



Cape Cod Cranberry Growers' Association

WETLAND CHANGE AND ENFORCEMENT BULLETIN

SEPTEMBER 2004

Background:

Since the early 1990s, the Department of Environmental Protection (the "Department") has been analyzing aerial photographs of the state. Using these photographs, the Department delineates wetlands boundaries and records the locations throughout the entire state. However, only recently has the Department had the technology to compare old aerial photographs of wetlands boundaries to updated photographs. Using United States Department of Defense technology, the Department can now overlay old aerial photographs with new photographs and scan them through a computer program that identifies areas where wetlands boundaries have changed. As a result, the Department can easily observe wetlands changes throughout the entire state. The changes are then categorized, numbered and digitized for use in Geographic Information System (GIS). The technology allows the Department to analyze wetland change as small as 1,760 square feet. However these smaller areas have a greater likelihood for error.

It is important to note that **areas of wetland change do not necessarily constitute an area that has a wetland violation.** These changes may be a result of succession, the natural change in plant communities, or the result of a man made alteration that was permitted or exempt from permitting. In some cases the wetland delineation may even be inaccurate.

The DEP estimates there are over 522 acres of wetland change in southeast Massachusetts associated with cranberry operations, residential and commercial development, logging/clearing, gravel operations and new road construction. Alterations that are not permitted or exempt activities may constitute an enforceable infraction.

Do you have an area of wetland change on your Farm?

If you have made improvements on your farm in the last ten years that have impacted wetlands, even though those activities are exempt or were performed with a permit, you probably have an alteration notation on the State Wetland Change Map.



CCCGA has the wetland change data for all of Southeast Massachusetts including Cape Cod and Islands. We have printed out (75) 20" X 30" maps from 13 local communities: *Bridgewater, Carver, Duxbury, Freetown, Halifax, Hanson, Kingston, Lakeville, Mattapoisett, Middleboro, Plympton, Rochester and Wareham.*

Due to the large number of maps, CCCGA only printed maps for communities that have the largest amount of change. These **maps cannot leave** the CCCGA Office. They are for research purposes only. The maps can be viewed at the CCCGA office M-F 8:30 AM -5:00 PM. No appointment is necessary.

If you need to view communities not listed above, please call the office to make an appointment. These communities consist of *Acushnet, Berkley, Bourne, Dartmouth, Dennis, E. Bridgewater, Harwich, Marion, Pembroke, Plymouth, Rehoboth, Sandwich, Scituate, Taunton, Wellfleet and Yarmouth.* These communities have limited alterations due to cranberry activities, thus we have chosen not to incur the cost to print these maps. The data from these communities can only be accessed by utilizing the CCCGA GIS, thus an appointment needs to be made with the CCCGA staff. We cannot provide GIS service for stop-in clients.

This service to view maps and review GIS data is **free for CCCGA members.** **Non-members will be charged \$25/hour** for use of the maps and any GIS assistance.

What will the data tell you?

The data we have will give you the square footage of alteration, the type of activity believed to have taken place and the type of wetland it was prior to the alteration.

Who else has the wetland change data?

DEP provided each local Conservation Commission in SE Massachusetts the GIS data of wetland change. The towns are providing DEP with information on the wetland change sites such as if the local town had issued a permit for the alteration or if the town decided the project did not require a permit or filing with the Conservation Commission. You must assume it is public information and interest groups will be provided the data. Most communities may let DEP take any and all enforcement.

Will there be Federal Involvement?

The US Army Corps. of Engineers and US EPA have enforcement capabilities in wetlands under section 404 of the Clean Water Act. It is not known at this time how the federal agencies will respond to alleged wetland violations. In the past state and federal agencies have coordinated and usually agreed to let one of the agencies take the lead and the other would adopt the lead agencies findings.

Ok now you know you have an area of wetland change, What Next?

There are three categories of wetland change that would be applicable to cranberry growers:

Category 1: Exempt or unregulated activities that fall under the *Normal Maintenance and Improvement of Land in Agricultural Use* regulations, 310 CMR 10.04. (See the Agricultural Regulations of the Wetlands Protection Act Grower Advisory mailed to all growers in January 2004.) Even though you may have a wetland alteration that falls in this category, there may have been certain notification requirements with the USDA, Natural Resource Conservation Service or your local conservation commission in order to enjoy the exemption. **NEW BOG CONSTRUCTION DOES NOT FALL IN THIS CATEGORY.** You should make sure you have your certified farm Conservation Plan (CP) with the activities conducted on your farm well documented to prove use of the *Normal Maintenance and Improvement of Land in Agricultural Use* regulations. The only exempt BVW changes for growers are limited to the following categories for land currently in agricultural use.



Normal Improvement Practices

- Construction Tail Water Recovery Pond up to 10,000 square feet of BVW
- Reconstruction of Existing Dike up to 5,000 square feet of BVW
- Expansion of a Farm Pond/Reservoir up to 10,000 square feet of BVW
- By-Pass Canal construction up to 5,000 square feet of BVW

Category 2: Permitted projects. These projects may have been permitted or determined not to require a permit by the local conservation commission. It is important to have all documentation from this available such as a negative determination of applicability if the conservation commission said you did not require a permit or an order of conditions from the conservation commission if a permit was issued.

Limited projects

- Tail Water Recovery up to 20,000 square feet
- Reconstruction of Existing Dike up to 10,000 square feet of BVW
- Re-Construction of a Farm Pond/Reservoir up to 20,000 square feet of BVW
- Construction of new farm pond up to 20,000 square feet of BVW
- By-Pass Canal construction up to 20,000 square feet of BVW

Category 3: Unauthorized activities include any alteration to wetlands that would not have fallen in the category of “Normal Maintenance or Improvement of land in agricultural use” that would require a permit (i.e. new bog construction in wetlands or a project listed above over the square foot limitation set in the regulations)



An example of an unauthorized activity (without a permit) is renovation of a bog that deemed to be abandoned. If you have renovated a bog that would be categorized as “abandoned” it is treated as an alteration that happened in a wetland. If the bog was in “disrepair” it may still have qualified for the normal maintenance or improvement of land in agricultural use regulations listed above. However you will have to prove the bog was in disrepair and not abandoned. There is plenty of legal information on what constitutes an active bog that may have been in “disrepair”. CCCGA can provide you with this information.

Enforcement Process

CCCGA ran a full article on enforcement by CCCGA Legal Council Francis A. DiLuna of Murtha Cullina LLP in the July 2004 issue of *BOGSIDE*. Please refer to this article for further detailed information on the enforcement process.

Notification: Typically the Department will send a landowner a notice of a suspected violation and invitation to attend a meeting to discuss issues of compliance. This is called a “Notice of Enforcement Conference” Failure to attend the compliance meeting will only escalate the enforcement process. At the meeting the landowner is shown the aerial evidence collected and analyzed. Typically, the landowner will be given an estimated amount of the suspected alterations. Oftentimes the Department will request a site visit. Sometime thereafter, the landowner should expect to receive a document entitled *Administrative Consent Order with Penalty and Notice of Non-Compliance*.

You have a violation: In the event the landowner has not convinced the investigators that the wetland change was exempt or permitted, the landowner will expect to receive *Notice of Non-Compliance* and an *Administrative Consent Order with Penalty*.

Consent Order and Fines: If after an enforcement conference, *Notice of Non-Compliance* and site visit the landowner and DEP agree to the terms concerning liability, remediation (restoration of area altered) and fines, the Department can issue to the landowner a Consent Decree. A Consent Decree has the same legal force and effect as a permit. It is the Department’s preference to negotiate a mutual Consent Decree over issuing a *Unilateral Enforcement Order*. When the Department acts on a wetland violation, by statute, generally, it must issue a *Notice of Non-Compliance* or administrative penalty (fines). The amount of the fine must be determined by guidelines. The landowner should, at an enforcement conference, ask how the penalty was determined, the amount of the penalty assessed for each factor and the weight of each. CCCGA has seen fines issued anywhere from a couple thousand dollars up to seventy thousand dollars. In some cases fines are waived.



Is there a statute of limitations?

Case law is a bit ambiguous on the issue of statute of limitations. There is a general two-year statute of limitations for penalty actions. Some attorneys believe that in all cases the statute of limitations begins to run from the time when the Department or conservation commission discovers the violation, while others contend that it begins to run from the time the violation occurred, except when the violation has been fraudulently concealed. They contend that this is the only instance when the start of the time period is delayed until the Department or conservation commission discovers the violation.

The Wetland Protection Act also provides that it is unlawful to “leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition”. This means that the DEP or the conservation commission can, subject to the property transfer exception described below, take enforcement action to remove old fill after a two-year period because the two-year statute of limitations clock essentially resets every day that the fill or alteration remains in place. The Department’s position is that the violation is current everyday the alteration remains and it can both order removal and assess penalties for leaving fill in place or failing to restore.

Mass General Laws says that the subsequent owner of a property cannot be sued for violations existing on the property at the time of purchase or inheritance if more than three years have passed since the recording of the deed. If you purchased or inherited a property that had wetland violation on it at the time of purchase or inheritance and were not responsible for creating the problem, you may have a defense.

Given the complexities of statutes of limitations, you should seek legal insight from your own attorney on this.

For more information contact

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This bulletin does not constitute the rendering of legal advice or other professional advice by the Cape Cod Cranberry Growers’ Association. In all cases consultation with your own attorney is suggested and recommended.