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October 12, 2010

Mass. Department of Environmental Protection
Box 4062
Boston, MA 02211

Via U.S. Mail

MassDEP Northeast Region
205B Lowell Street
Wilmington, MA 01887

Via Hand Delivery

Subject: DEP File No. 006-1238 – Back Bay Fens Interim II Invasive Vegetation Control
Plan Request for Superseding Order of Conditions

To Whom It May Concern:

On behalf of the Boston Parks and Recreation Department, Camp Dresser and McKee Inc. (CDM) submits this request to appeal the above referenced Order of Conditions (Order) issued by the Boston Conservation Commission. The Order denied *Phragmites* mowing along the Muddy River in the Back Bay Fens Park. The Boston Parks and Recreation Department respectfully requests the Massachusetts Department of Environmental Protection issue a Superseding Order of Conditions to allow temporary *Phragmites* mowing to improve public safety and health, as described in the attached Request for Department Action.

Attached are: 1) Request for Department Action Fee Transmittal Form, 2) supporting documentation stating the objections to the Order; and 3) a copy of the Order issued by the Boston Conservation Commission.

It is our understanding that municipalities are exempt from the appeal fee pursuant to Standing Order 2-97 - Payment of Filing Fees in Wetlands Appeals. Please contact us immediately if a Request for Department Action Fee is required for municipalities.

Very truly yours,

Dwight R. Dunk, PWS
Principal Scientist
Camp Dresser & McKee Inc.

Enclosures

cc: Boston Conservation Commission
M. Dyson, Boston Parks and Recreation Department

SM00164.docx





Massachusetts Department of Environmental Protection
 Bureau of Resource Protection - Wetlands
Request for Departmental Action Fee
Transmittal Form

DEP File Number:

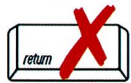
006-1238

Provided by DEP

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. Request Information

Important:
 When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Person or party making request (if appropriate, name the citizen group's representative):

Boston Parks and Recreation Department (Margaret Dyson - Contact)

Name

1010 Massachusetts Avenue

Mailing Address

Boston

MA

02118

City/Town

State

Zip Code

(617) 635-4505

--

Phone Number

Fax Number (if applicable)

Project Location

Back Bays Fens

Mailing Address

Boston

MA

Zip Code

City/Town

State

2. Applicant (as shown on Notice of Intent (Form 3), Abbreviated Notice of Resource Area Delineation (Form 4A); or Request for Determination of Applicability (Form 1)):

Boston Parks and Recreation Department (Margaret Dyson - Contact)

Name

1010 Massachusetts Avenue

Mailing Address

Boston

MA

02118

City/Town

State

Zip Code

(617) 635-4505

--

Phone Number

Fax Number (if applicable)

3. DEP File Number:

006-1238

B. Instructions

1. When the Departmental action request is for (check one):

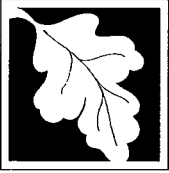
Superseding Order of Conditions

Superseding Determination of Applicability

Superseding Order of Resource Area Delineation

Send this form and check or money order for \$100.00 (single family house projects) or \$200 (all other projects), payable to the *Commonwealth of Massachusetts* to:

Department of Environmental Protection
 Box 4062
 Boston, MA 02211



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

Request for Departmental Action Fee Transmittal Form

DEP File Number:

006-1238

Provided by DEP

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

B. Instructions (cont.)

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office.
4. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Request for Superseding Order of Conditions

MassDEP File No. 006-1238

Background Information

The Boston Parks and Recreation Department (Department) received an Order of Conditions (MassDEP File No. 006-1238) denying the Department permission to control common reed (*Phragmites australis*) in the Back Bay Fens via mechanical mowing. The Boston Conservation Commission noted that the proposed mechanical cutting of 5,400 s.f. of wetland vegetation contravenes the performance standard at 10.55(4)(b) even as they concur that the present condition presents numerous health and safety concerns and agree that the proposal for temporary vegetation management would benefit public safety in the park.

The proposed common reed temporary control program would consist of cutting the *Phragmites* 3 to 4 times during the growing season, or when the vegetation reaches a height of 4 feet, whichever occurs first. *Phragmites* will be cut to approximately 6-inches above ground level. Cutting will occur within the defined area as depicted on Figures 5 through 8 in the Notice of Intent. The temporary invasive vegetation control plan is limited to cutting *Phragmites* in approximately: 18,720 square feet of BLSF; 5,400 square feet in BVW; 63,570 square feet in LUW; 18,720 square feet in RFA and 17,430 square feet (3,725 linear feet) along inland Bank.

The basic project purpose is to: 1) remove the public safety and health threats caused by the tall stand of common reed in the Back Bay Fens public park and adjacent to the Victory Gardens. *Phragmites* stands are currently dense and over 10 feet in height, and 2) support the process of returning this Olmsted designed park to its previous landscaped condition. This will be a temporary invasive vegetation control program until full implementation of the Muddy River Flood Control, Water Quality and Habitat Enhancement, and Historic Preservation Project (EOEA No. 11865), i.e. Muddy River project. The height and location of this stand of *Phragmites* provides an obscured location in which individuals engage in illicit behavior creating unsafe conditions for park users and people tending their gardens. Furthermore the reeds pose a fire hazard, with the most recent fire occurring in April 2010 during which a dangerous and fast moving wild fire burned the reeds. See photos below.



Photograph source:

<http://www.freddvchurchville.files.wordpress.com/2010/04/004.jpg>



Photograph source:

<http://www.google.com/imgres?imgurl=http://www.intotheweeds.com/fire1.jpg&imgrefurl=http://www.intotheweeds.com/&usq=uYcWmM2EPckrTjrXov3plB-PFbM=&h=1800&w=1350&sz=875&hl=en&start=10&um=1&itbs=1&tbnid=byjqcroHmZQDM:&tbnh=150&tbnw=113&prev=/images%3Fq%3Dback%2Bbay%2Bfens%2Bfire%2Bin%2Bboston%26um%3D1%26hl%3Den%26sa%3DN%26tbs%3Disch:1>
<http://www.google.com/imgres?imgurl=http://www.intotheweeds.com/fire1.jpg&imgrefurl=http://www.intotheweeds.com/&usq=uYcWmM2EPckrTjrXov3plB-PFbM=&h=1800&w=1350&sz=875&hl=en&start=10&um=1&itbs=1&tbnid=byjqcroHmZQDM:&tbnh=150&tbnw=113&prev=/images%3Fq%3Dback%2Bbay%2Bfens%2Bfire%2Bin%2Bboston%26um%3D1%26hl%3Den%26sa%3DN%26tbs%3Disch:1>

During the Public Hearing for the Notice of Intent (NOI) the Boston Conservation Commission (BCC) heard testimony from the public in support of the proposed mowing by the Department. The BCC is aware of the public health and safety hazards posed by the presence of common reed in this area and previously issued an Order of Conditions (DEP File 06-1061) for mowing *Phragmites* within Riverfront Area and the 100-foot buffer zone to BVW and Bank in the vicinity of the Victory Gardens. That limited mowing has not satisfactorily ameliorated the hazards in this area. The Department understands the BCC supports the proposed project but denied the currently proposed mowing due to the regulatory limitation that prevents Conservation Commissions from authorizing loss of Bordering Vegetated Wetland which exceed 5,000 square feet without including a replacement wetland, and which do not meet one of the identified limited projects defined in 310 CMR 10.53.

Request for Superseding Order of Conditions

The Department requests that the Massachusetts Department of Environmental Protection (MassDEP) issue a Superseding Order of Conditions (SOC) allowing the maintenance mowing of the common reed stand in wetland resources as described in the NOI. The following objections to the denial are provided below:

1. Maintenance mowing will not result in the loss of Bordering Vegetated Wetland or the other wetland resource areas of Land Under Water Bodies or Waterways, Inland Bank, Bordering Vegetated Wetland (BVW), or Riverfront Area. This work was assessed to meet all performance standards, see NOI Attachment A Section 5.1. Maintenance mowing is proposed only to control the height of *Phragmites* in the project area to improve public health and safety of park users.

The BCC found that:

- a. *".... With regard to the performance standards specific to the aforementioned wetland resource areas ... the proposed project will not impair the ground or surface water quality, the water carrying capacity of the Muddy River, the physical stability of the bank, or the capacity of the resource areas to provide wildlife habitat functions, breeding habitat, escape cover and food for fisheries ..."*

The Department concurs with that finding.

- b. The BCC also found that proposed 5,400 s.f. of *Phragmites* mowing, *"... contravenes the performance standards at 10.55(4)(b) which limits the loss of BVW to 5,000 s.f. and requires the replacement of lost BVW."*

The Department disagrees with that finding because:

- i. 310 CMR 10.55(4)(a) reads in part, *"... any proposed work in Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area."* and
- ii. 310 CMR 10.55(4)(b) reads in part, *"... the issuing authority may issue an Order of Conditions permitting work which results in the loss of up to 5000 square feet of Bordering*

Vegetated Wetland when said area is replaced in accordance with the following general conditions ..."

The proposed temporary maintenance mowing will not destroy or otherwise impair the common reed dominated BVW as found by the BCC. Furthermore, maintenance mowing will not result in the loss of BVW. Therefore, a replacement area is not required and an issuing authority may permit the maintenance mowing without the need for a replacement area.

2. Maintenance mowing will not change the community type from an emergent wetland. Mowing is proposed to maintain emergent vegetation to a height not greater than 4 feet tall. Mowing the excessively tall reeds may provide suitable conditions for colonization by native wetland plants.
3. The Muddy River and Back Bay Fens do not support native wetland plant communities. This is a man-made landscape altered previously for the Olmsted designed park and is currently dominated by invasive plant species. See historic and recent photos of the project area which depict the area as a low height plant community previously (Exhibit 1). Also the burned conditions, photo taken after the April 2010 wild fire, provides an example of what the area will look like after mowing, i.e. with low growth vegetation. Maintaining common reed to 4 feet tall or less is expected to return the character of the park in this area to more closely resemble past conditions.
4. *Phragmites* are the object of eradication programs in Massachusetts and throughout the United States. Mowing is not proposed to eradicate *Phragmites* from the park; however, it may provide conditions for colonization of native wetland plants in the area, which would improve wetland plant species diversity compared to existing conditions. Please see quote from a *Phragmites* eradication project in Arlington, MA at which reeds are being removed from the marsh to provide open areas into which native plants can colonize.

Muskrat Marsh Pilot Project Complete

Volunteers from the Cambridge Alewife region and Boston Latin High School's Sailing to the Stars Club completed the "Muskrat Marsh" pilot project with approval from the Conservation Commission. The small area within a 12 acre marsh next to the Harvard Smithsonian Building is partially hydrated by East Arlington 's stormwater through culverts under Rt. 2 and into a ravine (former Menotomy river bed) abutting the Belmont Uplands and the water coming east from Belmont Hill. FAR hopes to eventually restore the larger wetlands acreage with native plants with the success of the pilot. The "Discovery Park" Acorn Park Drive access is linked to Frontage Road from Lake Street in Arlington and is largely owned by Bulfinch Co. and DCR public land.

The Commission and the Bulfinch Co. approved the 1,000 sq. foot removal of common reed invasive species. Primarily, phragmites, purple loose strife, and bittersweet were removed to allow the return of native plant species, such as Tussock Sedge. Volunteers from 3 years of FAR Ecology Camp have contributed to the project. In October, they geared in boots and gloves in muddy marsh waters, FAR and the Boston students removed remains of the stems with shears. Jacqueline Daoust supervisor for the pilot and FAR staff, noted, "This

invasive project is visible proof that the removal of the common reed from just 1,000 square feet of marsh provides room for more native species to re-grow, and now we can consider removing invasives for the entire 12 acres to increase the area's biodiversity."

(Source Also from the Friends of Alewife Reservation 2010 newsletter)

5. The proposed mowing program is a temporary measure to improve public safety in the Back Bay Fens and maintenance mowing will continue until the Muddy River Project (EOEA No. 11865) is underway at this location. As part of that comprehensive project, the reeds in this area will be removed and replaced with open water and a plant community consistent with the Olmsted park plant pallet to restore this historic park to its original condition.

Conclusion

In conclusion, for the reasons enumerated above, the Department respectfully requests a Superseding Order of Conditions to allow mowing of *Phragmites australis* located in the Back Bay Fens as described in the NOI and summarized above, to concomitantly meet the Department's goal to:

- 1) Improve public health and safety of park users in the Back Bay Fens and those residents tending their Victory Gardens, and
- 2) Result in no loss of wetland resources areas.

Exhibit 1 - Images of the project area past and present



Post card of Boylston Street Bridge late 1800's with exposed beach along the river's edge

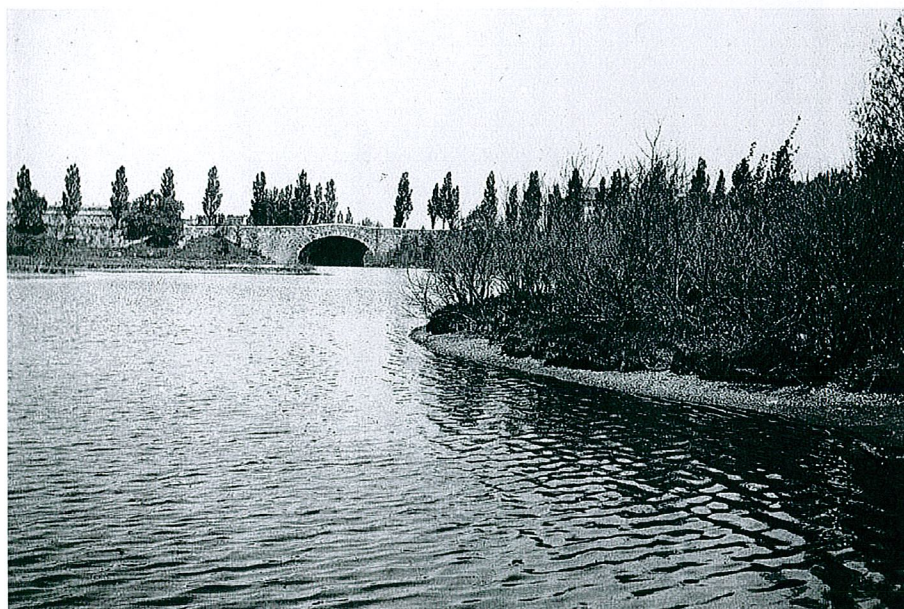


Photo of the Boylston Street bridge c. 1900



Image of Victory Garden c. 1950, note low growth along the Muddy River and visible Boylston Street bridge in background.



Image of Boylston Street bridge 2010 after the April wild fire.



Image of project area after the April 2010 wild fire



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
006-1238
MassDEP File #
eDEP Transaction #
Boston
City/Town

A. General Information

Important:
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. From: Boston Conservation Commission
Conservation Commission

2. This issuance is for (check one):
a. Order of Conditions b. Amended Order of Conditions

3. To: Applicant:

Margaret a. First Name Dyson b. Last Name

Boston Parks & Recreation Dept. c. Organization

1010 Massachusetts Ave. d. Mailing Address

Boston e. City/Town MA f. State 02118 g. Zip Code

4. Property Owner (if different from applicant):

a. First Name b. Last Name

same

c. Organization

d. Mailing Address

e. City/Town f. State g. Zip Code

5. Project Location:

Back Bay Fens a. Street Address Boston b. City/Town

N/A c. Assessors Map/Plat Number 0504175000 (north Agassiz Road) d. Parcel/Lot Number

N/A c. Assessors Map/Plat Number

Latitude and Longitude, if known: 42d20m42s d. Latitude 71d5m35s e. Longitude



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A. General Information (cont.)

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):
Suffolk
 a. County _____ b. Certificate Number (if registered land) _____
 c. Book _____ d. Page _____
7. Dates: August 4, 2010 September 1, 2010 September 29, 2010
 a. Date Notice of Intent Filed b. Date Public Hearing Closed
8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):
Boston Parks & Recreation Department Back Bay Fens Interim II Invasive Vegetation Control Plan: Areas of Mowing (fig. 5, fig. 6, fig. 7, fig. 8);
Camp Dresser & McKee, Inc.
 b. Prepared By _____ c. Signed and Stamped by _____
August 4, 2010 1" - 40'
 d. Final Revision Date _____ e. Scale _____
- f. Additional Plan or Document Title _____ g. Date _____

B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act:
 Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act (the Act). Check all that apply:
- a. Public Water Supply b. Land Containing Shellfish c. Prevention of Pollution
 d. Private Water Supply e. Fisheries f. Protection of Wildlife
 g. Groundwater Supply h. Storm Damage Prevention i. Flood Control
2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

- a. the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.



Massachusetts Department of Environmental Protection
 Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
 006-1238
 MassDEP File # _____
 eDEP Transaction # _____
Boston
 City/Town

B. Findings (cont.)

Denied because:

- b. the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**
- c. the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only)

3. Buffer Zone Impacts: Shortest distance between limit of project disturbance and Bank or Bordering Vegetated Wetland boundary (if available) _____ a. linear feet

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. <input checked="" type="checkbox"/> Bank	<u>3,725</u> a. linear feet	no alteration permitted	_____ c. linear feet	_____ d. linear feet
5. <input checked="" type="checkbox"/> Bordering Vegetated Wetland	<u>5,400</u> a. square feet	no alteration permitted	_____ c. square feet	_____ d. square feet
6. <input checked="" type="checkbox"/> Land Under Waterbodies and Waterways	<u>63,570</u> a. square feet	no alteration permitted	_____ c. square feet	_____ d. square feet
7. <input checked="" type="checkbox"/> Bordering Land Subject to Flooding	_____ e. c/y dredged <u>18,720</u> a. square feet	_____ f. c/y dredged no alteration permitted	_____ c. square feet	_____ d. square feet
Cubic Feet Flood Storage	_____ e. cubic feet	_____ f. cubic feet	_____ g. cubic feet	_____ h. cubic feet
8. <input type="checkbox"/> Isolated Land Subject to Flooding	_____ a. square feet	_____ b. square feet		
Cubic Feet Flood Storage	_____ c. cubic feet	_____ d. cubic feet	_____ e. cubic feet	_____ f. cubic feet



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B. Findings (cont.)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
9. <input checked="" type="checkbox"/> Riverfront Area	<u>18,720</u>	no alteration permitted		
Sq ft within 100 ft	<u>18,720</u>	no alteration permitted	<u> </u>	<u> </u>
Sq ft between 100-200 ft	<u> </u>	<u> </u>	<u> </u>	<u> </u>

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

10. Designated Port Areas
 Indicate size under Land Under the Ocean, below
11. Land Under the Ocean
 a. square feet b. square feet
 c. c/y dredged d. c/y dredged
12. Barrier Beaches
 Indicate size under Coastal Beaches and/or Coastal Dunes below
13. Coastal Beaches
 a. square feet b. square feet c. nourishment cu yd d. nourishment cu yd
14. Coastal Dunes
 a. square feet b. square feet c. nourishment cu yd d. nourishment cu yd
15. Coastal Banks
 a. linear feet b. linear feet
16. Rocky Intertidal Shores
 a. square feet b. square feet
17. Salt Marshes
 a. square feet b. square feet c. square feet d. square feet
18. Land Under Salt Ponds
 a. square feet b. square feet
 c. c/y dredged d. c/y dredged
19. Land Containing Shellfish
 a. square feet b. square feet c. square feet d. square feet
20. Fish Runs
 Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above
- a. c/y dredged b. c/y dredged
21. Land Subject to Coastal Storm Flowage
 a. square feet b. square feet



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B. Findings (cont.)

22. Restoration/Enhancement:

_____ a. square feet of BVW

_____ b. square feet of salt marsh

23. Stream Crossing(s):

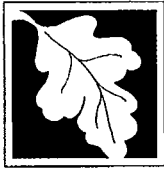
_____ a. number of new stream crossings

_____ b. number of replacement stream crossings

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
 - a. the work is a maintenance dredging project as provided for in the Act; or
 - b. the time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order.
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on XXX unless extended in writing by the Department.
7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.



**Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands**

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:

006-1238

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Boston

City/Town

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.
10. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words,

"Massachusetts Department of Environmental Protection" [or, "MassDEP"]
"File Number 006-1238 "
11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.
12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
13. The work shall conform to the plans and special conditions referenced in this order.
14. Any change to the plans identified in Condition #12 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.
15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.
16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.
17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

NOTICE OF STORMWATER CONTROL AND MAINTENANCE REQUIREMENTS

19. **The work associated with this Order (the "Project") is (1) is not (2) subject to the Massachusetts Stormwater Standards. If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:**

- a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.
- b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
- i.* all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
 - ii.* as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
 - iii.* any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;
 - iv.* all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;
 - v.* any vegetation associated with post-construction BMPs is suitably established to withstand erosion.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

- c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement") for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following: *i.*) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and *ii.*) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.
- d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.
- e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.
- f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

- g) The responsible party shall:
 1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
 2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
 3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.

- h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
- i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
- j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
- k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.
- l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

No work shall be performed on this project. See Attachment A (Boston Conservation Commission Findings)



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D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable? Yes No

2. The Conservation Commission hereby finds (check one that applies):

a. that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:

1. Municipal Ordinance or Bylaw

2. Citation

Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

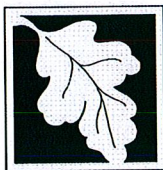
b. that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

1. Municipal Ordinance or Bylaw

2. Citation

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.

The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):



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E. Signatures

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

1. Date of Issuance

Please indicate the number of members who will sign this form.

This Order must be signed by a majority of the Conservation Commission.

2. Number of Signers

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

Signatures:

Charles Butts

John Peels

June M. McHale

by hand delivery on

by certified mail, return receipt requested, on

Date

Date

F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request of Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.



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G. Recording Information

This Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

Boston Conservation Commission
 Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

Conservation Commission

Please be advised that the Order of Conditions for the Project at:

Project Location _____ MassDEP File Number _____

Has been recorded at the Registry of Deeds of:

County _____ Book _____ Page _____

for: _____
 Property Owner

and has been noted in the chain of title of the affected property in:

Book _____ Page _____

In accordance with the Order of Conditions issued on:

_____ Date

If recorded land, the instrument number identifying this transaction is:

_____ Instrument Number

If registered land, the document number identifying this transaction is:

_____ Document Number

_____ Signature of Applicant

The Boston Conservation Commission (the "Commission") finds the proposed project, the Back Bay Fens Interim II Invasive Vegetation Control Plan, located in the Back Bay Fens and Muddy River, (the "project site"), as proposed by the Boston Parks and Recreation Department (the "applicant") cannot be conditioned to meet the performance standards set forth in the Wetland Protection Act Regulations 310 CMR 10.00 (the "Regulations"), as the proposed mechanical cutting of common reed (*Phragmites australis*) will alter over 5,000 square feet of Bordering Vegetated Wetland. The Order of Conditions (the "Order") prohibits the work proposed in the Notice of Intent (the "Notice"), as reviewed and voted on by the Commission at the September 1, 2010 public hearing.

The Commission finds and affirms the presence of the following wetland resource areas, subject to protection under the Massachusetts Wetlands Protection Act, M.G.L. Ch. 131, § 40, at the project site: Inland Bank, Bordering Vegetated Wetland, Land Under Waterbodies and Waterways, Bordering Land Subject to Flooding and Riverfront Area. The Commission affirms the delineation of jurisdictional wetland resource areas as represented in the Notice and on the plans of record, referenced on page 2 of this Order. The delineations of the wetland resource areas at the project site were previously approved by the Commission through an Order of Resource Area Delineation (DEP File No. 006-0867) issued on February 21, 2001, and extended thereafter.

The Commission finds based upon the Notice and plan of record the proposed mechanical cutting of common reed will occur within 3,725 square feet (s.f.) of Inland Bank, 5,400 s.f. of Bordering Vegetated Wetland, 63,570 s.f. of Land Under Waterbodies and Waterways, 18,720 s.f. of Bordering Land Subject to Flooding, and 18,720 s.f. of Riverfront Area. With regard to the performance standards specific to the aforementioned wetland resource areas, the Commission finds the proposed project will not impair ground or surface water quality, the water carrying capacity of the Muddy River, the physical stability of the river bank, or the capacity of the resource areas to provide wildlife habitat functions, breeding habitat, escape cover and food for fisheries due to the *Phragmites* limited habitat value, as represented in the Wildlife Habitat Function (2.2) section of the Notice. Additionally, the Commission finds the Alternatives Analysis (4.0) section of the Notice adequately addresses common reed control methodologies and agrees with the applicant's preferred alternative of 'cutting only' as the most practicable and economically feasible means of *Phragmites* control. Furthermore, the Commission concurs with the applicant's assertion that there are numerous health and safety concerns associated with the tall stands of common reed as they pose a fire hazard and limit visibility in an area of park land actively utilized by the public and urban gardeners.

The Commission finds, however, the project as proposed is denied as it does not meet the performance standards set forth in the Regulations for Bordering Vegetated Wetland (BVW), (310 CMR 10.55). Specifically, the proposed mechanical cutting of 5,400 s.f. of wetland vegetation contravenes the performance standard at 10.55(4)(b), which limits the loss of BVW to 5,000 s.f. and requires the replacement of lost BVW.