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Understanding Massachusetts Wetlands Restrictions and the Agricultural Exemption

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Many farmers in Massachusetts have the challenge of dealing with wetlands on their land. Wetlands are areas that contain surface waters and are protected under the state Wetlands Protection Act (WPA), Massachusetts General Laws (MGL) Chapter 131, Section 40, such as streams, ponds, bogs, marshes, swamps, floodplains, isolated land subject to flooding, wet meadows, salt ponds, salt marshes, land under the ocean, and fish runs. In 1996 the Rivers Protection Act (RPA) went into effect to amend the WPA by including a new resource area – Riverfront Areas. The WPA requires anyone performing agricultural activities within wetland areas, their 100-foot buffer zones, 200 feet of a perennial stream, or the 100-year floodplain and endangered species habitat to obtain a wetland permit from the local Conservation Commission (ConCom). However, some projects can be exempted from this requirement.

What Activities are Exempted by the WPA?

310 CMR 10.04 provides that work performed for the normal maintenance or improvement of land in agricultural or aquacultural use are exempted from ConCom review. In short, an agricultural use must satisfy the following tests to qualify for exemption: (1) it is the work or the activity that is exempted and not the land itself; (2) the activity must be within a set of activities defined as "normal" maintenance or improvement of the land; and (3) the activity must occur on the land that is in agricultural or aquacultural use. However, even though an activity is considered exempted, there are conditions that must be satisfied get the exemption. For instances, all maintenance or improvement shall be "undertaken in such a manner to prevent erosion and situation of adjacent water bodies and wetlands;" filling or dredging of a salt marsh is prohibited under all circumstances; and all maintenance and improvement must be "conducted in accordance with federal and state laws," among other requirements. There are also certain limitations on size, location, loss of flood storage capacity, etc. Some example of exempted activities include management of existing field edges, squaring off fields and bogs, construction of farm structures (not including habitable dwellings), etc.



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How Do you Apply for this Exemption?

Normally if a project may impact wetland areas or is located within 200 feet of a river or perennial stream or other projected resource areas, one needs to file a formal application known as a "Notice of Intent" (NOI) with the local ConCom. The NOI is a formal presentation usually prepared with the assistance of a civil engineer and a wetland consultant, based on the requirements of the WPA, showing the details of the proposed project. After receiving the NOI, ConCom will set a time for a public hearing on the project and will advertise the hearing in the local paper at the applicant's expense. Once the hearing is completed and closed, the Commission must issue its decision, known as an "Order of Conditions," within 21 days. The applicant may appeal an Order of Conditions issued under the Act within 10 days. Abutters, a group of at least ten residents of the community, or the Department of Environmental Protection can also appeal within the 10-day period. Note that any proposed or undertaken activity to "remove, fill, dredge or alter a protected area" within specified sections in the Act must be approved by the ConCom.

If you believe your project should be exempted from ConCom's review or your project is located entirely in the 100-foot wetlands buffer zone (but not within 200 feet of a perennial stream or river), you may submit a Request for Determination of Applicability (RDA) instead. You will need to submit the RDA with a plan, sketch or other description of the work to be done, showing any measures you plan to take to protect nearby wetlands from alteration. If the project is determined to have no wetlands impact or be exempted, you will be given permission to proceed as soon as the 10-day appeal period passes. It is good practice to talk to your Town's ConCom agent (or have your lawyer do so) to help decide which, if any, filings need to be made.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys Danielle Justo or Yana Zheng .

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