



Shutesbury Conservation Commission
P.O. Box 276
Shutesbury MA 01072

To: Town of Shutesbury
Property: Lake Wyola Dam and Lake Wyola

Re: Violation Notice

Date: July 27, 2023

The Conservation Commission of Shutesbury has information that you or your agents may have violated the Massachusetts Wetlands Protection Act, MGL ch. 131 §40 and its Regulations at 310 CMR 10.00, as well as the Shutesbury Wetlands Protection Bylaw and its Regulations. The following activities may have impacted Protected Resource Areas and their associated 100-foot Adjacent Upland Resource Areas. Please note that this is **not** an Enforcement Order. It is a notice of violations with requests for action by the Town. The Commission is providing this notification in hopes that the concerns can be resolved in a collaborative manner.

The following conditions were observed and documented by the Commission:

1. Pursuant to enforcement of Order of Conditions #286-0279, the Commission observed on a site visit on 7/25/23 that the erosion controls on the work site were in damaged condition and work activities had taken place outside of the approved limit of work. Stockpiled materials were observed near Resource Areas with no erosion controls. We direct your attention to Pre-Construction #6 and Construction Conditions #3, #10, #11, #13, and #17.
2. Between 6/23/23 and 7/25/23, the Commission observed and documented fluctuations in water release levels at the Shutesbury Lake Wyola Dam that were inconsistent with the Order of Conditions #286-0272. Prior to 7/13/23, very low release levels were observed at the sluiceway of the dam.
3. The Dam Keeper increased the water flow at the Dam after 7/13/23. Although the Commission recognizes the month of July has been a period of high water flow and precipitation, the timing of this alteration took place right before construction began for the Culvert Replacement Project. The Commission was advised by the Project Manager at Nitsch Engineering on 7/17/23 that he had been informed that the Town intended to draw down the lake water level, **for the project**, before the dewatering stage of the project began on August 1. This intention, if correct, conflicts with the months of guidance provided by the Town about this aspect of the project, in which the Commission was assured that no drawdown was to occur.

4. Between 7/22/23 and 7/24/23, the Commission observed an intentional drawdown of at least 10 inches in 48 hours with notice to the Commission or application. This drawdown, at a rate of 5 inches in 24 hours, is far faster than the maximum drawdown rate in the original NOI, which called for 3 inches in 24 hours. We note that the MA DFW Drawdown Performance Standards advise a rate of no more than 2 inches in 24 hours in order to allow aquatic organisms sufficient time to migrate to deeper water. The Commission is unaware of any emergency condition as defined under 310 CMR 10.06 and the Shutesbury General Wetlands Protection Bylaw that merited such a rapid and excessive drawdown during these dates, nor did the Town contact the Commission. In the absence of a Permit or other authorization by the Commission, lake drawdowns cannot be instituted for prevention purposes alone.
5. The #286-0272 Order of Conditions does not address summer drawdowns or water retention, nor does it authorize water level manipulation for flood control or construction projects. Of note, the 2020 Memorandum of Understanding, signed after the issuance of the #286-0272 is advisory and does not have the force of law.
6. The Order of Condition #286-0279, General Condition # 7 of DEP File # 286-0279 Order of Conditions reads: “**No lowering of Lake Wyola is allowed (sic) under this Order beyond what is specified in Order of Conditions # 286-0272.**”
7. The observed alterations of water levels at Lake Wyola were inconsistent with the Dewatering Plan Condition # 5 of the Order of Conditions # 286-0279: “*In case of emergencies, problems, or the need to discuss site conditions with the Conservation Commission, please contact the Conservation Commission (413-259-3792 or Town Administrator during business hours at (413) 259-1214.*” In its July 7, 2023 letter to the Town of Shutesbury, the Commission replaced this requirement when it directed the Town to contact the Commission Chair directly via her cell phone number for all emergencies.
8. In various communications with the Commission, Town representatives for the Locks Pond Culvert Replacement Project and the Lake Wyola Drawdown NOI have expressed a desire to limit requests for Permit changes due to concerns about state regulatory requirements under MESA (NHESP). The Commission also received multiple assurances, dating back to early this year, that no lake drawdown was needed for the Culvert Replacement Project. Recently, the Commission received a notification from NHESP about a circumstance in which the Town failed to file for a MESA review for two Emergency Certifications issued by the Commission. NHESP is responsible for reviewing proposed work subject to the Wetlands Protection Act when state-listed vertebrate or invertebrate animal species are present. The Commission does not administer MESA regulations, but the Commission must consider NHESP conditions for projects in mapped Priority or Estimated Habitat for Endangered Species. A desire to avoid state-mandated regulatory requirements is not a sufficient justification for deviation from or violation of Orders of Conditions.

The Wetlands Protection Act provides that:

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. Each day such violation

continues shall constitute a separate offense except that any person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter fails to comply with an enforcement order or order of conditions.

Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation.

The Shutesbury General Wetlands Protection Bylaw provides that:

Except as permitted by the Conservation Commission or as provided in this Bylaw, no person shall remove, fill, dredge, build upon, or alter the following resource areas: a. any freshwater wetland, isolated wetland, marsh, wet meadow, bog or swamp; within 100 feet of any freshwater wetland, isolated wetland, marsh, wet meadow, bog or swamp; b. any lake, river, pond or stream (whether surface or subsurface); within 100 feet of any lake, river, pond or stream (whether surface or subsurface); any land under said waters; c. any land subject to flooding or inundation by groundwater, surface water, storm flowage, or within a 100-year flood plain.

The Commission shall have authority to enforce this Bylaw, its regulations, and permits issued thereunder by violation notices, administrative orders, and civil and criminal court actions. As part of a permit issued under this Bylaw, the Commission may provide that the applicant agrees to reimburse the Town for all enforcement expenses, including but not limited to court costs, attorney's fees and expert witness fees.

Pursuant to our enforcement of the above-referenced Orders of Conditions, under the Wetlands Protection Act and the Shutesbury General Wetlands Protection Bylaw, the Commission requests that the Town comply with all of the following:

1. Advise the Shutesbury Dam Keeper that all manipulations of water levels during summer months must comply with Order of Conditions #286-0272. Should an emergency condition exist, the Town must request authorization via either Amended Order of Conditions Request or an Emergency Certification Application. The Commission will require credible evidence to justify a drawdown for emergency purposes.
2. Direct the Town Administrator to submit a typed, monthly report of Dam Keeper management activities at the Dam, to be submitted by the 15th of the month for each preceding month. Such report must include daily water levels, any adjustments made to the Dam gate, and any other pertinent dam and water level information.
3. Direct the Site Supervisor for MAS Building and Bridge to submit to the Commission a daily email report of site conditions and work progress, with photographs to verify erosion controls and downstream turbidity per the Order of Conditions. If work has been discontinued at the site, the Town must inform the Commission immediately which personnel shall be responsible for this task.
4. Should the Town request approval of a new Control of Water Plan for OOC 286-0279, the Commission requests that the Town approve a request for a 53G Technical Consultant to assist the Commission in review. If an Amended Order of Conditions is requested, the Commission shall consider at that time whether a 53G Consultant is needed.
5. Provide the Commission with a timeline, to be submitted no later than 30 days from the issuance of this letter, regarding how the Town proposes to address

concerns regarding the Order of Conditions #286-0272. To avoid future potential difficulties, the Commission encourages the Town to submit an Amended Order of Conditions Request to resolve all issues before the 2023 Fall drawdown period begins.

6. Any future emergency drawdowns should be accompanied by a Town-wide alert to ensure public safety.
7. The Commission continues to expect to receive documentation of retroactive MESA filings for the two Lakeview Culvert Emergency Certifications from April and June of 2023, per the Conditions of those Permits. Proof of submissions must be provided to the Commission within 30 days.

The Commission is sending this Violation Notice in the spirit of working cooperatively. We fully understand the importance of these municipal infrastructure projects. The issues noted above, however, are serious and undoubtedly impacted the Resource Areas and Values we are charged with protecting. We hope to work with the Town to avoid an Enforcement Order.

The Shutesbury Conservation Commission