Questions and Answers

Concerning Abutter Notification

...er the Massachusetts Wetlands Protection Act

Topics covered are:

1. Meaning of "all abutters within one-hundred feet."
2. The one-hundred feet measurement is made from the property line, not from the limit of the proposed activity.
3. Limiting number of notifications in unusual cases.
4. Work done in a "right of way."
5. Whether notification must be sent on the same day as the NOI is filed.
6. Having the Conservation Commission send notification for the applicant.
7. How to prove that notification was given.
8. Return receipts and acknowledgments of hand delivery.
9. Defects in notification.
10. Compiling the list of abutters.
11. Abutters lists supplied by the Conservation Commission.
12. Notification requirement applies to state and local agencies.
13. Relation to local wetlands ordinances and bylaws.
14. Notifications to condominiums.
15. Stating where copies of the NOI may be examined.
16. Stating where copies of the NOI may be obtained.
17. Stating where information regarding the date, time, and place of the public hearing may be obtained.

- Notification Form (suggested version)
- Affidavit of Service (suggested version)

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April 8, 1994

The recent amendment - known as the Menard Bill - to the Wetlands Protection Act, requiring applicants to give notification to abutters when filing a Notice of Intent, presents some difficult issues. The Department of Environmental Protection (DEP) has consulted with the Massachusetts Association of Conservation Commissions (MACC) and seeks to work with all interested parties to resolve these issues with an eye toward the following interests:

- furthering the goal of the legislation, namely, to ensure that abutters to sites where wetlands alterations are proposed receive notification of the filing of the Notice of Intent;

- protecting Conservation Commissions - especially those in small towns, that might not have regular office hours or paid staff - from excessive workload; and

- avoiding excessive burdens on applicants, particularly in terms of delay, expense, and difficulty in achieving compliance.

The text of the statute is set out below. The Questions and Answers that follow examine some of the potential problems raised by the statute and reflect DEP's current thinking on how to deal with these problems. The real-world experiences of applicants, consultants, abutters, and Conservation Commissions over the next few months will help DEP to create a final regulation that successfully balances the interests named above.

Chapter 472 of the Acts of 1993

Section 1. Section 40 of Chapter 131 of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting after the first paragraph the following paragraph:

> *Any person filing a notice of intention with a conservation commission shall at the same time give written notification thereof, by delivery in hand or certified mail, return receipt requested, to all abutters within one-hundred feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and in*

another municipality or across a body of water. Said notification shall be at the applicant's expense, and shall state where copies of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the conservation commission.

Section 2. The notification required by section one of this act shall not apply to projects of the department of highways.

Questions and Answers

Note: To avoid repetition of the phrase "the land where the activity is proposed," we will use the word "locus" to be synonymous with that phrase. Also, "Notice of Intent" - which refers to either a full Notice of Intent (Form 3) or an Abbreviated Notice of Intent (Form 4) - sometimes will be abbreviated as "NOI."

1. **What is the meaning of "all abutters within one-hundred feet"?**

At first glance, this phrase may be confusing because abutters to the locus - by definition - are within zero feet of the locus. That is because to "abut" means "to touch." A closer reading, however, shows that "abutters" is defined in the statute to include more than just the owners of properties that touch the locus; it also includes owners of properties separated from the locus by "any public or private street or way...or across a body of water."

Accordingly, the qualification about one-hundred feet relates to those "abutters" who are separated from "the land where the activity is proposed" by a street, way, or body of water. If the separation is one-hundred feet or less, notification is required. If the separation exceeds one-hundred feet, no notification is required.

2. **Is the one-hundred feet measurement made from the property line or from the limit of the proposed activity?**

All measurements are made from the property line of the locus. For example, an activity is proposed on a large property, with the farthest limits of the work set to take place two hundred feet from the nearest property that touches the locus. Each owner of property that touches the locus must receive notification by virtue of being an abutter (except see Question #3 for a clarification). The list of abutters also includes owners whose land is separated from the locus by a street, way, or body of water, where the separation is not greater than one-hundred feet. Even though the total distance from the edge of the proposed work to an abutter separated by a street, way, or body of water might total (in this example) 300 feet, still notification must be given because the abutting land is less than one-hundred feet from the property line of the locus.

3. **Won't there be cases where "abutters" receive notification even though they are far away from the proposed activity and therefore totally unaffected by it - cases where hundreds of notifications must be sent, with unreasonable costs in time for compiling the list and money to pay for certified mail?**

In most cases, notification will go to abutters who are within a reasonable distance of the proposed activity. Even if the work takes place off to one side of the locus or at the center of a large parcel of land, the burden to the typical applicant will be manageable.

There are, however, foreseeable situations where genuine hardships might arise. One case involves a long, narrow piece of land such as a pipeline, a road or highway, or a railroad line where, in each case, all the land is in a single ownership (contrast this with Question #4). Another involves a large parcel of tens or hundreds of acres. In such situations, <u>if the proposed activity does not call for a significant change in the use or character of the land</u>, requiring notification to every landowner who meets the statutory definition of "abutter" would result in an unreasonable hardship.

For example, a public agency that owns a railroad bed wants to restore service on a line that has fallen into disuse. This proposal does not change the use or character of the land, as it has been used as a rail line in the past. (By contrast, turning vacant land into a residential subdivision <u>would</u> change its use and character.) To restore railway service, it is necessary to make improvements that require the filing of a Notice of Intent. If the agency owns the entire strip of land that forms the railroad bed - tens and tens of miles long and running through a dozen communities - it would be unreasonable to require notification to every landowner who abuts that property. A more reasonable approach is to target notification to an appropriate selection of abutters in a manner designed to ensure that the property owners who are most likely to be affected by the proposed work are notified and have a chance to respond to the Notice of Intent.

DEP suggests that for long, narrow properties, and for parcels of land that are fifty acres or larger, notification could be targeted to abutters who are located within a reasonable distance - but not less than one thousand feet - from the limits of the proposed activity that is subject to the Wetlands Protection Act.

4. **What happens when work is done by a person who has a "right of way" over land - for example, in the case of a utility pipeline?**

Sometimes, the applicant is not the property owner. One example of this involves a utility company doing work affecting wetlands located along a right of way. Such a right of way would be a long, narrow strip of land that cuts across the properties of many landowners. (Contrast this situation with the situation described in Question #3.)

Because the right of way crosses many ownership boundaries, the key is to identify the property lines that enclose the proposed work. The fact that the utility company (in this example) has a right to lay pipe over the land of many adjacent landowners in either direction is not the issue; only the property lines enclosing the proposed work are relevant. Abutters are determined by reference to those property lines.

5. **Must the notification be sent out on the same day that the Notice of Intent is filed?**

The statute requires that notification be given "at the same time" as the filing of the NOI; DEP take this to mean that the notification cannot be given (hand delivered or posted by certified mail) later than the same day as the filing of the NOI. For example, the notification could be given a day or two before the filing of the NOI. However, notification that is given after the day on which the NOI is filed violates the letter of the statute.

Frequently, the date, time, and place of the public hearing are not finalized by the time when the NOI is filed. Therefore, notifications often will omit this vital information - forcing abutters to track down someone (the applicant, the applicant's representative, or the Conservation Commission) to get it. Whenever this information is known in advance, therefore, the notification should be sure to include it.

To better carry out the intent of the statute, DEP suggests that notifications include two additional items. First, they should point out that notice of the public hearing - including the date, time, and place of the hearing - will appear in a local newspaper. Second, they should point out that a similar notice will be posted at city or town hall. In this way, abutters will have two ways of discovering any information that wasn't included in the notification.

With this in mind, DEP suggests that the form set out at the end of this document be used for giving notification. It can be filled in or customized as necessary to reflect the name of the local newspaper used for publishing notices of public hearings.

6. **Can the Conservation Commission send notification on behalf of the applicant?**

According to the statute, the "person filing" the NOI shall give the notification; and notification shall be given "at the applicant's expense." Conservation Commissions are completely within their rights to take no active part whatsoever in the notification process and applicants are completely within their rights to exercise full control over that process.

Some Conservation Commissions have virtually no resources besides the time volunteered by Commissioners. Others are fortunate enough to have their own offices, supplies, and full- or part-time staff. If a Commission, for whatever reason, wishes to set up procedures for

sending out notifications to abutters, it may do so and offer that service to applicants.

7. **The statute requires proof of notification to be filed with the Conservation Commission. How and when should that be accomplished?**

DEP believes that a good way for applicants to document compliance is by preparing and submitting to the Conservation Commission an Affidavit of Service. A suggested form for this Affidavit is set forth at the end of this document. Submission of an Affidavit of Service should create a rebuttable presumption that the statute has been satisfied - in effect shifting the burden of disproving compliance to anyone who asserts that notification was not duly given.

When an NOI is filed, copies go to the appropriate DEP Regional Office, which reviews the NOI for completeness. DEP will not issue a file number for any NOI that is not accompanied by an Affidavit of Service. Accordingly, applicants should submit the Affidavit of Service with each copy of the NOI so that the NOI will be deemed complete and a file number can be issued.

Similarly, Conservation Commissions should consider adopting a procedure by which it does not deem an NOI to be complete and entitled to a public hearing unless an Affidavit of Service is included.

It is possible that, for whatever reason, an application might proceed to a public hearing before proof of compliance with the statute has been submitted. In that case, it is acceptable to prove compliance halfway through the public hearing, at the end of the hearing, or even after the hearing has been closed. Compliance is compliance - whether it's demonstrated sooner or later.

Although DEP recommends the use of an Affidavit of Service, in the absence of an official regulation requiring its use any evidence of notification provided by the applicant to the Conservation Commission that tends to prove compliance should be accepted by the Commission. Similarly, any evidence submitted by others that tends to disprove compliance should be accepted. Then, all the evidence has to be considered and the Commission must make a judgment call about compliance with the statute.

8. **Must return receipts ("green cards") be submitted as proof of compliance? If the notification is hand delivered, must each recipient's signature be submitted as proof of delivery?**

No. Applicants should retain the return receipts and make them available to the Conservation Commission if requested to do so. However, an applicant cannot control the flow of return receipts; for example, the person to whom the notification is addressed might not go to the post office to retrieve the letter. Similarly, an applicant may go to a home to deliver a notification by hand and, finding no one there, safely deposit the letter indoors through a mail slot.

Because it is not always possible to affirmatively demonstrate receipt of notifications, DEP recommends the use of the Affidavit of Service described above to create a rebuttable presumption of compliance with the statute.

9. **What if there is a defect in notification?**

If there is a defect in notification, the consequences depend on the nature of the problem. Outright failure - whether deliberately or by oversight - to notify any abutters is a clear violation of the statute. In that case, any Order of Conditions issued by the Conservation Commission would easily be challenged and overturned. The appropriate course, where there is a clear violation or no proof of compliance, is to continue the public hearing to the next meeting of the Conservation Commission in order to give the applicant an opportunity to comply.

Some alleged defects may be less clear. For example, an abutter may claim - and even demonstrate - that he or she did not receive notification. Still, that person may show up at the public hearing, be very familiar with the applicant's proposal, and participate fully. In such a situation, the abutter has - one way or another - received all the benefits of the notification requirement. The defect is, at worst, a technicality and should not affect the Conservation Commission's ability to conduct the public hearing and issue an Order of Conditions.

10. **How does an applicant find out the names and addresses of the abutters?**

According to the statute, the most recent applicable tax list of the assessors should be used for this purpose. Unless the Conservation Commission has made alternative arrangements for applicants (see Question #11), applicants are responsible for examining the tax maps and the tax records kept by the local assessors in order to compile the list of abutters. Since the statute specifies that "abutters" in another municipality are to receive notification, it may be necessary to check the tax maps and records in more than one city or town.

11. **Can applicants rely on a list of abutters supplied by the city or town? Some municipalities already supply abutters lists under their local wetlands ordinance or bylaw or under the Zoning Act.**

As a service, Conservation Commissions - directly, or through another part of municipal government such as the tax assessors or planning office- may supply applicants with a list of abutters. Mistakes may happen and they should be dealt with as described in Question #9. A list supplied by the city or town, however, should be accorded a presumption of being complete and accurate. Once again, such a presumption shifts the burden of <u>disproving</u> compliance to anyone who asserts that notification was not duly given.

12. **Does the new notification requirement apply to state and local agencies, such as the DPW?**

Only one public agency is excluded from the notification requirement: the Massachusetts Highway Department. This is stated explicitly in the legislation that created the new requirement. Local departments of public works, and state agencies such as the MWRA, MDC, Massachusetts Turnpike Authority, MBTA, etc., must comply with the notification requirement <u>whenever they file a Notice of Intent</u>.

Keep in mind, however, that work done by public agencies may be exempt under the Wetlands Protection Act. <u>If</u> work is exempt, then by definition no Notice of Intent needs to be filed. If no NOI is filed, then abutters will not receive notification of the proposed work - nor of the claim of exempt status under the Wetlands Protection Act.

Also, notification is required only when filing a Notice of Intent. A landowner filing a Request for Determination of Applicability under the Wetlands Protection Act need not give notification to abutters.

13. **Many municipalities have a local wetlands ordinance or bylaw; some of these local laws also require notice to abutters. Does the state law overrule the local requirements?**

Although local ordinances and bylaws are not affected at all by this new state law, it is possible - depending on the exact requirements of the local law - that one notification could satisfy both obligations. However, if compliance with all state and local laws requires two separate mailings to the same abutters, both sets of laws must be met.

Conservation Commissions with local ordinances or bylaws should review them to see if they are consistent with the statute. DEP suggests consultation with the municipal lawyer for this purpose. If the Commission is satisfied that one notification would cover both bases, it may want to formally certify that conclusion so that applicants can rely on the certification when limiting themselves to a single round of notification.

14. **To whom should notification be sent when the abutter is a condominium?**

In a condominium - whether residential, commercial, or industrial - the property has been divided into different components; each component has a different owner. The buildings are turned into units and each unit has a unit owner. The land is held in common by an association of unit owners (often - but not always - in the form of a trust).

The new statute refers to abutters as being "owners of land." In that case, since it is the association of unit owners that holds title to the land, the party to whom notification should be sent is the association and <u>not</u> the owners of each individual unit. It is the

responsibility of the owners association to act on behalf of its members.

The notice requirements of local wetlands ordinances and bylaws (see Question #13) may require applicants to notify all of the unit owners - contrary to the situation under state law. This may be due to the explicit wording of the local law or because that is the interpretation of the local law enforced by the Conservation Commission. In any case, it is important to comply fully with the notification requirements of both the Wetlands Protection Act and local wetlands ordinances and bylaws.

15. **The statute requires the notification to state where copies of the NOI may be examined. Is there any rule about how this is carried out?**

The statute does not give any rule. Several options spring to mind, however. The NOI might be made available for examination by:

- the applicant;
- the applicant's representative (*e.g.*, an engineer);
- the Conservation Commission; or
- some other municipal office (City/Town Clerk or library).

Each option has various benefits and drawbacks:

a. Applicant or Applicant's Representative
Putting the burden on the applicant or the applicant's representative is the simplest solution for the Conservation Commission, which in many cases may be overburdened and have no staff and no regular office hours. On the other hand, applicants may find it difficult to carry out this obligation, especially homeowners who do not hire an engineer and who would find it disruptive to field telephone inquiries or have abutters knocking on their door.

In addition, abutters might be intimidated by having to contact a neighbor to learn more about the application, especially if there are bad feelings about the proposed activity. If the applicant is not a neighbor but an out-of-town developer, it may be impractical for abutters to examine the NOI even if the applicant agrees to make it available. Finally, one cannot ignore the possibility of applicants refusing to play fairly by not answering the telephone.

b. Conservation Commission
As noted, many Conservation Commissions do not have the wherewithal to effectively carry out this duty. Putting the onus on them, therefore, inconveniences both the Commission's volunteer members (who will have to struggle to meet their obligations) and the abutters (who may be frustrated in their attempts to make connections with the Commission). On the other hand, Commissions that do have staff and regular office hours may

be willing to take on this chore, knowing that they can give good service to the public by doing so.

c. Other Municipal Offices

In some ways, this is the ideal solution. Typically, the local Clerk's office, library, or other municipal office has regular hours and full-time staffing. Neither DEP nor the Conservation Commission, however, has jurisdiction over these officials. They cannot require their assistance nor control their diligence in providing services.

DEP recommends that each Conservation Commission analyze its local situation promptly and vote to implement the method that best suits its resources and needs. The Commission may wish to authorize some party other than the applicant - either the Commission or another municipal official who has indicated a willingness to assist the Commission - to carry out this duty. <u>If so, the applicant must follow the procedures laid down by the Conservation Commission</u>.

On the other hand, the Conservation Commission may choose not to authorize itself or some other municipal official to make the NOI available for examination. <u>In that case, this responsibility remains with the applicant who then should name either the applicant or the applicant's representative in the notification</u>.

With this in mind, DEP suggests that the form set out at the end of this document be used for giving notification. It can be filled in or customized as necessary to reflect the decisions made about arrangements for examining the NOI. <u>Applicants should contact the Commission before preparing their notification to see if there is a customized notification form that must be used</u>.

16. **The statute requires the notification to state where copies of the Notice of Intent may be obtained. Is either the Conservation Commission or the applicant responsible for making a copy of the NOI for anyone who requests one?**

Conservation Commissions already should have in place appropriate procedures for making public records - including NOIs - available to interested persons for examination and copying.

DEP believes that it would place an unreasonable burden on applicants to require them to make copies of the NOI for every abutter for free - especially when, in some cases, there could be dozens of abutters. NOIs can be lengthy and include large, difficult-to-reproduce plans; making dozens of copies would be unduly expensive and time-consuming.

DEP, therefore, suggests the following:

- Applicants may choose to provide abutters with copies of the NOI. In that case, applicants have the option of imposing a

reasonable charge, not to exceed the cost of reproduction, for each copy.

- Applicants may choose to direct abutters to their representative - typically an engineer - for copies of the NOI. Again, the representative has the right to impose a reasonable charge, not to exceed the cost of reproduction, for each copy.

- Applicants (or their representatives) may give a spare copy of the NOI to an abutter for the abutter - at his or her own expense - to copy and then return.

With this in mind, DEP suggests that the form set out at the end of this document be used for giving notification. It can be filled in or customized as necessary to reflect the decisions made about arrangements for obtaining copies of the NOI.

17. **The statute requires the notification to state where information regarding the date, time, and place of the public hearing may be obtained. How should this be carried out if the date, time, and place are <u>not</u> contained in the notification itself?**

As seen in Question #5, the notification to abutters may - or may not - contain details on when and where the public hearing will take place. If the applicant gives a notification that does <u>not</u> contain those details, the notification must state where the information may be obtained.

The considerations here echo those discussed in Question #15. Once again, there are various benefits and drawbacks to the different solutions. Once again, DEP recommends that each Conservation Commission analyze its local situation promptly and vote to implement the method that best suits its resources and needs.

The Commission may wish to authorize some party other than the applicant - either the Commission or another municipal official who has indicated a willingness to assist the Commission - to carry out this duty. (A telephone line with a recorded message might serve the purpose.) <u>If so, the applicant must follow the procedures laid down by the Conservation Commission</u>.

On the other hand, the Conservation Commission may choose not to authorize itself or some other municipal official to provide information regarding the date, time, and place of the public hearing for the purpose of compliance with the statute. <u>In that case, this responsibility remains with the applicant who then should name either the applicant or the applicant's representative in the notification</u>.

With this in mind, DEP suggests that the form set out at the end of this document be used for giving notification. It can be filled in or customized as necessary to reflect the decisions made about arrangements for supplying information regarding the date, time, and

place of the public hearing for the purpose of compliance with the statute. Applicants should contact the Commission before preparing their notification to see if there is a customized notification form that must be used

Notification to Abutters Under the Massachusetts Wetlands Protection Act

In accordance with the second paragraph of Massachusetts General Laws Chapter 131, Section 40, you are hereby notified of the following.

A. The name of the applicant is _____

_____.

B. The applicant has filed a Notice of Intent with the Conservation Commission for the municipality of _____ seeking permission to remove, fill, dredge or alter an Area Subject to Protection Under the Wetlands Protection Act (General Laws Chapter 131, Section 40).

C. The address of the lot where the activity is proposed is_____.

_____

_____.

D. Copies of the Notice of Intent may be examined at_____

_____

between the hours of _____ and _____ on the following days of the week:

_____.

For more information, call: (_____) _____-_____.

Check One: This is the applicant ☐, representative ☐, or other ☐ (specify):

_____.

E. Copies of the Notice of Intent may be obtained from either (check one) the applicant ☐, or the applicant's representative ☐, by calling this telephone number (_____) _____-_____ between the hours of _____ and _____ on the following days of the week:_____.

F. Information regarding the date, time, and place of the public hearing may be obtained from _____

_____

by calling this telephone number (_____) _____-_____ between the hours of _____ and _____ on the following days of the week:

_____.

Check One: This is the applicant ☐, representative ☐, or other ☐ (specify):

_____.

NOTE: Notice of the public hearing, including its date, time, and place, will be published at least five (5) days in advance in the _____
(name of newspaper)

_____.

NOTE: Notice of the public hearing, including its date, time, and place, will be posted in the City or Town Hall not less than forty-eight (48) hours in advance.

NOTE: You also may contact your local Conservation Commission or the nearest Department of Environmental Protection Regional Office for more information about this application or the Wetlands Protection Act. To contact DEP, call:

Central Region: 508-792-7650

Northeast Region: 617-935-2160

Southeast Region: 508-946-2800

Western Region: 413-784-1100

AFFIDAVIT OF SERVICE

Under the Massachusetts Wetlands Protection Act

(to be submitted to the Massachusetts Department of Environmental Protection and the Conservation Commission when filing a Notice of Intent)

I, [insert name of person making the Affidavit], hereby certify under the pains and penalties of perjury that on [insert date] I gave notification to abutters in compliance with the second paragraph of Massachusetts General Laws Chapter 131, Section 40, and the **DEP Guide to Abutter Notification** dated April 8, 1994, in connection with the following matter:

> A Notice of Intent filed under the Massachusetts Wetlands Protection Act by [insert name of applicant] with the [insert name of municipality] Conservation Commission on [insert date] for property located at [insert address of land where the work is proposed].

The form of the notification, and a list of the abutters to whom it was given and their addresses, are attached to this Affidavit of Service.

_____ _____

Name Date