



**Guidance to Massachusetts Conservation Commissions  
Wetlands Protection Regulations & Vegetation Management in Railroad Rights-of-Way  
September 16, 2020**

Dear Conservation Commission Members and Staff:

Massachusetts Association of Conservation Commissions (MACC) and Massachusetts Society of Municipal Conservation Professionals (MSMCP) wish to provide our members with guidance regarding the application of the Wetlands Protection Act (M.G.L. c. 131, § 40) and Regulations (310 CMR 10.00) to vegetation management in railroad rights-of-way. We have been speaking with MassDEP, MBTA/Keolis, and our members in August and September 2020, and realize there is some confusion about this topic. This guidance explains our understanding of the proper application of the Wetlands Protection Regulations, which we believe is consistent with guidance that MassDEP has given in the past in response to questions in this area. This guidance responds to recent filings by MBTA/Keolis but may also be relevant to vegetation management by other rail companies.

**Background – RDA Filings**

If you are a community with an MBTA rail line in town, you likely recently received a Request for Determination of Applicability (RDA) from MBTA/Keolis in association with their proposed 2021-2026 Vegetation Management Plan (VMP). We want to make you aware that MACC and MSMCP believe that the categories of Determination of Applicability requested by MBTA/Keolis are not appropriate for these filings. MACC and MSMCP recommend that Commissions ONLY issue a Positive Determination #2a or 2b, approving or rejecting the wetland boundaries, and NOT a Negative Determination #2 or #5, as requested by MBTA/Keolis in the cover letter submitting the RDA.

**Determinations Applicable to Herbicide Application within a Railroad Right-of-Way**

MBTA/Keolis state in each cover letter for these filings that they are “submitting the enclosed RDA for the review of the wetlands map(s) along the railroad right-of-way (ROW) within your community as part of the renewal of the five-year Vegetation Management Plan (VMP).” This is an appropriate request regarding the application of herbicides for vegetation management in the Buffer Zones within railroad rights-of-way, in accordance with 310 CMR 10.05(3)(a)2 and 333 CMR 11 (the Rights-of-Way Management Program Regulations issued by the Department of Agricultural Resources pursuant to the Pesticide Control Act). The appropriate Commission response is a Positive Determination of Applicability that either confirms or rejects the wetlands boundaries presented. The Wetlands Protection Act is applicable to the mapped resource areas.

Once the boundaries have been approved in a Positive Determination of Applicability, the rail companies are entitled to a presumption that application of herbicides within the Buffer Zones within the mapped areas will not alter the wetlands resource areas, as long as the herbicide application is done in accordance with a Vegetation Management Plan approved by the Department of Agricultural

Resources under 333 CMR 11. (See 310 CMR 10.03(6)(b).) Thus, no additional filing is necessary for that particular work. A Negative #3 Determination (for work in the Buffer Zone that will not alter a resource area) would be appropriate for that particular work. However, the RDAs as filed do not make clear that the Determination sought is limited to that particular work, and MBTA/Keolis have not requested a limited Negative #3 Determination.

Similarly, once the resource area boundaries have been approved, the rail companies are entitled to the exemption set forth at 310 CMR 10.03(6)(c) for application of herbicides to the right-of-way within Riverfront Area (but outside all other resource areas), provided the area qualifies under 310 CMR 10.58(6)(a) and the herbicide application is done according to the approved Vegetation Management Plan. However, the rail companies have not specifically identified work that qualifies for the exemption at 310 CMR 10.03(6)(c).

To the contrary, MBTA/Keolis are taking the position that they are entitled to very broad exemptions. In addition to requesting permission to apply herbicides, it appears that MBTA/Keolis request that Commissions issue a determination that all work broadly described in the VMP can be carried out without further filings with the Conservation Commission. This includes “Physical Control Methods” (i.e. mechanical vegetation removal) and “Natural, Cultural, Biological Methods.”

### **Blanket Negative #2 and #5 Determinations Are Not Appropriate**

The Wetlands Protection Regulations presumption of no alteration at 310 CMR 10.03(6)(b) does not apply to application of herbicides within resource areas (except for the limited exemption for Riverfront Area in 310 CMR 10.03(6)(c)). Also, it DOES NOT apply to mechanical removal of trees or vegetation within the right-of-way (ROW). Mechanical removal of trees and vegetation within resource areas REQUIRES the filing of a Notice of Intent. Mechanical removal is proposed under the MBTA/Keolis RDA and can be reviewed in the VMP link provided in the RDA cover letter ([www.fdcerrailroadvegetation.com](http://www.fdcerrailroadvegetation.com)).

Issuance of a Negative #2 Determination applies when *“The work described in the Request is within an area subject to protection under the Act, but will not remove, fill, dredge, or alter that area. Therefore, said work does not require the filing of a Notice of Intent.”* Alteration is defined in the Wetlands Regulations at 310 CMR 10.04, and includes *“the destruction of vegetation.”* Railroad ROW vegetation management activities that alter jurisdictional wetland resource areas require the filing of a Notice of Intent.

Further, the exemption requested by the MBTA to include in a Negative #5 Determination does not apply to the MBTA, and should not be issued as part of your Commission’s Determination. The text of the exemption at CMR 310 10.02(2)(a)(2) reads: *“activities conducted to maintain, repair or replace, but not substantially change or enlarge an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, sewer, telephone, telegraph and other communication services.....”* The MBTA does not provide electric, gas, water, sewer, telephone, telegraph and other communication services to the public, so this exemption does not apply (except possibly to work specifically related to maintenance of MBTA communications equipment).

Please feel free to contact us with any questions or to share any information you have that may be useful to other communities. – MACC ([staff@macweb.org](mailto:staff@macweb.org)) & MSMCP ([massconpros@gmail.com](mailto:massconpros@gmail.com))