

# Wetlands Program Policy 08-1: Lack of Information Necessary for Conservation Commission Decisions

Effective Date: 3-28-2008

DWW Policy 08-1 (BRP/DWM/WWP 08-1)

Program Applicability: All Boston and regional BRP programs

Supersedes Policy: None

Approved by: [signed] Glenn Haas, Acting Assistant Commissioner, BRP

This policy sets forth the Department's approach for reviewing requests for Superseding Orders of Conditions when a conservation commission denies an Order of Conditions (OOC), a Request for Determination of Applicability, or a Notice of Resource Area Delineation due to a lack of necessary information pursuant to 310 CMR 10.05(6).

To help ensure that conservation commissions have sufficient expertise available to address the specific issues raised by an applicant's project, c. 44, section 53G\* gives conservation commissions authority to charge a fee for the employment of outside consultants. Conservation commissions can utilize that fee to ensure that an application has the necessary information for them to make a decision pursuant to the Wetlands Protection Act, M.G.L. c. 131, sec.40, and 310 CMR 10.00. The Department will apply the following criteria when reviewing a request for a Superseding Order of Conditions where the commission's denial was based upon a lack of necessary information provided by the applicant.

1. The Department will not automatically uphold a commission's decision or support a commission's lack of action (e.g. failure to hold a public hearing or issue an OOC), based on a claim that the file is administratively incomplete, solely due to the lack of consultant fee payment. Nor will the Department make a determination about the reasonableness of the amount of a fee requested by a commission. Rather, the Department will review the decision to determine whether it was reasonable under the Wetlands Protection Act and the regulations promulgated at 310 CMR 10.00. To assist in this review, the Department will look for documentation by the commission that identifies the "information which is lacking and why it is necessary" in accordance with the requirements of 310 CMR 10.05(6)(c). The commission should also confirm that the information to be generated by the outside consultant was not otherwise available or previously provided to other town agencies such as the Planning Board or the Board of Health. In fairness to project proponents, commissions and other town agencies are encouraged to coordinate overlapping information requests to avoid duplicative requests for the same information.
2. To avoid issuing decisions based upon lack of information, commissions are encouraged to negotiate appropriate scopes of work with applicants as part of the deliberative process to ensure that the final scope of work does not include elements beyond those necessary to satisfy the standards of 310 CMR 10.05(6)(c). If the Commission ultimately denies due to failure to pay the fee, the scope of work should be attached to the decision.

3. When the Department reviews a decision based on a lack of sufficient information, the Department will review the reasonableness of the scope of work outlining the "information which is lacking and why it is necessary". The Department will assess such factors as the adequacy of the proponent's submission, the degree to which the application involves technical or complex questions, the need for an outside consultant to address those questions, the capability of a typical commission to perform a meaningful review of the submission without an outside consultant, and other pertinent factors. Based upon its review, the Department will either affirm the denial, reverse the denial, or remand to the commission.

This guidance is for Department staff reviewing requests for Superseding Orders of Conditions when a conservation commission denies an Order of Conditions (OOC), a Request for Determination of Applicability, or a notice of Resource Area Delineation due to a lack of necessary information pursuant to 310 CMR 10.05(6) and may not be relied upon for any other purpose. This guidance does not constitute a final agency decision and does not create any legal rights or relieve any person of obligations that exist pursuant to applicable laws.

\* M.G.L. c. 44, Section 53G provides, in relevant part:

*...any city or town that provides by rules promulgated ... by a conservation commission established by a city or town ... when implementing the authority conferred under ... section 40 of chapter 131, or under any local wetlands ordinance or by-law, for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account. Such rules shall provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications.*