

Chapter 237

WETLANDS PROTECTION

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[HISTORY: Adopted by the Town of Barnstable 11-7-1987, approved 12-3-1987 (Art. XXVII of Ch. III of the General Ordinances as updated through 7-7-2003). Amendments noted where applicable.]

GENERAL REFERENCES

Wastewater discharge — See Ch. 232.

Wells — See Ch. 397.

On-site sewage disposal systems — See Ch. 360.

Subdivision Rules and Regulations — See Ch. 801.

§ 237-1. Purpose. [Amended 2-3-2011 by Order No. 2011-045]

The purpose of this chapter is to protect wetlands and related water resources, and their values and functions, including, but not limited to, the following: public or private water supply; groundwater; storm damage prevention; flood control; erosion and sedimentation control; prevention of water pollution; wildlife habitat; shellfish; fisheries; recreation; in trustlands; aesthetics; agricultural and aquacultural values; and historical values (collectively, "the wetlands values protected by this chapter").

§ 237-2. Jurisdiction.

- A. Except as permitted by the Conservation Commission or as provided in this chapter in § 237-3, no person shall remove, fill, dredge, or alter in or within 100 feet of the following resource areas: surface water body, vegetated wetland or unvegetated wetland; any land under said waters; and any land subject to flooding or inundation by groundwater, surface water, tidal action or coastal storm flowage. In the event that the Commission determines that an activity occurring beyond the limit of jurisdiction noted above is having or has had a significant effect on the wetlands values of a resource area, the Commission may require a notice of intent or determination of applicability for that activity.

- B. In determining whether a resource area is subject to the provisions of this chapter, the origin of the wetland, whether natural or man made, is not a relevant factor.

§ 237-3. Exceptions.

- A. The permit and application required by this chapter shall not be required for maintaining, repairing, or replacing (but not substantially changing or enlarging), any existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph or other telecommunications services, sewage collection and traffic control, provided written notice has been given to the Commission prior to the commencement of work, and provided that the work conforms to performance standards, design specification, policy guidelines and other regulations adopted by the Commission.
- B. The permit and application required by this chapter shall not be required for normal maintenance or improvement of land or waters in an existing agricultural or aquacultural use. Expansion of existing uses in these areas or new uses in areas within the jurisdiction of this chapter will require a permit.
- C. The permit and application required by this chapter shall not apply to emergency projects necessary for the protection of wetlands values or 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. For this work, advance notice, oral or written, must be given to the Commission prior to or within 24 hours after the commencement of work. The Commission or its agent must certify the work to be an emergency project prior to the commencement of work. The work must be performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency, but in no instance shall the emergency period exceed 30 days. All emergency work must conform to the performance standards, design specifications, policy guidelines and other regulations adopted by the Commission. Within 21 days of the commencement of an emergency project, a permit application shall be filed with the Commission for review as provided in this chapter. 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.

§ 237-4. Applications for permits and requests for determination.

- A. Written applications shall be filed with the Commission to perform activities regulated by this chapter affecting resource areas protected by this chapter. The application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on wetlands, resource areas, and their values. No activities shall commence without receiving a permit issued pursuant to this chapter (except as provided in § 237-3).
- B. The Commission may, at its discretion, accept as the application and plans under this chapter the notice of intent and plans filed under the Wetlands Protection Act.

- C. Any person desiring to know whether or not a proposed activity of an area is subject to this chapter may, in writing, request a determination from the Commission. Such a request for determination shall contain data and plans specified by the regulations of the Commission.
- D. At the time of an application or request the applicant shall pay a filing fee specified in the regulations of the Commission. This fee is in addition to that required by the Wetlands Protection Act. The Commission may waive the filing fee and costs and expenses for an application or request filed by a government agency, or if the applicant can prove financial hardship, or other extenuating circumstances.

§ 237-5. Notice and hearings.

- A. Any person filing an application or a request for determination with the Commission shall give written notice thereof, within 14 days of the public hearing, by certified mail or hand delivery, to all abutters in accordance with the regulations of the Commission.
- B. The Commission shall conduct a public hearing on any application or request for determination. At the expense of the applicant, the Commission shall cause written notice of the hearing to be published at least five working days prior to the public hearing in a paper of general circulation in the Town of Barnstable.
- C. The Commission shall commence the public hearing within 21 days from the receipt of a completed notice of intent or request for determination. The Commission or its agents shall determine, for scheduling purposes only and in accordance with the submission regulations of the Commission, that the application or request is complete. The twenty-one-day deadline for a hearing may be extended by the Commission or its agents only with the assent of the applicant.
- D. The Commission shall issue its decision on the notice of intent in writing within 21 days of the close of the public hearing thereon. The Commission shall issue its decision on the request for determination in writing within 21 days of receipt of the request.
- E. The Commission in an appropriate case may combine its hearing under this chapter with the hearing conducted under the Wetlands Protection Act.
- F. The Commission may accept the applicant's request to continue the public hearing to a date and time certain announced at the hearing, for reasons stated at the hearing, which may include the receipt of additional information offered by the applicant deemed necessary by the Commission.

§ 237-6. Issuance or denial of permits; conditions.

- A. If the Commission, after a public hearing, determines that the proposed activities which are the subject of a notice of intent are not likely to have a significant or cumulative effect upon the wetlands values protected by this chapter, the Commission, within 21 days of the close of the public hearing, shall issue 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 wetlands values, and all activities shall be done in accordance with those conditions.

- B. The Commission is empowered to deny a permit for failure to meet the requirements of this chapter; for failure to submit necessary information and plans required or requested by the Commission; for failure to meet the design specifications, performance standards, policy guidelines or other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the wetlands values protected by this chapter; where it is deemed that the denial is necessary to preserve the environmental quality of resource areas; and where no conditions are adequate to protect those values. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

§ 237-7. Wetlands replication.

- A. In order to protect the values inherent in wetland areas, it is the intent of this chapter to preserve wetlands, surface water bodies and other resource areas as functioning natural ecosystems. Filling of wetlands is therefor prohibited except when mitigated by wetlands replication as permitted in this section. At its discretion, the Conservation Commission may permit activities involving wetlands replication that do not harm the wetlands values protected under this chapter.
- B. Wetlands replication in order to make lands buildable, as by fulfilling septic system setbacks, flood elevation requirements or other construction setbacks, or to achieve lot area requirements, is prohibited. Replication is prohibited in areas providing habitat for existing rare or endangered species as listed by the Massachusetts Natural Heritage Program.
- C. Replication may be permitted to provide access to otherwise buildable uplands. Replication may also be permitted when an overriding public purpose can be demonstrated. The creation of new wetlands may be permitted, without any concomitant wetlands filling, when the applicant can demonstrate that such creation will not harm existing wetlands or their values. Purposes for creating new wetlands include, but are not limited to, the absorption of stormwater runoff, improvement of wildlife habitat, stabilization of unvegetated intertidal areas, or aesthetic, experimental, or scientific purposes.
- D. No more than 2,500 square feet of wetland may be filled in accordance with this section. The replicated wetland must be at least equal in size to the wetland that is filled and properly vegetated. Where physically possible, replicated wetlands shall be made contiguous with existing natural wetlands. When a person owns abutting properties, any applications on the properties for wetlands replication submitted within the same calendar year shall be treated as one proposal for the purpose of evaluating wetlands replication, and the combined area to be filled shall not exceed 2,500 square feet.
- E. Due to the fact that replication is an experimental process and is subject to failure, the Commission may require any applicant requesting permission for wetlands replication to conduct a scientific monitoring program to last for a time period as determined by the Commission, but not to exceed five years. If said monitoring period is less than five

years, the Commission shall review the results at the end of the monitoring period to determine if additional monitoring is needed within the maximum five-year period. The applicant shall provide an escrow bond for the duration of the monitoring period plus one year to cover correction of any deficiencies revealed by the monitoring program. Said bond shall, at a minimum, be equal to the initial cost of the replication.

§ 237-8. Promulgation of standards, specifications and rules.

- A. After public notice and public hearing the Commission may, from time to time, promulgate performance standards, design specifications, policy guidelines and other rules and regulations to accomplish the purposes of this chapter. Failure of 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 chapter.
- B. Any performance standards, design specifications, policy guidelines or other rules and regulations promulgated under a lawfully adopted Wetlands Protection Ordinance of the Town of Barnstable which may be superseded by this chapter shall be considered a part of this chapter at the time of its adoption.

§ 237-9. Escrow and security.

- A. The Commission may require the establishment of an escrow account or other security running to the municipality, and sufficient as to form and surety in the opinion of the Commission's counsel, to secure faithful and satisfactory performance of work required by any permit, in such sum and upon such conditions as the Commission may require.
- B. Notwithstanding the above, the amount of such escrow account of security shall not exceed the estimated cost of the work required or the restoration of affected lands and properties if the work is not performed as required, whichever is greater. Forfeiture of any such escrow account or security shall be recoverable at the suit of the municipality in Superior Court. The Commission may, at its discretion, accept as security 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 Barnstable whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

§ 237-10. Enforcement.

- A. The Commission, its agents, officers, and employees shall have the authority to enter upon privately owned land for the purpose of performing their duties under this chapter. With the authority of the property owner or his designee, the Commission may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary.
- B. The Commission shall have the authority to enforce this chapter, its regulations, and permits issued thereunder by violation notices, administrative orders, and civil and criminal court actions.

- C. Upon request of the Commission, the Town Manager and Town Attorney 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.
- D. Upon request of the Commission, municipal boards and officers, including any police officer, natural resource officer, or other officer having police powers, shall have the authority to assist the Commission in enforcement.
- E. Any person who violates any provision of this chapter, regulations thereunder, or permits issued thereunder, shall be punished by a fine of not more than \$300. Each day or portion thereof during which a violation continues shall constitute a separate offense, and each provision of the chapter, regulations or permit violated shall constitute a separate offense.
- F. In the alternative to criminal prosecution, the Commission may elect to utilize the noncriminal disposition procedure set forth in MGL c. 40, § 21D.

§ 237-11. Burden of proof.

The applicant shall have the burden of proving by a preponderance of credible evidence that the work proposed in the application will not have an unacceptable significant and cumulative effect upon the wetland values protected by this chapter. 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.

§ 237-12. Relation to the Wetlands Protection Act.

This chapter is adopted under the Home Rule Amendment of the Massachusetts Constitution and the home rule statutes, independent of the Wetlands Protection Act (MGL c. 131, § 40), and regulations thereunder, except where specifically included herein.

§ 237-13. Definitions.

The following definitions apply to the interpretation of this chapter. Unless otherwise defined here, definitions found in 310 CMR also apply to this chapter.

AESTHETICS — Retention or improvement of natural conditions, including natural lighting, sound, odors and significant trees, as at the time are experienced by the general public from public ways, including waterways. Activities in or within 100 feet of any resource area shall not have significant effects on aesthetic values.

AGRICULTURE — Any work which produces food or other products for commerce or subsistence which occurs in, on, or within 100 feet of a resource area or which is directly or indirectly dependent upon wetlands values for proper agricultural functions, such as prevention of pollution or maintenance of adequate water flow for irrigation. Agriculture includes, but is not limited to the growing of crops, including cranberries, and the raising of livestock. Nonagricultural activities in or within 100 feet of resource areas shall not have a significant effect on existing agriculture. Notwithstanding this definition, new or expanded

agricultural activities shall not have a significant effect on other wetlands values identified in § 237-1 of this chapter.

ALTER — To change the condition of areas within jurisdiction of the Conservation Commission. Activities presumed to alter these areas, include, but are not limited to, the following:

- A. Removal, excavation or dredging if 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;
- E. Placing of fill or brush or removal of material;
- F. Erection of buildings, or structures of any kind; installation of piles except in accordance with pier maintenance regulations of the Commission;
- G. Destruction of plant life including the cutting of trees; application of pesticides or herbicides except in accordance with agricultural exemptions set forth in § 237-3;
- H. Changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water;
- I. Any activities, changes or work which pollute in any way any body of water or groundwater;
- J. Any activities that change the aesthetics of a resource area in a significant manner and for more than a temporary period.

AQUACULTURE — The growing, raising, breeding, storing, or producing of specified aquatic or marine organisms at specified locations for commercial, municipal, or scientific purposes as approved by appropriate agencies. Organisms in aquacultural use include, but are not limited to: shellfish, such as oysters, quahogs, clams, lobsters, mussels, scallops and crabs; finfish, such as trout, eel, herring, salmon, smelt and bass; amphibians, such as frogs; reptiles, such as turtles; seaweeds, such as Irish moss and dulse; edible freshwater plants, such as watercress; and plankton grown as a food source for other organisms. Activities in or within 100 feet of a resource area shall not have a significant effect on existing permitted aquaculture. Notwithstanding this definition, new or expanded aquacultural activities shall not have a significant effect on other wetlands values set forth in § 237-1 of this chapter.

COASTAL BANK — The first significant break in slope beyond the one-hundred-year storm elevation on a seaward face or elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other coastal wetland. The slope of the bank must be greater than an 18% and serve to contain storm flowage, rather than

being inundated by it, or function as a sediment source. A coastal bank may serve one of two functions:

- A. It may serve as a vertical buffer because of its height and stability which protects upland areas from storm damage and flooding. Activities shall not increase erosion of a coastal bank, either from above (by stormwater runoff, brushcutting or other means) or from below (by tidal action, wind and waves). Any project on such a coastal bank shall have no adverse impact on the stability of the coastal bank.
- B. Coastal banks composed of unconsolidated sediment and exposed to vigorous wave action serve as a source of sediment for dunes, beaches, barrier beaches and other coastal landforms. Naturally occurring wave action removes sediment from these banks to replenish coastal landforms. These landforms protect coastal wetlands and real property by reducing storm damage and flooding by dissipating storm wave energy. Any project on or within a coastal bank serving this function shall not have a significant effect on that bank's ability to serve as a sediment source.

CUMULATIVE EFFECTS — Activities regulated under this chapter which may be individually minor, but when considered in relation to other past, present or future activities in a given area may be significant in the aggregate.

EROSION AND SEDIMENTATION CONTROL —

- A. **EROSION CONTROL** — The ability of the wetland to buffer forces or processes which would threaten or cause to be threatened the stability of landforms and the soil and/or vegetation associated with wetlands and adjoining land areas, in particular, coastal and inland banks. Erosion can be caused by a wearing away of the surface soil or by undermining the interior portion of the landform. Activities in or within 100 feet of resource areas shall not have a significant effect on natural erosion processes.
- B. **SEDIMENTATION CONTROL** — The ability of wetlands to settle out sediments and other waterborne material by reducing water flow by passing it through vegetation or by diffusing flow and reducing velocity. Activities in or within 100 feet of resource areas shall not accelerate or impede the rate of natural sedimentation significantly.

FLOOD CONTROL — The ability of wetlands to absorb, store and slowly release floodwaters to minimize peak flood levels. Flooding can be caused by precipitation or a rising water table. Activities within 100 feet of resource areas shall not alter the flood control value of wetlands significantly.

GROUNDWATER — All subsurface water contained in natural geologic formations or artificial fill, including soil water in the zone of aeration. Activities in or within 100 feet of resource areas shall not significantly alter the existing quality or elevation of naturally occurring groundwater.

HISTORICAL VALUES — The importance of wetlands and adjoining land areas as sites often used for prehistoric and historic occupation, subsistence, industry, trade, agriculture, burial and other cultural purposes. Resource areas which are known to contain sites of historic or archaeological resources (as by being listed of the State Register of Historic Places, the Inventory of Historic and Archaeological Assets of the Commonwealth, and/or the Barnstable

Historical Commission's Historic Properties Inventory) are deemed to have historic value. Activities in or within 100 feet of resource areas shall not have a significant effect on historical values.

PERSON — Any individual, group of individuals, associations, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof to the extent subject to Town ordinances, administrative agency, public or quasi-public corporation or body, the Town of Barnstable, and any other legal entity, its legal representatives, agents, or assigns.

PRIVATE WATER SUPPLY — Any source or volume of surface or ground water demonstrated to be in private use or shown to have potential for private use, including ground or surface water in the zone of contribution around a private well. Activities in or within 100 feet of a resource area shall not have a significant effect on the quality of a private water supply.¹

PUBLIC WATER SUPPLY — Any source or volume of surface or ground water demonstrated to be in public use or approved for water supply pursuant to MGL c. 111, § 160 by the Department of Environmental Quality Engineering Division of Water Supply, or demonstrated to have a potential for public use, in addition to all surface and ground water in zones of contribution. Activities within 100 feet of resource areas shall not have a significant effect on the quality of a public water supply.

RECREATION — Any leisure activity or sport taking place in, on, or within 100 feet of a resource area which is dependent on the resource area and its values directly or indirectly for its conduct and enjoyment. Recreational activities include, but are not limited to, the following: noncommercial fishing and shellfishing, hunting, boating, swimming, walking, painting, birdwatching and aesthetic enjoyment. Structures and activities in or within 100 feet of a resource area shall not have a significant effect on public recreational values. Notwithstanding this definition, new or expanded recreational activities shall not have a significant effect on other wetlands values identified in § 237-1 of this chapter.

STORM DAMAGE PREVENTION — The ability of wetland soils, vegetation and physiography to prevent damage caused by water from storms, including but not limited to: erosion and sedimentation; damage to vegetation, property or buildings; or damage caused by flooding, waterborne debris or waterborne ice. Activities in or within 100 feet of a resource area shall not have a significant effect on storm damage protection.

SURFACE WATER BODY — Any area where water or ice stands or flows over the surface of the ground for at least five months of any calendar year except in times of severe, extended drought as defined in appropriate section of 310 CMR. Drainage ditches, exclusive of fish runs and intermittent streams, and impoundment areas which hold or pass water only during or for short periods following storms and which, owing to their relationship to groundwater, do not support wetland vegetation, are excluded from this definition.

TRUSTLANDS — Lands impressed with public trust rights protected by the commonwealth, including great ponds; and tidelands, being present and former submerged lands and tidal flats

1. Editor's Note: The former definition of "public trust rights," which immediately followed this definition, was repealed 2-3-2011 by Order No. 2011-045.

lying between the natural high-water mark and the state limit of seaward jurisdiction. Tidelands including both flowed and filled tidelands, and privately owned and publicly owned tidelands.

UNVEGETATED WETLAND RESOURCE AREAS — Coastal areas, such as flats and unvegetated intertidal areas; coastal and freshwater beaches, dunes and banks; and land subject to flooding. Also, inland areas subject to flooding which do not support wetland vegetation, but which store at least 1/4 acre feet of water to an average depth of six inches at least once a year, and land areas two feet or less vertically above the high-water mark of any lake or pond defined by 310 CMR. Does not include swimming pools, artificially lined ponds or pools, wastewater lagoons or stormwater runoff basins, the construction of which may be regulated, but do not themselves constitute regulated areas.

VEGETATED WETLANDS — Any area of at least 500 square feet where surface or ground water, or ice, at or near the surface of the ground support a plant community dominated (at least 50%) by wetland species.

WETLANDS REPLICATION — The creation of wetland, surface water body or other resource area to compensate for the filling or other loss or displacement of all or part of an existing wetland, surface water body or other resource area.

WILDLIFE HABITAT — Resource areas that provide breeding and nesting habitats, shelter, food and water to all plant and animal species dependent on wetlands for any portion of their life cycles. Includes resource areas identified as containing rare, threatened or endangered species as listed by the Massachusetts Natural Heritage Program. Structures and activities in or within 100 feet of any resource area shall not have a significant effect on wildlife habitat.

ZONE OF CONTRIBUTION — The segment of an aquifer that contributes significant quantities of ground or surface water to a water supply well.

§ 237-14. Severability.

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