



**Town of Westborough  
Wetlands Protection Regulations  
Implementing Town of Westborough, Massachusetts Non-Zoning  
Wetlands Protection Bylaw  
(Article 45 of the Special Town Meeting of October 20, 2008)**

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*Westborough Conservation Commission*

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## 1 PURPOSE

The Massachusetts Wetland Protection Act (G.L. Ch. 131, Sec. 40) (the Act) sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection in accordance with 310 CMR 10.02(1) are to be regulated in order to contribute to the following interests:

- protection of public and private water supply;
- protection of ground water supply;
- flood control;
- storm damage prevention;
- prevention of pollution;
- protection of fisheries and wildlife habitat

A vernal pool habitat, which includes a buffer of 100 feet around the pool, is presumed significant to wildlife habitat if it lies within a wetland resource area. Westborough extends this buffer to include vernal pools regardless of whether they lie within a resource area and extends the buffer zone to 125 ft.

### 1.1 Overview

Under the Massachusetts Wetland Protection Act (G.L. Ch. 131, Sec. 40) (the Act) 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 Conservation 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 CMR12.00. 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).

The Town of Westborough 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 water bodies; lands subject to flooding or inundation by groundwater or surface water; Isolated Land Subject to Flooding and lands within 100 feet of any of the aforesaid resource areas (collectively the resource areas protected by this Bylaw).

Vernal pools within a 125 ft. buffer, regardless of whether the pool lies 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. Procedures for identifying and protecting vernal pools are further detailed in Section 3.1 of these regulations.

A buffer zone of 100 ft. around any resource area is subject to protection under the Bylaw. Within this buffer zone, the regulations define setbacks from the wetlands edge, and provide explicit guidance regarding areas where no disturbance or no building will be allowed. Under the regulations, the Westborough Conservation Commission, hereinafter, "Conservation Commission" must consider whether activities within the buffer zone will likely affect the wetland resource area and will presume that projects involving 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 Conservation 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 Structure***

A structure shall mean anything constructed or erected, the use of which requires fixed location on the ground, or attachment to something located on the ground, including swimming pools and mobile homes, but not including retaining walls or similar devices, signs, exterior lighting, pavement or fences. All other activities not constituting a structure shall be subject to setbacks that apply to limits of disturbance as defined in Section 8.

### ***2.2 Parking Lot***

A parking lot shall mean any area, paved or unpaved, that is used for parking, storage, loading or unloading of vehicles or the storage of any item.

### ***2.3 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.

### ***2.4 Existing***

The term "existing" as used in the Bylaw shall mean lawfully existing in full as of the date the regulations were adopted. The term existing shall also include approved Site Plan Reviews permitted under Section 1240 the Westborough Zoning Bylaws and approved Definitive Subdivision Plans for the construction of roadways and associated utilities but excluding any individual lot development.

### ***2.5 Discharges into Wetlands***

Discharges into wetlands, 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.

### ***2.6 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.

### ***2.7 Passive Passage***

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

## **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.

## **2.9 Vernal Pool Species**

A vernal pool species is defined in the Division of Fisheries & Wildlife – Natural Heritage & Endangered Species Program’s “Guidelines for the Certification of Vernal Pool Habitat” dated March 2009 and any subsequent revisions.

## **2.10 Rare Species**

The term "rare species" shall be as defined in 310 CMR 10.04: “*mean those vertebrate and invertebrate animal species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 10.60.*”

## **2.11 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.

## **2.12 Isolated Land Subject to Flooding (ILSF)**

As provided in 310 CMR 10.57(2)(b)1 through 3, the Town of Westborough definition of an Isolated Land Subject to Flooding “*. . . is an isolated depression or closed basin without an inlet or an outlet. It is an area which at least once a year confines standing water to a volume of at least ¼ acre-feet and to an average depth of at least six inches. Isolated Land Subject to Flooding may be underlain by pervious material, which in turn may be covered by a mat of organic peat or muck . . . The boundary of Isolated Land Subject to Flooding is the perimeter of the largest observed or recorded volume of water confined in said area.*”

If there is a question regarding whether the extent of water confined in an ILSF, calculations to determine the volume of standing water shall be based on the total volume (rather than peak rate) of run-off from the drainage area contributing to the ILSF and the assumption that there is no infiltration of said run-off into the soil within the Isolated Land Subject to Flooding as stated in 310 CMR 10.57(2)(b)3.

# **3 JURISDICTION**

## **3.1 Presumption of Vernal Pool Habitat**

The definition of vernal pool habitat shall be based on the criteria presented in the Massachusetts Division of Fisheries & Wildlife Guidelines for the Certification of Vernal Pool Habitat (current version is dated March 2009) and any subsequent revisions, herein referred to as the Massachusetts Vernal Pool Guidelines.

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 be certified through the Natural Heritage Program or identified by a preponderance of credible evidence presented at a public hearing to be protected. The Westborough Wetlands Protection Regulations extends this protection to 125 ft, regardless of whether the pool is within a wetland resource area.

During a public hearing or review of submittals to the Commission, the Conservation Commission can request that an area be evaluated for its potential to be a vernal pool based on the Massachusetts Vernal Pool Guidelines. If the

area meets the criteria established in the Guidelines, then the Commission shall extend vernal protection to this area in accordance with 310 CMR 10.53(1), which in part states “*If the issuing authority determines that a resource area is significant to an interest identified in (G.L. Ch. 131, Sec. 40) for which no presumption is stated in the Preamble to the applicable section, the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests*”.

The Conservation Commission recommends applicants to file an Abbreviated Notice of Resource Area Delineation (herein referred to as ANRAD) to obtain and certify all resource areas on a site prior to initiating design, engineering and permitting. The ANRAD filing can only serve to speed the permitting process, avoid appeals and unnecessary expenditure of the proponent’s funds.

### **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/fruited 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, the Bylaw protects streams of all forms (Bylaw section II) and the buffer zone within 100 feet of those streams.

### **3.3 Isolated Land Subject to Flooding**

As stated in 310 CMR 10.57, an Isolated Land Subject to Flooding (ILSF) is an area that is “*likely to be locally significant to flood control and storm damage prevention. In addition, where such areas are underlain by pervious material they are likely to be significant to public or private water supply and to ground water supply. Where such areas are underlain by pervious material covered by a mat of organic peat and muck, they are also likely to be significant to the prevention of pollution. Finally, where such areas are vernal pool habitat, they are significant to the protection of wildlife habitat.*”

*ILSF provides a temporary storage area where run-off and high ground water pond and slowly evaporate or percolate into the substrate. Filling causes lateral displacement of the ponded water onto contiguous properties, which may in turn result in damage to said properties.*

*ILSF, where it is underlain by pervious material, provides a point of exchange between ground and surface waters. Contaminants introduced into said area, such as septic system discharges and road salts find easy access into the ground water and neighboring wells. Where these conditions occur and a mat of organic peat or muck covers the substrate of the area, said mat serves to detain and remove contaminants which might otherwise enter the ground water and neighboring wells.”*

Where a project involves removing, filling, dredging or altering of ILSF, the Conservation Commission shall presume that the ILSF is a resource area significant to the roles outlined above and that this presumption can be overcome only upon a clear showing that it does not play any of those roles.

## 4 CONDITIONAL EXCEPTIONS

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

As stipulated in Section III of the Bylaw:

“The application and permit required by this Bylaw shall not be required for work performed for normal maintenance or improvement of land in agricultural or aquacultural use as defined by the Wetlands Protection Act regulations 310 CMR 10.04 and for mosquito control projects.

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

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

The term "existing" refers to structures placed in service prior to the adoption of the Westborough Wetlands Regulations, 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 adoption of the Westborough Wetlands Regulations, whether or not they would be considered appurtenant.

### 4.2 *Expansion of Agricultural Lands*

As stipulated in Section III of the Bylaw:

“The application and permit required by this Bylaw shall not be required for work performed for normal maintenance or improvement of land in agricultural or aquacultural use as defined by the Wetlands Protection Act regulations 310 CMR 10.04. . .”

Agriculture is one of the interests and values protected by the Westborough Wetlands Protection Bylaw. Accordingly the Bylaw (Section III) exempts from permitting certain work on lands already in agriculture 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 Conservation 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 Conservation 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 310 CMR 10.53(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 Conservation 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. Abandoned and existing farm and fire ponds are some of the area's most important salamander breeding sites, including those of rare species. Accordingly, stocking of farm and fire ponds with fish shall not be permitted except in those cases where the Conservation 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 Conservation 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 permit applications must be complete and in accordance with the check list provided in Appendix B. In the case of an incomplete permit application (i.e. permit applications which do not contain the information necessary for the Conservation to complete its review), the applicant will be notified, the DEP Regional Office will be notified, and the permit application will be returned to the applicant for completion. In those instances where the permit application 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 permit application.

Completeness in this context means only that the permit 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 Conservation Commission's review of the permit application 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.

*As stated in 310 CMR 10.53(1), "For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes that may increase the potential for adverse impacts on resource areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act. Where a buffer zone has already been developed, the issuing authority may consider the extent of existing development in its review of subsequent proposed work and, where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a resource area to protect the interest of the Act. The purpose of preconstruction review of work in the buffer zone is to ensure that adjacent resource areas are not adversely affected during or after completion of the work."*

Existing state regulations therefore give the Westborough Conservation Commission authority to permit, condition, and prohibit work within the buffer zone as the specific situation warrants. The Westborough Conservation Commission has specific jurisdiction:

- To impose conditions to protect the interests of the Act identified for the adjacent resource area.
- To consider the characteristics of the buffer zone that may increase the potential for adverse impacts on resource areas.
- To place limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas.
- To require erosion and sedimentation controls during construction.
- To establish a clear limit of work.
- To preserve the natural vegetation adjacent to the resource area.
- To specify other measures commensurate with the scope and location of the work within the buffer zone.
- To consider measures such as the restoration of natural vegetation adjacent to a resource area to protect the interest of the Act.

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 or reconfigured, and thus made permissible, when appropriate conditions are imposed.

#### **5.1.1 No Disturbance Area**

This is an area in the buffer zone 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 re-grading or travel by heavy machinery. Once the activity is completed, however, the area will be returned 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 over story 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.

### **5.1.5 Permanent Immovable Barriers**

The Conservation 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 Conservation 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. The Conservation Commission may also require the use of approved signage to further protect resource areas.

## **5.2 Considerations in Setting Disturbance Restrictions**

The Conservation Commission shall designate areas of the buffer zone to be suitable for temporary, limited, or permanent disturbance as appropriate, pursuant to 310 CMR 10.53(1), and condition work with the goal of "*... the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act.*"

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 Pre-Project Characteristics of the Site**

The quantity and quality of resource values and functions shall 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. Some wetlands may provide more significant flood storage than other areas. Higher quantity and/or quality resource values would warrant stronger buffer zone restrictions because a larger number of functions are involved and some functions, such as habitat, are more sensitive to buffer zone activity. The Conservation Commission will consider such factors when evaluating the buffer zone for proposed projects.

To this end, the Conservation Commission refers applicants to the submission requirements in Appendix B for a comprehensive list of items that may be included in site characterization, which have been included to assist in the quantification of all pre-existing disturbed and non-disturbed areas within resource areas and their buffer zones. In addition, filing of an ANRAD before any detailed planning or design costs are incurred would enable both the project proponent and the Conservation Commission to agree on resource area delineations and values, thus streamlining the permitting process.

Thorough characterization of the site is also important in project evaluation. 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. Any advice or suggestions that the Conservation Commission may provide shall not bind its subsequent decision making because the Commission (and applicant) may not be aware of all issues regarding a site when and if the Commission offers such suggestions or advice. For example, the Conservation Commission may suggest relocating a detention basin to a different area but subsequent subsurface investigation may reveal groundwater levels or shallow bedrock that would make such relocation infeasible.

### **5.2.2 Wildlife Habitat**

According to 310 CMR 10.60: "*To the extent that a proposed project on inland Banks, Land Under Water, Riverfront Area, or Land Subject to Flooding will alter vernal pool habitat or will alter other wildlife habitat beyond the thresholds permitted under 310 CMR 10.54(4)(a)5., 10.56(4)(a)4., 10.57(4)(a)3. and 10.58(4)(d)1., such alterations may be permitted only if they will have no adverse effects on wildlife habitat. Adverse effects on wildlife habitat mean the alteration of any habitat characteristic listed in 310 CMR 10.60(2), insofar as such alteration will, following two growing seasons of project completion and thereafter (or, if a project would eliminate trees, upon the maturity of replanted saplings) substantially reduce its capacity to provide the important wildlife habitat functions*

*listed in 310 CMR 10.60(2). Such performance standard, however, shall not apply to the habitat of rare species, which are covered by the performance standards established under 310 CMR 10.59.”*

Therefore, any project that exceeds these thresholds shall be permitted only if the project proponent can demonstrate that they do not have adverse affects on wildlife habitat as specified in 310 CMR 10.60.

These thresholds are:

- 310 CMR 10.54(4)(a)5. – *“(cumulatively) alter(s) up to 10% or 50 feet (whichever is less) of the length of the bank found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions.”*
- 10.56(4)(a)4. - *“The capacity of said land to provide important wildlife habitat functions. A project or projects on a single lot, for which Notice(s) of intent is filed . . . that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions.*
- 10.57(4)(a)3. –*“ Work in those portions of bordering land subject to flooding found to be significant to the protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions. Except for work which would adversely affect vernal pool habitat, a project or projects on a single lot, for which Notice(s) of Intent is filed . . . that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions.”*
- 10.58(4)(d)1 – *“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 M.G.L. c. 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. Replication and compensatory storage required to meet other resource area performance standards are allowed within this area; structural stormwater management measures may be allowed only when there is no practicable alternative. Temporary impacts where necessary for installation of linear site-related utilities are allowed, provided the area is restored to its natural conditions. Proposed work which does not meet the requirement of 310 CMR 10.58(4)(d)1.a. may be allowed only if an applicant demonstrates by a preponderance of evidence from a competent source that an area of undisturbed vegetation with an overall average width of 100 feet will provide equivalent protection of the riverfront area, or that a partial rebuttal of the presumptions of significance is sufficient to justify a lesser area of undisturbed vegetation;*
  - b. Stormwater is managed according to standards established by the Department in its Stormwater Policy.*
  - 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. The calculation of square footage of alteration shall exclude areas of replication or compensatory flood storage required to meet performance standards for other resource areas, or any area of*

*restoration within the riverfront area. The calculation also shall exclude areas used for structural stormwater management measures, provided there is no practicable alternative to siting these structures within the riverfront area and provided a wildlife corridor is maintained (e.g. detention basins shall not be fenced).*

### 5.2.3 Rare Species

According to 310 CMR 10.59: *“If a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program (hereinafter referred to as the Program), a fully completed copy of the Notice of Intent (including all plans, reports, and other materials required under 310 CMR 10.05(4)(a) & (b)) for such project shall be sent to the Program . . .”*

In addition, DEP Wetlands Program Policy 90-2, Rare Species, states that: *“When work is proposed in a rare species habitat, the applicant shall have the burden of demonstrating to the issuing authority that the alteration will not adversely affect the habitat of the local population of that species. In order to meet this burden, the applicant shall be required to: 1) identify the relevant habitat requirements of the rare species in question; 2) identify the habitat characteristics of the resource areas and the important wildlife functions provided for that rare species; and 3) demonstrate that the proposed work will not alter any habitat characteristics which are providing important wildlife functions for the rare species. Wildlife habitat functions to be analyzed are important food, shelter, migratory or overwintering areas, or breeding areas. (Wildlife habitat characteristics for inland resource areas can be found at 310 CMR 10.60(2).)*

*The issuing authority shall presume a written opinion from the Program on whether a proposed project will have an adverse effect to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary. In the absence of a finding by the Program, the issuing authority may require additional information, which may include a written opinion from the Program or other qualified wildlife expert, to show that the proposed project will not have an adverse effect.*

*The issuing authority is prohibited from allowing any project which has not met the burden of demonstrating no adverse effect. Furthermore, habitat replication, relocation of individual animals, or other proposed measures purported to offset adverse effects, shall not be permitted because these activities cannot meet the performance standard of no adverse short or long term effect on the habitat of the local population.”*

Based on the above established regulations on rare species, if a project is within estimated habitat which is indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetlands Wildlife (if any) published by the Natural Heritage and Endangered Species Program or a preponderance of evidence is presented at a public hearing that rare species are present in the project area, the applicant shall have the burden of demonstrating to the Conservation Commission that the alteration will not adversely affect the habitat of the local population of that species. In order to meet this burden, the applicant shall be required to:

1. Identify the relevant habitat requirements of the rare species in question;
2. Identify the habitat characteristics of the resource areas and the important wildlife functions provided for that rare species; and
3. Demonstrate that the proposed work will not alter any habitat characteristics which are providing important wildlife functions for the rare species. Wildlife habitat functions to be analyzed are important food, shelter, migratory or overwintering areas, or breeding areas.

The Conservation Commission shall consider a written opinion from the Natural Heritage and Endangered Species Program on whether a proposed project will have an adverse effect to be correct. The burden is on the applicant to rebut this presumption. It is also within the jurisdiction of the Conservation Commission, in the absence of a finding by the Program, to require additional information, which may include a written opinion from the Program or other qualified wildlife expert, to show that the proposed project will not have an adverse effect.

Current state law and regulations also clearly prohibit the Conservation Commission from allowing any project which has not met the burden of demonstrating no adverse effect. The Conservation Commission will also utilize

for reference purposes the Department of Environmental Protection's document entitled "Massachusetts Wildlife Habitat Guidance for Inland Wetlands" dated March 2006 and subsequent revisions.

### **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.

During the last few decades, Westborough has experienced the impacts described above due to the impervious surfaces created by residential subdivisions and large scale commercial/industrial projects.

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 the most current DEP's Stormwater Management Guidelines and other local bylaws and regulations. In particular, the Conservation Commission shall enforce the following general performance standards:

#### **5.3.1 Storm Water Runoff Best Management Practices**

All storm water runoff systems shall at minimum conform to best management practices as specified in the most current DEP Storm Water Management Guidelines and other local bylaws and regulations. The Conservation Commission may impose more stringent practices where resource values and functions or the protection of public/private properties warrant it.

#### **5.3.2 Minimize 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 Conservation Commission shall permit such variation when in its judgment such changes will not produce a significant impact of wetlands functions or values and not adversely impact abutting or down-gradient public or private properties.

Erosion control may require limiting stormwater discharge volumes and velocities which will impact resource areas. Therefore the Conservation 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, functions, and public and private properties.

The Conservation Commission will also utilize for reference purposes both of the Department of Environmental Protection's documents entitled "Hydrology Handbook for Conservation Commissioners" dated March 2002 and the "Massachusetts Stormwater Handbook" dated February 2008 and subsequent revisions to both documents.

### **5.3.3 Minimize 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 Conservation 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 Conservation Commission may require the construction of specific structures to improve storm water runoff quality as required and in accordance with, the most current DEP's Storm Water Management Guidelines and other local bylaws and regulations.

### **5.3.4 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 address:

1. Runoff from all impervious surfaces associated with the project including if applicable, conceptual and planned individual lot construction; and
2. Both pre- and post-project calculations for discharge volumes, concentration times, discharge velocities, and other quantities that the Conservation Commission may require for complete information.

The Conservation Commission reserves the authority to request additional hydrological calculations or related analysis based upon the complexity of the site and the project. All calculations and analysis shall be summarized and provided in an easily readable and understandable format.

### **5.3.5 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 low permeability soils are present, 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 Conservation Commission shall require as part of the application for permit detailed information on pre- and post-construction groundwater flows. In such cases, the Conservation 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.

### **5.3.6 Underground Infiltration System Requirements**

Since subsurface infiltrations are difficult to maintain once installed, systems which accept surface water runoff (and thus excluding those which solely accept roof runoff), shall include an in-line proprietary runoff treatment structure prior to entrance into the infiltration bays. The purpose of the additional structure will be to ensure removal of suspended solids and other materials that may degrade the performance of the infiltration system over time.

### **5.3.7 Subdivisions vs. Individual Lots**

Unless otherwise specifically identified (i.e. Section 5.3.3.1), subdivision approvals and Orders of Conditions apply only to the roads, drainage, and related infrastructure on the definitive subdivision 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.

The Conservation Commission reserves the authority while reviewing a Notice of Intent for a definitive subdivision plan to comment on the configuration of the proposed roadway layout and individual lot lines so that potential wetland impacts and induced hardships can be avoided. If the Conservation Commission determines that a better layout of the definitive subdivision plan is warranted those suggested changes will be brought to the Planning Board's attention. Failure to make suggested changes may result in a denial of the project.

If the applicant submits to the Planning Board a preliminary or definitive subdivision plan or is required to file a Special permit for an Open Space Community in accordance with Section 4300 of the Westborough Zoning Regulations, the applicant shall schedule a work session with the Conservation Commission so that the Conservation Commission can review the proposals and provide written comments to the Planning Board as part of the planning process.

### **5.4 Site visits**

As stated in the Westborough Wetlands Bylaw Section VII, 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 Conservation 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.

### **5.5 Replications**

The policy of the Conservation Commission is 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; the Commission's policy is 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 as well as location of replication will be approved by the Conservation Commission on the basis of the existing site topography and other site considerations.

1. 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 Conservation Commission the following conditions must be met:
2. The replicated wetland must be hydrologic ally and geographically associated with the same water body as the original wetland (310CMR10.55).
3. A qualified wetland scientist, employed by the applicant, may be required by the Conservation Commission during the construction of the wetland replication area. The credentials of the wetland scientist shall be submitted to the Conservation Commission for approval prior to the start of construction.
4. 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 Conservation Commission may require that additional values and functions be incorporated into the replication design.
5. 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 Conservation Commission may require additional compensation area, functions, values, etc. beyond those required in other sections of the Bylaw and its regulations.

6. 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 Section 5.5 Item 3.
7. 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 Section 5.5 Item 3 and 4.
8. 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 establishment and/or spread of invasive species.
9. 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. These soils must be reasonably free of invasive species propagules, such as plant fragments, stems, rhizomes, or seeds.
10. Erosion control barriers shall be placed around the proposed wetland replication area prior to the start of construction.
11. 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.
12. 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 5.5.6, 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*) or any other invasive species shall be used in the replication area.
13. 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.
14. 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.
15. 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.
16. 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 or as otherwise specified in the Order of

Conditions. A written report shall be submitted to the Conservation 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 Conservation Commission report.

17. An inspection report shall be submitted to the Conservation 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. Surveys and reports by the wetland consultant should include monitoring for the presence of invasive species and a plan for their immediate removal.
18. 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.
19. A bond shall be posted that will enable the Conservation 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 applicant and approved by the Conservation Commission.
20. 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 Conservation Commission may set other conditions as required on a project/site specific basis.

## **5.6 *Alternative Analysis***

310 CMR 10.53(3), states in part:

*“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 extent to which adverse impacts can be avoided, 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.”*

In keeping with 310 CMR 10.53(3), the Conservation Commission shall impose a 3-tiered approach for evaluating work proposed within the buffer zone. In all cases, impacts shall be first designed to avoid all resource areas. When such avoidance is not feasible or practicable impacts must be minimized and mitigated so there are no significant adverse impacts to the resource area. If the Conservation Commission determines that the project will have significant adverse impacts on the resource area and cannot be conditioned to meet the interests of the Act 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. Disturbances in the buffer zone shall be subject to standards set forth in these regulations including minimum setbacks (see Section 8). 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 Conservation 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 protected resources.) The project shall be located outside the resource area unless the applicant convinces the Conservation Commission that the area or part of it may be disturbed without harm to the values protected by the Bylaw.

- 2) If in the Conservation 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 8 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 Conservation 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.

### ***5.7 Self-Imposed Hardship***

The Conservation 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 Conservation Commission shall consider any future crossings or impacts proposed to be self-imposed and will not grant further crossings or alterations in subsequent filings in any portion of the originally subdivided property.

### ***5.8 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 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.

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

The Conservation Commission 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 5,000 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 for 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.

The Conservation Commission 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 their Certificate of Compliance). If the Conservation Commission determines the presumption should not apply, or if an applicant does not submit sufficient information to allow the Conservation 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.

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

Work must conform to the plans submitted with the Request for Determination or any modifications imposed by the Conservation Commission 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 Conservation Commission or the Department.

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

The Conservation Commission shall require a pre-application work session with project proponent prior to the submission of any project to the Planning Board which would result in the Notice of Intent application to the Conservation Commission under the Limited Projects provision of DEP regulations 310 CMR 10.53 (3)(e) and Policy 88-2.

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 Conservation Commission determines are necessary to adequately protect the interests of the Wetlands Protection Act, M.G.L. c. 131, §40. The Conservation Commission 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 Conservation Commission 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.

A project satisfies the general requirements of a limited project driveway or roadway, if the Conservation Commission 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 Conservation Commission 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 Conservation Commission 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 Conservation Commission may also consider whether adjacent property, which would have provided dry access to the uplands, has been sold off or built on.

The Conservation Commission will work with the Planning Board to ensure that the new roadway or driveway is the minimum length and width acceptable to the Planning Board and other applicable Town Departments. Therefore, the Conservation Commission may require the applicant to request the Planning Board to comment on revisions of the project which would protect wetlands, even if approval of the revisions would require the Planning Board to apply waiver provisions. The Conservation Commission shall 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 for their comment. In addition, the applicant

shall also stake the center lines of all proposed driveways or roadways so that the Conservation Commission can perform a site walk to further evaluate proposed alternative means of access. 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.

The Conservation Commission shall evaluate the magnitude of the wetlands impacts proposed and the significance of that particular wetland to the interests of the Act. If 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 Conservation Commission may appropriately deny the proposal.

When the Conservation Commission decides to grant an exception for a new driveway or roadway, 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 1.5 basis, wherever practicable.

The Conservation 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 or roadway is not understated during the planning and impact calculation stage, only to result in substantially greater alteration once construction begins. The Conservation 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.

The Conservation Commission shall recommend, where appropriate, inclusion of 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).

### ***5.10 Colors for Plan Contents***

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

- |   |   |
|---|---|
| 1. Green: the edge of Bordering Vegetated Wetlands;   | 9. Dotted Yellow: the edge of the Outer Riparian Zone;        |
| 2. Red: all culverts and discharges;                  | 10. Dotted Red: 100 year flood elevation                      |
| 3. Blue: bank, for perennial rivers or streams;       | 11. Dotted Purple: the limit of buffer zone to a vernal pool. |
| 4. Purple: the edge of isolated wetlands;             | 12. Dotted Blue: the edge of ISLF.                            |
| 5. Dotted Green: the edge of the Inner Riparian Zone; |   |
| 6. Orange: intermittent streams;                      |   |
| 7. Yellow: the limit of the buffer zone;              |   |
| 8. Pink: the edge of other wetlands                   |   |

## **6 PROVISIONAL DECISIONS AND FINAL DECISIONS**

All decisions issued by the Conservation Commission shall be provisional decisions. Provisional decisions become final decisions as follows:

1. All decisions by the Conservation Commission, under the Bylaw, are provisional unless, the applicant waives the right to request for reconsideration. The applicant shall provide to the Conservation Commission the waiver in writing prior to the close of the public hearing.

2. An applicant can request reconsideration under the Bylaw within 10 business days from the date of issuance of the provisional decision. A request for reconsideration under the Bylaw shall be submitted to the Conservation Commission, via certified mail or hand delivery, separate from any Request for Superseding Order of Conditions or Superseding Determination of Applicability filed with the Department of Environmental Protection. (Date of issuance means, the date the decision is mailed, as evidenced by a postmark, or the date it is hand delivered).
3. If no request for reconsideration is filed within 10 business days in accordance with item 2, the provisional decision becomes a final decision.
4. Within 21 calendar days following receipt of a request for reconsideration, the Conservation Commission in open session shall either:
  - a. Vote to accept the provisional decision as the final decision or;
  - b. Vote to require the re-opening of the public hearing in accordance with Section V of the Bylaw.
  - c. The hearing reopening can be delayed, with the applicant's specific written request via certified mailing or hand delivery to the Conservation Commission, until after the DEP's appeal has ended.
5. Upon reopening the public hearing, the Conservation Commission will then reconsider any new information brought by the applicant or their representatives, and if applicable, from DEP's decision.
6. Upon issuance of the final decision the applicant can then appeal the final decision to Superior Court in accordance with Massachusetts General Laws.

## 7 WRITTEN CONDITIONS

Upon closing the hearing and voting on the approval or denial of the Notice of Intent, the Conservation 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)).

## 8 REGULATIONS

The following additional regulations apply.

### ***8.1 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. The Conservation Commission's experience, backed by the precedent set by the Rivers Protection Act of 1996, is that lands within 200 feet of rivers and streams, and lands within 125 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, the Conservation Commission's policy is to require that any person intending to perform work within 200 feet of a river or stream, 125 feet of a vernal pool, 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 applicable performance standards.

If in response to a Request for Determination of Applicability, the Conservation 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 Conservation 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 perennial streams].

The undisturbed vegetative cover will range from 20 to 50 feet unless otherwise specified or if State laws and regulations are more restrictive, in which case those regulations will supersede Westborough regulations. The Conservation Commission shall determine the actual width based on the quality of the wetlands resource area and contributing buffer zone. For example, a buffer of 50 feet shall be imposed if the buffer zone is previously undisturbed or the wetlands are determined to be high value in terms of their quantity and/or quality resource values or contribute to the protection of Outstanding Resource Waters. A 20-foot buffer would be set for a degraded wetland adjacent to disturbed buffer zones in a developed area not likely to provide higher quality wild life habitat or support other interests of the act as detailed in Section 1.1. These examples are not inclusive and setbacks will be determined on a case-by-case basis.

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. All measurements are in feet.

Note: All existing residential, commercial, industrial or other non residential encroachment in the buffer zone which existed prior to the adoption of the Westborough Wetlands Protection Regulations shall remain in place.

In addition, as provided in Massachusetts Wetlands Regulations (310 CMR 10.02(2)(b)(1)(a-g)), the following activities are not subject to regulation under M.G.L. c. 131, § 40 or the Westborough Wetlands Protection Regulations unless they result in the alteration of a resource area if special protective measures are not taken:

- a. Unpaved pedestrian walkways for private use;
- b. Fencing, provided it will not constitute a barrier to wildlife movement; stonewalls; stacks of cordwood;
- c. Vista pruning, provided the activity is located more than 50 feet from the mean annual high water line within a riverfront area or from bordering vegetated wetland, whichever is farther. (Pruning of landscaped areas is not subject to jurisdiction under 310 CMR 10.00.);
- d. Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;
- e. The conversion of lawn to uses accessory to residential structures such as decks, sheds, patios, and pools, provided the activity is located more than 50 feet from the mean annual high-water line within the riverfront area or from bordering vegetated wetland, whichever is farther, and erosion and sedimentation controls are



implemented during construction. The conversion of such uses accessory to existing single family houses to lawn is also allowed. (Mowing of lawns is not subject to jurisdiction under 310 CMR 10.00);

- f. The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and
- g. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, exploratory borings, sediment sampling and surveying).

The Westborough Wetlands Protection Regulations amend this list to include the following activities:

- 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) that meets the separation distances specified in Table 8.1.
- c. Mowing or cutting vegetation within defined and agreed areas provided the soil is not exposed to erosion and that sod cover or natural litter layer is maintained.

As with any work in the Buffer Zone, the activities listed above still require (at a minimum) filing a Request for Determination of Applicability in order for the Conservation Commission to determine if special preventative measures are required.

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Type of Work	Limits	
All existing residential, commercial, industrial or other non-residential encroachment in the buffer zone which existed prior to the adoption of the Westborough Wetlands Protection Regulations (see text in Section 8.1 for further details)	Shall remain in place.	
Any activity abutting a river, stream or other body of water covered under the Rivers Protection Regulations (310 CMR 10.58)	310 CMR 10.58 River Front Area Regulations Apply	
Stormwater management outfalls, assuming that their structures (i.e. basins) are located entirely upland of the outfalls	Limit of disturbance 30 feet (except for limited project crossings)	
Utilities, roads, common or private driveways	Limit of disturbance 25 feet (except for limited project crossings)	
	Limit of Disturbance (feet)	Limit of Structure (feet)
Any activity abutting an ACEC where the buffer zone has previously been disturbed. Actual limits will be based on the extent of previous disturbance.	20 – 50	25 - 75
Any activity abutting an ACEC where the buffer zone has not been disturbed.	50	75
New or expanded residential activity, including existing residential lots and residential development not otherwise exempt under current state Wetlands Regulations (310 CMR 10.02(2)(b)(1)(a-g)). See Section 8.1 for further details.	20	25
New or expanded commercial, industrial, municipal, multi-family or other non-residential activity not included in this table	20 - 50	50
Any activity abutting a certified vernal pool, whether or not the activity is listed in any other category in this table	125	125
Any activity abutting an ILSF, whether or not the activity is listed in any other category in this table	20	20
Commercial, industrial, municipal, multi-family or other non residential parking lots. Limits to be evaluated based on the quality of the buffer zone; proposed use; wetland value and planned stormwater treatment design. Limit of disturbance shall be measured from edge of curbing or defined parking area shown on the plans.	20 - 50	Not Applicable

## 8.2 Determining the Edge of a Wetlands/Resource Area

Wetlands are defined under the Act by plant life and vegetation and in some instances by soil analysis. The Conservation Commission or its consultant may not be able to 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.

The Conservation Commission strongly requests applicants to file an ANRAD prior to submitting a Notice of Intent for any proposed project. This permitting mechanism allows the applicant and the Conservation Commission to properly and thoroughly assess and quantify all resource areas before an applicant expends significant funds on design and engineering. The Conservation Commission will also utilize for reference purposes the Department of Environmental Protection's document entitled "Delineating Bordering Vegetated Wetlands" dated March 1995 and any subsequent revisions.

### ***8.3 Certificates of Compliance***

In addition to those requirements specified in the Wetlands Protection Act and its associated regulations, the following regulations apply to the issuance of Certificates of Compliance by the Conservation Commission:

1. All temporary erosion controls must be removed from the site and erosion control installation areas returned to a natural state.
2. Any restrictive covenants or other easements specified in the Order of Conditions must be recorded with the Registry of Deeds and proof of such presented to the Conservation Commission.
3. Submission of a stamped as-built plan, if required in the Order of Conditions.

The as-built shall include, at a minimum, the following information:

- revised contours,
- location of all underground and aboveground utilities,(i.e. gas, water, sewer, cable, phone, drainage appurtenances, gutter downspouts/recharge areas, foundation drains, retaining wall drains, septic systems),
- rim and invert elevations,
- edge of all installed pavement,
- verification of driveway location and percent slope,
- location of retaining walls and top of wall elevation,
- distances post-construction to resource areas,
- top of concrete for house and garage,
- wetland replication areas with contours and planting schematic, and
- flood storage compensatory areas with contours and volume calculations tabulated on the plan.

The Conservation Commission reserves the authority to request additional as-built requirements based upon the complexity of the original design and specific site conditions.

4. If the proposal included the installation of catch basins and other storm water proprietary structures, receipts shall be submitted demonstrating that the structures were cleaned and the material disposed of in accordance with state and federal laws.

Requests for Certificates of Compliance must be made in writing no less than 30 days prior to the next Conservation Commission hearing.

The Conservation Commission reserves the right to consult with other town boards prior to issuing a Certificate of Compliance to ensure that the project is consistent with and complies with other Town of Westborough regulations and requirements.

## **8.4 *Fees for Consultants to the Conservation Commission (adopted by the Conservation Commission on August 12, 2008)***

### **8.4.1 Purpose**

As provided by M.G.L. Chapter 44 Section 53G, the Westborough Conservation Commission may impose reasonable fees for the employment of outside consultants, engaged by the Conservation Commission, for specific expert services. Such services shall be deemed necessary by the Conservation Commission to come to a final decision on an application submitted to the Conservation Commission pursuant to the requirements of: the Wetlands Protection Act (M.G.L. Chapter 131 Section 40), the Westborough non-zoning wetlands Bylaw, Conservation Commission Act (M.G.L. Chapter 40 Section 8C), or any other state municipal statute, by law or regulation, as they may be amended or enacted from time to time. The Conservation Commission may also impose fees for other consultant services related to application review, or permit conditioning or monitoring, under any of the above-referenced laws or regulations.

### **8.4.2 Special Account**

Funds received pursuant to these rules shall be deposited with the Town of Westborough treasurer who shall establish a special account for this purpose. Expenditures from this special account may be made at the direction of the Conservation Commission without further appropriation as provided in M.G.L. Chapter 44 Section 53G. Expenditures from this account shall be made only in connection with a specific project or projects for which a consultant fee has been collected from the applicant. Expenditures of accrued interest may also be made for these purposes.

### **8.4.3 Consultant Services**

Specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, hydrogeologic and drainage analysis, analysis of potential impacts to existing municipal drainage structures and/or private off-site drainage structures, analysis of potential impacts on municipal conservation lands, and environmental or land use law. Services may also include on-site monitoring during construction, or other services related to the project deemed necessary by the Conservation Commission. The consultant shall be chosen by, and report to the Conservation Commission, its administrator and the applicant's designated representative.

### **8.4.4 Notice**

The Conservation Commission shall give written notice to the applicant of the selection of an outside consultant. Such notice shall state the identity of the consultant, the amount of the fee to be charged to the applicant, and a request for payment of said fee in its entirety. Such notice shall be deemed to have been given on the date it is mailed or delivered. No such costs or expenses shall be incurred by the applicant if the application or request is withdrawn within five days of the date notice is given.

### **8.4.5 Payment of Fee**

The fee must be received prior to the initiation of consulting services. The Conservation Commission may request additional consultant fees if necessary review requires a larger expenditure than originally anticipated or new information requires additional consultant services. Failure by the applicant to pay the consultant fee specified by the Conservation Commission within (10) business days of the request for payment, or refusal of payment, shall be cause for the Conservation Commission to deny the application based on lack of sufficient information to evaluate whether the project meets applicable performance standards in 310 CMR 10.00 and the Westborough non-zoning wetlands Bylaw or its regulations. An appeal stops the clock on the above deadline; the countdown resumes on the first business day after the appeal is either denied or upheld. A denial for lack of information may be based solely on the lack of the third party consultant review identified as necessary by the Conservation Commission. The Conservation Commission shall specify in its denial the nature of the information lacking which its chosen consultant would provide, e.g. the questions it needs answered.

#### **8.4.6 Appeals**

The applicant may appeal the selection of the outside consultant to the Westborough Board of Selectman, who may only disqualify the outside consultant selected on the grounds that the consultant has a conflict of interest or does not possess the minimum required qualifications. The minimum qualifications shall consist of either an educational degree or three or more years of practice in the field at issue or a related field. Such an appeal must be in writing and received by the Board of Selectman and a copy received by the Conservation Commission, so as to be received within ten (10) days of the date consultant fees were requested by the Conservation Commission. The required time limits for action upon the application shall be extended by the duration of the administrative appeal.

#### **8.4.7 Return of Unspent Fees**

Upon the Conservation Commission receiving the recording information from the registry of deeds for an Order of Resource Area Delineation, or upon receiving the recording information from the registry of deeds for a full Certificate of Compliance associated with an Order of Conditions, and/or a final inspection by the Conservation Commission and/or its administrator to determine that the work associated with a Determination of Applicability has been satisfactorily completed, the Conservation Commission will notify the Town treasurer to return any excess funds still remaining within the special account. The Conservation Commission reserves the right upon written request by the applicant or the applicant's successor to release portions of excess funds within the special account. Upon determining that the above requirements have been satisfied, the Town treasurer shall return the excess funds or portions thereof within 30 days. The excess funds, including interest, shall be paid to the applicant or the applicant's successor in interest. For the purpose of this regulation, any person or entity claiming to be an applicant's successor in interest shall provide the Conservation Commission with appropriate documentation. A final report of said account shall be made available to the applicant or applicant's successor in interest.

#### **8.5 *Legal Fees Resulting From Enforcement Orders***

The Town of Westborough shall not be held liable to pay for legal services required to enforce M.G.L. Chapter 131 Section 40 or the General Town Wetland Bylaws. In the case of an Enforcement Order issued by the Conservation Commission requiring assistance of legal counsel, it is the policy of the Conservation 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.

#### **8.6 *Non-Criminal Enforcement of Bylaw Violations***

Under MGL Chapter 40 Section 21D, adopted by the Westborough Town Meeting as Article 37 of the Town Bylaws a violator of the Non-Zoning Wetlands Protection By Law and Regulations, may be subject to the following fines under Article 37 – Appendix A:

- First violation shall be \$100 per day.
- Second violation shall be \$200 per day.
- Third violation shall be \$300 per day.

For the purposes of this clause, "second violation" shall mean an instance of non-compliance that occurs after a prior first instance of non-compliance has been cured. "Third violation" shall mean an instance of non-compliance that occurs after a second violation has been cured.

Any person so notified may appear before the clerk of the district court and confess the offense charged and pay the fine, or 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 date of the notice. Such hearing will be held before a district court judge, clerk or assistant clerk as the court shall direct.

No fines under this provision may be imposed until the property owner has been afforded at least 21 days to resolve any alleged violation.

### ***8.7 Consistency of Plans***

In the event that another Town or State permitting authority has in any way altered the Conservation Commission's previously approved plans/drawings or supplemental information, that new information must be copied to the Conservation Commission office. Substantial changes may warrant a reopening of the public hearing.

## **9 Waivers**

Strict compliance with the requirements of these regulations may be waived in accordance with Section VII of the Bylaw only when, in the judgment of the Conservation Commission, such action is in the public interest and not inconsistent with the Wetlands Protection Act. In waiving strict compliance, the Conservation Commission may require such alternative conditions as will serve substantially the same objective as the regulations waived.

In each case when a waiver is granted, the Conservation Commission will issue a written finding regarding the reasons for granting the waiver. In all cases, waivers will be specific to a given site and project.

## Appendix A - Procedures Regarding Comprehensive Permit Applications

The Westborough 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 (herein referred to as the CPL or Comprehensive Permit Law). The following information and guidelines shall form the basis for reviews by the Conservation Commission.

- a. 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.
- b. 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 CPL 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 clarified by case law, the Conservation Commission shall work closely and cooperatively with the ZBA to ensure that all applicable local regulations governing wetlands protection in Westborough 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.
- c. Ch 40B Section 20-23 filings are 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.
- d. All applicable fees, including consultant's 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.
- e. The CPL, 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."
- f. 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)
- g. 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."
- h. 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.”

- i. 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 Conservation Commission shall review materials as provided by the ZBA or the applicant for compliance with the Westborough Wetlands Protection Bylaw. If conducted in parallel with the Conservation 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.

## **Appendix B - Notice of Intent Checklist**

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 Conservation Commission will schedule a hearing within 21 days of receipt. The Conservation Commission may also wish to schedule a site visit to see the site first-hand and shall conduct site visits at time mutually agreeable to the Conservation Commission and the applicant or site owner.

### 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 Conservation 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. If required by the Conservation Commission, nine complete copies of the permit application and supporting documents in electronic format that can be read by industry standard readers such as Adobe Acrobat Reader. These copies will be submitted on a CD or DVD and sent directly to the members of the Conservation Commission. Addresses of the Conservation Commission members may be obtained from the Conservation Commission office during regular business hours. All plans must be provided to the members of the Conservation Commission no less than 21 days prior to the hearing.
  - a. The plans must be highlighted with transparent marker pen or shown in electronic format as follows as follows:
    - i. Green: the edge of the Bordering Vegetated Wetlands;
    - ii. Blue: bank, for perennial rivers or streams;
    - iii. Dotted Green: the edge of the Inner Riparian Zone;
    - iv. Yellow: the limit of the buffer zone;
    - v. Dotted Yellow: the edge of the Outer Riparian Zone;
    - vi. Red: all culverts and discharges;
    - vii. Purple: the edge of isolated wetlands;
    - viii. Orange: intermittent streams;
    - ix. Pink: the edge of other wetlands;
    - x. Dotted Red: 100 year flood elevation.
    - xi. Dotted Purple: the limit of the buffer zone to a vernal pool.
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. Existing and proposed topography at two feet (2') contour intervals; and, by symbols the highest known high water mark of the last one hundred (100) years. All elevations shall refer to the U.S.C. & G.S. datum, mean sea level. Where zone boundaries shown on the most recently approved Federal Emergency Management Agency Flood Insurance Rate Maps, Town Flood Plain Map, or the Soil Conservation Services Flood Hazard Analysis (for the Upper Assabet River Tributaries or for the Upper Sudbury River) lie within the locus of the plan, they shall be referenced. The flood boundaries which have the most significant impact on the proposed development are to be shown and appropriately labeled.

Existing Conditions plan (may be combined with the contour plan) Major features of the land, such as existing waterways, swamps, and water bodies, natural drainage courses, stone walls, fences, trails, buildings, large trees or wooded areas, rock ridges, outcroppings, and ditches which exist on or near the site at the time of survey. Aerial photographs may be required. Trees within one hundred feet (100') of the center line of the proposed roadways with a diameter at breast height greater than eight inches (8") shall be located and identified.
4. Arrows denoting direction of flow (overland and water body) shall be shown on the plan.
5. If required by the Conservation Commission, the plans shall include a map showing pre-existing drainage 0.25 miles downstream of the site and immediately upstream of the site that will impact the site.
6. 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.
7. All distances and % slopes along septic system piping shall be shown.
8. 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.

9. The plan shall show all soil boring and test pit locations performed for any purpose on the site. The logs will also be part of the permit application. 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 or in-situ permeability tests with corresponding elevations and percolation rates.
10. All proposed grades must be shown.
11. The limit of working for clearing, grubbing, and/or grading shall be shown on the Contour Plan..
12. Plan scale shall be no less than 1" = 40'.
13. All proposed structures and areas of disturbance within 100 feet of the resource areas shall be shown.
14. 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.
15. 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.
16. Evidence that all abutters within 300 feet of the property have been notified.
17. If the proposed work is part of a subdivision, then the application package shall include drawings showing the proposed subdivision site plan, not just the portion of the subdivision that will impact resource areas.
18. Diagrams showing cross section(s) of any open channel stream shall be included as part of the application package.
19. A storm drainage plan will be shown a separate drawing or sheet and will include all storm water design elements to meet the most current DEP's Storm Water Management Guidelines and other local bylaws and regulations. Surface elevation and approximate depth of water shall be shown at each point where drainage pipe ends at a waterway. It shall give a clear indication of what course the storm water discharge will take, accompanied by evidence from the owners of adjacent property that if surface water drains will discharge onto adjacent existing streets or onto adjacent properties not owned by the applicant, such discharge is satisfactory and permitted by those abutters.
20. Soil Erosion and Sediment Control Plan shall be submitted to the Conservation Commission, and shall contain the following:
  - a. Location and description of existing natural and manmade features on and surrounding the site including general topography and soil characteristics, and soil types based on the most recent Natural Resources Conservation Service soil survey and available site soil samples.
  - b. Location and description of proposed changes to the site.
  - c. Location and description of measures for soil erosion and sediment control which shall be equivalent to or exceed the standards set by the US Environmental Protection Agency Stormwater Management Program, the MA Department of Environmental Protection Stormwater Management Policy, and the USDA, Natural Resources Conservation Service and published in Guidelines for Soil and Water Conservation in Urbanizing Areas of Massachusetts.
  - d. A schedule of the sequence of installation of planned erosion and sediment control measures as related to the progress of the project including anticipated starting and completion dates or an ordering of sequential steps. The soil erosion and sediment control plan shall address each step of the phasing plan, addressing lot development, roadway construction, utility construction, and operation, etc. The

sequencing of curb installation, catch basin capture efficiency prior to top course paving, etc. shall be addressed. The use of measures such as temporary settling basins and the subsequent abandonment of these measures shall be addressed for each phase.

21. A Construction Sequencing Plan shall be submitted to the Conservation Commission. The plan shall detail how construction sequencing will be protective of resource areas. The Conservation Commission shall judge the effectiveness of the plan by determining whether resource areas are protected from impacts due to construction activities.

The Conservation 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 Conservation 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 Commission Office for further guidance.