

APPENDIX D
333 CMR 10.00 PREFACE TO WETLANDS REGULATIONS
RELATIVE TO RIGHTS-OF-WAY MANAGEMENT

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

1987 REGULATORY REVISION

In 1983, the Massachusetts Pesticide Control Act, M.G.L. c. 132B, was amended to require notification of conservation commissions prior to application of herbicides on rights of way. Many commissions became aware for the first time that application of herbicides on rights of way may result in alteration of wetlands and, with the exception of exempt utilities, may require action under the M.G.L. c. 131, § 40. On July 18, 1986, the Department issued a final decision after adjudicatory hearing in DEP Hearing Docket Nos. 83-28 and 83-35 (Clinton and Leverett) finding that the application of specific herbicides by the railroads to track and ballast within 100 feet of wetland areas would alter those wetlands and was therefore subject to jurisdiction under M.G.L. c. 131, § 40, requiring the filing of Notices of Intent with the local conservation commissions.

The Department of Food and Agriculture (DFA) initiated a Generic Environmental Impact Report (GEIR) evaluating alternatives for rights of way management. A technical advisory task force of environmentalists, agencies and rights of way managers assisted in the GEIR preparation and, based on the results of the study, recommended to the Secretary of Environmental Affairs a framework for a coherent state-wide rights of way regulatory program. DFA published draft regulations to implement this program in 1986 and received extensive public commentary. Final regulations, 333 CMR 11.00, became effective on July 10, 1987.

The DFA regulations require persons proposing to apply herbicides to rights of way to first receive approval of a five year Vegetation Management Plan (VMP) and Yearly Operating Plan (YOP). These regulations identify certain "sensitive areas", including wetlands and public and private surface and groundwater supplies, where the application of herbicides is, in most instances, prohibited, and areas adjacent to the sensitive areas where use of herbicides is curtailed.

DEP worked closely with DFA to include provisions which give maximum protection for water supplies and provide protection for wetlands at least equal to that provided under the M.G.L. c. 131, § 40 and 310 CMR 10.00. To eliminate duplicate review under M.G.L. c. 131, § 40, DEP has adopted changes to the wetlands regulations which allow herbicide applications on rights of way in accordance with the DFA regulations without filing a Notice of Intent under the M.G.L. c. 131, § 40. However, non-exempt applicants will still be required to file a Request for Determination of Applicability to the appropriate conservation commission to establish boundaries of wetlands on or near the right of way. Specifically, these regulations presume that work performed in accordance with a VMP and YOP, as may be required under DFA regulations, will not alter an area subject to protection under M.G.L. c. 131, § 40.

During the public comment period on its proposed regulations, the Department identified several issues of major concern. After consideration of all comments, the Department has determined that, except for minor points of clarification and the addition of an automatic expiration date, no further changes in the regulations are warranted at this time. A discussion of these issues follows.

A. Presumption vs. Limited Project Several commentators suggested that conservation commissions should retain the authority to review each herbicide application on rights of way through the usual Notice of Intent process. These regulations create a presumption that herbicide application carried out in accordance with an approved VMP and YOP under the DFA regulations will not alter wetlands and that the filing of a Notice of Intent is therefore not required. This procedure was established pursuant to the recommendation of the GEIR task force which states:

APPENDIX D

333 CMR 10.00 PREFACE TO WETLANDS REGULATIONS RELATIVE TO RIGHTS-OF-WAY MANAGEMENT

10.00: continued

The regulations which provide for approval of Vegetation Management Plans by the Department of Food and Agriculture should be conditioned on review and approval by the Department of Environmental Protection (DEP) of those portions of the Plans that deal with wetlands. The DEP should be required to certify to the DFA that these portions of the Plans will result in compliance with the substantive and procedural provisions which protect the interests of the M.G.L. c. 131, § 40. If the regulations are so drawn, activities under a Plan approved by DEP would not constitute an alteration of wetlands as defined under 310 CMR 10.00.

Since the DFA regulations provide that DEP is a member of the VMP advisory panel which reviews and makes recommendations on the approval of VMPs, the GEIR task force recommendations have been fully implemented. Therefore, the Department has determined that it would be duplicative to require the filing of individual Notices of Intent in each municipality for each application of herbicides to rights of way.

B. Adequacy of Setback from Wetlands. The DFA rights of way regulations prohibit application of herbicides on or within ten feet of wetlands and strictly limit herbicide application from ten feet to 100 feet of wetlands. Many commentators questioned the adequacy of these setback requirements and suggested that a 50 or 100 foot no spray zone would be more appropriate. Several commentators suggested that the proposed setback requirements were inconsistent with the Department's adjudicatory hearing decision in the Clinton and Leverett cases.

The no spray zone surrounding wetlands is necessary for three reasons: to compensate for mapping errors, to compensate for applicator errors and to assure that herbicides will not migrate into wetlands after application on the adjacent uplands. During the public comment period, the Department received no evidence demonstrating that the ten-foot setback established in the DFA regulations will not be adequate. The DFA regulations establish a procedure for selecting a limited number of herbicides that may be applied in the limited spray zone (from 10 to 100 feet from wetlands) which is adjacent to the no spray zone. Herbicides that will be selected for use in these limited spray zones under the DFA regulations are those which available data demonstrate will not migrate further than ten feet.

The applicators have argued that they can maintain a level of accuracy in mapping of wetlands and in application of herbicides to assure that herbicides will not be inadvertently applied within ten feet of wetland areas. The Department is not convinced that these claims are unreasonable; however, in order to confirm their accuracy, the Department has included in the final regulations an automatic expiration date two years from the effective date, which is coterminous with the expiration date of the DFA regulations. During the two-year effective period of these regulations, the Department expects applicators to conduct studies monitoring herbicide application operations and to submit a report concerning impacts of herbicide application on wetlands under these new regulations detailing the accuracy of wetlands mapping, the accuracy of herbicide application, and the extent of herbicide migration. The results of this study will provide a basis for recommendations by the Department for amendments to the DFA regulations and a decision on reauthorization of these amendments to the Department's wetland regulations.

Finally, the Department does not find the setbacks requirements established in the DFA regulations to be inconsistent with its decision in the Clinton and Leverett cases. In that decision, the Department assumed a worst-case analysis in terms of an herbicide known to be highly mobile which was applied to the track and ballast areas adjacent to wetlands. The Department found, based on the particular facts of these cases and the particular herbicide proposed for application that there would be a migration of that herbicide into the wetlands from application within the 100-foot buffer zone that would be sufficiently concentrated to cause alterations of the wetlands plants. However, the DFA rights of way management regulations set up a procedure for identification of herbicides which are relatively immobile and which are preapproved for application on the buffer zone in order to avoid alteration of wetlands plants. Furthermore, guidelines for application of the selected herbicides will also be established. Finally, no herbicides may be applied within ten feet of

APPENDIX D
333 CMR 10.00 PREFACE TO WETLANDS REGULATIONS
RELATIVE TO RIGHTS-OF-WAY MANAGEMENT

10.00: continued

wetland areas. In light of the strict controls placed on application of herbicides within the 100-foot buffer zone under the DFA regulations, the Department finds that adoptions of the proposed regulatory scheme is fully consistent with its previous adjudicatory hearing decision in the Clinton and Leverett cases.

C. Impacts of Herbicides Application on Wildlife Habitat. The Department is currently developing regulations under M.G.L. c. 131, § 40 to protect wildlife habitat. The effective date of these regulations is November 1, 1987. One commentator expressed concern regarding the impact of herbicide application on wildlife habitat in wetlands, and particularly on the habitat of rare, "state-listed" wildlife species. As discussed above, the Department has determined that the DFA regulations provide for protection of wetlands from alterations due to herbicide application. However, the OFA regulations do not include floodplains in their definition of wetlands, although those regulations do prohibit herbicide application within 10 feet of any standing or flowing surface water. Beyond that, there is no specific protection of wildlife habitat, including rare species, in floodplain areas.

The Department is concerned that the DFA regulations do not specifically address protection of wildlife habitat in floodplains, in particular those rare, "state-listed" wildlife species. Therefore, as a member of the VMP advisory panel, the Department will review VMPs for potential effect on wildlife habitat and specifically will recommend disapproval of any VMP that will have an adverse effect in areas mapped by the Natural Heritage and Endangered Species Program as habitat of any rare, "state-listed" wildlife species. Furthermore, the Department expects applicators to incorporate into the previously discussed two-year monitoring study a section detailing the effects of herbicide application on wildlife habitat in floodplains and on the habitat of rare, "state-listed" wildlife species. The Department will use the results of this study as the basis for recommending any amendments to the DFA regulations and a decision on reauthorization of these amendments to the Department's wetlands regulations.