

# Guidance on Section 208 Plan Update

## Obtaining a Consistency Determination

April 2018

Exceptional development pressure in the latter half of the 20th century motivated Cape Cod residents to seek a coordinated regional land use approach to protect the region's natural resources from the consequences of uncoordinated growth. As a result, the Cape Cod Commission (Commission) was created by the Cape Cod Commission Act (Act) in January 1990.

The Cape Cod Commission is Barnstable County's regional planning and regulatory agency and, through the Act, is responsible for balancing the protection of the region's unique environmental resources with appropriate economic development.

Specifically, one purpose of the Commission is to protect groundwater, surface water and ocean water quality. Through the Act, the Commission is responsible for furthering the provision of adequate capital facilities, coordinating those facilities with the achievement of other goals, and anticipating, guiding and coordinating the rate and location of development with the capital facilities necessary to support such development.

In 2013, in response to overwhelming evidence that nitrogen from septic systems across the region are impacting coastal water quality, the Commonwealth of Massachusetts directed the Cape Cod Commission to update the Area Wide Water Quality Management Plan (208 Plan), pursuant to Section 208 of the Federal Clean Water Act. Recognizing that Cape Cod communities had, in many cases, identified strategies to address this issue but had struggled with implementation, the Commission committed to an extensive stakeholder engagement process to help identify barriers to success. A key barrier identified was the mismatch between the planning and regulatory framework and the unique and shared nature of the water resources impacted. Planning and regulation traditionally occurred at the town-wide scale; however, 32 of the 53 watersheds to sensitive coastal embayments on Cape Cod are shared by more than one town.

Municipal Comprehensive Wastewater Management Plans (CWMPs) have traditionally been reviewed as Developments of Regional Impact (DRIs), which are defined by the Act as a development which, because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality. DRI review is not well-suited for town water quality improvement initiatives which are systemic, not necessarily associated with any particular parcels of land, might not involve 'development' in its traditional sense, and which may not have discrete permitting and implementation timelines. Water quality initiatives are often long-term projects subject to changing conditions over time and include municipal infrastructure necessary to support development. One of the most important determinations the Commission makes during DRI review is whether there are inherent benefits from a project to the region. Given the region's pressing water quality issues, the benefit of these town water quality efforts should be presumed.

The unique and multijurisdictional nature of the issue on Cape Cod called for a new approach. The 208 Plan, which was certified and approved by the Commonwealth of Massachusetts and the Environmental Protection Agency in September 2015, provides a streamlined regulatory pathway for more efficiently and effectively achieving water quality goals through the development of targeted watershed management plans that address nutrient remediation through a variety of approaches.

One aspect of the streamlined regulatory approach is the Commission's review of municipal water quality plans and projects, which are no longer reviewed as DRIs, but instead for consistency with the 208 Plan. The following provides guidance on obtaining and maintaining consistency with the 208 Plan.

## DEFINITIONS

The following are definitions of terms referenced in this document.

**208 Plan:** The Cape Cod Area Wide Water Quality Management Plan, developed pursuant to Section 208 of the Clean Water Act.

**Development of Regional Impact (DRI):** A development which, because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality.

**Waste Treatment Management Agency (WMA):** The entity, or entities, designated as the responsible party for planning and implementation of local water quality improvement plans, as required by Section 208 of the Clean Water Act. On Cape Cod, the 15 Cape Cod towns are the designated WMAs.

**Water Quality Improvement Plan:** A plan proposed by a WMA that describes the extent of the nutrient related issues within a town, watershed, or subwatershed and a program for implementing the necessary infrastructure and strategies to reduce nutrient impacts on the quality of coastal waters.

**Water Quality Improvement Project:** A project proposed by a WMA intended to reduce nutrient impacts on the quality of coastal waters.

## REGIONAL REGULATORY REVIEW

The 208 Plan recommended that the Commission revise its regulations to provide a simpler and more supportive process for the review of municipal water quality improvement plans and projects.

After much consideration, it was determined that these types of plans and projects should be reviewed exclusively for consistency with the 208 Plan. The 2017 Implementation Report, an addendum to the 208 Plan which documents successes to date and next steps at the local and regional levels, recommended that the Commission adopt regulatory amendments to allow for

208 Plan consistency review in place of traditional DRI review for municipal water quality and wastewater capital plans and projects.

In February 2018 the Commission proposed amendments to Chapter A of the Cape Cod Commission Regulations: Enabling Regulations Governing Review of Developments of Regional Impact (Enabling Regulations). In April 2018 the amendments were approved by both the Barnstable County Assembly of Delegates and Board of Regional Commissioners.

The revised enabling regulations exempt towns from DRI review for water quality plans and projects that have nutrient remediation as a primary purpose. The amendment applies equally to plans and projects previously reviewed and approved by the Commission as DRIs, and modifications to such plans or projects will not require further DRI review.

The Commission proposed that DRI review be replaced with a Commission staff-level review and approval through a determination by the Commission's Executive Director that local plans and projects are consistent with the 208 Plan.

This new review and approval process allows the Commission to be more supportive and collaborative with towns in their development of solutions to water quality problems. This process also provides a better platform to deal with multiple towns on common water quality solutions in shared watersheds, and promotes public engagement at earlier stages of planning and plan development which should increase community support for these plans and projects.

## 208 CONSISTENCY CRITERIA

The 2017 Implementation Report provided draft guidance on the specific criteria by which local plans and projects will be reviewed, which include:

- ✓ WMA assumes responsibility for controllable nitrogen for any part of the watershed within its jurisdiction
- ✓ Plan meets applicable nutrient reduction targets
- ✓ Planning occurs at a watershed level with consideration of a hybrid approach
- ✓ Public was engaged to gain plan consensus
- ✓ Plan includes proposed strategies to manage nitrogen loading from new growth
- ✓ Plan includes adaptive management approach
- ✓ Plan includes pre- and post-implementation monitoring program
- ✓ Plan includes a description and assessment of the town's proposed funding strategy
- ✓ WMA commits to regular 208 Plan Update Consistency reviews until water quality goals are achieved, generally reviewed at least every five years
- ✓ In shared watersheds, WMA seeking 208 Consistency Review collaborates with neighboring WMA(s) on nitrogen allocation, shared solutions, and cost saving measures

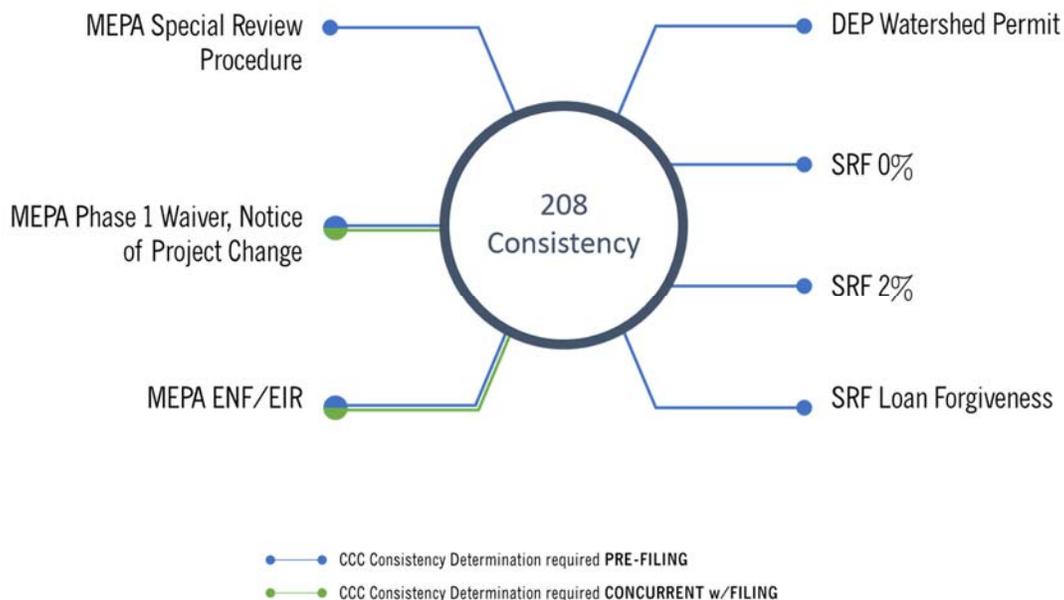
Guidance on 208 consistency criteria is attached to this document.

## INSTANCES REQUIRING A 208 CONSISTENCY DETERMINATION

There are several instances that will require a WMA to obtain a 208 consistency determination. Depending on the plan or project, a 208 consistency determination may be requested more than

once, at different stages of planning, project development and plan implementation. Instances requiring a 208 consistency determination include:

- **Modification of an Existing DRI Permit:** WMAs with an existing DRI permit will not require further DRI review. Requests for modifications to DRI permits shall undergo 208 consistency review in place of DRI review concurrent with the DRI modification action.
- **Massachusetts Environmental Policy Act (MEPA):** Water quality improvement plans and projects that require review under MEPA and therefore are typically reviewed by the Cape Cod Commission as a DRI, shall instead be reviewed for consistency with the 208 Plan. This applies to filings of Environmental Notification Forms (ENFs), Environmental Impact Reports (EIRs), Phase 1 and other Waivers, Notices of Project Change, and applications for any special review procedure.
- **Massachusetts Clean Water State Revolving Fund (SRF) Loans (310 CMR 44.00, effective January 27, 2017):** Plans and projects for which SRF funding is sought must be consistent with the 208 Plan Update. WMAs that choose to request SRF loans for plan or project implementation must first obtain a 208 consistency determination. This applies to 0% and 2% interest loans and eligibility for principal forgiveness.
- **Massachusetts Department of Environmental Protection (MassDEP) Watershed Permits:** MassDEP has issued guidance on watershed permitting which states that plans and projects for which a WMA is seeking nitrogen credit through a watershed permit require a 208 consistency determination. WMAs seeking a watershed permit with DEP shall also first obtain a 208 consistency determination from the Commission.



*Instances requiring a 208 consistency determination. In most cases, a consistency determination is required pre-filing; however, a consistency determination may be obtained concurrent with the MEPA filing of an ENF, EIR, Notice of Project Change or Phase 1 or other Waiver.*

## REQUESTING A 208 CONSISTENCY REVIEW

Key to ensuring consistency of local plans and projects with the 208 Plan is early consultation with the Commission. Communities initiating planning processes and developing project specific proposals should request a meeting and/or assistance from the Commission in the early phases of plan or project development. Initial review for consistency with the 208 Plan is process oriented, with progress measured and reviewed over time, via reporting on implementation and during the five-year consistency review process. The 208 Plan provides a framework for a process that engages stakeholders in plan development, considers a broad range of strategies and utilizes decision support tools to help determine an approach to the problem that best suits local needs. Early consultation with the Commission will help to ensure appropriate steps are taken at the local level, during the planning process to ensure consistency with the regional plan and public support for implementation.

Through early consultation, Commission staff will work with the WMAs designee(s) to identify 208 consistency criteria applicable to the plan or project and discuss options and opportunities for achieving consistency with those criteria. Applicable criteria may vary from request to request, including for requests made for plans versus projects. For example, a project may be proposed by a WMA that is anticipated to achieve a percentage of the nitrogen reduction required in a given watershed. At the time of consistency review for the project, the Commission will not require that the project fully meet the watershed nitrogen reduction target. However, the Commission would anticipate that the project should ultimately be incorporated as one part of a comprehensive or targeted watershed management plan, which should anticipate achieving the nitrogen reduction required for the respective watersheds addressed in such plans.

Requests for a meeting to discuss consistency criteria applicable to a local plan or project, requests for watershed team technical assistance for plan or project development, and/or requests for a 208 consistency review and determination should be submitted in writing to the Cape Cod Commission Executive Director from the WMA (Town Manager or Administrator, Board of Selectmen, or Town Council). Projects or plans proposed through a cooperative effort by two or more WMAs should be submitted jointly by all parties involved.

WMA(s) may request determinations for individual projects, specific watersheds, or for town wide plans; however, in all cases, the Commission will apply a watershed-based approach to consistency review of such requests.

## ISSUANCE OF 208 CONSISTENCY DETERMINATIONS

A 208 consistency determination is effective per the terms, conditions and duration set out in the determination. In most cases, the Commission will issue determinations for plans or projects in recurring five-year intervals. Upon the expiration of the then current effective period, the WMA must submit updates for the respective project or plan, pursuant to its adaptive management plan and other 208 consistency criteria, in order to maintain 208 consistency and obtain an updated determination for the succeeding period. In certain cases, once a 208 consistency determination is issued, subsequent requests for a determination or project or plan updates within the five year timeframe may simply warrant a letter from the Commission confirming that associated plan or project is consistent with the 208 Plan.

## MAINTAINING CONSISTENCY WITH THE 208 PLAN

### **Annual reporting**

Each 208 consistency determination will require that the WMA(s) commit to annual reporting. Annual reports shall include data collected during the reporting period, such as technology performance monitoring and/or embayment monitoring data, and a progress update on implementation. Details on data submission requirements may vary based on the proposed project or plan and will be included in the 208 consistency determination.

Annual reports will be used to update watershed reports, which were issued as part of the 2017 Implementation Report. Annual reporting and watershed reports will be used to complete 208 compliance reports. Compliance reports will be issued annually at the OneCape Summit, typically held in the Spring.

### **Adaptive Management and Five-year Consistency Determinations**

To maintain a 208 consistency determination for a given project or plan, the WMA(s) must undergo consistency review at least every five years until water quality goals are achieved, or as otherwise established by the Commission and the WMA(s) in a determination. The intent of periodic consistency reviews is to allow for adaptive management. WMAs should have the flexibility to be responsive to changes in environmental quality, relative effectiveness of implemented approaches, identification of new technology, and unforeseen community needs. Five-year consistency determinations allow WMAs to change the course of action identified, based on the best available data and stakeholder feedback, and submit a modified implementation plan as part of an adaptive management report, if necessary.

Subsequent consistency determinations will focus on progress toward originally identified goals and changes to the implementation plan outlined through an adaptive management report.

### **Stakeholder Engagement**

Six to twelve months prior to expiration of a consistency determination, the WMA(s) shall convene a stakeholder group to discuss implementation activities to date and any potential changes necessary. Stakeholder groups should include representation from town staff, elected officials, local watershed associations, civic groups, and interested professional groups, such as realtors, homebuilders, and/or businesses. The stakeholder group composition is subject to variation. The Cape Cod Commission shall be engaged in this effort.

The purpose of the stakeholder process will be to review implementation efforts, consider changes in water quality as identified through ongoing embayment water quality monitoring, and come to consensus on potential changes to the implementation plan, if necessary.

Based on an agreed upon path forward, the WMA shall develop a public engagement and outreach plan for successful implementation of the revised plan or project. As part of the five-year 208 consistency review, the WMA shall submit the public engagement and outreach plan along with the revised plan or project details.

## **Representation on the Cape Cod Water Protection Collaborative**

In June 2017, the Cape Cod Water Protection Collaborative (Collaborative) was re-established, following a long-standing history of working with the State's legislative delegation to highlight the need for a broader base of financial support for water quality issues on Cape Cod. The Collaborative's newly stated mission is to protect Cape Cod's shared water resources by promoting and supporting the coordinated, cost-effective and environmentally sound development and implementation of local water quality initiatives, including, but not limited to watershed management plans required by section 208 of the Federal Clean Water Act.

The roles and responsibilities of the Collaborative directly align with implementation of locally developed water quality plans and projects. Each WMA has a seat on the Collaborative's Governing Board and the ability of the Collaborative to support ongoing local and regional water quality initiatives relies on participation from each Cape Cod community. As such, as a condition of 208 consistency, WMAs must appoint a member to the Collaborative Governing Board and must commit to maintaining their representation through reappointments, as necessary. WMAs must prioritize attendance at monthly Governing Board meetings.