

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, the ocean
- any freshwater wetland, any estuary
- any coastal wetland, any creek
- any beach, bordering any river
- any dune, on any stream
- any flat, any pond
- any marsh, or any lake
- or any swamp
- (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.

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(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

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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;

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- 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

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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).

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(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

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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:

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- (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.