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Chapter 119 WETLANDS PROTECTION

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[HISTORY: Adopted by Annual Town Meeting of the Town of Harvard 3-25-2006 by Art. 21. (This article repealed former Ch. 119, Wetlands Protection, adopted 3-28-1987 ATM by Art. 40, as amended.) Amendments noted where applicable.]

GENERAL REFERENCES

**Protective Bylaw – See Ch. 125
Subdivision control – See Ch. 130**

Wetlands Protection Bylaw Rules – See Ch. 147

119-1. Purpose

The purpose of this bylaw is to protect the wetlands, water resources and adjoining land areas in the Town of Harvard by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative impact upon resource area values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water quality, water pollution control, fisheries, shellfisheries, wildlife habitat, rare species habitat including rare plant species, agriculture, aquaculture, and recreation values deemed important to the community (collectively, the “resource area values protected by this bylaw”). This bylaw is intended to utilize the Home Rule authority of the Town of Harvard to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act (G.L. Ch. 131 sec. 40) and Regulations thereunder (310 CMR 10.00), subject, however, to the rights and benefits accorded to agricultural uses and structures of all kinds under the laws of the Commonwealth.

119-2. Jurisdiction

Except as permitted by the Conservation Commission (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 resources; and lands abutting any of the aforesaid resources as set out in section 119-9. (collectively, the “resources protected by this bylaw”). Said resources shall be protected whether or not they border surface waters.

119-3. Exemptions and Exceptions

A. The application and permit required by this bylaw shall not be required for work performed for normal maintenance or improvement of land in agricultural use.

B. 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 and provided that the work conforms to any performance standards and design specifications in regulations adopted by the Commission.

C. The application and permit required by this bylaw shall not be required for 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 24 hours 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.

D. Other than stated in this bylaw, the exceptions provided in the Wetlands Protection Act and Regulations shall not apply under this bylaw.

119-4. Applications and Fees

A. Written application shall be filed with the Conservation Commission to perform activities affecting resource areas protected by this bylaw. The permit application or Notice of Intent (NOI) shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the resource areas. No activities shall commence without receiving and complying with a permit issued pursuant to this bylaw, the Order of Conditions (OOC).

B. The Commission in an appropriate case may accept as the application and plans under this bylaw any application and plans filed under the Wetlands Protection Act and Regulations.

C. 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.

Such a Request for Determination (RFD) shall include information and plans as are deemed necessary by the Commission.

D. Any person desiring to know where a resource area or a wetland line lies may in writing submit an Abbreviated Notice of Resource Delineation (ANRAD) from the Commission.

Such a Request for Delineation shall include information and plans as are deemed necessary by the Commission.

E. At the time of an application, the applicant shall pay a filing fee specified in regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act and Regulations.

F. Upon receipt of an application or at any point during the hearing process, the Commission is authorized to require an applicant to pay a Consultant 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 specific consultant services may include, but are not limited to, performing or verifying the accuracy of resource area survey and delineation; researching environmental and land use laws; and analyzing resource area functions and values, including those of wildlife habitat, hydrogeology, and drainage.

G. Filing and/or Consultant Fees shall be deposited in separate accounts (a revolving fund) for uses set out in the vote establishing it. This account will be kept separate from the account established for filing fees paid under the state Wetlands Protection Act.

H. 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 to make an objective decision.

Any applicant aggrieved by the imposition of, or size of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

I. The Commission may waive the filing fee, consultant fee and costs and expenses for a permit or other application or RFD filed by a government agency, the town, or a non-governmental organization working the interest of the town.

119-5. Notice and Hearings

A. Any person filing a permit or other application or RFD with the Conservation Commission shall at the same time give to all Abutters (as described below) written notice thereof, delivered

by hand or by certified mail (return receipt requested) to their mailing addresses shown on the most recent applicable tax list of the assessors.

These Abutters include owners of land directly opposite on any public or private street or way, and abutters to the abutters 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 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.

B. 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.

C. The Commission shall conduct a public hearing on any permit application, NOI, ANRAD or RFD, with written notice given in a newspaper of general circulation in the Town, at the expense of the applicant, at least five business days prior to the hearing.

D. The Commission shall commence the public hearing within 21 days from receipt of a completed permit application, NOI, ANRAD or RFD unless an extension is authorized in writing by the applicant. The Commission shall have authority to continue the hearing to a specific date and time announced at the hearing, for reasons stated at the hearing, which may include the need for additional information from the applicant or other sources deemed necessary by the Commission in its discretion, based on comments and recommendations of the boards and officials listed in section 119-6.

E. The Commission shall issue its permit, order, delineation or determination (see section 119-7, Permits and Conditions) in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant.

F. The Commission in an appropriate case may combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act and the Regulations promulgated thereunder.

119-6. Coordination with Other Boards

A. Any person filing a permit application, NOI, ANRAD or RFD with the Conservation Commission may be required to provide a copy thereof, by certified mail (return receipt requested) or hand delivery, to the select board, planning board, board of appeals, board of health, town engineer, building inspector, fire chief or police chief.

A copy shall be provided in the same manner to the Conservation Commission of the adjoining municipality if the application pertains to property within 300 feet of that municipality.

An affidavit of the person providing notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. The Commission shall not take final action until the boards and officials have had 14 days from receipt of notice to file written comments and recommendations with the Commission, which the Commission shall take into account but which shall not be

binding on the Commission. The applicant shall have the right to receive any comments and recommendations and to respond to them at a hearing of the Commission prior to final action.

B. Any person filing a permit application, NOI, ANRAD or RFD with the Conservation Commission shall, if other permits from other boards are required for their project, file simultaneously with those boards. Any information or plans communicated to those boards shall also be sent to the Commission.

119-7. Permits and Conditions

A. 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 specific or cumulative effect upon the resource area values protected by this bylaw, the Commission, within 21 days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the Commission shall impose conditions that it deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions.

The Commission shall take into account the cumulative adverse effects of loss, degradation, isolation and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities.

B. 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. Resource Areas are presumed to be important for the protection of the resources enumerated in section 119-2 because activities undertaken in close proximity to those resource 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 operations 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 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 Resource Areas, 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.

D. In the review of Resource Areas, 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 that is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g. its residential, institutional, commercial, or industrial purpose), logistics, existing technology, costs of the alternatives, and overall project costs.

E. To prevent wetlands loss, the Commission shall require applicants to avoid wetlands alteration wherever feasible; to minimize wetlands alteration; and, where alteration is unavoidable, to install full 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 ensure success, being aware of the high likelihood of failure of replication.

F. The Commission is authorized, if it deems appropriate, to require an applicant to pay a fee for the reasonable costs borne by the Commission for a wildlife habitat study of the project area, 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, the importance of wildlife corridors in the area, or the possible presence of rare species in the area. The work shall be performed by an individual who meets at least the qualifications set out in the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.60). The Commission is further authorized to require an applicant or requester to pay the costs of an outside consultant, employed pursuant to the provisions of Massachusetts General Laws, Chapter 44, Section 53G, when it requires expert advice unavailable from municipal employees.

G. The Commission shall presume that all areas meeting the definition of "vernal pool" under section IX of this bylaw, including the 200-foot adjacent area, perform essential habitat functions.

This presumption may be overcome only by the presentation of credible evidence that, in the judgment of the Commission, demonstrates that the basin or depression does not provide essential habitat functions. Any formal evaluation shall be performed by an individual who meets at least the qualifications set out in the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.60).

H. A permit shall expire three years from the date of issuance, except as follows. Any permit may be renewed once for an additional one-year period, provided that the Commission prior to expiration receives a request for a renewal in writing. 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.

A permit may identify requirements that shall be enforceable for a stated number of years, in perpetuity, or until permanent protection is in place, and shall apply to current and also to subsequent owners of the land.

I. For good cause the Commission may revoke any permit, delineation, 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 V and VI of this bylaw and a public hearing. Amendments to permits, delineations or determinations shall be handled in the manner set out in the Wetlands Protection Act Regulations and policies thereunder.

J. The Commission in appropriate cases may combine the decision issued under the bylaw with the Order of Conditions (OOC), Order of Resource Area Delineation (ORAD), Determination of Applicability (DOA) or Certificate of Compliance (COC) issued under the Wetland Protection Act and Regulations.

K. No work proposed in any application shall be undertaken until the permit, OOC, ORAD or DOA issued by the Commission with respect to such work has been recorded in the Worcester Registry of Deeds or, if the land affected is registered land, in the registry section of the land court for Worcester County, 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 document.

119-8. Regulations

A. After public notice and public hearing, the Conservation Commission shall promulgate rules and regulations to accomplish the purposes of this bylaw, effective when voted 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.

B. At a minimum these regulations shall define key terms in this bylaw not inconsistent with the bylaw, and procedures governing the amount and filing of fees.

119-9. Definitions

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

The term “abutter” shall mean, in addition to the usual meaning of the term, owners of land directly opposite on any public or private street or way, and abutters to abutters within 300 feet of the property line of the applicant, including any in another municipality or across a body of water.

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

- Removal, excavation or dredging of soil, sand, gravel or aggregate materials of any kind
- Changing of preexisting drainage characteristics, flushing characteristics, sedimentation patterns, flow patterns or flood retention characteristics
- Drainage or other disturbance of water level or water table
- Dumping, discharging or filling with any material that may degrade water quality
- Placing of fill or removal of matter that would alter elevation
- Driving of piles, erection, expansion or repair of buildings or structures of any kind
- Placing obstructions or objects in water
- Destruction of plant life, including cutting or trimming of trees and shrubs other than minor activities as defined in the regulations to this bylaw
- Changing temperature, biochemical oxygen demand or other physical, biological or chemical characteristics of any waters
- Any activities, changes or work that may cause or tend to contribute to pollution of any body of water or groundwater
- Incremental activities that have, or may have, a 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 phrase “land in agricultural use” shall mean land within resource areas presently and primarily used in producing or raising the following agricultural commodities for commercial purposes:

1. Animals, including but not limited to livestock, poultry and bees;
2. Fruits, vegetables, berries, nuts, maple sap and other foods for human consumption;
3. Feed, seed, forage, tobacco, sod, nursery or greenhouse products and ornamental plants or shrubs; and
4. Forest products on land maintained in forest use, including but not limited to biomass, sawlogs and cordwood, but not including the agricultural commodities described in 310 CMR 10.4 (Agriculture)(a)1. through 3..

The abbreviated term “M.G.L.” shall mean the general laws of the Commonwealth of Massachusetts.

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 bylaw, administrative agency, public or quasi-public corporation or body, the Town of Harvard, and any other legal entity, its legal representatives, agents or assigns.

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.

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 “resource area” shall mean any wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds of any size; rivers; streams; creeks; beaches; dunes; estuaries; land subject to flooding; land under water bodies and lands within 200 feet of rivers, ponds, vernal pools, and lakes, and lands within 100 feet of other resources.

The term “Town” shall mean the Town of Harvard.

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 which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 200 cubic feet of water at some time during most years, is free of adult predatory fish populations, provides essential breeding and rearing habitat functions for amphibian, reptile or other vernal pool community species, and shows evidence of the presence of obligate vernal pool species, regardless of whether the site has been certified by the Massachusetts Division of Fisheries and Wildlife. The boundary of the resource area for any vernal pool shall be 200 feet outward from the mean annual high-water line defining the depression.

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

119-10. Security

A. 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:

1. By a proper bond or deposit of money or negotiable securities or other undertaking of financial responsibility sufficient in the opinion of the Commission; such security shall be released in whole or in part upon issuance of a Certificate of Compliance for work performed pursuant to the permit.
2. 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 the Town of Harvard 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.

119-11. Enforcement

A. 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.

B. 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.

C. The Commission shall have authority to enforce this bylaw, its regulations and permits issued thereunder by violation notices, non-criminal citations under M.G.L. Ch. 40 section 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.

D. Upon request of the Commission, the Town's Board of Selectmen and Town Counsel may take civil legal action to enforce the provisions of this bylaw. Upon request of the Commission, the Town's Chief of Police may criminally prosecute violations of this bylaw.

E. Town boards and officers, including any police officer of the Town or other officer having police powers, shall have authority to assist the Commission in enforcement.

F. Any person who violates any provision of this bylaw, or regulations, permits or administrative orders issued hereunder, shall be punished by a fine of not more than \$300 for each 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.

G. 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 section 21D.

119-12. Burden of Proof

A. 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 the bylaw. Failure to provide adequate evidence to the Conservation Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.

119-13. Appeals

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

119-14. 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 Wetland Protection Act (M.G.L. Ch. 131, section 40) and Regulations (310 CMR 1.00) promulgated thereunder.

119-15. 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, which previously has been issued.