

# Wetlands Policy 88-2: Access Roadways

Access Roadways: Interpretation of 310 CMR 10.53(3)(e)

Limited Projects: Access Roadways or Driveways (DWW Policy 88-2)

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The limited project provisions of 310 CMR 10.53(3) are designed to provide the issuing authority with the discretion to allow certain work to proceed although the work may not meet the performance standards set forth in 310 CMR 10.54 through 10.57. These provisions merely provide the discretion to permit these projects and the authority to impose conditions which, in addition to those set forth in the applicable portion of 310 CMR 10.53(3), the issuing authority determines are necessary to adequately protect the interests of the Wetlands Protection Act, M.G.L. c. 131, s.40. The issuing authority is not required to give approval to all projects filed under this provision, but should examine the facts and determine whether the project qualifies as a limited project.

The purpose of 310 CMR 10.53(3)(e) is to allow projects in which wetlands will be crossed with a new roadway to provide access to otherwise unreachable upland areas. In this Program Policy, the Department elaborates on the analysis that should be applied when determining whether a new roadway qualifies for consideration as a limited project.

In each case proposed under 310 CMR 10.53(3)(e), the issuing authority must determine, before approving the project under this section; (1) whether the project satisfies the general requirements stated in the regulation; (2) whether it is appropriate to grant an exception from the provisions of Sections 10.54 through 10.57 in this case, and (3) if the project is approved, what conditions should be imposed in addition to those required by 310 CMR 10.53(3)(e) to adequately protect the interests of the Act.

1) A project satisfies the general requirements of a limited project roadway, if the issuing authority determines no reasonable alternative means of access from a public way to uplands of the same owner is available. For the purposes of 310 CMR 10.53(3)(e), a public way includes any road, whether publicly or privately owned, off of which access may be gained into the subject property. In making the determination regarding alternate means of access, the issuing authority may require the applicant to evaluate the reasonableness of any previously or currently available alternatives including the realignment or reconfiguration of the project, to conform with the requirements of 310 CMR 10.54 through 10.57, or to minimize to the greatest extent possible disruption of wetlands. For example, the issuing authority may require the applicant to utilize upland access over an adjacent parcel of land owned by the applicant, or which the applicant has a beneficial ownership of through a realty trust, to avoid filling of wetlands. The issuing authority may also consider whether adjacent property, which would have provided dry access to the uplands, has been sold off or built on, particularly where the applicant has had notice as described in #3 below.

For projects subject to a Planning Board's jurisdiction, the issuing authority must also determine whether the new roadway or driveway is the minimum length and width acceptable to the Planning Board. Therefore, the issuing authority may require the applicant to request the Planning Board to formally rule on revisions of the project which would protect wetlands, even if approval

of the revisions would require the Planning Board to apply variance provisions that allow the Board to waive or vary its standard requirements. The issuing authority should only determine that no reasonable alternative means of access are available after the applicant has made a good faith effort to identify alternate means of access and has actually presented any reasonable alternatives to the Planning Board and received that Board's ruling. This provision does not preclude the possibility of more than one wetland crossing in certain circumstances, such as where an applicant is developing a very large parcel of land and the Planning Board has required, after a review of alternatives as discussed above, the applicant to provide multiple access points into the property.

2) Even if the general requirements of the regulation are met as described in paragraph 1 above, the issuing authority may deny limited project status for certain work. The issuing authority should evaluate the magnitude of the wetlands impacts proposed and the significance of that particular wetland to the interests of the Act. For example, the issuing authority may permit an access proposal requiring a relatively small wetlands loss, all of which would be replicated, to gain access to a relatively large area of uplands all of which would otherwise be inaccessible. If, however, it is particularly important to avoid alteration of this wetland in order to protect the interests of the Act, for example when the wetland: lies adjacent to or above a public water supply, particularly in an area that is the primary cone of influence to a well; is in an Area of Critical Environmental Concern; contains rare species habitat; is a Class A designated water body by the Division of Water Pollution Control; is an anadromous fish run; or has some other special environmental attribute, the issuing authority may appropriately deny the same proposal\*.

3) When the issuing authority decides to grant an exception for a new roadway or driveway, it must condition the work in a manner adequate to protect the interests of the Act. The conditions set forth in the General Performance Standards of 310 CMR 10.54 through 10.57 should be used as guidelines. In particular, the Department strongly endorses requiring replication of all wetlands filled and compensation for lost flood storage volume on a 1 to 1 basis, wherever practicable.

It is also recommended, where appropriate, to include a special permanent condition advising the applicant and anyone performing a title search on the property in the future, that any future project to cross wetlands to gain access to certain portions of the property will not be qualified as a limited project roadway under 310 CMR 10.53(3)(e).

\*Under the Department's 401 Water Quality Certification Program, spanning of certain areas may be presumed to be a practicable alternative to avoid fill in wetlands. See 314 CMR 9.06.