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**REGULATIONS FOR ADMINISTERING
THE TOWN OF AYER WETLAND BYLAW (ARTICLE XXVI)**

TOWN OF AYER
TOWN CLERK

Scopeland

**In association with the
WETLANDS PROTECTION ACT
and RIVERS PROTECTION ACT**

**Approved by vote of the Ayer Conservation Commission
January 28, 2021**

SECTION 1 – GENERAL PROVISIONS

A. AUTHORITY

These Regulations are promulgated by the Town of Ayer Conservation Commission (“Commission”) pursuant to the authority granted to it under Section 8 of the Town of Ayer Wetlands Protection Bylaw (Article XXVI, “the Bylaw”). These Regulations shall complement the Bylaw and shall have the force of law upon their approval by vote of the Commission at a Public Hearing. Terms and definitions used herein are consistent with usage in the Bylaw.

The failure of these Regulations to address all aspects of the Bylaw, or a legal declaration of their invalidity by a court of law, shall not act to suspend or invalidate the effect of the Bylaw.

These Regulations shall not apply to any applications submitted prior to the effective date, nor is the Bylaw retroactive to existing conditions.

B. PURPOSE AND INTENT

The Bylaw identifies additional interests of the Commission that are not recognized by the Commonwealth of Massachusetts. The purpose of these Regulations is to define and clarify the process and standards applied under the Bylaw by establishing definitions, performance standards, and uniform procedures by which the Commission may carry out its responsibilities under the Bylaw.

Wetlands and their Buffer Zones contribute to a number of public interests including, but not limited to, prevention of water and soil pollution, erosion and sedimentation control, protection of fisheries and wildlife habitat, and preservation of recreation values. Where not otherwise specified in the Bylaw or in these Regulations, the presumptions, definitions and performance standards set forth in the Massachusetts Wetlands Protection Act and Massachusetts Rivers Protection Act (MGL Ch. 131 S.40, “the Acts”) and the Massachusetts Department of Environmental Protection (“MassDEP”) Wetlands Protection Regulations (310 CMR 10.00 *et. seq.*) shall apply.

C. JURISDICTION AND RESOURCE AREAS PROTECTED UNDER THE BYLAW

No person shall remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter Resource Areas subject to protection under the Bylaw without a Determination of Applicability or an Order of Conditions from the Commission as provided by the Bylaw and these Regulations.

The Bylaw provides additional protections to wetland Resource Areas and, importantly, includes their Buffer Zones (Adjacent Upland Resource Areas) as Resource Areas subject to greater protection than under the Acts. The Bylaw also presumes the inner portion of a Buffer Zone to have a higher ecological value than the outer portion. All Resource Areas defined in the Bylaw are protected from any form of disturbance unless permitted by the Commission. These Resource Areas protected by the Bylaw include:

1. **Bordering Vegetated Wetlands (BVW).** This includes wet meadows, swamps, bogs, and isolated vegetated wetlands.
 - a. The **Buffer Zone** shall extend 100 feet horizontally outward from the professionally delineated and flagged boundary of the wetlands.
2. **Riparian Waterways: Rivers, Streams or Brooks (Perennial or Intermittent), and their Banks.** Criteria for determining whether a particular stream or section of stream flows throughout the year is at the sole discretion of the Commission and may be based on (1) reference on a USGS topographic map to a perennial stream, (2) calculation of watershed size, or (3) observation on the part of experienced Commissioner(s) or resident experts that flow has historically been perennial except during times of drought.
 - a. The **Riverfront Area** to a perennial waterway shall extend 200 feet horizontally outward from the Bank, and be designated "inner riparian" (first 100 feet) and "outer riparian" (100-200 feet).
 - b. The **Buffer Zone** to an intermittent waterway shall extend 100 feet horizontally outward from the Bank.
3. **Ponds.** As per the definition in the Bylaw, this includes ponds of any size, the land under these waterbodies, and their bank or beach.
 - a. The **Buffer Zone** for ponds shall extend 100 feet from the mean annual high-water line.
4. **Vernal Pools.** As per the definition in the Bylaw, this includes a basin or depression that holds water for a minimum two continuous months during 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 habitat functions for amphibians, reptiles, or other vernal pool community species, regardless of whether certified by the Massachusetts Division of Fisheries and Wildlife.
 - a. The **Buffer Zone** for a vernal pool shall extend 100 feet horizontally outward from the mean annual high-water line defining the depression, or half the distance between the vernal pool and any pre-existing house foundation, whichever is smaller.

SECTION 2 – PERFORMANCE STANDARDS FOR BUFFER ZONES PROTECTED UNDER THE BYLAW

A. PRESUMPTIONS OF SIGNIFICANCE

Where a proposed activity involves the removing, filling, dredging, building upon, discharging into, degrading, or altering of a Buffer Zone, the Commission shall presume that protection of the Buffer Zone is significant to the interests specified in Section 1 of the Bylaw.

B. PERFORMANCE STANDARDS WITHIN THE BUFFER ZONE RESOURCE AREA

1. **Homeowners:** Waivers may be provided for proposed alterations on property which is the Homeowner's principal residence for the No-Disturbance Zone noted below.
2. **Inner 50-Foot No-Disturbance Zone for Undisturbed Lands**
 - Undisturbed Land is land determined by the Commission to be of a predominantly natural character or to have been altered after May 1996 without a permit from the Commission.
 - No alterations are allowed within 50 feet of a wetland resource area, except those alterations explicitly permitted as part of a pre-approved restoration plan approved by the Commission.
 - Prohibited alterations include, but are not limited to, grading, landscaping, clearing or cutting of vegetation, filling, excavating, and construction of roads or structures except as allowed under Minor Activities (see below).
 - Structures include, but are not limited to, single family houses, multi-family dwellings, commercial or industrial buildings, porches, decks, house additions, pools, septic systems, and sheds.
 - Driveways, roadways, fences, and facilities for stormwater management may be allowed in the 50-foot No-Disturbance Zone by waiver when no other feasible alternative exists; see Section 3.
3. **Outer 50-foot Resource Area Buffer Zone:** Activities outside the first 50 feet of a non-riverfront Buffer Zone shall not adversely affect the form or function of the wetland resource area or the Inner 50-foot No-Disturbance Zone.
4. **Grades:** Unless permitted by the Commission, artificially-constructed grades within 100' of wetland shall be 3 to 1 (horizontal to vertical) or less for grass or mulch; steeper grades must be designed by a professional engineer.
5. **Stream Crossing Standards:** Proposed stream crossings shall at minimum meet MassDEP Stream Crossing Standards.

SECTION 3 – WAIVERS

The performance standards for wetland Resource Areas and their Buffer Zones have been adopted to ensure that the interests of the Bylaw are adequately protected. The Commission

recognizes that, in certain situations, a waiver of a specific performance standard may be appropriate for a particular project when the waiver is consistent with the intent and purpose of the Bylaw and these Regulations. The applicant shall have the burden of demonstrating that the granting of the waiver is consistent with the intent and purpose of the Bylaw and these Regulations. The Commission shall act on the request for a waiver and shall provide to the applicant, either by certified mail or hand delivery, its written decision. The following paragraphs describe the waiver and its associated mitigation measures for the Buffer Zone performance standards.

Any request for a waiver must be submitted to the Commission in writing at the time of filing. The request must state why a waiver is desired or needed, and how it meets the relevant waiver criteria stated below. Grant of a waiver is at the sole discretion of the Commission, which may impose conditions on any waiver to protect the interests protected by the Bylaw.

The Commission may grant a waiver from these Regulations for an alteration of a Buffer Zone Resource Area in situations where no feasible alternative provides less impact to the resource area values. The applicant is responsible for conducting an alternatives analysis to show that there are no such feasible alternatives. The Commission may grant a waiver of a performance standard and impose such additional or substituted mitigation requirements as it deems necessary. The applicant must show, clearly and convincingly, that:

1. There are no practicable conditions or alternatives that would allow a project to proceed in compliance with the Regulations; and
2. The project, or its natural and consequential effects, will have the least possible adverse effects upon any of the interests protected by the Bylaw.
3. In the case where a waiver is granted, the Commission may require mitigation measures to be implemented to offset potential impacts to the wetland resource areas. The mitigation must maintain or improve the natural capacity of a Resource Area to protect the interests identified in the Bylaw. See Wetlands Mitigation, Section 7, below.

SECTION 4 – MINOR ACTIVITIES

Activities noted in Section 10.02(2)(b) of the Act's Regulations (310 CMR 10.00).

SECTION 5 – PERMITTING APPLICATIONS AND PROCEDURES

A. Municipal Filings of Notices of Intent (NOIs) or Requests for Determination of Applicability (RDAs)

For projects or subdivisions involving the new construction of more than two dwellings or houses on lots where Resource Areas and/or Buffer Zones are present, the applicant must submit individual Notices of Intent or, where appropriate, Requests for Determination of Applicability, for each housing lot. The same requirement of an individual NOI or RDA also applies for infrastructure associated with a subdivision project where Resource Areas or Buffer

Zones are present. In cases where the amount of Resource Area or Buffer Zone is so minimal, or the project's impact on same is deemed to be minimal or nonexistent, the Commission, in its sole discretion, may grant a waiver to allow a single filing for a whole project. Any lots divided through the Approval Not Required (ANR) process will also each require a separate NOI or RDA if Resource Areas or Buffer Zones are located on the lot and no waiver is granted.

SECTION 6 – ORDERS OF CONDITIONS, DETERMINATIONS OF APPLICABILITY, AND CERTIFICATES OF COMPLIANCE

A. AMENDMENTS TO ORDERS OF CONDITIONS

1. Amending an Order of Conditions is at the sole discretion of the Commission. The Commission will make a determination whether the requested change is great enough to warrant the filing of a new Notice of Intent, or whether the change is of a relatively minor nature and can be considered as an amendment to the original Order of Conditions. In making this determination, the Commission will consider such factors as whether the purpose of the project has changed, whether the scope of the project has increased, whether the project meets current relevant performance standards, and whether the potential for adverse impacts to the protected interests of the Acts or the Bylaw will be increased. Relatively minor changes which result in the same or decreased impact on the Resource Area(s), or interests protected by the Bylaw are appropriate for amendments. If the Commission determines that the project purpose or scope has changed substantially or that the interests specified in the Bylaw are not protected, it will not issue an amendment. This determination is not subject to appeal.
2. The applicant to whom an Order of Conditions has been issued may submit a written request for an amendment to the Commission, including a narrative description of what changes have been proposed and any pertinent plans showing the changes, with a copy to MassDEP's regional office. The Commission shall publish a newspaper notice (at the Applicant's expense) in the same general manner as required for Notices of Intent. In addition, the Applicant must follow the requirements of abutter notification as if filing a Notice of Intent.

B. PERMIT RECORDATION

No work proposed in any NOI shall be undertaken until the Order of Conditions has been recorded at the Registry of Deeds, and until the holder of the permit certifies in writing to the Commission that the permit has been recorded. Such certification shall include the book and page or instrument number and date.

SECTION 7 – WETLANDS MITIGATION

In order to meet performance standards set forth in MassDEP Regulations or in these Regulations, or to meet the conditions of a waiver, it may be necessary to create Replacement Resource Areas to compensate for Resource Areas proposed to be altered. Mitigation is understood to include such activities as Bordering Vegetated Wetlands replication, Land

Subject to Flooding compensatory storage, and wildlife habitat and/or riverfront area restoration, or other activities as permitted.

A. MITIGATION REQUIREMENTS

The Commission recognizes that the history of mitigation, and specifically vegetated wetland replication, is mixed. Scientific reviews conclude that for the most part, replications fail to reproduce the range of values of the wetlands they are intended to replace. Difficulties in replicating proper hydrological, soil, or vegetative conditions in a consistent and enduring fashion seem to be a major source of the problem. The Commission strongly discourages any plan that requires wetland replication. Projects that necessitate wetland replication to mitigate unavoidable impacts to Resource Areas shall meet the pertinent requirements of the MassDEP Regulations and the following additional requirements of the Commission:

1. Proposed Replacement Resource Area design shall:
 - Be submitted as part of the project NOI. Applicants are advised to appear before the Commission for preliminary review prior to submittal of the NOI.
 - Reproduce all the values and functions of the wetland(s) proposed to be altered, as determined by the Commission.
 - Provide a 2:1 area ratio of replacement wetlands to wetlands proposed to be altered.
 - Design shall conform to the Massachusetts Inland Wetland Replication Guidelines.
2. The proposed Replacement Resource Area must be clearly flagged for the Commission's site inspection before the NOI filing shall be considered complete, and the numbering of said flagging shall correspond to that shown on the Plans.
3. Any Replacement Resource Area work that creates a new Resource Area on (an) abutting property(ies) shall require an easement from the affected property(ies) owner(s) covering the full extension of the associated resource area on the property prior to commencement of the work.
4. The Replacement Resource Area shall be constructed, immediately after alteration of the existing wetland, to the extent possible, and during the same growing season. The Replacement Resource Area must be conditionally approved by the Commission or its Agent prior to commencing any other construction.
5. The applicant must provide a construction sequence which includes progress reports on the construction, planting, and growth of vegetation within the Replacement Resource Area.
6. Replacement Resource Areas greater than 100 sq-ft must be designed & monitored by an accredited Professional Wetland Scientist employed by and at the expense of the Applicant.
7. Vegetation within the Replacement Resource Area must achieve, at the end of two growing seasons, at least 75% coverage of the same or comparable plant types as were lost.
8. The Commission will require a bond from the Applicant to be held to ensure completion of the Replacement Resource Area in the event of an Applicant's default.

9. Replacement Resource Areas that do not properly perform the approved functions and values as specified in the Order of Conditions, will not be deemed acceptable no matter how closely they adhere to approved plans. Monitoring reports shall be submitted at the end of each of the two growing seasons after installation of the replication area. If, after two growing seasons, the Commission determines that the replacement area has not satisfactorily developed into a wetland, the applicant or owner may be required to submit new plans to successfully replace said wetland. No Certificate of Compliance shall be issued until the Commission has determined that a satisfactory Replacement Resource Area has been completed at the end of two growing seasons.

George Bacon moved to accept these Regulations; Mark Phillips seconded.

Motion approved unanimously by Roll Call Vote:

George Bacon – Aye

Jen Amaya – Aye

Jessica Gugino, Clerk – Aye

Mark Phillips – Aye

Jon Schmalenberger, Chair – Aye

Date / Signature of Approval : 1/28/2021 Jessica L. Gugino, Clerk