



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

Northeast Regional Office • 205B Lowell Street, Wilmington MA 01887 • 978-694-3200

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**CITY OF HAVERHILL
CONSERVATION DEPARTMENT**

Kathleen A. Theoharides
Secretary

Martin Suuberg
Commissioner

February 5, 2021

Keolis Commuter Services, LLC
c/o Lynch, DeSimone & Nylén, LLP
10 Post Office Square, Suite 970N
Boston, MA 02109
Attn: Attorney Richard A. Nylén, Jr.

RE: WETLANDS/HAVERHILL
MBTA Right-of-Way
Superseding Determination of Applicability

Dear Attorney Nylén,

Following an in-depth review of the file referenced above, and in accordance with the Massachusetts Wetlands Protection Act, M.G.L. c 131, § 40, (the "Act") and its regulations at 310 CMR 10.00 et. seq. (the "Regulations") the Northeast Regional Office of the Massachusetts Department of Environmental Protection, Wetlands Program (MassDEP), is issuing the attached Superseding Determination of Applicability (SDA) based upon: 1) information and plans submitted; and 2) reasons MassDEP has deemed necessary to protect the statutory interests identified in the Act and Regulations.

On July 15, 2020, Keolis Commuter Services, LLC (Keolis) filed a Request for a Determination of Applicability (RDA) with the Haverhill Conservation Commission (Commission), requesting that the Commission determine whether the delineation of wetland resource areas along the MBTA right-of-way (ROW) is accurate for the purposes of vegetation management control and that additional filings under the Act are not required so long as the work is conducted in accordance with an approved Vegetation Management Plan (VMP) issued pursuant to 333 CMR 11.00 Rights of Way Management. The RDA requests the Commission "renew the wetland map(s) along the ROW" for the purpose of vegetation management. Keolis also opines that work to maintain the ROW is exempt pursuant to 310 CMR 10.02(2)(a)2 of the Regulations.

On October 27, 2020, the Commission issued a Determination of Applicability (DOA). The DOA stated that the area described in the Request is subject to protection under the Act and

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.

TTY# MassRelay Service 1-800-439-2370

MassDEP Website: www.mass.gov/dep

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that the work described in the Request meets the requirements for an exemption under 310 CMR 10.03(6)(b) and 310 CMR 10.58(6)(a). Therefore no Notice of Intent is required.

On November 6, 2020, Keolis appealed the DOA stating that the Commission "issued a DA that did not confirm the wetland line and offered limited approval to the application of herbicides, and not for physical or mechanical work associated with managing vegetation, brush, trees or canopy in order to protect public safety and manage the vegetation." The appeal states that Keolis seeks to have the wetland line confirmed and to confirm that mechanical work necessary for managing vegetation is authorized consistent with the 2021 VMP. Keolis reiterated its opinion that the MBTA and Keolis are exempt from filing with the Commission for vegetation management measures, including mechanical cutting, for operations and maintenance provided that those measures are consistent with the VMP and best management procedures.

The Regulations under 310 CMR 10.02(2)(a)2 provide an exemption for certain maintenance and repair activities on existing structures and facilities used in the service of the public to provide electric, gas, water, sewer, telephone, telegraph and other communication services. This section of the Regulations does not include an exemption for railroads or commuter rail service. Therefore, it is MassDEP's opinion that MBTA and Keolis may not utilize this section of the Regulations in order to perform work to manage vegetation within MBTA's ROWs.

Based upon review of the information and plan contained in the file and taking into consideration all issues raised in the appeal, it is MassDEP's opinion that the application of herbicides to vegetation located within the 100-foot Buffer Zone to wetland resource areas, as approved under a VMP and Yearly Operation Plan (YOP), may be conducted pursuant to 310 CMR 10.03(6)(b) and is permissible under a negative Determination. However, the application of herbicides within a wetland resource area and/or mechanical cutting of vegetation within a wetland resource area or its Buffer Zone requires the filing of a Notice of Intent and receipt of an Order of Conditions prior to undertaking these activities.

Please be advised that MassDEP reserves the right, should there be further proceedings in this case to raise additional issues and present further evidence as may be appropriate. Should you or any party dispute these findings, please consult the language in this SDA that specifies your rights and procedures to appeal.

Should you have any questions, please contact me at (978) 694-3250 or at jill.provencal@mass.gov.

Sincerely,



Jill Provencal
Section Chief
Wetlands Program – NERO

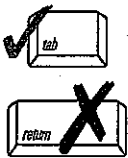
cc: Haverhill Conservation Commission, City Hall, 4 Summer Street, Room 300, Haverhill, MA
01830
Clary Coutu, c/o Keolis Commuter Services, LLC, 470 Atlantic Avenue, Suite 500, Boston,
MA 02210



Massachusetts Department of Environmental Protection
 Bureau of Water Resources - Wetlands
Superseding Determination of Applicability
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. General Information

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



From:

Massachusetts Department of Environmental Protection

Northeast

MassDEP Regional Office

To: Applicant

Clary Coutu, Keolis Commuter Services

Name

470 Atlantic Avenue, Suite 500

Mailing Address

Boston

MA

02210

City/Town

State

Zip Code

Property Owner (if different from applicant):

MBTA

Name

10 Park Plaza, Suite 1607

Mailing Address

Boston

MA

02210

City/Town

State

Zip Code

1. Title and Date (or Revised Date if applicable) of Final Plans and Other Documents:

"USGS Right of Way Maps by Rail Line and Community"

Title

July 15, 2020

Date

Title

Date

2. Date Request Filed:

7/15/2020

Date

B. Determination

Pursuant to the authority of M.G.L. c. 131, § 40, the Department considered your Request for Determination of Applicability, with its supporting documentation, and made the following Determination.

Project Description (if applicable):

The project proposes vegetation management control and maintenance activities for the railroad right-of-way (FRA, 49 CFR 237). The vegetation management plan for the railroad incorporates Integrated Pest Management approach towards promoting safer railroad for employees, passengers, and neighboring communities by means of implementing various approaches towards removal of nuisance vegetation along the ROW. This work includes both chemical and mechanical controls as represented within the Vegetation Management Plan.

Project Location:

MBTA Right-of-Way, Western Route Main Line

Street Address

N/A

Assessors Map/Plat Number

Haverhill

City/Town

N/A

Parcel/Lot Number



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B. Determination (cont.)

The following Determination(s) is/are applicable to the proposed site and/or project relative to the Wetlands Protection Act and regulations:

Positive Determination

Note: No work within the jurisdiction of the Wetlands Protection Act may proceed until a final Order of Conditions (issued following submittal of a Notice of Intent or Abbreviated Notice of Intent) has been received from the issuing authority (i.e., Conservation Commission or the Department of Environmental Protection).

- 1. The area described on the referenced plan(s) is an area subject to protection under the Act. Removing, filling, dredging, or altering of the area requires the filing of a Notice of Intent.
- 2a. The boundary delineations of the following resource areas described on the referenced plan(s) are confirmed as accurate. Therefore, the resource area boundaries confirmed in this Determination are binding as to all decisions rendered pursuant to the Wetlands Protection Act and its regulations regarding such boundaries for as long as this Determination is valid.

- 2b. The boundaries of resource areas listed below are not confirmed by this Determination, regardless of whether such boundaries are contained on the plans attached to this Determination or to the Request for Determination.

- 3. The work described on referenced plan(s) and document(s) (applicaton of herbicides and mechanical cutting of vegetation) is within an area subject to protection under the Act and will remove, fill, dredge, or alter that area. Therefore, said work requires the filing of a Notice of Intent.
- 4. The work described on referenced plan(s) and document(s) (mechanical cutting of vegetation) is within the Buffer Zone and will alter an Area subject to protection under the Act. Therefore, said work requires the filing of a Notice of Intent.

- 5. The area and/or work described on referenced plan(s) and document(s) is subject to review and approval by:

 Name of Municipality

Pursuant to the following municipal wetland ordinance or bylaw:

 Name

 Ordinance or Bylaw Citation



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B. Determination (cont.)

6. The following area and/or work, if any, is subject to a municipal ordinance or bylaw but not subject to the Massachusetts Wetlands Protection Act:
-

7. If a Notice of Intent is filed for the work in the Riverfront Area described on referenced plan(s) and document(s), which includes all or part of the work described in the Request, the applicant must consider the following alternatives. (Refer to the wetland regulations at 10.58(4)c. for more information about the scope of alternatives requirements):

- Alternatives limited to the lot on which the project is located.
- Alternatives limited to the lot on which the project is located, the subdivided lots, and any adjacent lots formerly or presently owned by the same owner.
- Alternatives limited to the original parcel on which the project is located, the subdivided parcels, any adjacent parcels, and any other land which can reasonably be obtained within the municipality.
- Alternatives extend to any sites which can reasonably be obtained within the appropriate region of the state.

Negative Determination

No further action under the Wetlands Protection Act is required by the applicant.

1. The area described in the Request is not an area subject to protection under the Rivers Protection Act.
2. The work described in the Request is within an area subject to protection under the Act, but will not remove, fill, dredge, or alter that area. Therefore, said work does not require the filing of a Notice of Intent.
3. The work described in the Request is within the Buffer Zone, as defined in the regulations, but will not alter an Area subject to protection under the Act. Therefore, said work does not require the filing of a Notice of Intent, subject to the following conditions (if any).

The application of herbicides to manage vegetation within the Buffer Zone is allowed pursuant to 310 CMR 10.03(6)(b).

4. The work described in the Request is not within an Area subject to protection under the Act (including the Buffer Zone). Therefore, said work does not require the filing of a Notice of Intent, unless and until said work alters an Area subject to protection under the Act.



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B. Determination (cont.)

5. The area described in the Request is subject to protection under the Act. Since the work described therein meets the requirements for the following exemption, as specified in the Act and the regulations, no Notice of Intent is required:

Exempt Activity (site applicable statutory/regulatory provisions)

6. The area and/or work described in the Request is not subject to review and approval by:

Name of Municipality

Pursuant to a municipal wetland ordinance or bylaw.

Name

Ordinance or Bylaw Citation

C. Authorization

This Determination is issued to the applicant and delivered as follows:

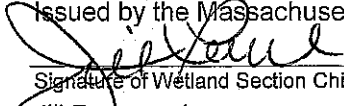
- by hand delivery on by certified mail, return receipt requested on

Date

Date

This Determination is valid for **three years** from the date of issuance (except Determinations for Vegetation Management Plans which are valid for the duration of the Plan). This Determination does not relieve the applicant from complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.

Issued by the Massachusetts Department of Environmental Protection, Northeast Region:


Signature of Wetland Section Chief

Date

Jill Provencal

Printed Name of Wetland Section Chief



Massachusetts Department of Environmental Protection
Bureau of Water Resources - Wetlands
Superseding Determination of Applicability
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

D. Appeals

Notice of Appeal Rights:

Appeal Rights and Time Limits

The applicant, the owner, any person aggrieved by the Superseding Determination, any owner of land abutting the land upon which the proposed work is to be done, or any ten (10) persons pursuant to M.G.L. c.30A, §10A, are hereby notified of their right to request an adjudicatory hearing pursuant to M.G.L. c.30A, § 10, providing the request is made by certified mail or hand delivery to the Department, with the appropriate filing fee and a DEP Fee Transmittal Form within ten (10) business days from the date of issuance of this Superseding Determination, and addressed to:

Docket Clerk
Office of Administrative Appeals
Massachusetts Department of Environmental Protection
One Winter Street, 3rd Floor
Boston, MA 02108.

A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission, the applicant, and the issuing office of the DEP at:

Massachusetts Department of Environmental Protection
Northeast Regional Office
205B Lowell Street
Wilmington, MA 01887

Contents of Hearing Request

A Notice of Claim for Adjudicatory Hearing shall comply with the Department's Rules for Adjudicatory Proceedings, 310 CMR 1.01(6), and shall contain the following information:

- (a) the DEP Wetlands File Number, name of the applicant and address of the project;
- (b) the complete name, address, and fax and telephone numbers of the party filing the request, and, if represented by consultant or counsel, the name, fax and telephone numbers, and address of the representative;
- (c) the names, telephone and fax numbers, and addresses of all other parties, if known;
- (d) a clear and concise statement of (1) the facts which are grounds for the proceedings, (2) the objections to this Superseding Order, including specifically the manner in which it is alleged to be inconsistent with the Department's Wetlands Regulations, 310 CMR 10.00, and does not contribute to the protection of the interests identified in the Act, and (3) the relief sought through the adjudicatory hearing, including specifically the changes desired in the Superseding Order;
- (e) a statement that a copy of the request has been sent by certified mail or hand delivery to the applicant and the conservation commission.

Filing Fee and Address

A copy of the Notice of Claim along with a DEP Fee Transmittal Form and a valid check or money order payable to the Commonwealth of Massachusetts in the amount of one hundred dollars (\$100) must be mailed to:

Commonwealth of Massachusetts
Department of Environmental Protection
Commonwealth Master Lockbox
P.O. Box 4062
Boston, Massachusetts 02211

The request will be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver. The filing fee is not required if the appellant is a city or town (or municipal agency), county, or district of the Commonwealth of Massachusetts, or a municipal housing authority. The Department may waive the adjudicatory hearing filing fee pursuant to 310 CMR 4.06(2) for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file an affidavit setting forth the facts believed to support the claim of undue financial hardship together with the hearing request as provided above.