



Massachusetts Association of Conservation Commissions

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

By email to conscom@townofnewbury.org

April 15, 2014

Town of Newbury Conservation Commission
Town Hall
25 High Street
Newbury, MA 01951

Re: Request for Determination of Applicability regarding work proposed for the Pikul Farm, 70
Scotland Road, Newbury, MA

Dear Town of Newbury Conservation Commission:

Residents of Newbury have brought to our attention the Request for Determination of Applicability (RDA) that they filed with you concerning a proposal to construct and site numerous greenhouses with solar array roofs, each just shy of 4,000 square feet, in Bordering Vegetated Wetlands on the Pikul Farm in Newbury. We think the proposal is not the standard normal improvement of land in agricultural use and, with the RDA, presents important issues that may extend beyond the particular matter, issues that are similar in some aspects to the previous proposal for the site. With that backdrop of this potentially precedent-setting case, we write to provide our perspective.

As you know, the purpose of a RDA is to seek a determination from a conservation commission as to whether the Massachusetts Wetland Protection Act, M.G.L. c.131, § 40, applies to land or to work that may affect an area subject to protection under the Wetland Protection Act. 310 CMR 10.05(3)(a). If the conservation commission determines that standard is met, and the work is not exempt, it must require the filing of a Notice of Intent (NOI) and act upon that notice before the work on the land may be undertaken. 310 CMR 10.05(3)(b) and (d). Bordering Vegetated Wetlands is an area subject to protection under the Wetland Protection Act. 310 CMR 10.02, 10.04, 10.55.

We understand the property owners claim their proposed project is not subject to the Wetland Protection Act under the agricultural exemption, which exempts "work performed for the normal maintenance or improvement of land in agricultural or aquacultural use." M.G.L. c.131, § 40. As required by the Wetland Protection Act, the wetland protection regulations define agriculture and set forth the limit of the agricultural exemption. 310 CMR 10.04 Agriculture.

A critical factor to consider is that the agriculture exemption does not apply to agricultural land; the land itself is not exempt. What is exempt is certain work or activity done on land in agricultural use. The specific work activities that are exempt are set forth in the definition of agriculture found in the wetland protection regulations. 310 CMR 10.04. The state agencies responsible for the programs have explained:

It is the work, or the activity, that is exempt, not the land. Even though a piece of land is in agricultural use, a particular activity may not necessarily qualify for the exemption.

In other words, not all activities are exempt simply because they take place on a farm.
(Emphasis in original.)

Farming in Wetland Resource Areas, A Guide to Agriculture and the Massachusetts Wetlands Protection Act, January 1996, produced by the Massachusetts Department of Environmental Management, Massachusetts Department of Environmental Protection, and Massachusetts Department of Food and Agriculture, page 2-1.

To be exempt from the Wetlands Protection Act, the proposed work at Pikul Farm must be: 1) normal improvement of land in agricultural use; 2) undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands; 3) conducted in accordance with federal and state laws; and 4) an activity listed in subsection (c) of the agricultural definition in the wetlands protection regulations. 310 CMR 10.04, Agriculture, subsection (c).

Where, as here, a RDA has been filed, a conservation commission will determine whether the proposed work at Pikul Farm is exempt. 310 CMR 10.05.

The commission should make a positive determination of applicability and require the property owner to file a NOI, 310 CMR 10.05(b), unless it finds that the work is exempt. *Farming in Wetland Resource Areas* explains:

...any member of the public, also may file an RDA for a project that either is proposed or underway as a means of establishing with certainty the permitting requirements (if any) for such activity.

Farming in Wetland Resource Areas further explains, at page 2-14, that conservation commissions can require a farmer to submit documentation in support of a claimed exemption, and that, "refusal to answer the question can lead to enforcement."

While unusual, requiring the filing of a NOI for work on land in agricultural use is sometimes required. As shown in the below table, a NOI is required if land in agricultural use is subject to protection under the Wetlands Protection Act, the proposed work is subject to regulation, and the work is not normal maintenance or improvement. Similarly, a NOI is required if the land is not in agricultural use. The below table (on the next page) is found in *Farming in Wetland Resource Areas*, at page 2-15:

(Continued on next page)

Table for Determining Jurisdiction

Note: Under "Outcome,"

"Exempt" means the exemption applies and no Notice of Intent ("NOI") is required;

"No NOI" means there is no Wetlands Protection Act jurisdiction and no NOI is required; and

"File" means there is jurisdiction under the Wetlands Protection Act, the exemption does not apply, and an NOI must be filed.

Note: Under "Is the Land in Ag Use?" and "Is it Normal Maintenance/Improvement?" it is assumed that no exemptions other than the agricultural exemption apply.

Note: "Is the Work Subject to Regulation?" means "Is the work subject to regulation in the absence of any claim of an exemption?"

Is the Land Subject to Protection?	Is the Land in Ag Use?	Is the Work Subject to Regulation?	Is it Normal Maintenance/Improvement?	Outcome
Yes	Yes	Yes	Yes	Exempt
No	No	No	No	No NOI
Yes	Yes	Yes	No	File
Yes	Yes	No	Yes	No NOI
No	Yes	Yes	Yes	No NOI
Yes	Yes	No	No	No NOI
No	Yes	Yes	No	No NOI
Yes	No	Yes	Yes	File
Yes	No	Yes	No	File
No	Yes	No	Yes	No NOI
Yes	No	No	No	No NOI
No	Yes	No	No	No NOI
No	No	Yes	No	No NOI

We are not convinced the work proposed for Pikul Farm meets the eligibility requirements of the wetland protection regulations to be exempt from the Wetlands Protection Act. We believe the work will be subject to the regulatory requirements of the federal Clean Water Act; whether the work would meet those requirements is beyond the scope of this letter and should involve review by the Army Corps of Engineers. Conformity with that law is required for the work to be exempt. Even potentially exempt activities must meet those preconditions to be eligible. That may include a permit, ruling, or letter from the Army Corps of Engineers on whether the work would meet the requirements of the federal Clean Water Act, and detailed plans for erosion and sediment control.

We do not believe the work, as described in the Request for a Determination of Applicability, qualifies for the agricultural exemption for the following reasons.

- All activities (including construction of a farm structure < 4000 sf) are only considered "normal improvement of land in agricultural use" when "...they are directly related to production or raising of [agricultural commodities]." 310 CMR 10.04 Agriculture (c) 1. *Farming in Wetland*

Resource Areas, page 2-2, makes it clear that to qualify for an exemption the agricultural operation must be conducted with the intent to make a profit (i.e. commercial agriculture). Therefore, the commission should consider whether the proposed operation is designed with the intent to make a profit from the production of agricultural commodities. Solar panels can be considered to the extent that they reduce the cost of the agricultural operation. The solar panels cannot be considered in determining "intent to make a profit" if it is the solar panels themselves that are responsible for that profit (i.e. through the sale of electricity) because that generation of electricity is not agricultural production.

- The regulations allow under the agricultural exemption construction of farm structures if the footprint for each structure is < 4000 sf. 310 10.04 Agriculture (c) 1. c. *Farming in Wetland Resource Areas* indicates that this threshold is not meant to be applied cumulatively. There is no reason however to believe that DEP intended this provision to be without limits. It is not reasonable to believe that over 380,000 sf of structures in this BVW can be considered normal improvement of land in agricultural use even if each one of the 99 structures is less than 4000 sf.
- For the land itself to be considered in agricultural use, the land must primarily be used in agricultural production or primarily be used in a manner related to, and customarily and necessarily used in, producing or raising agricultural commodities. 310 10.04 Agriculture (a). If the use of the land is primarily to sell the electricity generated from the greenhouse solar arrays, the land is no longer in agricultural use. If the majority of the revenues would come from the generation and sale of electricity rather than from the sale of agricultural commodities produced within the greenhouses, we believe the land would not be primarily in agricultural use. A secondary use of the greenhouses for agricultural purposes is insufficient for the land to be considered in agricultural use.
- The greenhouses appear to be platforms for solar arrays to be used to generate electricity for sale off-site. While one would usually consider a greenhouse a "farm structure," we believe the proposed greenhouses would not be farm structures if they will not be directly related to production or raising of agricultural commodities. 310 CMR 10.04 Agriculture (c). If they are not farm structures they are not exempt. Id.
- The agricultural exemption only applies to the production of agricultural commodities. It does not apply to structures used for the processing, storage or sale of agricultural products.
- New access roads are not covered by the agricultural exemption. Grass pavers or other means to provide access for vehicles within BVW will require the filing of a Notice of Intent.
- To be considered an exempt agricultural activity under the Wetlands Protection Act the work must be "...conducted in accordance with federal and state laws." 310 CMR 10.04 Agriculture (c) 1. We believe that the proposed activities will not comply with federal regulations under the Clean Waters Act. Consequently, the project is not entitled to an exemption under the Massachusetts Wetlands Protection Act.

Based on the documentation we have seen, and knowing the prior attempt to site a solar array on the property, it appears to us there is ample ground to issue a positive Determination of Applicability. The property owner would then need to file a NOI or appeal to MA DEP. If it does neither, enforcement would be in order if it undertakes any work on the land subject to protection.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Eugene B. Benson". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Eugene B. Benson

Executive Director

Email: eugene.benson@macweb.org

cc: Army Corps of Engineers
MA DEP
Marlene Schroeder
Tracy Peter, Peter Environmental Consulting
MACC Advocacy Committee