

Town of Concord WETLANDS BYLAW

1. Purpose

The purpose of this Bylaw is to protect the Town of Concord's wetlands, water resources, flood prone areas, and adjoining upland areas including three major rivers, the Assabet, Sudbury, and Concord and their tributaries by prior review and regulation of activities deemed by the Concord Natural Resources Commission (the Commission) likely to have a significant or cumulative effect on resource area values. These resource area values include, but are not limited to, the following:

- public or private water supply
- groundwater
- flood control
- erosion and sedimentation control
- storm damage prevention
- water quality
- prevention and control of pollution
- fisheries
- wildlife habitat
- rare species habitat including rare plant and animal species
- agriculture

deemed important to the community (collectively, the "wetland resource area values protected by this Bylaw").

This Bylaw is subject, however, to the rights and benefits accorded to agricultural uses and structures of all kinds under the laws of the Commonwealth and other relevant Bylaws of the Town of Concord.

2. Jurisdiction

Except as permitted by the Commission or as provided in this Bylaw or its Regulations hereunder, no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas:

- 2.1 any freshwater wetland, marsh, wet meadow, bog, swamp, flat, bank, or beach bordering on any reservoir, lake, pond, perennial or intermittent stream, river, brook, or creek; and adjoining lands out to a distance of 100 feet known as the Buffer Zone;
- 2.2 any land under the aforementioned waterways and waterbodies;
- 2.3 any Certified Vernal Pool and adjoining lands out to a distance of 100 feet known as the Vernal Pool Habitat;
- 2.4 any perennial stream, river, brook, or creek; the land thereunder; and adjoining lands out to a distance of 200 feet known as the Riverfront Area, and;
- 2.5 any Land Subject to Flooding

(collectively the "resource areas protected by this Bylaw").

Concord Wetlands Protection Map

The Natural Resources Commission may refer to, and amend from time to time, a "Concord Wetlands and Certified Vernal Pool Protection Map" which shall be designed to illustrate the wetland resource areas (including Certified Vernal Pools) that may be jurisdictional under this Bylaw. The map is to be used as a general guide only. Field observations and/or engineering calculations shall control in determining jurisdiction under this bylaw.

3. Exemptions

The following exemptions shall apply and no application or permit is required for:

3.1 The following activities in the 100-foot Buffer Zone (which includes the 25-foot No-Disturb Zone) or the 200-foot Riverfront Area provided the activity is not within any other resource area; there is no regrading; no trees greater than 6 inches diameter breast height are removed; there is no alteration to additional resource areas; and erosion and sedimentation controls are used as needed or as determined by the Commission or agent of the Commission:

- a. Maintaining and repairing existing buildings and structures provided that:
 - i. the footprint remains the same;
 - ii. there is no additional alteration of any resource areas; and
 - iii. there is no heavy equipment or stockpiling within 50 feet of resource areas;
- b. Constructing, maintaining, and repairing unpaved pedestrian walkways for private use provided no use of fill material;
- c. Maintaining and repairing existing stonewalls;
- d. Maintaining and constructing new fencing provided that:
 - i. it is greater than 50 feet from the edge of the wetland boundary or 50 feet from the mean annual high water line of a perennial stream (whichever is farther);
 - ii. it does not constitute a barrier to wildlife movement (i.e. the fence is greater than 6 inches from the ground surface);
- e. Stacking cordwood;
- f. Conversion of lawns to decks, sheds, patios, and pools that are accessory to residential structures, provided the activity, including any discharge pipes, is located more than 50 feet from the mean annual high water line or bordering vegetated wetland (whichever is farther). The conversion of such uses, or other impervious surfaces accessory to existing single family houses to lawn or natural vegetation is also allowed;
- g. Activities, such as monitoring wells, exploratory borings, soil sampling, and surveying, that are temporary, have negligible impacts as determined by the Commission, and are necessary for planning and design purposes;
- h. Planting native species of trees, shrubs, or groundcover (excluding turf lawns).
- i. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther.

3.2 The following activities are exempt in any resource area and Buffer Zone:

- a. Routine mowing (including river meadows) and maintenance of lawns, gardens, and landscaped areas (including tree pruning), in existence on the effective date of this Bylaw or which are created after such date in accordance of the terms of this Bylaw;
- b. Work performed for normal maintenance or improvement of land in agricultural use as defined by the Wetlands Protection Act Regulations as 310 CMR 10.00; and Removal of dead and dying trees, as confirmed by the Natural Resource Director or a certified arborist and documented to the Commission within 30 days of removal; and
- d. Fencing around existing vegetable gardens that is flush or below ground.

3.3 Emergency Projects

Permits shall not be required for emergency projects necessary for the protection of the health and safety of the public, provided that the work is to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof; provided that advance notice, oral or written, has been given to the Commission prior to commencement of work or within 24 hours after commencement; provided that the Commission or its agent certifies the work as an emergency project; provided that the work is performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency; and provided that within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this Bylaw, if deemed necessary by the Commission. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

3.4 Utilities and Roads

Permits shall not be required for maintaining, repairing, or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, sewer, telephone, telegraph, or other telecommunication services, provided that written notice has been given to the Commission 14 days prior to commencement of work, and provided that the work conforms to any performance standards and design specifications in Regulations adopted by the Commission.

The applications and permits required by this Bylaw shall not be required for maintaining and repairing existing and lawfully located existing roads (excluding bridges and culverts) provided that:

- a. there is no increase in impervious surface;
- b. there is no additional alteration of resource areas;
- c. written notice has been given to the Division of Natural Resources 14 days prior to commencement of work;
- d. erosion and sedimentation controls are used as necessary.

4. **Definitions**

Except as otherwise provided in this Bylaw or the Regulations hereunder, the definitions of terms and the procedures in this Bylaw shall be as set forth in the Wetlands Protection Act (M.G.L. Ch. 131 §40) and Regulations (310 CMR 10.00), as now in effect. In addition, the following definitions shall apply in the interpretation and implementation of this Bylaw.

The term "alter" shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this Bylaw:

- 4.1 Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind;
- 4.2 Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics;
- 4.3 Drainage, or other disturbance of water level or water table;
- 4.4 Dumping, discharging, or filling with any material which may degrade water quality;
- 4.5 Placing of fill, or removal of material, which would alter elevation;
- 4.6 Driving of piles, erection or expansion of buildings or structures of any kind;
- 4.7 Placing of obstructions or dam-like objects in water;
- 4.8 Destruction of plant life including removal of trees and shrubs;
- 4.9 Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters;
- 4.10 Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater;
- 4.11 Incremental activities that have, or may have, a cumulative adverse impact on the resource areas protected by this Bylaw.

The term "vernal pool" is defined as any confined basin or depression which has been certified by the Division of Fisheries and Wildlife. The boundary of the resource area for vernal pools shall be the mean annual high-water line defining the depression.

The term "vernal pool habitat" is the area within 100 feet of a Certified Vernal Pool, which provides essential habitat for vernal pool species to complete their life cycle.

The term "vista pruning" means the selective thinning of tree branches or understory shrubs to establish a specific "window" to improve visibility. Vista pruning does not include the cutting of trees which would

reduce the leaf canopy to less than 90% of the existing crown cover and does not include the mowing or removal of understory brush.

5. Applications and Fees

5.1 Application.

Written application shall be filed with the Commission to perform activities subject to this Bylaw. This application shall include the information and plans set forth in the Rules and Regulations of the Commission.

5.2 Request for Determination of Applicability.

Any person desiring to know whether a proposed activity or an area is subject to this Bylaw may in writing request a determination from the Commission. The Commission shall accept a Request for Determination of Applicability (RDA) under the Wetlands Protection Act as a request under this Bylaw. Such a request for determination shall contain information and plans specified by the Rules and Regulations of the Commission. The Commission shall issue its order or determination in writing within 21 days of the close of the public hearing thereon unless the applicant authorizes an extension in writing. If the Commission determines that a proposed activity is subject to this Bylaw and issues a positive RDA, the applicant may file for approval as outlined in §§ 6.0 – 7.0 of this Bylaw.

5.3 Request for Wetland Resource Area Approval.

Any person desiring to certify, for purposes of this Bylaw, the limits of resource areas on a site may file a request for approval of resource area boundaries. This application shall include such information and plans as are set forth in the Rules and Regulations of the Commission to describe and define the wetland resource areas. The Commission shall accept an Abbreviated Notice of Resource Area Delineation (ANRAD) under the Wetlands Protection Act (M.G.L. Ch. 131 §40) as similar request under this Bylaw.

5.4 Independent Consultants.

The Commission may, at the expense of the applicant, retain an independent consultant for the purpose of providing the Commission with data, analysis, or other information deemed by the Commission to be reasonably necessary or appropriate to assist the Commission in reviewing the application or rendering its decision, in conformity with the provisions of M.G.L. Ch. 44 §53G and Rules and Regulations of the Commission. This is intended only to assist in reviewing large or complex projects.

6. Notice and Hearings

6.1 Notice.

Any person filing a Notice of Intent, Abbreviated Notice of Intent, or Abbreviated Notice of Resource Area Delineation, or an amendment to any of the above permits with the Commission at the same time shall give written notice thereof, by certified mail (return receipt requested) or hand delivered, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, and abutters to the abutters within 100 feet of the property line of the applicant, including any in another municipality or across a body of water. The notice shall state a brief description of the project or other proposal and the date of any Commission hearing or meeting date if known. The notice to abutters also shall include a copy of the application or request, with plans, or shall state where copies may be examined and obtained by abutters. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. When a person filing any application is other than the owner, the request, the notice of the hearing and the determination shall be sent by the Commission to the owner as well as to the person making the request.

6.2 Public Hearing.

The Commission shall conduct a public hearing on any application and a public meeting on the Request for Determination of Applicability, with written notice given at the expense of the applicant, at least five business days prior to the hearing, in a newspaper of general circulation in Concord. The

Commission shall commence the public hearing within 21 days from receipt of a completed permit application unless an extension is authorized in writing by the applicant. The Commission shall have authority to continue the hearing to a specific date announced at the hearing, for reasons stated at the hearing, which may include the need for additional information or plans required of the applicant or others as deemed necessary by the Commission. In the event that the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

- a. In order to provide sufficient review time the Commission may continue a public hearing or public meeting if new information is submitted by the applicant, or applicant's agent, less than seven (7) business days before the scheduled public hearing or public meeting.
- b. The Commission may combine its hearing under this Bylaw with the hearing conducted under the Wetlands Protection Act (M.G.L. Ch. 131 §40) and Regulations (310 CMR 10.00).

7. Permits and Conditions

7.1 Administrative Approvals.

Activities considered minor in scope and that would predictably have no measurable or cumulative impact upon the resource areas protected by this Bylaw, may be reviewed and permitted by the Natural Resource Director.

7.2 Decision.

If the Commission, after a public hearing and consideration of the general and specific factors set forth below, determines that the activities which are subject to the application, or the land and water uses which will result therefrom, are likely to have a significant individual or cumulative effect on the resource area values protected by this Bylaw, the Commission, within 21 days of the close of the hearing, unless the applicant authorizes an extension in writing, shall issue or deny a permit for the activities requested. The decision shall be in writing.

7.3 Factors.

In making such a determination, the Commission shall take into account the following factors:

- a. the extent to which the applicant has avoided, minimized and mitigated any such effect;
- b. any loss, degradation, isolation, and replacement or replication of such protected resource areas elsewhere in the community and the watershed, resulting from past activities, whether permitted, unpermitted or exempt; and
- c. foreseeable future activities.

Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

7.4 Specific Factors.

a. Buffer Zone

In reviewing activities within the Buffer Zone, the Commission shall presume the Buffer Zone is important to the protection of other resource areas because activities undertaken in close proximity have a high likelihood of adverse impact, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse impacts from construction and use can include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality, and loss of wildlife habitat.

b. Riverfront Area

In reviewing activities within the Riverfront Area, the Commission shall presume the Riverfront Area is important to all the resource area values unless demonstrated otherwise, and no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this Bylaw, has proved by a preponderance of the evidence that (1) there is no practicable alternative to the proposed project with less adverse effects, and that (2) such activities, including proposed mitigation measures, will have no significant adverse impact on the areas or values protected by this Bylaw. The Commission shall regard as

practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional, commercial, or industrial), logistics, existing technology, costs of the alternatives, and overall project costs.

c. Resource Area Loss

To prevent resource area loss, the Commission shall require applicants to avoid alteration wherever feasible; to minimize alteration; and, where alteration is unavoidable and has been minimized, to provide full mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with specific plans, professional design, proper safeguards, adequate security, and professional monitoring and reporting to assure success, because of the high likelihood of failure of replication.

d. Certified Vernal Pools

The Commission shall presume that all areas meeting the definition of “vernal pools” under §4.0 of this Bylaw, including the adjacent Vernal Pool Habitat, perform essential habitat functions. This presumption may be overcome only by the presentation of credible evidence which, in the judgment of the Commission, demonstrates that the area does not provide essential habitat functions. Any formal evaluation should be performed by an individual who at least meets the qualifications under the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.00).

e. Setbacks

The Commission shall presume that any activity or alteration within 25 feet of any freshwater wetlands, marshes, wet meadows, bogs, swamps, springs, banks, beaches, reservoirs, lakes, ponds, and lands under water bodies, intermittent streams, brooks and creeks, and perennial rivers and streams, has a significant individual or cumulative impact upon the resource area values protected by this Bylaw and shall be prohibited.

- i. This presumption may be overcome where applicant can clearly demonstrate with credible evidence the proposed activity or alteration would have no individual or cumulative impact upon any of the resource area values protected by this Bylaw in accordance with the Regulations hereunder. Alternatively, the Commission may waive the setback if it determines that an applicant satisfies the waiver requirements in §7.7.
- ii. The following shall not be subject to this setback presumption: Routine maintenance, repairs and construction on legally preexisting structures so long as there is no expansion in the structure; continuation of a legally preexisting use; or the construction and maintenance of publicly maintained trails that restrict the use of motorized vehicles. Maintenance, repairs, and construction shall be subject to all other requirements under this Bylaw and its Regulations hereunder.

7.5 Conditions.

Upon the issuance of a permit, the Commission shall impose conditions it deems necessary or desirable to protect said wetland resource area values, and all activities shall be conducted in accordance with those conditions.

7.6 Denial.

Where no conditions are adequate to protect said resource area values, the Commission is empowered to deny a permit for failure to meet the requirements of this Bylaw. The Commission may also deny a permit:

- a. for failure to submit necessary information and plans requested by the Commission;
- b. for failure to comply with the procedures, design specifications, performance standards, and other requirements in Regulations of the Commission; or
- c. for failure to avoid, minimize or mitigate unacceptable significant or cumulative effects upon the resource area values protected by this Bylaw.

7.7 Waivers.

The Commission may waive specifically identified and requested procedures, design specifications, performance standards, or other requirements set forth in its Regulations, provided that:

- a. the Commission finds in writing after said public hearing that there are no reasonable conditions or alternatives that would allow the proposed activity to proceed in compliance with said Regulations;
- b. that avoidance, minimization and mitigation have been employed to the maximum extent feasible; and
- c. that the waiver is necessary to accommodate an overriding public interest or to avoid a decision that so restricts the use of the property as to constitute an unconstitutional taking without compensation.

7.8 Expiration of Permit.

A permit, Determination of Applicability (DOA), or Order of Resource Area Delineation (ORAD) shall expire three years from the date of issuance. The Commission may extend a permit for one or more periods of up to three years each, upon written request from the applicant made at least 30 days prior to the expiration of the permit.

Notwithstanding the above, the Commission in its discretion may (a) issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission, and (b) extend such permit for one or more periods of up to five years each, upon written request from the applicant made at least 30 days prior to the expiration of the permit. Notwithstanding the above, a permit may identify requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all present and future owners of the land.

7.9 Revocation of Permit.

For good cause the Commission may revoke any permit, DOA, or ORAD or any other order, determination or other decision issued under this Bylaw after notice to the holder, the public, abutters, and town boards, pursuant to §6.0, and after a public hearing.

7.10 Amendment of Permit.

Amendments to any permit shall be handled in the manner set out in the Wetlands Protection Act Regulations (310 CMR 10.00) and policies thereunder. For good cause, the Commission may also modify its determination of any resource area boundary delineation established in an ORAD at the time of issuance of any Order of Conditions for any activity or project on the same site; the issuance of an ORAD shall not be considered final action on such a boundary delineation request.

7.11 Recordation of Permit.

No work proposed in any application shall be undertaken until the permit issued by the Commission with respect to such work has been recorded in the Middlesex (South) Registry of Deeds or, if the land affected is registered land, in the registry section of the land court for the Middlesex (South) Registry of Deeds, and until the holder of the permit certifies in writing to the Commission that the document has been recorded. If the applicant fails to perform such recording, the Commission may record the documents itself and require the Applicant to furnish the recording fee therefore, either at the time of recording or as a condition precedent to the issuance of a COC.

8. Regulations

After public notice at least 14 days prior to public hearing, the Natural Resource Commission may promulgate such Rules and Regulations to effectuate the purpose of this Bylaw, effective when voted and approved by a majority vote of Town Meeting, and filed with Town Clerk. Failure by the Commission to promulgate such Rules and Regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this Bylaw.

9. Compliance

9.1 Scope.

No person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this Bylaw, 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 a permit or an enforcement order issued pursuant to this Bylaw.

9.2 Entry.

The Commission, its agents, officers, and employees shall have authority to enter upon privately owned land for the purpose of performing their duties under this Bylaw and may make or cause to be made such examinations, surveys, or sampling as the Commission deems necessary, subject to the constitutions and laws of the United States and the Commonwealth.

9.3 Enforcement.

The Commission shall have authority to enforce this Bylaw, its Regulations, and permits issued thereunder by letters, phone calls, electronic communication and other informal methods, violation notices, non-criminal citations under M.G.L. Ch. 40 §21D, and civil actions. Any person who violates provisions of this Bylaw may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

9.4 Legal Action.

Upon request of the Commission, the Town Manager, Board of Selectmen and Town Counsel may take legal action for enforcement under civil law.

9.5 Fines.

The Natural Resources Director or other designee of the Town Manager may issue a fine for each offense as specified in this Bylaw and in Appendix A of the Regulations for the Enforcement of Town Bylaws under M.G.L. Chapter 40, §21D and the Bylaw for Non-Criminal Disposition of Violations adopted under Article 47 of the 1984 Town Meeting, as amended.

As long as any person in violation demonstrates a reasonable, good faith effort to comply with this Bylaw, the Natural Resources Director shall refrain from issuing fines. However, the Natural Resources Director shall resort to issuing fines when the violator ceases to demonstrate a reasonable, good faith effort toward achieving compliance. This provision does not preclude the Natural Resources Director from issuing fines and the Commission from simultaneously ordering mitigation or restoration of the affected resource area(s).

a. Fine Schedule

Any person who violates any provision of this Bylaw, Regulations, permits, or administrative permits issued hereunder, may be subject to the following fine schedule:

- i. \$100 per day for the first offense;
- ii. \$200 per day for the second offense;
- iii. \$300 per day for the third and subsequent offense.

Each day or a portion thereof during which a violation continues shall constitute a separate offense, and each provision of the Bylaw, Regulations, or permit violated shall constitute a separate offense, provided, however, that the accelerating penalty schedule for second, third and subsequent offenses set forth above shall not apply to continuing violations or violations of multiple bylaw provisions arising out of the same activity.

b. Appeals.

In addition to the appeal provisions under M.G.L. Chapter 40, §21D, persons fined may appeal in writing to the Commission within 21 days. The Commission shall vacate fines where compliance has been established or, their issuance is inconsistent with the interests of this Bylaw. The Commission shall suspend fines as long as the person in violation demonstrates a

reasonable, good faith effort toward obtaining compliance. The Commission may restore suspended fines at any time during an existing violation. This provision does not preclude the issuance of fines in conjunction with orders for restoration or mitigation.

10. Burden of Proof

Except where a higher burden of proof is specified in this Bylaw or Regulations adopted by the Commission, the applicant shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the permit application will not have unacceptable significant or cumulative effect upon the resource area values protected by this Bylaw. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.

11. Appeals

A decision of the Commission shall be reviewable in the superior court in an action filed within 60 days thereof, in accordance with M.G.L. Ch. 249 §4 as amended .

12. Relation to the Wetlands Protection Act

This Bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act (M.G.L. Ch. 131 §40), as amended, and Regulations (310 CMR 10.00), as amended thereunder.

13. Severability

The invalidity of any section or provision of this Bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any permit, approval or determination which previously has been issued.

Provided that this Bylaw shall not be applicable to activity that is the subject of a Notice of Intent filed with the Commission pursuant to the provisions of said Wetlands Protection Act (M.G.L. Ch. 131 §40) before May 6, 2009.

Voted at Annual Town Meeting, Article 43

April 29, 2009

Approved by Attorney General September 8, 2009