

legal

Alarming Wetland Protection Trends

BY MARK A. KABLACK

A recent project involving construction of a single-family home on a residential lot, within 50 feet of bordering vegetated wetlands, has brought to light several alarming trends as a result of recent changes in the Wetland Protection Act.



The Massachusetts Department of Environmental

Protection (DEP) enacted a series of regulatory changes in 2005 pursuant to the Wetland Protection Act (Massachusetts General Laws, Chapter 131, Section 40) by implementing revisions to the regulations codified at 310 Code of Massachusetts Regulations 10. These revisions were billed as an attempt by DEP to streamline the permitting process by reducing the filing requirements for certain work within the buffer zone (100 feet of bordering vegetated wetland), reducing certain abutter appeals and revising the fee structure for permit filings and appeals. In exchange, the new regulations were designed to allow DEP more time to focus on projects with greater potential impact to wetland resources and enforcement actions for wetland violations.

Zones Within Zones

To accomplish this end, the new regulations, in part, establish the concept of an inner and outer zone within the wetland buffer zone. A presumption of "no impact"

has been created in the new regulations when work is proposed 50 feet or more from a wetland boundary (the outer zone). Provided that a project is located within the outer zone, and is otherwise located away from sensitive areas (e.g. Areas of Critical Environmental Concern), incorporates storm water management and provides erosion controls during construction, it can receive expedited review and approval through the filing of an Abbreviated Notice of Resource Area Delineation with limited appeal rights. The benefits to a project proponent are obvious, and the reduction in the number of permits and appeals will enable local conservation commissions and DEP to focus on the larger, more detrimental projects affecting the alteration of wetlands.

My experience with the new regulations, however, has revealed some unforeseen practical consequences that will impact projects going forward. The project mentioned above involved a single-family home construction proposal on an existing, unimproved lot within a larger subdivision of existing homes. The lot was constrained by a detention basin and drainage easement, together with restrictions related to nearby wetland areas. The lot was moderately sloped, with mixed deciduous trees and shrub vegetation. No other site development constraints were evident. A Notice of Intent (NOI) was filed with the local conservation commission to perform site work and construction for the project. The home would be serviced by public water and sewer, so no well or septic improvements were planned or proposed. The NOI identified the restrictions mentioned above, which together with zoning setback re-

quirements predetermined placement of the proposed home without much room for modification or realignment. The corner of the proposed garage would be located approximately 10 feet from the wetland boundary; however, there would be no direct alteration of wetlands. The project applicant proposed several design conditions, including sedimentation and erosion controls, landscaping and permanent demarcation of the wetland boundary as mitigation. There was no local wetland bylaw in effect, so the NOI was submitted solely under the Wetland Protection Act and its implementing regulations.

The local conservation commission issued a Denial Order of Conditions stating that: 1) the project failed to consider mitigating alternatives; and 2) that the project failed to meet a no-build guideline of 30 feet from the wetland boundary. The applicant filed a request for a Superseding Order of Conditions, submitting to DEP the entire NOI filing and describing in detail how the conditions of the local denial were not consistent with the Wetland Protection Act or its implementing regulations. DEP reaffirmed the denials stating multiple reasons therefore. The stated reasons for denial, together with statements made by DEP personnel during the site walk, highlight two negative consequences of the new regulations.

Unexpected Consequences

The concept of an outer zone, by its very definition, creates the idea of an inner zone for projects located less than 50 feet from the wetland boundary. While advantageous presumptions are in place with respect to outer zone projects, reciprocal

presumptions appear to be in place with respect to inner zone projects. A project proposed within the inner zone appears to be burdened with the presumption that it will have adverse impact to wetland resources. This is the first unexpected consequence of the new wetland regulations, as there were never any enumerated standards for such negative presumptions. Furthermore, there were never any enumerated standards for how the negative presumption could be rebutted.

A negative presumption is workable when a project proponent is able to rebut the presumption with site-specific and project-specific data. In the new regulations, we appear to have a "bright line test" for establishing whether a project is acceptable or not based upon whether a project is located within the inner zone or without. The bright line test does not appear to consider site-specific and project-specific conditions to overcome the presumption. This is a very unfortunate consequence of the new regulations, as the bright line test begins to resemble a 50-foot no-build zone. If the no-build zone is the ultimate price for achieving expedited review for projects in the outer zone, it is an expensive price for project proponents to have to pay.

The project discussed above also has highlighted a second unexpected and unfortunate consequence of the new regulations. In line with DEP's attempt to streamline the permitting process, the agency now appears to be providing considerable deference to local conservation commissions in the application and enforcement of the Wetlands Protection Act on appeal. By de-

ferring to local conservation commissions, DEP hopes to accomplish two objectives: 1) to deter applicants from considering the casual appeal for a Superseding Order of Conditions as an easy solution to local resistance to a project, and 2) to reduce the amount of time DEP would otherwise spend on reviewing a project in true de novo review terms. Both objectives would free up DEP, allowing it to focus on the more egregious cases. While this is an identified goal of the new regulations, the deferential standard raises a number of concerns for project proponents.

Prior to the new regulations, DEP conducted de novo review of projects on appeal for a Superseding Order of Conditions. The term de novo means "anew, afresh, for a second time." Under de novo review, DEP would review an NOI filing, visit a project site and render its own decision based upon the training and skill of DEP personnel, without persuasion from local political issues. A decision under de novo review is without deference to the local conservation commission. DEP would render a decision based upon the individual merits of the project, without determination of whether the underlying decision by the local conservation commission was reasonable or not.

Deferential Review

Under a deferential standard of review, DEP will now look to whether a decision is reasonable. In other words, DEP will determine whether there is reasonable justification for a decision rendered by a local conservation commission. It will not take a fresh look at a project as before, and it will not render a

decision based solely on the merits of the case as DEP sees and understands them. If a local conservation commission has justifiable grounds for its decision, DEP will affirm.

The consequence of DEP conducting a deferential standard of review is problematic for obvious reasons. To name a few, the standards and guidelines of individual conservation commissions vary from municipality to municipality. This is true of local conservation commissions that look solely to the Wetlands Protection Act. The situation worsens when a local wetland bylaw is involved. Under such variation, a project proponent will not have a standardized and consistent mechanism to measure the impacts of a particular project and the likelihood of success. Secondly, local conservation commissions vary in their training and skill level. Commission members can be easily swayed by issues that are locally charged but of little state-impact. Project proponents deserve a fresh look on projects by DEP, measured against state documented standards, incorporated through the administrative procedures of regulation adoption and modification, when proposing a project for review under state law.

The project described above highlights just two unexpected consequences of the new wetland regulations. Project proponents will need to be vigilant and share in their collective experiences in order to determine the full extent of these alarming trends. ◆

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