accordance with all applicable state and federal laws and regulations governing their use; and

3. all activities shall be undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands as specified by the U.S.D.A. Soil Conservation Service, *Guidelines for Soil and Water Conservation*. A plan prepared by the U.S.D.A. Soil Conservation Service through a county conservation district for the improvement of land for agriculture shall be deemed adequate to prevent erosion and siltation.

10.53: continued

(b) Work on land to be used primarily and directly in the raising of cranberries or on land to be used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products, provided it is carried out in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority:

1. all fertilizers, pesticides, herbicides and other such materials shall be used in accordance with all applicable state and federal laws and regulations governing their use; and
2. all activities shall be undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands as specified by the U.S.D.A. Soil Conservation Service, *Guidelines for Soil and Water Conservation*.

(c) Work on land to be used primarily and directly in the raising of forest products under a planned program to improve the quantity and quality of a continuous crop or on land to be used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products, provided it is carried out in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority:

1. there shall occur no change in the existing topography or the existing soil and surface water levels of the area except for temporary access roads;
2. the removal of trees shall occur only during those periods when the ground is sufficiently frozen, dry or otherwise stable to support the equipment used; and
3. all activities shall be undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands as specified by the U.S.D.A. Soil Conservation Service, *Guidelines for Soil and Water Conservation*.
4. the placement of slash, branches and limbs resulting from the cutting and removal operations shall not occur within 25 feet of the bank of a water body.

(d) The construction, reconstruction, operation and maintenance of underground and overhead public utilities, such as electrical distribution or transmission lines, or communication, sewer, water and natural gas lines, may be permitted, in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority:

1. the issuing authority may require a reasonable alternative route with fewer adverse effects for a local distribution or connecting line not reviewed by the Energy Facilities Siting Council;
2. best available measures shall be used to minimize adverse effects during construction;
3. the surface vegetation and contours of the area shall be substantially restored; and
4. all sewer lines shall be constructed to minimize inflow and leakage.

(e) The construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable. Such roadway or driveway shall be constructed in a manner which does not restrict the flow of water. Reasonable alternative means of access may include any previously or currently available alternatives such as realignment or reconfiguration of the project to conform to 310 CMR 10.54 through 10.58 or to otherwise minimize adverse impacts on resource areas. The issuing authority may require the applicant to utilize access over an adjacent parcel of land currently or formerly owned by the applicant, or in which the applicant has, or can obtain, an ownership interest. The applicant shall design the roadway or driveway according to the minimum length and width acceptable to the Planning Board, and shall present reasonable alternative means of access to the Board. The applicant shall provide replication of

bordering vegetated wetlands and compensatory flood storage to the extent practicable. In the Certificate of Compliance, the issuing authority may continue a condition imposed in the Order of Conditions to prohibit further activities under 310 CMR 10.53(3)(e).

(f) Maintenance and improvement of existing public roadways, but limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving inadequate drainage systems.

(g) The excavation of wildlife impoundments, farm ponds and ponds for fire protection. The above uses are allowed provided that no fill or other material is placed upon the wetland except as may be necessary to construct said impoundments or ponds, to provide access thereto, and to provide bank stabilization.

10.53: continued

(h) The maintenance of beaches and boat launching ramps which existed on the effective date of 310 CMR 10.51 through 10.60 (April 1, 1983).

(i) The maintenance, repair and improvement (but not substantial enlargement except when necessary to meet the Massachusetts Stream Crossing Standards) of structures, including dams and reservoirs and appurtenant works to such dams and reservoirs, buildings, piers, towers, headwalls, bridges, and culverts which existed on the effective date of 310 CMR 10.51 through 10.60 (April 1, 1983). When water levels are drawn down for the maintenance, repair, or improvement of dams or reservoirs or appurtenant works to such dams or reservoirs under 310 CMR 10.53(3)(i), water levels that existed immediately prior to such projects being undertaken shall be restored upon completion of the work, and a new Notice of Intent need not be filed for such restoration. If the Department of Conservation and Recreation Office of Dam Safety determines that it would not be safe to restore the water level existing prior to the project being undertaken, the applicant shall submit a new Notice of Intent within ninety days of the date of the determination describing the measures necessary with a schedule for repairing or replacing the dam and returning water levels to the previous condition, or removing the dam and restoring the riparian habitat.

(j) The construction and maintenance of catwalks, footbridges, wharves, docks, piers, boathouses, boat shelters, duck blinds, skeet and trap shooting decks and observation decks; provided, however, that such structures are constructed on pilings or posts so as to permit the reasonably unobstructed flowage of water and adequate light to maintain vegetation.

(k) The routine maintenance and repair of road drainage structures including culverts and catch basins, drainage easements, ditches, watercourses and artificial water conveyances to insure flow capacities which existed on the effective date of 310 CMR 10.51 through 10.60 (April 1, 1983).

(l) The construction, reconstruction, operation or maintenance of water dependent uses; provided, however that:

1. any portion of such work which alters a bordering vegetated wetland shall remain subject to the provisions of 310 CMR 10.55,
2. such work in any other resource area(s) found to be significant to flood control or prevention of storm damage shall meet the performance standards for that interest(s), and
3. adverse impacts from such work in any other resource area(s) shall be minimized regarding the other statutory interests for which that resource area(s) is found to be significant.

(m) Lake drawdown projects (except those related to the breaching of a dam or a reservoir or an appurtenant work to such dam or reservoir) undertaken in response to written Orders or Recommendation Letters issued by the Department of Conservation and Recreation Office of Dam Safety (DCR). The issuing authority shall, in the Order of Conditions, limit the duration of the drawdown based on information contained in the written finding or superseding finding by DCR pursuant to M.G.L. c. 253, §§ 44 through 50, concerning the time required to repair the dam and the economic practicability of repairing the dam. In no event shall the drawdown continue longer than three years without a new or extended Order of Conditions being obtained permitting the drawdown. Water levels that existed immediately prior to such drawdowns shall be restored no later than the expiration date of the Order of Conditions or any new or extended Order of Conditions, and a new Notice of Intent need not be filed for such restoration.

(n) Airport vegetation removal projects; provided, however, that:

1. such projects must be undertaken in order to comply with Federal Aviation Administration (FAA) Regulation Part 77 (14 CFR Part 77), FAA Advisory Circular 150/5300-13 (Navigational Aids and Approach Light Systems), and FAA Order 6480.4

(Air Traffic Control Tower Siting Criteria), all as amended, or to comply with the airport approach regulations set forth in M.G.L. c. 90, §§ 40A through 40I;

2. such projects must be undertaken at airports that are managed by the Massachusetts Port Authority (Massport) or that are subject to certification by the Massachusetts Aeronautics Commission (MAC);

3. the requirement outlined in 310 CMR 10.53(3)(n)1. must be certified in writing by the FAA or by the MAC;

4. such projects shall not include the construction of new airport facilities or the expansion or relocation of existing airport uses;

5. Notices of Intent filed for such projects shall:

   a. delineate the vegetation requiring removal;

10.53: continued

b. delineate the affected resource areas;

c. identify the proposed method for removal of vegetation and analyze alternatives. At a minimum, the alternatives analysis shall include:

i. an alternative (based on a Federal Aviation Administration waiver or airport operation changes) that does not alter resource areas, which will provide baseline data for evaluating other alternatives;

ii. an assessment of impacts to resource areas resulting from mechanical methods of vegetation removal, including the use of both large and small equipment; and

iii. an assessment of impacts to resource areas resulting from chemical methods of vegetation removal;

d. quantify the likely impacts to wildlife habitat and water quality;

e. evaluate possible mitigation measures, including but not limited to an assessment of erosion and sedimentation controls, wetland restoration, wetland replication, on-site and off-site wetland enhancement, herbicide application guidelines, spill containment plans, development restrictions, monitoring, and compensatory flood storage; and

f. propose a five-year airport vegetation management plan. The vegetation management plan shall, at minimum, contain a purpose and goals statement, identify all airport protective zones, identify proposed vegetation management areas within the protective zones, and identify and prioritize future vegetation removal projects. Updated vegetation management plans shall be provided for each Notice of Intent filed after the expiration of the most recent five-year vegetation management plan period;

6. where such projects require the filing of a Notice of Intent in more than one municipality, the Notice of Intent filed in each municipality shall describe the total impacts to resource areas proposed for the entire project;

7. in addition to existing notice requirements contained in 310 CMR 10.00, for projects pursuant to 310 CMR 10.53(3)(n) copies of each Notice of Intent shall be filed simultaneously with the Massachusetts Department of Food and Agriculture, the Massachusetts Historical Commission, the Massachusetts Department of Conservation and Recreation (Areas of Critical Environmental Concern Program), and the Division of Water Supply in the Department of Environmental Protection; and

8. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable:

a. hydrological changes to resource areas shall be minimized;

b. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

c. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

d. compensatory storage shall be provided in accordance with the standards of 310 CMR 10.57(4)(a)1. for all flood storage volume that will be lost;

e. no access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

f. no change in the existing surface topography or the existing soil and surface water levels shall occur except for temporary access roads;

g. temporary structures and work areas in resource areas, such as access roads, shall

be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods;

h. work in resource areas shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used; and

i. slash, branches, and limbs resulting from cutting and removal operations shall not be placed within 25 feet of the bank of any water body.

10.53: continued

(o) The exploration, development, construction, expansion, maintenance, operation, and replacement of public water supply wells or wellfields (including necessary associated roads, ways, structures, and underground and overhead utility lines) derived from groundwater, provided, however, that:

1. approval for the water supply has been granted under the Public Water Supply Source Approval Process pursuant to 310 CMR 22.21: *Ground Water Supply Protection* and/or the Water Management Act, M.G.L. c. 21G. This general condition shall not apply to exploration; and

2. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable:

a. hydrological changes to resource areas shall be minimized;

b. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

c. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

d. compensatory storage shall be provided in accordance with the standards of 310 CMR 10.57(4)(a)1. for all flood storage volume that will be lost;

e. no access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

f. temporary structures and work areas in resource areas, including access roads, shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods; and

g. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

(p) The closure of landfills when undertaken to comply with the requirements of 310 CMR 19.000: *Solid Waste Management*; provided, however, that:

1. a project design alternative analysis shall be prepared in accordance with 310 CMR 19.150: *Landfill Assessment Requirements*; and

2. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and to meet the following standards to the maximum extent practicable:

a. hydrological changes to resource areas shall be minimized;

b. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

c. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

d. compensatory storage shall be provided in accordance with the standards of 310 CMR 10.57(4)(a)1. for all flood storage volume that will be lost;

e. no access road, assessment or monitoring device, or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

f. temporary structures and work areas in resource areas, such as access roads and assessment and monitoring devices, shall be removed within 30 days of the Department's written determination that the closure of the facility has been completed in accordance with the closure permit. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods. Temporary structures, work areas, and alterations to resource areas are those that no longer are necessary to fulfill the requirements of 310 CMR 19.000: *Solid Waste Management*;

10.53: continued

g. except for direct impacts to resource areas caused by the final cap and cover on the landfill, no changes in the existing topography or the existing soil and surface water levels shall be permitted, except for those resulting from temporary access roads;

h. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment used; and

i. such projects shall not include the construction of new landfills or the expansion or modification of existing landfills.

(q) Assessment, monitoring, containment, mitigation, and remediation of, or other response to, a release or threat of release of oil and/or hazardous material in accordance with the provisions of 310 CMR 40.0000: *Massachusetts Contingency Plan* and the following general conditions (although no such measure may be permitted which is designed in accordance with the provisions of 310 CMR 40.1020: *Background Levels of Oil and Hazardous Material* solely to reduce contamination to a level lower than that which is needed to achieve "No Significant Risk" as defined in 310 CMR 40.0006(12)):

1. there are no practicable alternatives to the response action being proposed that are consistent with the provisions of 310 CMR 40.0000: *Massachusetts Contingency Plan* and that would be less damaging to resource areas. The alternatives analysis shall include, at a minimum, the following:

a. an alternative that does not alter resource areas, which will provide baseline data for evaluating other alternatives; and

b. an assessment of alternatives to both temporary and permanent impacts to resource areas.

A "Comprehensive Remedial Action Alternative" that is selected in accordance with the provisions of 310 CMR 40.0851 through 40.0869 shall be deemed to have met the requirements of 310 CMR 10.53(3)(q)1.; and

2. such projects shall be designed, constructed, implemented, operated, and maintained to avoid or, where avoidance is not practicable, to minimize impacts to resource areas, and shall meet the following standards to the maximum extent practicable:

a. hydrological changes to resource areas shall be minimized;

b. best management practices shall be used to minimize adverse impacts during construction, including prevention of erosion and siltation of adjacent water bodies and wetlands in accordance with standard U.S.D.A. Soil Conservation Service methods;

c. mitigating measures shall be implemented that contribute to the protection of the interests identified in M.G.L. c. 131, § 40;

d. compensatory storage shall be provided in accordance with the standards of 310 CMR 10.57(4)(a)1. for all flood storage volume that will be lost;

e. no access road, assessment or monitoring device, or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity;

f. temporary structures and work areas in resource areas, such as access roads and assessment and monitoring devices, shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion in accordance with standard U.S.D.A. Soil Conservation Service methods. Temporary structures, work areas, and alterations to resource areas are those that no

longer are necessary to fulfill the requirements of 310 CMR 40.0000: *Massachusetts Contingency Plan*; and

g. work in resource areas shall occur only when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

(r) The construction of a new access for forestry, including leaving in place an access constructed in accordance with 310 CMR 10.04(Agriculture)(b)14.d., or the enlargement of an existing access for forestry, provided that:

1. the access is constructed:

a. in accordance with a Forest Cutting Plan approved by the Department of Environmental Management (DEM) under the provisions of M.G.L. c. 132, §§ 40 through 46; or

10.53: continued

b. on land subject to a permanent, recorded conservation restriction that has been created in accordance with M.G.L. c. 184, §§ 31 through 33 and maintains the land in perpetual forest use;

2. the access is of the minimum practicable width that is required for the cutting and removal of trees;

3. practicable alternative access across upland in not available;

4. the number of access ways located within resource areas is minimized;

5. activities shall be conducted when the soil is frozen, dry, or otherwise stable to support the equipment used;

6. the access does not increase flood stage or velocity;

7. the design and installation of the access complies with the Massachusetts Forestry Best Management Practices Manual. When the access involves fill, culverts or other structures that will obstruct flow, it shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual. When crossings involve fill, culverts or other structures that will obstruct flow, they shall be designed, constructed, and maintained in accordance with the Massachusetts Forestry Best Management Practices Manual to allow the unobstructed passage of existing flows for at least the 25 year storm; and

(s) The cutting of trees by owners for their own use of more than 10,000 board feet or 20 cords but less than 25,000 board feet or 50 cords during any 12 month period, provided that:

1. after the cutting, the remaining trees in the resource area shall be evenly distributed throughout the area where cutting occurred and the crown cover shall not be less than 50%. Crown cover is determined as the percent of the ground's surface that would be covered by a vertical projection of foliage from trees with a diameter at breast height of five inches or greater, where minor gaps between branches are disregarded and areas of overlapping foliage are counted only once;

2. the cutting and removal of trees shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment used;

3. the cutting, removal, or other destruction of trees and understory vegetation shall be minimized within 25 feet of the bank of a water body, except for the purpose of providing access for the activities described in 310 CMR 10.04(Agriculture)(b)15.;

4. the placement of slash, branches, and limbs resulting from cutting and removal operations shall not occur within 25 feet of the bank of a water body;

5. no filling, excavation, or other change shall occur in the existing topography or hydrology of a resource area; and

6. landings for forest products shall not be located in Bordering Vegetated Wetland or Bank.

(t) The construction of a new access roadway, or the improvement, repair and/or replacement of an existing access roadway, needed to transport equipment to a renewable energy project site, where reasonable alternative means of access to an upland area is unavailable, provided that it is carried out in accordance with the following general conditions and any additional conditions deemed necessary by the issuing authority. Reasonable alternative means of access may include any previously or currently available alternatives such as realignment or reconfiguration of the project to conform to 310 CMR 10.54 through 10.58 or to otherwise minimize adverse impacts on resource areas. The issuing authority may require the applicant to utilize access over an adjacent parcel of land currently or formerly owned by the applicant, or in which the applicant has, or can obtain, an ownership interest. Such projects shall be designed, constructed, implemented, operated, and maintained to meet all of the following standards to the maximum extent practicable:

1. Hydrological changes to resource areas shall be minimized.
2. Best management practices shall be used to minimize adverse impacts during construction. An applicant shall be presumed to use best management practices to minimize adverse impacts during construction if s/he implements erosion and sediment controls in accordance with the *Massachusetts Erosion and Sediment Control Guidelines*. This presumption may be rebutted by credible evidence from a competent source.
3. No access road or other structure or activity shall restrict flows so as to cause an increase in flood stage or velocity.
4. No change in the existing surface topography or the existing soil and surface water levels shall occur except for temporary access roads.

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5. Temporary structures and work areas in resource areas shall be removed within 30 days of completion of the work. Temporary alterations to resource areas shall be substantially restored to preexisting hydrology and topography. At least 75% of the surface of any area of disturbed vegetation shall be reestablished with indigenous wetland plant species within two growing seasons and prior to said vegetative reestablishment any exposed soil in the area of disturbed vegetation shall be temporarily stabilized to prevent erosion. Surface area shall be presumed to be stabilized to prevent erosion if the applicant implements the procedures set forth in the *Massachusetts Erosion and Sediment Control Guidelines*. This presumption may be rebutted by credible evidence from a competent source.

6. Work in resource areas shall occur only during those periods when the ground is sufficiently frozen, dry, or otherwise stable to support the equipment being used.

7. Slash, branches, and limbs resulting from cutting and removal operations shall not be placed within 25 feet of the bank of any water body.

8. The applicant shall provide replication of bordering vegetated wetlands and compensatory flood storage to the extent practicable.

9. The applicant demonstrates to the satisfaction of the Issuing Authority that any stream crossings meet the general performance standards in 310 CMR 10.54(4)a. and 10.56(4)a.

(4) Ecological Restoration Limited Projects.

(a) Notwithstanding the requirements of any other provision of 310 CMR 10.25 through 10.35, 10.54 through 10.58, and 10.60, the Issuing Authority may issue an Order of Conditions permitting an Ecological Restoration Project listed in 310 CMR 10.53(4)(e) as an Ecological Restoration Limited Project and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40, provided that:

1. the Issuing Authority determines that the project is an Ecological Restoration Project as defined in 310 CMR 10.04;

2. if the project will impact an area located within estimated habitat which is indicated on the most recent *Estimated Habitat Map of State-listed Rare Wetlands Wildlife* published by the Natural Heritage and Endangered Species Program (Program), the applicant has obtained a preliminary written determination from the Program in accordance with 310 CMR 10.11(2) that the project will not have any adverse long-term and short-term effects on specified habitat sites of Rare Species, or the project will be carried out in accordance with a habitat management plan that has been approved in writing by the Natural Heritage and Endangered Species Program and submitted with the Notice of Intent;

3. the applicant demonstrates that the project will be carried out in accordance with any time of year restrictions or other conditions recommended by the Division of Marine Fisheries for coastal waters and the Division of Fisheries and Wildlife in accordance with 310 CMR 10.11(3);

4. if the project involves the dredging of 100 cubic yards of sediment or more or dredging of any amount in an Outstanding Resource Water, the applicant has applied for or obtained a Water Quality Certification by the Department; and

5. the project complies with all applicable provisions of 310 CMR 10.53(1), (2), (7), and (8).

(b) An Ecological Restoration Project permitted as an Ecological Restoration Limited Project in accordance with 310 CMR 10.53(4) may result in the temporary or permanent loss of Resource Areas and/or the conversion of one Resource Area to another when such loss is

necessary to the achievement of the project's ecological restoration goals.

(c) As set forth in 310 CMR 10.12(3), a person submitting a Notice of Intent for an Ecological Restoration Limited Project in accordance with 310 CMR 10.12(1) and (2) is exempt from the requirement to perform a wildlife habitat evaluation in accordance with the requirements of 310 CMR 10.60, notwithstanding the provisions of 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., and 10.60.

(d) In determining whether to approve a project as an Ecological Restoration Limited Project, the issuing authority shall consider the following:

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1. the condition of existing and historic coastal Resource Areas proposed for restoration including evidence of the extent and severity of the impairment(s) that reduce the capacity of said Resource Areas to protect and sustain the interests identified in M.G.L. c. 131, § 40;

2. the magnitude and significance of the benefits of the Ecological Restoration Project in improving the capacity of the affected Resource Areas to protect and sustain the other interests identified in M.G.L. c. 131, § 40; and

3. the magnitude and significance of the impacts of the Ecological Restoration Project on existing Resource Areas that may be modified, converted and/or lost and the interests for which said Resource Areas are presumed significant in 310 CMR 10.00, and the extent to which the applicant will:

a. void adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that can be avoided without impeding the achievement of the project's ecological restoration goals;

b. minimize adverse impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40, that are necessary to the achievement of the project's ecological restoration goals; and

c. utilize best management practices such as erosion and siltation controls and proper construction sequencing to avoid and minimize adverse construction impacts to Resource Areas and the interests identified in M.G.L. c. 131, § 40.

(e) Types of Ecological Restoration Limited Projects. The issuing authority may permit the following projects as Ecological Restoration Limited Projects in accordance with 310 CMR 10.53(4)(a) through (d).

1. Dam Removal Projects. A dam removal project, that does not meet all of the eligibility criteria set forth in 310 CMR 10.13, may be permitted as an Ecological Restoration Limited Project provided that in addition to meeting the eligibility criteria set forth in 310 CMR 10.53(4)(a) through (d), the project as proposed furthers at least one of the interests identified in M.G.L. c. 131, § 40. In considering the factors set forth in 310 CMR 10.53(4)(d)3., the Issuing Authority shall consider whether the project as proposed is consistent with the Department's 2007 Guidance entitled *Dam Removal and the Wetlands Regulations*.

2. Freshwater Stream Crossing Repair and Replacement Projects. A freshwater stream crossing repair or replacement project that does not meet all of the eligibility criteria set forth in 310 CMR 10.13 may be permitted as an Ecological Restoration Limited Project provided that in addition to meeting the eligibility criteria set forth in 310 CMR 10.53(4)(a) through (d), the project meets all of the following eligibility criteria:

a. the applicant demonstrates to the satisfaction of the Issuing Authority that meeting the eligibility criteria set forth in 310 CMR 10.13 would result in significant stream instability or flooding hazard that cannot otherwise be mitigated, and site constraints make it impossible to meet said criteria;

b. the project is designed to ensure that the project will not impair the stability of the Bank;

c. to the maximum extent practicable, the project provides for the restoration of the stream upstream and downstream of the structure as needed to restore stream continuity and eliminate barriers to aquatic organism movement; and the project complies with the requirements of 310 CMR 10.53(7) and (8).

3. Stream Daylighting Projects. A stream daylighting project that does not meet all the eligibility criteria set forth in 310 CMR 10.13 may be permitted as an Ecological Restoration Limited Project provided that in addition to the eligibility criteria set forth

in 10.53(4)(a) through (d), the proposed project meets to the maximum extent practicable, consistent with the project's ecological restoration goals, all the performance standards for Bank and Land under Water Bodies and Waterways. As set forth in 310 CMR 10.12(3), a person submitting a Notice of Intent for a Stream Daylighting Project that meets the requirements of 310 CMR 10.12(1) and (2) is exempt from the requirement to perform a wildlife habitat evaluation in accordance with the requirements of 310 CMR 10.60, notwithstanding the provisions of 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., and 10.60.

10.53: continued

4. Tidal Restoration Projects. A project that will restore tidal flow and that does not meet all the eligibility criteria set forth in 310 CMR 10.13 may be permitted as an Ecological Restoration Limited Project provided that in addition to the eligibility criteria set forth in 310 CMR 10.53(4)(a) through (d), the project, including any proposed flood mitigation measures, will not significantly increase flooding or storm damage to the built environment, including without limitation, buildings, wells, septic systems, roads or other man-made structures or infrastructure,

5. Other Restoration Projects. An Ecological Restoration Project that is not listed in 310 CMR 10.54(4)(e)2. through 4., that will improve the natural capacity of a Resource Area(s) to protect the interests identified in M.G.L. c. 131, § 40, may be permitted as an Ecological Restoration Limited Project provided that the project meets the eligibility criteria set forth in 310 CMR 10.54(4)(a) though (d). Such projects include, but are not limited to, the restoration, enhancement or management of Rare Species habitat, the restoration of hydrologic and habitat connectivity, the removal of aquatic nuisance vegetation to retard pond and lake eutrophication, the thinning or planting of vegetation to improve habitat value, riparian corridor re-naturalization, river floodplain reconnection, in-stream habitat enhancement, fill removal and regrading, flow restoration, and the installation of fish passage structures.

(5) Notwithstanding the provisions of 310 CMR 10.53(1), 10.54 through 10.58, and 10.60, the issuing authority shall issue an Order of Conditions permitting as a limited project for the support of existing agricultural production the reconstruction of existing dikes, the construction of new ponds or reservoirs, the expansion of existing ponds or reservoirs, and the construction of tailwater recovery systems and by pass canals/channels, provided that the following criteria are met:

(a) The Notice of Intent shall include all relevant portions of the farm Conservation Plan (CP) covering the work which has been prepared for the property and the applicant in cooperation with the United States Soil Conservation Service (SCS) pursuant to the January 20, 1993, Memorandum of Understanding (MOU) between the Department and SCS concerning CPs. At a minimum, the Notice of Intent shall include a description of the project, the number of square feet of each type of resource area that will be altered, and the alternatives that were considered in order to avoid alterations of wetland resource areas.

(b) There shall be a rebuttable presumption, which may be overcome upon a clear showing to the contrary, that:

1. work described in the CP avoids impacts to wetland resource areas or minimizes impacts where they are unavoidable; and

2. construction specifications and mitigation measures contained in the CP minimize impacts where impacts are unavoidable and adequately protect the interests of M.G.L. c. 131, § 40.

(c) If any presumption set forth in 310 CMR 10.53(5)(b) is overcome upon a clear showing to the contrary, the issuing authority shall impose such conditions on the work as are necessary to restore the presumption.

(d) The project will not have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.59.

(e) The maximum amount of Bordering Vegetated Wetland which may be altered by the above activities is:

1. 20,000 square feet for the construction or expansion of a pond or reservoir;
2. 20,000 square feet for the construction of a tailwater recovery system;
3. 20,000 square feet for the construction of a by-pass canal/channel; and
4. 10,000 square feet for the reconstruction of an existing dike.

(f) There shall not be any filling or dredging of a Salt Marsh.

(6) Notwithstanding the provisions of 310 CMR 10.58, the Issuing Authority may issue an Order of Conditions permitting as a limited project the construction, rehabilitation, and maintenance of footpaths, bikepaths, and other pedestrian or nonmotorized vehicle access to or along riverfront areas but outside other resource areas, provided that adverse impacts from the work are minimized and that the design specifications are commensurate with the projected use and are compatible with the character of the riverfront area. Generally, the width of the access shall not exceed ten feet of pavement, except within an area that is already altered (*e.g.*, railroad beds within rights of way). Access shall not be located in vernal pools or fenced in a manner which would impede the movement of wildlife.

10.54: continued

(7) The Notice of Intent for any projects involving the construction, repair, replacement or expansion of public or private infrastructure shall include an operation and maintenance plan to ensure that the infrastructure will continue to function as designed. Implementation of the operation and maintenance plan as approved by the Issuing Authority shall be a continuing condition that shall be set forth in the Order of Conditions and the Certificate of Compliance.

(8) Any person proposing the replacement of an existing stream crossing shall demonstrate to the Issuing Authority that the impacts of the crossing have been avoided where possible, and when not possible have been minimized and that mitigation measures have been provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40. An applicant will be presumed to have made this showing if the project is designed as follows:

(a) If the project includes replacement of an existing non-tidal crossing, the applicant demonstrates to the satisfaction of the Issuing Authority that the crossing complies with the Massachusetts Stream Crossing Standards to the maximum extent practicable.

(b) If the project includes replacement of an existing tidal crossing that restricts tidal flow, the applicant demonstrates to the satisfaction of the Issuing Authority that tidal restriction will be eliminated to the maximum extent practicable.

This presumption may be rebutted by credible evidence from a competent source that the impacts of the project have not been avoided, minimized or mitigated to the maximum extent practicable.

At a minimum, in evaluating the potential to comply with the standards to the maximum extent practicable the applicant shall consider site constraints in meeting the standard, undesirable effects of risk in meeting the standard and the environmental benefit of meeting the standard compared to the cost by evaluating the following:

- The potential for downstream flooding;
- Upstream and downstream habitat (in-stream habitat, wetlands);
- Potential for erosion and head-cutting;
- Stream stability;
- Habitat fragmentation caused by the crossing;
- The amount of stream mileage made accessible by the improvements;
- Storm flow conveyance;
- Engineering design constraints specific to the crossing;
- Hydrologic constraints specific to the crossing;
- Impacts to wetlands that would occur by improving the crossing;
- Potential to affect property and infrastructure; and
- Cost of replacement.

10.54: Bank (Naturally Occurring Banks and Beaches)

(1) Preamble. Banks are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to the prevention of pollution and to the protection of fisheries and wildlife habitat. Where Banks are composed of concrete, asphalt or other artificial impervious material, said Banks are likely to be significant to flood control and storm damage prevention.

Banks are areas where ground water discharges to the surface and where, under some circumstances, surface water recharges the ground water.

Where Banks are partially or totally vegetated, the vegetation serves to maintain the Banks' stability, which in turn protects water quality by reducing erosion and siltation.

Banks may also provide shade that moderates water temperatures, as well as providing

breeding habitat, escape cover and food, all of which are significant to the protection of fisheries. Banks which drop off quickly or overhang the water's edge often contain numerous undercuts which are favorite hiding spots for important game species such as largemouth bass (*Micropterus salmoides*).

10.54: continued

The topography, plant community composition and structure, and soil structure of banks together provide important food, shelter, migratory and overwintering areas, and breeding areas for wildlife. Topography plays a role in determining the suitability of banks to serve as burrowing or feeding habitat. Soil structure also plays a role in determining the suitability for burrowing, hibernation and other cover. Bank topography and soil structure impact the bank's vegetative structure, as well. Bushes and other undergrowth, trees, vegetation extending from the bank into the water, and vegetation growing along the water's edge are also important to a wide variety of wildlife. A number of tubers and berry bushes also grow in banks and serve as important food for wildlife. Finally, banks may provide important shelter for wildlife which needs to move between wetland areas.

Banks act to confine floodwaters during the most frequent storms, preventing the spread of water to adjacent land. Because Banks confine water during such storms to an established channel they maintain water temperatures and depths necessary for the protection of fisheries. The maintenance of cool water temperatures during warm weather is critical to the survival of important game species such as brook trout (*Salvelinus frontinalis*), rainbow trout (*Oncorhynchus Mykiss*) and brown trout (*Salmo trutta*). An alteration of a Bank that permits water to frequently and consistently spread over a large and more shallow area increases the amount of property which is routinely flooded, as well as elevating water temperature and reducing fish habitat within the main channel, particularly during warm weather.

(2) Definition, Critical Characteristics and Boundary.

(a) A Bank is the portion of the land surface which normally abuts and confines a water body. It occurs between a water body and a vegetated bordering wetland and adjacent flood plain, or, in the absence of these, it occurs between a water body and an upland.

A Bank may be partially or totally vegetated, or it may be comprised of exposed soil, gravel or stone.

(b) The physical characteristics of a Bank, as well as its location, as described in 310 CMR 10.54(2)(a), are critical to the protection of the interests specified in 310 CMR 10.54(1).

(c) The upper boundary of a Bank is the first observable break in the slope or the mean annual flood level, whichever is lower. The lower boundary of a Bank is the mean annual low flow level.

(3) Presumption. Where a proposed activity involves the removing, filling, dredging or altering of a Bank, the issuing authority shall presume that such area is significant to the interests specified in 310 CMR 10.54(1). This presumption is rebuttable and may be overcome upon a clear showing that the Bank does not play a role in the protection of said interests. In the event that the presumption is deemed to have been overcome, the issuing authority shall make a written determination to this effect, setting forth its grounds (Form 6).

(4) General Performance Standard.

(a) Where the presumption set forth in 310 CMR 10.54(3) is not overcome, any proposed work on a Bank shall not impair the following:

1. the physical stability of the Bank;
2. the water carrying capacity of the existing channel within the Bank;
3. ground water and surface water quality;
4. the capacity of the Bank to provide breeding habitat, escape cover and food for fisheries;
5. the capacity of the Bank to provide important wildlife habitat functions. A project or projects on a single lot, for which Notice(s) of Intent is filed on or after November 1,

1987, that (cumulatively) alter(s) up to 10% or 50 feet (whichever is less) of the length of the bank found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. In the case of a bank of a river or an intermittent stream, the impact shall be measured on each side of the stream or river. Additional alterations beyond the above threshold may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.

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6. Work on a stream crossing shall be presumed to meet the performance standard set forth in 310 CMR 10.54(4)(a) provided the work is performed in compliance with the Massachusetts Stream Crossing Standards by consisting of a span or embedded culvert in which, at a minimum, the bottom of a span structure or the upper surface of an embedded culvert is above the elevation of the top of the bank, and the structure spans the channel width by a minimum of 1.2 times the bankfull width. This presumption is rebuttable and may be overcome by the submittal of credible evidence from a competent source. Notwithstanding the requirement of 310 CMR 10.54(4)(a)5., the impact on bank caused by the installation of a stream crossing is exempt from the requirement to perform a habitat evaluation in accordance with the procedures contained in 310 CMR 10.60.

(b) Notwithstanding the provisions of 310 CMR 10.54(4)(a), structures may be permitted in or on a Bank when required to prevent flood damage to facilities, buildings and roads constructed prior to the effective date of 310 CMR 10.51 through 10.60 or constructed pursuant to a Notice of Intent filed prior to the effective date of 310 CMR 10.51 through 10.60 (April 1, 1983), including the renovation or reconstruction (but not substantial enlargement) of such facilities, buildings and roads, provided that the following requirements are met:

1. The proposed protective structure, renovation or reconstruction is designed and constructed using best practical measures so as to minimize adverse effects on the characteristics and functions of the resource area;

2. The applicant demonstrates that there is no reasonable method of protecting, renovating or rebuilding the facility in question other than the one proposed.

(c) Notwithstanding the provisions of 310 CMR 10.54(4)(a) or (b), no project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.59.

10.55: Bordering Vegetated Wetlands (Wet Meadows, Marshes, Swamps and Bogs)

(1) Preamble. Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat.

The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run-off and flood waters.

Some nutrients and toxic substances are detained for years in plant root systems or in the soils. Others are held by plants during the growing season and released as the plants decay in the fall and winter. This latter phenomenon delays the impacts of nutrients and toxins until the cold weather period, when such impacts are less likely to reduce water quality.

Bordering Vegetated Wetlands are areas where ground water discharges to the surface and where, under some circumstances, surface water discharges to the ground water.

The profusion of vegetation in Bordering Vegetated Wetlands acts to slow down and reduce the passage of flood waters during periods of peak flows by providing temporary flood water storage and by facilitating water removal through evaporation and transpiration. This process reduces downstream flood crests and resulting damage to private and public property. During dry periods the water retained in Bordering Vegetated Wetlands is essential to the maintenance of base flow levels in rivers and streams, which in turn is important to the protection of water quality and water supplies.

The Act defines freshwater wetlands by hydrology and vegetation. Hydrology is the driving force which creates wetlands, but it is a transient, temporal parameter. The presence of water

at or near the ground surface during a significant portion of the year supports, and in fact promotes, the growth of wetland indicator plants. Prolonged or frequent saturation or inundation also produces hydric soils, and creates anaerobic conditions that favor the growth of wetland indicator plants. Hydric soils are direct indicators of long-term hydrologic conditions and are present throughout the year.

Wetland vegetation supports a wide variety of insects, reptiles, amphibians, small mammals and birds which are a source of food for important game fish. Bluegills (*Lepomis macrochirus*), pumpkinseeds (*Lepomis gibbosus*), yellow perch (*Perca flavescens*), rock bass (*Ambloplites rupestris*) and all trout species feed upon nonaquatic insects. Large-mouth bass (*Micropterus salmoides*), chain pickerel (*Esox niger*) and northern pike (*Esox lucius*) feed upon small mammals, snakes, nonaquatic insects, birds and amphibians.

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Wetland vegetation provides shade which moderates water temperatures important to fish life. Wetlands flooded by adjacent water bodies and waterways provide food, breeding habitat and cover for fish. Fish populations in the larval stage are particularly dependent upon food provided by over-bank flooding which occurs during peak flow periods (extreme storms) because most river and stream channels do not provide sufficient quantities of the microscopic plant and animal life required for food.

Bordering vegetated wetlands are probably the Commonwealth's most important inland habitat for wildlife. The hydrologic regime, plant community composition and structure, soil composition and structure, topography, and water chemistry of bordering vegetated wetlands provide important food, shelter, migratory and overwintering areas, and breeding areas for many birds, mammals, amphibians and reptiles. A wide variety of vegetated wetland plants, the nature of which are determined in large part by the depth and duration of water, as well as soil and water composition, are utilized by varied species as important areas for mating, nesting, brood rearing, shelter and food (directly and indirectly). The diversity and interspersion of the vegetative structure is also important in determining the nature of its wildlife habitat. Different habitat characteristics are used by different wildlife species during summer, winter and migratory seasons.

Although the vegetational community can often be analyzed to establish an accurate wetland boundary, sole reliance on the presence of wetland indicator plants can be misleading because some species thrive in both uplands and wetlands. Gently sloping areas often produce large transitional zones where the vegetational boundary is difficult to delineate. Hydrology can supplement vegetative criteria to enhance the technical accuracy, consistency, and credibility of wetland boundary delineations, and are especially useful for analyzing disturbed sites.

(2) Definition, Critical Characteristics and Boundary.

(a) Bordering Vegetated Wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering Vegetated Wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40.

(b) The physical characteristics of Bordering Vegetated Wetlands, as described in 310 CMR 10.55(2)(a), are critical to the protection of the interests specified in 310 CMR 10.55(1).

(c) The boundary of Bordering Vegetated Wetlands is the line within which 50% or more of the vegetational community consists of wetland indicator plants and saturated or inundated conditions exist. Wetland indicator plants shall include but not necessarily be limited to those plant species identified in the Act. Wetland indicator plants are also those classified in the indicator categories of Facultative, Facultative+, Facultative Wetland-, Facultative Wetland, Facultative Wetland+, or Obligate Wetland in the *National List of Plant Species That Occur in Wetlands: Massachusetts (Fish & Wildlife Service, U.S. Department of the Interior*, 1988) or plants exhibiting physiological or morphological adaptations to life in saturated or inundated conditions.

1. Areas containing a predominance of wetland indicator plants are presumed to indicate the presence of saturated or inundated conditions. Therefore, the boundary as determined by 50% or more wetland indicator plants shall be presumed accurate when:

a. all dominant species have an indicator status of obligate, facultative wetland+, facultative wetland, or facultative wetland- and the slope is distinct or abrupt between the upland plant community and the wetland plant community;

b. the area where the work will occur is clearly limited to the buffer zone; or

c. the issuing authority determines that sole reliance on wetland indicator plants will

yield an accurate delineation.

2. When the boundary is not presumed accurate as described in 310 CMR 10.55(2)(c)1.a. through c. or to overcome the presumption, credible evidence shall be submitted by a competent source demonstrating that the boundary of Bordering Vegetated Wetlands is the line within which 50% or more of the vegetational community consists of wetland indicator plants and saturated or inundated conditions exist. The issuing authority must evaluate vegetation and indicators of saturated or inundated conditions if submitted by a credible source, or may require credible evidence of saturated or inundated conditions when determining the boundary. Indicators of saturated or inundated conditions sufficient to support wetland indicator plants shall include one or more of the following:

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a. groundwater, including the capillary fringe, within a major portion of the root zone;
b. observation of prolonged or frequent flowing or standing surface water;
c. characteristics of hydric soils.

3. Where an area has been disturbed (*e.g.* by cutting, filling, or cultivation), the boundary is the line within which there are indicators of saturated or inundated conditions sufficient to support a predominance of wetland indicator plants, a predominance of wetland indicator plants, or credible evidence from a competent source that the area supported or would support under undisturbed conditions a predominance of wetland indicator plants prior to the disturbance.

(3) Presumption. Where a proposed activity involves the removing, filling, dredging or altering of a Bordering Vegetated Wetland, the issuing authority shall presume that such area is significant to the interests specified in 310 CMR 10.55(1). This presumption is rebuttable and may be overcome upon a clear showing that the Bordering Vegetated Wetland does not play a role in the protection of said interests. In the event that the presumption is deemed to have been overcome, the issuing authority shall make a written determination to this effect, setting forth its grounds (Form 6).

(4) General Performance Standards.

(a) Where the presumption set forth in 310 CMR 10.55(3) is not overcome, any proposed work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area.

(b) Notwithstanding the provisions of 310 CMR 10.55(4)(a), the issuing authority may issue an Order of Conditions permitting work which results in the loss of up to 5000 square feet of Bordering Vegetated Wetland when said area is replaced in accordance with the following general conditions and any additional, specific conditions the issuing authority deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost:

1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and
7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the extent to which adverse impacts can be avoided, the extent to which adverse

impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(c) Notwithstanding the provisions of 310 CMR 10.55(4)(a), the issuing authority may issue an Order of Conditions permitting work which results in the loss of a portion of Bordering Vegetated Wetland when;

1. said portion has a surface area less than 500 square feet;
2. said portion extends in a distinct linear configuration ("finger-like") into adjacent uplands; and

10.55: continued

3. in the judgment of the issuing authority it is not reasonable to scale down, redesign or otherwise change the proposed work so that it could be completed without loss of said wetland.

(d) Notwithstanding the provisions of 310 CMR 10.55(4)(a),(b) and (c), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

(e) Any proposed work shall not destroy or otherwise impair any portion of a Bordering Vegetated Wetland that is within an Area of Critical Environmental Concern designated by the Secretary of Energy and Environmental Affairs under M.G.L. c. 21A, § 2(7) and 301 CMR 12.00: *Areas of Critical Environmental Concern*. 310 CMR 10.55(4)(e):

1. supersedes the provisions of 310 CMR 10.55(4)(b) and (c);
2. shall not apply if the presumption set forth at 310 CMR 10.55(3) is overcome;
3. shall not apply to work proposed under 310 CMR 10.53(3)(l); and
4. shall not apply to maintenance of stormwater detention, retention, or sedimentation ponds, or to maintenance of stormwater energy dissipating structures, that have been constructed in accordance with a valid order of conditions.

10.56: Land under Water Bodies and Waterways (under any Creek, River, Stream, Pond or Lake)

(1) Preamble. Land under Water Bodies and Waterways is likely to be significant to public and private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution and to protection of fisheries and wildlife habitat. Where such land is composed of concrete, asphalt or other artificial impervious material, said land is likely to be significant to flood control and storm damage prevention.

Where Land under Water Bodies and Waterways is composed of pervious material, such land represents a point of exchange between surface and ground water.

The physical nature of Land under Water Bodies and Waterways is highly variable, ranging from deep organic and fine sedimentary deposits to rocks and bedrock. The organic soils and sediments play an important role in the process of detaining and removing dissolved and particulate nutrients (such as nitrogen and phosphorous) from the surface water above. They also serve as traps for toxic substances (such as heavy metal compounds).

Land under Water Bodies and Waterways, in conjunction with banks, serves to confine floodwater within a definite channel during the most frequent storms. Filling within this channel blocks flows which in turn causes backwater and overbank flooding during such storms. An alteration of Land under Water Bodies and Waterways that causes water to frequently spread out over a larger area at a lower depth increases the amount of property which is routinely flooded. Additionally, it results in an elevation of water temperature and a decrease in habitat in the main channel, both of which are detrimental to fisheries, particularly during periods of warm weather and low flows.

Land under rivers, streams and creeks that is composed of gravel allows the circulation of cold, well oxygenated water necessary for the survival of important game fish species such as brook trout (*Salvelinus frontinalis*), rainbow trout (*Oncorhynchus mykiss*), brown trout (*Salmo trutto*) and atlantic salmon (*Salmon salar*). River, stream and creek bottoms with a diverse structure composed of gravel, large and small boulders and rock outcrops provides escape cover and resting areas for the above mentioned game fish species (*salmonids*). Such bottom type also provides areas for the production of aquatic insects essential to fisheries.

Land under ponds and lakes is vital to a large assortment of warm water fish during spawning periods. Species such as large mouth bass (*Micropterus salmoides*), smallmouth bass (*Micropterus dolomieui*), blue gills (*Lepomis macrochirus*), pumpkinseeds (*Lepomis gibbosus*), black crappie (*Pomoxis nigromaculatus*) and rock bass (*Ambloplites rupestris*) build nests on the

lake and bottom substrates within which they shed fertilize their eggs.

The plant community composition and structure, hydrologic regime, topography, soil composition and water quality of land under water bodies and waterways provide important food, shelter, migratory and overwintering areas, and breeding areas for wildlife. Certain submerged, rooted vegetation is eaten by water fowl and some mammals. Some amphibians (as well as some invertebrate species eaten by vertebrate wildlife) attach their eggs to such vegetation. Some aquatic vegetation protruding out of the water is also used for nesting, and many species use dead vegetation resting on land under water but protruding above the surface for feeding and basking Soil composition is also important for hibernation and for animals which begin to burrow their tunnels under water. Hydrologic regime, topography, and water quality not only affect vegetation, but also determine which species feed in an area.

10.56: continued

(2) Definition, Critical Characteristics and Boundaries.

(a) Land under Water Bodies and Waterways is the land beneath any creek, river, stream, pond or lake. Said land may be composed of organic muck or peat, fine sediments, rocks or bedrock.

(b) The physical characteristics and location of Land under Water Bodies and Waterways specified in 310 CMR 10.56(2)(a) are critical to the protection of the interests specified in 310 CMR 10.56(1).

(c) The boundary of Land under Water Bodies and Waterways is the mean annual low water level.

(3) Presumption. Where a project involves removing, filling, dredging or altering of Land under Water Bodies and Waterways, the issuing authority shall presume that such area is significant to the interests specified in 310 CMR 10.56(1). This presumption is rebuttable and may be overcome upon a clear showing that said land does not play a role in the protection of said interests. In the event that the presumption is deemed to have been overcome, the issuing authority shall make a written determination to this effect, setting forth the grounds (Form 6).

(4) General Performance Standards.

(a) Where the presumption set forth in 310 CMR 10.56(3) is not overcome, any proposed work within Land under Water Bodies and Waterways shall not impair the following:

1. The water carrying capacity within the defined channel, which is provided by said land in conjunction with the banks;

2. Ground and surface water quality;

3. The capacity of said land to provide breeding habitat, escape cover and food for fisheries; and

4. The capacity of said land to provide important wildlife habitat functions. A project or projects on a single lot, for which Notice(s) of intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures established under 310 CMR 10.60.

5. Work on a stream crossing shall be presumed to meet the performance standard set forth in 310 CMR 10.56(4)(a) provided the work is performed in compliance with the Massachusetts Stream Crossing Standards by consisting of a span or embedded culvert in which, at a minimum, the bottom of a span structure or the upper surface of an embedded culvert is above the elevation of the top of the bank, and the structure spans the channel width by a minimum of 1.2 times the bankfull width. This presumption is rebuttable and may be overcome by the submittal of credible evidence from a competent source. Notwithstanding the requirements of 310 CMR 10.56(4)(a)4., the impact on Land under Water Bodies and Waterways caused by the installation of a stream crossing is exempt from the requirement to perform a habitat evaluation in accordance with the procedures established under 310 CMR 10.60.

(b) Notwithstanding the provisions of 310 CMR 10.56(4)(a), the issuing authority may issue an Order in accordance with M.G.L. c. 131, § 40 to maintain or improve boat channels within Land under Water Bodies and Waterways when said work is designed and carried out using the best practical measures so as to minimize adverse effects such as the suspension or transport of pollutants, increases in turbidity, the smothering of bottom organisms, the

accumulation of pollutants by organisms or the destruction of fisheries habitat or nutrient source areas.

(c) Notwithstanding the provisions of 310 CMR 10.56(4)(a) or (b), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

10.57: Land Subject to Flooding (Bordering and Isolated Areas)

(1) Preamble.

(a) Bordering Land Subject to Flooding:

1. Bordering Land Subject to Flooding is an area which floods from a rise in a bordering waterway or water body. Such areas are likely to be significant to flood control and storm damage prevention.

2. Bordering Land Subject to Flooding provides a temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (*i.e.*, slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by Bordering Land Subject to Flooding. Over time, incremental filling of these areas causes increases in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties.

3. Certain portions of Bordering Land Subject to Flooding are also likely to be significant to the protection of wildlife habitat. These include all areas on the ten year floodplain or within 100 feet of the bank or bordering vegetated wetland (whichever is further from the water body or waterway, so long as such area is contained within the 100 year floodplain), and all vernal pool habitat on the 100 year floodplain, except for those portions of which have been so extensively altered by human activity that their important wildlife habitat functions have been effectively eliminated (such "altered" areas include paved and gravelled areas, golf courses, cemeteries, playgrounds, landfills, fairgrounds, quarries, gravel pits, buildings, lawns, gardens, roadways (including median strips, areas enclosed within highway interchanges, shoulders, and embankments), railroad tracks (including ballast and embankments), and similar areas lawfully existing on November 1, 1987 and maintained as such since that time).

The hydrologic regime, plant community composition and structure, topography, soil composition and proximity to water bodies and bordering vegetated wetlands of these portions of bordering land subject to flooding provide important food, shelter, migratory and overwintering areas, and breeding areas for wildlife. Nutrients from flood waters, as well as the inundation of floodplain soil, create important wildlife habitat characteristics, such as richness and diversity of soil and vegetation. A great many species require or prefer habitat which is as close as possible to water and/or has moist conditions, characteristics generally present on lower floodplains. Similarly, lower floodplains, because of their proximity to water and vegetated wetlands, can provide important shelter for wildlife which needs to migrate between such areas, or between such areas and uplands. The "edge" where floodplain habitat borders vegetated wetlands or water bodies is frequently very high in wildlife richness and diversity. Similar "edges" may be found elsewhere the lower floodplain, where differences in topography and frequency of flooding have created varied soil and plant community composition and structure.

Finally, vernal pool habitat is found at various locations throughout the 100 year floodplain, the pool itself generally formed by meander scars, or sloughs left after the main water channel has changed course. These pools are essential breeding sites for certain amphibians which require isolated areas that are generally flooded for at least two continuous months in the spring and/or summer and are free from fish predators. Most of these amphibians remain near the breeding pool during the remainder of their lifecyle. Many reptiles, birds and mammals also feed here.

(b) Isolated Land Subject to Flooding:

1. Isolated Land Subject to Flooding is an isolated depression or a closed basin which

serves as a ponding area for run-off or high ground water which has risen above the ground surface. Such areas are likely to be locally significant to flood control and storm damage prevention. In addition, where such areas are underlain by pervious material they are likely to be significant to public or private water supply and to ground water supply. Where such areas are underlain by pervious material covered by a mat of organic peat and muck, they are also likely to be significant to the prevention of pollution. Finally, where such areas are vernal pool habitat, they are significant to the protection of wildlife habitat.

10.57: continued

2. Isolated Land Subject to Flooding provides a temporary storage area where run-off and high ground water pond and slowly evaporate or percolate into the substrate. Filling causes lateral displacement of the ponded water onto contiguous properties, which may in turn result in damage to said properties.

3. Isolated Land Subject to Flooding, where it is underlain by pervious material, provides a point of exchange between ground and surface waters. Contaminants introduced into said area, such as septic system discharges and road salts, find easy access into the ground water and neighboring wells. Where these conditions occur and a mat of organic peat or muck covers the substrate of the area, said mat serves to detain and remove contaminants which might otherwise enter the ground water and neighboring wells.

4. Isolated Land Subject to Flooding, where it is vernal pool habitat, is an essential breeding site for certain amphibians which require isolated areas that are generally flooded for at least two continous months in the spring and/or summer and are free from fish predators. Most of these amphibians remain near the breeding pool during the remainder of their lifecycle. Many reptiles, birds and mammals also feed here.

(2) Definitions, Critical Characteristics and Boundaries.

(a) Bordering Land Subject to Flooding.

1. Bordering Land Subject to Flooding is an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies; where a bordering vegetated wetland occurs, it extends from said wetland.

2. The topography and location of Bordering Land Subject to Flooding specified in the foregoing 310 CMR 10.57(2)(a)1. are critical to the protection of the interests specified in 310 CMR 10.57(1)(a). Where Bordering Land Subject to Flooding is significant to the protection of wildlife habitat, the physical characteristics as described in the foregoing 310 CMR 10.57(1)(a)(3) are critical to the protection of that interest.

3. The boundary of Bordering Land Subject to Flooding is the estimated maximum lateral extent of flood water which will theoretically result from the statistical 100-year frequency storm. Said boundary shall be that determined by reference to the most recently available flood profile data prepared for the community within which the work is proposed under the National Flood Insurance Program (NFIP, currently administered by the Federal Emergency Management Agency, successor to the U.S. Department of Housing and Urban Development). Said boundary, so determined, shall be presumed accurate. This presumption is rebuttable and may be overcome only by credible evidence from a registered professional engineer or other professional competent in such matters.

Where NFIP Profile data is unavailable, the boundary of Bordering Land Subject to Flooding shall be the maximum lateral extent of flood water which has been observed or recorded. In the event of a conflict, the issuing authority may require the applicant to determine the boundary of Bordering Land Subject to Flooding by engineering calculations which shall be:

a. based upon a design storm of seven inches of precipitation in 24 hours (*i.e.*, a Type III Rainfall, as defined by the U.S. Soil Conservation Service);

b. based upon the standard methodologies set forth in U.S. Soil Conservation Service Technical Release No. 55, *Urban Hydrology for Small Watersheds* and Section 4 of the U.S. Soil Conservation Service, *National Engineering Hydrology Handbook*; and

c. prepared by a registered professional engineer or other professional competent in

such matters.

4. The boundary of the ten year floodplain is the estimated maximum lateral extent of the flood water which will theoretically result from the statistical ten-year frequency storm. Said boundary shall be determined as specified under 310 CMR 10.57(2)(a)3., except that where NFIP Profile data is unavailable, the boundary shall be the maximum lateral extent of flood water which has been observed or recorded during a ten year frequency storm and, in the event of conflict, engineering calculations under 310 CMR 10.57(2)(a)3.a. shall be based on a design storm of $4^{8}/_{10}$ (4.8) inches of precipitation in 24 hours.

10.57: continued

5. The only portions of this resource area which shall be presumed to be vernal pool habitat are those that have been certified as such by the Massachusetts Division of Fisheries and Wildlife, where said Division has forwarded maps and other information needed to identify the location of such habitat to the Conservation Commission and DEP prior to the filing of each Notice of Intent or Abbreviated Notice of Intent regarding that portion. Such presumption is rebuttable, and may be overcome upon a clear showing to the contrary. However, notwithstanding any other provision of 310 CMR 10.57, should an Environmental Impact Report be required for a proposed project as determined by 301 CMR 11.00: *MEPA Regulations* the performance standard established under this Section regarding vernal pool habitat shall only apply to proposed projects which would alter such habitats as have been identified prior to the time that the Secretary of the Executive Office of Energy and Environmental Affairs has determined, in accordance with the provisions of 301 CMR 11.09(4): *Eligible Projects*, that a final Environmental Impact Report for that project adequately and properly complies with the M.G.L. c. 30, § 6 through 62H (unless, subsequent to that determination, the Secretary requires supplemental information concerning vernal pool habitat, in accordance with the provisions of 301 CMR 11.17: *Transition Rules*).

6. The boundary of vernal pool habitat is that certified by the Massachusetts Division of Fisheries and Wildlife. In the event of a conflict of opinion, or the lack of a clear boundary delineation certified by the Division of Fisheries and Wildlife, the applicant may submit an opinion certified by a registered professional engineer, supported by engineering calculations, as to the probable extent of said habitat. Said calculations shall be prepared in accordance with the general requirements set forth in 310 CMR 10.57(2)(a)3.a. through c., except that the maximum extent of said water shall be based upon the total volume (rather than peak rate) of run-off from the drainage area contributing to the vernal pool and shall be further based upon a design storm of $2^{6}/_{10}$ (2.6) inches (rather than seven inches) of precipitation in 24 hours. Vernal pool habitat shall include the area within 100 feet of the boundary of the vernal pool itself, insofar as such area is contained within the boundaries of this resource area.

(b) Isolated Land Subject to Flooding.

1. Isolated Land Subject to Flooding is an isolated depression or closed basin without an inlet or an outlet. It is an area which at least once a year confines standing water to a volume of at least ¼ acre-feet and to an average depth of at least six inches.

Isolated Land Subject to Flooding may be underlain by pervious material, which in turn may be covered by a mat of organic peat or muck.

2. The characteristics specified in the foregoing 310 CMR 10.57(2)(b)1. are critical to the protection of the interests specified in 310 CMR 10.57(1)(b).

3. The boundary of Isolated Land Subject to Flooding is the perimeter of the largest observed or recorded volume of water confined in said area.

In the event of a conflict of opinion regarding the extent of water confined in an Isolated Land Subject to Flooding, the applicant may submit an opinion certified by a registered professional engineer, supported by engineering calculations, as to the probable extent of said water. Said calculations shall be prepared in accordance with the general requirements set forth in 310 CMR 10.57(2)(a)3.a. through c., except that the maximum extent of said water shall be based upon the total volume (rather than peak rate) of run-off from the drainage area contributing to the Isolated Land Subject to Flooding and shall be further based upon the assumption that there is no infiltration of said run-off into the soil within the Isolated Land Subject to Flooding.

4. The only portions of this resource area which shall be presumed to be vernal pool

habitat are those determined under procedures established in 310 CMR 10.57(2)(a)5.
5. The boundary of vernal pool habitat is that determined under procedures established in 310 CMR 10.57(2)(a)6.

(3) Presumption. Where a project involves removing, filling, dredging or altering of Land Subject to Flooding (both Bordering and Isolated Areas) the issuing authority shall presume that such an area is significant to, and only to, the respective interests specified in 310 CMR 10.57(1)(a) and (b). This presumption is rebuttable and may be overcome only upon a clear showing that said land does not play a role in the protection of said interests. In the event that the presumption is deemed to have been overcome, the issuing authority shall make a written determination to this effect, setting forth its grounds (Form 6).

10.57: continued

(4) General Performance Standards.

(a) Bordering Land Subject to Flooding.

1. Compensatory storage shall be provided for all flood storage volume that will be lost as the result of a proposed project within Bordering Land Subject to Flooding, when in the judgment of the issuing authority said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows.

Compensatory storage shall mean a volume not previously used for flood storage and shall be incrementally equal to the theoretical volume of flood water at each elevation, up to and including the 100-year flood elevation, which would be displaced by the proposed project. Such compensatory volume shall have an unrestricted hydraulic connection to the same waterway or water body. Further, with respect to waterways, such compensatory volume shall be provided within the same reach of the river, stream or creek.

2. Work within Bordering Land Subject to Flooding, including that work required to provide the above-specified compensatory storage, shall not restrict flows so as to cause an increase in flood stage or velocity.

3. Work in those portions of bordering land subject to flooding found to be significant to the protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions. Except for work which would adversely affect vernal pool habitat, a project or projects on a single lot, for which Notice(s) of Intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold, or altering vernal pool habitat, may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.

(b) Isolated Land Subject to Flooding. A proposed project in Isolated Land Subject to Flooding shall not result in the following:

1. Flood damage due to filling which causes lateral displacement of water that would otherwise be confined within said area.

2. An adverse effect on public and private water supply or ground water supply, where said area is underlain by pervious material.

3. An adverse effect on the capacity of said area to prevent pollution of the ground water, where the area is underlain by pervious material which in turn is covered by a mat of organic peat and muck.

4. An impairment of its capacity to provide wildlife habitat where said area is vernal pool habitat, as determined by procedures contained in 310 CMR 10.60.

(c) Protection of Rare Wildlife Species. Notwithstanding the provisions of 310 CMR 10.57(4)(a) or (b), no project may be permitted which will have any adverse effect on specified wildlife habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

10.58 Riverfront Area

(1) Preamble. Riverfront areas are likely to be significant to protect the private or public water supply; to protect groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries. Land adjacent to rivers and streams can protect the natural integrity of these water

bodies. The presence of natural vegetation within riverfront areas is critical to sustaining rivers as ecosystems and providing these public values. The riverfront area can prevent degradation of water quality by filtering sediments, toxic substances (such as heavy metals), and nutrients (such as phosphorus and nitrogen) from stormwater, nonpoint pollution sources, and the river itself. Sediments are trapped by vegetation before reaching the river. Nutrients and toxic substances may be detained in plant root systems or broken down by soil bacteria. Riverfront areas can trap and remove disease-causing bacteria that otherwise would reach rivers and coastal estuaries where they can contaminate shellfish beds and prohibit safe human consumption. Natural vegetation within the riverfront area also maintains water quality for fish and wildlife.

10.58: continued

Where rivers serve as water supplies or provide induced recharge to wells, the riverfront area can be important to the maintenance of drinking water quality and quantity. Land along rivers in its natural state with a high infiltration capacity increases the yield of a water supply well. When riverfront areas lack the capacity to filter pollutants, contaminants can reach human populations served by wells near rivers or by direct river intakes. The capacity of riverfront areas to filter pollutants is equally critical to surface water supplies, reducing or eliminating the need for additional treatment. In the watershed, mature vegetation within riverfront areas provides shade to moderate water temperatures and slow algal growth, which can produce odors and taste problems in drinking water.

Within riverfront areas, surface water interaction with groundwater significantly influences the stream ecosystem. The dynamic relationship between surface and groundwater within the "hyporheic zone" sustains communities of aquatic organisms which regulate the flux of nutrients, biomass and the productivity of organisms including fish within the stream itself. The hyporheic zone extends to greater distances horizontally from the channel in large, higher order streams with alluvial floodplains, but the interaction within this zone is important in smaller streams as well.

By providing recharge and retaining natural flood storage, as well as by slowing surface water runoff, riverfront areas can mitigate flooding and damage from storms. The root systems of riverfront vegetation keep soil porous, increasing infiltration capacity. Vegetation also removes excess water through evaporation and transpiration. This removal of water from the soil allows for more infiltration when flooding occurs. Increases in storage of floodwaters can decrease peak discharges and reduce storm damage. Vegetated riverfronts also dissipate the energy of storm flows, reducing damage to public and private property.

Riverfront areas are critical to maintaining thriving fisheries. Maintaining vegetation along rivers promotes fish cover, increases food and oxygen availability, decreases sedimentation, and provides spawning habitat. Maintenance of water temperatures and depths is critical to many important fish species. Where groundwater recharges surface water flows, loss of recharge as a result of impervious surfaces within the riverfront area may aggravate low flow conditions and increase water temperatures. In some cases, summer stream flows are maintained almost exclusively from groundwater recharge. Small streams are most readily impacted by removal of trees and other vegetation along the shore.

Riverfront areas are important wildlife habitat, providing food, shelter, breeding, migratory, and overwintering areas. Even some predominantly upland species use and may be seasonally dependent on riverfront areas. Riverfront areas promote biological diversity by providing habitats for an unusually wide variety of upland and wetland species, including bald eagles, osprey, and kingfishers. Large dead trees provide nesting sites for bird species that typically use the same nest from year to year. Sandy areas along rivers may serve as nesting sites for turtles and water snakes. Riverfront areas provide food for species such as wood turtles which feed and nest in uplands but use rivers as resting and overwintering areas. Riverfront areas provide corridors for the migration of wildlife for feeding or breeding. Loss of this connective function, from activities that create barriers to wildlife movement within riverfront areas, results in habitat fragmentation and causes declines in wildlife populations. Wildlife must also be able to move across riverfront areas, between uplands and the river.

Vernal pools are frequently found within depressions in riverfront areas. These pools are essential breeding sites for certain amphibians which require isolated, seasonally wet areas without predator fish. Most of these amphibians require areas of undisturbed woodlands as habitat during the non-breeding seasons. Some species require continuous woody vegetation between woodland habitat and the breeding pools. Depending on the species, during non-breeding seasons these amphibians may remain near the pools or travel ¼ mile or more from the

pools. Reptiles, especially turtles, often require areas along rivers to lay their eggs. Since amphibians and reptiles are less mobile than mammals and birds, maintaining integrity of their habitat is critical.

In those portions so extensively altered by human activity that their important wildlife habitat functions have been effectively eliminated, riverfront areas are not significant to the protection of important wildlife habitat and vernal pool habitat.

(2) Definitions, Critical Characteristics and Boundaries.

(a) A Riverfront Area is the area of land between a river's mean annual high water line and a parallel line measured horizontally. The riverfront area may include or overlap other resource areas or their buffer zones. The riverfront area does not have a buffer zone.

10.58: continued

1. A river is any natural flowing body of water that empties to any ocean, lake, pond, or other river and which flows throughout the year. Rivers include streams (*see* 310 CMR 10.04: Stream) that are perennial because surface water flows within them throughout the year. Intermittent streams are not rivers as defined herein because surface water does not flow within them throughout the year. When surface water is not flowing within an intermittent stream, it may remain in isolated pools or it may be absent. When surface water is present in contiguous and connected pool/riffle systems, it shall be determined to be flowing. Rivers begin at the point an intermittent stream becomes perennial or at the point a perennial stream flows from a spring, pond, or lake. Downstream of the first point of perennial flow, a stream normally remains a river except where interrupted by a lake or pond. Upstream of the first point of perennial flow, a stream is normally intermittent.

a. A river or stream shown as perennial on the current United States Geological Survey (USGS) or more recent map provided by the Department is perennial.

b. A river or stream shown as intermittent or not shown on the current USGS map or more recent map provided by the Department, that has a watershed size greater than or equal to one square mile, is perennial.

c. A stream shown as intermittent or not shown on the current USGS map or more recent map provided by the Department, that has a watershed size less than one square mile, is intermittent unless:

i. The stream has a watershed size of at least ½ (0.50) square mile and has a predicted flow rate greater than or equal to 0.01 cubic feet per second at the 99% flow duration using the USGS Stream Stats method. The issuing authority shall find such streams to be perennial; or

ii. When the USGS StreamStats method cannot be used because the stream does not have a mapped and digitized centerline (including but not limited to streams located in the following basins: North Coastal Basin, Taunton Basin, Buzzards Bay Basin, Cape Cod and Islands Basin, and that portion of the South Coastal Basin that is south of the Jones River sub-basin), and the stream has a watershed size of at least ½ (0.50) square mile, and the surficial geology of the contributing drainage area to the stream at the project site contains 75% or more stratified drift, the issuing authority shall find such streams to be perennial. Stratified drift shall mean sand and gravel deposits that have been layered and sorted by glacial meltwater streams. Areal percentages of stratified drift may be determined using USGS surficial geologic maps, USGS Hydrological Atlases, Massachusetts Geographical Information System (MassGIS) surficial geology data layer, or other published or electronic surficial geological information from a credible source.

d. Notwithstanding 310 CMR 10.58(2)(a)1.a. through c., the issuing authority shall find that any stream is intermittent based upon a documented field observation that the stream is not flowing. A documented field observation shall be made by a competent source and shall be based upon an observation made at least once per day, over four days in any consecutive 12 month period, during a non-drought period on a stream not significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments, or other human-made flow reductions or diversions. Field observations made after December 20, 2002 shall be documented by field notes and by dated photographs or video. Field observations made prior to December 20, 2002 shall be documented by credible evidence. All field observations shall be submitted to the issuing authority with a statement signed under the penalties

of perjury attesting to the authenticity and veracity of the field notes, photographs or video and other credible evidence. Department staff, conservation commissioners, and conservation commission staff are competent sources; issuing authorities may consider evidence from other sources that are determined to be competent.

e. Rivers include the entire length and width to the mean annual high-water line of the major rivers (Assabet, Blackstone, Charles, Chicopee, Concord, Connecticut, Deerfield, Farmington, French, Hoosic, Housatonic, Ipswich, Merrimack, Millers, Nashua, Neponset, Parker (Essex County), Quinebaug, Shawsheen, Sudbury, Taunton, Ten Mile, and Westfield).

10.58: continued

f. Rivers include perennial streams that cease to flow during periods of extended drought. Periods of extended drought for purposes of 310 CMR 10.00 shall be those periods, in those specifically identified geographic locations, determined to be at the "Advisory" or more severe drought level by the Massachusetts Drought Managment Task Force, as established by the Executive Office of Energy and Environmental Affairs and the Massachusetts Emergency Management Agency in 2001, in accordance with the Massachusetts Drought Management Plan (MDMP). Rivers and streams that are perennial under natural conditions but are significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments, or other human-made flow reductions or diversions shall be considered perennial.

g. Human-made canals (*e.g.*, the Cape Cod Canal and canals diverted from rivers in Lowell and Holyoke) and mosquito ditches associated with coastal rivers do not have riverfront areas.

h. Where rivers flow through lakes or ponds, the Riverfront Area stops at the inlet and begins again at the outlet. A water body identified as a lake, pond, or reservoir on the current USGS. map or more recent map provided by the Department, is a lake or pond, unless the issuing authority determines that the water body has primarily riverine characteristics. When a water body is not identified as a lake, pond, or reservoir on the current USGS. map or more recent map provided by the Department, the water body is a river if it has primarily riverine characteristics. Riverine characteristics may include, but are not limited to, unidirectional flow that can be visually observed or measured in the field. In addition, rivers are characterized by horizontal zonation as opposed to the vertical stratification that is typically associated with lakes and ponds. Great Ponds (*i.e.*, any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark; a list is available from the Department) are never rivers.

2. Mean Annual High-water Line of a river is the line that is apparent from visible markings or changes in the character of soils or vegetation due to the prolonged presence of water and that distinguishes between predominantly aquatic and predominantly terrestrial land. Field indicators of bankfull conditions shall be used to determine the mean annual high-water line. Bankfull field indicators include but are not limited to: changes in slope, changes in vegetation, stain lines, top of pointbars, changes in bank materials, or bank undercuts.

a. In most rivers, the first observable break in slope is coincident with bankfull conditions and the mean annual high-water line.

b. In some river reaches, the mean annual high-water line is represented by bankfull field indicators that occur above the first observable break in slope, or if no observable break in slope exists, by other bankfull field indicators. These river reaches are characterized by at least two of the following features: low gradient, meanders, oxbows, histosols, a low-flow channel, or poorly-defined or nonexistent banks.

c. In tidal rivers, the mean annual high-water line is coincident with the mean high water line determined under 310 CMR 10.23.

3. The Riverfront Area is the area of land between a river's mean annual high-water line measured horizontally outward from the river and a parallel line located 200 feet away, except that the parallel line is located:

a. 25 feet away in Boston, Brockton, Cambridge, Chelsea, Everett, Fall River, Lawrence, Lowell, Malden, New Bedford, Somerville, Springfield, Winthrop, and

Worcester;

b. 25 feet away in densely developed areas, as designated by the Secretary of the Executive Office of Energy and Environmental Affairs pursuant to 301 CMR 10.00: *Densely Developed Areas*; and

c. 100 feet away for new agricultural and aquacultural activities.

Measured horizontally means that the riverfront area extends at a right angle to the mean annual high-water line rather than along the surface of the land.

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Where a river runs through a culvert more than 200 feet in length, the riverfront area stops at a perpendicular line at the upstream end of the culvert and resumes at the downstream end. When a river contains islands, the riverfront area extends landward into the island from and parallel to the mean annual high-water line.

(b) The physical characteristics of a Riverfront Area as described in 310 CMR 10.58(2)(a) are critical to the protection of the interests specified in 310 CMR 10.58(1).

(c) The boundary of the Riverfront Area is a line parallel to the mean annual high-water line, located at the outside edge of the riverfront area. At the point where a stream becomes perennial, the riverfront area begins at a line drawn as a semicircle with a 200 foot (25 foot in densely developed areas; 100 foot for new agriculture) radius around the point and connects to the parallel line perpendicular to the mean annual high-water line which forms the outer boundary. When a river flows into coastal waters or an embayment, the river shall end at the mouth of coastal river line as delineated on the current mouth of coastal river map series maintained by the Department, subject to revisions after public notice and referred to as the Massachusetts Mouth of Coastal River Maps. If a mouth of coastal river line is not delineated on the current map series, the issuing authority shall determine the mouth of coastal river line in accordance with the Department's most current Mouth of Coastal River Policy. A mouth of coastal river line shown on the Department's mouth of coastal river map series is not evidence that a stream is perennial; such a determination shall only be made pursuant to 310 CMR 10.58(2)(a)1.

(3) Presumption. Where a proposed activity involves work within the riverfront area, the issuing authority shall presume that the area is significant to protect the private or public water supply; to protect the groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect fisheries.

The presumption is rebuttable and may be overcome by a clear showing that the riverfront area does not play a role in the protection of one or more of these interests. In the event that the presumption is deemed to have been overcome as to the protection of all the interests, the issuing authority shall make a written determination to this effect, setting forth its grounds on Form 6. Where the applicant provides information that the riverfront area at the site of the activity does not play a role in the protection of an interest, the issuing authority may determine that the presumption for that interest has been rebutted and the presumption of significance is partially overcome.

(4) General Performance Standard. Where the presumption set forth in 310 CMR 10.58(3) is not overcome, the applicant shall prove by a preponderance of the evidence that there are no practicable and substantially equivalent economic alternatives to the proposed project with less adverse effects on the interests identified in M.G.L. c.131 § 40 and that the work, including proposed mitigation, will have no significant adverse impact on the riverfront area to protect the interests identified in M.G.L. c. 131 § 40. In the event that the presumption is partially overcome, the issuing authority shall make a written determination setting forth its grounds in the Order of Conditions and the partial rebuttal shall be taken into account in the application of 310 CMR 10.58 (4)(d)1.a. and c.; the issuing authority shall impose conditions in the Order that contribute to the protection of interests for which the riverfront area is significant.

(a) Protection of Other Resource Areas. The work shall meet the performance standards for all other resource areas within the riverfront area, as identified in 310 CMR 10.30 (Coastal Bank), 10.32 (Salt Marsh), 10.55 (Bordering Vegetated Wetland), and 10.57 (Land Subject to Flooding). When work in the riverfront area is also within the buffer zone to another resource area, the performance standards for the riverfront area shall contribute to

the protection of the interests of M.G.L. c. 131, § 40 in *lieu* of any additional requirements that might otherwise be imposed on work in the buffer zone within the riverfront area.

(b) Protection of Rare Species. No project may be permitted within the riverfront area which will have any adverse effect on specified habitat sites of rare wetland or upland, vertebrate or invertebrate species, as identified by the procedures established under 310 CMR 10.59 or 10.37, or which will have any adverse effect on vernal pool habitat certified prior to the filing of the Notice of Intent.

(c) Practicable and Substantially Equivalent Economic Alternatives. There must be no practicable and substantially equivalent economic alternative to the proposed project with less adverse effects on the interests identified in M.G.L. c. 131 § 40.

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1. Definition of Practicable. As set forth in 310 CMR 10.04, an alternative is practicable and substantially equivalent economically if it is available and capable of being done after taking into consideration costs, existing technology, proposed use, and logistics, in light of overall project purposes. Available and capable of being done means the alternative is obtainable and feasible. Project purposes shall be defined generally (*e.g.*, single family home, residential subdivision, expansion of a commercial development). The alternatives analysis may reduce the scale of the activity or the number of lots available for development, consistent with the project purpose and proposed use. The alternatives analysis shall not include interior design specifications (*i.e.*, neither the proposed use or project purpose in the Notice of Intent nor the Order of Conditions should specify the number of rooms, bedrooms, *etc.* within a building). Transactions shall not be arranged to circumvent the intent of alternatives analysis review. The four factors to be considered are:

a. Costs, and whether such costs are reasonable or prohibitive to the owner. The owner means the individual or entity which owns the area where the activity will occur or which will implement the project purpose. Cost includes expenditures for a project within the riverfront area, such as land acquisition, site preparation, design, construction, landscaping, and transaction expenses. Cost does not include anticipated profits after the project purpose is achieved or expenditures to achieve the project purpose prior to receiving an Order with the exception of land acquisition costs incurred prior to August 7, 1996. In taking costs into account, the issuing authority shall be guided by these principles:

i. The cost of an alternative must be reasonable for the project purpose, and cannot be prohibitive.

ii. Higher or lower costs taken alone will not determine whether an alternative is practicable. An alternative for proposed work in the riverfront area must be a practicable and substantially equivalent economic alternative (*i.e.*, will achieve the proposed use and project purpose from an economic perspective).

iii. In considering the costs to the owner, the evaluation should focus on the financial capability reasonably expected from the type of owner (*e.g.*, individual homeowner, residential developer, small business owner, large commercial or industrial developer) rather than the personal or corporate financial status of that particular owner. Applicants should not submit, nor should issuing authorities request, financial information of a confidential nature, such as income tax records or bank statements.

iv. Issuing authorities may require documentation of costs, but may also base their determinations on descriptions of alternatives, knowledge of alternative sites, information provided by qualified professionals, comparisons to costs normally associated with similar projects, or other evidence. Any documentation of costs should be limited to that required for a determination of whether the costs are reasonable or prohibitive.

b. Existing technology, which includes best available measures (*i.e.*, the most up-to-date technology or the best designs, measures, or engineering practices that have been developed and are commercially available);

c. The Proposed Use. This term is related to the concept of project purpose. In the context of typical single family homes, the project purpose (construction of a single family house) and proposed use (family home) are virtually identical. In the context of projects where the purpose implies a business component, such as residential subdivision, commercial, and industrial projects, the proposed use typically requires

economic viability. Practicable and substantially equivalent economic alternatives include alternatives which are economically viable for the proposed use from the perspective of site location, project configuration within a site, and the scope of the project. In the context of publically financed projects, the proposed use includes consideration of legitimate governmental purposes (*e.g.*, protection of health and safety, providing economic development opportunities, or similar public purposes); and

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d. Logistics. Logistics refers to the presence or absence of physical or legal constraints. Physical characteristics of a site may influence its development. Legal barriers include circumstances where a project cannot meet other applicable requirements to obtain the necessary permits at an alternative site. An alternative site is not practicable if special legislation or changes to municipal zoning would be required to achieve the proposed use or project purpose. An alternative is not practicable if the applicant is unable to obtain the consent of the owner of an alternative site for access for the purpose of obtaining the information required by the Notice of Intent or of allowing the issuing authority to conduct a site visit.

2. Scope of Alternatives. The scope of alternatives under consideration shall be commensurate with the type and size of the project. The issuing authority shall presume that alternatives beyond the scope described below are not practicable and therefore need not be considered. The issuing authority or another party may overcome the presumption by demonstrating the practicability of a wider range of alternatives, based on cost, and whether the cost is reasonable or prohibitive to the owner; existing technology; proposed use; and logistics in light of the overall project purpose.

a. The area under consideration for practicable alternatives is limited to the lot for activities associated with the construction or expansion of a single family house on a lot recorded on or before August 1, 1996.

b. The area under consideration for practicable alternatives is limited to the lot, the subdivided lots and any adjacent lots formerly or presently owned by the same owner for:

i. activities associated with the construction or expansion of a single family house on a lot recorded after August 1, 1996;

ii. any expansion of an existing structure, including enlargement of the footprint of any structure or the addition of associated structures for single family homes (*e.g.*, a garage) on lots recorded after August 1, 1996;

iii. any activity other than the construction or expansion of a single family house where the applicant owned the lot before August 7, 1996, including the creation of a real estate subdivision but excluding public projects, and the applicant will implement the project purpose;

iv. new agriculture or aquaculture projects;

v. any activity by a public entity when funds for the purchase of the site for the project purpose have been appropriated through action of the appropriate municipal board or state agency prior to the August 7, 1996; or

vi. any lot shown on a definitive subdivision plan approved under M.G.L. c. 41, §§ 81K to 81GG, provided there is a recorded deed restriction limiting the total alteration to 5000 square feet or 10%, whichever is greater, of the riverfront area allocated to the lots within the entire subdivision.

c. Except as allowed under 310 CMR 10.58(4)(c)2.b., the area under consideration for practicable alternatives extends to the original parcel and the subdivided parcels, any adjacent parcels, and any other land which can reasonably be obtained within the municipality for:

i. activities associated with residential subdivision or housing complexes, institutional, industrial, or commercial projects; or

ii. activities conducted by municipal government.

For adjacent lots, reasonably be obtained means to purchase at market prices if otherwise practicable, as documented by offers (and any responses). For other land, reasonably be obtained means adequate in size to accommodate the project purpose and listed for sale within appropriately zoned areas, at the time of filing a Request for

Determination or Notice of Intent, within the municipality.

d. Alternatives extend to any sites which can reasonably be obtained within the appropriate region of the state for:

i. residential, institutional, commercial, or industrial activities required to evaluate off-site alternatives in more than one municipality in an Environmental Impact Report under M.G.L. c. 30, §§ 61 through 62H, or an alternatives analysis conducted by the Corps of Engineers for a Section 404 permit under the federal Clean Water Act, 33 U.S.C. 1251 *et seq*., and used for 401 Water Quality Certification under 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth*; or

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ii. activities conducted by district, county, state or federal government entities. The area to be considered is the service area within the governmental unit boundary or jurisdictional authority, or the municipality if there is no defined service area, consistent with the project purpose.

3. Evaluation of Alternatives. The applicant shall demonstrate that there are no practicable and substantially equivalent economic alternatives as defined in 310 CMR 10.58(4)(c)1., within the scope of alternatives as set forth in 310 CMR 10.58(4)(c)2., with less adverse effects on the interests identified in M.G.L. c. 131 § 40. The applicant shall submit information to describe sites and the work both for the proposed location and alternative site locations and configurations sufficient for a determination by the issuing authority under 310 CMR 10.58(4)(d). The level of detail of information shall be commensurate with the scope of the project and the practicability of alternatives. Where an applicant identifies an alternative which can be summarily demonstrated to be not practicable, an evaluation is not required.

The purpose of evaluating project alternatives is to locate activities so that impacts to the riverfront area are avoided to the extent practicable. Projects within the scope of alternatives must be evaluated to determine whether any are practicable. As much of a project as feasible shall be sited outside the riverfront area. If siting of a project entirely outside the riverfront area is not practicable, the alternatives shall be evaluated to locate the project as far as possible from the river.

The issuing authority shall not require alternatives which result in greater or substantially equivalent adverse impacts. If an alternative would result in no identifiable difference in impact, the issuing authority shall eliminate the alternative. If there would be no less adverse effects on the interests identified in M.G.L. c. 131, § 40, the proposed project rather than a practicable alternative shall be allowed, but the criteria in 310 CMR 10.58(4)(d) for determining no significant adverse impact must still be met. If there is a practicable and substantially equivalent economic alternative with less adverse effects, the proposed work shall be denied and the applicant may either withdraw the Notice of Intent or receive an Order of Conditions for the alternative, provided the applicant submitted sufficient information on the alternative in the Notice of Intent.

(d) No Significant Adverse Impact. The work, including proposed mitigation measures, must have no significant adverse impact on the riverfront area to protect the interests identified in M.G.L. c. 131, § 40.

1. Within 200 foot riverfront areas, the issuing authority may allow the alteration of up to 5000 square feet or 10% of the riverfront area within the lot, whichever is greater, on a lot recorded on or before October 6, 1997 or lots recorded after October 6, 1997 subject to the restrictions of 310 CMR 10.58(4)(c)2.b.vi., or up to 10% of the riverfront area within a lot recorded after October 6, 1997, provided that:

a. At a minimum, a 100 foot wide area of undisturbed vegetation is provided. This area shall extend from mean annual high-water along the river unless another location would better protect the interests identified in M.G.L. c. 131 § 40. If there is not a 100 foot wide area of undisturbed vegetation within the riverfront area, existing vegetative cover shall be preserved or extended to the maximum extent feasible to approximate a 100 foot wide corridor of natural vegetation. Replication and compensatory storage required to meet other resource area performance standards are allowed within this area; structural stormwater management measures may be allowed only when there is no practicable alternative. Temporary impacts where necessary for installation of linear site-related utilities are allowed, provided the area is restored to its natural conditions. Proposed work which does not meet the

requirement of 310 CMR 10.58(4)(d)1.a. may be allowed only if an applicant demonstrates by a preponderance of evidence from a competent source that an area of undisturbed vegetation with an overall average width of 100 feet will provide equivalent protection of the riverfront area, or that a partial rebuttal of the presumptions of significance is sufficient to justify a lesser area of undisturbed vegetation;

b. Stormwater is managed according to standards established by the Department in its Stormwater Policy.

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c. Proposed work does not impair the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat identified by evidence from a competent source, but not yet certified. For work within an undeveloped riverfront area which exceeds 5,000 square feet, the issuing authority may require a wildlife habitat evaluation study under 310 CMR 10.60.

d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.

The calculation of square footage of alteration shall exclude areas of replication or compensatory flood storage required to meet performance standards for other resource areas, or any area of restoration within the riverfront area. The calculation also shall exclude areas used for structural stormwater management measures, provided there is no practicable alternative to siting these structures within the riverfront area and provided a wildlife corridor is maintained (*e.g.* detention basins shall not be fenced).

2. Within 25 foot riverfront areas, any proposed work shall cause no significant adverse impact by:

a. Limiting alteration to the maximum extent feasible, and at a minimum, preserving or establishing a corridor of undisturbed vegetation of a maximum feasible width. Replication and compensatory storage required to meet other resource area performance standards are allowed within this area; structural stormwater management measures shall be allowed only when there is no practicable alternative;

b. Providing stormwater management according to standards established by the Department;

c. Preserving the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat when identified by evidence from a competent source but not yet certified; and

d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.

3. Notwithstanding the provisions of 310 CMR10.58(4)(d)1. or 2., the issuing authority shall allow the construction of a single family house, a septic system if no sewer is available, and a driveway, on a lot recorded before August 7, 1996 where the size or shape of the lot within the riverfront area prevents the construction from meeting the requirements of 310 CMR 10.58(4)(d)1. or 2., provided that:

a. The lot can be developed for such purposes under the applicable provisions of other municipal and state law; and

b. The performance standards of 310 CMR 10.58(4)(d) are met to the maximum extent feasible. In difficult siting situations, the maximum extent of yards around houses should be limited to the area necessary for construction. Except where the lot contains vernal pool habitat or specified habitat sites of rare species, a wildlife habitat evaluation study shall not be required.

4. Notwithstanding the provisions of 310 CMR 10.58(4)(d)1. or 2., the issuing authority may allow the construction of a commercial structure of minimum feasible dimension, on a lot recorded before August 7, 1996 where the size or shape of the lot within the riverfront area prevents the construction from meeting the requirements of 310 CMR 10.58(4)(d)1. or 2., only if:

a. The lot can be developed for such purposes and cannot be developed for any other

purposes under the applicable provisions of other municipal and state law;

b. The work is not eligible for 310 CMR 10.58(5); and

c. The performance standards of 310 CMR 10.58(4)(d)1. or 2. are met to the maximum extent feasible.

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(5) Redevelopment Within Previously Developed Riverfront Areas; Restoration and Mitigation. Notwithstanding the provisions of 310 CMR 10.58(4)(c) and (d), the issuing authority may allow work to redevelop a previously developed riverfront area, provided the proposed work improves existing conditions. Redevelopment means replacement, rehabilitation or expansion of existing structures, improvement of existing roads, or reuse of degraded or previously developed areas. A previously developed riverfront area contains areas degraded prior to August 7, 1996 by impervious surfaces from existing structures or pavement, absence of topsoil, junkyards, or abandoned dumping grounds. Work to redevelop previously developed riverfront areas shall conform to the following criteria:

(a) At a minimum, proposed work shall result in an improvement over existing conditions of the capacity of the riverfront area to protect the interests identified in M.G.L. c. 131 § 40. When a lot is previously developed but no portion of the riverfront area is degraded, the requirements of 310 CMR 10.58(4) shall be met.

(b) Stormwater management is provided according to standards established by the Department.

(c) Within 200 foot riverfront areas, proposed work shall not be located closer to the river than existing conditions or 100 feet, whichever is less, or not closer than existing conditions within 25 foot riverfront areas, except in accordance with 310 CMR 10.58(5)(f) or (g).

(d) Proposed work, including expansion of existing structures, shall be located outside the riverfront area or toward the riverfront area boundary and away from the river, except in accordance with 310 CMR 10.58(5)(f) or (g).

(e) The area of proposed work shall not exceed the amount of degraded area, provided that the proposed work may alter up to 10% if the degraded area is less than 10% of the riverfront area, except in accordance with 310 CMR 10.58(5)(f) or (g).

(f) When an applicant proposes restoration on-site of degraded riverfront area, alteration may be allowed notwithstanding the criteria of 310 CMR 10.58(5)(c), (d), and (e) at a ratio in square feet of at least 1:1 of restored area to area of alteration not conforming to the criteria. Areas immediately along the river shall be selected for restoration. Alteration not conforming to the criteria shall begin at the riverfront area boundary. Restoration shall include:

1. removal of all debris, but retaining any trees or other mature vegetation;
2. grading to a topography which reduces runoff and increases infiltration;
3. coverage by topsoil at a depth consistent with natural conditions at the site; and
4. seeding and planting with an erosion control seed mixture, followed by plantings of herbaceous and woody species appropriate to the site;

(g) When an applicant proposes mitigation either on-site or in the riverfront area within the same general area of the river basin, alteration may be allowed notwithstanding the criteria of 310 CMR 10.58(5)(c), (d), or (e) at a ratio in square feet of at least 2:1 of mitigation area to area of alteration not conforming to the criteria or an equivalent level of environmental protection where square footage is not a relevant measure. Alteration not conforming to the criteria shall begin at the riverfront area boundary. Mitigation may include off-site restoration of riverfront areas, conservation restrictions under M.G.L. c. 184, §§ 31 through 33 to preserve undisturbed riverfront areas that could be otherwise altered under 310 CMR 10.00, the purchase of development rights within the riverfront area, the restoration of bordering vegetated wetland, projects to remedy an existing adverse impact on the interests identified in M.G.L. c. 131, § 40 for which the applicant is not legally responsible, or similar activities undertaken voluntarily by the applicant which will support a determination by the issuing authority of no significant adverse impact. Preference shall be given to potential mitigation projects, if any, identified in a River Basin Plan approved by the Secretary of the

Executive Office of Energy and Environmental Affairs.

(h) The issuing authority shall include a continuing condition in the Certificate of Compliance for projects under 310 CMR 10.58(5)(f) or (g) prohibiting further alteration within the restoration or mitigation area, except as may be required to maintain the area in its restored or mitigated condition. Prior to requesting the issuance of the Certificate of Compliance, the applicant shall demonstrate the restoration or mitigation has been successfully completed for at least two growing seasons.

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(6) Notwithstanding the Provisions of 310 CMR 10.58(1) through (5), Certain Activities or Areas Are Grandfathered or 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.

(b) Certain minor activities as identified in 310 CMR 10.02(2)(b)1.

(c) On-site sewage disposal systems in existence on August 7, 1996 and the repair or upgrade of existing systems in compliance with 310 CMR 15.000: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage*. New construction of a system under 310 CMR 15.000 must comply with 310 CMR 10.58, subject to the presumption for the siting of systems in 310 CMR 10.03.

(d) The expansion of structures, airports, and marine cargo terminals, provided they are owned by a political subdivision and the expansion activity was physically begun on or before November 1, 1996.

(e) Projects for which a draft environmental impact report was prepared and submitted pursuant to M.G.L. c. 30, § 62B, on or before November 1, 1996, or as extended by the Department for just cause but no later than December 31, 1996.

(f) Projects for which a building permit conforming to local requirements was filed on or before October 1, 1996 and granted on or before April 1, 1997, or as extended by the conservation commission for just cause by no more than 60 days.

(g) The road and infrastructure shown on a definitive subdivision plan approved or endorsed under M.G.L. c. 41, § 81U, on or before August 1, 1996. Activities on the subdivided lots are subject to 310 CMR 10.58 unless they received a building permit under 310 CMR 10.58(6)(f).

(h) Construction, expansion, repair, restoration, alteration, replacement, operation and maintenance of public or private local or regional wastewater treatment plants and their related structures, conveyance systems, and facilities, including utility lines.

(i) Structures and activities subject to a M.G.L. c. 91 waterways license or permit, or authorized prior to 1973 by a special act, are exempt, provided the structure or activity is subject to jurisdiction and obtains a license, permit, or authorization under 310 CMR 9.00: *Waterways*.

(j) Activities within riverfront areas subject to a protective order under M.G.L. c. 21, § 17B, the Scenic Rivers Act.

(k) Activities within an Historic Mill Complex.

10.59: Estimated Habitats of Rare Wildlife (for Inland Wetlands)

If a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program (hereinafter referred to as the Program), a fully completed copy of the Notice of Intent (including all plans, reports, and other materials required under 310 CMR

10.05(4)(a) and (b)) for such project shall be sent to the Program via the U.S. Postal Service by express or priority mail (or otherwise sent in a manner that guarantees delivery within two days). Such copy shall be sent no later than the date of the filing of the Notice of Intent with the issuing authority. Proof of timely mailing or other delivery to the Program of the copy of such Notice of Intent shall be included in the Notice of Intent which is submitted to the issuing authority and sent to the Department's regional office.

Estimated Habitat Maps shall be based on the estimated geographical extent of the habitats of all state-listed vertebrate and invertebrate animal species for which a reported occurrence within the last 25 years has been accepted by the Program and incorporated into its official data base.

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Within 30 days of the filing of such a Notice of Intent with the issuing authority the Program shall determine whether any state-listed species identified on the aforementioned map are likely to continue to be located on or near the site of the original occurrence and, if so, whether the area to be altered by the proposed project is in fact part of such species' habitat. Such determination shall be presumed by the issuing authority to be correct. Any proposed project which would alter a resource area that is not located on the most recent Estimated Habitat Map (if any) provided to the conservation commission, shall be presumed not to be within a rare species' habitat. Both of these presumptions are rebuttable and may be overcome upon a clear showing to the contrary. If the issuing authority fails to receive a response from the Program within 30 days of the filing of such a Notice of Intent, a copy of which was received by the Program in a timely manner, it shall issue its Order of Conditions based on available information; however, the fact that a proposed project would alter a resource area that is located on an Estimated Habitat Map shall not be considered sufficient evidence in itself that such project is in fact within the habitat of a rare species.

If the Program determines that a resource area which would be altered by a proposed project is in fact within the habitat of a state-listed species, it shall provide in writing to the applicant and to the Conservation Commission and the Department, the identification of the species whose habitat would be altered by the proposed project, and all other relevant information which the Program has regarding the species' location and habitat requirements, insofar as such information may assist the applicant and the issuing authority to determine whether the project is or can be designed so as to meet the performance standard set in 310 CMR 10.59.

Notwithstanding 310 CMR 10.53 through 10.58 and 10.60, if a proposed project is found by the issuing authority to alter a resource area which is part of the habitat of a state-listed species, such project shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species. A determination of whether or not a proposed project will have such an adverse effect shall be made by the issuing authority. However, a written opinion of the Program on whether or not a proposed project will have such an adverse effect shall be presumed by the issuing authority to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary.

The conservation commission shall not issue an Order of Conditions under 310 CMR 10.05(6) regarding any such project for at least 30 days after the filing of the Notice of Intent unless the Program before such time period has elapsed has either determined that the resource area(s) which would be altered by the project is not in fact within the habitat of a state-listed species or, if it has determined that such resource area(s) is in fact within rare species habitat, rendered a written opinion as to whether the project will have an adverse effect on that habitat.

Notwithstanding any other provision of 310 CMR 10.58, should an Environmental Impact Report be required for a proposed project under the M.G.L. c. 30, §§ 6 through 62H, as determined by 301 CMR 11.00: *MEPA Regulations* the performance standard established under 310 CMR 10.58 shall only apply to proposed projects which would alter the habitat of a rare species for which an occurrence has been entered into the official data base of the Massachusetts Natural Heritage and Endangered Species Program prior to the time that the Secretary of the Executive Office of Energy and Environmental Affairs has determined, in accordance with the provisions of 301 CMR 11.09(4): *Eligible Projects*, that a final Environmental Impact Report for that project adequately and properly complies with the M.G.L. c. 30, §§ 6 through 62H (unless, subsequent to that determination, the Secretary requires supplemental information concerning state-listed species, in accordance with the provisions of 301 CMR 11.17: *Transition Rules*).

10.60: Wildlife Habitat Evaluations

(1) Measuring Adverse Effects on Wildlife Habitat.

(a) To the extent that a proposed project on inland Banks, Land under Water, Riverfront Area, or Land Subject to Flooding will alter vernal pool habitat or will alter other wildlife habitat beyond the thresholds permitted under 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., 10.57(4)(a)3. and 10.58(4)(d)1., such alterations may be permitted only if they will have no adverse effects on wildlife habitat. Adverse effects on wildlife habitat mean the alteration of any habitat characteristic listed in 310 CMR 10.60(2), insofar as such alteration will, following two growing seasons of project completion and thereafter (or, if a project would eliminate trees, upon the maturity of replanted saplings) substantially reduce its capacity to provide the important wildlife habitat functions listed in 310 CMR 10.60(2). Such performance standard, however, shall not apply to the habitat of rare species, which are covered by the performance standards established under 310 CMR 10.59.

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(b) An evaluation by the applicant of whether a proposed project will have an adverse effect on wildlife habitat beyond permissible thresholds shall be performed by an individual with at least a masters degree in wildlife biology or ecological science from an accredited college or university, or other competent professional with at least two years experience in wildlife habitat evaluation.

(c) Any wildlife habitat management practices conducted by the Division of Fisheries and Wildlife, and any wildlife management practices of any individual or organization if reviewed and approved in writing by said Division, shall be presumed to have no adverse effect on wildlife habitat. Such presumption is rebuttable, and may be overcome by a clear showing to the contrary.

(2) Wildlife Habitat Characteristics of Inland Resource Areas.

(a) Banks. The topography, soil structure, and plant community composition and structure of banks can provide the following important wildlife habitat functions:

1. Food, shelter and migratory and breeding areas for wildlife
2. Overwintering areas for mammals and reptiles.

(b) Land under Water Bodies or Waterways. The plant community and soil composition and structure, hydrologic regime, topography and water quality of land under water bodies or waterways can provide the following important wildlife habitat functions:

1. Food, shelter and breeding areas for wildlife;
2. Overwintering areas for mammals, reptiles and amphibians.

(c) Vernal Pool Habitat. The topography, soil structure, plant community composition and structure, and hydrologic regime of vernal pool habitat can provide the following important wildlife habitat functions:

\ 1. Food, shelter, migratory and breeding areas, and overwintering areas for amphibians;
2. Food for other wildlife.

(d) Lower Floodplains. The hydrologic regime, plant community and soil composition and structure, topography, and proximity to water bodies and waterways of lower floodplains can provide the following important wildlife habitat functions:

1. Food, shelter, migratory and overwintering areas for wildlife;
2. Breeding areas for birds, mammals and reptiles.

(e) Riverfront Area. The topography, soil structure, plant community composition and structure, and hydrologic regime can provide the following important wildlife habitat functions:

1. Food, shelter, overwintering and breeding areas for wildlife, including turtle nesting areas, nesting sites for birds which typically reuse specific nesting sites, cavity trees, and isolated depressions that function as vernal pools.
2. Migratory areas along the riparian corridor including the movement of wildlife unimpeded by barriers within the riverfront area.

(3) Restoration and Replication of Altered Habitat. Alterations of wildlife habitat characteristics beyond permissible thresholds may be restored onsite or replicated offsite in accordance with the following general conditions, and any additional conditions the issuing authority deems necessary to insure that the standard in 310 CMR 10.60(1)(a) is satisfied:

(a) the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");

(b) the elevation of groundwater relative to the surface of the replacement area shall be approximately equal to that of the lost area;

(c) the replacement area shall be located within the same general area as the lost area. In

the case of banks and land under water, the replacement area shall be located on the same water body or waterway if the latter has not been rechanneled or otherwise relocated. In the case of bordering land subject to flooding, the replacement area shall be located approximately the same distance from the water body or waterway as the lost area. In the case of vernal pool habitat, the replacement area shall be located in close proximity to the lost area;

(d) interspersion and diversity of vegetation, water and other wildlife habitat characteristics of the replacement area, as well as its location relative to neighboring wildlife habitats, shall be similar to that of the lost areas, insofar as necessary to maintain the wildlife habitat functions of the lost area;

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(e) the project shall not alter ten or more acres of Land Subject to Flooding or Land under Water found to be significant to the protection of wildlife habitat, or 2,000 feet or more of Bank found to be significant to the protection of wildlife habitat (in the case of a bank of a stream or river, this shall be measured on each side of said stream or river).
(f) if the replacement area is located in an area subject to M.G.L. c. 131, § 40, there shall be no adverse effect on the existing important wildlife habitat functions of said area as measured by the standards of 310 CMR 10.60;
(g) the "thresholds" established in 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., 10.57(4)(a)3. and 10.58(4)(d)1.c. (below which alterations of resource areas are not deemed to impair capacity to provide important wildlife habitat functions) shall not apply to any replacement area; and
(h) the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in 310 CMR 10.51 through 10.60.

REGULATORY AUTHORITY

310 CMR 10.00: M.G.L. c. 131, § 40.

NON-TEXT PAGE