



# **TOWN OF WEST TISBURY WETLANDS PROTECTION BYLAW**

**Effective Date: June 3, 2004**

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# **West Tisbury Wetlands Protection Bylaw**

## **I. Purpose**

The purpose of this bylaw is to protect the wetlands, water resources and adjoining land areas in the Town of West Tisbury by prior review and regulation of activities deemed by the Conservation Commission (the "Commission") likely to have a significant or cumulative effect upon public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, prevention of water pollution, fisheries, shellfisheries, wildlife habitat, rare species habitat, agriculture, and aquaculture (collectively, the "resource values protected by this bylaw").

## **II. Jurisdiction**

Except as permitted by the Commission or as provided in this bylaw, no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas: any freshwater or coastal wetlands; marshes; wet meadows; bogs; swamps; vernal pool habitat; banks; lakes; ponds with a surface area of at least 2,500 square feet; rivers; streams; creeks; beaches; dunes; estuaries; the ocean; lands under water bodies; lands subject to flooding or inundation by groundwater or surface water; lands subject to tidal action, coastal storm flowage, or flooding; land within 100 feet of the aforesaid resource areas (the "Buffer Zone"); lands within 200 feet of perennial streams or rivers (the "Riverfront Area"); bordering land subject to flooding; or isolated land subject to flooding. Collectively these are the resource areas protected by this bylaw. Said resource areas shall be protected whether or not they border surface waters or other resource areas.

## **III. Exemptions and Exceptions**

No application or permit is required for:

A. Certain minor activities in the Buffer Zone or the Riverfront Area provided the activity is not within any other resource area:

1. Maintaining and repairing existing buildings and structures provided the footprint remains the same and there is no additional alteration of resource areas;
2. Maintaining and repairing existing roads (excluding bridges and culverts), provided there is no additional alteration of resource areas;
3. Maintaining and repairing unpaved pedestrian walkways for private use, provided there is no additional alteration of resource areas;
4. Maintaining and repairing stone walls and existing fencing, provided it will not constitute a new barrier to wildlife movement, and there is no additional alteration of resource areas;
5. Planting of native species of trees, shrubs, or groundcover, but excluding turf lawns;
6. Mowing of existing lawns, brush cutting existing meadows, and normal maintenance of trees and shrubs.

B. Work performed for normal maintenance or improvement of land in agricultural use as defined by the Wetlands Protection Act Regulations at 310 CMR 10.00;

C. 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, sewer, telephone, telegraph, or other telecommunication services, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to any performance standards and design specifications in regulations adopted by the Commission;

D. Emergency projects necessary for the protection of the health and safety of the public, provided that the work is to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof; provided that advance notice, oral or written, has been given to the Commission prior to commencement of work or within one (1) working day after commencement; provided that the Commission or its agent certifies the work as an emergency project; provided that the work is performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency; and provided that within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this bylaw. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

Other than stated in this section, the exemptions and exceptions provided in the Wetlands Protection Act (G.L. Ch. 131 §40) and Regulations (310 CMR 10.00) shall not apply under this bylaw.

#### **IV. Applications for Permits and Requests for Determination**

Written application shall be filed with the Commission to perform activities subject to this bylaw. The permit application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the resource area 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 may in writing request a determination from the Commission. The Commission shall accept a Request For Determination of Applicability ("RFD") under the Wetlands Protection Act, as amended, as a request under this bylaw. The RFD shall contain information and plans specified by the regulations of the Commission.

The Commission shall accept as the application and plans under this bylaw the Notice of Intent ("NOI") and plans filed under the Wetlands Protection Act (G.L. Ch. 131 §40), as amended, together with such other information and plans as is required by this bylaw and regulations issued hereunder.

Any person desiring to certify, for purposes of this bylaw, the limits of resource areas on a site may file a request for wetland delineation. This application shall include such information and plans as are deemed necessary by the Commission to describe and define the wetland resource areas. The Commission shall accept a Notice of Resource Area Delineation ("ANORAD") under the Wetlands Protection Act as a similar request under this bylaw.

At the time of an application request, the applicant shall pay a filing fee specified in regulations of the Commission. This fee is in addition to that required by the Wetlands Protection Act. The Commission, upon written request, may waive the filing fee for an application or request filed by a government agency.

As provided by G.L. Ch. 44 § 53G, the Commission may impose reasonable fees for the employment of outside consultants, engaged by the Commission, for specific expert services deemed necessary by the Commission to come to a final decision on an application submitted to the Commission pursuant to the requirements of the Wetlands Protection Act (G.L. Ch. 131 § 40), the West Tisbury non-zoning wetlands bylaw, Commission Act (G.L. Ch. 40 § 8C), or any other state or municipal statute, bylaw or regulation, as they may be amended or enacted from time to time.

Funds received by the Commission pursuant to these rules shall be deposited with the town treasurer who shall establish a special account for this purpose. Expenditures from this special account may be made at the direction of the Commission without further appropriation as provided in G.L. Ch. 44 §53G. Expenditures from this account shall be made only in connection with the review of a specific project or projects for which a consultant fee has been collected from the applicant.

Specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, hydrogeologic and drainage analysis, impacts on municipal conservation lands, and environmental or land use law. The consultant shall be chosen by, and report only to, the Commission and/or its Administrator.

The Commission shall give written notice to the applicant of the selection of an outside consultant, which 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 postmarked or hand 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. The fee shall be received in its entirety prior to the initiation of consulting services. The 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 Commission within ten (10) business days of the request for payment shall be cause for the Commission to determine that the application is administratively incomplete (except in the case of an appeal). The Commission shall state such in a letter to the applicant, copied to the DEP. No additional review or action shall be taken on the permit request until the applicant has paid the requested fee.

The applicant may appeal the selection of the outside consultant to the Board of Selectmen, who may disqualify the outside consultant selected only 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 Selectmen and a copy received by the Commission, so as to be received within ten (10) days of the date consultant fees were requested by the Commission. The required time limits for action upon the application shall be extended by the duration of the administrative appeal.

The Commission may waive the filing fee, consultant fee, and costs and expenses for a permit or other application filed by the Town of West Tisbury.

## **V. Notice and Hearings**

With the exception of an RFD, any person filing a permit or other application with the Commission at the same time shall give written notice thereof, by certified mail (return receipt requested) or hand delivery, to all abutters at their mailing addresses shown on the most recent records of the Assessors Office, including owners of land directly opposite on any public or private street or way, within 300 feet of the property line of the applicant, including any in another municipality or across a body of water. The notice to abutters shall have enclosed a copy of the application, with plans, or shall state where copies may be examined and obtained by abutters and other members of the public. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. When a person requesting a determination is other than the owner, the Applicant shall send a copy of the request, the notice of the hearing, and the determination itself to the owner.

When the content of the application requires referral to the Martha's Vineyard Commission ("MVC") for review as a Development of Regional Impact ("DRI") pursuant to G.L. Ch.831, the applicant will be provided with written notice of such referral. In the event of such referral, issuance by the Commission of its determination or permit will be held in abeyance, and any time requirements associated with such issuance will be tolled until the Commission is directed by the MVC to complete its review.

The Commission shall conduct a public hearing on any application and a public meeting on the RFD, with notice given at the expense of the applicant, at least five working days prior to the hearing, in a newspaper of general circulation in West Tisbury.

The Commission shall have authority to continue the hearing to a date announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information and plans required of the applicant deemed necessary by the Commission. 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 or determination in writing within 21 days of the close of the public hearing thereon unless the applicant authorizes an extension in writing.

The Commission may combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act (G.L. Ch.131 §40) and Regulations (310 CMR 10.00).

## **VI. Determinations, Permits and Conditions**

### **A. Determinations**

If, in response to an RFD, the Commission determines that the activities that are the subject of the application are within the area described in Section II and that such activities will alter the resource area, the applicant must then apply for a permit for such activities.

### **B. Permits**

If the Commission, after a public hearing, determines that the activities, which are the subject of the application, are likely to have a significant impact or cumulative effect upon the 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 that the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions. The Commission shall take into account the cumulative adverse effects of loss, degradation, isolation and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and clearly 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 significant or cumulative 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.

#### C. Conditions

1. Preamble. Land within any resource area is presumed important to the protection of resource areas because activities undertaken within this area have a high likelihood of adverse impact upon the wetland or other resource, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse impacts from construction and use can include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality, and degradation of wildlife habitat.

2. Performance Standards. The Commission may therefore establish performance standards for protection of such lands including, without limitation, strips of continuous, undisturbed vegetative cover within the resource 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, including but not limited to "no-build" setbacks with limitations on landscaping and other manipulation, and "no-disturbance" areas where no disruption at all is allowed during or after the work.

a. In the review of work within a resource area no permit issued hereunder shall authorize 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 that is reasonably available and can be accomplished 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.

b. 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 appropriate mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with adequate security, professional design and monitoring to assure success.

c. The Commission shall presume that all areas meeting the definition of "vernal pool habitat" under §VIII 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 must be performed by an individual meeting the qualifications under the wildlife habitat section of the Wetlands Protection Act Regulations.

#### D. Term

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission 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 period, provided that a request for a renewal is received in writing by the Commission prior to expiration.

#### E. Violations

If an applicant violates any condition of a permit or determination the Commission may revoke such permit, determination or other decision issued under this bylaw after public notice and public hearing, and notice to the holder of the permit or other decision. The Commission may issue amendments to permits or determinations for good cause shown.

#### F. Recording

No work proposed in any application shall be undertaken until the permit issued by the Commission with respect to such work has been recorded in the Dukes County 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 submits proof of recording and the recording information to the Commission.

### **VII. Regulations**

After public notice and public hearing, the Commission shall promulgate rules and regulations to implement the intent of this bylaw. However, 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 bylaw itself.

### **VIII. Definitions**

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

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 that may degrade water quality;
- E. Placing of fill, or removal of material, that would alter elevation;
- F. Driving of piles, erection, expansion of buildings or structures of any kind;
- G. Placing of obstructions or objects such as docks, boardwalks or floats in water;
- H. Destruction of plant life, including cutting or trimming of trees, shrubs and brush (mowing of existing lawns, brush cutting existing meadows, and normal maintenance of trees and shrubs is not considered destruction);
- I. Changing temperature, biological oxygen demand, chemical oxygen demand, or other physical, biological or chemical characteristics of any waters;
- J. Any activities, changes, or work that pollute in any way any body of water or groundwater;
- K. Activities that will have, a significant or cumulative adverse impact on the resource areas protected by this bylaw.

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.

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.

The term "pond" means any open body of fresh, brackish or salt water with a surface area of at least 2,500 square feet. Ponds may be either naturally occurring or man-made by impoundment, excavation, or otherwise. Ponds shall contain standing water except for periods of extended drought.

The following man-made bodies of open water shall not be considered ponds:

- (a) Swimming pools or other impervious man-made basins;
- (b) Individual gravel pits or quarries excavated from upland areas unless inactive for five or more consecutive years.

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.

The term "stream" means an open body of water, including brooks and creeks, which moves in a definite channel, natural or man-made, in the ground due to a hydraulic gradient, year-round or intermittent. Such bodies of running water that are intermittent (do not flow throughout the year) are streams, except for those that

serve only to carry the immediate surface runoff from stormwater or snowmelt. A portion of a stream may flow through a culvert or beneath a bridge.

The term "vernal pool habitat" shall include, in addition to 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 that, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, is free of adult predatory fish populations, and provides essential breeding and rearing habitat 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. This includes the area within 100 feet of the mean annual boundaries of such depressions. Such areas need not lie within other resource areas subject to this bylaw to be protectable hereby. These areas are essential breeding habitat and provide other extremely important wildlife habitat functions during non-breeding seasons particularly for a variety of amphibian species.

Except as otherwise provided in this bylaw or in regulations of the Commission, the definitions of terms and procedures in this bylaw shall be as set forth in the Wetlands Protection Act (G.L. Ch. 131 §40) and Regulations (310 CMR 10.00).

## **IX. Security**

As part of a permit issued under this bylaw, the Commission may require, in addition to any security required by any other municipal or state board, agency or official, 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 other than by mortgage deed. This method shall be used only with the consent of the applicant.

## **X. Enforcement**

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

The Commission shall have authority to enforce this bylaw, its regulations, and permits issued thereunder by violation notices, enforcement orders, non-criminal citations under G.L. Ch. 40 §21D, and civil and criminal court actions. Any person who violates provisions of this bylaw may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

Upon request of the Commission, the Board of Selectmen and town counsel shall take legal action for enforcement under civil law. Upon request of the Commission, the chief of police shall take legal action for enforcement under criminal law.

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 any provision of this bylaw, or regulations, permits or administrative orders issued there under, shall be punished by a fine of not more than \$300 per offense. 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.

In the alternative to criminal prosecution, the Commission may elect to utilize the non-criminal disposition procedure set forth in G.L. c.40, Section 21D and in the Town of West Tisbury By-law adopted December 1981 as amended May 24, 2000 and approved by the Attorney General's office on September 8, 2000.

#### **XI. Burden of Proof**

The applicant for a permit shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the permit application will not have unacceptable significant or cumulative effect upon the resource area values protected by this bylaw. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions or, in the Commission's discretion, to continue the hearing to another date to enable the applicant or others to present additional evidence.

#### **XII. Appeals**

A decision of the Commission shall be reviewable in the superior court in accordance with G.L. Ch. 249 §4.

#### **XIII. Relation to the Wetlands 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 (G.L. Ch. 131 §40) and Regulations (310 CMR 10.00) thereunder.

#### **XIV. 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, approval or determination that previously has been issued.

Provided that this bylaw shall not be applicable to activity that is the subject of a Notice of Intent filed with the Commission before the effective date of this bylaw, pursuant to the provisions of the Wetlands Protection Act, or take any other action relative thereto.

**EFFECTIVE DATE: JUNE 3, 2004**