

## **12. WETLANDS PROTECTION BYLAW**

### **12-1. Introduction.**<sup>31</sup>

The purpose of this bylaw is to protect the foreshores, wetlands, water resources, and adjoining land areas in the Town of Provincetown by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater quantity and quality, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, water pollution control, fisheries, shellfish, wildlife habitat, rare species habitat including rare plant species, agriculture, aquaculture, and recreation values, deemed important to the Town (collectively, the “resource area values protected by this bylaw”). This bylaw is intended to utilize the Home Rule authority of the Town to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Massachusetts Wetlands Protection Act (G.L. Ch. 131, §40) and Regulations thereunder (310 CMR 10.00).

### **12-2. Jurisdiction.**<sup>32</sup>

Except as permitted by the Conservation Commission or as provided in this bylaw, no person shall commence to remove, fill, dredge, build upon, degrade, or discharge into, or otherwise alter the following resource areas: any freshwater or coastal wetlands; vegetated and unvegetated wetlands (both Bordering and Isolated); marshes; flats; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds of any size; rivers; streams; creeks; beaches; dunes; estuaries; the ocean; lands under water bodies; any and all areas protected by the Massachusetts Endangered Species Act (MESA) and as defined by the Natural Heritage and Endangered Species Act Program (NHESP); and the one-hundred (100) foot Buffer Zone to any of the aforementioned resource areas; lands subject to flooding or inundation by groundwater or surface water; and lands subject to tidal action, coastal storm flowage, or flooding (collectively the “resource areas protected by this bylaw”). Said resource areas shall be protected whether or not they border surface waters.

In the event that the Commission determines that an activity occurring beyond the limit of jurisdiction noted above is likely to have, is having or has had a significant effect on the wetlands values of a resource area, the Commission may require the filing of a Notice of Intent or a Request for Determination of Applicability for that activity.

In determining whether a resource area is subject to the provisions of this bylaw, the origin of the wetland, whether natural or manmade, is not a relevant factor.

### **12-3. Conditional exceptions.**

**12-3-1. Public utility facilities.** The application and permit required by this bylaw 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, telephone, telegraph, or other telecommunication services, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission.

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<sup>31</sup> Amended April, 2019 ATM 21

<sup>32</sup> Amended April, 2019 ATM Article 21

**12-3-2. Agricultural uses.** The application and permit required by this bylaw shall not be required for work performed for normal maintenance or improvement of land which is lawfully in agricultural use at the time the work takes place.

**12-3-3. Emergency project.** The application and permit required by this bylaw 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. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

**12-3-4. Exceptions contained in the act.** Other than stated in this section, the exceptions provided in the Wetlands Protection Act (M.G.L. c. 131 §40) and Regulations (31 CMR 10.00) shall not apply under this bylaw.

**12-4. Applications for permits and requests for determination.**

**12-4-1. Application.** Written application shall be filed with the Commission to perform activities affecting resource areas protected by this bylaw. The permit application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the resource areas protected by this bylaw. No activities shall commence without receiving and complying with a permit issued pursuant to this bylaw. The Commission in an appropriate case may accept as the permit application and plans under this bylaw the Notice of Intent and plans filed under the Wetlands Protection Act (M.G.L. c. 131 §40) and Regulations (310 CMR 10.00).

**12-4-2. Request for determination.** Any person desiring to know whether or not a proposed activity or an area is subject to this bylaw may in writing request a determination from the Commission. Such a Request for Determination (RFD) shall include information and plans as are deemed necessary by the Commission.

**12-4-3. Filing fee.** At the time of a permit application or RFD, or application for Certificate of Compliance, the applicant shall pay a filing fee specified in Regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act (M.G.L. c. 131 §40) and Regulations (310 CMR 1.00). The fee shall be deposited in a dedicated account, for use only for wetland protection activities, from which the Commission may withdraw funds without further appropriation.

**12-4-4. Consultant fee.** Upon receipt of a permit application or RFD, or at any point during the hearing process, the Commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the Commission for specific expert engineering and other consultant services deemed necessary by the Commission to come to a final decision on the application. This fee is called the "consultant fee." The specific consultant services may include, but are not limited to, performing or verifying the accuracy of resource area survey and delineation; analyzing resource area functions and values, including wildlife habitat evaluations, hydro geologic and drainage analysis; and researching environmental or land use law. The

exercise of discretion by the Commission in making its determination to require the payment of a consultant fee shall be based upon its reasonable finding that additional information acquirable only through outside consultants would be necessary for the making of an objective decision. Any applicant aggrieved by the imposition of, or size of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

**12-4-5. Method of payment.** The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision. If a consultant fee account is authorized by a special act, the applicant’s fee shall be put into such account, and the Commission may draw upon that account for specific consultant services approved by the Commission at one of its public meetings. Any unused portion of the consultant fee shall be returned to the applicant unless the Commission decides at a public meeting that additional services will be required.

**12-4-6. Waiver of fee.** The Commission may waive the filing fee, consultant fee, and costs and expenses for a permit application or RFD filed by a government agency.

**12-4-7. Fee schedule.** The maximum consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be according to the following schedule:

Project costs	Maximum fee
Up to \$ 100,000	\$ 500
\$ 100,001 - \$ 500,000	\$ 2,500
\$ 500,001 - \$1,000,000	\$ 5,000
\$1,000,001 - \$1,500,000	\$ 7,500
\$1,500,001 - \$2,000,000	\$10,000

Each additional \$500,000 project cost increment (over \$2,000,000) shall be charged an additional \$2,500 maximum fee per increment. The project cost means the estimated, entire cost of the project including, but not limited to, building construction, site preparation, landscaping, and all site improvements. The consultant fee shall be paid pro rata for that portion of the project cost applicable to those activities within resource areas protected by this bylaw. The project shall not be segmented to avoid being subject to the consultant fee. The applicant shall submit estimated project costs at the Commission’s request, but the lack of such estimated project costs shall not avoid the payment of the consultant fee.

**12-5. Notice and hearings.<sup>33</sup>**

**12-5-1. Notice.** Any person filing a permit application or a RFD with the Commission at the same time shall give written notice thereof, by hand delivery or certified mail, return receipt requested, or by certificates of mailing 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.<sup>34</sup> The notice to abutters shall have enclosed a copy of the permit 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 requesting a determination is other than the owner, the request, the notice of the hearing, and the determination itself shall be sent by the Commission to the owner as well as to the person making the request.

<sup>33</sup> Amended April, 2011 ATM Article 29

<sup>34</sup> Amended April 7, 2008 ATM Article 24

**12-5-2. Public Hearing.**<sup>35</sup> The Commission shall conduct a public hearing on any permit application or RFD, with written notice given at the expense of the applicant, not less than five days prior to the hearing, in a newspaper of general circulation in the municipality. The Commission shall commence the public hearing 21 days from its posted deadline for filing applications, upon receipt of a completed permit application or RFD unless an extension is authorized in writing by the applicant. The Commission shall issue its permit or determination in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant. The Commission in an appropriate case may combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act (G.L. Ch.131 §40) and Regulations (310 CMR 10.00).

**12-5-3. Continuation of hearing.** The Commission shall have authority to continue the hearing to a certain date announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information from the applicant or others deemed necessary by the Commission in its discretion, or comments and recommendations of the boards and officials listed in Section 12-6-1.

**12-6. Coordination with other boards.**

Any person filing a permit application or RFD with the Commission shall provide a copy thereof at the same time, by certified mail (return receipt requested) or hand delivery, to the Conservation Agent, who shall distribute copies thereof to the appropriate regulatory boards, the cost of which copies shall be at the applicant's expense.<sup>36</sup> A copy shall be provided in the same manner to the Conservation Commission of the adjoining municipality, if the application or RFD pertains to property within 200 feet of that municipality. An affidavit of the person providing notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. The Commission shall not take final action until the boards and officials have had 14 days from receipt of notice to file written comments and recommendations with the Commission, which the Commission shall take into account but which shall not be binding on the Commission. The applicant shall have the right to receive any comments and recommendations, and to respond to them at a hearing of the Commission, prior to final action.

**12-7. Permits and conditions.**

**12-7-1. Issuance of permit.** If the Commission, after a public hearing, determines that the activities which are subject to the permit application or the land and water uses which will result therefrom are likely to have a significant individual or cumulative effect upon the resource area values protected by this bylaw, the Commission, within 21 days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the Commission shall impose conditions which the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions. The Commission shall take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities.

**12-7-2. Denial of permit.** The Commission is empowered to deny a permit for failure to meet the requirements of this bylaw; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance

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<sup>35</sup> Amended April, 2019 ATM Article 21

<sup>36</sup> Amended April 7, 2008 ATM Article 24

standards, and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the resource area values protected by this bylaw; and where no conditions are adequate to protect those values.

**12-7-3. Presumed importance of buffer zone.** Lands within 100 feet of rivers, ponds and lakes, and lands within 100 feet of other resource areas, are presumed important to the protection of these resources because activities undertaken in close proximity to resource areas have a high likelihood of adverse impact upon the wetland or other resource, 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. The Commission therefore may require that the applicant maintain a strip of continuous, undisturbed vegetative cover within the 100-foot area, unless the applicant convinces the Commission that the area or part of it may be disturbed without harm to the values protected by the bylaw.

**12-7-4. Practicable alternatives.** In the review of areas within 100 feet of rivers and streams, 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 purpose), logistics, existing technology, costs of the alternatives, and overall project costs.

**12-7-5. Avoidance of wetlands loss or alteration.** To prevent wetlands loss, the Commission shall require applicants to avoid wetlands alteration wherever feasible; shall minimize wetlands alteration; and, where alteration is unavoidable, shall require full mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with adequate security, professional design, and monitoring to assure success, because of the high likelihood of failure of replication.

**12-7-6. Expiration of permit.** A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may 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. Notwithstanding the above, a permit may contain requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all owners of the land.

**12-7-7. Revocation of permit.** For good cause the Commission may revoke or modify a permit or determination issued under this bylaw after notice to the holder of the permit or determination, notice to the public, abutters, and town boards, pursuant to §V and §VI, and a public hearing.

**12-7-8. Coordination of permit with order of conditions.** The Commission in an appropriate case may combine the permit or determination issued under this bylaw with the Order of Conditions or Determination of Applicability issued under the Wetlands Protection Act (M.G.L. c. 131 §40 and Regulations (310 CMR 10.00)).

**12-7-9. Recording of permit.** No work proposed in any permit application shall be undertaken until the permit issued by the Commission with respect to such work has been recorded in the registry of deeds or, if the land affected is registered land, in the registry section of the land court for the district wherein the land lies, and until the holder of the permit certifies in writing to the Commission that the permit has been recorded, or provides the Commission with a copy of the recording information or other evidence of recordation with the appropriate registry.

**12-8. Regulations.**

After public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purposes of this bylaw effective when voted and filed with the 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. At a minimum, these regulations shall define key terms in this bylaw not inconsistent with the bylaw and procedures governing the amount and filing of fees.

**12-9. Definitions.<sup>37</sup>**

**12-9-1. Defined terms.** The following definitions shall apply in the interpretation and implementation of this bylaw.

**12-9-1-1. Coastal & inland banks.** “Coastal Bank” shall mean the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland. “Inland Bank” shall mean the portion of the land surface which normally abuts and confines a water body. It occurs between a water body and a vegetated bordering wetland and adjacent flood plain, or, in the absence of these, it occurs between a water body and an upland. A bank may be partially or totally vegetated, or it may be comprised of exposed soil, gravel or stone. The upper boundary of a Bank is the first observable break in the slope or the mean annual flood level, whichever is lower. The lower boundary of a Bank is the mean annual low flow level. The topography, soil structure, and plant community composition and structure of coastal and inland banks can provide the following important wildlife habitat functions: 1. Food, shelter and migratory and breeding areas for wildlife. 2. Overwintering area for mammals and reptiles.

**12-9-1-2. Vernal pool.** “Vernal pool” shall include a confined basin depression which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, and which is free of adult fish populations, as well as the area within 100 feet of the mean annual boundary of such a depression, regardless of whether the site has been certified by the Massachusetts Division of Fisheries and Wildlife. Vernal pools shall include those mapped and certified by the Massachusetts Natural Heritage and Endangered Species Program as well as those areas identified in the field as eligible for certification by a professional wetland biologist or other expert.

**12-9-1-3. Rare species.** “Rare species” shall include, without limitation, all vertebrate and invertebrate animal and plant species listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife, regardless of whether the site in which they occur has been previously identified by the Division.

**12-9-1-4. Person.** “Person” shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or

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<sup>37</sup> Amended by April 4, 2011 ATM Article 29

political subdivision thereof to the extent subject to town bylaws, administrative agency, public or quasi-public corporation or body, this municipality, and any other legal entity, its legal representatives, agents, or assigns.

**12-9-1-5. Alter.** “Alter” shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protect by this bylaw:

1. Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind.
2. Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patters, flow patterns, or flood retention characteristics.
3. Drainage, or other disturbance of water levels or water table. Dumping, discharging, or filling with any materials which may degrade water quality.
4. Placing of fill, or removal of material, which would alter elevation.
5. Driving of piles, erection, or repair of buildings, or structures of any kind.
6. Placing of obstructions or objects in water.
7. Destruction of animal and/or plant life, including cutting of trees.
8. Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters.
9. Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater.
10. Incremental activities which have, or may have, a cumulative adverse impact on the resource areas protected by this bylaw.
11. Use of fertilizers, pesticides, herbicides and fungicides.

**12-9-1-6. Isolated vegetated wetland.** Isolated vegetated wetland is any area where surface or ground water or ice at or near the surface of the ground and greater than 300 square ft. which supports a plant community (cover) comprise of 50% or greater of wetland species, or which in the judgment of the Commission supports a significant community of wetland vegetation.

**12-9-1-7. Passive recreation.** Passive recreation refers to non-consumptive, non-motorized uses such as wildlife observation, walking, biking, canoeing and fishing as well as trail-based hiking, mountain biking, horseback riding, recreation generally encompasses the less intensive range of outdoor activities compatible with preserving natural resource functions such as wildlife habitat and floodplain protection. Passive recreation is that which emphasizes the open-space aspect of a park and which involves a low level of development, including picnic areas and trails.<sup>38</sup>

**12-9-2. Consistency with wetlands protection act.** Except as otherwise provided in this bylaw or in regulations of the Commission, the definitions of terms in this bylaw shall be as set forth in the Wetlands Protection Act (M.G.L. c. 131 §40) and Regulations (310 CMR 10.00).

## **12-10. Security.**

**12-10-1. Performance and observation of conditions.** As part of a permit issued under this bylaw, in addition to any security required by any other municipal or state board, agency, or official, the Commission may require that the performance and observance of the conditions imposed thereunder (including conditions requiring mitigation work) be secured wholly or in part by one or more of the methods described below:

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<sup>38</sup> Amended by April 7, 2008 ATM Article 24

By a proper bond or deposit of money or negotiable securities or other undertaking of financial responsibility sufficient in the opinion of the Commission, to be released in whole or in part upon issuance of a Certificate of Compliance for work performed pursuant to the permit.

By accepting a conservation restriction, easement, or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of the Town whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed. This method shall be used only with the consent of the applicant.

**12-11. Enforcement.**

**12-11-1. Prohibition.** 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.

**12-11-2. Entry on property.** 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.

**12-11-3. Enforcement alternatives.**<sup>39</sup> The Commission shall have authority to enforce this bylaw, its regulations, and permits issued thereunder by violation notices, enforcement orders, under the Town's non-criminal disposition section of its general bylaws, pursuant to M.G.L. c. 40, §21D, and civil and criminal court actions. Any police officer, Conservation Agent, Harbormaster, Shellfish Constable or Commissioner (with the Commission's approval) shall have authority to enforce this bylaw.<sup>40</sup> An 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.

**12-11-4. Fine.** Any person who violates any provision of this bylaw, or regulations, permits, or administrative orders issued thereunder, shall be punished by a fine of \$300. Each day or portion thereof during which a violation continues, or unauthorized fill or other alteration remains in place, shall constitute a separate offense, and each provision of the bylaw, regulations, permits, or administrative orders violated shall constitute a separate offense.

**12-12. Burden of proof.**

**12-12-1. Preponderance of evidence.** The applicant for a permit 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 permit with conditions.

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<sup>39</sup> Amended by April 4, 2011 Annual Town Meeting Article 29

<sup>40</sup> Amended by April 7, 2008 Annual Town Meeting Article 24



**12-13. Appeals.**

**12-13-1. Certiorari appeal.** A decision of the Commission shall be reviewable in the Superior Court in accordance with M.G.L. c. 249 §4.

**12-14. Relation to the wetlands protection act.**

**12-14-1. Home rule authority.** 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. c. 131 §40) and Regulations (310 CMR 10.00) thereunder.

**12-15. Severability.**

**12-15-1. Invalidity.** The invalidity of any section or provision of this bylaw shall not invalidate any other section or provision thereof.