

Amended Orders: Amending an Order of Conditions (DWW Policy 85-4)

Issued: September 17, 1985

Revised: March 1, 1995

Following the issuance of a Final Order of Conditions, unforeseen circumstances sometimes arise which may require minor deviations from the project approved in that Order. To allow for the smooth operation of the permitting procedure and to avoid unnecessary and unproductive duplication of regulatory effort after a Final Order of Conditions has been issued, the Department recognizes that it would not be reasonable to require a complete refile of the Notice of Intent when the changes sought in the Final Order of Conditions are relatively minor and will have unchanged or less impact on the interests protected by the Act. Amended Orders provide assurances to applicants that modifications undertaken in the course of the project are within the scope of the deviations allowed for the receipt of a Certificate of Compliance at 310 CMR 10.05(9)(d). Thus, the process of amending a Final Order of Conditions is acceptable to the Department as long as certain procedural safeguards are employed. This policy does not apply to Final Orders of Conditions which have expired.

Amending a Final Order of Conditions is at the discretion of the body that issued the Final Order of Conditions ("the issuing authority"). There is no provision in the wetland regulations that requires the issuing authority to consider or act upon a request to amend a Final Order of Conditions. There is no right to request a Superseding Order of Conditions or an Adjudicatory Hearing if a request to amend is not granted. If the issuing authority refuses to amend a Final Order of Conditions, the only opportunity for further review is the filing of a new Notice of Intent.

The Department recommends that in processing an amendment to a Final Order of Conditions, the most simple changes, such as correcting obvious mistakes such as citing a wrong file number or typographical errors, be accomplished by correction of the Order, with a copy sent to the Department. In other cases, the Department recommends that the following procedures be used:

1. The applicant makes a request for an amendment to the issuing authority (the Conservation Commission in the case of an Order of Conditions or the Department of Environmental Protection in the case of a Superseding Order of Conditions). The request for an amendment of the Final Order of Conditions issued by a Conservation Commission is to be made either orally at a regularly scheduled meeting of the Commission or by submitting the request to the Commission in writing. In either case a written copy of the request, a narrative description of what changes have been proposed and any pertinent plans showing the changes are to be sent to the Department's Regional Office. The request for an amendment

of a Superseding Order of Conditions issued by the Department's Regional Office is to be made in writing to the DEP Regional Office. A written copy of the request should also be forwarded to the Conservation Commission.

2. The issuing authority first makes a determination whether the requested change is great enough to warrant the filing of a new Notice of Intent or whether it is of a relatively minor nature and can be considered as an amendment to the original Final Order of Conditions. In making this determination, the issuing authority should consider such factors as whether the purpose of the project has changed, whether the scope of the project has increased, whether the project meets relevant performance standards, and whether the potential for adverse impacts to the protected statutory interests will be increased. Relatively minor changes which result in the same or decreased impact on the interests protected by the Act are appropriate for amendments. If the determination is made that the project purpose or scope has changed substantially or that the interests specified in the Wetlands Protection Act are not protected, then the issuing authority should not issue the amendment, but should require the filing of a new Notice of Intent.
3. If the Conservation Commission determines that a new Notice of Intent is not necessary, the Conservation Commission should publish newspaper notice (at the applicant's expense) in the same general manner as outlined in the Act for new Notices of Intent and as required by the Open Meeting Law, M.G.L. c. 39, 23B, to inform the public that the request for amendment to the Order of Conditions will be considered by the commission at a public hearing. In addition, the applicant must follow the requirements of abutter notification as if filing a Notice of Intent as described in the Act. When the request for an amendment is before the Department the applicant must publish notice in a newspaper of general circulation in the municipality where the requested amendment to the proposed activity will take place. The notice must describe that an amendment to a Final Order is being requested, that the request is before the Department for review, and the date that the public comment period closes. Proof of notice must be provided to the Department.
4. If, after considering the information presented by the applicant and any comments received at the public hearing, or submitted to the Department within 21 days of the requested amendment, and the issuing authority decides to issue an amended Order of Conditions, a copy of such order should be forwarded to the Department's Regional Office or the Conservation Commission, as the case may be, at the time of issuance. By analogy to the usual appeal procedure of the Final Order of Conditions, a person aggrieved by the amendments to the Order, or the other parties given appeal rights in 310 CMR 10.07, may, within ten days of issuance, request that the Department review the changes made to the Final Order of Conditions. The issues under appeal will be limited to those issues subject to the amendment(s) or the change(s) made in the

Final Order of Conditions. Until there is a final resolution of the appeal, no work may continue on those portions of the project not permitted under the Final Order of Conditions but only permitted by the amendment(s) which has been appealed.

5. Under no circumstances will the issuance of an Amended Order of Conditions extend the effective date of the original Final Order of Conditions. The Amended Order shall run with the term of the original Order of Conditions or the effective date of an extended Order of Conditions.
6. The Amended Order should be issued on the form provided for an Order of Conditions, with the insertion of the word "Amended" and the amendment date. Amended Orders must be recorded with the registry of Deeds in the same manner as Orders.