



## Massachusetts Association of Conservation Commissions

*protecting wetlands, open space and biological diversity through education and advocacy*

March 11, 2016

Linda Dorcena Forry, Senate Chair  
Joint Committee on Housing  
State House, Room 410  
Boston, MA 02133

Kevin G. Honan, House Chair  
Joint Committee on Housing  
State House, Room 38  
Boston, MA 02133

Re: Senate Bill 119, *An Act improving housing opportunities and the Massachusetts economy*

Dear Senate Chair Dorcena Forry and House Chair Honan:

We are writing about Senate Bill 119, *An Act improving housing opportunities and the Massachusetts economy*. Section 16 of the bill would amend G.L. c. 131, §40 (the Massachusetts Wetlands Protection Act), reducing environmental protections in Massachusetts and increasing the workload of the Department of Environmental Protection, an agency that does not have the capacity to undertake the work that would be required under the bill. Section 16 of the bill would not increase affordable housing opportunities in our state but instead would be a gift to developers of higher-end housing at the expense of the environment. If your committee is favorably inclined toward the bill, we respectfully ask that your committee delete Section 16 of the bill. Similar and identical provisions to undermine local protections of wetlands have been rejected in previous legislative sessions. Details are below.

### Wetlands Protection in Massachusetts Is a State and Local Partnership

Massachusetts is a national leader in effective wetlands protection. Every municipality in Massachusetts has established a conservation commission for the promotion and development of the natural resources and protection of watershed resources in the municipality. G.L. c.40 § 8C. Conservation commissions administer the Massachusetts Wetlands Protection Act (WPA) in their communities. G.L. c.131, §40. Anyone proposing to do work in or near wetlands and subject to the requirements of the Act must file a notice with the municipal conservation commission and receive an order of conditions (permit) to do the work. The Massachusetts Department of Environmental Protection (DEP) promulgates the WPA regulations that conservation commissions implement. Persons dissatisfied with a decision of a conservation commission may appeal that decision to DEP, which can issue an order that supersedes the order issued by the conservation commission.

Although the WPA is an effective law, it does have its limitations. It does not protect all important wetland resources and its standards are sometimes inadequate. Massachusetts continues to lose wetland acres and the functions of some wetlands are diminished.

To close loopholes in the WPA, and to protect local wetland resources more adequately, 197 Massachusetts cities and towns have adopted municipal wetland ordinances and bylaws to regulate activities in or near wetlands by imposing stronger protective measures than the WPA provides. Those municipal laws help ensure work in and near wetlands will not impair the benefits provided by wetlands. Cities and towns have the authority to do so under Home Rule and such ordinances and bylaws have been upheld by the Supreme Judicial Court in *Lovequist v. Conservation Commission of Town of Dennis*, 379 Mass. 7 (1979). Appeals of decisions made under municipal wetland ordinances and bylaws are to court rather than to DEP because those decisions are made under local law not under a state law or state regulation.

### Wetlands Protection Is Critically Important

More than half of our country's original wetland acreage has been lost to agricultural, commercial, and residential development. The cost of this loss in degraded water quality, increased storm damage, and depleted fish, wildlife, and plant populations has been well documented.

In their natural state, wetlands provide many free services to the community. Low areas serve as flood ways to convey storm and other flood waters safely away, and act as buffers to prevent damage to nearby roads and buildings. Naturally forested riverfront areas slow flood waters and trap sediment and debris. Those functions minimize the need for extensive (and often expensive) engineered flood management systems and seawalls. Wetlands also provide temporary storage of floodwaters, allowing floods to recede slowly and, in fresh water wetlands, to recharge groundwater. Any alteration of the land that reduces flood storage capacity may displace floodwaters and cause greater flooding elsewhere. Unfortunately there are too many examples of houses flooded and even lives lost through the cumulative effect of many people filling in a floodplain over the years.

With a changing climate, more damaging storms, and rising sea levels, the ability of wetlands to soak up carbon and storm water and buffer us from floods is especially significant.

Directly or indirectly, wetlands are sources of public or private drinking water supply. In addition, wetlands and vegetated riverfront lands help to purify the waters they receive from highway or agricultural runoff and other sources. They serve as natural settling areas where soils and vegetation trap sediments that bind and, in some cases, break down pollutants into nontoxic compounds. For example, the sediments under marsh vegetation absorb lead, copper and iron. Wetlands and riverfront lands retain nitrogen and phosphorus compounds which otherwise would foster nuisance plant growth and degradation of fresh and coastal waters. Wetlands also absorb and retain carbon that would otherwise increase the amount of greenhouse gases in the atmosphere that scientists consider responsible for causing global climate change.

Wetlands are valuable to wildlife, providing food, breeding areas, and protective cover. Naturally vegetated riverfront lands also provide essential travel corridors for many species. Wetlands are home to native animals and plants, including rare and endangered species that would go extinct if not for wetlands. Shellfish beds and commercial and recreational fisheries are dependent on good water quality and healthy coastal and inland wetlands.

Wetlands provide opportunities for boating, fishing, birding, swimming, and other recreation that help support the Massachusetts economy and are part of a good quality of life that makes our state an attractive place to live and visit.

## Section 16 of S.119 Would Significantly Disrupt and Reduce Wetlands Protections in Massachusetts

Section 16 of the bill would wreak havoc with the current system of wetlands protection in our state. In brief:

1. It would prevent 197 municipalities from administering or enforcing their existing wetland ordinances and bylaws until those local laws are approved by DEP;
2. It would prevent all 351 municipalities from adopting new or amended wetland ordinances and bylaws without prior DEP approval of each ordinance or bylaw;
3. It would impose significant staff time requirements and costs on DEP;
4. It would base review of wetland ordinances and bylaws on unrealistic standards that evince a significant misunderstanding of wetlands protection procedures and practices;
5. It would allow appeals of decisions made under a local law to DEP, even though DEP does not have the responsibility to implement that law.

Each of those is discussed below briefly.

1. Section 16 of the bill does not directly address the 197 municipalities that currently have their own wetland ordinances or bylaws but the first sentence in Section 16 can be read as allowing those local laws to be administered and enforced only after DEP has approved the ordinance or bylaw. That would, of course, wreak havoc in those communities, many of which have been administering and enforcing those local laws for decades. During the time it would take DEP to issue such approvals, wetland protections in those municipalities would be reduced and we can imagine a rush of persons during that time period to undertake activities that might have been limited or conditioned under municipal ordinances and bylaws. When DEP later approves the local law, the result would be uncertainty if that approval has retroactive effect and what to do about work done in and near wetlands that would not have been permitted under the ordinance or bylaw.
2. Section 16 of the bill would require DEP to approve each new wetland ordinance and bylaw, and presumably each amendment to an existing wetland ordinance or bylaw. That could significantly delay the adoption of those municipal laws during DEP review. If DEP were to require changes to such a law before approval, there could be a delay of more than one year, depending on the timing of the next town meeting. That is simply unacceptable for municipal laws designed to protect the environment. Further, it would be a discouragement for municipalities to amend their current wetland bylaws and ordinances, resulting in some communities choosing not to update their local laws even when updating would be desirable.
3. DEP's review of each ordinance and bylaw would be time and resource intensive, especially considering the standards set forth in Section 16, as described in more detail below. DEP is already resource constrained and does not have the capacity to undertake such reviews. Years of budget and staff cuts have reduced DEP staffing levels by 30% since FY 2008 even though DEP has more environmental mandates to fulfill. DEP already has a long list of priorities it must meet, including timely permitting, climate change, water management act, brownfields, and wetlands issues relating to coastal processes, rainfall data, and revisions to wetlands delineation requirements. It simply does not have the resources to take on this additional task in a timely manner. It also does not have the knowledge of each local community -- or the staff time to acquire that knowledge -- to know if the ordinance or bylaw is "necessary to protect unusual local resources that warrant special or enhanced protection," a standard proposed in Section 16. That is discussed in more detail below.

4. Section 16 sets out a four-part standard that a proposed wetland bylaw or ordinance must meet for approval by DEP. The four-part standard evinces a lack of understanding of wetlands protection and is inconsistent with an earlier part of Section 16. The standard for a municipal wetland ordinance or bylaw would be that the ordinance or bylaw: does not conflict with the WPA or implementing regulations; has a generally recognized scientific basis; is a recommended best practice; and is necessary to protect unusual local resources that warrant special or enhanced protection. Apparently, all four criteria must be met for a wetland ordinance or bylaw to be subject to approval. There are many problems with each of the criteria in the four-part standard, including:
  - a. Section 16 is internally inconsistent. On one hand, it would require that the municipal wetland ordinance or bylaw “impose standards or other requirements that are more stringent than or otherwise exceed those set forth in the [WPA or WPA regulations].”<sup>1</sup> On the other hand it would require that the municipal ordinance or bylaw not conflict with the WPA and WPA regulations. Those two requirements are inconsistent. A more stringent municipal standard or requirement (e.g., protection of an unprotected isolated vernal pool or intermittent stream; a larger buffer zone for a wetland) would conflict with the WPA and regulations that do not have those protections. That internal inconsistency in Section 16 will cause confusion and challenges to municipal wetland laws.
  - b. Section 16 would require that each wetland bylaw or ordinance have a generally recognized scientific basis. We believe in science-based environmental regulation but Section 16 ignores that the choices made by municipalities in adopting wetland bylaws and ordinances are often policy-based decisions. For example, whether a municipal law should protect isolated vernal pools not protected by the WPA is a policy choice similar to the WPA choice not to protect that important natural resource. Another example is the decision of which values of wetlands should be protected. The WPA does not protect the recreational value of wetlands but a city or town may choose to do so as a policy choice. Buffer zones are another policy choice. Larger buffer zones often provide more protection to the wetlands they buffer than do smaller buffer zones, subject to a number of factors. A community may wish to use the precautionary principle in its law, recognizing there is a level of scientific uncertainty but it should act to protect a resource even with some uncertainty. DEP may make one choice in adopting wetlands regulations; a city or town may make another choice. Neither choice is right or wrong; instead each reflects a different policy decision, using good science.
  - c. Section 16 would require that a local wetland ordinance or bylaw be a recommended best practice. That proposed requirement ignores that there is not a recommended best practice for each instance of wetland protection. Instead, there may be a suite of options to choose from to apply to different situations that cannot be reduced to a best practice ordinance or bylaw. Laws and regulations often recognize that by requiring reasonable practices or generally accepted practices, rather than best practices. Also, what may be best practice often depends on time, place, and circumstances. Requiring only recommended best practices without regard to cost, resource to be protected, or

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<sup>1</sup> That is a current requirement; since at least the early 1970’s, Massachusetts courts have regarded the WPA as setting forth minimum statewide standards to protect wetlands and “leaving local communities free to adopt more stringent controls.” *Golden v. Selectmen of Falmouth*, 358 Mass. 519, 526 (1970). See also, *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7 (1979); *Parkview Electronics Trust, LLC v. Conservation Commission of Winchester*, 88 Mass. App. Ct. 833 (2016).

circumstances, is an unrealistic limitation and is not how protection of wetlands must be accomplished.

- d. Section 16 would require that a wetland bylaw or ordinance be “necessary to protect unusual local resources that warrant special or enhanced protection....” That standard ignores that the WPA has traditionally set forth minimum statewide standards to protect wetlands, leaving local communities free to adopt more stringent controls. A community may want to provide more protections for all or some of its wetland resources, even those that are not unusual. Section 16 would take away from cities and towns the ability to determine the appropriate level of protection of all their wetland resources and would make the state law the ceiling not the floor for most resources. Section 16 also turns local protection on its head, making DEP arbiter of what is important to protect in each community. Why should DEP, rather than the community, determine whether there is an unusual local resource in a community that warrants special or enhanced protection by a more protective municipal law?
5. Section 16 would require that appeals of decisions made under municipal wetland ordinances and bylaws be made to DEP. That makes no sense because DEP would not be interpreting its own wetland regulations but instead the laws of many municipalities. Those appeals currently go to court, which is the correct place for appeals of municipal ordinances and bylaws. Inserting DEP into the appeal process would add another layer before court review, increase expenses and time of litigants and municipalities, and increase DEP’s workload unnecessarily. DEP is already resource constrained and does not need that additional burden.

#### Section 16 of S.119 Would Diminish the Home Rule Authority of Cities and Towns to Protect Their Natural Resources, With a Resulting Loss of Wetlands Protections

The ability of cities and towns to choose to augment and strengthen state protections of wetlands within their boundaries is important to wetlands protection in Massachusetts. Communities may choose to expand their conservation commission’s jurisdiction, add wetland values warranting local protection, tighten permit and hearing procedures, establish filing and consultant fees, allow commissions to adopt their own regulations, and clarify the power to disapprove work in or affecting wetlands and floodplains. Those are important components of our integrated state-local system that Section 16 would undermine.

Examples of the extra protections provided by municipal wetland ordinances and bylaws that Section 16 would prohibit or limit would include:

- Communities may wish to protect more than the eight interests noted in the WPA adding, for example, recreational or educational values of wetlands.
- Communities may wish to protect natural resources not protected by the WPA, such as isolated vegetated wetlands, vernal pools, and other water resources not linked to waterbodies, and also include adjacent upland areas (sometimes termed the buffer zone), which may affect wetlands and floodplains. (The WPA protects vegetated wetlands, flood prone areas, and other listed resource areas only if they border bodies of water. Vernal pools are protected only if they occur in resource areas.)
- Communities may wish to improve riverfront protection beyond that afforded by the WPA. For instance, many communities abolish the distinction between perennial and intermittent waterways to define what constitutes a river as a protectable resource, or add lakes and ponds to the list. That may be especially important in areas where there has been a drawdown of an aquifer or where there has been a local drought that is not subject to a state drought declaration.

- Communities may wish to assure adequate professional review of proposed projects through filing fees and consultant fees paid by applicants, and through professional staff who can be hired for this purpose with filing fees.
- Communities may seek specialized coverage. For example, in a sparsely populated town, a bylaw applying only to large/high-impact projects could provide the extra filing and consulting fees especially useful for review of such projects. Or a community might impose requirements only in certain critical areas such as a coastal floodplain, barrier beach or barrier island, rare species habitat, zone of contribution to a wellfield, wildlife corridor, vernal pool, or state-designated Area of Critical Environmental Concern.
- Many communities choose to create a no-disturb setback that offers more protection than the 100-foot “jurisdictional” or “review area” buffer found in the WPA regulations.
- Communities may expand the topographic limit of inland banks where extra protection is needed. For example, a steep slope above the high water line (1:4 or greater) can be treated as part of the bank, by defining the term “bank” in the bylaw/ordinance as the point where the slope becomes less than 1:4. Where no alternative exists for building near banks on small lots, best available technologies may be required for erosion control.
- Communities may better protect coastal areas subject to flooding by creating strong design specifications and performance standards (currently missing from the WPA regulations) which take increased periodic flooding and sea-level rise into account. The Cape Cod Commission had prepared a good model floodplain district zoning bylaw/ordinance to deal with coastal flooding.

#### Section 16 of S.119 Is Not About Affordable Housing

In past legislative sessions, development interests have often incorrectly claimed that municipal wetland ordinances and bylaws prevent the construction of affordable housing. There is no good data supporting that claim. Affordable housing can be -- and often is -- sited and built in coordination with wetlands protection rather than in conflict with the environment. Affordable housing need not be in ecologically sensitive areas, flood plains, or areas that provide buffer protection to wetlands -- and that may become flood plains with climate change. Also, Zoning Boards of Appeal can override or limit the impact of municipal wetland ordinances on 40B projects, allowing those affordable housing projects to be built.

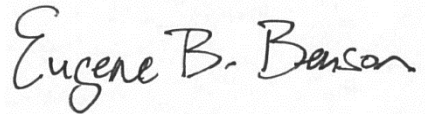
#### Conclusion

We have opposed similar provisions in bills in the past. Legislative committees have regularly given such bills unfavorable reports. This bill would be disruptive for the 197 municipalities that currently have local wetland bylaws or ordinances. It would markedly increase DEP’s workload and set an unreasonable and resource intensive review standard. It would effectively eliminate the ability of municipalities to make their own decisions about whether their wetland resources need more protections than those afforded by state law. Section 16 of the bill also has internal inconsistencies and is ambiguous as to whether current municipal wetland bylaws and ordinances would require DEP approval or if only amendments or new bylaws and ordinances would require approval. We request that Section 16 be stricken from S.119 if your committee will report the bill out favorably.

We are available to provide additional information and to meet or speak with you or your staff if that would be helpful.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink that reads "Eugene B. Benson". The signature is written in a cursive style with a large initial "E".

Eugene B. Benson  
MACC Executive Director  
Email: [eugene.benson@maccweb.org](mailto:eugene.benson@maccweb.org)  
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Also signing this letter:

Charles River Watershed Association  
Clean Water Action  
Environmental League of Massachusetts  
Mass Audubon  
Mass Climate Action Network  
Massachusetts Land Trust Coalition  
Massachusetts Rivers Alliance  
Massachusetts Sierra Club

Copy: Members of the Joint Committee on Housing