

**TOWN OF WENHAM  
WATER RESOURCES PROTECTION BYLAW**

**Section 1: Purpose**

The purpose of this bylaw is to maintain the quality of surface water and groundwater; to maintain the level of the groundwater table and water recharge areas for existing or potential water supplies; to protect persons and property against the hazards of flood water inundation; to protect and conserve natural features, resources, and amenities for the benefit and welfare of present and future citizens of the Town of Wenham.

This bylaw is intended to protect the water resources, wetlands, and adjoining areas in Wenham by prior review and control of activities deemed by the Conservation Commission likely to have a significant or detrimental effect upon the following values: public or private water supply, groundwater, fisheries, wildlife, wildlife habitat and the prevention and control of flooding, erosion, sedimentation, storm damage, or pollution (collectively, the "resource area values protected by the bylaw"). This bylaw is intended to utilize the Home Rule Authority of this town to protect additional resource areas, for additional values, with additional standards and procedures to augment those of the Wetlands Protection Act, G.L. Ch. 131, sec. 40 and Regulations there under, 310 CMR 10.00.

**Section 2: Jurisdiction**

Except as permitted in writing by the Conservation Commission or as provided in this bylaw, no person shall remove, fill, dredge, discharge into, build upon, otherwise alter, pollute, or degrade the following resource areas: any freshwater wetland as determined by vegetational community, soils composition or hydrologic regime including any marsh, wet meadow, bog, or swamp; any vernal pool, any lake, stream, reservoir, river, or pond, whether intermittent or continuous, natural or manmade; land under such waters; bank or beach; land subject to flooding or inundation by groundwater, surface water or storm water (collectively the "wetland resource areas protected by this bylaw") or lands within one hundred (100) feet of any of the aforesaid resource areas (collectively "the adjacent upland resource areas protected by this bylaw").

**Section 3: Exceptions**

The application and permit required by this bylaw shall not be required for maintaining, repairing, but not substantially changing, relocating or enlarging, any existing or lawfully located structure or facility used in the service of the public to provide electricity, gas, water, telephone, telegraph, or other telecommunication services, provided that, except in cases of public emergency, written notice and plan of work has been given to the Commission at least forty-eight (48) hours prior to commencement of work, and provided that the work is performed in accordance with standards adopted in regulations promulgated under this bylaw.

The application and permit required by this bylaw shall not apply to any emergency project necessary for public health and safety, provided that the work is to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof; provided that notice, oral or written, has been given to the Commission or its agent within 24 hours after commencement; provided that the Commission or its agent certifies the work as an

As amended May 2008

emergency project; provided that the work is performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency and provided that within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this bylaw. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

The application and permit required by this bylaw shall not be required for work performed for the normal maintenance or improvement of lands in lawful, active agricultural use, provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission. Other than as stated in this section, the exceptions provided in the Wetlands Protection Act, G.L. Ch. 131, sec. 40 and Regulations, 310 CMR 10.00 shall not apply under this bylaw.

#### **Section 4: Requests for Determination and Applications for Permits**

Written application shall be filed with the Commission to perform activities affecting wetland and upland resource areas protected by this bylaw. The permit application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their potential effects on the resource areas protected by this bylaw. No activities shall commence without receiving and complying with a permit issued pursuant to this bylaw.

Any person desiring to know whether or not a proposed activity or an area is subject to this bylaw shall request in writing a determination from the Commission. Such request for determination shall contain data and plans as specified by regulations adopted under this bylaw.

The Commission in an appropriate case may accept any request, application and plans filed under M.G.L. Ch. 131 Sec. 40 as having also been filed under this bylaw. An application for a permit or a request for determination shall be hand delivered or sent by certified mail to the Commission.

The Commission may reasonably request that a separate submittal be made under this bylaw if concerns which may arise pursuant to this by-law are not addressed as part of the original submittal.

The applicant shall pay fees as specified in regulations adopted under this bylaw. The fee is in addition to that required by the Wetlands Protection Act, M.G.L. Ch. 131, sec. 40. The Commission may waive the fees, costs, and expenses for an application or request filed by a government agency, or if the project serves a public purpose as determined by the Commission.

Upon receipt of a permit application or Request for Determination, the Commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the Commission for expert engineering and other consultant or legal services ("Consultant Services") deemed necessary by the Commission to come to a final decision on the application. This fee is called the "consultant fee". The Consultant Services may include, but are not limited to, performing or verifying the accuracy of resource area survey and delineation; analyzing resource area functions and values, including wildlife habitat evaluations, hydrogeologic and drainage analysis; and researching environmental or land use law.

The exercise of discretion by the Commission in making its determination to require the payment of a consultant fee shall be based upon its reasonable finding that additional information available through outside consultants is necessary for the making of an objective decision. Any applicant aggrieved by the imposition of, or amount of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws. The consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be based on the overall project costs and shall not exceed \$15,000.

### **Section 5: Notice and Hearings**

Any person filing a permit or other application or Request For Determination (“RFD”) with the Commission, shall give written notice by certified mail (return receipt requested) or hand delivered, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way or across a body of water (within 300 feet of the boundaries of the locus of the proposed project or within 100 feet of the property line on which the project is to be carried out, whichever is greater), including any in another municipality. The Commission may at its own discretion request that additional parties who may be affected by the proposed project (including but not necessarily limited to, those affected by or through changes in surface water runoff patterns, impact on the groundwater table, etc.) be notified according to the procedures established for abutters as described above. The notice to abutters shall have enclosed a copy of the permit application or request, with plans, or shall state where copies may be examined and obtained by abutters. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. The Commission shall conduct a public hearing on any permit application, Abbreviated Notice of Resource Area Delineation (ANORAD), or RFD, with written notice given at the expense of the applicant, five business days prior to the hearing, in a newspaper of general circulation in Wenham.

The Commission shall commence the public hearing within 21 days from receipt of a completed permit application, ANORAD, or RFD unless an extension is authorized in writing by the applicant or unless a hearing is delayed beyond 21 days by conditions beyond the reasonable control of the Commission, in which case the hearing will be held as soon as reasonably possible. The Commission shall have the authority to continue the hearing to a specific date announced at the hearing for reasons stated at the hearing, which may include the need for additional information from the applicant or from others as deemed necessary by the Commission in its discretion, to solicit or respond to comments and recommendations of the boards and officials listed in the following section. In the event the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

The Commission shall issue its permit, other order, or determination in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant. When a person requesting a determination is other than the owner, the request, the notice of the hearing and the determination itself shall be sent by the Commission to the owner as well as to the person making the request.

As amended May 2008

The Commission shall combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act, G.L. Ch. 131, §40, and Regulations, 310 CMR 10.00 in instances of concurrent jurisdiction.

### **Section 6: Coordination with Other Boards**

The Conservation Commission may choose to solicit the advice and opinions of other Town boards and officials in the course of its deliberations. Town boards and officials shall be entitled to file written comments and recommendations with the Commission at or before the public hearing. The Commission shall take any such comments and recommendations into account but shall not be bound by them. The applicant shall have the right to receive any comments and recommendations, and will be given the opportunity to respond to them at a hearing of the Commission, prior to final action.

Any application for a permit or determination shall at the same time be mailed or delivered to the Board of Selectmen, Planning Board, Zoning Board of Appeals, Board of Health and Building Inspector.

### **Section 7: Determinations, Permits, and Conditions**

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

Where no conditions are adequate to protect those resource values, the Commission is empowered to deny a permit for failure to meet the requirements of this bylaw. It may also deny a permit; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards, and other requirements in regulations of the Commission; or for failure to avoid or prevent unacceptable effects upon the resource area values protected by this bylaw. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

Lands within 200 feet of rivers, ponds and lakes, and lands within 100 feet of other resource areas, are presumed important to the protection of these resources because activities undertaken in close proximity to resource areas have a high likelihood of adverse impact upon the wetland or other resource areas, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse impacts from construction and use can include, without limitation, erosion, siltation, loss of groundwater

As amended May 2008

recharge, poor water quality, and loss of wildlife habitat. The Commission may therefore establish performance standards for protection of such lands including without limitation strips of continuous, undisturbed vegetative cover within the 200-foot or 100-foot area, or other form of work limit or setback to buildings, roads, landscaping and other features, unless the applicant convinces the Commission that the area or part of it may be disturbed without harm to the values protected by the bylaw. The specific size and type of protected area may be established by regulations of the Commission.

In the review of areas within 200 feet of rivers, ponds and lakes, no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this bylaw, has proved by a preponderance of the evidence that (1) there is no practicable alternative to the proposed project with less adverse effects, and that (2) such activities, including proposed mitigation measures, will have no significant adverse impact on the areas or values protected by this bylaw. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional, commercial, or industrial purpose), logistics, existing technology, costs of the alternatives, and overall project costs.

To prevent wetlands loss, the Commission shall require applicants to avoid wetlands alteration wherever feasible; shall minimize wetlands alteration; and, where alteration is unavoidable, shall require full mitigation which shall include, at a minimum, complete replacement or restoration of the lost wetlands.. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with adequate security, professional design, and monitoring to assure success, because of the high likelihood of failure of replication.

The Commission may require a wildlife habitat study of the project area, to be paid for by the applicant, whenever it deems appropriate, regardless of the type of resource area or the amount or type of alteration proposed. The decision shall be based upon the Commission's estimation of the importance of the habitat area considering (but not limited to) such factors as proximity to other areas suitable for wildlife, importance of wildlife "corridors" in the area, or possible presence of rare species in the area. The work shall be performed by an individual who at least meets the qualifications set out in the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.60).

The Commission shall presume that all areas meeting the definition of "vernal pools" under Section 9 of this bylaw, including the adjacent area, perform essential habitat functions. This presumption may be overcome only by the presentation of credible evidence which, in the judgment of the Commission, demonstrates that the basin or depression does not provide essential habitat functions. Any formal evaluation should be performed by an individual meeting the qualifications under the wildlife habitat section of the Wetlands Protection Act Regulations.

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one year

As amended May 2008

period, provided that a request for a renewal is received in writing by the Commission prior to expiration. Notwithstanding the above, a permit may identify requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all owners of the land.

For good cause the Commission may revoke any permit, other order, determination or other decision issued under this bylaw after notice to the holder of the permit, the public, abutters, and town boards, pursuant to Sections 5 and 6, and a public hearing. Amendments to permits or determinations shall be handled in the manner set out in the Wetlands Protection Act Regulations and policies thereunder.

The Commission in an appropriate case may combine the decision issued under this bylaw with the Order of Conditions, Order of Resource Area Delineation (ORAD), Determination of Applicability or Certificate of Compliance issued under the Wetlands Protection Act and Regulations.

No work proposed in any application shall be undertaken until the permit, ORAD or determination issued by the Commission with respect to such work has been recorded in the registry of deeds or, if the land affected is registered land, in the registry section of the land court for the district wherein the land lies, and until the holder of the permit certifies in writing to the Commission that the document has been recorded. If the applicant fails to perform, the Commission may record the documents itself.

### **Section 8: Regulations and Establishment of Fees**

After public notice and public hearing, the Commission may promulgate or amend rules and regulations to accomplish the purposes of this bylaw and may establish a schedule of filing fees and consultant fees to be paid by persons making requests for determinations or applications for permits hereunder, effective when approved by majority vote of the Commission and filed with the town clerk. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this bylaw.

### **Section 9: Definitions**

The following definitions shall apply in the interpretation and implementation of this bylaw.

**ADJACENT UPLAND RESOURCE AREA** The term “adjacent upland resource area” shall include all lands with 100 feet of wetland resource areas as enumerated in Section 2, except for perennial streams and rivers for which the adjacent upland resource area extends for 200 feet from the top of bank, and except for vernal pools and ponds under 10,000 square feet in area for which special adjacent upland resource area definitions are described below.

**ALTER** The term “alter” shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this bylaw:

- A. Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind

- B. Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics
- C. Drainage, or other disturbance of water level or water table
- D. Dumping, discharging, or filling with any material which may degrade or otherwise impact water quality
- E. Placing of fill, or removal of material, which would alter elevation
- F. Driving of piles, erection, expansion or repair of buildings, or structures of any kind
- G. Placing of obstructions or objects in water
- H. Destruction of plant life including cutting or trimming of trees and shrubs
- I. Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters
- J. Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater (including the application of pesticides and herbicides)
- K. Incremental activities which have, or may have, a cumulative adverse impact on the resource areas protected by this bylaw.
- L. Placing of materials which have a reasonable likelihood of contributing to pollution or of impacting water quality through surface run-off, groundwater infiltration or air borne transport including but not limited to yard and landscaping wastes and debris, slash, soils and sediments, woodchips, mulch, grit, gravel or other organic and inorganic materials.,

**BANK** The term “bank” shall include the land area which normally abuts and confines a water body; the lower boundary being the mean annual low flow level, and the upper boundary being the first observable break in the slope or the mean annual flood level, whichever is higher.

**PERSON** The term “person” shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to town bylaws, administrative agency, public or quasi-public corporation or body, this municipality, and any other legal entity, its legal representatives, agents, or assigns.

**POND** The term “pond” shall follow the definition of 310 CMR 10.04 except that the size threshold of 10,000 square feet shall not apply.

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

**VERNAL POOL** The term “vernal pool” shall include, in addition to scientific definitions found in the regulations under the Wetlands Protection Act, any confined basin or depression not occurring in existing lawns, gardens, landscaped areas or driveways which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 150 cubic feet of water (approximately 1000 gallons) at some time during most years, is free of adult predatory fish populations, and provides essential breeding and rearing habitat

As amended May 2008

functions for amphibian, reptile or other vernal pool community species, regardless of whether the site has been certified by the Massachusetts Division of Fisheries and Wildlife. The boundary of the resource area for vernal pools shall be 100 feet outward from the mean annual high-water line defining the depression, but shall not include existing lawns, gardens, landscaped or developed areas.

Except as otherwise required by this bylaw or regulations promulgated thereunder, definitions and regulations set forth in M.G.L. Ch. 131, sec. 40 and 310 Code of Mass. Regulations 10.00 effective November 1987 as amended from time to time shall apply.

### **Section 10: Security**

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

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, to be released in whole or in part upon issuance of a Certificate of Compliance for work performed pursuant to the permit

B. By accepting a conservation restriction, easement, or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of this municipality whereby the permit conditions shall be performed and observed before any lot may be conveyed. Unless postponement of the execution is due to circumstances beyond the reasonable control of the applicant and delays in conveyance would impose an unreasonable burden on the applicant.. This method shall be used only with the consent of the applicant.

### **Section 11: Enforcement**

No person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this bylaw, or cause, suffer, or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with a permit or an enforcement order issued pursuant to this bylaw.

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

The Commission shall also have authority to enforce this bylaw, its regulations, and permits issued thereunder by enforcement orders, violation notices, non-criminal citations under G.L. Ch. 40 §21D[lh1][lh2] and civil and criminal court actions. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement. Any person who violates the provisions of this bylaw may be

As amended May 2008

ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

Upon request of the Commission, the Selectboard and town counsel may take legal action for enforcement under civil law. Upon request of the Commission, the Chief of Police may take legal action for enforcement under criminal law.

Any person who violates any provision of this bylaw, or regulation, permits, or administrative orders issued thereunder, shall be punished by a fine of not more than \$300.00. Each day or portion thereof during which a violation continues or unauthorized fill or other alteration remains in place shall constitute a separate offense, and each provision of the bylaw, regulations, permits, or administrative orders violated shall constitute a separate offense.

As an alternative to criminal prosecution in a specific case, the Commission may issue citations under the non-criminal disposition procedure set forth in G.L. Ch. 40 21D, which has been adopted by the Town of Wenham in its general bylaws.

### **Section 12: Severability**

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

### **Section 13: Burden of Proof**

The applicant for a permit shall have the burden of proof of proving by a preponderance of credible evidence that the work proposed in the permit application will not have unacceptable significant effect upon the resource area values protected by this bylaw. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.

### **Section 14: Appeals**

A decision of the Commission shall be reviewable in the Superior Court in accordance with G.L. Ch. 249, sec. 4.

### **Section 15: Relation to the Wetland Protection Act**

This bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act, M.G.L. Ch. 131, sec. 40, and Regulations 310 CMR 10.00, there.