

Memorandum

To: Jason Makofsky, Conservation Commission
From: Raphael Herz, Charter and Bylaw Review Committee
Date: March 25, 2002

Regarding Revisions Proposed by the Charter and Bylaw Review Committee to Article 30 and the Wetlands Protection Bylaw

Attached, please find a copy of a draft article version for submittal to the 2002 Fall Annual Town Meeting, and additional supporting materials.

This proposed article will seek to modify the bylaws so that the wetland protection bylaws are organized with other similar bylaws, and make other changes for clarity.

Generally, these proposed changes are summarized below:

- (a) Move the Article 30, section 2, as known as the Wetlands Protection Bylaw (WPB) from the area of the Bylaws on Appointed Officials to the more appropriate area on Property Regulations, into a new section 78;
- (b) Perform some minor editing revisions; and
- (c) Create a definition for Resource Area Values in the Definition section of the Wetlands Protection bylaw.

In the attached additional supporting materials, you will find a revised WPB, with many revisions, caused by (a), (b), and (c) above, included. The changes not reflected here below are the changes in Article 30 caused by the removal of article 2. Please note that Article 30, Conservation Commission, Section 1, Composition, Term of Office, will remain as is and is not being changed.

Please let me know if you have any questions [ph: 508-870-0312 x1-205; email: herz@mtpc.org]. I do look forward to hearing comments and suggestions from the commissioners.

To see if the Town will vote to move Section 2 of Article 30 in the Appointed Officials section of the Town of Natick By-Laws to a new Article 78 in the Property Regulations section of the By-Laws, change section references, and make minor changes in wording.

Motion: Amend the Town of Natick By-Laws as referenced in the text of the warrant article as follows:

1. Add a new by-law entitled:

ARTICLE 78

WETLANDS PROTECTION

2. Copy Sections 2.1 through 2.13 from Section 2 of Article 30 to new Article 78. Delete Section 2 of Article 30 in its entirety.

3. Make changes to phrases involving “Section 2” as follows:

From	To	Number of Occurrences
this Section 2	this by-law	1 in Section 2.2 1 in Section 2.4.1 1 in Section 2.5.6 3 in Section 2.12
	this by-law	2 in Section 2.1 1 in Section 2.2 1 in Section 2.3 1 in Section 2.4 1 in Section 2.5.1 1 in Section 2.6.2 1 in Section 2.6.3 3 in Section 2.7 1 in Section 2.8 3 in Section 2.9 2 in Section 2.11 1 in Section 2.13 3 in Section 2.13.1 3 in Section 2.13.2 2 in Section 2.13.3 1 in Section 2.13.4
Section 2.8	Section 8	1 in Section 2.6.1
Section 2.13.6	Section 13.6	1 in Section 2.6.3

4. Make changes to section labels as follows:

From	To
2.1 – Purpose and Intent	Section 1 Purpose and Intent
Make similar changes for Sections 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, and 2.13.	

2.4.1 – Emergency Projects.

4.1 **Emergency Projects -**

Make similar changes for Sections 2.4.2, 2.4.3, 2.5.1 thru 2.5.8, 2.6.1 thru 2.6.3, 2.8.1, 2.8.2, 2.13.1 thru 2.13.6

5. Add the following new definition in alphabetical order:

Resource Area Values. Values, including, without limitation: the protection of public water supply, private water supply and groundwater; the prevention and control of flooding, erosion and sedimentation; the prevention of storm damage; the prevention and control of pollution; the protection of water quality, agriculture and aquaculture; the protection of wildlife, wildlife habitat and Rare Species habitat including rare plant species; and the protection and promotion of aesthetic values, recreation values, education values, and similar concerns.

6. In new Section 1, in the first sentence, replace all words after “Resource Area Values” with the words “as defined below”.

7. In new Section 5.1, change “RDS” to “RDA”.

8. In new Section 9, delete the second to last sentence. In the last sentence, change “provision” to “provisions”.

Article 78 Wetlands Protection

Section 2.1 ~~___~~ **—Purpose and Intent**

The Purpose of ~~Section 2~~this by-law is to preserve and exercise jurisdiction over the Protected Resource Areas, as defined below, and adjoining land areas in the Town by means of the regulation and control of activities deemed by the Conservation Commission (the “Commission”) as likely to have significant or cumulative adverse effect on any or all Resource Area Values, ~~as defined below. which include, without limitation: the protection of public water supply, private water supply and groundwater; the prevention and control of flooding, erosion and sedimentation; the prevention of storm damage; the prevention and control of pollution; the protection of water quality, agriculture and aquaculture; the protection of wildlife, wildlife habitat and Rare Species habitat including rare plant species; and the protection and promotion of aesthetic values, recreation values, education values, and similar concerns.~~ Section 2 This by-law is intended to use the authority of the Town, under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule Statutes, to protect additional resource areas, independent of, and to provide more stringent protection by the Commission than that provided by M.G.L. Chapter 131, Section 40 (the “Wetlands Protection Act”) and the regulations issued thereunder, 310 CMR 10.00 (the “Wetlands Protection Regulations”).

Section 2.2 ~~—~~ **Definitions**

The definition of certain words used in the interpretation and implementation of ~~this Section 2~~this by-law follow. Terms used herein and not defined below, or elsewhere in ~~Section 2~~this by-law, or in the Rules and Regulations adopted by the Commission, shall be defined as provided in Section 200 of the Natick Zoning Bylaws, and if not defined in said Section 200, shall be defined as provided in the Wetlands Protection Act and the Wetlands Protection Regulations.

Alter/Alteration. This term includes, without limitation, the following activities when undertaken to, upon, within or affecting Protected Resource Areas and associated Buffer Zones:

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

Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, pollution distribution, 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 which may degrade water quality.

Placing of fill, or removal of material, that would change elevation.

Driving of piles, or placement, erection, or exterior repair of Structures.

Placing of obstructions or objects in water.

Destruction of plant life including cutting of trees.

Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters.

Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater.

Bank. 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.

Buffer Zone. Lands within 100 feet of any Protected Resource Area except floodplain land and Riverfront Area.

No Build Zone. Lands within 15 feet of any No Disturbance Zone.

No Disturbance Zone. Lands within 25 feet of any Protected Resource Area except floodplain and Riverfront Area.

Protected Resource Area. Any freshwater wetland as defined in M.G.L. Chapter 131, Section 40 and as determined by vegetational community, soil composition or hydrologic regime, bank, beach, marsh, wet meadow; bog or swamp lands bordering any creek, river, perennial stream, intermittent stream, reservoir, pond or lake; vernal pool; Riverfront Area; any floodplain; any lands under; or any lands subject to flooding or inundation by groundwater, surface water or storm flow.

Rare Species. All vertebrate and invertebrate animal and plant species listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife, or any successor organization, regardless of whether the site in which they occur has been previously identified by the Massachusetts Division of Fisheries and Wildlife.

Resource Area Values. Values, including, without limitation: the protection of public water supply, private water supply and groundwater; the prevention and control of flooding, erosion and sedimentation; the prevention of storm damage; the prevention and control of pollution; the protection of water quality, agriculture and aquaculture; the protection of wildlife, wildlife habitat and Rare Species habitat including rare plant species; and the protection and promotion of aesthetic values, recreation values, education values, and similar concerns.

Riverfront Area. As defined in 310 CMR 10.00, as amended.

Structure. A combination of materials assembled at a fixed location to give support or shelter such as a building, house, barn, garage, or shed. The word “Structure” shall be construed, where the context requires, as though followed by the words “or part or parts thereof”. However, in reference to the No Build Zone, “Structure” shall not include fences, retaining walls, decks, patios, gazebos, lawn furniture, children’s toys such as sandboxes and swing-sets, rip-rapped areas, driveways, parking areas, or the like.

Vernal Pool. This term includes all areas defined as vernal pool habitat under the Wetlands Protection Act and Wetlands Protection Regulations and all areas within the mean annual high water level of 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, is free of adult fish populations and provides breeding, rearing or other habitat functions for amphibians, reptiles or other vernal pool community species and the site has been certified or is certifiable by the Massachusetts Division of Fisheries and Wildlife, or any successor organization.

Section 2.3— Activities Requiring Approval

Except as otherwise provided hereunder, no person shall Alter any Protected Resource Area or the Buffer Zone thereof (hereafter, “Regulated Activity”), without first having received and complied with a permit issued pursuant to Section 2this by-law. Such permit shall be in the form of an Order of Conditions issued by the Commission in accordance with its Rules and Regulations.

Section 2.4— Exceptions

The application and permit required by Section 2this by-law shall not be required for the following activities, subject to the conditions provided below:

2.4.1— Emergency Projects. Projects necessary for the protection of the health and safety of the public, provided that:

the work that is to be performed has been ordered to be so performed by an agency of the Commonwealth or a political subdivision thereof;

advance written notice has been given to the Commission prior to the commencement of the work or within 24 hours after commencement in the event of extreme emergency;

and the Commission or its agent certifies the work as an emergency project, or fails to act within 10 business days after receiving written notice thereof.

The work to be performed shall be limited as to the time and place certified by the Commission and for the limited purposes necessary to abate the emergency. Notwithstanding the above exception, within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided in this Section 2this by-law. If any of the conditions specified above are not met, or if any of the conditions contained in any determination of the Commission regarding such project are not fulfilled, the Commission may,

after notice and a public hearing, revoke or modify any determination or order it has issued regarding an emergency project, and/or may order restoration and mitigation measures to be performed.

2.4.2 – Public Service Structures and Facilities. Maintenance, repair or replacement, without substantial change or enlargement, of existing and lawfully located structures or facilities used in the service of the public and used to provide electric, gas, water, storm drainage, sewer, telephone or other telecommunication services to the public, provided that written notice has been given to the Commission prior to commencement of work and provided that the work conforms to the Rules and Regulations of the Commission, including any performance standards and design specifications.

2.4.3 – Public Ways. Maintenance and repair of existing public ways, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to the Rules and Regulations of the Commission, including any applicable performance standards and design specifications.

Section 2.5 – Procedure and Fees

2.5.1 – Applications. All applications to perform Regulated Activities shall be in the form of a written Request for Determination of Applicability (“RDA”), a Notice of Intent (“NOI”), or both, as applicable, and shall be filed with the Commission pursuant to its Rules and Regulations. Any person desiring to know whether or not a proposed activity or an area is subject to Section 2 this by-law may file a RDS-RDA with the Commission, including information and plans as are deemed necessary by the Commission. All permit applications (i.e., “Notices of Intent”) shall include such information and plans as are deemed necessary by the Commission to describe the proposed Regulated Activities and their effects on Resource Area Values.

2.5.2 – Filing Fees. The Rules and Regulations of the Commission adopted hereunder shall require the payment of a fee at the time of filing a RDA, NOI, permit application and Certificate of Compliance. Such fee shall be in addition to that required by the Wetlands Protection Act. The filing fees collected hereunder shall be deposited in a dedicated account, for use only for wetland protection activities, from which the Commission may withdraw funds without further appropriation.

2.5.3 – Consultant Fees. The Commission, at the commencement of its process hereunder, or at any time during a hearing may require an applicant to pay a fee for the reasonable costs and expenses incurred or to be incurred by the Commission for specific expert engineering and other consultant services that the Commission deems are necessary to enable it to reach a final decision on the application. The exercise of discretion by the Commission in determining whether to require the payment of fees shall be based on a reasonable finding that additional information acquirable only through outside consultants is necessary for the making of an informed, objective decision. The specific consultant services may include, but are not limited to, performing or verifying the accuracy of Protected Resource Area survey and delineation; analyzing Protected Resource Area functions and values, including wildlife habitat evaluations, hydrogeologic and drainage analysis; and researching environmental, land use or other law.

Any applicant aggrieved by the imposition of, or the size of, the consultant fees, or any act related thereto, may appeal according to the provisions of the Mass. Gen. Laws.

2.5.4 – Waiver of Fees. The Commission may waive the filing fees, and costs and expenses for a RDA, NOI, or permit application filed by a government agency.

2.5.5 – Notice. The Rules and Regulations of the Commission adopted hereunder shall provide notice requirements for public hearings of the Commission and for applications to perform Regulated Activities, including the timing and contents of such notices.

2.5.6 - Hearing and Burden of Proof. The Commission shall commence the public hearing within 21 days from receipt of a completed RDA or NOI unless the applicant authorizes an extension in writing. In an appropriate case, the Commission may combine its hearing under ~~this Section 2~~this by-law with the hearing conducted under the Wetlands Protection Act and Wetlands Protection Regulations. The public hearing may be continued upon the request of the Applicant, or upon vote of the Commission, until such time that the Commission is satisfied that it has received sufficient evidence concerning all issues raised during the hearing to enable it to render a decision upon the application. To receive the approval of the Commission to conduct a Regulated Activity the applicant must establish by a preponderance of the evidence submitted during the hearing that the proposed Regulated Activity and any proposed mitigation will not have a significant or cumulative adverse effect on Resource Area Values.

2.5.7 - Decisions. The Commission shall issue a written decision within 21 days of the close of the public hearing, unless an extension is authorized in writing by the applicant. In rendering its decision the Commission shall take into account the cumulative adverse effects of loss, degradation, isolation, and replication of Protected Resource Areas throughout the Town and the watershed, resulting from past activities, permitted and exempt activities, and foreseeable future activities. The Commission may issue a permit to conduct the Regulated Activity with such conditions as it deems are necessary or desirable to insure that the proposed Regulated Activity will not have a significant or cumulative adverse effect on Resource Area Values. Alternatively, the Commission may deny a permit for the proposed Regulated Activity, stating in reasonable detail the reasons for its denial.

2.5.8 – Permits. No work proposed in any Notice of Intent shall be undertaken until the Order of Conditions issued by the Commission with respect to such work has been recorded in the registry of deeds or land court, and until the permit holder submits evidence of such recording to the Commission. A permit shall expire three years from the date of issuance, however, where recurring or continuous maintenance work is required, the Commission may issue a permit expiring five years from the date of issuance. Any permit may be renewed for periods of up to three years, provided that a request for renewal of the permit is received in writing by the Commission at least thirty (30) days prior to its expiration, and further provided that all requirements provided in the Rules and Regulations of the Commission are met. Notwithstanding the foregoing, the permit may contain 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 including successors. For good cause, the Commission may

revoke or modify a permit by following the procedure set forth above in connection of the initial issuance of such permit.

Section 2.6—Policies and Conditions

2.6.1 – Wetlands Replication. To prevent wetlands loss, the Commission shall require applicants to avoid wetlands Alteration wherever feasible, to minimize wetlands Alteration where the Commission determines that Alteration is necessary; and, where Alteration is unavoidable, the Commission shall require mitigation in the form of replication of not less than the amount of wetlands permitted to be Altered and not more than twice such amount; said amount of replication to be determined by the Commission in accordance with its Rules and Regulations. The construction of replication shall be designed and monitored by a registered engineer or a professional wetlands scientist, and adequate security shall be provided, in accordance with the provisions of ~~Section 2.8~~Section 8, to insure the proper construction of replication.

2.6.2 – No Disturbance and No Build Zones. No Alteration shall occur within a No Disturbance Zone, unless otherwise provided in a permit issued under ~~Section 2~~this by-law. Lands within a No Build Zone may be cleared of vegetation to the extent necessary to construct a permitted Structure located outside of such No Build Zone and the adjacent No Disturbance Zone; provided however that once such Structure is completed, no further Alteration, other than the growing of vegetation, shall occur in the No Build Zone. The Commission may require, as a condition of a permit issued hereunder, that deeds conveying any portion of the previously cleared No Build Zone contain a restriction running in perpetuity preventing any further Alteration in such No Build Zone upon completion of such nearby construction.

2.6.3 – Vernal pools. No Alteration shall occur within the 100-foot Buffer Zone of a Vernal Pool unless otherwise provided in a permit issued under ~~Section 2~~this by-law, and except as provided in ~~Section 2.13.6~~Section 13.6.

Section 2.7—Rules and Regulations

After public notice and public hearing, the Commission shall adopt rules and regulations to carry out the purpose and intent of ~~Section 2~~this by-law (the “Rules and Regulations”). The Rules and Regulations shall include procedures to conduct hearings, issue, deny, revoke and/or modify permits and to appeal, and shall also provide guidance generally to persons seeking to conduct a Regulated Activity. Such Rules and Regulations may also provide, as the Commission deems necessary, additional definitions and procedures not inconsistent with ~~Section 2~~this by-law and a schedule of fees to be charged, which may be based on estimated project cost including, but not limited to, building construction, site preparation, landscaping, and all site improvements. Such Rules and Regulations shall become effective when voted by the Commission and filed with the Town Clerk. Failure by the Commission to promulgate such Rules and Regulations, or a final unappealable decision by a court of the invalidity of any part of such Rules and Regulations, shall not act to suspend or invalidate the effect of ~~Section 2~~this by-law other than in accordance with such decision.

Section 2.8— Security

The Commission may require, in addition to any security required by any other municipal or state agency, that the performance and observance of the conditions imposed under a permit issued under ~~Section 2~~this by-law, including conditions requiring mitigation work, be secured wholly or in 30-7 part by one or more of the methods described below, or combinations thereof:

2.8.1 – Surety. 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.

2.8.2 – Restrictions. By a conservation restriction, easement, or other covenant executed and duly recorded by the owner of record, running with the land to the benefit of the Town whereby the permit conditions shall be performed and observed by all owners, including successors.

Section 2.9— Enforcement

Upon receipt of a RDA or NOI, the Commission or its agents shall have authority to enter upon privately owned land for the purpose of performing their duties under ~~Section 2~~this by-law and may make or cause to be made such examinations, surveys, or sampling as the Commission deems necessary. The Commission shall have the authority to enforce ~~Section 2~~this by-law and its Rules and Regulations, and the Commission, any member thereof, or its agent, may issue citations under the non-criminal disposition procedure set forth in G. L. Ch. 40 Sect 21D, which has been adopted by the Town in Article 92 of the Natick By-Laws, and by civil and criminal court actions. ~~Any person who violates provisions of this Wetlands Protection 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.~~ Any person who violates provisions of ~~Section 2~~this by-law 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.

Section 2.10— Appeals

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

Section 2.11— Severability

The invalidity of any section or provision of ~~Section 2~~this by-law shall not invalidate any other section or provision thereof, nor shall it invalidate a permit or determination, which previously has been issued. In the event any section or provision of ~~Section 2~~this by-law is declared invalid by a court of law, such section or provision shall nevertheless remain valid and in effect to the fullest possible extent under the law.

Section 2.12— Transition

The provisions of ~~this Section 2~~this by-law shall not apply to:

That work for which a Notice of Intent has been filed with, or an Order of Conditions has been obtained from, the Commission at the time of the effective date of ~~this Section 2~~this by-law, but

such work has not yet been commenced or completed, so long as such Order of Conditions issued for such work remains valid, unexpired and unmodified; and

The initial Notice of Intent filing for construction on an individual lot that is part of the development for which an Order of Conditions has been obtained from the Commission at the time of the effective date of ~~this Section 2~~this by-law but has not yet been commenced or completed, so long as the Order of Conditions remains valid, unexpired and unmodified, and provided further that the proposed work is, in the determination of the Commission, consistent with and not an expansion of the previously approved development.

~~Section 2.13~~— _____ Nonconforming Uses in the Areas Which May Be Regulated by the Commission Under ~~Section 2~~This By-law.

~~2.13.1~~ – Continuation. The lawful use of any Structure or land in the areas which may be regulated by the Commission under ~~Section 2~~this by-law existing at the time of the enactment or subsequent amendment of ~~Section 2~~this by-law may be continued, although such Structure or use did not conform with the provisions of ~~Section 2~~this by-law as adopted or amended.

~~2.13.2~~ – Extension. No increase in the extent of the nonconforming use of a Structure or land in areas which may be regulated by the Commission under ~~Section 2~~this by-law may be made beyond the limits of the property owned at the time of enactment or subsequent amendment of ~~Section 2~~this by-law, without applying for and receiving an Order of Conditions to permit such increase. Pre-existing, nonconforming Structures or uses in the areas which may be regulated by the Commission under ~~Section 2~~this by-law, may be extended or altered, provided, that no such extension or Alteration shall be permitted unless there is a finding by the Commission that such extension or Alteration is not substantially more detrimental than the existing nonconforming use to Protected Resource Areas.

~~2.13.3~~ – Abandonment. A nonconforming use in the areas which may be regulated by the Commission under ~~Section 2~~this by-law that has been abandoned or not used for a period of two years shall not be re-established and any future use shall conform with ~~Section 2~~this by-law.

~~2.13.4~~ – Changes. Once changed to a conforming use in the areas which may be regulated by the Commission under ~~Section 2~~this by-law, no Structure or land shall be permitted to revert to a nonconforming use.

~~2.13.5~~ – No Disturbance and No Build Zones. Where a prior existing Structure protrudes into, or a prior existing Alteration exists in, a No Disturbance Zone or No Build Zone, the Commission may permit the extension of such non-conforming Structure into, or further Alteration in, such zones, in accordance with its Rules and Regulations.

~~2.13.6~~ – Vernal Pools. Where a prior existing Structure protrudes into, or a prior existing Alteration exists within the 100-foot Buffer Zone of a Vernal Pool, the Commission may permit the extension of such non-conforming Structure into, or further Alteration within the 100-foot Buffer Zone of a Vernal Pool, in accordance with its Rules and Regulations.