



## **Town of Hopkinton**

# **Wetlands Protection Regulations** **for Applying the** **Hopkinton Wetlands Protection Bylaw**

**Copies of Chapter 206, Wetlands Protection, are available  
from the Town Clerk**

**Regulations adopted as policy April 27, 1998;**  
**Updated for:**  
**Bylaw Study Committee changes, February 29, 2000**  
**ATM Article 57, May 3, 2000**  
**Add ANORAD fee, January 8, 2001**  
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**Update fees, September 9, 2002 and April 28, 2003**  
**ATM Article 40 & 41, clarify setbacks table, June 16, 2003**

**June 16, 2003**

*Hopkinton Conservation Commission*

# **Hopkinton Wetlands Protection Bylaw - Wetlands Protection Regulations**

**June 16, 2003**

## **1 PURPOSE**

The purpose of these regulations is to aid in the consistent and effective implementation of the Hopkinton Wetlands Protection Bylaw by way of further definition; explanation and specification; and illustration and example of the Bylaw's provisions. These regulations are intended to clarify but not expand, extend, modify, or replace any provision of the Hopkinton Wetlands Protection Bylaw, except as specifically allowed by the Bylaw. In some cases, illustrative examples from and discussion related to the Massachusetts Wetlands Protection Act and Regulations are also included.

### **1.1 Overview**

Under the Massachusetts Wetland Protection Act (G.L. Ch. 131, Sec. 40) and Regulations (310 CMR 10), bordering vegetated wetlands and land under a body of water are presumed significant to the following interests: public and private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, fisheries and protection of wildlife habitat. A vernal pool habitat, which includes a buffer of 125 feet around the pool, is presumed significant to wildlife habitat when it lies within a wetland resource area.

The performance standards under the Act for a bordering vegetated wetland (BVW) state that there may be no destruction or impairment of the area: alteration of up to 5,000 square feet may be permitted at the commission's discretion provided the area is properly replicated, unless said area lies within an Area of Critical Environmental Concern (ACEC) designated by the Secretary of Environmental Affairs under M.G.L. c. 21A, •2(7) and 301 CMR 12.00. If an area lies within a designated ACEC, no alteration of BVW is allowed (i.e. the regulations for ACECs supersede the regulations allowing discretionary alteration of up to 5,000 square feet with replication) unless the presumption of significance under the state Act is overcome in accordance with 310 CMR 10.55(3).

Vernal pools within a 125 ft. buffer, if they lie within a wetland resource area, are given special protection, and no adverse effects on the wildlife habitat characteristics are permitted. Pools must have been certified through the Natural Heritage program or identified by a preponderance of the evidence presented at a public hearing to be protected under the Act.

The Town of Hopkinton Wetland Protection Bylaw adds to the areas protected by the state Act any Vegetated freshwater wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs, lakes; ponds of any size; rivers; streams; creeks; lands under waterbodies; lands subject to flooding or inundation by groundwater or surface water; and lands within 100 feet of any of the aforesaid resource areas (collectively the resource areas protected by this bylaw) are protected whether or not they border water bodies. Vernal pools and their 125 foot buffers are protected, regardless of whether they have been certified under the state program or whether the pool and buffer are located within state protected resource areas. The bylaw protects the interests identified in the state act, and adds: erosion and sediment control, wildlife and recreational values.

A buffer zone of 100 ft. around any resource area is subject to protection under the bylaw. Within this buffer zone, setbacks from the wetlands edge are defined, and provide explicit guidance regarding areas where no disturbance or no building will be allowed. Under the regulations, the commission must consider whether activities within the buffer zone will likely affect the wetland resource area and will presume that projects that work within specified setbacks from the wetland will so affect the wetlands. This presumption is rebuttable and may be overcome upon a clear showing by a preponderance of the evidence that the nature of the proposed work, special design measures, construction controls or site conditions which exceed the norm for work anywhere within the Buffer Zone will prevent alteration of the resource area. Depending on site conditions and project characteristics, the Commission may also find that work at greater distance from the resource area will alter the resource area. The regulations establish specific minimum setbacks related to limit of work and limit of disturbance, which are tabulated according to project type.

2 DEFINITIONS

2.1 Direct discharge

Direct discharge includes, without limitation, any outfall of water that empties into the resource area or buffer zone, including infiltration.

2.2 Distance

All distances noted in the Bylaw (excluding depth), such as buffer zones distances, are planar distances measured along a single elevation. Consequently, on steeply sloped topography the measured over-ground distance may not accurately reflect the distances specified in the permits and conditions specified by the Bylaw. In particular, the 100-foot buffer zone on steeply sloped land will measure considerably more than 100 feet when measured over-ground on site.

2.3 Existing

The term 'existing' as used in the Bylaw shall mean existing in full as of November 1, 1995, unless specified otherwise in the Bylaw.

2.4 Discharges into Wetlands

Discharges into wetlands, as listed under Section 3, shall include, without limitation, any discharge from the project that flows to a wetland resource or buffer zone through new or existing drainage structures, including existing road drainage pipes, that empty into wetland resources or buffer zones regardless of the distance between the project site and the wetlands resources or buffer zones.

2.5 Recreation

The term recreation connotes passive recreation activities that do not conflict with **or** diminish other wetland values and functions. Examples include, without limitation, bird watching and other nature studies, walking and hiking, canoeing, and as appropriate fishing, hunting, etc.

2.6 Passive Passage

The term passive passage connotes passage by foot for the purposes of passive recreation, as defined above.

2.7 Wet Detention Basin

A wet detention basin is a detention basin designed to hold water for at least two continuous months during the spring/summer, where the ponding area covers at least one-third of the basin floor to an average depth of six inches of water, which supports wetland vegetation, and which meets the other design requirements set by the Conservation Commission. Wet detention basins are covered under DEP's Stormwater Management Guidelines.

For the purposes of the Bylaw a wet detention basin shall be considered a constructed wetland and not acceptable as part of a wetland replication plan. As a constructed wetland a wet detention basin shall be presumed to serve two wetlands values: pollution attenuation and flood control. The buffer zone for wet detention basins shall extend 100 feet beyond the break in slope of the detention basin. Consequently, a wet detention basin which functions as a constructed wetland is considered a resource area, and may not be altered without filing a Notice of Intent to describe the proposed work.

2.8 Volume Of A Detention/Retention Basin

Basin volume shall be calculated as that volume contained between the basin's 100-year flood elevation and the lowest elevation of the basin floor, except that in the case of a wet detention basin 50% of the calculated volume shall be used for fee determination purposes.

## 2.9 Intermittent Stream

Intermittent stream is a defined channel with a hydraulic gradient through which water flows during part of the year and which either flows out of, into, or within a wetland resource under this bylaw. A portion may flow through a culvert or under a bridge.

## 2.10 Vernal Pool Species

Any species of reptile, amphibian, or invertebrate that breeds in a vernal pool. These species may be obligate or facultative.

## 2.11 Rare Species

The term "rare species" shall include, without limitation, all vertebrate and invertebrate animal and plant species listed as endangered, threatened, or of special concern by the Mass Division of Fisheries and Wildlife, regardless of whether the site in which they occur has been previously identified by the Division.

## 2.12 Flood Storage as an Alteration

The term 'alter' includes storage of flood waters and storm water runoff waters in wetlands. Storage of flood waters and storm water runoff is prohibited unless the Conservation Commission deems that such action would enhance wetland values and functions.

# 3 JURISDICTION

## 3.1 Presumption of Vernal Pool Habitat

Vernal pools and the area within a 100 ft. buffer are given special protection under State law, and no adverse effects on the wildlife habitat characteristics are permitted. Pools must have been certified through the Natural Heritage program or identified by a preponderance of credible evidence presented at a public hearing to be protected under the Act.

The Bylaw extends this protection to 125 ft., and presumes vernal pool habitat exists if a wetland's physical characteristics conform with those defined for vernal pools in Section 206-2 (Definitions) of the Bylaw. This paragraph of the regulations clarifies the definition of vernal pool by adding the italicized text as follows:

*“The term "vernal pool" shall include, in addition to that already defined under the Wetlands Protection Act, MGL. Ch. 131, §40 and Regulations thereunder, 310 CMR 10.00, a confined basin depression which, at least in most years, holds water for a minimum of two continuous months during the spring and/or the summer, is free of adult fish populations, and provides essential breeding and rearing habitat functions for amphibian, reptile, or other vernal pool community species, as well as the area within 125 feet of the mean annual boundary of such depression, regardless of whether the site has been certified by the Massachusetts Division of Wildlife and Fisheries provided, however, the site can be so certified by the Commission based upon generally accepted scientific principles and methods.”*

One point needs further clarification. Section 206-3 of the Bylaw defines vernal pools as a resource area, and protects "lands within 125 feet of any of the aforesaid resource areas". A strict reading of the Section 206-2 definition, above, could be interpreted as defining vernal pool to include the area within 125 feet, and then add another 100 feet to that. This is not the intent. The area protected consists of the vernal pool as the resource area, and lands within 125 feet of the mean annual boundary of the depression.

This presumptive definition for vernal pools is based on systematic field observations showing that most basins that possess the above characteristics host breeding vernal species, and upon the importance of vernal pools. These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non-breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma*

*maculatum*), and are important habitat for other wildlife species.

Vernal pools include tiny pockets in uplands and barrier beaches, temporary and/or permanent ponds in kettleholes, depressions in swamps and wet meadows, old river oxbows and other floodplain pools, and isolated lands subject to flooding, ranging from small puddles to multi-acre expanses.

Most vernal pools either (a) lie within Bordering Land Subject to Flooding; (b) lie within Isolated Land Subject to Flooding, or (c) lie within depressions in riverfront areas. These pools are essential breeding sites for certain amphibians which require isolated, seasonally wet areas without predator fish. Most of these amphibians require areas of undisturbed woodlands as habitat during the non-breeding seasons. Some species require continuous woody vegetation between woodland habitat and the breeding pools. Depending on the species, during non-breeding seasons these amphibians may remain near the pools or travel one-fourth mile or more from the pools. Reptiles, especially turtles, often require areas along rivers to lay their eggs. Since amphibians and reptiles are less mobile than mammals and birds, maintaining integrity of their habitat is critical. Various kinds of animals, including several amphibian species and a number of invertebrate groups, occur or reproduce only in vernal pools (e.g. mole salamanders and wood frogs live in the uplands surrounding a vernal pool). These animals often live their lives a quarter mile or more from the vernal pool and migrate to the pool only for a few days each year for breeding purposes. Many of these animals only return to their own birth pool to mate, therefore increasing the importance of protecting all vernal pools.

The presumption of vernal pool habitat may be overcome with the presentation of a preponderance of credible evidence which in the judgment of the Conservation Commission and its consultant demonstrates that the wetland does not provide, or cannot provide, vernal pool habitat functions.

### 3.1.1 Demonstrating that a Ponding Area Is Not a Vernal Pool

For the purposes of overcoming the presumption of vernal pool habitat the Commission will consider:

- 3.1.1.1 Evidence that the ponding area does not hold water for at least two continuous months when not in a period of extended drought. For purposes of this definition, extended drought shall mean any period when precipitation for the previous four months was below normal for the period of record, with at least three of the four months 75% or less and two of the four months 50% or less of normal precipitation.
- 3.1.1.2 Evidence that vernal pool species do not breed or have not bred in the ponding area. The Conservation Commission shall provide explicit guidelines for this evidence.
- 3.1.1.3 Evidence that the ponding area could not be a viable breeding site for vernal pool species due to incompatible physical, chemical, biological, or other persistent conditions at the site in most years. Such evidence could include, without limitation, several months of pH and dissolved oxygen measurements yielding values incompatible with amphibian or reptile breeding.

### 3.1.2 Demonstrating that a Ponding Area Is a Vernal Pool

Much has been written on the subject of certification of vernal pools. One useful publication, available from the Massachusetts Audubon Society, is entitled *Certified: A Citizen's Step-by-Step Guide to Protecting Vernal Pools*, edited by Elizabeth A. Colburn, PhD. This publication focuses on achieving certification of a vernal pool, which is not required under the Town bylaw. Copies are available from the Audubon headquarters in Lincoln (617-259-9500) and at some of the sanctuaries around the state. The following material has been drawn from this source, as a guide to what makes a vernal pool.

#### 3.1.2.1 Vernal Pool Characteristics

Vernal pools vary in size, shape, and location. Some are as small as a few square feet in area; others extend to several acres during maximum flooding. They occur in gravel pits, small depressions in the woods, kettle holes, and oxbows on river floodplains. Many occur in isolated depressions in areas far away from rivers and streams, lakes, and typical wetland areas. These differences are of little significance to the wildlife that depends on vernal pools for habitat; for

them, the important considerations are water, food, and safety.

Under the State Wetlands Protection Act and Regulations, a vernal pool is automatically protected if it has been certified by the Massachusetts Natural Heritage and Endangered Species Program. Under state law, a certified vernal pool, and any land within 100 feet of it that is also within the wetland resource area, is protected from any "impairment of its capacity to provide wildlife habitat" [310 CMR 10.57(4)(b)4]. Generally, this means that no filling of the pool can occur and that no development can take place within any part of the 100-foot protected area surrounding the vernal pool.

In summary, to be considered a vernal pool, the pool must:

- a. Be a "confined basin depression";
- b. Hold water for a minimum of two continuous months during spring and/or summer for most years;
- c. Be free of adult fish populations or dry up sometime during the year; and/or
- d. Provide essential breeding habitat for certain amphibians and/or food, shelter, migrating, and breeding habitat for other wildlife species.

Under the State regulations, a vernal pool can still be protected even when it has not been certified. If credible evidence is presented at the public hearing that the area supports a vernal pool community and functions as vernal pool habitat, the conservation commission may make a finding that the pool is significant to the protection of wildlife habitat and may impose protective conditions, including denial of activities that would fill or alter the pool or its buffer. In such a case, the burden of proof is on the conservation commission and/or those who provide the evidence to show that the pool does in fact serve an important vernal pool wildlife habitat function. The commission may draw upon its consultant or other experts to assist in making determinations. In contrast, if the pool has been certified, then the burden of proof is on the person proposing to alter the area to show that the wildlife habitat value will not be altered or impaired.

Under the Bylaw, it is not necessary for the pool to have been certified by the Massachusetts Natural Heritage and Endangered Species program. The intent of the following section is to establish guidelines for determining what constitutes a vernal pool. Once again, the commission may draw upon its consultant or other experts to assist in making determinations, or in reviewing data submitted by interested parties.

- j. Biological and Physical Criteria (from *Certified: A Citizen's Step-by-Step Guide to Protecting Vernal Pools*, Appendix 1; Massachusetts Audubon Society; and the Commonwealth of Massachusetts Division of Fisheries & Wildlife, publication #15498-10-600-6-1-88C.R)

Vernal pool habitat is extremely important to a variety of wildlife species. Some amphibians breed exclusively in vernal pools, whereas other organisms such as fairy shrimps spend their entire life cycles confined to vernal pool habitat. Many additional wildlife species utilize vernal pools among various aquatic habitats for breeding, feeding and other important functions.

The species listed under categories A and B below are "obligate" vernal pool species--that is, species that are found only in vernal pools during all or part of their lifetimes, and that require vernal pools for their survival. They serve as direct indicators for the existence of vernal pool habitat. These species are the intended primary beneficiaries of vernal pool habitat protection.

Documentation of vernal pool utilization by these species is the preferred method of identifying vernal pools. It is also generally the easiest type of evidence to find in the field.

The animal and plant species listed under categories C and D below are "facultative" vernal pool species--that is, species which occur in vernal pools, but which can also be found in permanent water. They serve as indirect indicators for the existence of vernal pool habitat. Because these species also occur in permanently aquatic habitats that support fish populations, it is essential that the absence of fish be documented for these vernal pools prior to the submittal of evidence for consideration for certification status. Generally, such documentation will consist of evidence that the pool dries up during the year. Category E may include a combination of obligate and facultative vernal pool species, including those not specifically listed in A and C, such as Spadefoot Toads (*Scaphiopus holbrookii*).

ANY ONE OF THE FOLLOWING (A THROUGH E) WILL VERIFY THE EXISTENCE OF A VERNAL POOL:

- A. Existence of (1) a confined basin depression and (2) evidence of breeding in standing water by any of the following amphibian species (these species breed only in vernal pools):
- a. Wood Frog (*Rana sylvatica*)
  - b. Spotted Salamander (*Ambystoma maculatum*)
  - c. Blue-spotted Salamander (*Ambystoma laterale*)
  - d. Jefferson Salamander (*Ambystoma jeffersonianum*)
  - e. Silvery Salamander (*Ambystoma "platineum"*)
  - f. Tremblay's Salamander (*Ambystoma "tremblayi"*)
  - g. Marbled Salamander (*Ambystoma opacum*)

Species b through g above are collectively known as mole salamanders.

The presence of any of the following will be considered as acceptable proof that a vernal pool is utilized for breeding purposes by one or more of the above-named species:

1. Breeding adults
    - a. Wood frog-breeding chorus and/or mated pairs
    - b. Mole salamanders--courting individuals and/or spermatophores
  2. Two or more egg masses of any of the above-named species
  3. Wood frog tadpoles or mole salamander larvae
  4. Transforming juveniles
    - a. Wood frog-tail stubs evident
    - b. Mole salamanders-gill remnants evident; or
- B. Existence of (1) a confined basin depression and (2) the presence of fairy shrimp (*Anostraca*) or their eggs therein. These species spend their entire life cycles in vernal pool habitat; or
- C. Existence of (1) a confined basin depression which (2) contains standing water that dries up during the year (or which for other reasons is free of adult fish populations) and (3) the presence of two or more of the following in standing water (these species are not found in water that persists for less than two continuous months in the spring and/or summer):
- a. Breeding spring peepers (*Hyla crucifer*)\*
  - b. Breeding gray treefrogs (*Hyla versicolor*)\*
  - c. Breeding green frogs (*Rana clamitans*)\*
  - d. Breeding American toads (*Bufo americanus*)\*
  - e. Breeding Fowler's toads (*Bufo woodhousii fowleri*)\*
  - f. Breeding four-toed salamanders (*Hemidactylium scutatum*)\*
  - g. Adult red-spotted newts (*Notophthalmus viridescens*)
  - h. Spotted turtles (*Clemmys guttata*)
  - i. Painted turtles (*Chrysemys picta*)
  - k. Snapping turtles (*Chelydra serpentina*)
  - l. Water scorpions (*Nepidae*)
  - m. Predaceous diving beetle larvae (*Dytiscidae*)
  - n. Whirligig beetle larvae (*Gyrinidae*)
  - o. Caddisfly larvae (*Trichoptera*)
  - p. Dragonfly larvae (*Odonata, Anisoptera*)
  - q. Damselfly larvae (*Odonata, Zygoptera*)
  - r. Leeches (*Hirudinea*)

\* Evidence for breeding activity includes breeding adults, eggs, tadpoles or larvae, and transforming juveniles (see

category A. 1-4 above); or

- D. Existence of (1) a confined basin depression which (2) lacks standing water or which contains standing water that dries up during the year (or is otherwise free of adult fish populations) and (3) the presence of one or more of the following (these species are found only in areas that contain water for at least two continuous months in the spring and/or summer):

- a. Cases of caddisfly larvae (*Trichoptera*)
- b. Adults, juveniles or shells of either of the following:
  1. Freshwater clams (*Pisidiidae*)
  2. Amphibious air-breathing snails (*Basommatophora*)
- c. At least six of the following wetland plant species:
  1. Duckweeds (*Lemna* spp., *Spirodela* spp., *Wolffia* spp.)
  2. Fountain moss (*Fontinalis* spp.)
  3. False mermaid weeds (*Proserpinaca palustris* and *P. pectinata*)
  4. Bur-reeds (*Sparganium angrocladum* and *S. chlorocarpum*)
  5. Buttonbush (*Cephalanthus occidentalis*)
  6. Pondweeds (*Potamogeton* spp.)
  7. Bladderworts (*Utricularia clandestina*, *U. gibba* and *U. subulata*)
  8. Water-milfoils (*Mvriophyllum humile* and *M. tenellum*)
  9. Water plantain (*Alisma plantago-aquatica*)
  10. Yellow water-crowfoot (*Ranunculus flabellaris*)
  11. Featherfoil (*Hottonia inflata*)
  12. Water-starworts (*Callitriche* spp.)
  13. False pimpurnels (*Lindernia anagallidea* and *L. dubia*)
  14. Lance-leaved violet (*Viola lanceolata*)
  15. St. John's-worts (*Hypericum adpressum*, *H. boreale*, *H. canadense*, and *H. mutilum*)
  16. Smartweeds (*Polygonum amphibium*, *P. hydropiper*, *P. hydropiperoides*, *P. pennsylvanicum* and *P. punctatum*)
  17. A rush (*Juncus pelocarpus*)
  18. Sedges (*Rhynchospora capitellata* and *R. fusca*)
  19. Grasses
 

a. <i>Agrostis scabra</i>	g. <i>Panicum dichotomiflorum</i>
b. <i>Glyceria acutiflora</i>	h. <i>Panicum meridionale</i>
c. <i>Glyceria canadensis</i>	i. <i>Panicum philadelphicum</i>
d. <i>Glyceria fernaldii</i>	j. <i>Panicum rigidulum</i>
e. <i>Glyceria pallida</i>	k. <i>Panicum tuckermanii</i>
f. <i>Muhlenbergia uniflora</i>	l. <i>Panicum verrucosum</i> ; or

- E. Existence of all of the following:

1. Documented presence of water in a confined basin depression for at least two continuous months in the spring and/or summer; and
2. Confirmation that the vernal pool area becomes completely dry during a portion of the year (or other documentation proving the absence of adult fish populations); and
3. Presence of any amphibians and/or reptiles in standing water within the confined basin depression.

### 3.1.3 Timing of Evidence Collection.

Many of the indicators of vernal pool habitat are seasonal. For example, certain salamander egg clusters are only found between late March and late May. Wood frog chorusing only occurs between late March and May, and then only at night. Consequently, failure to find evidence of breeding must be tied explicitly to those periods during which the evidence is most likely to be available. Accordingly, in the case of challenges to the presumption of vernal pool habitat the Conservation Commission may require that the determination be postponed until the appropriate time period consistent with the evidence being presented. The Commission may also require its own site visits as necessary to



confirm the evidence. It is the Commission's intent that no applicant will be required to wait longer than 12 months for a vernal pool determination except in periods of extended drought, in which case the Commission will make its determination as soon as possible.

### 3.2 Intermittent Streams

Creeks and streams, including intermittent streams, are important for storm damage prevention, flood control, ground water protection, wildlife habitat, and recreation values. During spring, summer, and fall these streams disperse snowmelt and storm runoff across the landscape thereby preventing dangerous volumes and flows from spilling over roadways and property. This broad dispersal also allows for larger volumes of water to infiltrate into the ground, recharging groundwater supplies.

Intermittent streams are an essential source of food and water for wildlife, and are often the only source of water in higher elevation areas. The moist soils that border intermittent streams are significantly richer in herbs and flowering/fruitlet plants - the base trophic level of food - than surrounding upland areas. During all seasons, but especially in winter and spring, intermittent streams act as essential corridors for animal movement when food is scarce. Some animals, such as pickerel frogs and eastern spotted newts, rely heavily on intermittent streams for movement.

For these reasons the upland areas surrounding intermittent streams are heavily utilized by wildlife for living space, breeding, feeding, migrating, dispersal, and security. Accordingly, this Bylaw protects streams of all forms (Bylaw section 206-3 and Regulation 11.9) and the buffer zone within 100 feet of those streams.

## 4 CONDITIONAL EXCEPTIONS

### 4.1 Structures used in the service of the Public

As stipulated in Section 206-4.A of the Bylaw:

“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 or lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph or other telecommunication services, sanitary sewers and storm sewers, provided that written notice has been given to the Commission at least forty-eight (48) hours prior to the commencement of work, and provided that the work conforms to the performance standards and design specifications in regulations adopted by the Commission.”

#### 4.1.1 Definition and Application of the Term 'Existing'

The term "existing" refers to structures placed in service prior to November 1, 1995, and refers to both structures and any appurtenance claiming exemption.

Therefore, the application and permit required by this Bylaw shall apply to work associated with entirely new structures (those that are not replacing antecedents) placed in service on or after November 1, 1995, whether or not they would be considered appurtenant.

### 4.2 Expansion of Agricultural Lands

As stipulated in Section 206-4.D of the Bylaw:

“This bylaw shall not apply to any activity performed for the normal maintenance or improvement of land activity devoted to agricultural use at the time of application.”

Agriculture is one of the interests and values protected by the Hopkinton Wetlands Protection Bylaw. Accordingly the Bylaw (Section 206-4) exempts certain work on lands already in agriculture from permitting as long as that work meets approved performance standards under the Bylaw. Alteration of resource areas which are not land in agriculture, or going beyond what is allowable under State regulations (310 CMR 10) without a permit may be cause for an

Enforcement Order and may require restoration of the illegally altered areas.

Expansion of agricultural activities onto lands not previously or not currently in agricultural use and within the jurisdiction of the Commission is considered new land and does require a permit under the Wetland Protection Act and the bylaw. In protecting agricultural values and interests under the Bylaw the Commission may require as one of its conditions for approval that the land be placed under a deed restriction for at least 10 years limiting use of that land to agriculture, especially if that land was previously in an undisturbed state.

Applicants are reminded that the provisions of the DEP regulations do apply to land activity devoted to agriculture (see 310 CMR 10.04 and 310CMR10.53(5), and DEP'S publication entitled 'Farming in Wetland Resource Areas', Jan 1996). Applicants may be required to file a Notice of Intent for certain categories of proposed work for land in agriculture, along with supporting information from the farm Conservation Plan (CP), in order to fully describe the proposed work. The Commission is available to answer questions and to work with farmers to help understand when a Notice of Intent should be filed.

#### 4.3 Farm & Fire Ponds

Historically farm and fire ponds have served as vernal pools across the New England landscape. Some of the area's most important salamander breeding sites, including those of rare species, are abandoned and existing farm and fire ponds. Accordingly, stocking of farm and fire ponds with fish shall not be permitted except in those cases where the Commission determines that the pond does not currently, and in the future will not likely, serve vernal pool functions. Likewise, alteration of farm and fire ponds shall not be permitted except in those cases where the Commission determines that the pond does not currently, and in the future will not likely, serve vernal pool functions. Alteration, in this case, includes the removal of water by a tank or pump truck, such as a lawn service truck, hydro-seeding truck, or fire truck. All such proposed activities require the filing of a Notice of Intent, except in emergency fire safety conditions.

### 5 APPLICATION FOR PERMITS AND REQUESTS FOR DETERMINATION

All Notice of Intent (NOI) filings must be complete and in accordance with the check-off list provided at the end of this document in order to qualify as having been filed. In the case of incomplete Notices of Intent (i.e. NOIs which do not contain the information necessary for the Commission to complete its review), the applicant will be notified, the DEP Regional Office will be notified, and the Notice will be returned to the applicant for completion. In those instances where the NOI is returned for insufficient information, no public hearing will be advertised or held, and the 21-day period will not start until receipt of a complete NOI.

Completeness in this context means only that the Application contains certain items specified in the Regulations and the Town Bylaw. It does not necessarily mean that the application contains all of the information the conservation commission will need to determine whether the proposed work meets the performance standards; the commission's review of the NOI and the public hearing are designed to ensure all necessary information is provided.

#### 5.1 Performance Standards & Design Criteria for Buffer Zone Areas

Lands within 100 feet of wetlands resource areas and within 200 feet of perennial streams and rivers are presumed important to the protection of these resources because activities undertaken in close proximity to wetlands and other resources 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 harm to wildlife habitat. For this reason these buffer zone areas are a valuable resource under this Bylaw.

The Commission therefore may require that the applicant maintain a strip of continuous, undisturbed vegetative cover in part or all of the buffer zone and set other conditions on this area, unless the applicant provides evidence deemed credible and sufficient by the Commission that the area or part of it may be disturbed without harm to the values protected by the law.

In some circumstances some types of activities, when properly conditioned, may be acceptable in buffer zone areas. Under other circumstances even minimal adjacent buffer zone disturbance may have serious harmful effects on resource area values and functions. When the presumption of significance is questioned the actual determination of impact must be made on a project and site specific basis. In this respect the actual impact of proposed adjacent buffer zone work or activities on wetland values and functions can often be reduced substantially, and thus made permissible, when appropriate conditions are imposed.

The Bylaw gives the Conservation Commission broad discretion to permit, condition, and prohibit work within the buffer zone as the specific situation warrants. Therefore the Conservation Commission shall consider proposals for work in the buffer zone in terms of four broad forms of disturbance areas. This approach is intended to allow flexibility for property use while maintaining adequate levels of resource protection.

#### 5.1.1 No Disturbance Area

This is an area in which virtually no activities or work, other than passive passage, are permitted. No vegetation may be disturbed, leaf litter and debris remains in place, etc. The no disturbance area should remain unchanged from its pre-project state.

#### 5.1.2 Temporary Disturbance Area.

This is an area in the buffer zone where temporary disturbance for a limited period of time is permitted, such as for regrading or travel by heavy machinery. Once the activity is completed, however, the area will be allowed to return to natural vegetation and function. Any subsequent disturbance or activity shall require a new filing.

The Conservation Commission shall establish specific time frames and conditions for allowing temporary disturbances, as well as setting criteria for assessing the successful return of the buffer zone to natural functions.

#### 5.1.3 Limited Disturbance Area

This is an area in the buffer zone where a limited set of activities and work is permitted in perpetuity. For example understory clearing of poison ivy might be allowed, but no clearing of overstory and no planting of lawn. Limited (sustainable) harvesting of wood, composting of brush, and storing firewood are other examples of limited activities that might be allowed.

#### 5.1.4 Permanent Disturbance Area.

This is an area in the buffer zone in which most, if not all, legal activities and permanent disturbances are permitted. Houses, porches, driveways, gardens, and lawns in the buffer zone represent permanent disturbance areas.

Nevertheless, within the context of permanent disturbance the Conservation Commission may set specific conditions prohibiting or restricting those forms of work and activities in the buffer zone deemed potentially harmful to the resource area values, such as the use of herbicides and pesticides, use of interceptor drains, swimming pool discharge or filter backwash systems, or installation of in-ground sprinkler systems for irrigating areas in the buffer zone.

#### 5.1.5 Permanent Immovable Barriers

The Commission may, at its discretion, request the installation of permanent immovable barriers (large rocks, stone walls, or shrub barriers, at the applicant's discretion) along the line where the limit of work or disturbance is proposed. It has been the Commission's experience that permanent immovable barriers are an effective visual reference, and serve to help avoid 'lawn creep' by future homeowners, who may not be as aware of the resource areas as the original applicant.

#### 5.2 Considerations in Setting Disturbance Restrictions

A growing body of research evidence suggests that even 'no disturbance' areas reaching 100 feet from wetlands may be

insufficient to protect many important wetland resource characteristics and values. Problems of nutrient runoff, water pollution, siltation, erosion, vegetation change, and habitat destruction are greatly exacerbated by activities within 100 feet of wetlands. Thus, in general work and activity within 100 feet of wetlands should be avoided and discouraged and reasonable alternatives pursued.

Accordingly, the Conservation Commission shall begin with the presumption that lands within the buffer zone of a resource area are best left in an undisturbed and natural state.

However the Commission shall designate areas of the buffer zone to be suitable for temporary, limited, or permanent disturbance as appropriate when the applicant can demonstrate to the Commission's satisfaction that the proposed work or activity will not affect wetland values singularly or cumulatively and that reasonable alternatives to the proposed work or activity do not exist.

In considering designation of buffer zone disturbance areas, the types of work and activities allowable, and conditions to apply, the Conservation Commission shall consider:

#### 5.2.1 Values and Functions of the Resource Area

The quantity and quality of resource values and functions should be considered explicitly in placing conditions on buffer zone work. Some isolated land subject to flooding, for example, may serve for temporary flood storage only. Minimal buffer zone restrictions within several feet of the resource might be necessary only to prevent erosion.

Other isolated land subject to flooding might provide vernal pool habitat. It might also provide important flood storage capacity and intersect ground water. In this instance far stronger buffer zone restrictions would be appropriate because a larger number of functions are involved and some functions, such as habitat, are more sensitive to buffer zone activity and require 100 foot protection without exception. If rare or endangered species, such as blue spotted salamanders, were found at the site then still greater levels of restrictions would be appropriate, with no disturbance being allowed.

#### 5.2.2 Pre-Project Characteristics of the Site

Ground slope, soil conditions, vegetation, and prior disturbance are just a few of the site specific characteristics that shall be considered in setting conditions for work in the buffer zone.

For example land that slopes toward a wetland demands greater restrictions on work and activity and larger no-disturbance distances to prevent pollution and silt from stormwater runoff from harming wetlands values than does land which slopes away from a wetland. Steeper slopes imply greater restrictions.

#### 5.2.3 Wildlife Habitat and Rare Species

The near-upland areas around wetland resources often play important roles in determining and maintaining the wildlife habitat values of associated wetlands. While it is common to think of the protective or 'buffering' value of buffer zones in terms of area undisturbed, habitat values may be equally affected by the configuration of the buffer zone perimeter, the inclusion or exclusion of specific topographical and ecological features (such as an abutting sandy knoll or tree canopy), etc.

Therefore where significant wildlife habitat values and functions are present delineation of non-disturbance areas within the buffer zone shall, as is reasonable, minimize the length of perimeter to area left undisturbed, exclude fingers, islands, or other projections or indentations of the non-disturbance zone, and in general avoid delineating oddly shaped non-disturbed areas. The Commission shall give special attention to inclusion inside the no disturbance area of those topographical and ecological features that it deems important for maintaining the wildlife habitat value of the resource.

The potential presence of rare or endangered species and their specific sensitivity to buffer zone activity shall be considered in determining buffer zone restrictions. The Conservation Commission shall consider evidence of the presence of such species or evidence of likely habitat. Prior designation of rare or endangered species habitat by the Division of Fisheries and Wildlife Natural Heritage Program is not necessary.

The Commission may consult with the Division of Fisheries and Wildlife Natural Heritage Program or other authorities as it deems necessary for guidance and recommendations.

#### 5.2.4 No Significant Adverse Impact On Wildlife Habitat

Wildlife habitat serves a variety of functions in support of wildlife. Food, water, breeding space, shelter, security, movement and migration space, and connections to other habitat areas are all equally important. All of these wildlife habitat functions are presumed to exist in all resource areas.

Therefore in accordance with the Bylaw's fundamental purposes (see Section 206-1) no project may have a significant adverse impact - either project-specific or cumulative - on wildlife habitat. Any proposal to alter or impact wildlife habitat must be filed as a Notice of Intent and reviewed by the Commission and expert consultants.

For wildlife habitat purposes, a significant adverse project-specific impact is defined as an impact caused by work in a resource area that would under reasonable assumptions (a) result in a measurable decrease in the extant wildlife populations or biological composition, structure, or richness on the site or in the vicinity exclusive of the present or future state of adjacent and nearby properties, or (b) impair, damage, destroy, or reduce in value for wildlife purposes certain specific habitat features.

Wildlife studies have shown that direct impacts from work - filling, grading, vegetation removal, construction of barriers to movement, etc. - in resource areas can severely harm wildlife populations. For example, low stone walls, culverts or roadways bisecting a resource area can prevent amphibians that live in upland areas from reaching breeding pools, marshes, and streams. Or, removal of large snags (dead trees) can virtually eliminate nesting by barred owls, pileated woodpeckers, mink, etc. Accordingly, the Commission shall prohibit the placement of fences or other barriers to wildlife movement within and between resource areas and the destruction of specific habitat features.

Examples of protected habitat features include (but are not limited to):

- Large cavity trees
- Turtle nesting areas
- Existing nest trees for birds that reuse nests (e.g., great blue herons, osprey)
- Beaver dams, dens, and lodges
- Mink or otter dens
- Vernal pools and their 125-foot buffer zones
- Vertical sandy banks
- Migration corridors that provide connectivity between wildlife habitats
- Sphagnum hummocks and pools suitable to serve as nesting habitat for four-toed salamanders

But indirect impacts - the effects of human activities near wildlife habitat can have equally harmful effects. Therefore the Commission shall take into account indirect effects on a project by project basis. So, for example, work within resource areas may be restricted within 100 feet of existing beaver, mink or otter dens, or within 200 feet of existing osprey or great blue heron nests.

As clearly stated in Section 206-1 of the Hopkinton Wetlands Protection Bylaw the purpose of the Bylaw is to preserve for future generations of residents the natural resources and amenities - including wildlife - we presently enjoy in Hopkinton. The Bylaw protects cumulative values as well as immediate ones. Therefore, the Commission must be especially cognizant of the likely cumulative impact of work within resource areas.

For wildlife habitat purposes a significant cumulative adverse impact is defined as an impact that would under reasonable assumptions result in a measurable decrease in the extant wildlife populations or biological structure, composition, or richness on the site or in the vicinity taking into account the projected impacts of future projects that could be proposed in the vicinity with similar, comparable, or other significant impacts and disturbance.

This method for assessing cumulative impacts avoids the pitfall of placing an unreasonable burden of resource protection

on subsequent applicants/projects in the vicinity while subsidizing those who are first to develop land. It allows the Commission to level the marginal impact of all proposed projects in the vicinity while ensuring appropriate protection - present and future - of the values and interests protected by the Bylaw.

#### 5.2.5 Projects to Enhance or Benefit Wildlife Habitat

The Conservation Commission may, as part of the permitting process, require at its discretion any project that proposes to alter the extant wildlife populations or biological composition, structure, or richness of an area as a wildlife benefit to have that plan approved by the Massachusetts Division of Fisheries and Wildlife.

#### 5.2.6 The Character of the Work or Activities Proposed and Alternatives

The applicant shall carry the burden of proof for demonstrating to the Commission's satisfaction that the proposed work or activities in the buffer zone are necessary and that reasonable alternatives, including reducing the scale and scope of the project, do not exist.

The Commission shall consider the specific characteristics of the work proposed for immediate and cumulative impact on the wetland resource. For example, understory clearing and shrub landscaping in sensitive sections of the buffer zone might be appropriate where a lawn might not due to concerns about nutrient runoff. Similarly, clearing a flat section of the buffer zone to establish a vegetable garden might not threaten adjacent wetland values and functions. However, construction of a tennis court with extensive impervious surface on the same site and covering the same area might not be acceptable.

The Conservation Commission may offer suggestions and advice for altering plans and proposals to reduce impact on wetlands values and functions toward the goal of modifying the project to make it acceptable. However, the Commission is not obligated to do so and shall not be bound in its decision making by any prior advice or suggestions offered to applicants.

#### 5.3 Subdivision Roadways and Parking Lots

The construction of impervious surfaces such as roadways or parking lots in watersheds can significantly alter the quantity and quality of stormwater runoff and affect important ground water characteristics. Impervious surfaces reduce surface infiltration, potentially worsening flooding problems by increasing stormwater runoff volumes and by redirecting flows within a watershed.

The increase in surface flows from impervious surfaces may create new erosion problems where storm flows are directed and discharged.

Impervious surfaces increase the opportunities for various pollutants to mix in water flows. Roadways, for example, will retain a surface coating of petroleum and combustion-byproduct pollutants that will flush during the early stages of a storm. Snow and slush can introduce substantial quantities of road sand, salt, and associated pollutants. Roof runoff can pick up a variety of chemicals used in fertilizers, pesticides, and herbicides as it transverses lawns and landscape areas.

Impervious surfaces that direct water flows into wetlands may inundate sensitive resources and thereby destroy vital vegetative and wildlife characteristics, reduce preexisting flood storage capacity, and contaminate ground water recharge areas.

Conversely, impervious surfaces may direct traditional surface and groundwater flow patterns away from wetlands and thereby destroy the necessary hydrological conditions needed to maintain wetland functions and values. Each of these situations has been experienced due to subdivision projects in Hopkinton during the past several years.

Therefore, for purposes of flood control, erosion control, water quality protection, and wildlife habitat preservation the Conservation Commission shall review all roadway and parking lot construction plans for impact, immediate and cumulative, on resource area functions and values in accordance with DEP's Stormwater Management Guidelines,

Volume I and II. In particular, the Conservation Commission shall enforce the following general performance standards:

#### 5.3.1 No Net Change In Runoff Volumes

Pre-project and post-project hydrology should remain fundamentally the same as it pertains to protecting wetland functions and values. Of course some minor degree of change in hydrology is inevitable in any engineering/construction project and within reasonable limits the Commission shall permit such variation when in its judgment such changes will not produce a significant impact of wetlands functions and values.

Erosion control may require limiting stormwater discharge volumes and velocities which will impact resource areas. Therefore the Commission may require the construction of such stormwater control structures, and specify particular engineering and design details, as it deems necessary to protect wetland resources, values, and functions.

#### 5.3.2 Minimizing Change In Runoff Water Quality.

The physical, chemical, and biological qualities of stormwater runoff are altered by encounters with impervious surfaces, especially roadways and related structures. Increases in water temperature, reduction in pH, chemical and nutrient contamination, and transport of silt are just a few of the degrading shifts that may occur.

Where such waters are likely to contact wetland resources or buffer zones the Commission shall specify treatment of runoff or impose other conditions that in its judgment reduce undesirable water quality changes to levels that will not harm wetland functions or values, immediately or cumulatively. The Commission may require the construction of specific structures to improve stormwater runoff quality, such as wet detention basins for pollutant removal and broad riprap swales for aeration.

#### 5.3.3 Requirements for Hydraulic Calculations

In accordance with the above, the Conservation Commission shall require as part of the application for permit complete hydrological calculations for the two, ten, twenty-five, and one-hundred year storm events. Such calculations shall include

5.3.3.1 runoff from all impervious surfaces associated with the project including individual lot construction; and

5.3.3.2 both pre- and post-project calculations for discharge volumes, concentration times, discharge velocities, and other quantities that the Commission may require for complete information.

All calculations and analysis shall be summarized and provided in an easily readable and understandable format.

#### 5.3.4 Groundwater Flows, and Impact to Water Quality and Groundwater Recharge

In cases where significant amounts of bedrock or ledge are present near the surface, or where naturally occurring springs exist, or where the project involves substantial potential for changes in groundwater flows (i.e. construction of wells, groundwater diversion trenches, etc), or in large subdivision projects, the Commission shall require as part of the application for permit detailed information on pre- and post-construction groundwater flows. In such cases, the Commission shall review the information to ensure there are no detrimental impacts to water quality, groundwater recharge, or wetland resource areas as a result of the proposed project. All calculations and analysis shall be summarized and provided in an easily readable and understandable format.

#### 5.3.5 Subdivisions vs. Individual Lots

Unless otherwise specifically identified, subdivision approvals and Orders of Conditions apply only to the roads, drainage, and related infrastructure on the definitive plan, and do not apply to any individual lots. Each lot within a resource area and its buffer zone as defined under the Bylaw shall be required to file a separate Notice of Intent.

#### 5.4 Limited Project Roadways or Driveways

For the purpose of calculating wetlands impact when limited project driveways adjoin, cross over or traverse wetland resource areas, and based upon discussions between and experience of the Building Inspector, Fire Chief, Conservation Commission, and Planning Board, the Commission shall assess wetlands impact based upon no less than a 12 foot wide traveled way and a 16 foot disturbance footprint. Experience of the Building Inspector shows this to be the minimum acceptable driveway width for fire safety in cases where the driveway forms a narrow causeway over or through a resource area.

For reference relating to Limited Projects, 310CMR10.53 states “Notwithstanding the provisions of 310 CMR 10.54 through 10.58 and 10.60, the issuing authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40 permitting the following limited projects (although no such project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.59). In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, the availability of reasonable alternatives to the proposed activity, the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c.131, ' 40.” Refer also to 4.13 of these regulations.

Regarding limited project driveways, 310 CMR 10.53(3)(e) allows:

“e. The construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable. Such roadway or driveway shall be constructed in a manner which does not restrict the flow of water.”

The Commission shall exercise its discretion under 310CMR10.53 regarding practical width, using the experience of Town Boards and guidance from the Planning Board, in order to ensure that the driveway is not understated during the planning and impact calculation stage, only to result in substantially greater alteration once construction begins. The Commission may, when site conditions suggest or upon recommendations from the Planning Board, use its discretion to adjust these minimum footprints depending upon specific project and site conditions, elevations, and slopes.

#### 5.5 Site visits

As stated in Section 206-8, Permits and Conditions, the Conservation Commission may deny a permit if the applicant fails to provide the information requested. "Information" in this instance includes site visits by the Commission and its staff or representatives for the purpose of directly observing pre-project and post-project conditions on the property, at seasonally appropriate times.

#### 5.6 Replications

The history of wetland replication is mixed. Scientific reviews conclude that for the most part replications fail to reproduce the range of values - in quantity and quality - of the wetlands they ostensibly replace. In particular, difficulties in replicating proper hydrological conditions in a consistent and enduring fashion seem to be the source of the problem.

Accordingly, the Conservation Commission discourages any plan that requires replication. In those instances where replication is required by State Law and/or approved by the Commission the following conditions must be met:

5.6.1 The replicated wetland must be hydrologically and geographically associated with the same water body as the original wetland (310CMR10.55).

5.6.2 The replicated wetland must be constructed in full, and conditionally approved prior to construction of any structures. A qualified wetland scientist, employed by the Applicant, shall be required by the Commission during the construction of the wetland replication area. The credentials of the wetland scientist shall be submitted to the



Commission for approval prior to the start of construction.

5.6.3 At a minimum the replicated wetland must reproduce all the values and functions of the original wetland as determined by the Conservation Commission. Site conditions permitting, the Commission may require that additional values and functions be incorporated into the replication design.

In particular, in circumstances where replacement of specific functions and values would require substantial amounts of time before being completely replicated (for example, those provided by large mature trees) the Commission may require additional compensation of area, functions, values, etc. beyond those required in other sections of the Bylaw and its regulations.

5.6.4 The area of replication must be at least 1.5X as large as the area of the original resource that will be destroyed. The actual area ratio of replacement shall be decided on a case-by case basis in accordance with 5.6.3.

5.6.5 In most instances the replication of wetland resource areas will result in the destruction of buffer zone areas. In such instances replication of new resource areas shall follow 5.6.3 and 5.6.4.

5.6.6 Prior to the start of wetland construction, detailed measurements of the depth of the soil O and A horizons within the wetland to be lost during construction shall be conducted. The project shall use this information to determine the suitability of these horizons for reuse in the replication area and to calculate the need for additional soil materials. The top 12" of soil from the original wetland must be transplanted with soil structure - especially lamination and density profile – as intact as possible to the replication. This is intended to preserve plant, invertebrate, and planktonic communities of the wetland and inhibit the blossoming of invasive species.

5.6.7 Soil materials to be reused (from the wetland to be lost during construction) shall be removed and placed in the prepared replication area within one day. If this is not possible, these soils shall be stockpiled for the minimum amount of time and kept loosely covered and moist at all times.

5.6.8 Erosion control barriers shall be placed around the proposed wetland replication area prior to the start of construction.

5.6.9 The proposed replication area shall be excavated to a depth of one foot below the proposed final grade, as specified in the specifications and plans submitted as part of the Notice of Intent and referred to in the Order of Conditions. The subsoil within the replication area shall be examined by the wetland scientist to determine whether it is fine textured (fine sandy loam or finer, as defined by NRCS standards). If the subsoil is course textured, it shall be replaced with fine textured material to allow for the development of a capillary fringe between the groundwater and the soil surface.

5.6.10. A minimum of one foot (12 inches) of good quality, organic-rich (>10% by weight) topsoil shall be placed in the replication area. This soil may consist of soil removed from the wetland to be lost during construction (see 4.5.6, above) or from an outside source. The soil may be amended with peat moss, peat humus, or composted manure in order to provide the necessary organic matter. Soils from an outside source shall be free of chemical contamination, sticks, trash, and rocks more than one inch in diameter. Reused wetland soils shall be free of sticks, trash, and rocks greater than six inches in diameter. Reused wetland soils shall not be screened prior to use in order to avoid removal of existing wetland vegetation. No soils from areas containing either purple loosestrife (*Lythrum salicaria*) or common reed grass (*Phragmites australis*) shall be used in the replication area.

5.6.11. Following placement of topsoil, a minimum of 48 hours shall pass prior to planting of wetland vegetation to allow for rebound of buried or compacted peat. The final grade shall be adjusted as necessary.

5.6.12. The replication area shall be planted and seeded according to specifications and plans submitted as part of the Notice of Intent and referred to in the Order of Conditions. Plantings shall be fertilized and irrigated as necessary to promote successful establishment.

5.6.13. The wetland scientist shall visit the replication area weekly, following planting and seeding, for the duration of

the first growing season to determine the need for irrigation and additional fertilization and to inform the site contractor of these requirements.

5.6.14. Erosion control structures shall be removed upon stabilization of the replication area to allow free circulation of water between the wetland replication area and the adjacent, natural wetland.

5.6.15. The wetland scientist shall inspect the wetland replication area twice each year, during late spring and during the mid to late summer of the first two full growing seasons. A written report shall be submitted to the Commission at the end of each growing season. The spring inspection shall include monitoring of the groundwater elevation within a soil pit a minimum of 18 inches deep at each of three randomly distributed quadrants. The summer inspection shall include groundwater elevation monitoring and a vegetation survey to determine compliance with the general performance standard of 75% of the wetland surface being reestablished with indigenous wetland plant species within two growing seasons following planting. Vegetation monitoring shall occur within three randomly distributed quadrants sampled within the tree, shrub, and herb strata. Photos of each quadrant shall be taken during the summer inspection and submitted with the Commission report.

5.6.16. An inspection report shall be submitted to the Commission no later than September 15 of each of the first two years. The report shall include all data collected during the inspections and photographs, and shall include recommendations for additional plantings or other remedial work as required, to ensure successful wetland replication.

5.6.17 Any replication or restoration work that creates a resource on abutting properties shall require an easement from the abutting property owner covering the full extension of the resource on that property prior to commencement of the work.

5.6.18 A bond shall be posted that will enable the Commission to complete the replication should the applicant fail to fulfill obligations set forth in the Order of Conditions. The amount of the bond shall be determined by the Commission.

5.6.19 Standards for the replication shall be specified and verified in terms of functions, values, and actual performance. Technical and engineering specifications used for design and construction shall be considered approximate. Criteria for acceptance and approval shall be based solely on function and performance as specified in the Order of Conditions. In other words replications will be evaluated on what they are expected to do, not how closely actual construction matched the plan.

For example, although elevations may be used for design and planning of a pond the standards shall be set in terms of volume and depth of water over the course of a year. Replications that do not properly perform the approved functions and values as specified in the order of conditions will not be deemed acceptable no matter how closely they adhere to approved engineered plans.

The Commission may set other conditions as required on a project/site specific basis.

#### 5.7 Orders of Conditions for Violation Permits

Orders of Conditions for permits associated with violations shall include explicit dates for milestones and completion of work. Restoration Orders of Conditions associated with violations shall include explicit restoration requirements as well as dates for review of restoration plans, restoration milestones and completion of work.

#### 5.8 River Front Area Protection

For the purposes of this Bylaw the protections afforded to River Front Areas under the 1996 amendment to the Massachusetts Wetlands Protection Act shall follow the regulations as listed under regulation sections 5.1 and 5.2 for buffer zones except that the reach of jurisdiction shall extend 200 feet from the stream or river bank as specified by state law. Certain key elements of the Rivers Protection Act are repeated here, due to the newness of the regulations. For additional information, consult 310CMR10.58, available from the Massachusetts DEP or from our Conservation Agent.

Overview - 310 CMR Preface III p 319 paragraph 2 and 4 states "The Rivers Protection Act requires an applicant to

demonstrate that any work, including proposed mitigation measures, will have no significant adverse impact on the riverfront area to protect public and private water supplies, groundwater, wildlife habitat, fisheries, shellfish, and to prevent flooding, storm damage and pollution.” “The criteria include a limitation on alteration, a 100 foot vegetated corridor, stormwater management, and provisions to protect wildlife habitat.” “The criterion of a 100 foot corridor of undisturbed vegetation is based on the scientific literature which recognizes the importance of naturally vegetated riparian areas for the reduction of nonpoint source pollution and protection of wildlife habitat. Limitations on alterations within the entirety of the riverfront area are justified by the need to protect all eight interests of the Act.”

310 CMR 10.58 (2)a.1.a states “The issuing authority shall presume that a river or stream shown as perennial on the current United States Geologic Survey (U.S.G.S.) or more recent map provided by the Department is perennial unless rebutted by evidence from a competent source asserting to the contrary or a finding by the issuing authority. Department staff, conservation commissioners, and conservation commission staff are competent sources; issuing authorities may consider evidence from other sources.” This statement establishes the basis for considering whether a river is perennial or intermittent, and establishes that Commission members are competent sources to declare a river or stream’s status based on evidence or observations brought before the Commission.

310 CMR 10.58 (4) requires “Where the presumption set forth in 310 CMR 10.58(3) is not overcome, the applicant shall prove by a preponderance of the evidence that there are no practicable and substantially equivalent economic alternatives to the proposed project with less adverse effects on the interests identified in MGL Ch 131 §40 and that the work, including proposed mitigation, will have no significant adverse impact on the riverfront area to protect the interests identified in MGL Ch 131 §40.” In addition, 310 CMR 10.58 (4)a and b requires that “The work shall meet the performance standards for all other resource areas within the riverfront area, as identified in 310 CMR 10.30 (coastal bank), 10.32 (salt marsh), 10.55 (Bordering Vegetated Wetland), and 10.57 (Land Subject to Flooding).” “No project may be permitted within the riverfront area which will have any adverse effect on specified habitat sites of rare wetland or upland, vertebrate or invertebrate species, as identified by the procedures established under 310 CMR 10.59 or 10.37, or which will have any adverse effect on vernal pool habitat certified prior to the filing of the Notice of Intent.”

310 CMR 10.58 (4)d requires that “The work, including proposed mitigation measures, must have no significant adverse impact on the riverfront area to protect the interests identified in MGL Ch 131 §40.” “Within 200 foot riverfront areas, the issuing authority may allow the alteration of up to 5000 square feet or 10% of the riverfront area within the lot, whichever is greater, on a lot recorded on or before October 6, 1997 or lots recorded after October 6, 1997 subject to the restrictions of 310 CMR 10.58(4)(c)2.b.vi., or up to 10% of the riverfront area within a lot recorded after October 6, 1997, provided that:

- a. At a minimum, a 100 foot wide area of undisturbed vegetation is provided. This area shall extend from mean annual high-water along the river unless another location would better protect the interests identified in MGL Ch 131 §40. If there is not a 100 foot wide area of undisturbed vegetation within the riverfront area, existing vegetative cover shall be preserved or extended to the maximum extent feasible to approximate a 100 foot wide corridor of natural vegetation.”
- b. Stormwater is managed according to standards established by the Department.
- c. Proposed work does not impair the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat identified by evidence from a competent source, but not yet certified. For work within an undeveloped riverfront area which exceeds 5,000 square feet, the issuing authority may require a wildlife habitat evaluation study under 310 CMR 10.60.
- d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.

#### 5.9 Storm Water Runoff Best Management Practices

All storm water runoff systems shall at minimum conform to best management practices as specified in the DEP Storm Water Management Guidelines, Volumes I and II. The Conservation Commission may impose more stringent conditions where resource values and functions warrant it.

**5.10 Alternative Analysis**

In accordance with Bylaw paragraphs 206-2, 206-3, 206-8.B and C, and 206-13.A and these regulations, the Commission shall impose a 3-tiered approach for evaluating work proposed within the buffer zone. In all cases, impacts must be minimized and mitigated so there are no significant adverse impacts to the resource area. If the Commission determines that the project will have significant adverse impacts on the resource area then the project shall be denied.

- 1) The Bylaw states "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 enforcement order pursuant to this bylaw." Accordingly, projects and associated disturbances shall be located outside any resource area that falls under the jurisdiction of this Bylaw, including the buffer zone. Practical alternatives to locate the project outside these areas must be investigated and should one or more prove feasible the plan must be amended to relocate all activities accordingly.

The Commission shall consider as practical alternatives options that were available to the applicant but appear to be precluded due to self-imposed hardships and constraints (e.g., lot, roadway, and drainage layouts engineered without prior regard to impact on Bylaw resources.) The project shall be located outside the resource 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.

- 2) If in the Commission's view there are no practical alternatives to locate the project outside the buffer zone, then the project shall comply with the setback distances identified in section 10 of these regulations. Projects shall be required to maximize the distance between any area of disturbance within the buffer zone and the resource area, and the Applicant must convince the Commission that the area may be disturbed without harm to the values protected by the Bylaw.
- 3) It is presumed that work within tabulated distances from a resource area will result in alteration of the resource area. This presumption is rebuttable and may be overcome upon a showing by a preponderance of the evidence that the nature of the proposed work, special design measures, construction controls, or site conditions will prevent alteration of the resource area, and will cause no significant harm to the areas or values protected by the Bylaw.

**5.11. Self-Imposed Hardship**

The Commission views any adjacent properties or properties located nearby which are under common ownership as part of a cumulative resource area impact, such that the maximum of 5,000 square feet of alteration that may be allowed under certain conditions under the Wetland Protection Act, or the proposed degree of alteration of the resource area under the Bylaw applies to the entire area. The applicant or property owner is advised to prevent situations where they have created their own hardship by not carefully considering all likely impacts to areas subject to the Wetland Protection Act or the Bylaw. In the case of limited project proposals, proposed roadways or driveways shall be designed to provide access to all areas of the proposed site without relying upon the possibility of future wetlands crossings. The Commission shall consider any future crossings or impacts proposed to be self-imposed and will not grant further crossings or alterations in subsequent filings on a lot-by-lot basis for any project.

**5.12. Activities in the Buffer Zone (Based on DEP Policy 99-1, Issued: March 6, 1999)**

In 1983, DEP determined that since activities in the 100-foot buffer zone are sufficiently likely to alter a resource area, preconstruction review may be necessary. Therefore, a Request for Determination of Applicability or Notice of Intent must be filed for all activities within the buffer zone. Since the 1983 regulatory revisions, the Department has gained considerable experience with the effect of activities in the buffer zone of resource areas. The Department therefore is establishing criteria for activities that are proposed to occur exclusively within the buffer zone and a presumption that projects meeting the criteria may proceed under a Negative Determination of Applicability.

In its revisions to implement the Rivers Protection Act, the Department identified carefully circumscribed categories of minor activities within the riverfront area or within the buffer zone to another resource area and exempted them from

review. For projects that are not exempt, the Department has determined that the location and scope of the activity within the buffer zone is the most important factor in protecting against adverse impacts. Establishing performance standards for work that is proposed exclusively within the buffer zone will increase wetlands protection by steering development away from the edge of resource areas.

By encouraging project proponents to meet these criteria, the review of relatively small projects limited to work within the buffer zone should proceed more smoothly for applicants, conservation commissions, and the Department. The Department hopes that streamlining the review of smaller projects will allow more time for the review of projects with the potential for greater impacts. The application of uniform criteria for similar projects will ease the administrative burden on commissions and the Department, allowing more efficient use of resources while promoting wetlands protection. While commissions may regulate activities in the buffer zone differently under local bylaws, the Department encourages the use of these criteria and this process for all qualifying projects under the state regulations.

To this end, the Hopkinton Conservation Commission will consider issuing a Negative Determination of Applicability under the Bylaw for all projects that qualify under the following guidelines, which are more stringent than but otherwise parallel the State regulations.

#### 5.12.1 Criteria for Negative Determination of Applicability for Activities in the Buffer Zone

The issuing authority shall presume that activities that are proposed to occur *exclusively within the buffer zone* are eligible for a Negative Determination of Applicability if:

1. Alteration within the buffer zone is less than 4,000 (5,000 under DEP policy) square feet or 10% of the buffer zone on the lot, whichever is less;
2. At a minimum, a 50-foot wide area of undisturbed vegetation in the buffer zone along the resource area is provided;
3. Stormwater is managed according to standards established by the Department of Environmental Protection;
4. The buffer zone where the project is proposed does not border an Outstanding Resource Water (i.e., certified vernal pool, public water supply, or some Areas of Critical Environmental Concern (ACECs));
5. The buffer zone does not contain estimated wildlife habitat which is indicated on the most recent Estimated Habitat Map of State-listed Rare Wetlands Wildlife; and
6. Erosion and sedimentation controls are provided at the limit of work to protect resource areas.

A conservation commission or the Department may determine that this presumption should not apply based on unusual characteristics of the site (e.g., steep slopes) or of the project (e.g., potential for impacts over time that may require oversight through continuing conditions in a Certificate of Compliance). If a commission or the Department determines the presumption should not apply, or if an applicant does not submit sufficient information to allow the commission to determine whether the criteria are met, it may issue a Positive Determination and require a Notice of Intent. Applicants proposing activities which do not meet these criteria may be required to submit a Notice of Intent to the conservation commission for preconstruction review and conditions to protect the interests of the Act.

Conservation commissions or Department staff should always conduct a site visit to verify that the project is limited to work within the buffer zone and the criteria are met. The issuing authority should be confident that the boundaries of wetland resource areas have been properly delineated and may request an assessment by the Commission's consultant.

Work must conform to the plans submitted with the Request for Determination or any modifications imposed by the issuing authority in the Determination of Applicability. Failure to conform to the plans and specifications shall constitute grounds for requiring a Notice of Intent or enforcement action by the commission or the Department.

#### 5.13. DEP Policy 88-2 – Interpretation of 310 CMR 10.53 (3)(e) Limited Projects (February 1988)

The Conservation Commission shall interpret Limited Project proposals in accordance with 310 CMR 10.53(3) and DEP's Policy 88-2. The following text is provided as guidance regarding the most common filing under the Limited Project section, driveways and roadways.

The limited project provisions of 310 CMR 10.53(3) are designed to provide the issuing authority with the discretion to allow certain work to proceed although the work may not meet the performance standards set forth in 310 CMR 10.54 through 10.57. These provisions merely provide the discretion to permit these projects and the authority to impose conditions which, in addition to those set forth in the applicable portion of 310 CMR 10.53(3), the issuing authority determines are necessary to adequately protect the interests of the Wetlands Protection Act, M.G.L. c. 131, §40. The issuing authority is not required to give approval to all projects filed under this provision, but should examine the facts and determine whether the project qualifies as a limited project.

The purpose of 310 CMR 10.53(3)(e) is to allow projects in which wetlands will be crossed with a new roadway to provide access to otherwise unreachable upland areas. In this Program Policy, the Department elaborates on the analysis that should be applied when determining whether a new roadway qualifies for consideration as a limited project.

In each case proposed under 310 CMR 10.53(3)(e), the issuing authority must determine, before approving the project under this section; (1) whether the project satisfies the general requirements stated in the regulation; (2) whether it is appropriate to grant an exception from the provisions of Sections 10.54 through 10.57 in this case, and (3) if the project is approved, what conditions should be imposed in addition to those required by 310 CMR 10.53(3)(e) to adequately protect the interests of the Act.

1. A project satisfies the general requirements of a limited project roadway, if the issuing authority determines no reasonable alternative means of access from a public way to uplands of the same owner is available. For the purposes of 310 CMR 10.53(3)(e), a public way includes any road, whether publicly or privately owned, off of which access may be gained into the subject property. In making the determination regarding alternate means of access, the issuing authority may require the applicant to evaluate the reasonableness of any previously or currently available alternatives including the realignment or reconfiguration of the project, to conform with the requirements of 310 CMR 10.54 through 10.57, or to minimize to the greatest extent possible disruption of wetlands. For example, the issuing authority may require the applicant to utilize upland access over an adjacent parcel of land owned by the applicant, or which the applicant has a beneficial ownership of through a realty trust, to avoid filling of wetlands. The issuing authority may also consider whether adjacent property, which would have provided dry access to the uplands, has been sold off or built on, particularly where the applicant has had notice as described in #3 below.

For projects subject to a Planning Board's jurisdiction, the issuing authority must also determine whether the new roadway or driveway is the minimum length and width acceptable to the Planning Board. Therefore, the issuing authority may require the applicant to request the Planning Board to formally rule on revisions of the project which would protect wetlands, even if approval of the revisions would require the Planning Board to apply variance provisions that allow the Board to waive or vary its standard requirements. The issuing authority should only determine that no reasonable alternative means of access are available after the applicant has made a good faith effort to identify alternate means of access and has actually presented any reasonable alternatives to the Planning Board and received that Board's ruling. This provision does not preclude the possibility of more than one wetland crossing in certain circumstances, such as where an applicant is developing a very large parcel of land and the Planning Board has required, after a review of alternatives as discussed above, the applicant to provide multiple access points into the property.

2. Even if the general requirements of the regulation are met as described in paragraph 1 above, the issuing authority may deny limited project status for certain work. The issuing authority should evaluate the magnitude of the wetlands impacts proposed and the significance of that particular wetland to the interests of the Act. For example, the issuing authority may permit an access proposal requiring a relatively small wetlands loss, all of which would be replicated, to gain access to a relatively large area of uplands all of which would otherwise be inaccessible. If, however, it is particularly important to avoid alteration of this wetland in order to protect the interests of the Act, for example when the wetland lies adjacent to or above a public water supply, particularly in an area that is the primary cone of influence to a well; is in an Area of Critical Environmental Concern (ACEC); contains rare species habitat; is a Class A designated water body by the Division of Water Pollution Control; is an anadromous fish run; or has some other special environmental attribute, the issuing authority may appropriately deny the same proposal.

3. When the issuing authority decides to grant an exception for a new roadway or driveway, it must condition the work in a manner adequate to protect the interests of the Act. The conditions set forth in the General Performance Standards of 310 CMR 10.54 through 10.57 should be used as guidelines. In particular, the Department strongly endorses requiring replication of all wetlands filled and compensation for lost flood storage volume on a 1 to 1 basis, wherever practicable.

It is also recommended, where appropriate, to include a special permanent condition advising the applicant and anyone performing a title search on the property in the future, that any future project to cross wetlands to gain access to certain portions of the property will not be qualified as a limited project roadway under 310 CMR 10.53(3)(e).

5.14 Colors for Plan Contents

All plans submitted to the Commission for review shall be highlighted with transparent marker pen as follows:

- |  |   |
|--|---|
| 1. Green: the edge of Bordering Vegetated Wetlands;    | 6. Red: all culverts and discharges;      |
| 2. Blue: bank, for perennial rivers or streams;        | 7. Purple: the edge of isolated wetlands; |
| 3. Dotted Green: the edge of the Inner Riparian Zone;  | 8. Orange: intermittent streams;          |
| 4. Yellow: the limit of the buffer zone;               | 9. Pink: the edge of other wetlands       |
| 5. Dotted Yellow: the edge of the Outer Riparian Zone; | 10. Dotted Red: 100 year flood elevation  |

6. PUBLIC HEARINGS AND NOTIFICATIONS

From time to time, the Commission may find that it does not have a quorum present at a given hearing on a Notice of Intent, and therefore cannot legally act upon the applicant’s submission. Every effort is made to ensure that a quorum is always present, but in certain instances, family emergencies or unexpected obligations may cause a member to be unavailable.

In such instances, it is the policy of the commission to open and continue (if a new hearing) or continue the hearing to the next available date. This action is necessary, because the law requires that the Commission act to open a hearing within a set time-period from the filing date of the NOI. While it might seem that the Commission would be unable to act in this manner due to the lack of a quorum, the Supreme Court has ruled (*Winning Homes, Inc. v. Lexington Conservation Commission, Middlesex, CV97-01045*) that a quorum is not necessary for members of the Commission to open and continue a hearing for lack of a quorum. The Court concluded that “as a safeguard, it is entirely reasonable to permit the members present to perform such ministerial tasks as opening and continuing the meetings to another date, so long as no evidence is taken.”

7 COORDINATION WITH OTHER BOARDS

As appropriate the Conservation Commission may choose to solicit the advice and opinions of other Town boards and officials in the course of its deliberations. Town boards and officials shall be entitled to file written comments and recommendations with the Commission at or before the public hearing. The Commission shall take any such comments and recommendations into account but shall not be bound by them. 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.

8 DETERMINATIONS, PERMITS, AND CONDITIONS

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.

The Commission is empowered to deny a permit for failure to meet the requirements of the Hopkinton Wetland Protection Bylaw; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance 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. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

8.1 Tentative Decisions and Final Decisions

In accordance with Bylaw Section 206-8.1, all decisions issued by the Commission shall be Tentative Decisions. Tentative Decisions become Final Decisions as follows.

1. All decisions by the Commission, under the bylaw, are tentative.
2. Any applicant can request a reconsideration under the bylaw within 10 days. A request for reconsideration under the Bylaw must be submitted to the Commission, separate from any Request for Superceding Order of Conditions filed with the Department of Environmental Protection.
3. Within 21 days following receipt of a request for reconsideration, the Commission can issue a final decision or vote to reopen the hearing. The hearing reopening can wait, with the applicant's specific request, until after the DEP appeal has ended; otherwise, it must reopen within 30 days of the request for reconsideration.
4. The Commission will then consider any new facts brought to light by the applicant, plus any new facts from DEP's decision, and then close the hearing and issue a final decision.
5. The applicant can then appeal the final decision to Superior Court.
6. If no request for reconsideration is filed within 10 days, the tentative decision becomes final as of the date of issuance. If the applicant chooses to waive the right to reconsideration or withdraw a request, the tentative decision shall become final as of the date this notice is received by the Commission.
7. The Conservation Commission clearly will participate in good faith efforts to resolve the remaining issues through mediation if possible.

9 WRITTEN CONDITIONS

Upon closing the hearing and voting on the approval or denial of the Notice of Intent, the Commission may not issue an Order of Conditions under the Massachusetts Wetlands Protection Act until a Mass DEP file number has been issued (CMR 10.05(4)(c)).

10 REGULATIONS

The following additional regulations apply.

10.1 Minimum setback from resource area

(1) Preamble

The amendments to Ch. 131 §40, incorporating the Rivers Protection Act in 1996, established a 200 foot protected zone surrounding the rivers and streams of the Commonwealth in order to: protect the public or private water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries. It has been the Commission's experience, backed by the precedent set by the Rivers Protection Act of 1996, that lands within 200 feet of rivers and streams, and lands within 100 feet of vernal pools and 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 a longer period of time, as a consequence of daily operation or existence of the activities. Accordingly, it is the policy of the Commission to require that any person intending to perform work within 200 feet of a river or stream, or within 100 feet of other resource areas



must submit to the Conservation Commission either a Request for Determination of Applicability or an Application for Permit. This way, the Conservation Commission has an opportunity to review the proposed project to determine whether any alteration of the neighboring resource area will occur, and whether any resulting alteration is in compliance with other applicable performance standards.

If in response to a Request for Determination of Applicability, the Commission finds that work within the Buffer Zone will not alter the resource area, it may issue a Negative Determination of Applicability, with or without conditions.

(2) Definition, Critical Characteristic and Boundary

(a) Definition: The Buffer Zone is that area of land extending 200 feet horizontally outward from the boundary of the mean high water mark of rivers and streams; and lands extending outward 125 feet horizontally from vernal pools, and lands extending outward 100 feet horizontally from other resource areas as defined under the Town Bylaw.

(b) Critical Characteristic: Where surface runoff or groundwater from the Buffer Zone drains towards the resource area, vegetative cover and soils may filter runoff and provide uptake or renovation of pollutants from adjacent areas, thereby protecting water quality within the resource area. The vegetation and soils may slow surface runoff and permit infiltration of precipitation, maintaining the hydrologic regime to which the area is adapted. Where the surface water or groundwater from the Buffer Zone does not drain toward the resource area, the topography and soils characteristics may help to control the surface and groundwater regime in the resource area.

(3) Presumption

Based on experience to date with projects in the Buffer Zone, and in accordance with the Rivers Protection Act of 1996, the Commission shall presume that work in the categories below, within the tabulated distances from a resource area, will result in alteration of the resource area, and will require that the applicant maintain a strip of continuous, undisturbed vegetative cover within the 100 foot [200 foot for rivers and streams] buffer 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. This presumption is rebuttable and may be overcome upon a showing by a preponderance of the evidence that the nature of the proposed work, special design measures, construction controls, or site conditions will prevent alteration of the resource area, and will cause no significant harm to the areas or values protected by the Bylaw. Depending upon site conditions and project characteristics, the Commission may also find that work at greater distances from the resource area will alter the resource area. For the purposes of the table below, “work” means filling, excavation, grading, operation of motorized construction equipment, and storage or stockpiling of earth or construction materials; and “structure” means a structure requiring a building permit or any other permanent entity serving a function or purpose as defined in the table below.

<b>Type of Work</b>	<b>Limit of Work or Disturbance</b>	<b>Limit of Structure</b>
Any activity abutting a river, stream or other body of water covered under the Rivers Protection Act	100	200
Any activity abutting a vernal pool, whether or not the activity is listed in any other category in this table	125	125
Residential activity, including residential lots and multi-family residential development, for which a definitive subdivision plan was approved by the Planning Board on or before November 1 1995	25 (reduced to reflect grandfathering rec'dn of Bylaw Study Committee)	50
Residential activity, including residential lots and multi-family residential development (Note: See 5.12 to see whether a NDA may apply)	50	50
Utilities (electric or gas transmission, telecommunications, water main, sewer main, drainage pipe, or stormwater management outfalls)	10 (except for permitted crossings)	15
Stormwater Management structures (excluding outfalls)	50	50
Roads or multiple concurrent driveways	25 (except for permitted crossings)	30

Private driveway (one)	10 (except for permitted crossings)	15
Commercial, Industrial, Parking Lot, Municipal, or other Non-Residential activity not included above	50	75

The following activities within the Buffer zone are presumed not to alter a resource area. This presumption is rebuttable and may be overcome when the nature of the work or site conditions will result in alteration of the resource area unless special preventive measures are taken. As with any work in the Buffer Zone, the activities listed below still require (as a minimum) filing a Request for Determination of Applicability in order for the Conservation Commission to determine if these presumptions apply.

- a. Discharge of subsurface drainage from a single residential lot or residential building.
- b. Discharge of roof and driveway runoff from a total impervious area of less than 4000 square feet (per project) meeting the above separation distance.
- c. Mowing or cutting vegetation within defined and agreed Limited Disturbance Areas provided the soil is not exposed to erosion and that sod cover or natural litter layer is maintained.
- d. Landscape plantings, provided that areas disturbed are mulched immediately and there is no change in grade.
- e. Construction or installation of fences or structures not requiring a building permit
- f. Minor conversion of lawn to uses accessory to single family homes, like pools and decks, when the work lies entirely within the buffer zone, and the work will not go beyond the pre-existing lawn edge, and will discharge all backwash and/or drainage into an upland (non-buffer zone) area (see June 1998 revisions to Regulations).
- g. Percolation tests or soil borings carried out to gather information for submittal with an application for a Permit.

10.2 Determining The Edge Of A Wetlands/Resource Area

Wetlands are defined in chapter 131 M. G.L. by plant life and vegetation and in some instances by soil analysis. The Conservation Commission or its consultant may not make a determination of a wetland/resource boundary when conditions prevent a visual examination (ex: snow cover or frozen ground). Requests for such determination may be deferred until conditions permit a visual examination and/or a soil test.

10.3 Replication Of Wetland Resource Area

It is the policy of the Hopkinton Conservation Commission that there shall be no net loss of wetlands in the town. When wetlands are destroyed by fill or other means, compensatory replication must be provided (Chapter 131 M.G.L., 310 CMR 10). Further, as replicated wetlands carry no assurance that it will serve the function of the destroyed wetlands as effectively, it is the policy of the Commission that the replication of a destroyed wetland shall be compensated on a greater than 1.5 :1 basis and installed according to specific guidelines. The exact proportion of replication to destruction to be approved by the Commission will be on the basis of the existing site topography and other site considerations.

10.4 Legal Fees Resulting From Enforcement Orders

The Town of Hopkinton shall not be held liable to pay for legal services required to enforce Chapter 131 Section 40, M.G.L. and/or General Town Wetland Bylaws. In the case of an Enforcement Order issued by the Hopkinton Conservation Commission requiring assistance of legal counsel, it is the policy of the Commission that settlement may include payment of legal counsel. In any legal proceedings this policy will be brought to the attention of the presiding court officers.

10.5 Consultants

The Commission, at its discretion, may choose to hire a consultant for projects of such a scope as to warrant an independent review and/or an on-site construction monitor, in order to protect and preserve wetland values and to monitor adherence to Orders of Conditions and/or Enforcement Orders. It is the policy of the Commission to request that the applicant reimburse the Commission for the cost of such consultant, and that failure to agree to such request

may, at the Commission's discretion, be considered as a factor when reviewing the Applicant's submission or performance under an Order of Conditions.

## 11 FEES

### 11.1 Definition And Types Of Fees

Section 206-11 of the bylaw provides for two types of payments by applicants. Though both are called "fees", one is *the filing fee*, payable at the time of submitting an application (Notice of Intent), and the other is a consultant fee, paid in special cases when needed.

#### 11.1.1 Filing Fee, Payable With Application

The purpose of the filing fee is stated in paragraph 206-11.E of the Bylaw:

"The applicant shall pay the filing fee to the Town of Hopkinton to be put into an account established pursuant to G.L. c 44. Sec. 53E1/2. which account may be drawn upon by the Commission as necessary to carry out the provisions of this bylaw."

Accordingly, the combined filing fees of all applicants are pooled for uses directly related to the bylaw, including salaries, administration, office supplies, enforcement, postage, and miscellaneous costs. The filing fee an applicant pays is based on the fee schedule in paragraph 11.2 below, and does not depend on the cost of handling that individual application. In this regard, the fees are just like building permits, hunting licenses, and many other municipal fees.

The amount of the filing fee is defined in paragraph 11.2 of these regulations. The filing fee is to be paid when submitting the application for a permit and is non-refundable. Applications without the proper fee will not be accepted or, if scheduled for a hearing, will not receive a permit (and may be denied), as provided in paragraph 206-11.I.

Not-for-profit projects are not exempt from payment of applicable fees. There shall be no exceptions to this regulation.

The fee schedule set forth in paragraph 11.2 below may, in some individual cases, prove unreasonable. The commission reserves the right to consider requests, during or before a hearing, for reduction of fees which prove unreasonable due to the size of the project's impact on wetlands and buffer zones.

#### 11.1.2 Consultant Fee

As provided in paragraph 206-11.A, B, and C of the Bylaw, the commission may require an additional fee, beyond the filing fee of paragraphs 206-11.E and F. Although this too is called a "filing fee" in the bylaw, the term "consultant fee" better explains its purpose and distinguishes it from the mandatory initial filing fee. The consultant fee is required by the commission when the characteristics or size or complexity of the site or project require independent consultations, or when the work proposed or history of violation require that the commission monitor the project to a higher degree. In such instances the Commission shall notify the applicant of this need and the estimated costs and provide the opportunity for the application to be amended or withdrawn. Should an applicant choose to proceed the Commission shall require the applicant to pay the reasonable costs and expenses borne by the Commission for these consulting services as listed below. 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. This consultant fee will not be required in all cases, but is common in subdivision or subdivision roadway projects. This fee will be deposited into an account established pursuant to G.L. c 44. Sec. 53E1/2, which at present is the only account available to Conservation Commissions statewide. The Commission shall use its best efforts to estimate the amount of consultant fee required, in accordance with the table below and in Section 11.2. The amounts shown represent the initial minimum amount charged; the Commission reserves the right to require the applicant to pay additional amounts to cover the reasonable costs and expenses borne by the Commission for these consulting services, should the initial estimate prove insufficient.

The following guidelines for consultant fees, as typically charged by the consultant for reasonable costs and expenses and to be reimbursed to the Commission, are as follows<sup>1</sup>:

<u>Project Cost</u>		<u>Initial Consultant Fee</u>	Note: These tabulated initial fees do not apply for Minor Projects and Single Family Dwellings. Refer to Section 11.2, below, for the minimum consultant’s fee. Actual fees may be higher depending on scope of the review and completeness of the submittal.
Up to	\$100,000	\$1,500	
\$100,001 to	\$500,000	\$3,500	
\$500,001 to	\$1,000,000	\$6,000	
\$1,000,001 to	\$1,500,000	\$8,500	
\$1,500,001 to	\$2,000,000	\$11,000	

Each additional \$500,000 project cost increment (over \$2,000,000) should anticipate an additional \$2,500 fee per increment. The project cost means the estimated, entire cost of the project including, but not limited to, site preparation, building construction, 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 the 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 payment of the consultant fee.

Note 1. From *Environmental Handbook for Massachusetts Conservation Commissioners*,  
A. Dawson and S. Zielinski, MACC 1997.

**11.2 Schedule Of Initial Filing Fees and Certain Minimum Consultant’s Fees**

In accordance with the authority granted under Section 206-5.G and 206-10.A of the Bylaw, the Commission is setting forth herein its table of filing fees, taking into account: experience with administration of the bylaw since 1995; the purpose of the fees; expenses of the Commission related to various project types, and the need for better definitions of project types and buffer zones. Article 57 of the May 2000 Annual Town Meeting authorized moving the fees into the regulations. The fees are as set forth below.

At the time of a permit application or RFD, the applicant shall pay a filing fee according to the following schedule:

- |    |  |   |
|----|--|---|
| 1. | Minor project - house addition, tennis court, swimming pool, or other accessory residential activity | \$50 plus 2 hrs minimum consultant fee  |
| 2. | Single family dwelling   | \$300 plus 3 hrs minimum consultant fee   |
| 3. | Subdivision - road and utilities only  | \$1,500 plus \$5 per foot of road sideline within the 50-foot buffer zone or Resource Area  |
| 4. | Multiple family dwelling and Condominium structure   | \$1,500 plus \$300 for each unit, all or part part of which is within the 100-foot Buffer Zone or Resource Area                     |
| 5. | Commercial and industrial projects   | \$1,500 plus \$0.50 per square foot of disturbance within the 50-foot buffer zone or Resource Area                                  |
| 6. | Application filed after Enforcement Order  | Double above fees   |
| 7. | Determination of Applicability   | \$50 plus 2 hrs minimum consultant fee  |
| 8. | Application for Certificate of Compliance  | \$50 plus 1 hr minimum consultant fee   |
| 9. | Abbreviated Notice of Resource Area Delineation  | \$100 plus 2 hrs minimum consultant fee for single family homes, and \$300 plus 2 hrs minimum consultant fee for all other projects |

The above fees are in addition to those required by the Wetlands Protection Act, G.L. c. 131, Sec. 40, and are not refundable. The Commission may waive the filing fee and the costs and expenses for a permit application or RFD submitted by a government agency. The fee for an application for modification of a permit will be the excess, if any, of (i) the amount calculated as provided above for the activities requested to be allowed by the modified permit, over (ii) the fee paid for the original permit, provided the fee for an application for modification of a permit will in no event be less than \$25.

### 11.3 Printing Of Public Notices

Both the Bylaw (Section 206-6.B) and the state Wetland Protection Act (MGL Ch. 131, sect. 40) require the printing of public notice of hearings to be paid for by the applicant. The commission will ask the newspaper publishing the notice to bill the applicant directly. If the bill is forwarded to the Commission for whatever reason, the Commission shall require the bill to be paid before any permit or Order of Conditions is issued.

### 11.4 Additional Definitions

#### 11.4.1 Single Minor Project

For the purposes of fee determination work to remove debris and hazardous materials from wetlands, and wetland restoration projects, and similar projects for improving the natural capacity of a wetland resource to protect or enhance wetland values shall be considered a single minor project.

#### 11.4.2 Subdivision Roadway Fees

For the purposes of fee determination the term roadways in the case of subdivisions shall include all common and private driveways associated with new lot construction. Therefore driveway sidelines that fall within the buffer zone shall be added to the overall roadway sideline calculation pertinent to fees for roadway construction in the buffer zone. In those instances where driveways for new lots are not included in the subdivision application, the pertinent driveway sideline charge shall be imposed when the specific lot plan is submitted. Where the base fee for roadways has already been paid as part of the subdivision, that fee shall also cover the base fee for subsequent driveway plans in the subdivision.

## 12 SECURITY

### 12.1 Orders Of Conditions & Bonding

In the specifying of an Order of Conditions and setting of bond the Conservation Commission may, at its choosing, take into account the prior history of applicant and the applicant's representatives, consultants, builders, or other contractees. When in the Commission's opinion prior instances of disregard for orders of conditions, violations of wetlands regulations and policies, practices known to threaten wetlands values and functions, or other failures to fulfill legal obligations pursuant to wetlands protection raise questions about the applicant's willingness or ability to abide by permit requirements the Commission can set additional conditions and impose bond requirements to ensure adherence to permit requirements.

### 12.2 Permitting in the Context of Outstanding Violations

No permit shall be issued for any project to an applicant who has an outstanding violation of this Bylaw for which either (a) no corrective Order of Conditions has been recorded at the Registry of Deeds, or (b) which is not under legal appeal.

## 13 ENFORCEMENT

The following guidelines outline the response the Commission and its agent will take to violations or apparent violations of the Massachusetts Wetlands Protection Act (M.G.L. Ch. 131 Sect. 40) or the Hopkinton Wetland Protection Bylaw. Experience has shown that enforcement situations are rarely alike; each can present its own combination of characteristics such as: type of violation; availability and reliability of evidence; severity and immediacy of the threat posed to wetland values; ability to identify and contact responsible parties; applicability of state and town

laws. Therefore, this regulation is meant to provide an adaptable model, not a strict recipe to be followed in all cases. The intent is to establish as much uniformity as possible consistent with effective and appropriate enforcement.

VIOLATIONS

Under the Act:

- Dredging, filling, alteration or removal of resource areas.
- Work in buffer zone causing alteration of resource area.
- Work outside buffer zone causing alteration of resource area.
- Maintaining unauthorized fill in place.
- Failure to comply with Enforcement Order.

Under the Bylaw:

- Dredging, filling, etc.
- Work in buffer zone
- Work outside the buffer zone that causes alterations of wetlands.
- Maintaining unauthorized fill in place.
- Failure to comply with Enforcement Order.

13.1 Enforcement

- 1) When the Commission determines that an activity is in violation of the Bylaw or a Permit issued under the Bylaw, the Commission may
  - a) issue an Restoration Enforcement Order, and/or
  - b) hold a public hearing to consider whether the landowner should be fined for the violation.
- 2) Violations include, but are not limited to:
  - a) failure to comply with an Order of Conditions, such as failure to observe a particular condition or time period specified in the Order;
  - b) failure to complete work described in an Order, when such failure causes damage to the interests protected by the Bylaw;
  - c) failure to obtain a valid Order prior to conducting an activity subject to regulation under the Bylaw.
- 3) In appropriate cases, the Commission may issue an Enforcement Order under the Wetlands Protection Act, MGL Chapter 131 Section 40 in lieu of or in addition to a Restoration Enforcement Order. The Wetlands Protection Act carries its own provisions for fines, which will be enforced by the Commission as required.
- 4) An Enforcement Order issued by the Commission shall be signed by a majority of the Commission. In a situation requiring immediate action, an Enforcement Order may be signed by a single member or agent of the Commission, if said Order is ratified by a majority of the members at the next scheduled meeting of the Commission.
- 5) If a fine or an adjustment of fine for a violation is contemplated, the Commission shall hold a public hearing to discuss the violation and to give the landowner or the landowner's representative an opportunity to respond to the evidence and circumstances. The landowner must be given at least 48 hours notice in writing of the date, time and place of a public hearing, by certified mail or hand delivery. If a majority of the Commission present at the hearing finds by a preponderance of the evidence that a violation has occurred, the landowner shall be levied a fine of not more than three hundred dollars (\$300) per violation in accordance with the Bylaw.
- 6) The Commission hereby established guidelines for calculating the appropriate amount of the fine if levied by the Commission after a public hearing. Each day of the violation constitutes a separate violation under the Bylaw.

**Violations without a Permit or a valid Order of Conditions:**

- a) Any action which removes, fills, dredges, builds upon, degrades, discharges into, or otherwise alters (collectively 'alteration of') the following resource areas: any freshwater or coastal wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs, lakes; ponds of any size; rivers; streams; creeks; lands under waterbodies; lands subject to flooding or inundation by groundwater or surface water; or other

wetlands as defined in the Bylaw: \$300.00 per violation as provided under the Bylaw. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order.

- b) Alteration of No Disturbance area (going beyond Limit of Work setbacks as defined in the Regulations) not including the areas above: \$250.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order.
- c) Alteration of No Build area (going beyond Limit of Build setback) not including the areas above: \$200.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order.
- d) Alteration of 100-foot buffer zone not including the areas above: \$100.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order.
- e) Cutting of plant life or trees anywhere in the buffer zone: \$200.00 per inch of caliper per tree. For plant life smaller than 1-inch caliper, the fine shall be \$200.00 per plant destroyed.

**Violations which occur on a project with a Permit or for which a valid Order of Conditions exists:**

- f) Alteration of the following resource areas: any freshwater or coastal wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs, lakes; ponds of any size; rivers; streams; creeks; lands under waterbodies; lands subject to flooding or inundation by groundwater or surface water; or other wetlands as defined in the Bylaw: \$300.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order. In addition, a fine of \$600.00 per numbered condition violated in the Order of Conditions shall be assessed.
  - g) Alteration of No Disturbance area (going beyond Limit of Work setbacks as defined in the Regulations) not including the areas above: \$250.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order. In addition, a fine of \$500.00 per numbered condition violated in the Order of Conditions shall be assessed.
  - h) Alteration of No Build area (going beyond Limit of Build setback) not including the areas above: \$200.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order. In addition, a fine of \$400.00 per numbered condition violated in the Order of Conditions shall be assessed.
  - i) Alteration of 100-foot buffer zone not including the areas above: \$100.00 per violation. Restoration of the area to its pre-existing condition shall be required under a Restoration Enforcement Order. In addition, a fine of \$200.00 per numbered condition violated in the Order of Conditions shall be assessed.
  - j) Cutting of plant life or trees anywhere in the buffer zone: \$200.00 per inch of caliper per tree. For plant life smaller than 1-inch caliper, the fine shall be \$200.00 per plant destroyed.
- 7) The notice of a fine or fines and explanation thereof, including the date or approximate date of the violation from which daily violations are counted, will be sent in writing to the responsible landowner(s) by certified mail or hand delivery. The fine or fines under the Bylaw are payable to The Town of Hopkinton within twenty-one (21) days of the date of issuance of the notice.
  - 8) The Town Collector may record in the Registry of Deeds a conservation lien for non-payment of accumulated fines. The lien shall be against all property in the Town of Hopkinton held by the landowner at the time of the violation which is contiguous to the area of the violation. The Commission shall hold a public hearing, in accordance with (5) above, in order to decide the amount of the lien which may not exceed the amount of accumulated fines to-date.
  - 9) A landowner can apply in writing for a continuance of the public hearing stating in full the reason for the request. The Commission may grant such a continuance for compelling and/or environmentally sound reasons.

- 10) An Enforcement Order issued under the Wetlands Protection Act MGL Chapter 131 Section 40 and its regulations 310 CMR 10, or under the Town Bylaw will constitute a warning that a public hearing and possible fine may result from any violation.
- 11) The Commission reserves the right to adjust the fine in response to new information or new circumstances at a public hearing to which the landowner will be given notice as outlined in (5) above. A written notice of the adjustment of fine shall be sent to the landowner by certified mail or hand-delivery.
- 12) The Commission may accept a written plan with timetable for full restitution of the violation and may then withhold sending the notice of fine(s) for a specified time period. If satisfactory restitution is not made in a timely manner, the notice of fines shall be retroactive to the start of the violation.
- 13) Unless otherwise stated in the Bylaw or in the regulations promulgated under the Bylaw, the definitions, procedures, and performance standards of the Wetlands Protection Act MGL Chapter 131 Section 40 and associated Regulations, promulgated as 310 CMR 10, shall apply.

13.2 Enforcement Sequence

Step 1 and Continuing: DOCUMENT THE VIOLATION as best as possible.

Step 2: INFORMAL CONTACT. Contact the violator or property owner by phone, to arrange a meeting (on site, in office, or at a Commission meeting). Discuss with the contact the site activity, the legal requirements, and possible remedial action. If full cooperation and agreement is achieved, Commission may issue a **Restoration Enforcement Order** (see below).

Step 3: VIOLATION LETTER: If informal contact cannot be made, send a violation letter, informing violator or owner of the wetlands protection laws and the apparent violation. Include a cease and desist warning and a requirement to prevent further damage. Ask for a response by a certain date, typically in 10-14 days, in writing or by phone, to set up a meeting, preferably on site. Or, the letter may set a date and time for the respondent to appear at a Conservation Commission meeting.

Step 4: ENFORCEMENT ORDER #1: Failing an adequate response to step 2 or step 3, issue an Enforcement Order with:

- (a) a cease and desist order (checked off on the DEP Enforcement Order form);
- (b) a restoration order (also checked off);
- (c) an order to prevent further violations (also checked off);
- (d) an order that states: "The property owner (or agent) shall appear before the Conservation Commission at its meeting on Monday, \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ pm, to show cause why further enforcement action should not be taken."

Step 5: ENFORCEMENT ORDER #2: Failing an adequate response to step 4, issue a second Enforcement Order, setting specific requirements for the restoration of the site to its original condition within a specified time period (typically 14 days) or court action will be taken under the Act and/or the Bylaw. Make reference in this Order to past enforcement efforts and to the legal penalties for non-compliance.

Step 6: CIVIL COMPLAINT: Failing adequate response to step 5, file a civil complaint with the district court.

If the violator does respond and is at least mildly cooperative, draw up a **Restoration Enforcement Order**. This will spell out the terms and conditions of the restoration work, and will use Form 9 followed by a Restoration Order of Conditions. The Commission may direct the violator to record this order, so long as it states that it will issue a Certificate of Compliance fully discharging the violator from any further liability regarding the violation once the restoration work has been satisfactorily completed.

All Enforcement Orders and letters will be directed toward restoration rather than toward the filing of plans or a Notice of Intent. If further enforcement action is required, it should be for failure to restore illegally altered land to its original condition rather than for failure to submit plans.



13.3 Non-Criminal Enforcement Of Bylaw Violations

Under MGL Chapter 40 Section 21D, adopted by Hopkinton Town Meeting as a Town Bylaw, a violator of the Hopkinton Wetlands Protection Bylaw may be issued a ticket and assessed a fine of \$50 per violation. Each day constitutes a separate violation. A separate ticket is used for each violation.

Any person so notified to may appear before the clerk of the district court and confess the offense charged and pay the fine, or may mail the fine together with a copy of the notice to the Town Clerk. Any appearance or payment under this paragraph is not deemed to be a criminal proceeding. The procedure for appeal of a ticket issuance is described in the Town's non-criminal disposition bylaw and state law, and allows the violator to request a hearing in writing within 21 days after the date of the notice. Such hearing will be held before a district court judge, clerk or assistant clerk as the court shall direct.

Suggested guidelines for ticketing:

1. At steps 2 and 3 (above), warn violator that fines may be assessed if violation is not addressed or removed within 7 days. After that deadline, issue ticket if no or inadequate response is received.
2. A ticket will be issued at any point in the above sequence when in the judgment of the Commission it is deemed to the most effective means of enforcement. In making that judgment, the Commission (or its agent) may consider the following factors:
  - a) The ability to reach the violator or property owner to deliver the ticket;
  - b) The severity of the violation and the importance of prompt remediation and compliance;
  - c) The relationship of the amount of the fine to the size of the violation;
3. If ticket is ignored (not paid and no hearing requested) past the 21-day deadline:
  - a) send a letter granting an additional 10 days to pay before a criminal complaint is issued.
  - b) issue a criminal complaint

13.4 Further Enforcement Actions

If the above actions do not secure compliance, the following remedies are available to the Commission, and will be selected as the Commission finds appropriate.

Remedies under the Act

- (a) Civil Suit - Injunctive order, penalties up to \$25,000 a day; possible site access.
- (b) Criminal Action - penalties up to \$25,000 a day
- (c) DEP action - administrative penalties, Attorney General pursuing (a) and (b)

Remedies under the Bylaw

- (a) Civil Suit - Injunctive order, no penalties available
- (b) Criminal Action - penalties up to \$300 a day
- (c) Non-criminal citations, \$50 per citation.

14 BURDEN OF PROOF

15 APPEALS

Article 57 of the Spring 2000 Annual Town Meeting was passed unanimously, and provides the Commission with the ability to issue Tentative Decisions. This new language offers a substantial improvement to the appeals process.

Under State law, an Applicant wishing to appeal a decision by the Conservation Commission must follow two paths. Under the state Wetlands Protection Act, they must appeal to DEP. Under local law prior to May 2000, applicants were also forced within 10 days under State law to appeal the decision under the Bylaw to Superior Court. Since DEP seldom renders an opinion within 10 days, applicants were forced to file the Court appeal to preserve their standing, while waiting for DEP to act.

The new language of Bylaw Section 206-8.1 allows the Commission to issue Tentative Decisions, wait for DEP's response, and then reconsider the project using DEP's findings before any decision becomes Final. This in effect preserves the Applicant's right to appeal under the Bylaw, until they see how DEP rules on their case. The article also establishes the Commission's policy of encouraging dispute resolution through mediation and settlement wherever possible.

The main points of the Appeals language, section 206-8.1, are as follows:

1. All decisions by the Commission, under the bylaw, are tentative.
2. Any applicant can request a reconsideration under the bylaw, while that applicant can appeal the decision, under the state law, to DEP.
3. In response to a request for reconsideration, the ConCom can issue a final decision or vote to reopen the hearing. The hearing reopening can wait, with the applicant's approval, until after the DEP appeal has ended.
4. The ConCom will then consider any new facts brought to light, plus DEP's decision, and then close the hearing and issue a final decision.
5. The applicant can appeal the final decision to Superior Court.
6. If no request for reconsideration is filed within 10 days, the tentative decision becomes final as of the date of issuance.
7. The Conservation Commission clearly states its desire to resolve the remaining issues through mediation if possible.

There are exceptions. A Commission may approve work under the state law but deny it under the stricter standards of the local bylaw. In that case, a dissatisfied applicant would request reconsideration and/or appeal the bylaw/ordinance decision but not the Wetlands Act Order of Conditions. On the other hand, dissatisfied abutters might want to appeal the Wetlands Protection Act decision, but not the bylaw decision. Or an Enforcement Order may have been issued under both the bylaw and the Wetlands Protection Act. Since such Enforcement Orders cannot be appealed to DEP, all appeals of Enforcement Orders will be to the Superior Court.

In most cases, an appeal will be filed with DEP. Assume that the appellant is a dissatisfied applicant for a permit (the most common appellant). Under the Wetlands Protection Act she/he must file an appeal with DEP within ten days after the Commission issues the Order of Conditions or Determination of Applicability. DEP will then proceed to process the appeal in the usual way, issuing a Superseding Order of Conditions which may in turn, be appealed to an administrative law judge in DEP under an adjudicatory hearing. If a court appeal is filed under a bylaw/ordinance, the administrative law judge hearing will be delayed to see what the judge will rule (DEP Policy 89-1). Ultimately, the administrative law judge will uphold or reject the Superseding Order of Conditions. If that result offends any of the parties to the adjudicatory hearing (including the Commission, automatically a party to such appeals), that person must file a legal action with a trial court. There are some possible short cuts through this lengthy procedure, but in most cases, the full DEP administrative procedure must be observed. Courts are not anxious to overturn decisions arrived at through this procedure.

Once the DEP findings are known, and assuming the applicant requested reconsideration in accordance with Section 206-8.1 of the Bylaw, the Commission will vote to reopen the hearing. Following the conclusion of the reopened hearing, the Commission will issue a Final Decision in which it may reaffirm its Tentative Decision or modify the Tentative Decision as requested by the applicant in whole or in part; provided that if the Commission includes conditions of approval stricter than those imposed under the Wetlands Protection Act, or if the Commission denies a permit for a project approved under the Wetlands Protection Act, it shall include in its Final Decision a statement specifying each relevant respect in which this Bylaw, or regulations promulgated thereunder, are stricter than the requirements of the Wetlands Protection Act as applied to the project. In the event of any appeal to the Superior Court under G.L. c. 249, the Tentative Decision, the request for reconsideration, the Superseding Order of Conditions (if any), and the Commission's Final Decision shall be included in the record. If the applicant still chooses to file a suit in Superior Court, the appellant must file a lawsuit in the superior court attacking the bylaw/ordinance decision, which cannot be reviewed by DEP (even if the decisions are virtually the same). This kind of review, called "certiorari," is discussed below.

It should be noted that it is the policy of the Town of Hopkinton to encourage the resolution of disputes arising under this Bylaw by settlement wherever possible. Consistent with this policy, in the event of an appeal to Superior Court under G.L. c. 249 from a Final Decision by the Commission, the Commission shall, subject to the availability of any funds required therefor, participate in good faith in mediation if the party appealing the decision makes a request to the Commission for it to do so, provided that all other parties to the appeal so agree. If the party appealing the decision elects not to participate in mediation, the appeal to Superior Court proceeds.

The certiorari process is found in G.L. Ch. 249 §4 which governs appeals of permit decisions of many kinds. The appeal must be filed within 60 days after the Commission issues its final bylaw/ordinance decision, either in the superior court or in the Supreme Judicial Court. However, an appeal directed to the latter is likely to be sent to the superior court anyway, so most are submitted directly to that court.

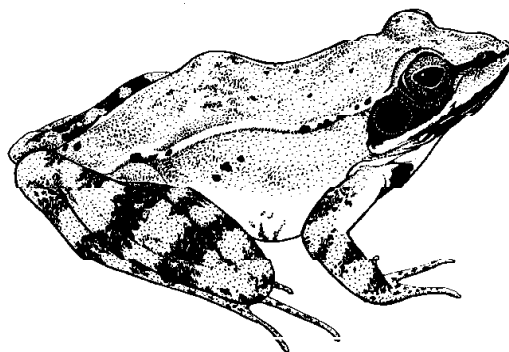
Certiorari is a limited review, based on the record of the proceedings of the permit body. The standard of proof requires a showing that an error of law was committed, e.g., that the Commission failed to follow proper procedures, or that its decision was arbitrary and not based on evidence. The judge is not supposed to substitute her/his judgment for that of the Commission, if the latter was based on reasonable evidence. The burden of proof is on the plaintiff. The town counsel or city solicitor will file, as a response to the complaint, either an "answer" or a certified copy of the administrative record (sometimes called a "return") or both. The record compiled at the public hearing is instrumental in shaping court review. In contrast, review by DEP on an appeal under the Act is "de novo": Agency review of the application and plans for the project starts afresh, as if the application were filed with DEP to begin with. DEP automatically treats the Conservation Commission as a party, but by no means does the Commission enjoy a benefit of doubt. The opposite is true in superior court, given the burden of proof.

A superior court trial ends with the judge's written decision. Generally, the judge simply rules in favor of the plaintiff or the defendant, though it may "remand" (send back) the matter to the Commission for further findings about what the permit really means. Courts will not rewrite permits. It is therefore up to the appellant and the appellee (the town or city) to decide exactly what "relief" (decision) they want from the court. In the typical appeal, the appellant will want the court to invalidate the Commission's decision because it was arbitrary or something was wrong with the process (e.g., the hearing was not posted or advertised, the neighbors were not notified). The municipality will want the judge to uphold the local permit. Decisions of the superior court may be appealed by either party to the Appeals Court or even to the Supreme Judicial Court, which selects the cases it wants to review.

An applicant must obtain all necessary permits before she/he can do work. Therefore, an applicant filing the two appeals discussed above must win in both instances. If DEP approves a Superseding Order of Conditions, this may be offered as evidence in the court action under the bylaw/ordinance, to show that the applicant is doing the right thing. However, the court is not bound by the DEP decision, nor vice versa.

16 RELATION TO THE WETLANDS PROTECTION ACT

17 SEVERABILITY



**Appendix A - Hopkinton Conservation Commission  
Procedures Regarding Comprehensive Permit Applications**

The Hopkinton Conservation Commission, upon request from the Zoning Board of Appeals, shall review plans provided by the ZBA or by an Applicant for a Comprehensive Permit under the State Chapter 40B Section 20-23 process. The following information and guidelines shall form the basis for reviews by the Commission.

- The Comprehensive Permit process does not set aside local Bylaws, but rather places the rulemaking authority for multiple local Boards under the coordination of the ZBA in order to simplify the permitting process for Applicants.
- The Mass Department of Housing and Community Development's Housing Advisory Committee, in providing 'Guidelines for Local Review of Comprehensive Permit Applications (see <http://www.state.ma.us/DHCD/components/hac>), has interpreted the enabling legislation to provide ZBA with the authority to act for all local Boards, including the Conservation Commission. There is some question whether Chapter 40B Sections 20-23 provides the authority to set aside Home Rule local bylaws, which, as non-zoning laws, may not fall under ZBA jurisdiction. Until subsequently clarified by case law, the Commission shall work closely and cooperatively with the ZBA to ensure that all applicable local regulations governing wetlands protection in Hopkinton under the home rule bylaw are applied to Comprehensive Permit projects consistently, fairly, and in the same manner as they would be applied to market-rate projects.
- Ch 40B Section 20-23 filings are clearly not exempt from the State Wetlands Protection Act, and do not constitute any form of Limited Project or other exemption under the State Wetlands Protection Act. If the project proposes work within an area subject to State jurisdiction under the Wetlands Protection Act (Chapter 131 Section 40 and its regulations 310 CMR 10), or within an area subject to local jurisdiction under the Bylaw (Chapter 206) and its regulations the Applicant must file the necessary permit applications with the Conservation Commission.
- All applicable fees, including consultants fees necessary to review and permit the project, are to be paid either by the Applicant or the ZBA, which has the authority to have applicable costs paid by the Applicant. Such fees must be reasonably related to costs incurred in reviewing the application and permitting the project and may not be higher than fees ordinarily charged for comparable permits.
- The enabling legislation, Section 21 of Chapter 40B states that before conducting the Comprehensive Permit hearing, "the board of appeals shall request the appearance at such hearing of such representatives of said local boards... and, in making its decision on said application, shall take into consideration the recommendations of the local boards....". HAC guidelines stress that "Input from local boards and professional staff is critical to sound, well documented permit decisions."
- The Housing Advisory Committee guidelines state "The law enables a local Zoning Board of Appeals (ZBA), in consultation with other local boards and officials, to grant a single permit to an eligible developer proposing state or federally sponsored low or moderate income housing. It also permits the Board to override local requirements and regulations that are inconsistent with affordable housing needs *if environmental and planning concerns have been addressed.*" (italics added for emphasis)
- The Housing Advisory Committee guidelines state "The Conservation Commission and the Board of Health have separate jurisdictions, which are not subsumed within the comprehensive permit process. They should conduct separate hearings relating to state requirements in their areas (i.e., the Wetlands Protection Act and state "Title 5" septic regulations). However, local bylaws or regulations enforced by these boards that are more restrictive than state requirements may be waived by the ZBA if requested by the applicant and if waiver is consistent with local needs."

- The Housing Advisory Committee guidelines state ““In considering conditions that might be imposed on a project, the Zoning Board of Appeals should focus on the health, safety, environmental, design, open space, and planning impacts of the development. *The Board may impose conditions either to eliminate or to mitigate the adverse impact of the development.*” “Conditions must not be imposed in a manner that places additional burdens on an affordable housing development that would not be imposed in similar circumstances upon market-rate housing.”
- The statute requires that a comprehensive permit be granted when it is "consistent with local needs," and describes a balancing test. That is, on some sites it may be possible to build affordable housing that does not comply with certain local restrictions, but nevertheless *has no negative impact on local health, safety, environmental, design, open space, and planning concerns*. For other sites, the impact on these local concerns may be limited enough so that these concerns are outweighed by the need for low and moderate-income housing.

In accordance with the above information, the Commission shall review materials as provided by the ZBA or the Applicant for compliance with the Hopkinton Wetlands Protection Bylaw (Chapter 206 of the Code of the Town of Hopkinton). If conducted in parallel with the Commission’s review under the State Act, the Order of Conditions for the project shall clearly identify the provisions and conditions applicable under the State Act from those applicable under the local Bylaw.

## Hopkinton Wetlands Regulations

### CHECKLIST FOR COMPLETENESS OF NOTICES OF INTENT – Revised October 2000

In order to facilitate review of your proposal, please verify the following items are included as part of your Notice of Intent. Once the *complete* NOI is received in our office, the Commission will schedule a hearing within 21 days of receipt. We may also wish to schedule a site visit to see the site first-hand.

The Commission conducts site visits on Saturday mornings, beginning at 9AM. It will facilitate our ability to schedule a site visit if you indicate which Saturdays within the next 3 weeks are convenient for you to meet with the Commission. Our Agent will try to confirm one of these dates, or, if the Commission is already booked, will indicate the first available date, which may fall after your initial hearing date.

**Available Saturdays:** \_\_\_\_\_.

#### NOI requirements under 310CMR 10 (DEP requirements)

- 1) Two copies of a completed Notice of Intent form (Form 3).
- 2) Two copies of plans, supporting calculations, and other documentation necessary to completely\* describe the proposed work and mitigation measures (see NOTE 1, below).
- 3) Two copies of plans showing compliance with Title 5 of the State Environmental Code, if a subsurface sewage disposal system (septic system) is proposed in an area subject to commission jurisdiction (e.g., in the 100-foot buffer zone or Land Subject to Flooding-- Title 5 does not permit construction of septic systems within 50 feet of most wetlands and within 100 feet of some wetlands).
- 4) Two copies of an 8 1/2" by 11 " section of the USGS quadrangle map of the area, marked to identify where the proposed work will be located.
- 5) The appropriate filing fee and fee transmittal form and a copy of the fee calculation.
- 6) Evidence that all abutters within 100 feet of the property or 1,000 feet of the work have been notified.
- 7) If applicable, evidence that a copy of the Notice was sent to the Massachusetts Natural Heritage and Endangered Species Program by Express or Priority mail on or before the date the Notice of Intent was filed, or other evidence that the Program received the Notice of Intent within 2 days of filing with the commission.

**NOTE 1. A determination that plans and other documentation are "complete" for the purposes of accepting a Notice of Intent does not necessarily mean that enough information has been provided to let the conservation commission adequately evaluate the project.**

#### NOI Requirements under Town Bylaw

- 1) Plans: Seven complete copies of the permit application and supporting documents.
  - (a) The plans **must be highlighted with transparent marker pen** as follows:
    1. Green: the edge of the Bordering Vegetated Wetlands;
    2. Blue: bank, for perennial rivers or streams;
    3. Dotted Green: the edge of the Inner Riparian Zone;
    4. Yellow: the limit of the buffer zone;
    5. Dotted Yellow: the edge of the Outer Riparian Zone;
    6. Red: all culverts and discharges;
    7. Purple: the edge of isolated wetlands;
    8. Orange: intermittent streams;
    9. Pink: the edge of other wetlands;
    10. Dotted Red: 100 year flood elevation.

## Hopkinton Wetlands Regulations

- 2) The location of consecutively numbered flags denoting the wetland resources shall be shown on the plan and shall be certified by a registered land surveyor, registered sanitarian, professional engineer or wetland biologist.
- 3) Elevation contours shall be shown in two-foot contours unless the slopes are very steep. Steep elevations, over 25%, shall be shown in five-foot contours.
- 4) All offset distances from the proposed foundation(s), well(s) and septic system(s) or other proposed work to all wells, septic systems, wetland resources, property lines, streams, watercourses, drainage structures, or easements within 150 feet, shall be shown.
- 5) All distances and % slopes along septic system piping shall be shown.
- 6) Where septic systems are proposed, the maximum groundwater elevation, and the elevation of the bottom of the leaching facility, the elevations of the inlets, outlets and the finished grades shall be given, as well as breakout calculations where a septic system is located on a slope.
- 7) All soil logs must be submitted showing the type of material, soil horizons, elevation of existing grades, maximum ground water elevation, depth of hole, and location of percolation test with corresponding elevations and percolation rates.
- 8) All proposed grades must be shown.
- 9) The limit of proposed work shall be shown.
- 10) Plan scale shall be no less than 1" = 40'.
- 11) All proposed structures within 100 feet of the resource areas shall be shown.
- 12) The Assessor's map, block, lot number, street number and subdivision lot number, where applicable, on the lot where work is proposed shall be shown.
- 13) Owner/applicant of large parcels or adjacent property of which they may have a vested interest should supply a general scheme of any proposed development, i.e. what impacts (cumulative or significant) to the values protected by the bylaw, will be addressed along with mitigation, compensation and remediation protocols.
- 14) The estimated project cost in accordance with Section 206-11.I of the bylaw, and the applicable fee as defined in the Regulations.
- 15) Evidence that all abutters within 300 feet of the property have been notified.
- 16) The appropriate filing fee and a copy of a worksheet showing the fee calculation.

The Commission may, at its discretion, choose to waive certain of the above items for small projects or projects likely to result in minimum or no impact. However, the Commission reserves the right to require additional information during the course of the public hearing if necessary to reach a decision on the proposal. In general, all roadway projects, limited projects as defined by 310 CMR 10.53(3), and subdivisions will require a full filing. Applicants who wish guidance prior to submitting a project should consult with the Conservation Agent for further guidance.