
NEW WETLANDS REGULATIONS

The Massachusetts Department of Environmental Protection (DEP) is promulgating new regulations intended to streamline the process for approval of development projects subject to wetlands regulation. First, the DEP has created a type of "safe harbor" for projects in vegetative buffer zones. Subject to certain important provisos, a project that leaves the first fifty feet of buffer zone undisturbed is entitled to simplified review, essentially an "as of right" approval. Second, opponents to projects now will lose the right to require an adjudicatory hearing before the DEP unless they document their opposition during the permitting process.

New Buffer Zone Regulation

The previous regulations of the DEP provide jurisdiction over, and certain protections for, buffer zones around wetlands. Under those regulations, administered first by local conservation commissions and then by superseding permitting by the DEP, the conservation commission or DEP could deny approval to projects that were predicted to affect wetlands though the work was to occur in the buffer zone.

Now, the DEP's wetlands regulations will allow as-of-right permitting of a project where no work will occur closer than 50 feet from wetlands. The only issue will be whether the wetlands have been properly delineated on the plans. The DEP calls this "simplified review." Once the developer has agreed not to perform work (other than work exempt under the regulations) closer than 50 feet, the only basis to challenge the proposal with the DEP will be errors in the wetlands delineation.

This new "safe harbor" has several significant limitations, requirements, and exceptions. First, "simplified review" is available only under the state wetlands act, not local wetlands by-laws. Therefore, municipalities still can utilize any local regulation to stymie "simplified review" projects. Second, the developer must agree to meet any applicable Stormwater Management Standards for the project, as well as erosion and sedimentation control. Third, certain specially-protected areas, such as rare species habitats, coastal wetlands, aquifer sources, and sites with steep slopes, are not eligible. Fourth, the buffer zone outside the first 50 feet cannot be improved with additional impervious surface that would exceed 40% of that area. Most importantly, once the rights under the simplified review are exercised, there can be no work within 50 feet of the wetlands for a minimum of three years and for so long as the previously-issued permit is utilized.

New Restrictions On Abutter Rights

Any abutter seeking to file an adjudicatory appeal with the DEP from the grant of a permit now will have to establish that he or she participated before the conservation commission (when it considered the Order of Conditions) or before the DEP (when it considered the Superseding Order of Conditions). The claim of failure to notify an abutter also now will be more difficult to assert. Attempted delivery, as with a U.S. Postal Service proof of attempted service, will be enough. Moreover, abutters will now have to "prove" that they were harmed by a failure of notice. The adjudicatory proceeding process also has been streamlined, with greater opportunities for project proponents to dismiss appeals before they get to "trial."

What does this mean for developers?

The principal limiting factor for the new "safe harbor" will be the effect of any local wetlands regulation. Local by-laws still will have the potential to prevent project approvals, even those allowed as of right under the DEP regulations. Thus, the new regulations will be especially effective in municipalities with no local wetlands by-law.

The new regulations apply only to projects having no involvement in the wetlands themselves and in the first 50 feet of buffer. However, there is no prohibition on use of traditional requests for Orders of Condition for that portion of a project requiring approvals in wetlands or the first 50 feet of buffer, then later using simplified review for the remainder of the project. For example, a developer could seek traditional review for the laying of subdivision roads and infrastructure, and simplified review for approval of development of individual house lots or groups of lots.

Limitations on abutters' rights will be good news to developers.

What does this mean for project opponents?

Project opponents will need to rely upon local by-laws to battle projects that fall within the "safe harbor" under simplified review. Otherwise, there will be little basis to object to projects, other than the proper delineation of the wetlands. The other enforcement opportunities will be in ensuring that construction conforms to the requirements for simplified review, such as conformity with stormwater management, limited impervious surface, and no disturbance within 50 feet of the wetlands.

Most importantly, project opponents will need to provide written comments to the conservation commission and/or the DEP in order to preserve any right to an adjudicatory hearing. This may mean hiring lawyers and engineers earlier in the process, not relying initially on the agencies to defeat or narrow projects.

What does this mean for towns?

Municipalities that have a local wetlands by-law will need to decide whether to work with or work against this new simplified review for projects in buffer zones. The DEP's view is that the certainty of maintaining development at least 50 feet from wetlands justifies granting the certainty of as-of-right projects to developers. The DEP points to a study showing that buffer zone projects already are being approved with closest development at an average of 14 to 27 feet from wetlands. Certain municipalities may feel that the DEP has not struck an appropriate balance of interests. Other municipalities may support the DEP's goals, and may therefore conform their local regulation to create a similar "safe harbor" under local by-laws.

Projects proceeding "as of right" under simplified review will require additional monitoring by conservation agents to ensure that the conditions and assumptions of the approvals are met during construction. Since there is no appeal and no right to condition grants of simplified review permits, the conservation agent will need to ensure that project development actually conforms to the requirements of the regulation.

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