



# EFFECTIVE WETLANDS ENFORCEMENT

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MACC Annual Environmental Conference

March 5, 2016

Cynthia O'Connell, Conservation Agent, Town of Canton

Rebekah Lacey, Counsel, Miyares and Harrington LLP



# Presentation Outline

- Enforcement options
- Access to property
- Walk through escalating enforcement process
- What constitutes a violation?
- Whom to enforce against
- Case studies

# Enforcement Options

	WPA	MACC Model Bylaw
Notices of Violation	YES	YES
Enforcement Orders	YES	YES
Fines (Ticketing)	NO	YES
Court (Civil Action):		
Injunction	YES	YES
Penalties	YES	NO
Court (Criminal Prosecution):		
Fines	YES	YES
Imprisonment	YES	NO
Can DEP step in?	YES	NO

# Notice of Violation

- Requests (does not order) landowner to stop activity and contact the Commission
- No legal force and effect
- Does not require a high level of evidence before issuing
- Can be issued by agent without Commission vote
- NOV not required before Enforcement Order, but is advisable for due process reasons

# Enforcement Order

## WPA

- Issued by:
  - Commission, OR
  - Agent or member if ratified by Commission at next mtg
- Must be issued within 2 years of violation
- Can both **prohibit** and **require** actions
- **Cannot** impose fines/penalties
- Appeal is to Superior Court under c. 249, § 4

## MACC Model Bylaw

- Issued by Commission
- No specified statute of limitations
- Can both **prohibit** and **require** actions
- **Cannot** impose fines/penalties
- Appeal is to Superior Court under c. 249, § 4

# Enforcement Order Best Practices

- Document evidence of violation
- Be very clear and specific about:
  - Findings: Facts and law regarding violation
  - Requirements and deadlines
- Do **not** use NOI/OOC process for restoration
  - NOI/OOC process can be used for after-the-fact permitting of alteration that may be approvable
- Give violator due process
  - Notice
  - Opportunity to be heard

# Fines and Penalties

- Under WPA:
  - \$25,000/day **penalty** can be sought with civil complaint
  - \$25,000/day **fine** can be sought with criminal complaint
- Under MACC Model Bylaw, Commission can impose up to \$300/day **fine**
  - Collect via criminal prosecution, or
  - Collect via ticketing procedure of Chapter 40, § 21D, or
  - Settle with violator for agreed amount.
- Correcting common misconceptions:
  - No bylaw can impose fines of more than \$300/day or civil penalty
  - Bylaw fines may **not** be added to tax bill and collected via lien
  - Enforcement order **cannot** impose fine or penalty

# Chapter 40, § 21D Ticketing Procedure

- Municipality (Town Meeting or City Council) must:
  - Accept c. 40, § 21D specifically for wetland bylaw
  - Specify exact fine amount per violation (not “up to”)
  - Specify enforcing agent
- Enforcing agent must:
  - Use form approved by District Court (see handouts)
  - Issue ticket to violator at time and place of violation, **or** mail to violator within 15 days
  - Send copy to clerk of district court
- Violator can appeal within 21 days by sending a written request for a hearing to the district court



SAMPLE NONCRIMINAL MUNICIPAL CITATION FORM  
 FOR USE PURSUANT TO G.L. C. 40, § 21D  
 APPROVED BY THE CHIEF JUSTICE OF THE DISTRICT COURT DEPARTMENT  
 EFFECTIVE MARCH 21, 1991

CITY [or TOWN] OF [Name] NOTICE OF VIOLATION OF CITY ORDINANCE [or TOWN BY-LAW], RULE OR REGULATION	
DATE OF NOTICE	NOTICE NO.
NAME OF OFFENDER	
ADDRESS OF OFFENDER	
CITY, STATE, ZIP CODE	DOB OF OFFENDER
MV OPERATOR LICENSE NO.	MV/MB REGISTRATION NO.
OFFENSE (s)	
DATE & TIME OF VIOLATION	
LOCATION OF VIOLATION	
SIGNATURE OF ENFORCING PERSON	ENFORCING DEPT.
I HEREBY ACKNOWLEDGE RECEIPT OF THE FOREGOING CITATION	
x	
<input type="checkbox"/> Unable to obtain signature of offender. Date Mailed _____	
THE NONCRIMINAL FINE FOR THIS OFFENSE IS \$ _____.	
<b>YOU HAVE THE FOLLOWING ALTERNATIVES IN THIS MATTER:</b>	
<i>Either option (1) or option (2) will operate as a final disposition, with no resulting criminal record.</i>	
(1) You may <b>pay</b> the above noncriminal fine, either by appearing in person or through an authorized agent, or by mailing a check, money order or postal note WITHIN 21 DAYS OF THE DATE OF THIS NOTICE to:	
[City or Town Clerk] [Address].	
(2) You may <b>contest</b> this matter by making a written request for a noncriminal hearing before a court magistrate WITHIN 21 DAYS OF THE DATE OF THIS NOTICE to:	
Clerk-Magistrate, [Name] District Court [Address] Attn: 21D Noncriminal hearings.	
(3) If you do not pay the noncriminal fine or request a hearing within 21 days, or if you do not appear for the hearing or pay any fine determined to be due, a criminal complaint may be issued against you.	
<input type="checkbox"/> I elect <b>Option (1)</b> above, confess the violation charged, and enclose payment by check, money order or postal note in the amount of \$ _____. I have written the number of this notice on my check, money order or postal note, or enclosed a copy of this notice.	
<input type="checkbox"/> I elect <b>Option (2)</b> above and request a noncriminal hearing on this matter. I have enclosed a copy of this notice and my name and current address.	
Signature _____	

21D citation form  
approved by District  
Court

[http://www.mass.gov/courts/  
forms/dc/dc-forms-gen.html](http://www.mass.gov/courts/forms/dc/dc-forms-gen.html)

353

**TOWN OF NORTH ANDOVER  
NOTICE OF VIOLATION OF WETLAND BYLAW**

DATE OF THIS NOTICE \_\_\_\_\_

NAME OF OFFENDER \_\_\_\_\_

ADDRESS OF OFFENDER \_\_\_\_\_

CITY, STATE, ZIP CODE \_\_\_\_\_ DATE OF BIRTH OF OFFENDER \_\_\_\_\_

VIOLATION LICENSE NUMBER \_\_\_\_\_ VIOLATION RECEIPT NUMBER \_\_\_\_\_

OFFENSE: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

THE AND DATE OF VIOLATION \_\_\_\_\_  
(A.M.) (P.M.) ON \_\_\_\_\_

AT LOCATION OF VIOLATION \_\_\_\_\_

AT \_\_\_\_\_

SIGNATURE OF ENFORCING PERSON \_\_\_\_\_ ENFORCING DEPARTMENT \_\_\_\_\_

I HEREBY ACKNOWLEDGE RECEIPT OF THE FOREGOING CITATION

X

Unable to obtain signature of offender. Date Mailed \_\_\_\_\_

Citation mailed to offender \_\_\_\_\_

THE FINE FOR THIS NON-CRIMINAL OFFENSE IS \$ \_\_\_\_\_

YOU HAVE THE FOLLOWING ALTERNATIVES WITH REGARD TO DISPOSITION OF THIS MATTER.

- (1) You may elect to pay the above fine, either by appearing in person between 8:30 A.M. and 4:30 P.M., Monday through Friday, legal holidays excepted, before: The Conservation Office, Town Hall, 120 Main St., North Andover, MA 01845 OR by mailing a check, money order or postal note to the Conservation Office WITHIN TWENTY-ONE (21) DAYS OF THE DATE OF THIS NOTICE. This will operate as a final disposition of the matter, with no resulting criminal record.
- (2) If you desire to contest this matter in a non-criminal proceeding, you may do so by making a written request, and enclosing a copy of this citation WITHIN TWENTY-ONE (21) DAYS OF THE DATE OF THIS NOTICE TO:  
The Clerk-Magistrate, Lawrence District Court  
Two Appleton St., Lawrence, MA 01840  
ATTN: Civil Clerk
- (3) If you fail to pay the above fine or to appear as specified, a criminal complaint may be issued against you.

- A. I HEREBY ELECT the first option above, confess to the offense charged, and enclose payment in the amount of \$ \_\_\_\_\_
- B. I HEREBY REQUEST a non-criminal hearing on this matter.

Signature \_\_\_\_\_

WRITE OFFENDER'S COPY YELLOW CONSERVATION COPY  
PINK COURT COPY

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OFFENSE: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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(A.M.) (P.M.) ON \_\_\_\_\_

AT LOCATION OF VIOLATION \_\_\_\_\_

AT \_\_\_\_\_

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VIOLATION LICENSE NUMBER \_\_\_\_\_ VIOLATION RECEIPT NUMBER \_\_\_\_\_

OFFENSE: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

THE AND DATE OF VIOLATION \_\_\_\_\_  
(A.M.) (P.M.) ON \_\_\_\_\_

AT LOCATION OF VIOLATION \_\_\_\_\_

AT \_\_\_\_\_

SIGNATURE OF ENFORCING PERSON \_\_\_\_\_ ENFORCING DEPARTMENT \_\_\_\_\_

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Signature \_\_\_\_\_

WRITE OFFENDER'S COPY YELLOW CONSERVATION COPY  
PINK COURT COPY

# Court Actions

- WPA violations
  - Superior Court civil action:
    - Injunctive relief (i.e. order to violator to take actions)
    - Penalty (up to \$25,000/day)
  - Criminal complaint in District Court:
    - Fines (up to \$25,000/day)
    - Imprisonment (rare)
- Bylaw violations
  - Superior Court civil action:
    - Injunctive relief only
  - Criminal complaint in District Court:
    - Fines only (up to \$300/day)

# DEP Enforcement Actions

- For significant violations of the WPA within past two years
- DEP can take administrative enforcement actions
  - Compliance Orders
  - Penalty Assessment Notices
- Note that once DEP starts enforcement action, the Conservation Commission cannot take action on the same violations
  - See *Westminster Conservation Commission v. SBT Holdings, Inc.* litigation (state and federal court)

# Access to Property: Options

- Obtain consent
  - In person or in writing from owner or other authorized person (e.g., tenant)
  - Site access clauses in permit application and order of conditions
- View from off-property
  - Adjacent properties (with permission)
  - Public areas
  - Air (caution re: low-flying planes and drones)
- Obtain an administrative warrant
- Emergency situations

# Obtaining an Administrative Warrant

- If violation is bylaw-only, confirm that bylaw confers authority to enter
- Complete application, affidavit, and warrant; do not sign
- Go to local district court
  - Find office of civil (not criminal) clerk
  - Ask to speak to an assistant clerk
  - Present papers to assistant clerk and explain situation
  - Sign application and affidavit in presence of assistant clerk; assistant clerk will sign warrant

# Example Escalating Enforcement Process for Significant Violation

- Gathering of information and evidence (with administrative warrant if necessary)
- Notice of Violation
- Enforcement Order (can accompany with ticketing for violation of bylaw requirements)
- Ticketing for violation of Enforcement Order (bylaw only)
- Letter from Town Counsel (optional but often effective)
- Court action

# What constitutes a violation?

## Wetlands Protection Act:

“No person shall **remove, fill, dredge or alter** any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or **leave in place unauthorized fill**, or otherwise **fail to restore illegally altered land** to its original condition, or **fail to comply with an enforcement order** issued pursuant to this section.”

## MACC Model Bylaw:

“No person shall **remove, fill, dredge, build upon, degrade, or otherwise alter** resource areas protected by this bylaw, or cause, suffer, or allow such activity, or **leave in place unauthorized fill**, or otherwise **fail to restore illegally altered land** to its original condition, or **fail to comply with a permit or an enforcement order** issued pursuant to this bylaw.”



# Whom to enforce against?

- Landowner
- Tenant
- Contractor
- Third party





# CASE STUDIES

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# Riverfront Tree Removal



# Riverfront Tree Removal



# Case Study - Residential



# Violation Letter



## Town of Canton Conservation Commission

Pegsitside Farm  
79 Pleasant Street  
Canton, Massachusetts 02021  
Telephone (781)-821-5035  
Fax (781) 821-7456

Steven Landry, Chairman  
Robert MacDonald, Vice-Chair  
Donald MacAdam, Treasurer  
James Fitzpatrick, Clerk

Debra Sundin, Member  
Gerald Carnichael, Member  
Janna Stuh, Member

Cynthia B. O'Connell, Agent  
Heather Cahill, Administrative Assistant

September 21, 2015

[REDACTED]  
Canton, MA 02021

RE: Potential Wetland Violation  
[REDACTED]  
Canton, Massachusetts 02021

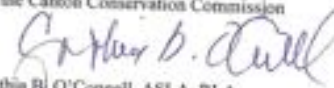
Dear [REDACTED]

It has come to my attention that there may be a wetland violation at your property located at [REDACTED] Street, Canton, Massachusetts. I was informed that there was grading and vegetation removal taking place at the rear of the property, possibly within the 100' Buffer Zone to the wetland resource area on the abutting parcel to the north.

Pursuant to an inspection that I conducted on September 11, 2015, I observed what appeared to be an area of fill and vegetation removal at the rear of your property. As you may or may not know, any work or activity in a wetland resource area, within 100 feet of a wetland or within 200 feet of a river is subject to review and approval by the Conservation Commission, pursuant to its authority under the Massachusetts Wetland Protection Act and the Town of Canton Wetlands Protection By-law. Your property contains portions of the 100' Buffer Zone. Any alteration, including vegetation removal and filling, within these areas without prior approval from the Commission constitutes a violation of the Act and the By-law.

The Conservation Commission is anxious to have this matter resolved as quickly as possible and to bring your property into compliance with state and local regulations. The Commission requests that you attend its regularly scheduled meeting on October 14, 2015 to discuss this issue. Should you have any questions or need additional information, please contact the Conservation Office (781)-821-5035 ([coconnell@town.canton.ma.us](mailto:coconnell@town.canton.ma.us)). Thank you for your prompt attention to this matter.

For the Canton Conservation Commission

  
Cynthia B. O'Connell, ASLA, RLA  
Conservation Agent

# Remedial Work in Response to Violation letter



# Fill placed on pond bank





# Enforcement Order



**Massachusetts Department of Environmental Protection**  
Bureau of Resource Protection - Wetlands  
**WPA Form 9 – Enforcement Order**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: \_\_\_\_\_

**A. Violation Information**

**Important:** When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.

This Enforcement Order is issued by:

Canton  
Conservation Commission (Issuing Authority)      June 19, 2015  
Date

To:

Name of Violator: \_\_\_\_\_  
Address: \_\_\_\_\_, MA 02021

1. Location of Violator:

Property Owner (if address): \_\_\_\_\_  
Street Address: \_\_\_\_\_  
Canton: \_\_\_\_\_ Zip Code: 02021  
Assessor Map/Plat Number: \_\_\_\_\_ Parcel/Lot Number: \_\_\_\_\_

2. Extent and Type of Activity (if more space is required, please attach a separate sheet):

Alteration of the Bank of \_\_\_\_\_ Pond, alteration of the 100' Buffer Zone to the Bank of \_\_\_\_\_ Pond, installation of a fixed boat dock without the benefit of a Chapter 91 license from DEP. Photographs of the violations were submitted by an abuter on June 18 & 19, 2015. Additional Canton residents have contacted the Commission and other town officials regarding the violation.

Under the Massachusetts Wetlands Protection Act (310 CMR 10.00): By conducting work within an Area Subject to Protection (wetland and buffer zone) without filing a Notice of Intent, \_\_\_\_\_ has violated the Wetlands Act, G.L. c. 131, sec. 40 and the Wetlands Regulations, 310 CMR 10.00(4) and the Town of Canton Wetlands Protection By-law, Article XV.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**B. Findings**

The Issuing Authority has determined that the activity described above is in a resource area and/or buffer zone and is in violation of the Wetlands Protection Act (M.G.L. c. 131, § 40) and its Regulations (310

WPA Form 9 - Rev. 11/08 Page 1 of 4



**Massachusetts Department of Environmental Protection**  
Bureau of Resource Protection - Wetlands  
**WPA Form 9 – Enforcement Order**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number: \_\_\_\_\_

Canton  
Conservation Commission

Conservation Commission signatures required on following page.

**D. Appeals/Signatures (cont.)**

In a situation regarding immediate action, an Enforcement Order may be signed by a single member or agent of the Commission and ratified by majority of the members at the next scheduled meeting of the Commission.

Signatures:

*Justin J. O'Connell* Conservation Agent  
*John Zaleski* Chair  
*James A. Stoughton*  
*John O'Brien*

*Heath*  
*Stacy*  
*Pat Noh*

\_\_\_\_\_  
Signature of delivery person or certified mail number

WPA Form 9 - Rev. 11/08 Page 2 of 4

# Post-enforcement Order – fill removed



# Access



# Result





# Questions?

Cynthia O'Connell

[coconnell@town.canton.ma.us](mailto:coconnell@town.canton.ma.us)

Rebekah Lacey

[rlacey@miyares-harrington.com](mailto:rlacey@miyares-harrington.com)