

***MassDEP Issues FAQs for Conservation Commissions and Applicants
for Wetlands Permitting Under the COVID-19 State of Emergency***

[Nathaniel Stevens, Esq.](#)
McGregor & Legere, PC

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The Massachusetts Department of Environmental Protection (“MassDEP”) recently issued its much-anticipated “MassDEP COVID-19 Wetlands FAQs for Conservation Commissions and Applicants” (“FAQs”)(copy available [here](#)). Posted on May 5, 2020, they could not have come soon enough for commissions, project proponents, and others involved with wetlands permitting under the Massachusetts Wetlands Protection Act (“WPA”) and the state’s Wetlands Regulations (310 CMR 10.00).

In the month since Governor Baker signed Chapter 53 of the Acts of 2020 (known by some as the “Municipal Relief Act” or by MassDEP as the “Emergency Act”), commissions and their agents, as well as applicants and their counsel, have sought answers from MassDEP to many questions raised while administering the WPA and the Wetland Regulations during the COVID-19 State of Emergency. The FAQs address those questions.

Most significantly, the new FAQs announce a much-needed mechanism to address a significant issue for applicants created by MassDEP’s interpretation of the various COVID-19 laws and orders. MassDEP takes the position that the 10-day appeal period for Orders and Determinations issued by commissions has not been tolled or extended and remains the same for anyone but MassDEP. MassDEP says that, as a state agency, its 10-day period to initiate its own request for a Superseding Determination or Order is tolled until 45 days following the end of the state of emergency. MassDEP calls such a request “interven[ing] on its own behalf.”

Given that the WPA says that work cannot begin pursuant to an Order or positive Determination until “all appeal periods have elapsed,” MassDEP’s interpretation could be problematic for applicants wanting to begin work, and may leave commissions wondering if an applicant starting work is legal.

To help resolve this predicament, the FAQs provide that an applicant who wishes to proceed with work and has not received any appeal within the 10-day period may request a letter from MassDEP indicating whether it plans to appeal to itself a Superseding Order or Determination. The applicant is to contact the appropriate Regional Office. This is a very helpful, useful new tool.

Notably, the FAQs do not address whether the 10-day period to appeal a Superseding Determination or Order within MassDEP for an adjudicatory hearing has changed. It would be helpful if it did.

The FAQs supplement, but do not supersede, MassDEP’s earlier “Guidance to Conservation Commissions and Applicants” which MassDEP first issued on April 17, 2020 after its offices were closed due to the COVID-19 emergency. The agency updated that guidance on May 5, 2020 at the time it issued these FAQs (the “Guidance”; a copy of which can be found [here](#)).

The revised Guidance essentially says, since MassDEP's offices are closed to the public, one method under the WPA for delivering a copy of any wetland application is no longer possible – namely, hand-delivery.

MassDEP now asks applicants to e-mail a copy to the appropriate Regional Office, in addition to mailing a hard copy, since incoming mail is not being processed as quickly as before.

Likewise, MassDEP also asks conservation commissions to e-mail a copy of any Determination of Applicability, Order of Conditions, Order of Resource Area Delineation, Extension, Certificate of Compliance, Enforcement Order, or Emergency Certification. This is in addition to the hard copy that must be mailed to the agency.

The new FAQs cover a broader range of topics and in greater depth than the Guidance.

On the first page, the FAQs provide helpful wetland program contact information for each Regional Office and the Boston Headquarters Office.

The FAQs expand on procedures for submitting applications to commissions and MassDEP. Notably, MassDEP takes the position that the Emergency Act does not change any of the requirements under the WPA for filing with a commission or MassDEP.

MassDEP reiterates that, in addition to following the statutory requirements, a copy of any filing with a commission should be e-mailed to the appropriate MassDEP Regional Office.

As for filing a wetland application of any type with a conservation commission, the FAQs give the good advice of checking with the conservation commission directly, while noting that the Emergency Act does allow for electronic filing with the City or Town Clerk. Some attorneys maintain this e-filing is required to be a valid filing; others say it an available option.

Turning to the requirement to notify abutters at the same time as filing an application, the FAQs say that the Emergency Act does not relieve any abutter notification requirements under the WPA or Wetlands Regulations, while noting that there may be some on-line tools available to assist with the required certified mailing requirement.

Regarding scheduling of public hearings for Notices of Intent that have been filed, the FAQs reiterate the options available to commissions under the Emergency Act to reschedule, postpone, or proceed as usual with hearings and meetings. My colleague, Luke Legere, covers these options in detail in a helpful [guidance](#), so I will not repeat them here.

The FAQs provide pointers on notices for such public hearings. They remind commissions and applicants to include the details required by not only the WPA and Wetland Regulations, but also the Open Meeting Law. If a hearing is to be held remotely, details should be included in the newspaper notice. If a commission chair reschedules a hearing, as is his or her prerogative during the emergency, notice should be provided on the City or Town Clerk's website and also be disseminated electronically as much as possible.

Site inspections, according to the FAQs, should be conducted “if necessary” using appropriate social distancing and other safety measures established by the commission in consultation with the local board of health.

Turning to the actual paperwork involved in issuing permits or determinations, whether electronic signatures can be used or the conservation agent can sign on behalf of commissioners has been a vexing question for many commissions. The FAQs say that electronic signatures can be used to satisfy the WPA, but notes that the Emergency Act does not change the WPA requirement that a majority of commissioners must sign, so electronic signatures of a majority of commissioners must be on each Order, Determination, or Certificate of Compliance.

Each commissioner’s actual or electronic signature can be on the same page or on separate pages. If a commission has met and voted to allow its agent to sign on their behalf (such delegation is best recorded in the Registry), the FAQs say nothing in the WPA prevents an agent from inserting each commissioner’s electronic signature in addition to the agent’s actual signature.

Regarding recording of a permit, MassDEP recommends contacting the appropriate Registry of Deeds or Land Court office as their current practices vary. As the FAQs note, the Emergency Act suspends the requirement to record a permit to become effective, but it does not eliminate it.

Finally, the FAQs note that the Emergency Act tolls both the expiration date of any permit in effect as of March 10, 2020, as well as any deadline within that permit, to the end of the State of Emergency. This means that any permit set to expire, or any deadline coming due, during the State of Emergency is automatically extended by the length of time of the declared emergency. This means many permits will expire on that very date, and many permit deadlines will have to be obeyed as of that date.

Because under the Wetland Regulations a request to extend a permit must be made in writing 30 days before the permit expiration date, and the end of the emergency may not be announced sufficiently in advance do so, a wise applicant would submit an extension request sooner rather than waiting for the emergency to end and then being surprised to be too late.

The breadth, depth, and detail of MassDEP’s comprehensive set of FAQs are a welcome and a laudable effort. The FAQs bring relative certainty to some wetland permitting procedures and expectations during this uncertain time.

A senior associate at McGregor & Legere, P.C., Nathaniel Stevens handles a broad range of environmental and land use matters, from administrative law to litigation. He has helped clients with environmental issues including permitting, development, contamination, transactions, conservation, real estate restrictions, underground tanks, water supply, water pollution, subdivision control, tidelands licensing, Boston and state zoning, coastal and inland wetlands, stormwater, air pollution, and energy facility siting. He can be contacted at NStevens@mcgregorlaw.com.