

Enclosure (1) to ConCom letter – “2019 Draft”

**CITY OF MALDEN
WETLANDS PROTECTION ORDINANCE**

**2019 DRAFT
BASED ON MASSACHUSETTS ASSOCIATION OF
CONSERVATION COMMISSION 2006 MODEL BYLAW**

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City of Malden Wetlands Protection Ordinance

I. Purpose

The purpose of this Ordinance is to protect the wetlands, water resources, flood prone areas, and adjoining upland areas in the City of Malden by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect on resource area values, including but not limited to the following: ~~public or private water supply, groundwater supply,~~ flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, prevention and control of pollution, fisheries, shellfisheries, wildlife habitat, rare species habitat including rare plant and animal species, ~~agriculture, aquaculture,~~ and recreation values), deemed important to the community (collectively, the “resource area values protected by this Ordinance”).

This Ordinance is intended to utilize the Home Rule authority of this municipality so as to protect the resource areas under the Wetlands Protection Act (G.L. Ch.131 §40; the Act) to a greater degree, to protect additional resource areas beyond the Act recognized by the City as significant, to protect all resource areas for their additional values beyond those recognized in the Act, and to impose in local regulations and permits additional standards and procedures stricter than those of the Act 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 and other relevant ordinances of the City of Malden.

II. Jurisdiction

Except as permitted by the Conservation Commission no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the City’s resource areas, consisting of:

- 1) any isolated vegetated wetland,
- 2) any vernal pool,
- 3) any vegetated wetland bordering on any creek, river, stream, pond, lake or unlined canal;
- 4) any bank of a creek, river, stream, pond, lake or unlined canal;
- 5) any beach, fresh or salt water marsh, wet meadow, bog or swamp,
- 6) any land under any creek, river, stream, brook, unlined canal, pond, lake or reservoir,
- 7) any 100-foot buffer zone of the wetlands listed in 1 – 6 above,
- 8) any land subject to storm flowage, or flooding by groundwater or surface water, and
- 9) the 25-foot riverfront area.
- 10) ~~any~~

~~any freshwater or coastal wetlands, marshes, wet meadows, bogs, swamps, vernal pools, springs, banks, reservoirs, lakes, ponds of any size, beaches, dunes, estuaries, the ocean, and lands under water bodies; intermittent streams, brooks and creeks; lands adjoining these resource areas out to a distance of 100 feet, known as the buffer zone; perennial rivers, streams, brooks and creeks (see note 3); lands adjoining these resource areas out to a distance of 200 feet, known as the riverfront area; lands subject to flooding or inundation by groundwater or surface water; and lands subject to tidal action, coastal storm flowage, or flooding (collectively areas 1 – 9 above shall be known as the “resource areas protected by this Ordinance”). Said resource areas shall be protected whether or not they border surface waters.~~

III. Exemptions and Exceptions

The applications and permits required by this Ordinance 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 Conservation 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.

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The applications and permits required by this Ordinance 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 Ordinance. 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 Ordinance, the exceptions provided in the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00) shall not apply under this Ordinance.

IV. Applications and Fees

Written application shall be filed with the Conservation Commission to perform activities affecting resource areas protected by this Ordinance on forms developed by the Conservation Commission. 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 areas protected by this Ordinance. **No such application shall be accepted as complete before all permits, variances, and approvals required by ordinances of the City with respect to the proposed activity, at the time of such application, have been applied for and obtained. Such application shall also include any information submitted in connection with such permits, variances and approvals which is necessary to describe the effect of the proposed activity on the resources area(s)** No activities shall commence without receiving and complying with a permit issued pursuant to this Ordinance.

The Commission in an appropriate case may accept as the application and plans under this Ordinance any application and plans filed under the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00), but the Commission is not obliged to do so.

Any person desiring to know whether or not a proposed activity or an area is subject to this Ordinance may in writing request a determination from the Commission. Such a Request for Determination of Applicability (RDA) or Abbreviated Notice of Resource Area Delineation (ANRAD) filed under the Act shall include information and plans as are deemed necessary by the Commission.

The Commission may authorize a City Staff person (“the City Conservation Administrator”) to make determinations of completeness of applications submitted to the Commission and shall reject, within two (2) business days, those applications that do not meet minimum submittal completeness requirements of this Ordinance, regulations and application checklists.

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.

Pursuant to G.L. Ch. 44 §53G and regulations promulgated by the Commission, the Commission may impose reasonable fees upon applicants for the purpose of securing outside consultants including engineers, wetlands scientists, wildlife biologists or other experts in order to aid in the review of proposed projects. Such funds shall be deposited with the town treasurer, who shall create an account specifically for this purpose. Additional consultant fees may be requested where the requisite review is more expensive than originally calculated or where new information requires additional consultant services.

Only costs relating to consultant work done in connection with a project for which a consultant fee has been collected shall be paid from this account, and expenditures may be made at the sole discretion of the Commission. Any consultant hired under this provision shall be selected by, and report exclusively to, the Commission. The Commission shall provide applicants with written notice of the selection of a consultant, identifying the consultant, the amount of the fee to be charged to the applicant, and a request for payment of that fee. Notice shall be deemed to have been given on the date it is mailed or delivered. The applicant

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may withdraw the application or request within five (5) business days of the date notice is given without incurring any costs or expenses.

The entire fee must be received before the initiation of consulting services. Failure by the applicant to pay the requested consultant fee within ten (10) business days of the request for payment shall be cause for the Commission to declare the application administratively incomplete and deny the permit without prejudice, except in the case of an appeal. The Commission shall inform the applicant and Department of Environmental Protection (DEP) of such a decision in writing.

The applicant may appeal the selection of an outside consultant to the City Council, who may disqualify the consultant only on the grounds that the consultant has a conflict of interest or is not properly qualified. 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. The applicant shall make such an appeal in writing, and must be received within ten (10) business days of the date that request for consultant fees was made by the Commission. Such appeal shall extend the applicable time limits for action upon the application.

V. Notice and Hearings

A) Combination with State Law Hearing

The Malden Conservation Commission, in its discretion, may hear any oral presentation under this Ordinance at the same public hearing to be held under the provisions of Chapter 131 Section 40 of the Massachusetts General Laws.

B) Notice

Any person filing a permit or other application or RDA or ANRAD or other request with the Conservation Commission at the same time shall give written notice thereof, by certified mail (return receipt requested) or hand delivered, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, 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 City Council, Planning Board and for projects along the Malden River, the Friends of the Malden River and the Mystic River Watershed Association**. The notice shall state a brief description of the project or other proposal and the date of any Commission hearing or meeting date if known. The notice to abutters also shall include 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. 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.

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

C) Hearing:

~~The Commission shall conduct a public hearing on any permit application, RDA, or ANRAD with written notice given at the expense of the applicant, at least five business days prior to the hearing, in a newspaper of general circulation in the municipality.~~ The Commission shall commence the public hearing within 21 days from receipt of a completed permit application, RDA, or ANRAD unless an extension is authorized in writing by the applicant. The Commission shall have authority to continue the hearing to a specific date announced at the hearing, for reasons stated at the hearing, which may include the need for additional information from the applicant or others as deemed necessary by the Commission in its discretion, based on comments and recommendations of the boards and officials listed in §VI.

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D) Proof:

The applicant shall have the burden of proof of providing by a preponderance of credible evidence that:

- (1) the activity proposed in the Notice of Intent will not cause adverse impacts to any of the interests or values intended to be protected by this Ordinance, and
- (2) any resources identified in A Notice of Resource Area Determination have been accurately delineated.

Failure to provide the Commission adequate evidence for it to determine the impacts of any proposed activity or the extent of resources shall be sufficient cause for the Commission to deny permission or to grant permission or make any determination with such conditions as it deems reasonable, necessary or desirable to carry out the purposes of this Ordinance; or to postpone or continue the hearing to another date certain to enable the applicant and others to present additional evidence, upon such terms and conditions as deemed by the Commission to be reasonable.

E) . Continuances:

The Commission may continue a public hearing or public meeting in the following situations:

1. With consent of the applicant, to and agreed-upon date which shall be announced at the hearing; or
2. Without consent of the applicant, to a specific date for reasons state at the hearing, including but not limited to the need to receive additional information from the applicant or others; and

Any application that expires would require refileing of the Notice of Intent or ANRAD.

The Commission shall issue its permit, other order or determination in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant. The Commission in an appropriate case may combine its hearing under this Ordinance with the hearing conducted under the Wetlands Protection Act (G.L. Ch.131 §40) and regulations (310 CMR 10.00).

VI. Coordination with Other Boards

Any person filing a permit application, RDA, or ANRAD with the Conservation Commission shall provide a copy thereof at the same time, by certified mail (return receipt requested) or hand delivery, to the City Council, Planning Board, Board of Appeals, Board of Health, City Engineer, and Building Inspector. A copy shall be provided in the same manner to the Commission of the adjoining municipality, if the application or RDA 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 above boards and officials have had 14 days from receipt of notice to file written comments and recommendations with to 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.

VII. Permits and Conditions

If the Conservation Commission, after a public hearing, determines that the activities which are subject to the permit application, or the land and water uses which will result therefrom, are likely to have a significant individual or cumulative effect on the resource area values protected by this Ordinance, the Commission, within 21 days of the close of the hearing, shall issue or deny a permit for the activities requested. The Commission shall take into account the extent to which the applicant has avoided, minimized and mitigated any such effect. The Commission also shall take into account any loss, degradation, isolation, and replacement or replication of such protected resource areas elsewhere in the community and the watershed, resulting from past activities, whether permitted, unpermitted or exempt, and foreseeable future activities.

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If it issues a permit, the Commission shall impose conditions which the Commission deems necessary or desirable to protect said resource area values, and all activities shall be conducted in accordance with those conditions.

Where no conditions are adequate to protect said resource area values, the Commission is empowered to deny a permit for failure to meet the requirements of this Ordinance. It may also deny a permit: for failure to submit necessary information and plans requested by the Commission; for failure to comply with the procedures, design specifications, performance standards, and other requirements in regulations of the Commission; or for failure to avoid, minimize or mitigate unacceptable significant or cumulative effects upon the resource area values protected by this Ordinance. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing. The Commission may waive specifically identified and requested procedures, design specifications, performance standards, or other requirements set forth in its regulations, provided that: the Commission finds in writing after said public hearing that there are no reasonable conditions or alternatives that would allow the proposed activity to proceed in compliance with said regulations; that avoidance, minimization and mitigation have been employed to the maximum extent feasible; and that the waiver is necessary to accommodate an overriding public interest or to avoid a decision that so restricts the use of the property as to constitute an unconstitutional taking without compensation.

In reviewing activities within the buffer zone, the Commission shall presume the buffer zone is important to the protection of other resource areas because activities undertaken in close proximity have a high likelihood of adverse impact, 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 loss of wildlife habitat. The Commission may establish, in its regulations, design specifications, performance standards, and other measures and safeguards, including setbacks, no-disturb areas, no-build areas, and other work limits for protection of such lands, including without limitation strips of continuous, undisturbed vegetative cover, unless the applicant convinces the Commission that the area or part of it may be disturbed without harm to the values protected by this Ordinance.

In reviewing activities within the riverfront area, the Commission shall presume the riverfront area is important to all the resource area values unless demonstrated otherwise, and no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this Ordinance, 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 Ordinance. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional, commercial, or industrial), logistics, existing technology, costs of the alternatives, and overall project costs.

To prevent resource area loss, the Commission shall require applicants to avoid alteration wherever feasible; to minimize alteration; and, where alteration is unavoidable and has been minimized, to provide full mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with specific plans, professional design, proper safeguards, adequate security, and professional monitoring and reporting to assure success, because of the high likelihood of failure of replication. The Commission may require a wildlife habitat study of the project area, to be paid for by the applicant, whenever it deems appropriate, regardless the type of resource area or the amount or type of alteration proposed. The decision shall be based upon the Commission’s estimation of the importance of the habitat area considering (but not limited to) such factors as proximity to other areas suitable for wildlife, importance of wildlife “corridors” in the area, or actual or possible presence of rare plant or animal species in the area. The work shall be performed by an individual who at least meets the qualifications set out in the wildlife habitat section of the Wetlands Protection Act regulations (310 CMR 10.60).

The Commission shall presume that all areas meeting the definition of “vernal pools” under §XII of this Ordinance, including the adjacent area, perform essential habitat functions. This presumption may be

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overcome only by the presentation of credible evidence which, in the judgment of the Commission, demonstrates that the basin or depression does not provide essential habitat functions. Any formal evaluation should be performed by an individual who at least meets the qualifications under the wildlife habitat section of the Wetlands Protection Act regulations.

A permit, Determination of Applicability (DOA), or Order of Resource Area Delineation (ORAD) shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one-year period, provided that a request for a renewal is received in writing by the Commission prior to expiration. Notwithstanding the above, a permit may identify requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all present and future owners of the land.

For good cause the Commission may revoke any permit, DOA, or ORAD or any other order, determination or other decision issued under this Ordinance after notice to the holder, the public, abutters, and city boards, pursuant to §V and §VI, and after a public hearing.

Amendments to permits, DOAs, or ORADs shall be handled in the manner set out in the Wetlands Protection Act regulations and policies thereunder.

The Commission in an appropriate case may combine the decision issued under this Ordinance with the permit, DOA, ORAD, or Certificate of Compliance (COC) issued under the Wetlands Protection Act and regulations.

No work proposed in any application shall be undertaken until the permit, or ORAD issued by the Commission with respect to such work has been recorded in the registry of deeds or, if the land affected is registered land, in the registry section of the land court for the district wherein the land lies, and until the holder of the permit certifies in writing to the Commission that the document has been recorded. If the applicant fails to perform such recording, the Commission may record the documents itself and require the Applicant to furnish the recording fee therefore, either at the time of recording or as a condition precedent to the issuance of a COC.

VIII. Security

As part of a permit issued under this Ordinance, in addition to any security required by any other municipal or state board, agency, or official, the Conservation 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 both of the methods described below:

- A. By a proper bond, deposit of money or negotiable securities under a written third-party escrow arrangement, 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 COC 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.

IX. Appeals

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

X. Responsibility for Compliance After Ownership Transfers

After the recording of a Notice of Violation, Order or Determination, any person who purchases, inherits, or otherwise acquires real estate upon which work has been done in violation of the provisions of this

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Ordinance or in violation of any Order or Determination issues under the Ordinance shall forthwith comply with such Order or Determination and also restore such land to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such **person solely for a violation occurring before transfer of ownership** unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.

XI. Regulations

After public notice and public hearing, the Conservation Commission shall promulgate rules and regulations to effectuate the purposes of this Ordinance, effective when voted and filed with the city 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 Ordinance. At a minimum these regulations shall reiterate the terms defined in this Ordinance, define additional terms not inconsistent with the Ordinance, and impose filing and consultant fees. The **City Council shall have the right to request changes to the Conservation Commission’s regulations by written correspondence, or by amending this by-law.**

XII. Definitions

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

The term “agriculture” shall refer to the definition as provided by G.L. Ch. 128 §1A.

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

- A. Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind
- B. Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics
- C. Drainage, or other disturbance of water level or water table
- D. Dumping, discharging, or filling with any material which may degrade water quality
- E. Placing of fill, or removal of material, which would alter elevation
- F. Driving of piles, erection, expansion or repair of buildings, or structures of any kind
- G. Placing of obstructions or objects in water
- H. Destruction of plant life including cutting or trimming of trees and shrubs
- I. Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters
- J. Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater
- K. Incremental activities which have, or may have, a cumulative adverse impact on the resource areas protected by this Ordinance.

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 city ordinances, 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” 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 animals and all plant species listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife, regardless whether the site in which they occur has been previously identified by the Division.

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The term “unlined canal” shall refer to any section of the modified channel of a perennial stream or river, including the Malden River, that is not entirely contained on two-sides and below by a concrete or metal culvert or channel. Sections of such streams or rivers that are contained by rip-rap or historic fill shall be considered unlined canals.

The term “vernal pool” shall include, in addition to scientific definitions found in the regulations under the Wetlands Protection Act, any confined basin or depression not occurring in existing lawns, gardens, landscaped areas or driveways which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 200 cubic feet of water at some time during most years, 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. The boundary of the resource area for vernal pools shall be the mean annual high-water line defining the depression.

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

XIII. Enforcement

No person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this Ordinance, 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 Ordinance.

The Conservation Commission, its agents, officers, and employees shall have authority to enter upon privately owned land for the purpose of performing their duties under this Ordinance 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 Ordinance, its regulations, and permits issued thereunder by letters, phone calls, electronic communication and other informal methods, violation notices, non-criminal citations under G.L. Ch. 40 §21D, and civil and criminal court actions. Any person who violates provisions of this Ordinance 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 City Council and city solicitor 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. **Upon recommendation of the Commission, the City Council may employ Special Counsel to assist the Commission in carrying out the legal aspects, duties, and requirements of this Ordinance and promulgated regulations.**

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 Ordinance, or regulations, permits, or administrative orders issued thereunder, shall be punished by a fine of not more than \$500 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 this Ordinance, regulations, permits, or administrative orders violated shall constitute a separate offense. **The City shall be the beneficiary of all fines on account of the violation of this Ordinance or promulgated regulations in order to defray the expense of enforcing the same.**

As an alternative to criminal prosecution in a specific case, the Commission may issue citations with specific penalties pursuant to the non-criminal disposition procedure set forth in G.L. Ch. 40 §21D, which has been adopted by the City in § [XXXXX] of the general ordinances.

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XIV. Relation to the Wetlands Protection Act

This Ordinance 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. It is the intention of this Ordinance that the purposes, jurisdiction, authority, exemptions, regulations, specifications, standards, and other requirements shall be interpreted and administered as stricter than those under the Wetlands Protection Act and regulations.

XV. Severability

The invalidity of any section or provision of this Ordinance shall not invalidate any other section or provision thereof, nor shall it invalidate any permit, approval or determination which previously has been issued. **The captions used herein are for convenience only and are expressly intended to have no legal significance.**

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SPW Note: This version used the Massachusetts Association of Conservation Commission’s 2006 Model Bylaw / Ordinance as a starting point. Significant additions or deletions are highlighted. Most of the additions are language proposed in the draft forwarded by the Malden Conservation Commission.

The most significant new addition is including a definition for and protection of “unlined canals” in order to ensure protection of the Malden River and the natural areas that have come into being along its re-aligned channel. The straightening of the Malden River over 100 years ago created man-made embankments of both natural and fill material. The Amelia Earhart Dam’s installation in the 1960’s eliminated the daily tidal influence, converting this area primarily into a flood storage basin rather than a tidal river. Despite these major man-made interventions in the riverine ecology, the Malden River and its current banks provide significant habitat to migratory birds including swans, Canada geese and crowned night herons. The associated uplands and wetlands provide habitat to muskrats, turtles and coyotes. Carp and alewife have been observed in the Malden River and the Townline Brook at the Medford line. The Malden River has also been increasing used as a recreational amenity by rowing crews and for passive observation of wildlife for those using the growing trail network along its uplands.

SPW Note on Section XIII – Enforcement: The MACC section was adapted for this section rather than the more detailed schedule of fines in the draft originally forwarded by the Conservation Commission.

MACC Notes

1. This model bylaw is merely a skeleton. The regulations actually adopted by the Conservation Commission will add the flesh and blood of the local wetlands program.
2. The town may regulate for recreational impact, but we do not recommend denial of a permit for this reason alone. Also, avoid regulating for the purpose of protecting “navigation.” See **Fafard v. Conservation Commission of Barnstable**, 432 Mass. 194 (2000). We do not suggest regulating for aesthetics unless there are special circumstances as are set forth in the Nantucket bylaw.
3. Optional additional protection for intermittent streams. In some communities, it may be reasonable to extend 200-foot riverfront area protection to intermittent streams, brooks and creeks. To do so, delete the words “intermittent streams, brooks and creeks” just before “lands adjoining these resource areas out to a distance of 100 feet,” delete the word “perennial,” and insert the words “whether perennial or intermittent” just before “lands adjoining these resource areas out to a distance of 200 feet.”
4. Note how the buffer zone is around wetlands and non-flowing water bodies; the riverfront is around flowing water bodies; and tidal and flooded areas have no buffer zone. Note also that under the bylaw the buffer zone and the riverfront areas are “resource areas” in their own right, triggering full jurisdiction and protectable in their own right.
5. The Attorney General interprets state laws encouraging agriculture as pre-empting the field of regulation by local bodies. On this theory, local wetlands bylaws must provide the same level of exemption as is provided by the regulations under the Wetlands Protection Act and they must do this for the breadth of agriculture as defined in state statutes. The MACC model bylaw reflects this state authority. It would be wise to check with the Attorney General’s office before creating or modifying any bylaw provision on the subject of agriculture and silviculture (forestry). Hence, this sentence in the bylaw largely repeating that statutory reference. The Commission is well advised to ascertain actual eligibility of any project claiming to qualify for this type of exemption from jurisdiction.
6. This model bylaw establishes expanded jurisdiction over all resource areas, beyond the Act. The standards applied, however, are not intended to be identical for all resource areas, as they differ. For instance, it is expected that the Commission’s regulations and decisions will be stricter for wetlands and vernal pools than they will be for floodplains. It is expected that the test of avoid-minimize-mitigate set forth in the model bylaw will be applied to activities within all resource areas, but that the stricter two-part “no practicable alternative” and “no significant adverse impact” test set forth in the model bylaw will be applied within the riverfront area. It is expected that the Commission will develop and apply its own standards within the buffer zone, especially to protect its buffering function.

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7. To protect resource areas many communities impose minimum “setbacks” in bylaws or in Commission regulations. It is important that these be in writing, in regulations, and not in mere policies. It is helpful to explicitly authorize such work limits in the bylaw itself. In any event, a “no-build” or “no structure” type of setback should be clearly distinguished and different from a “no-work” or “no alteration” area where no disturbance at all is allowed. See **Fieldstone Meadows Development Corp. v. Conservation Commission of Andover**, 62 Mass. App. Ct. 265 (2004), which supports the proposition that setbacks must be in writing and should be included in the regulation itself and not based on unwritten policy or practice.

8. Optional additional protection for vernal pools. Due to the habitat requirements of certain amphibians, which depend both on the spring waters of vernal pools and on the upland areas surrounding them, Commissions may wish to enact stricter protections for vernal pools by defining the boundary as 100 feet outward from the area that actually floods. This can be accomplished by amending the above definition to insert the words “100 feet outward from” just before “the mean annual high-water line defining the depression.” Note, however, that vernal pools are surrounded by a 100-foot buffer zone in this model bylaw, so that extending the resource area boundary 100 feet from the mean annual high water line will create a 200-foot jurisdictional zone around the flooded basin.

9. Constitutional limits on entry into private property supersede Wetlands Protection Act right-of-entry. We recommend obtaining consent or an administrative search warrant. The Commission may wish to discuss with Town Counsel whether filing a permit or other application or RDA or ANRAD or other request with the Conservation Commission may constitute implied consent. Other administrative inspections may need more explicit consent or an administrative search warrant. Also, without such permission, the Commission may have rights to inspect the property from nearby, such as from a neighboring property, public lands, or overhead. See the 2004 DEP *Wetlands Enforcement Manual: A Guide to Effective Compliance with the Massachusetts Wetlands Protection Act Regulations*.

10. This set of mandatory legal procedures for so-called Section 21D citations is best adopted as a separate general bylaw or ordinance. Some towns fold it into their wetlands bylaws; others include it elsewhere in their general bylaws. Regardless, a bylaw provision should be added repeating verbatim the important language from §21D. In that language, in the wetlands bylaw or elsewhere, the town should designate the Conservation Commission and its agents as authorized to issue non-criminal citations. If in the general bylaws, the typical town designates the Commissioners and staff along with other officials, such as the board of health, building inspector, zoning enforcement officer, fire department, housing inspector, animal control officer, and police officers.

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Example Language referenced above.

SECTION 4 PERFORMANCE STANDARDS

4.1 INTRODUCTION

The introduction, purpose and performance standards stated in 310 CMR 10.51 – 10.60 shall apply in addition to the additional performance standards identified below.

4.2 VEGETATED WETLANDS

The definition of “freshwater wetlands” (see Appendix A) shall include both Bordering and Isolated Vegetated Wetlands. Isolated Vegetated Wetlands are those wetland areas which meet the definition and critical characteristics of Bordering Vegetated Wetlands but do not border on creeks, rivers, streams, ponds or lakes [See 310 CMR 10.53 (1) & (3)]. See definitions of Hydric Soil, Freshwater Wetlands & Vegetated Wetlands (Appendix A).

Replications:

In those instances where replication is required by State Law and/or approved by the Commission the following conditions shall be met:

- The replicated wetland shall be hydrologically and geographically associated with the same water body as the original wetland (310CMR10.55).
- The replicated wetland shall be constructed in full, and conditionally approved prior to construction of any structures. A qualified wetland scientist, employed by the Applicant, shall be required by the Commission during the construction of the wetland replication area.
- At a minimum the replicated wetland shall reproduce all the values and functions of the original wetland as determined by the Conservation Commission. Site conditions permitting, the Commission may require that additional values and functions be incorporated into the replication design.
- In particular, in circumstances where replacement of specific functions and values would require substantial amounts of time before being completely replicated (for example, those provided by large mature trees) the Commission may require additional compensation of area, functions, values, etc. beyond those required in other sections of the Bylaw and its regulations.
- The area of replication shall be at least as large as the area of the original resource that will be destroyed. The actual area ratio of replacement required by the Commission shall be decided on a case-by case basis, but will generally be at least 1.5 to 1.
- Soil materials to be reused (from the wetland to be lost during construction) shall be removed and placed in the prepared replication area within one day. If this is not possible, these soils shall be stockpiled for the minimum amount of time and kept loosely covered and moist at all times.
- Erosion control barriers shall be placed around the proposed wetland replication area prior to the start of construction.
- The proposed replication area shall be excavated to a depth of one foot below the proposed final grade, as specified in the specifications and plans submitted as part of the Notice of Intent and referred to in the Order of Conditions.

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- A minimum of one foot (12 inches) of good quality, organic-rich (>10%by weight) topsoil shall be placed in the replication area. This soil may consist of soil removed from the wetland to be lost during construction or from an outside source. The soil may be amended with peat moss, peat humus, or composted manure in order to provide the necessary organic matter. Soils from an outside source shall be free of chemical contamination, sticks, trash, and rocks more than one inch in diameter. Reused wetland soils shall be free of sticks, trash, and rocks greater than six inches in diameter. Reused wetland soils shall not be screened prior to use in order to avoid removal of existing wetland vegetation. No soils from areas containing either purple loosestrife (*Lythrum salicaria*) or common reed grass (*Phragmites australis*) shall be used in the replication area.
- Following placement of topsoil, a minimum of 48 hours shall pass prior to planting of wetland vegetation to allow for rebound of buried or compacted peat. The final grade shall be adjusted as necessary.
- The replication area shall be planted and seeded according to specifications and plans submitted as part of the Notice of Intent and referred to in the Order of Conditions. Plantings shall be fertilized and irrigated as necessary to promote successful establishment.
- Erosion control structures shall be removed upon stabilization of the replication area to allow free circulation of water between the wetland replication area and the adjacent, natural wetland.
- The wetland scientist shall inspect the wetland replication area once each year during the mid to late summer of the first two full growing seasons. A written report shall be submitted to the Commission at the end of each growing season. The spring inspection shall include monitoring of the groundwater elevation within a soil pit a minimum of 18 inches deep at each of three randomly distributed quadrants. The summer inspection shall include groundwater elevation monitoring and a vegetation survey to determine compliance with the general performance standard of 75% of the wetland surface being reestablished with indigenous wetland plant species within two growing seasons following planting. Vegetation monitoring shall occur within three randomly distributed quadrants sampled within the tree, shrub, and herb strata. Photos of each quadrant shall be taken during the summer inspection and submitted with the Commission report.
- An inspection report shall be submitted to the Commission no later than September 15 of each of the first two years. The report shall include all data collected during the inspections and photographs, and shall include recommendations for additional plantings or other remedial work as required, to ensure successful wetland replication.
- Any replication or restoration work that creates a resource on abutting properties shall require an easement from the abutting property owner covering the full extension of the resource on that property prior to commencement of the work.
- Standards for the replication shall be specified and verified in terms of functions, values, and actual performance. Technical and engineering specifications used for design and construction shall be considered approximate. Criteria for acceptance and approval shall be based solely on function and performance as specified in the Order of Conditions.

4.3 VERNAL POOLS

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Vernal pools and vernal pool habitat as defined in the Bylaw shall be determined by the XX Conservation Commission. The Commission need not identify vernal pool and vernal pool habitat locations prior to application with the Commission. It shall be the applicant’s responsibility to indicate the location of possible vernal pools and vernal pool habitats on the subject property, during the application process. The applicant may request a determination of applicability prior to application for a permit under the Bylaw, if unsure as to whether a vernal pool exists on or near the subject site. The buffer zone of a vernal pool is presumed critical to the function of the pool and work in this area should be avoided. The presumption may be overcome by a clear and convincing showing that the ability of the vernal pool to function will not be impaired.

4.4 LANDS WITHIN 100 FEET

The land area within 100 feet of any freshwater wetland; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds; rivers; streams; creeks; beaches; land under water bodies; or surface water is subject to regulation under the Bylaw. Lands within 100 feet of protected resource areas are presumed important to the protection of these resources because activities undertaken in close proximity to wetlands and other resources 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 harm to wildlife habitat. For this reason these buffer zone areas are a valuable resource under this Bylaw.

The following restrictions are intended to represent the limits beyond which the ability of the protected resource area to function is presumed to be impaired. The presumption may be overcome by a clear showing that the ability of the resource area to function will not be impaired.

No Disturbance Zone

The Commission will enforce a No Disturbance Zone measuring 25 feet (measured horizontally) from all resource area boundaries (except riverfront and floodplain). This is an area in which virtually no activities or work, other than passive passage, are permitted (i.e. Boardwalk). No vegetation may be disturbed, leaf litter and debris shall remain in place, and no dumping of grass clippings, brush, leaves or any other debris or trash is allowed. The no disturbance area should remain unchanged from its pre-project state (unless the Commission grants approval to an applicant’s proposal to restore a previously altered area). The restrictions associated with a designated No Disturbance Zone shall not be lifted with the issuance of a Certificate of Compliance, but shall remain in force. Where a prior existing structure protrudes into, or a prior existing alteration exists in a No Disturbance Zone, the Commission may permit the extension of such non-conforming structure into, or further alteration in such zone in accordance with its Rules and Regulations.

No Build Zone

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The No Build Zone extends 15 feet (measured horizontally) from the edge of the (25-foot) No Disturbance Zone, in the direction upland or away from the resource area. This is an area where no structures are allowed to be placed or constructed. Prohibited structures include buildings, houses, barns, garages, and sheds. Items such as fences, retaining walls, decks, patios, gazebos, lawn furniture, children’s toys such as sandboxes and swing-sets, rip-rapped areas, boardwalks, driveways, parking areas and the like are not considered “structures” for the purposes of these regulations. The restrictions associated with a designated No Build Zone shall not be lifted with the issuance of a Certificate of Compliance, but shall remain in force. Where a prior existing structure protrudes into, or a prior existing alteration exists in a No Build Zone, the Commission may permit the extension of such non-conforming structure into, or further alteration in such zone in accordance with its Rules and Regulations.

100-foot of Vernal Pool

The Commission will enforce a No Disturbance Zone measuring at least 100 feet (measured horizontally) from all Vernal Pools. This is an area in which virtually no activities or work, other than passive passage, are permitted. The no disturbance area should remain unchanged from its preproject state (unless the Commission grants approval to an applicant’s proposal to restore a previously altered area). 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.

CONSIDERATIONS IN SETTING DISTURBANCE RESTRICTIONS

It is presumed that prohibited activities within the No Disturbance Zone, No Build Zone, and within the 100-foot Buffer Zone to Vernal Pools will result in alteration of the resource area. This presumption is rebuttable and may be overcome upon a showing by clear and convincing evidence that the nature of the proposed work, special design measures, construction controls, or site conditions will prevent alteration of the resource area, and will cause no significant harm to the areas or values protected by the Bylaw. Overcoming this presumption is to be granted only in rare and unusual cases.

In considering designation of buffer zone disturbance areas, the types of work and activities allowable, and conditions to apply, the Conservation Commission shall consider, in addition to other relevant criteria consistent with the wetland values:

1. Values and Functions of the Resource Area

The quantity and quality of resource values and functions shall be considered in placing conditions on buffer zone work. Some isolated land subject to flooding, for example, can serve for temporary flood storage only. Minimal buffer zone restrictions within several feet of the resource may be necessary under such circumstances only to prevent erosion. Other isolated land subject to flooding can provide vernal pool habitat. It might also provide important flood storage capacity and intersect ground water. In such instances significant buffer zone restrictions shall be appropriate because a larger number of functions are involved and some functions, such as habitat, are more sensitive to buffer

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zone activity and require protection without exception. If rare or endangered species were found within a project area then still greater levels of restrictions would be appropriate, with no disturbance being allowed.

2. Pre-Project Characteristics of the Site

Ground slope, soil conditions, vegetation, and prior disturbance are just a few of the site specific characteristics that shall be considered in setting conditions for work in the buffer zone.

For example land that slopes toward a wetland demands greater restrictions on work and activity and larger no- disturbance distances to prevent pollution and silt from stormwater runoff from harming wetlands values than does land which slopes away from a wetland. Steeper slopes imply greater restrictions.

3. The Character of the Work or Activities Proposed and Alternatives

The applicant shall carry the burden of proof for demonstrating to the Commission's satisfaction that the proposed work or activities in the buffer zone are necessary and that reasonable alternatives, including reducing the scale and scope of the project, do not exist. The Commission shall consider the specific characteristics of the work proposed for immediate and cumulative impact on the wetland resource.

4.5 STORMWATER MANAGEMENT All storm water runoff systems shall at minimum conform to best management practices as specified in the Massachusetts Department of Environmental Protection (DEP) Storm Water Management Guidelines, Volumes I and II (or succeeding guidance). The Conservation Commission may impose more stringent conditions where resource values and functions warrant it.

SUBDIVISION ROADWAYS AND PARKING LOTS

For purposes of flood control, erosion control, water quality protection, and wildlife habitat preservation the Conservation Commission shall review all roadway and parking lot construction plans for impact, immediate and cumulative, on resource area functions and values in accordance with DEP's Stormwater Management Guidelines, Volume I and II (or succeeding guidance). In particular, the Conservation Commission shall enforce the following general performance standards:

1. No Net Change In Runoff Volumes

Pre-project and post-project hydrology should remain fundamentally the same as it pertains to protecting wetland functions and values. Of course some minor degree of change in hydrology is inevitable in any engineering/construction project and within reasonable limits the Commission shall permit such variation when in its judgment such changes will not produce a significant impact of wetlands functions and values.

Erosion control may require limiting stormwater discharge volumes and velocities, which will impact resource areas.

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Therefore the Commission may require the construction of such stormwater control structures, and specify particular engineering and design details, as it deems necessary to protect wetland resources, values, and functions.

2. Minimizing Change In Runoff Water Quality

The physical, chemical, and biological qualities of stormwater runoff are altered by encounters with impervious surfaces, especially roadways and related structures. Increases in water temperature, reduction in pH, chemical and nutrient contamination, and transport of silt are just a few of the degrading shifts that may occur.

Where such waters are likely to contact wetland resources or buffer zones the Commission shall specify treatment of runoff or impose other conditions that in its judgment reduce undesirable water quality changes to levels that will not harm wetland functions or values, immediately or cumulatively. The Commission may require the construction of specific structures to improve stormwater runoff quality, such as wet detention basins for pollutant removal and broad riprap swales for aeration.

3. Requirements for Hydraulic Calculations

In accordance with the above, the Conservation Commission shall require as part of the application for permit complete hydrological calculations for the two, ten, twenty-five, and one-hundred year storm events. Such calculations shall include both pre-and post-project calculations for discharge volumes, peak flow rates, concentration times, discharge velocities, and other quantities that the Commission may require for complete information. All calculations and analysis shall be summarized and provided in an easily readable and understandable format.

4. Groundwater Flows, and Impact to Water Quality and Groundwater Recharge

In cases where significant amounts of bedrock or ledge are present near the surface, or where naturally occurring springs exist, or where the project involves substantial potential for changes in groundwater flows (i.e. construction of wells, groundwater diversion trenches, etc.), or in large subdivision projects, the Commission shall require as part of the application for permit detailed information on pre-and post-construction groundwater flows. In such cases, the Commission shall review the information to ensure there are no detrimental impacts to water quality, groundwater recharge, or wetland resource areas as a result of the proposed project. All calculations and analysis shall be summarized and provided in an easily readable and understandable format. 5.

Subdivisions vs. Individual Lots

Unless otherwise specifically identified, Orders of Conditions apply only to the roads, drainage, and related infrastructure on the definitive plan, and do not apply to any individual lots. Each lot within a resource area and buffer zone as defined under the Bylaw shall be required to file a separate Notice of Intent or Request for Determination for any additional work (construction of a house and yard, e.g.)