



January 27, 2009

Natural Heritage & Endangered Species Program
CVP Revisions
Route 135
Westborough, MA 01581

Via e-mail: natural.heritage@state.ma.us

Dear Natural Heritage and Endangered Species Program:

On behalf of Mass Audubon, I submit the following comments on the *Proposed Revisions to the Guidelines for the Certification of Vernal Pool Habitat*. Mass Audubon was a prime proponent of the addition of wildlife habitat as a protected public interest under the Massachusetts Wetlands Protection Act (WPA) in 1987, and has been involved in monitoring implementation since then. Mass Audubon helped write the vernal pool certification guidelines, and have trained hundreds of volunteers in their use. Mass Audubon supports the stated purpose of the revisions, i.e. improved consistency between the WPA regulations and the vernal pool guidelines. However, we have some significant concerns that some of the changes will not achieve this goal and in fact will be counterproductive to it. Some of the changes may be proposed in part due to limitations in staffing for the certification program, in terms of ability to follow up and verify questionable documentation. Mass Audubon supports good, consistent documentation requirements but also the provision of sufficient staffing to maintain the program consistent with its support of the WPA regulations as intended since 1988.

In particular, Mass Audubon objects to the elimination of many of the facultative indicators from the certification criteria. We also specifically request that the details of any proposed appeal process undergo public review prior to implementation. We also have a number of practical concerns with implementation of the proposed changes and the role of citizen volunteers. Mass Audubon recommends that these concerns be addressed and further revisions made to both the guidelines and the WPA regulations before changes are implemented.

Consistency with WPA Regulations

In 1988, Mass Audubon scientists participated in an advisory committee during the drafting of the WPA regulatory revisions and vernal pool certification guidelines by the Department of Environmental Protection (DEP) and Natural Heritage and Endangered Species Program (NHESP). The wildlife habitat provisions of the regulations and the vernal pool guidelines were developed to be both scientifically defensible and provide a consistent system that would work as a unified program.

To the extent that the vernal pool guidelines are being revised, Mass Audubon strongly urges that NHESP once again work closely with DEP to revisit the WPA regulations and make sure that important wetlands wildlife habitat remains protected at an appropriate level and consistent with current science. As described below, we have serious concerns that the proposed revisions to the guidelines will have the effect of denying

protection under the WPA to wetland resource areas that do, in fact, function as vernal pools and which deserve protection as important wildlife habitat.

According to the WPA regulations:

Vernal pool habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection Under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1). These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non-breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma maculatum*), and are important habitat for other wildlife species.

Thus, there are 4 main features of a vernal pool:

- 1) A confined basin depression;
- 2) Holds water for two continuous months in most years;
- 3) Free of adult fish populations; and
- 4) Provides essential breeding habitat for certain amphibian species and important habitat for other wildlife species.

Facultative Methods: The proposed elimination of facultative indicators is not consistent with the WPA regulations. There is nothing in the WPA regulations that distinguishes between obligate and facultative amphibians or other species, or that says that vernal pools are only important habitat to the extent that they provide breeding habitat for obligate amphibian species. Facultative indicators were included in the vernal pool guidelines because they are indicators of two continuous months of standing water in the spring and/or summer. They are indicators of vernal pool habitat when combined with criteria #1 and 3, and the presence of breeding facultative amphibians is also evidence in support of criteria #4. The proposed elimination of facultative invertebrates because only some of these species occur preferentially in vernal pools is based on flawed application of the regulation. These species support criterion #2 and should continue to be used in conjunction with evidence of the other criteria.

The proposed changes also are purportedly justified based on indicators that are “generally associated with better habitat...” This is inappropriate and not supported by the WPA regulations. The regulations require that the four criteria be met, then the area is automatically presumed to support important wetlands wildlife habitat. Vernal pools provide important habitat for many vertebrate species of wetlands wildlife – e.g. turtles feeding in spring and resting in summer, as recognized in the WPA regulations. Nor does the regulatory definition distinguish between obligate and facultative amphibian breeding habitat in determining whether criterion #4 is met. Nothing in the regulations says that vernal pools are only important habitat for amphibians, in fact there are several references to their habitat function for other species, e.g. under 310 CMR 10.57 and other sections: “Many reptiles, birds and mammals also feed here.” The wildlife habitat evaluation provisions at 10.60(2) state: “vernal pool habitat can provide the following important wildlife habitat functions:

1. Food, shelter, migratory and breeding areas, and overwintering areas for amphibians;
2. Food for other wildlife.”

Important wetlands wildlife habitat is and must remain protected under the Wetlands Protection Act. Narrowing the certification criteria to only protect those pools that have been shown to support obligate vernal pool amphibian species is inappropriate and contrary to the regulations. Therefore, the proposed changes do not achieve their stated goal of improving consistency between the regulations and the guidelines.

Invertebrates: There is an apparent inconsistency in the proposed revisions. The two species whose presence could potentially be used in the dry pool method (the log cabin caddisfly, and Herrington's fingernail clam) do not appear in the information on the facultative species method. Presumably the fingernail clam and caddisfly are also present when the pool is filled with water. In general, Table 2 of the revision proposal appears to be incomplete in relation to the list of invertebrates currently acceptable under the facultative species method, based on the list included in the January 1, 2001 version of the Guidelines or Table 3C of the current vernal pool certification form (accessed by Internet on 1/20/09), which also includes dragonfly and damselfly nymphs, caddisfly larvae, and fingernail clams, among others. NHESP should evaluate the full list of facultative invertebrate species before removing all invertebrates as potential indicators of vernal pool habitat.

Dry Pool Method: Determining that an area provides vernal pool habitat when the pool is dry can be difficult, but that less than 50 (1.2 percent) of 3,931 vernal pools were certified based on the dry pool method isn't a reason to eliminate the method. If qualified individuals are able to document appropriate evidence supporting the presence of vernal pool habitat—even if that evidence is limited to signs of two species only reliably identifiable by specialists—that area should be eligible for certification.

ILSF: A significant concern regarding the proposed revisions is the effect on protecting important wetlands wildlife habitat in Isolated Land Subject to Flooding (ILSF). There is ample science indicating that most areas that qualify under the WPA as ILSF provide important habitat for vertebrate wetlands wildlife species, but the proposed changes to the certification guidelines will make it more difficult to certify some of these areas as vernal pools. Since the WPA regulations do not contain a presumption of significance for wildlife habitat for ILSF (although they should), ILSF that in fact provide important wildlife habitat will be more difficult or sometimes impossible to protect under the new guidelines. Mass Audubon objects to narrowing of the certification criteria without a corresponding change to the ILSF regulations providing a presumption of significance for wetlands wildlife habitat.

Practical Considerations

Even to the extent that the proposed changes are supported by science, there are significant concerns regarding the practical effects on vernal pool certifications.

Timing: The elimination of certification methods that can be used outside of the spring amphibian breeding season will mean that certification is impossible during much of the year. While the dry pool method is used infrequently, it is important to have this method available when it is not possible to wait until the following spring to gather certification information. This is closely related to the ILSF issue – conservation commissions rely on vernal pool certifications as evidence that a pool functions as important wildlife habitat. Without the ability to conduct certifications outside of the spring season, disputes and project delays will increase, and protection of important wildlife habitat will be lost.

Number of Egg Masses: The proposed revisions will require photographic documentation of five rather than two egg masses for most of the species that remain available for use in documentation (except state listed

rare species). While it may be true that most viable vernal pools contain at least five egg masses in most years, the presence of all of the egg masses will be difficult for many citizen volunteers to document. Nothing in the WPA regulations precludes certification of vernal pools supporting small populations of obligate vernal pool amphibians, nor do the regulations require that pools be of relatively high productivity in all or most years.

The current standard of documenting two egg masses is one that most citizens can readily meet when attempting to certify a vernal pool, and presumably this standard could be met over many years. With the higher burden of proof, pools that support small populations of obligate amphibian species might not qualify for certification in all years, due to many factors. Citizens who desire to certify a vernal pool may only find four egg masses during a visit one year (assuming a thorough, accurate survey), although there may have been five the year before or the year after. Often, the opportunity exists for only one visit during one year.

Difficulty in Documenting Other Evidence: It is far easier for most people to confidently find, correctly identify, and clearly photograph egg masses of obligate vernal pool amphibians than to observe their larvae or document adult activity. It is our understanding that images of egg masses are the most frequent evidence used for certifying vernal pools through the obligate species method (which accounts for nearly 3,800 pools of 3,931—96.3 percent—since 1988). Depending upon the size and depth of the pool, and the clarity of the water in it, it may be difficult to observe some of the egg masses out in the center at depth. Unless equipped with waders, most people are not willing to wade out into cold springtime water in the pool to get their photos. It is far easier to photograph egg masses near the surface and or near the shore. Seeing only two masses or even four therefore does not prove that there are not others out of sight or difficult to photograph. Furthermore, egg masses are often attached to submerged vegetation such as the branches of shrubs or fallen trees. Wading into these areas can be hazardous for volunteers, and there is an increased risk to the egg masses themselves due to the extra disturbance associated with people walking around throughout the pool and pulling branches up to see if egg masses are attached.

Trespass: The proposed revisions add a statement indicating it is the responsibility of the person gathering the documentation to comply with all applicable laws. Mass Audubon urges that actual factual statements regarding laws, including that landowner permission is only required when posted, be provided rather than generalized statements that may be misleading and unnecessarily alarming to citizen volunteers.

Documentation by Minors: The revisions would require documentation submitted by minors to include a signature by their guardian. If information was gathered in the presence of another adult, the process should allow that adult to certify the accuracy of the information submitted.

Appeals

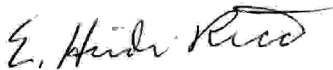
Mass Audubon supports the creation of an appeal process that is fair and objective. The proposed revisions do not provide details of the proposed appeal process, other than to indicate that one will be created and that NHESP will handle biological issues while DEP will be engaged to address hydrologic questions. We request that the details of the proposed appeal procedure be publicly noticed and a comment period provided before they are adopted. In addition to the landowner, the appeals process should provide, at a minimum, for input from the person(s) who gathered the certification information, the local conservation commission, abutters, and any 10 citizen group from the municipality.

Conclusion

Mass Audubon agrees that the vernal pool certification guidelines need to be kept current with science and consistent with the WPA regulations. However, we have identified a number of concerns in both regards. We recommend that NHESP evaluate the potential for revamping its internal vetting process for certifying vernal pools rather than revising the certification guidelines. If the guidelines are revised, this must be done in conjunction with updates to the WPA regulations.

Thank you for considering these comments.

Sincerely,



E. Heidi Ricci
Senior Policy Analyst

cc: Mary Griffin, Commissioner, Department of Fish and Game
Tom French, Assistant Director, Division of Fisheries and Wildlife
Kathleen Anderson, Chair, Natural Heritage and Endangered Species Advisory Committee
Lucy Edmundson, Deputy Commissioner for Policy, DEP
Lealdon Langley, Director, DEP Division of Wetlands and Waterways