

Wetlands Program Policy 86-1: Presumptions for Subsurface Sewage Disposal Systems That Meet Title 5 or More Stringent Local Board of Health Requirements

(Title 5 reference: 310 CMR 10.03(3))

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The Wetlands Regulations, at 310 CMR 10.03(3), establish a presumption that a subsurface sewage disposal system, which complies with the requirements of Title 5 or more stringent local Board of Health requirements, protects the interests of the Wetlands Protection Act (the "Act"). Compliance with the requirements of Title 5 or more stringent local requirements may be ascertained by the Conservation Commission either by reliance on the issuance of the Disposal System Construction Permit or by consultation with the Board of Health. The Department will generally rely on the issuance of the Disposal System Construction Permit by the Board of Health unless the Department is provided with credible evidence from a competent source or otherwise determines that further inquiry is appropriate. This presumption, however, only has effect if none of the components of the system is located within certain resource areas set forth at 310 CMR 10.03(2), and if the leaching facility of the system is located:

- at least 50 feet from the most landward edge* of those areas when the system is eligible for construction in compliance with the 1978 Title 5; or
- at least 50 feet from the most landward edge of the BVW, salt marsh, inland or coastal bank, 100 feet from the most landward edge of wetlands bordering a surface water supply or tributary thereto, or 100 feet (50 feet if the system is downgradient) from the most landward edge of a vernal pool certified at the time application for the Disposal System Construction Permit is filed when the system is to be constructed in compliance with the 1995 Title 5**; or
- a greater distance if required by a local Board of Health by-law or regulation.

The Conservation Commission and the Department, however, are not authorized to enforce more stringent local Board of Health requirements because neither has the authority to interpret ambiguous language that may be included in those by-laws or regulations or to determine whether the local Board of Health should grant a variance from the local standards. Any systems granted a variance which would reduce the setback to less than 50 feet from certain resource areas set forth at 310 CMR 10.03(2) will not be entitled to this presumption.

Therefore, the Department adopts the following guidelines for applying the provisions of 310 CMR 10.03(3):

1. When reviewing a Notice of Intent, a Conservation Commission or the Department must determine whether a proposed sewage disposal system meets the applicable Title 5 wetlands setbacks as set forth above. Usually, Title 5 issues other than wetlands setbacks should be left to the Board of Health unless there is overwhelming evidence that the Board of Health has failed to

properly review the case. The Title 5 requirements that may be considered are limited to those, such as the depth to groundwater, where a system not in compliance would have the potential to impair resource areas identified in 10.03(3). It is highly unlikely, therefore, that a standard such as a lot-line setback requirement should ever be considered in a wetlands review.

2. Neither a Conservation Commission nor the Department have the authority to interpret Board of Health regulations or to decide whether a local Board of Health will issue a variance from its own regulations. Where a proposed project meets the requirements of Title 5, but may fail to meet more stringent local standards, the Conservation Commission and the Department have two recommended alternative courses of action:

- Where it is clear that the system does not meet the local Board of Health requirements, such as when the Board of Health has already denied a request for a permit, the Conservation Commission or the Department could deny the project and require the applicant to obtain a permit from the local Board of Health prior to the issuance of an Order of Conditions. Suggested wording for such a denial is:

"This project is denied because it does not meet the [specify requirement not met that would have the potential to impair resource areas identified in 310 CMR 10.03(3)] requirements of the [town name] Board of Health and therefore does not have the benefit of the presumption under 310 CMR 10.03. A new Notice of Intent may be filed if the [town name] Board of Health issues a permit, or the project is revised to meet the [town name] Board of Health requirements."

Conservation Commissions and the Department must be careful when using this alternative. Many Boards of Health simply will not take any action before the issuance of an Order of Conditions. It would not be proper, therefore, to create a situation where the applicant is placed in the impossible position of having neither approval available until the other is obtained.

- If the only question about the permissibility of the proposed work is whether it will receive a local Board of Health permit, it is generally preferable for the Conservation Commission or the Department to issue an Order of Conditions that will permit the work on the condition that the applicant subsequently receives a local Board of Health permit. Suggested wording for such a condition is:

"No work permitted by this Order may begin unless and until the applicant receives a subsurface sewage disposal permit from the [town name] Board of Health which complies with both the requirements of Title 5 and any more stringent local standards, and until a copy of said permit is sent to the Conservation Commission and the Department."

The Conservation Commission or the Department are responsible for making the wetland boundary delineation in accordance with 310 CMR 10.00 and relevant policies [e.g. BVW policy, coastal bank policy] for the Board of Health to use in its review. Generally, this delineation will take place when the applicant's plans have been reviewed and found accurate, or modified in accordance with the findings of the Conservation Commission or the Department.

*All setback distances from wetlands shall be measured in accordance with the criteria of the Wetlands Protection Act and 310 CMR 10.00 from the most landward edge of the following: BVW, salt marsh, top of the inland bank and top of coastal bank, all as defined in 310 CMR 10.00.

**The intent of the Title 5 regulatory citation contained in 310 CMR 10.03(3) is to reference the Title 5 in effect at the time the regulatory presumption is applied. Accordingly, the 1995 Title 5 setbacks (see 310 CMR 15.211) referenced in this paragraph update the regulatory reference to the 1978 Title 5 setbacks contained in 310 CMR 10.03(3).