



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

Southeast Regional Office • 20 Riverside Drive, Lakeville MA 02347 • 508-946-2700

Charles D. Baker  
Governor

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Kathleen A. Theoharides  
Secretary

Martin Suuberg  
Commissioner

FEB 03 2021

Clary Coutu, Keolis Commuter Services  
c/o Richard A. Nylen, Jr., Esq.  
Lynch DeSimone & Nylen, LLP  
10 Post Office Square, Suite 970N  
Boston, MA 02109

RE: NEW BEDFORD - WETLANDS  
MBTA Commuter Rail  
Right of Way  
**Superseding Determination  
of Applicability (SDA)**

Dear Attorney Nylen:

Following an in-depth review of the file referenced above, and in accordance with the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40, (the "Act") and its regulations at 310 CMR 10.00 et. seq. (the "Regulations") the Southeast Regional Office of the Massachusetts Department of Environmental Protection, Wetlands Program ("MassDEP"), is issuing the attached Superseding Determination of Applicability (the "SDA") based upon: 1) information and plans submitted; and 2) reasons MassDEP has deemed necessary to protect the statutory interests identified in the Act and Regulations.

On July 29, 2020, Keolis Commuter Services filed a Request for a Determination of Applicability (RDA) with the New Bedford Conservation Commission (the "Commission") requesting that the Commission determine whether the delineation of wetland resource areas along the Massachusetts Bay Transportation Authority (the "MBTA") right-of-way ("ROW") is accurate for the purposes of vegetation management control and that additional filings under the Act are not required so long as the work is conducted in accordance with an approved Vegetation Management Plan (the "VMP") issued pursuant to 333 CMR 11.00, Rights of Way Management. The RDA states that the proposed work, which includes both mechanical and chemical controls, is necessary for the safe operation and maintenance of the commuter rail system. Keolis also opines that work to maintain the ROW is exempt pursuant to 310 CMR 10.02(2)(a)2 of the Regulations.

The plan of record included in the VMP, dated July 14, 2020, is at a scale of 1:25,000 making it difficult to discern the wetland delineation and if the wetland resource areas have been delineated in accordance with MassDEP guidance. Wetland areas shown on the plan of record are only labelled as "National Wetlands" and the work in those areas is shown as "No Spray

This Information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.  
TTY# MassRelay Service 1-800-439-2370  
MassDEP Website: [www.mass.gov/dep](http://www.mass.gov/dep)

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Zone”, and “Limited Spray Zone”. Presumably, the mechanical cutting is proposed in the “No Spray Zone” and chemical application is proposed in the “Limited Spray Zone”.

There are however other plans, not part of the RDA submittal, that show the wetland resource areas as defined by the Act and Regulations. Those plans were submitted as part of MassDOT’s SouthCoast Rail project, and the Commission issued an Order of Conditions on August 24, 2018 (SF 49-0805) approving the proposed work and affirming the wetland delineation. There are several plans associated with the Order of Conditions that were prepared by VIIB/HNTB.

On November 4, 2020, the Commission issued a Positive Determination of Applicability (DOA) confirming that “The boundary delineations of the following resource areas described on the referenced plan(s) are confirmed as accurate. Therefore, the resource areas boundaries confirmed in this Determination are binding as to all decisions rendered pursuant to the Wetlands Protection Act and its regulations regarding such boundaries for as long as this Determination is valid. The boundaries of the Bordering Vegetated Wetlands and Isolated Lands Subject to Flooding as depicted on the USGS Maps and labelled National Wetlands are confirmed as accurate for the purpose of this VMP only.”

On November 13, 2020 you appealed the DOA on behalf of MBTA/Keolis. Your appeal states that the Positive Determination issued by the Commission is inaccurate and that the work should be considered exempt. The appeal requests that MassDEP issue a Negative Determination for the vegetative management proposed in the RDA, including both in the buffer zone and in wetland resource areas and mechanical means when necessary.

The Regulations under 310 CMR 10.02(2)(a)2 provide an exemption for certain maintenance and repair activities on existing structures and facilities used in the service of the public to provide electric, gas, water, sewer, telephone, telegraph and other communication services. This section of the Regulations does not include an exemption for railroads or commuter rail service. Therefore, it is MassDEP’s opinion that MBTA and Keolis may not utilize this section of the Regulations in order to perform work to manage vegetation within the MBTA’s ROWs.

Based upon review of the information and plans contained in the file and taking into consideration all of the issues raised in the appeal, it is MassDEP’s opinion that:


- 1) The application of herbicides to vegetation located within the 100-foot Buffer Zone to wetland resources areas, as approved under a VMP and Yearly Operation Plan (the “YOP”), may be conducted pursuant to 310 CMR 10.03(6)(b) and is permissible under a negative Determination.
- 2) Any application of herbicides for management of rights of way within a riverfront area not subject to 310 CMR 10.03(6)(a) or (b), provided the area is outside of any other resource area and qualifies under the provisions of 310 CMR 10.58(6)(a), may be conducted pursuant to 310 CMR 10.03(6)(c) under the Negative Determination of Applicability.

- 3) The application of herbicides within a wetland resource area and/or mechanical cutting of vegetation within a wetland resource area require(s) the filing of a Notice of Intent, including plans showing the location and extent of work on the project site, and receipt of an Order of Conditions, prior to undertaking these activities.
- 4) Mechanical cutting of vegetation within the Buffer Zone will require the filing of either a Notice of Intent or a Request for Determination of Applicability, based on the location and extent of the cutting within the Buffer Zone, and confirmation of the boundaries of wetland resource areas.

Please be advised that MassDEP reserves the right, should there be further proceedings in this case to raise additional issues and present further evidence as may be appropriate. Should you or any party dispute these findings, please consult the language in this SDA that specifies your rights and procedures to appeal.

Should you have any questions regarding the Department's actions in this matter, please contact Mark Bartow at (508) 946-2746, or by e-mail at [Mark.Bartow@mass.gov](mailto:Mark.Bartow@mass.gov), or me at (508) 946-2808, or by e-mail at [Daniel.Gilmore@mass.gov](mailto:Daniel.Gilmore@mass.gov).

Very truly yours,

  
Daniel F. Gilmore, Chief  
Wetlands and Waterways Program  
Bureau of Water Resources

DFG/mnb

Enclosure

CERTIFIED MAIL # 7019 2280 0002 2137 1366

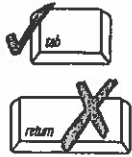
cc: New Bedford Conservation Commission



Massachusetts Department of Environmental Protection  
Bureau of Water Resources - Wetlands  
**Superseding Determination of Applicability**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

## 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.



From:

Massachusetts Department of Environmental Protection

Southeast

MassDEP Regional Office

To: Applicant

Clary Coutu, Keolis Commuter Services

Name

c/o Richard A. Nylen, Jr., Esq.

Lynch, DeSimone & Nylen, LLP

10 Post Office Square, Suite 970N

Mailing Address

Boston

MA

02109

City/Town

State

Zip

Property Owner (if different from applicant):

MBTA

Name

10 Park Plaza, Suite 1607

Mailing Address

Boston

MA

02210

City/Town

State

Zip Code

1. Title and Date (or Revised Date if applicable) of Final Plans and Other Documents:

USGS map of the City of New Bedford Secondary, Sheets 1 & 2 of 2

July 14, 2020

Title

Date

MassDOT South Coast Rail Notice of Intent Plans, prepared by VHB/HNTB

OoC issued 8/24/2018

Title

Date

Title

Date

2. Date Request Filed:

July 29, 2020

Date

## B. Determination

Pursuant to the authority of M.G.L. c. 131, § 40, the Department considered your Request for Determination of Applicability, with its supporting documentation, and made the following Determination.

Project Description (if applicable):

The project proposes vegetation management control and maintenance activities for the railroad right-of-way (FRA, 49 CFR 237). The vegetation management plan for the railroad incorporates Integrated Pest Management approach towards promoting safer railroad for employees, passengers, and neighboring communities by means of implementing various approaches towards removal of nuisance vegetation along the ROW. This work includes both chemical and mechanical controls as represented within the Vegetation Management Plan.

Project Location:

New Bedford Secondary

Street Address

R-O-W

Assessors Map/Plat Number

New Bedford

City/Town

R-O-W

Parcel/Lot Number



Massachusetts Department of Environmental Protection  
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**B. Determination (cont.)**

The following Determination(s) is/are applicable to the proposed site and/or project relative to the Wetlands Protection Act and regulations:

**Positive Determination**

Note: No work within the jurisdiction of the Wetlands Protection Act may proceed until a final Order of Conditions (issued following submittal of a Notice of Intent or Abbreviated Notice of Intent) has been received from the issuing authority (i.e., Conservation Commission or the Department of Environmental Protection).

- ☐ 1. The area described on the referenced plan(s) is an area subject to protection under the Act. Removing, filling, dredging, or altering of the area requires the filing of a Notice of Intent.
- ☒ 2a. The boundary delineations of the following resource areas described on the referenced plan(s) are confirmed as accurate. Therefore, the resource area boundaries confirmed in this Determination are binding as to all decisions rendered pursuant to the Wetlands Protection Act and its regulations regarding such boundaries for as long as this Determination is valid.

The boundaries of the resource areas that have been confirmed through the ANRAD/ORAD and NOI/OOC process are accurate as established through those reviews.

- ☒ 2b. The boundaries of resource areas listed below are not confirmed by this Determination, regardless of whether such boundaries are contained on the plans attached to this Determination or to the Request for Determination.

The boundaries of resource areas shown on the USGS plan(s) and described in the documents submitted with the Request for Determination of Applicability are too vague and cannot be confirmed.

- ☒ 3. The work described on referenced plan(s) and document(s) (application of herbicides and mechanical cutting of vegetation) is within an area subject to protection under the Act and will remove, fill, dredge, or alter that area. Therefore, said work requires the filing of a Notice of Intent.
- ☒ 4. The work described on referenced plan(s) and document(s) (mechanical cutting of vegetation) is within the Buffer Zone and will alter an Area subject to protection under the Act. Therefore, said work requires the filing of a Notice of Intent.

- ☐ 5. The area and/or work described on referenced plan(s) and document(s) is subject to review and approval by:

Name of Municipality

Pursuant to the following municipal wetland ordinance or bylaw:

Name

Ordinance or Bylaw Citation



**Massachusetts Department of Environmental Protection**

Bureau of Water Resources - Wetlands

**Superseding Determination of Applicability**

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

**B. Determination (cont.)**

- ☐ 6. The following area and/or work, if any, is subject to a municipal ordinance or bylaw but not subject to the Massachusetts Wetlands Protection Act:
- 
- ☐ 7. If a Notice of Intent is filed for the work in the Riverfront Area described on referenced plan(s) and document(s), which includes all or part of the work described in the Request, the applicant must consider the following alternatives. (Refer to the wetland regulations at 10.58(4)c. for more information about the scope of alternatives requirements):
- ☐ Alternatives limited to the lot on which the project is located.
  - ☐ Alternatives limited to the lot on which the project is located, the subdivided lots, and any adjacent lots formerly or presently owned by the same owner.
  - ☐ Alternatives limited to the original parcel on which the project is located, the subdivided parcels, any adjacent parcels, and any other land which can reasonably be obtained within the municipality.
  - ☐ Alternatives extend to any sites which can reasonably be obtained within the appropriate region of the state.

**Negative Determination**

No further action under the Wetlands Protection Act is required by the applicant.

- ☐ 1. The area described in the Request is not an area subject to protection under the Rivers Protection Act.
- ☐ 2. 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.
- ☒ 3. The work described in the Request is within the Buffer Zone, as defined in the regulations, but will not alter an Area subject to protection under the Act. Therefore, said work does not require the filing of a Notice of Intent, subject to the following conditions (if any).

The application of herbicides to manage vegetation within the Buffer Zone is allowed pursuant to 310 CMR 10.03(6)(b).

- ☐ 4. The work described in the Request is not within an Area subject to protection under the Act (including the Buffer Zone). Therefore, said work does not require the filing of a Notice of Intent, unless and until said work alters an Area subject to protection under the Act.



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**B. Determination (cont.)**

- ☒ 5. The area described in the Request is subject to protection under the Act. Since the work described therein meets the requirements for the following exemption, as specified in the Act and the regulations, no Notice of Intent is required:

Exempt Activity (site applicable statutory/regulatory provisions)

The application of herbicides for management of rights of way within a riverfront area not subject to 310 CMR 10.03(6) (a) or (b), provided the area is outside of any other resource area and qualifies under the provisions of 310 CMR 10.58(6)(a) is allowed pursuant to 310 CMR 10.03(6)(c).

- ☐ 6. The area and/or work described in the Request is not subject to review and approval by:

Name of Municipality

Pursuant to a municipal wetland ordinance or bylaw.

Name

Ordinance or Bylaw Citation

**C. Authorization**

This Determination is issued to the applicant and delivered as follows:

- ☐ by hand delivery on ☒ by certified mail, return receipt requested on

FEB 03 2021

Date

Date

This Determination is valid for **three years** from the date of issuance (except Determinations for Vegetation Management Plans which are valid for the duration of the Plan). This Determination does not relieve the applicant from complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.

Issued by the Massachusetts Department of Environmental Protection, Southeast Region:

Daniel F. Gilmore, Chief, Wetlands & Waterways Program, Bureau of Water Resources

7019 2280 0002 2137 1366

Certified Mail #



**Massachusetts Department of Environmental Protection**  
Bureau of Water Resources - Wetlands

**Superseding Determination of Applicability**

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

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**D. Appeals**

**Notice of Appeal Rights:**

**Appeal Rights and Time Limits**

The applicant, the owner, any person aggrieved by the Superseding Determination, any owner of land abutting the land upon which the proposed work is to be done, or any ten (10) persons pursuant to M.G.L. c.30A, §10A, are hereby notified of their right to request an adjudicatory hearing pursuant to M.G.L. c.30A, § 10, providing the request is made by certified mail or hand delivery to the Department, with the appropriate filing fee and a DEP Fee Transmittal Form within ten (10) business days from the date of issuance of this Superseding Determination, and addressed to:

Docket Clerk  
Office of Administrative Appeals  
Massachusetts Department of Environmental Protection  
One Winter Street, 3<sup>rd</sup> Floor  
Boston, MA 02108.

A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission, the applicant, and the issuing office of the DEP at:

Massachusetts Department of Environmental Protection  
Southeast Regional Office  
20 Riverside Drive  
Lakeville, MA 02347

**Contents of Hearing Request**

A Notice of Claim for Adjudicatory Hearing shall comply with the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.01(6), and shall contain the following information:

- (a) the DEP Wetlands File Number, name of the applicant and address of the project;
- (b) the complete name, address, and fax and telephone numbers of the party filing the request, and, if represented by consultant or counsel, the name, fax and telephone numbers, and address of the representative;
- (c) the names, telephone and fax numbers, and addresses of all other parties, if known;
- (d) a clear and concise statement of (1) the facts which are grounds for the proceedings, (2) the objections to this Superseding Order, including specifically the manner in which it is alleged to be inconsistent with the Department's Wetlands Regulations, 310 CMR 10.00, and does not contribute to the protection of the interests identified in the Act, and (3) the relief sought through the adjudicatory hearing, including specifically the changes desired in the Superseding Order;
- (e) a statement that a copy of the request has been sent by certified mail or hand delivery to the applicant and the conservation commission.

**Filing Fee and Address**

A copy of the Notice of Claim along with a DEP Fee Transmittal Form and a valid check or money order payable to the Commonwealth of Massachusetts in the amount of one hundred dollars (\$100) must be mailed to:

Commonwealth of Massachusetts  
Department of Environmental Protection  
Commonwealth Master Lockbox  
P.O. Box 4062  
Boston, Massachusetts 02211

The request will be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver. The filing fee is not required if the appellant is a city or town (or municipal agency), county, or district of the Commonwealth of Massachusetts, or a municipal housing authority. The Department may waive the adjudicatory hearing filing fee pursuant to 310 CMR 4.06(2) for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file an affidavit setting forth the facts believed to support the claim of undue financial hardship together with the hearing request as provided above.



# Adjudicatory Hearing Fee Transmittal Form

**IMPORTANT!** This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action.

## A. Person/Party Making Request

1. Name and address of person or party making request:

Name - If appropriate, name group representative

Street Address

City

State

Zip Code

2. Project Information:

Street Address

City

State

Zip Code

DEP File or ID Number

\$

Amount of filing fee attached

Email Address

## B. Applicant (if applicable)

1. Name and address of applicant:

Name - If appropriate, name group representative

Street Address

City

State

Zip Code

Email Address

## C. Instructions

1. Send this form and check or money order of \$100.00 payable to the Commonwealth of Massachusetts to the MassDEP Lockbox at:

Department of Environmental Protection  
P.O. Box 4062  
Boston, MA 02211

2. Send a copy of this form and a copy of the check or money order with the Request for Adjudicatory Appeal (Notice of Claim) to:

Case Administrator  
Office of Appeals and Dispute Resolution  
One Winter Street  
Boston, MA 02108

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

