

## SECTION XV

### Wetlands Protection By-Law

#### Section 1. Purpose

The purpose of this By-law is to protect the wetlands, and related water resources, in Rochester, by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater supply, flood control, storm damage prevention, prevention of pollution, protection of fisheries, protection of land containing shellfish, and protection of wildlife habitat, (collectively, the "resource area values protected by this bylaw").

#### Section 2. Jurisdiction

- 2.1 Except as permitted by the Conservation Commission or as provided by this By-law, no person shall remove, fill, dredge, or alter any bank, fresh water wetland, coastal wetland, beach, flat, marsh, meadow, bog, swamp, or land, bordering on any estuary, creek, river, stream, pond, or lake, or any land under said waters, or land subject or coastal storm flowage or flooding, or any other wetland greater than five thousand square feet in size, (collectively the resource areas protected by this By-law), without filing written notice of his intention to so remove, fill, dredge, or alter and without receiving and complying with an Order of Conditions and provided all appeal periods have elapsed. Such notice shall be sent by certified mail or hand delivered to the Conservation Commission, hereafter the commission, including such plans and sufficient information necessary to describe the proposed activity and its effect on the areas subject to protection under this By-law.
- 2.2 The same notice, plans, and specifications, required to be filed by the applicant under Massachusetts General Laws, (M.G.L.) Chapter 131, Section 40, will be accepted as fulfilling the requirements of this By-law, unless specified below.
- 2.3 The commission, in its discretion, may hear any oral presentation under this By-law at the same public hearing required to be held under the provisions of M.G.L. Chapter 131, Section 40.
- 2.4 Definitions, procedures, the presumption concerning Title 5 of the State Environmental Code, the presumptions of significance, and performance standards set forth in the Wetlands Protection Act, M.G.L. C. 131, S. 40 and in the wetland regulations (310 CMR 10.00 et. seq.) issued, and as may be amended, by the Department of Environmental Protection, are hereby made part of this By-law, unless specified below.

#### Section 3.0 Notice to Abutters

- 3.1 Any person filing a notice of intent with the commission pursuant to this By-law shall at the same time give written notification thereof, by delivery in hand or by certified mail, return receipt requested, to all abutters within one hundred feet of the property line of the land where activity is proposed, at the mailing addresses shown on the most recent applicable tax list of assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and in another municipality or across a body of water.
- 3.2 Said notification shall be at the applicant's expense, and shall state where copies

of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained.

- 3.3 Proof of such notification, with a copy of the notice mail or delivered, shall be filed with the commission

**Section 4.0 Definitions**

- 4.1 "Hydric Soil" shall mean any soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part.
- 4.2 "Other Wetland" shall mean any pond, vegetated wetland, or area that under natural conditions would support hydrophytes, or contiguous combination of such areas, that exceed 5,000 square feet in size, without regard to whether these areas are subject to separate jurisdiction of M.G.L. C. 131, S.40. In the case of vegetated wetlands, the boundary of other wetlands shall be the determined in the same manner as the edge of borderline vegetated wetlands in 310 CMR 10.55, as amended, unless the vegetation has been altered or removed. If the vegetation has been altered or removed, the determination of the edge of the wetland shall be made by determining the extent of hydric soils.
- 4.3 "Pond" shall have the same meaning as pond (Inland in DEP Regulations 310 CMR 10.0, as amended, except the minimum surface area is 5,000 square feet).
- 4.4 "Sufficient Information" shall mean the following requirements
- A. for plans:
1. seven complete copies of the permit application and supporting documents must be submitted;
  2. the plans submitted to the commission shall be high-lighted with transparent marker pen in the following manner:
    - i. Green: the edge of bordering vegetated wetlands;
    - ii. Blue: bank;
    - iii. Dashed blue: the edge of land subject to flooding;
    - iv. Yellow: the limit of the buffer zone;
    - v. Red: all culverts and discharges;
    - vi. Orange: the edge of other wetlands;
  3. The location of the consecutively numbered flags denoting wetland resources shall be shown on the plan and shall be certified by a registered land surveyor, registered sanitarian, or professional engineer;
  4. Elevations shall be shown in two foot contours;
  5. All offset distances from the proposed foundations(s), well(s), and septic system(s) to all wells, septic systems, wetland resources, property lines, stream, watercourses, drainage structures, or easements within 150 feet, shall be shown;
  6. All distances and % slope along septic system piping shall be shown;

7. Where septic systems are proposed, the maximum groundwater water elevation, and the elevation of the bottom of the leaching facility, the elevation of inlets, outlets and finish grades shall be given, as well as breakout calculations where the septic system is located on a slope;
8. All soil logs must be submitted showing the type of material, soil horizons, elevation of the existing grade, maximum ground water elevation, depth of hole, and location of percolation test, with corresponding elevation;
9. Plan scale shall be no less than 1" = 40';
10. All proposed grades must be shown;
11. The limit of work shall be shown on the plan;
12. All proposed structures within 100 feet of the resource areas shall be shown, and;
13. The assessor's lot and plot numbers and the subdivision lot number, where applicable, on the lot where work is proposed, shall be shown;
14. The estimated project cost in accordance with Section 8.9(c) of this By-law.

B. For the site inspection:

1. Adequate access must be granted to the commission, its agents and consultants, to determine the accuracy of the information submitted in the notice of intent;
2. The location of the proposed house building corners, driveway, leaching area for septic systems, and well(s) must be marked by labeled stakes in the field;
3. Lot corners shall be staked to enable the commission to find the lot;
4. All resource areas within 100 feet of all proposed work shall be marked by consecutively numbered tags;
5. The lot shall be marked in manner so as to enable the commission to locate the area of the proposed activity.

4.5 "Buffer Zone" shall mean the land extending 100 feet in any upland direction from the boundary of the resource areas protected under this By-law, as provided in Section 2.1, Other Wetlands as defined in Section 4.2 herein. A buffer zone itself a resource area protected under this By-law. Buffer zones extend in linear feet in the upland direction from the established boundary of any resource area.

- 4.6 “Regulated activity” means any activity conducted within wetland or a regulated buffer zone which may decrease wetland functions, including but not limited to construction, discharge of fill material, bulkheading, mining, excavating, draining, and dredging.
- 4.7 “Land In Agricultural Use” shall mean such land identified and defined as such in the current regulations of the Massachusetts Department of Environmental Protection at 310 C.M.R. § 10.40.

## **Section 5.0 Powers**

- 5.1 The commission shall consider all information in the record and issue a decision that will protect the resource area values listed in Section 1. The Commission may determine that:
- (A) The land where the activity is proposed is not significant to the resource area values listed in Section 1;
  - (B) The project may be approved as proposed;
  - (C) The project may be approved provided the work is done according to specific conditions;
  - (D) The work cannot be done in such a manner that would protect the resource area values listed in Section 1 and must be denied, or;
  - (E) The information available or the commission is not sufficient to make an informed, objective decision and the project must be denied without prejudice.
- 5.2 Buffer Zones: Buffer zones are presumed important to the protection of resources because activities undertaken in close proximity to resource areas have a high likelihood of adverse impact to these resources, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. The presumption of significance regarding a buffer zone may be overcome upon a clear showing that the buffer zone does not play a role in the protection of the interests of this By-law. In the event that the Commission determines that the presumption regarding buffer zones has been overcome, it shall make a written determination to this effect. No regulated activity shall be permitted within a buffer zone where said activity is likely to lead to harm to the resource area. The exemptions afforded to agricultural activities as described in 310 CMR Section 10.04 shall be allowed in the Buffer Zone.
- 5.3 No-Disturb Zone: The portion of a buffer zone extending 25 feet from the resource area or Other Wetland (existing in the buffer zone itself) is designated a No-Disturb Zone. No regulated activity shall be permitted in a No-Disturb Zone. Structures, including but not limited to porches, decks, pools, and sheds shall not be constructed or placed within a No-Disturb Zone. The exemptions afforded to agricultural activities as described in 310 CMR Section 10.04 shall be allowed in the No-Disturb Zone.
- 5.4 The Commission may allow certain regulated activities or structures in a No-Disturb Zone or a buffer zone where the applicant demonstrates that no practicable alternative exists to the proposed activity.
- 5.5 In no event, unless the Conservation Commission grants a variance pursuant to Section 15.0 herein, shall any wetland alteration be permitted to allow an applicant to meet any setback distance required in any applicable Rochester Zoning By-law or other law or regulation, including Title V of the Sanitary Code.

## **Section 6.0 Written Conditions**

Permits that are issued with conditions shall be issued on the same Order of Conditions as that issued pursuant to the Wetlands Protection Act. Conditions authorized solely by the provision of the By-law shall be in a separate section under the heading "additional conditions pursuant to the Town of Rochester Wetlands Protection By-Law."

## **Section 7.0 Exceptions/Exemptions/Emergencies**

7.1 The project plans and application required by this By-law shall not be required by emergency projects necessary for the protection of the health and/or safety of the public, provided that the threat to public health is so immediate that to comply with Section 2 would constitute a threat to the public health and/or safety, and

- (A) The work is performed or is ordered to be performed by an agency of the commonwealth or political subdivision thereof, and;
- (B) Advance notice shall be given to the commission prior to the commencement of work, and;
- (C) The commission shall have certified the project as an emergency project, and;
- (D) The work is performed only for the time and place certified by the commission for the limited purpose necessary to abate the emergency and;
- (E) The work is performed in a manner prescribed by the commission.

7.1.1 The application and permit required by this bylaw shall not be required for maintaining, repairing, or replacing, but not substantially changing, or enlarging, an existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph, or other telecommunication services, provided that written notice has been given to the Commission prior to commencement of work.

7.1.2 The application and permit required by this bylaw shall not be required for work performed for normal maintenance or improvement of land which is lawfully in agricultural use. Further, the application and permit required under this bylaw shall not be required for regulated activities where the work is necessary due to an agricultural emergency such as eliminating an imminent threat to a bog or water management system, restoring a bog or water management system that was damaged due to a storm or other sudden, unforeseen event or providing an emergency agricultural water source if existing source is suddenly and unforeseeably unusable. Provided, however, that notice has been provided to the Commission as soon as practicable under the circumstances and the procedures followed are in keeping with the current requirements for emergency projects promulgated by the Massachusetts Department of Environmental Protection under the Wetland Protection Act.

7.2 The commission may, after due notice, require a permit application pursuant to Section 2, revoke or modify any emergency project approval, and/or order restoration and mitigation measures, for failure to meeting the requirements of Section 7.1.

7.3 The commission may adopt emergency regulations under this By-law for limited durations after severe coastal storms, notice of which shall be provided as soon as possible after their adoption.

**Section 8.0 Consultants Fee**

- 8.1 The commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the commission for specific expert engineering and other consultant services deemed necessary by the commission to come to a final decision on the application. The fee is called to consultants fee.
- 8.2 The specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, including wildlife habitat evaluations, hydrogeological and drainage analysis, and environmental or land use law.
- 8.3 The commission may require the payment of the consultants fee at any point in the deliberations prior to a final decision.
- 8.4 The applicant shall pay the fee to the town to be put into a special purpose account established by the commission which may be drawn upon by the commission at one of its public meetings.
- 8.5 The commission is hereby authorized to charge for said fee when the notice of intent, proposes any of the following:
- (A) Five hundred (500) square feet or greater alteration of a coastal or inland resource area;
  - (B) Fifty (50) linear feet or greater of bank alteration to a coastal or inland waterway;
  - (C) Five hundred (500) square feet or greater alteration of land under a water body;
  - (D) The consultant fee shall be paid on a pro rata basis for that portion of the project cost applicable to those activities within resource areas protected by this by-law;
  - (E) Discharge of any pollutants into or contributing to surface or groundwater of the wetland resource area or buffer zone, or;
  - (F) Construction of any detention or retention basin, or water control structure.
- 8.6 The exercise of discretion by the commission in making its determination to require the payment of a fee shall be based upon its reasonable finding that additional information acquirable only through outside consultants would be necessary for the making of an objective decision.
- 8.7 The commission shall return any unused portion of the consultant fee to the applicant unless the commission decides at public meeting other action is necessary.
- 8.8 Any applicant aggrieved by the imposition of, or the amount of, the fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.
- 8.9.
- (A) The maximum consultant fee charged to reimburse the commission for reasonable costs and expenses shall be according to the following schedule:

<u>Project Cost</u>		<u>Maximum Fee</u>
up to	\$100,000	No Fee
\$100,001 -	\$500,000	\$2,500
\$500,000 -	\$1,000,000	\$5,000
\$1,000,001 -	\$1,500,000	\$7,500
\$1,500,001 -	\$2,000,000	\$10,000

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

8.10 Notwithstanding the provisions Section 8.9, no fee shall be assessed under this section for the construction of a single family dwelling, and appurtenant facilities thereto, on a lot less than 80,000 square feet in size, provided the only resource area impacted is land subject to coastal storm flowage or buffer zone to resource areas.

**Section 9.0 Fees**

Fees may be established by the commission, and may be amended, in consultation with the finance committee, subject to approval by the board for selectmen, for extensions and amendments to orders of conditions, and A-1 site inspections. Fees shall be effective for any request for extensions or amended orders of conditions or any A-1 Site Inspection Form filed ten days after approval of said fees by the board for selectmen. No such fees schedule shall be implemented unless a public hearing is held to discuss the fee.

**Section 10.0 Security**

10.1 As part of a permit issued under this By-law, an addition to any security required by any other municipal or state board, agency or official, the commission may require that the performance and observance of the conditions imposed hereunder be secured wholly or in part by one or more of the methods described below:

- a. By a proper bond or deposit of money or negotiable securities or other undertaking of financial responsibility sufficient in the opinion of the commission in a form approved by town counsel;
- b. By the conservation restriction, easement, or other covenant enforceable in a court of law, executed and duly recorded by the town of record, running with the land to the benefit of this municipality whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

**Section 11.0 Appeals**

- 11.1 A decision by the commission listed as "additional conditions pursuant to the Town of Rochester Wetlands Protection By-law" shall be reviewable in the superior court, in accordance with M.G.L. C. 249, S. 4, or as otherwise provided by law.
- 11.2 Conditions to an Order of Conditions not listed under "Additional Conditions Pursuant to Town of Rochester Wetlands Protection by-Law" are appealable to DEP pursuant or the Wetlands Protection Act, G.L.C. 131, S. 40, And DEP Wetland Regulations 310 CMR 10.00 et seq., as amended. Regulation procedures for the issuance of a final order.

**Section 12.0 Effective Date**

- 12.1 In addition to all other local, state, and federal permits and approvals that are required, a permit pursuant to this By-law shall be required for activity under the jurisdiction of this By-law upon its taking effect pursuant to G.L. Chapter 40, Section 32, or otherwise provided bylaw. However, this By-law shall not apply to any activity if:
  - a. A final Order of Conditions issued pursuant to the Massachusetts Wetlands Protection Act for that activity is in effect, and was issued prior to the effective date of this By-law; or,
  - b. A notice of intent pursuant to the Massachusetts Wetlands Protection Act was filed or that activity, prior to February 16, 1993, for which a final Order of Conditions was issued approving activity which was the subject of that notice of intent.

**Section 13.0 Severability**

The invalidity of any section or provision of this By-law shall not invalidate any other section or provision thereof, nor shall it invalidate any Order of Conditions Permit, which has previously been issued.

**Section 14.0 Requests for Site Inspection**

- 14.1 Prior to the filing of a request of determination of applicability, or notice of intent, an A-1 Site Inspection Form may be filed with the Conservation Commission for the purpose of informally identifying the wetland resource areas on the site. Such informal identification shall not be binding upon the Commission or on the town until the commission has issued a Determination of Applicability or an Order of Conditions for the subject site. Applicant for an A-1 may be made by the owner of said property, or any person authorized by the owner.
- 14.2 The A-1 Site Inspection Form shall be submitted to the Conservation Commission office showing the locus, street name where work is proposed and the owner's name and mailing address if not the same as the applicant. Copies of the A-1 Site Inspection Form shall be available in the Commission office.
- 14.3 Applications of five (5) or more acres must have a botanist or other qualified wetland scientist flag the wetlands prior to submitting the A-1 Site Inspection Form. All flags must be numbered and located on a site plan prepared by a registered engineer, registered land surveyor, or registered sanitarian in accordance with subsection 4.4(a) (3).
- 14.4 At the time of filing an A-1 Site Inspection Form, the applicant shall pay the appropriate filing fee established pursuant to Section 9.0.



**Section 15.0 Variances**

15.1 The Conservation Commission may, in its discretion, grant variances from the specific requirements of these regulations pursuant to this Section. The Conservation Commission may grant a variance from these regulations when an overriding public interest is demonstrated or when it is necessary to avoid so restricting the use of the property as to constitute an unconstitutional taking without compensation pursuant to the Massachusetts or United Constitution(s). The intent of this section is to ensure that reasonable use may be made of such property; however, the extent of use shall be limited in so far as is necessary to protect the resource(s) of interest, and to ensure that there is no foreseeable danger to the public health or safety. In all cases, the burden of proof shall be on the applicant to demonstrate maximum feasible compliance with the requirements of this Bylaw and regulations. The Conservation Commission may require mitigation to offset adverse impacts to resource areas protected by this by-law.