

**RARE SPECIES
AND
CONSERVATION COMMISSIONS**



BERKSHIRE CONSERVATION PROGRAM APRIL 2009

310 CMR 10

10.04 Definitions

Rare Species mean those vertebrate and invertebrate animal species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 10.60.

State-listed species mean the same as rare species, as defined in 310 CMR 10.04.

10.06 (6) Agricultural Emergencies

(a) Notwithstanding the provisions of 310 CMR 10.06(1) through (4), any person may undertake work for the emergency agricultural activities described in 310 CMR 10.06(6)(g) when necessary to:

1. eliminate an imminent threat to land in agricultural use;
2. restore land in agricultural use that has been damaged due to a storm or other sudden, unforeseen event; or
3. provide an emergency agricultural water source when the existing agricultural water source suddenly and unforeseeably has been rendered unusable or unavailable.

(b) Written notice of any work undertaken as an emergency activity under 310 CMR 10.06(6) must be received by the conservation commission and mailed to the Department within three days after the work has commenced or within three days after the end of the emergency event, whichever is sooner. Such notice shall state the name of the person performing the work, the name of the property owner (if different), the property and the location on the property where the work is to be performed, the exact nature of the emergency and of the work which is to be performed, and when the work was begun and when it is expected to be completed. The commission may, at its discretion, conduct a site visit to view the work being performed under such notice and to confirm that the information in the notice is correct.

(c) When an emergency is caused by a storm, any work undertaken as an emergency activity under 310 CMR 10.06(6) must commence within 30 days following the storm event which caused the agricultural emergency.

(d) Any work undertaken as an emergency activity under 310 CMR 10.06(6) shall be completed within 30 days from the commencement of such work unless written approval for a later completion date is given by the Commissioner.

(e) ***No work under 310 CMR 10.06(6) shall be allowed within estimated habitat which is indicated on the most recent Estimated Habitat Maps of State-Listed Rare Wetlands Wildlife published by the Natural Heritage and Endangered Species Program of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement.***

10.53 General Provisions.

(3) Notwithstanding the provisions of 310 CMR 10.54 through 10.58 and 10.60, the issuing authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40 permitting the following *limited projects (although no such project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59)*. In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

10.53 General Provisions.

(4) Notwithstanding the provisions of 310 CMR 10.54 through 10.58, the issuing authority may issue an Order of Conditions for projects which will *improve the natural capacity of a resource area(s)* to protect the interests identified in M.G.L. c. 131, § 40 (*although no such project may be permitted which will have any adverse effect on specified wildlife habitat sites of rare vertebrate or invertebrate species as identified by procedures established under 310 CMR 10.59*). Such projects include, but are not limited to, the removal of aquatic nuisance vegetation to retard pond and lake eutrophication and the thinning or planting of vegetation to improve habitat value.

10.53 General Provisions.

(5) Notwithstanding the provisions of 310 CMR 10.53(1), 10.54 through 10.58, and 10.60, the issuing authority shall issue an Order of Conditions permitting for the ***support of existing agricultural production the reconstruction of existing dikes, the construction of new ponds or reservoirs, the expansion of existing ponds or reservoirs, and the construction of tailwater recovery systems and by-pass canals/channels***, provided that the following criteria are met:(a) The Notice of Intent shall include all relevant portions of the farm Conservation Plan (CP) covering the work which has been prepared for the property and the applicant in cooperation with the United States Soil Conservation Service (SCS) pursuant to the January 20, 1993, Memorandum of Understanding (MOU) between the Department and SCS concerning CPs. At a minimum, the Notice of Intent shall include a description of the project, the number of square feet of each type of resource area that will be altered, and the alternatives that were considered in order to avoid alterations of wetland resource areas.

(b) There shall be a rebuttable presumption, which may be overcome upon a clear showing to the contrary, that:

1. work described in the CP avoids impacts to wetland resource areas or minimizes impacts where they are unavoidable; and
2. construction specifications and mitigation measures contained in the CP minimize impacts where impacts are unavoidable and adequately protect the interests of M.G.L. c. 131, § 40.

(c) If any presumption set forth in 310 CMR 10.53(5)(b) is overcome upon a clear showing to the contrary, the issuing authority shall impose such conditions on the work as are necessary to restore the presumption.

(d) The project will not have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

(e) The maximum amount of Bordering Vegetated Wetland which may be altered by the above activities is:

1. 20,000 square feet for the construction or expansion of a pond or reservoir;
2. 20,000 square feet for the construction of a tailwater recovery system;
3. 20,000 square feet for the construction of a by-pass canal/channel; and
4. 10,000 square feet for the reconstruction of an existing dike.

(f) There shall not be any filling or dredging of a Salt Marsh.

10.54 BANK (4) General Performance Standard.

(a) Where the presumption set forth in 310 CMR 10.54(3) is not overcome, any proposed work on a Bank shall not impair the following:

1. the physical stability of the Bank;
2. the water carrying capacity of the existing channel within the Bank;
3. ground water and surface water quality;
4. the capacity of the Bank to provide breeding habitat, escape cover and food for fisheries;
5. the capacity of the Bank to provide important wildlife habitat functions. A project or projects on a single lot, for which Notice(s) of Intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 50 feet (whichever is less) of the length of the bank found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.

(b) Notwithstanding the provisions of 310 CMR 10.54(4)(a), structures may be permitted in or on a Bank when required to prevent flood damage to facilities, buildings and roads constructed prior to the effective date of 310 CMR 10.51 through 10.60 or constructed pursuant to a Notice of Intent filed prior to the effective date of 310 CMR 10.51 through 10.60 (April 1, 1983), including the renovation or reconstruction (but not substantial enlargement) of such facilities, buildings and roads, provided that the following requirements are met:

1. The proposed protective structure, renovation or reconstruction is designed and constructed using best practical measures so as to minimize adverse effects on the characteristics and functions of the resource area;
2. The applicant demonstrates that there is no reasonable method of protecting, renovating or rebuilding the facility in question other than the one proposed.

(c) Notwithstanding the provisions of 310 CMR 10.54(4)(a) or (b), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

10.55 BVW (4) General Performance Standards. (a) Where the presumption set forth in 310 CMR 10.55(3) is not overcome, any proposed work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area. (b) Notwithstanding the provisions of 310 CMR 10.55(4)(a), 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 and any additional, specific conditions the issuing authority deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost: 1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area"); 2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area; 3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area; 4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area; 5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area; 6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and 7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00. In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the extent to which adverse impacts can be avoided, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

(c) Notwithstanding the provisions of 310 CMR 10.55(4)(a), the issuing authority may issue an Order of Conditions permitting work which results in the loss of a portion of Bordering Vegetated Wetland when; 1. said portion has a surface area less than 500 square feet; 2. said portion extends in a distinct linear configuration ("finger-like") into adjacent uplands; and 3. in the judgment of the issuing authority it is not reasonable to scale down, redesign or otherwise change the proposed work so that it could be completed without loss of said wetland.

(d) Notwithstanding the provisions of 310 CMR 10.55(4)(a),(b) and (c), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

10.56 LUW (4) General Performance Standards.

(a) Where the presumption set forth in 310 CMR 10.56(3) is not overcome, any proposed work within Land Under Water Bodies and Waterways shall not impair the following:

1. The water carrying capacity within the defined channel, which is provided by said land in conjunction with the banks;
2. Ground and surface water quality;
3. The capacity of said land to provide breeding habitat, escape cover and food for fisheries; and
4. The capacity of said land to provide important wildlife habitat functions. A project or projects on a single lot, for which Notice(s) of intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures established under 310 CMR 10.60.

(b) Notwithstanding the provisions of 310 CMR 10.56(4)(a), the issuing authority may issue an Order in accordance with M.G.L. c. 131, § 40 to maintain or improve boat channels within Land Under Water Bodies and Waterways when said work is designed and carried out using the best practical measures so as to minimize adverse effects such as the suspension or transport of pollutants, increases in turbidity, the smothering of bottom organisms, the accumulation of pollutants by organisms or the destruction of fisheries habitat or nutrient source areas.

(c) Notwithstanding the provisions of 310 CMR 10.56(4)(a) or (b), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.

10.57 BLSF and ILSF (4) Gen. Performance Standards. (a) BLSF: 1. Comp. storage shall be provided for all flood storage volume that will be lost as the result of a proposed project within BLSF, when in the judgment of the issuing authority said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows. Comp. storage shall mean a volume not previously used for flood storage and shall be incrementally equal to the theoretical volume of flood water at each elevation, up to and including the 100-year flood elevation, which would be displaced by the proposed project. Such comp. volume shall have an unrestricted hydraulic connection to the same waterway or water body. Further, with respect to waterways, such comp. volume shall be provided within the same reach of the river, stream or creek. 2. Work within BLSF, including that work required to provide the above-specified comp. storage, shall not restrict flows so as to cause an increase in flood stage or velocity. 3. Work in those portions of bordering land subject to flooding found to be significant to the protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions. Except for work which would adversely affect vernal pool habitat, a project or projects on a single lot, for which Notice(s) of Intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold, or altering vernal pool habitat, may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.(b) ILSF: A proposed project in ILSF shall not result in the following: 1. Flood damage due to filling which causes lateral displacement of water that would otherwise be confined within said area. 2. An adverse effect on public and private water supply or ground water supply, where said area is underlain by pervious material. 3. An adverse effect on the capacity of said area to prevent pollution of the ground water, where the area is underlain by pervious material which in turn is covered by a mat of organic peat and muck. 4. An impairment of its capacity to provide wildlife habitat where said area is vernal pool habitat, as determined by procedures contained in 310 CMR 10.60. ***(c) Protection of Rare Wildlife Species: Notwithstanding the provisions of 310 CMR 10.57(4)(a) or (b), no project may be permitted which will have any adverse effect on specified wildlife habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59.***

10.58(4) Riverfront General Performance Standard

(b) ***Protection of Rare Species.*** No project may be permitted within the riverfront area which will have any adverse effect on specified habitat sites of rare wetland or upland, vertebrate or invertebrate species, as identified by the procedures established under 310 CMR 10.59 or 10.37, or which will have any adverse effect on vernal pool habitat certified prior to the filing of the Notice of Intent.

10.58(4)(d) 3. Notwithstanding the provisions of 310 CMR10.58(4)(d)1. or 2., *(the section on no significant adverse impact)* the issuing authority shall allow the construction of *a single family house*, a septic system if no sewer is available, and a driveway, on a lot recorded before August 7, 1996 where the size or shape of the lot within the riverfront area prevents the construction from meeting the requirements of 310 CMR 10.58(4)(d)1. or 2., provided that:

- a. The lot can be developed for such purposes under the applicable provisions of other municipal and state law; and
- b. b. The performance standards of 310 CMR 10.58(4)(d) are met to the maximum extent feasible. In difficult siting situations, the maximum extent of yards around houses should be limited to the area necessary for construction. Except where the lot contains vernal pool habitat or *specified habitat sites of rare species*, a wildlife habitat evaluation study shall not be required.

10.59: Estimated Habitats of Rare Wildlife (for inland wetlands)

If a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program (hereinafter referred to as the Program), a fully completed copy of the Notice of Intent (including all plans, reports, and other materials required under 310 CMR 10.05(4)(a) & (b)) for such project shall be sent to the Program via the U.S. Postal Service by express or priority mail (or otherwise sent in a manner that guarantees delivery within two days). Such copy shall be sent no later than the date of the filing of the Notice of Intent with the issuing authority. Proof of timely mailing or other delivery to the Program of the copy of such Notice of Intent shall be included in the Notice of Intent which is submitted to the issuing authority and sent to the Department's regional office. Estimated Habitat Maps shall be based on the estimated geographical extent of the habitats of all state-listed vertebrate and invertebrate animal species for which a reported occurrence within the last 25 years has been accepted by the Program and incorporated into its official data base.

Within 30 days of the filing of such a Notice of Intent with the issuing authority the Program shall determine whether any state-listed species identified on the aforementioned map are likely to continue to be located on or near the site of the original occurrence and, if so, whether the area to be altered by the proposed project is in fact part of such species' habitat. Such determination shall be presumed by the issuing authority to be correct. Any proposed project which would alter a resource area that is not located on the most recent Estimated Habitat Map (if any) provided to the conservation commission, shall be presumed not to be within a rare species' habitat. Both of these presumptions are rebuttable and may be overcome upon a clear showing to the contrary. If the issuing authority fails to receive a response from the Program within 30 days of the filing of such a Notice of Intent, a copy of which was received by the Program in a timely manner, it shall issue its Order of Conditions based on available information; however, the fact that a proposed project would alter a resource area that is located on an Estimated Habitat Map shall not be considered sufficient evidence in itself that such project is in fact within the habitat of a rare species.

If the Program determines that a resource area which would be altered by a proposed project is in fact within the habitat of a state-listed species, it shall provide in writing to the applicant and to the ConCom and the Dept, the identification of the species whose habitat would be altered by the proposed project, and all other relevant information which the Program has regarding the species' location and habitat requirements, insofar as such information may assist the applicant and the issuing authority to determine whether the project is or can be designed to meet the performance standard set in 310 CMR 10.59. Notwithstanding 310 CMR 10.53 through 10.58 and 310 CMR 10.60, if a proposed project is found by the issuing authority to alter a resource area which is part of the habitat of a state-listed species, such project shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species. A determination of whether or not a proposed project will have such an adverse effect shall be made by the issuing authority. However, a written opinion of the Program on whether or not a proposed project will have such an adverse effect shall be presumed by the issuing authority to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary.

The concomm shall not issue an Order under 310 CMR 10.05(6) regarding any such project for at least 30 days after the filing of the NOI unless the Program before such time period has elapsed has either determined that the resource area(s) which would be altered by the project is not in fact within the habitat of a state-listed species or, if it has determined that such resource area(s) is in fact within rare species habitat, rendered a written opinion as to whether the project will have an adverse effect on that habitat.

Notwithstanding any other provision of 310 CMR 10.58, should an Environmental Impact Report (EIR) be required for a proposed project under the M.G.L. c. 30, §§ 6 through 62H, as determined by 301 CMR 11.00 the performance standard established under 310 CMR 10.58 shall only apply to proposed projects which would alter the habitat of a rare species for which an occurrence has been entered into the official data base of the MNHESP prior to the time that the Secretary of the Exec Off of Environmental Affairs has determined, in accordance with the provisions of 301 CMR 11.09(4), that a final EIR for that project adequately and properly complies with the M.G.L. c. 30, §§ 6 through 62H (unless, subsequent to that determination, the Secretary requires supplemental information concerning state-listed species, in accordance with the provisions of 301 CMR 11.17).