



The Commonwealth of Massachusetts

Executive Office of Environmental Affairs

Department of Environmental Quality Engineering

Division of Wetlands and Waterways Regulation

One Winter Street, Boston, Mass. 02108

Daniel S. Greenbaum
Commissioner

Gary R. Clayton
Director

MEMORANDUM

RECEIVED

MAY 18 1989

TO: Conservation Commissions
Other Interested Parties

FROM: Gary Clayton, Division Director

DATE: May 10, 1989

SUBJECT: Proposed Wetlands Fee System

Gary Clayton
Abs'd.....

Reviewers of proposed amendments to 310 CMR 10.00, the Wetlands Protection Act Regulations, have already raised a number of questions regarding the proposed wetlands fee system. The attached question and answer sheet is intended to address a number of the questions you may have.

I hope you will find this additional material useful. I look forward to receiving your comments on the proposed fee system at one of the public hearings and, if possible, your written comments. Your input is appreciated.

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PROPOSED WETLANDS FEE REGULATIONS
(310 CMR 10.00 and 801 CMR 4.00)

QUESTIONS & ANSWERS

May 1989

WHY AND HOW WAS THE WETLANDS FEE SYSTEM DEVELOPED?

Q. Why are the Office of Administration & Finance (A&F) and the Department of Environmental Quality Engineering (DEQE) changing the fees for filings under the Wetlands Protection Act, MGL C.131, s.40?

A. In 1988 the Legislature amended the Act to require a new sliding scale fee system for filing Notices of Intent (NOI), Chapter 202, sections 26 and 30 of the Acts of 1988. In addition, A&F is using its authority to set fees for state services to establish fees for requests for DEQE actions.

Q. What is the purpose of collecting fees for filing NOIs?

A. As stated in the Act, the purpose of the NOI fees is "to defray state and local administrative costs".

Q. Why is the NOI filing fee based on project type?

A. A number of models for filing fees were considered, including fees based on area of project impact, project cost, and project type. Project type was chosen because it is directly related to the size of the project and its impact on wetlands, which both directly relate to the amount of project review time required. In addition, the ease with which conservation commissions could accurately determine the appropriate fee was a factor. Project type is fairly simple to determine while the area of project impact to wetland resources is frequently disputed.

Q. How were the fee amounts for filing NOIs determined?

A. Two factors were considered - the cost to the state of administering the program and the reasonableness of the proposed fees.

The costs of administering the program include program management, technical assistance and training for conservation commissions and others, enforcement, regulatory and policy development, general program administration and operating costs.

To determine reasonable fees for NOI filings DEQE developed a comprehensive list of project activities and determined the average review time for each. Similar activities were grouped together to create five fee categories (A through E) with each category representing project types that take similar amounts of time to review. For each category, a reasonable fee was determined based on the approximate review time required.

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DEQE applied these fees to a random sample of 1988 project types to determine projected revenues.

Q. Won't there be disputes about fee amounts anyway? If so, how will these be handled?

A. Yes, but far fewer than under the more complex models considered. A conservation commission must notify the applicant in writing when, in its judgement, an incorrect fee amount has been submitted with the NOI filing. This could happen before, during, or after the public hearing is held. Time periods under the Act cease to elapse after such notification is issued. The applicant may then 1) pay the additional amount without disputing it, 2) pay the additional amount into an escrow account held by the municipality and allow the question of the fee amount to be resolved by a Final Order, or 3) file a Request for Determination of Applicability (RDA). Once the additional fee amount is paid, the time periods within which the conservation commission must act continue to elapse. If an RDA is filed, the time period for action would not begin to run again until a Final Determination is issued that supports the fee filed with the NOI or, in the event the commission is upheld, until the applicant pays the additional fee amount.

Q. In what circumstance would an applicant file a RDA to resolve a fee dispute?

A. Some fees are determined by the number of structures or activities in resource areas or the buffer zone. An RDA may be filed when the basis of the dispute is the delineation of the resource area. In such cases, the Final Determination (issued by the commission or DEQE) will establish the edges of wetlands resource areas and the precise location of activities subject to the Act and therefore subject to filing fees. The resulting Determination is binding on all parties.

Q. How were fees for requests for DEQE action determined?

A. Fees for appeals of Determinations of Applicability and Orders of Conditions are \$50. Clearly this does not reflect the time required by the Department to review project plans and prepare appeal decisions (often 60 hours or more). To avoid interference with due process rights and discouraging appellants with a sincere desire to protect wetland resources, the fee for these appeals was established at this nominal level. The same reasoning was applied in setting the Claim for Adjudication Fee at \$100. The cost for reviewing appeals will in large part be covered by the state's share of the NOI fees.

Because additional complex factors are considered, reviewing a variance request typically requires hundreds of hours of legal, technical and management staff time. At \$4000 per request, this fee still would not cover the entire cost of this review in many cases.

WHAT FILINGS DOES THE FEE SYSTEM INCLUDE?

Q. What activities are covered by Notice of Intent fees?

A. All activities that are subject to jurisdiction under the Act, including activities that cause impacts to resource areas "after the fact".

Q. What about activities not listed specifically in the DEQE regulations? Does this mean there will be no fee for these projects?

A. No. DEQE attempted to identify all project types, but added an "other" category just in case.

Q. Why is there no fee for a Request for Determination?

A. The Legislature did not amend the Act to provide a RDA filing fee.

HOW MUCH REVENUE WILL BE RAISED?

Q. How do A&F and DEQE propose to meet the legislative mandate to "defray state and local costs of program administration"?

A. Although it is impossible to project revenues precisely, we believe the fees collected will be within a reasonable range.

Q. What is the cost of running the state Wetlands Protection Program?

A. In Fiscal Year 1990, the program will cost \$3.75 million.

Q. What is the cost to municipalities of administering the Wetlands Protection Act?

A. This varies broadly from town to town depending on whether or not consultants are used or professional staff have been hired.

Q. How will the proposed fee system "defray" local costs of administering the program?

A. For cities and towns with a large number of filings, the fees collected could be sufficient to support full-time professional staff. The fees collected go into the town general fund and are not specifically earmarked for the conservation commission.

Q. What is the total revenue expected from the fee system and what are the anticipated local/state shares?

A. The Act provides that "Fifty percent of amounts collected in excess of twenty-five dollars from each such filing fee shall be paid over to the state treasurer and credited to the General Fund".

Fees for NOI should result in total revenues of approximately \$5.2 million. Of this total, \$2.5 million would go to the state and \$2.7 million (includes the first \$25 and half of the balance collected) would be retained by the municipalities. Revenue from fees for DEQE actions are expected to be in the range of \$700,000. The total amount of revenue for the state would be about \$3.2 million.

Q. Will the fee system relieve DEQE's backlog problem so that appeals decisions are issued in shorter time frames?

A. Yes. The fees will support the appropriate number of DEQE wetlands staff to ensure that the present backlog is eliminated and that future backlogs do not occur. Although improvements in processing times for appeals should be experienced within the next few months, the backlog will not be entirely eliminated for at least three years.

IN WHAT OTHER WAYS WILL CITIES AND TOWNS BE AFFECTED BY THESE REGULATIONS?

Q. How does the state fee relate to the fee assessed under a local non-zoning wetlands bylaw?

A. The fee systems established under local bylaw are entirely independent of the state wetlands fee system. Municipalities that have established such systems will want to consider whether the establishment of state fees renders their local fees duplicative in any part and to consider revising the local fees accordingly. A&F and DEQE have no authority to establish a state wetlands fee system that automatically adjusts itself to a local fee system.

Q. Will the cities and towns receive instructions on how and when to pay over the state share of fees collected?

A. Yes. Information will be distributed during June 1989.

OTHER QUESTIONS

Q. When will the new fee schedule be effective?

A. The regulations will be effective on June 30, 1989. The fees will apply to all NOI filings and requests for Departmental action filed on or after June 30, 1989.

Q. Where should fees for requests for DEQE action be sent?

A. While the request for action by the Department still shall be sent directly to the appropriate DEQE office, the fee must be sent to the DEQE Lock Box. The address for the Lock Box and instructions on how to submit requests and fees will be published and available from conservation commissions, from any DEQE office, and at the State House Book Store.

Q. Will a conservation commission have to pay a fee to request an Adjudicatory Hearing or to Intervene in an Adjudicatory Hearing?

A. No. A&F regulations exempt conservation commissions from this fee.

Q. Are there other exemptions?

A. Yes. Federal agencies are exempt from these fees although they are subject to the substantive and procedural requirements of state wetlands regulations if their work is regulated by s.404 of the federal Clean Water Act. Municipalities are exempt because it does not make sense for the city or town to pay a filing fee to itself.

Q. What happens when a NOI is withdrawn? Does the applicant get a refund?

A. No. The applicant forfeits the fee just as when the filing fee was \$25.

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S-436

Comm. from Gary Clayton, Div. Dir., Mass.
Exec. Office of Environmental Affairs, DEQE
Div. of Wetlands & Waterways Regulation Re:
proposed amendments to 310 CMR 10.00, the
Wetlands Protection Act Regulations.

In City Council,

June 5, 1989

6-5-89

Referred to the
City Manager

Copy sent to the City Manager 6/7/89 mhr