

**Town of West Newbury
Conservation Commission**

**FINAL 3/19/2024 - ANNOTATED
WETLANDS PROTECTION BYLAW**

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Throughout the annotated bylaw references will be made to the Wetlands Protection Act (the Act) and regulations thereunder, 310 CMR 10.00. Where possible the annotation will include the paragraph number of the Act and /or the section reference and page number of the regulations where the reference may be found.

- The Massachusetts Wetlands Protection Act, G.L. c.131, §40 (the Act) can be viewed in its entirety online at: <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXIX/Chapter131/Section40>
- The regulations of the Wetlands Protection Act, 310 CMR 10.00, can be viewed in its entirety online at: <https://www.mass.gov/doc/310-cmr-1000-the-wetlands-protection-act/download>

1. Purpose

The purpose of this bylaw is to protect the wetlands, water resources, flood-prone areas, and adjoining upland areas in the Town of West Newbury by regulating activities deemed by the Conservation Commission (“Commission”) likely to have a significant or cumulative adverse effect on resource area values deemed important to the community (collectively, the “resource area values protected by this bylaw”), including but not limited to the following:

- 1.1** Public or private water supply;
- 1.2** Groundwater supply;
- 1.3** Flood control;
- 1.4** Erosion and sedimentation control;
- 1.5** Storm damage prevention including coastal storm flowage;
- 1.6** Water quality;
- 1.7** Prevention and control of water pollution;
- 1.8** Agriculture;
- 1.9** Fisheries, including aquaculture;
- 1.10** Wildlife habitat;
- 1.11** Rare species habitat, including rare plant and animal species; and
- 1.12** Recreation.

The Purpose Section (1.) sets the scope of the bylaw. The protected resource area values form the foundational reasoning for why the bylaw exists. The resource area values protected by the bylaw include the eight public interests protected by the Act as listed in paragraph 18 of the Act:

- protection of public and private water supply
- protection of ground water supply
- flood control
- storm damage prevention
- prevention of pollution
- protection of land containing shellfish
- protection of fisheries and
- protection of wildlife habitat

plus, additional resource area values deemed important to protect by the community. The additional resource area values protected by the bylaw, are

- erosion and sedimentation control (1.4)
- prevention of damage from coastal storm flowage, as expanded into the public interest of storm damage prevention (1.5)
- water quality (1.6)
- agriculture (1.8)
- aquaculture, as expanded into the public interest of fisheries (1.9)
- rare species habitat (1.11) and
- recreation (1.2).

As is the case in all local bylaws in Massachusetts, the Commission is not able to narrow the scope of the bylaw relative to the Act (i.e. the bylaw can’t be less restrictive than the Act), but the Commission can include in the bylaw additional resource area values the community believes are worth protecting. Including these additional resource area values provided to the community by wetlands, especially agriculture and recreation, allows the Commission greater ability to ensure decisions made on projects that will impact wetland resource areas do not adversely impact these additional resource area values which wetlands provide to the community.

This bylaw is 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 bylaws of the Town of West Newbury.

The Commission has explicitly indicated that this bylaw does not restrict or remove any of the rights and benefits that are currently afforded to agricultural uses. 310 CMR 10.04 [pages 24-32] lists the definitions and exemptions that are afforded to agriculture and these will all continue to apply under the bylaw. For more information about farming in wetlands and adjacent areas, MassDEP has provided a helpful guide: <https://www.mass.gov/doc/farming-in-wetland-resource-areas-manual-1996-edition/download>

This bylaw is intended to utilize the Home Rule authority of West Newbury to protect the resource areas under the Wetlands Protection Act (G.L. c.131, §40; the Act) to a greater degree, to protect additional resource areas beyond those protected in the Act recognized by the Town as significant, to protect all resource areas for their additional values beyond those identified in the Act, and to impose, in local regulations and permits, Orders of Conditions, and Determinations of Applicability additional standards and procedures in addition to those of the Act and regulations thereunder (310 CMR 10.00).

The Act is meant to serve as a baseline, for “Statewide minimum wetlands protection standards, and local communities are free to impose more stringent requirements.” *Oyster Creek Pres., Inc. v. Conservation Comm’n of Harwich*, 449 Mass. 859, 866 (2007). Available online at: <http://masscases.com/cases/sjc/449/449mass859.html>

2. Jurisdiction

Except as permitted by the Commission or as provided in Section 3 of this bylaw, no person shall remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas (collectively the “resource areas protected by this bylaw”):

- 2.1 Any freshwater or coastal wetlands, isolated wetlands, marshes, wet meadows, bogs, swamps and adjoining land extending out to a distance of 100 feet, known as the Buffer Zone;
- 2.2 Any freshwater or coastal bank or beach bordering on any lake, pond, reservoir, river, stream, brook, or creek and adjoining land extending out to a distance of 100 feet, known as the Buffer Zone;
- 2.3 Any perennial rivers, streams, brooks and creeks and lands adjoining these resource areas out to a distance of 200 feet, known as the Riverfront Area;
- 2.4 Any land under the aforementioned waterbodies and waterways;
- 2.5 Any vernal pools and adjoining land extending out 100 feet, known as the Vernal Pool Habitat;
- 2.6 Any lands subject to flooding;
- 2.7 Any lands subject to tidal action; and
- 2.8 Any lands subject to coastal storm flowage.

Similar to the Purpose Section (1.), the Jurisdiction Section (2.) includes all wetland resource areas that are jurisdictional under the Act as listed in paragraph 1 of the Act which are:

- Any bank, freshwater or coastal wetland, beach, dune, tidal flat, marsh, or swamp bordering on the ocean, any estuary, creek, river, stream, pond, or lake
 - Land under any of the water bodies listed above
 - Land subject to tidal action
 - Land subject to coastal storm flowage
 - Land subject to flooding
 - Riverfront area, which is an area that extends a distance of 200’ from the mean annual highwater line of any river or perennial (flowing year-round) stream.
- plus, additional resource areas deemed important to protect by the community. The additional resource areas protected by the bylaw are:
- Isolated wetlands of at least 5,000 sq. ft. in size (2.1, see also “isolated wetlands” definition Section 4.)
 - Wet meadows and bogs (2.1)
 - The 100-foot buffer zone which is the adjoining land extending out a distance of 100-feet from the edge of any freshwater or coastal wetlands, isolated wetlands of at least 5,000 sq. ft., marshes, wet meadows, bogs, swamps, and any freshwater or coastal bank or beach bordering on any lake, pond of at least 5,000 sq. ft., reservoir, river, stream, brook, or creek (2.1, see also “pond” definition Section 4.)
 - Any vernal pool regardless of state certification (2.5, see also “vernal pool” definition Section 4.), and
 - Vernal pool habitat which is the adjoining land extending out a distance of 100-feet from the edge of any vernal pool (2.5)

The inclusion of the 100-foot Buffer Zone as a resource area in the bylaw does not necessarily imply a change in what activities are permissible in the Buffer Zone, which is not a resource area protected under the Act but is an area defined and regulated in 310 CMR 10.02(2)(b) [pages 6-9], but it does allow the Commission to create and apply performance standards and design specifications for activities proposed in the Buffer

Zone, something that is not included in 310 CMR 10.00 today. This will allow the Commission to create, within its regulations under the bylaw, simpler standards that are easy for applicants to apply and plan for as part of their proposed project or activity and will also, minimize subjective and /or situational judgement of a proposed project by the Commission during permitting, creating a more fair and equitable permitting process for all applicants.

The bylaw also recognizes and protects all vernal pools, regardless of state certification, and a 100-foot vernal pool habitat area surrounding said vernal pools, which is critically necessary for the unique, rare, and endangered species that rely on vernal pools. For more information on what is required for an area to be protected as a vernal pool, see Section 4. “vernal pool”.

Said resource areas shall be protected whether or not they border surface waters.

This note is important, as the Act has different standards for wetlands that do and do not border surface waters. See definition of “isolated wetlands” in Section 4 for additional information.

3. Exemptions and Exceptions

The following exemptions shall apply:

3.1 Activities in the Buffer Zone and Riverfront Area Pursuant to 310 CMR 10.02 (2)(a) and (b) and as may be Amended by the Massachusetts Department of Environmental Protection (“MassDEP”)

The exemptions provided in the Wetlands Protection Act (G.L. c. 131 §40, the Act) and regulations (310 CMR 10.00) shall apply under this bylaw provided that advance written notice, of at least 72 hours has been given to the Commission or its agent before the commencement of work and provided that the work also conforms to any performance standards and design specifications as written in the Act and regulations and to any performance standards and design specifications in regulations adopted by the Commission.

The bylaw includes exemptions for all of the Buffer Zone and Riverfront Area activities that are currently exempted from a filing in 310 CMR 10.02(2)(a) and (b) [pages 5-9]. This is not required and many municipalities with local wetlands protection bylaws have not opted to include these exemptions in their local bylaws or have narrowed the exempted activities to only apply to public works projects and not to activities by private homeowners. This is the case in the bylaws of neighboring Merrimac and Amesbury. However, the bylaw does ask for notice to be made before the exempted work is begun so that the Commission or its Agent can have the opportunity to review a proposed, exempt activity to ensure that a person does not inadvertently violate the bylaw or the Act by commencing an activity that is not in fact an exempt activity.

3.2 Emergency Projects

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 and provided that advance notice, oral or written, has been given to the Commission or its agent

This follows the provisions of 310 CMR 10.06 [pages 94-102] and does not substantially change the process for emergency projects.

before the commencement of work or within 24 hours after the commencement and provided that the Commission or its agent certifies the work as an emergency project and provided that the work is performed only for the time and place certified by the Commission or its agent for the limited purposes necessary to abate the emergency. 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.

3.3 Agriculture

Work performed for normal maintenance or improvement of land in agricultural and/or aquacultural use as defined by the Wetlands Protection Act (G.L. c.131, §40; the Act) and regulations thereunder (310 CMR 10.00).

The bylaw is very explicit that all agricultural exemptions under the Act and regulations remain exempt under the bylaw.

3.4 Routine Mowing and Maintenance of Lawns, Gardens, and Landscaped Areas

The routine mowing and maintenance of lawns, gardens, and landscaped areas shall be exempt from this bylaw provided that these areas were lawfully in existence on the effective date of this bylaw or were created after such date in accordance to any performance standards and design specifications in regulations adopted by the Commission.

The Commission has added, for clarity, explicit exemptions allowing for the normal mowing and maintenance of all lawn, garden, and landscaped areas that were lawfully in existence prior to the effective date of the bylaw. No lawfully existing, lawns, garden or landscaped area will have to change because of this bylaw.

4. Definitions

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

Any terms not defined in Section 4 of the bylaw or in any potential future regulations of the Commission shall rely on the definitions set in the Act, in paragraphs 4-16 and in the regulations 310 CMR 10.047 [pages 24-56]. The Commission has generally only included definitions in the bylaw that are new or deviate from the definitions found in the Act and regulations.

The term "agriculture" shall refer to the definition provided by G.L. c. 128, §1A.

**This definition can be found online at:
<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXIX/Chapter128/Section1A>**

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

- 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 changing 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, or expansion of buildings or structures of any kind;
- g. Placing of obstructions or objects in water;
- h. Destruction of plant life including but not limited to cutting or trimming of trees, shrubs, and other vegetation;
- i. Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters;
- j. Any activities, changes, or work that 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 effect on the resource areas protected by this bylaw; and/or
- l. Increasing the volume of untreated stormwater directed to a resource area.

This definition expands the definition of Alter found in 310 CMR 10.04 [pages 32-33] by adding additional examples of alterations. 310 CMR 10.04 defines alters as follows:

"Alter means to change the condition of any Area Subject to Protection under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;**
- (b) the lowering of the water level or water table;**
- (c) the destruction of vegetation;**
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water"**

As in 310 CMR, the list of examples of potential alterations is not exhaustive, but intended to help a reader more easily anticipate what range of activities fall under the scope of regulation under the bylaw.

Any activity that the Commission finds has altered or would alter a resource area protected by the bylaw may be regulated by the Commission under the bylaw even if said activity is not included in the list of examples in this definition or in the list of examples in the definition of alter in 310 CMR 10.04

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 break in the slope observed in the field or the mean annual high water line, whichever is higher.

This is defined in 310 CMR 10.54(2) [page 201]. The definition in the bylaw differs by defining the upper boundary of the bank by the higher of the first break in slope or the mean annual high water line instead of the lower of the first break in slope or mean annual flood level.

The term "cumulative adverse effect" shall mean the adverse effects of activities regulated under this bylaw which may be individually insignificant to the interests and values under this bylaw, but when considered in relation to other past or present activities in a given area may be significant to said interests and values in the aggregate.

This is a new term not defined by the Act or 310 CMR 10.00. It has been introduced to give the Commission flexibility to consider small or seemingly insignificant acts in relation to their past and present surroundings and total cumulative impacts

The term “interests” shall mean the resource area values and resource areas protected by this bylaw.

This is a different definition than how interests are identified in the Act and 310 CMR 10.00. At the state level, interests refer only to the eight public interests that wetlands provide to the community.

The term “isolated wetlands” means freshwater wetlands not bordering on a water body and at least 5,000 square feet in surface area.

In 310 CMR 10.57 [pages 213-215 and 217-218], isolated wetlands are defined using a complex formula using a minimum volume and depth of confined, standing water occurring at least once a year combined with a maximal area of observed standing water. The definition offered here is substantially simpler, consistent with the way non-isolated wetlands are identified, and explicitly avoids smaller areas by setting a size threshold of at least 5,000 sq. ft. as is consistent with other wetlands protection bylaws adopted in Essex County.

The term “permit” shall mean a document issued by the Commission solely under this bylaw or regulations promulgated hereunder.

This is a different definition than how permit is defined in the Act and 310 CMR 10.00 to create a name for a potential, future document the Commission may create to approve work in areas that are jurisdictional only to the bylaw and now the Act.

The term "pond" shall follow the definition of 310 CMR 10.04, and as may be amended, except a size threshold of 5,000 square feet shall apply.

310 CMR 10.04 [page 48] defines a pond as having a minimum size of 10,000 square feet. However, smaller ponds provide critical habitat to a variety of species and provide the town with better protection of public and private water supplies, better flood control, and better prevention of storm damage. The specific threshold was set through a mapping review of the unique geography of West Newbury and a review of a number of local ponds at different size thresholds. While ponds of even substantially smaller areas have scientifically significant benefits, this threshold was selected to balance the varied interests of the town and this size thresholds aligns with size thresholds set in bylaws of surrounding communities that also protect smaller ponds.

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, the United States Fish and Wildlife Service, and/or the National Oceanic and Atmospheric Administration regardless of whether the habitat in which they occur has been previously identified and/or mapped by the Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program.

This definition is expanded from the definition in 310 CMR 10.04 [page 50] to include the recognition of rare plants.

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,

Vernal pools are defined differently in the bylaw than in the Act and regulations thereunder. Notably, under the Act and regulations:

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, is free of adult predatory fish populations, and provides essential breeding and rearing habitat functions for amphibian, reptile or other vernal pool community species which have been found in the basin or depression. The boundary of the vernal pool is the mean annual high-water line defining the depression. A vernal pool may be subject to jurisdiction hereunder regardless of whether it has been certified by the Massachusetts Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program.

- Vernal pools themselves are not protected unless they also meet the criteria of another protected wetlands resource area such as an isolated wetland.
- Only vernal pools certified through the state's Natural Heritage and Endangered Species Program (NHESP) have a protected vernal pool habitat area. The guidelines to certify a vernal pool with NHESP can be found here: <https://www.mass.gov/doc/guidelines-for-the-certification-of-vernal-pool-habitat/download>
- Even if a vernal pool is certified through NHESP, the protected vernal pool habitat area only exists where it overlaps with another resource areas such as bordering vegetated wetlands or the riverfront resource area. The vernal pool habitat protected under the Act and regulations does not exist in the 100-buffer zone of wetlands or within uplands. 310 CMR 10.57(2)(a)6. [page 217] and 310 CMR 10.60(2)(c) [page 243]

Vernal pools provide critical habitat for a variety of specialized animal species while also providing groundwater recharge and flood water control. Many of the species dependent on vernal pools have life cycles that involve annual migrations of up to 1,800 feet from forested upland areas.

Protecting the upland areas adjacent to vernal pools is integral to conserving the species dependent on vernal pools. Vernal pools and the species that depend on them are much better understood than when the Act was enacted in 1972 and this new information suggests that the Act provides insufficient protections for these resource areas.

This updated definition also removes the costly and time-consuming burden of an applicant having to certify a vernal pool during the permitting process.

The term "written notice" shall include notice by electronic mail.

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

This definition has been added to give proponents of potentially exempt activities the opportunity to provide written notice by email in addition to traditional forms of written notice.

5. Burden of Proof

The applicant for a permit, Notice of Intent, or Request for Determination of Applicability to perform any work in a resource area protected by this bylaw shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the application will not have significant or cumulative adverse effects on the interests protected by this bylaw.

Similar to the Act and regulations thereunder, the bylaw requires the applicant for any proposed work/project/or activity to prove to the Commission that the proposed work/project/or activity will not have adverse effects on the interests protected under the bylaw.

Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to:

- a. Deny a permit or Order of Conditions; or
- b. Issue a positive Determination of Applicability; or
- c. Issue a permit, Order of Conditions, or Negative Determination of Applicability with conditions; or
- d. Continue a public hearing or public meeting to another date at the Commission's discretion and with the applicant's permission, to enable the applicant or others to present additional evidence upon such terms and conditions the Commission deems reasonable.

Similar to 310 CMR 10.05(4)(h) [page 66], the applicant shall provide the Commission the evidence needed for it to determine that the proposed work/project/or activity will not have adverse effects on the interests protected under the bylaw.

6. Applications, Fees, & Outside Consultants

6.1 Application

A written application shall be filed with the Commission to perform activities that may impact resource areas protected by this bylaw. No activities under the jurisdiction of this bylaw shall commence without receiving and complying with a permit, Order of Conditions, or Determination of Applicability issued pursuant to this bylaw.

The application shall include such information and plans deemed necessary by the Commission to describe proposed activities and their effects on the resource areas protected by this bylaw. The Commission may accept as the application and plans under this bylaw any application and plans filed under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) where they are sufficient to meet the requirements of the bylaw and any regulations promulgated thereunder. The Commission may require additional materials or information in addition to the plans and specifications required to be filed by an applicant under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00), in order to fulfill the requirements of this bylaw.

No new paperwork is being added by this bylaw. The bylaw is intentionally written to allow for the existing state forms to be used to submit one filing for permitting under both the Act and the bylaw. However, as this bylaw protects additional resource areas, additional resource area values, and defines some resource areas differently than the Act and regulations there may be, the Commission is can request additional information that it needs to make a determination on a filing if the required information is not already provided through the standard state forms.

6.2 Request for Determination of Applicability (RDA)
request, in writing, a Determination of Applicability from the Commission. The Commission shall accept a Request for Determination of Applicability (RDA) under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) as an RDA under this bylaw where the RDA is sufficient to meet the requirements of the bylaw and any regulations promulgated thereunder. The Commission may require additional materials or information in addition to the plans and specifications required to be filed by an applicant under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00), in order to fulfill the requirements of this bylaw and any regulations promulgated thereunder.

The decision issued by the Commission for an RDA filing is a Determination of Applicability.

Any person desiring only to confirm delineations of resource area(s) on site shall file an Abbreviated Notice of Resource Area Delineation (ANRAD).

The bylaw proposes no major changes for the permitting type Request for Determination of Applicability (RDA) except that the any person seeking only to confirm delineations of a resource area shall file an Abbreviated Notice of Resource Area Delineation (ANRAD). See 310 CMR 10.05(3)(a) and (b) [page 57-59].

6.3 Abbreviated Notice of Resource Area Delineation (ANRAD)
Any person desiring to confirm, for purposes of this bylaw, the limits of resource areas on a site may file an Abbreviated Notice of Resource Area Delineation (ANRAD) with the Commission. This application shall include such information and plans as are set forth in the regulations of the Commission to describe and define the wetland resource areas. The Commission shall accept an ANRAD under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) as an ANRAD under this bylaw where the ANRAD is sufficient to meet the requirements of the bylaw and any regulations promulgated thereunder. The Commission may require additional materials or information in addition to the plans and specifications required to be filed by an applicant under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00), in order to fulfill

The bylaw proposes no changes for the filing type Abbreviated Notice of Resource Area Delineation (ANRAD). See 310 CMR 10.05(3)(a) [pages 57-58].

the requirements of this bylaw and any regulations promulgated thereunder.

The decision issued by the Commission for an ANRAD filing is an Order of Resource Area Delineation (ORAD).

6.4 Notice of Intent (NOI)

Any Person desiring to perform activities regulated by this bylaw affecting resource areas protected by this bylaw shall first file a Notice of Intent (NOI) with the Commission. The Notice of Intent shall include such information and plans deemed necessary by the Commission to describe proposed activities and their effects on the resource areas protected by this bylaw. The Commission shall accept an NOI under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) as an NOI under this bylaw where the NOI is sufficient to meet the requirements of the bylaw and any regulations promulgated thereunder. The Commission may require additional materials or information in addition to the plans and specifications required to be filed by an applicant under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00), in order to fulfill the requirements of this bylaw and any regulations promulgated thereunder.

The decision issued by the Commission for an NOI filing is an Order of Conditions (OOC).

The bylaw proposes no changes for the filing type Notice of Intent. See 310 CMR 10.05(4)(a) [pages 58-66].

6.5 Permit

For regulating activities affecting resource areas protected solely under this bylaw and not under the Wetlands Protection Act (G.L. c. 131 §40), the Commission may create a permit application. Any permit application and all processes relating to a permit application shall be outlined in the regulations promulgated under this bylaw.

The decision issued by the Commission for a permit application is a permit.

Because the bylaw includes additional resource areas and resource area values than those of the Act and because the bylaw defines certain resource areas different than the Act there may be instances when a project is proposed in an area that is only jurisdictional under the bylaw and not under the Act. In these instances, the state filing forms may not be adequate to permit these projects. The Commission may for this reason create a local filing form and approval document (permit application and permit) to approve work in these locally jurisdictional areas.

6.6 Fees

At the time of an application, the applicant shall pay a filing fee specified in the regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00).

No change from the current town bylaw which gives the Commission the ability to issue local filing fees. See page 39:
https://www.wnewbury.org/sites/g/files/vyhlf1436/f/uploads/2022_town_bylaws_-_as_amd_10232021.pdf

6.7 Fee Waiver

The Commission may waive fees specified in the regulations of the Commission for applications filed by a government agency, including a municipal department, board, or committee. The Commission may also waive fees specified in the regulations of the Commission for applications filed for projects the Commission finds have a net benefit to wetland resources and a primary purpose of restoring wetland ecological functions.

This provides the Commission the ability to waive the local filings fees for projects with a net-positive benefit to the interests protected by the bylaw. It Commission intends to waive the local filings fees for projects such as invasive species management.

6.8 Consultants

The Commission may, at the expense of the applicant and in accordance with the provisions of G.L. c. 44 §53G and regulations promulgated by the Commission, impose reasonable fees upon applicants to secure outside consultants including engineers, wetlands scientists, wildlife biologists, or other experts to aid in the review of proposed projects presenting technical issues requiring additional expertise to assist the Commission in protecting resource areas. 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 initially calculated or new information requires additional consultant services. This is intended to apply only to assist in reviewing projects deemed by the Commission to be large or complex.

The Commission has already adopted this as its policy under G.L. Ch. 44 §53G and the bylaw does not propose any changes to this existing policy. The inclusion of this in the bylaw codifies this policy.

- For G.L. Ch. 44 §53G:
<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter44/Section53G>
- For the Commission's current policy on consultants visit
<https://www.wnewbury.org/conservation-commission/pages/conservation-commission-policy-hiring-outside-consultants>

7. Notice, Public Hearings, and Public Meetings

7.1 Abutter Notification

Any person filing a Notice of Intent or Abbreviated Notice of Resource Area Delineation, or for an amendment to an Order of Conditions shall follow the abutter notification requirements set forth in the Wetlands Protection Act (M.G.L.

The bylaw follows the same abutter notification process as is included in the regulations 310 CMR 10.05(4) [page 62] for NOI and ANRAD filings. Unlike many local wetlands protections bylaws this bylaw does not propose increasing abutter notifications to those greater than 100-feet from the property lines of a proposed project's location nor does it require abutter notifications for RDA filings.

c. 131 §40) and regulations, 310 CMR 10.05(4), and as may be amended by the MassDEP.

7.2 Public Notice

The Commission shall provide written notice given at the expense of the applicant at least five business days prior to the public hearing or public meeting by publication in a newspaper of general circulation in West Newbury or in any other manner approved by the MassDEP. Where applicable, notice given for public meetings and public hearings under this bylaw may be combined with notice given for public meetings and public hearings under the Wetlands Protection Act (G.L. c. 131, §40) and regulations (310 CMR 10.00).

The bylaw does not change any provisions in this section and follows what is required today in the Act and regulation, paragraph 17 of the Act and 310 CMR 10.05(3)(b) [page 58]. However, the bylaw is worded in a way that if in the future MassDEP were to create new provisions for posting public notice outside of posting in a newspaper, those new provisions would automatically be recognized by the bylaw and the bylaw would not restrict applicants to posting public notices in an outdated manner.

7.3 Public Hearings & Public Meetings

The Commission shall commence a public hearing on any permit application, Notice of Intent, Abbreviated Notice of Resource Area Delineation, or request to amend a final Order of Conditions, or a public meeting on any Request for Determination of Applicability, within 21 days from receipt of a complete application, unless an extension is authorized in writing by the applicant.

The Commission shall have authority to request that an applicant agree to continue the public hearing or public meeting to a specific date announced at the hearing or meeting, for reasons stated at the hearing or meeting, which may include the need for additional information or plans required of the applicant or others as deemed necessary by the Commission. In the event that the applicant objects to a continuance or postponement, the hearing or meeting shall be closed and the Commission shall take action on such information as is available.

The Commission may combine its public hearing or public meeting under this bylaw with the public hearing or public meeting conducted under the Wetlands Protection Act (M.G.L. c. 131 §40) and Regulations (310 CMR 10.00).

This follows the same timelines and provisions as outlined in the Act and regulations thereunder.

8. Decisions and Conditions

8.1 Decision

The Commission shall issue its decision as a permit, Order of Conditions, denial, Order of Resource Area Delineation, or Determination of Applicability within 21 calendar days of the close of the public hearing or public meeting, unless the applicant authorizes an extension in writing. The Commission shall take into account the extent to which the applicant has avoided, minimized and mitigated any adverse effect to the interests of this bylaw. Each case will be considered on its own merits. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing or public meeting. The Commission may, in an appropriate case, combine the permit, Order of Conditions, Order of Resource Area Delineation, or Determination of Applicability issued under this bylaw with the Order of Conditions, Order of Resource Area Delineation, or Determination of Applicability issued under the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00).

This section is consistent with the state regulations. See 310 CMR 10.05 (3)(b) [page 58 for RDAs] and 310 CMR 10.05(6) [page 66 for OOCs and ORADS]. Where possible the Commission will issue one decision with conditions and findings under both the Act and the bylaw on the existing state forms.

8.2 Waivers

Upon written request, the Commission may waive specifically identified and requested procedures, design specifications, performance standards, or other requirements set forth in this bylaw or regulations, provided that:

- a. 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 bylaw or regulations; and
- b. That avoidance, minimization and mitigation have been employed to the maximum extent feasible; and
- c. The project, when considered in its entirety, would result in a net benefit of resource areas values; and
- d. 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.

This provision applies only to the local bylaw and provides a path for requirements of the bylaw to be waived when appropriate conditions are met.

8.3 Approvals

The Commission is authorized to approve a permit or Order of Conditions or issue a Negative Determination of Applicability when proposed work meets all applicable design specifications, performance standards and other requirements under this bylaw and in regulations of the Commission and where the work will not result in significant or cumulative adverse effects upon the interests protected by this bylaw, as determined by the Commission. Any permit, Order of Conditions, or Negative Determination of Applicability issued under this bylaw may differ from any such permit or Order of Conditions issued by the Commission under the provisions of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) (the “Act”), where the bylaw and regulations of the Commission are more protective of any resource area(s) than the Act.

This section is consistent with the state regulations. See 310 CMR 10.05 (3)(b) [page 58 for RDAs] and 310 CMR 10.05(6) [page 66 for OOCs and ORADS]. Where possible the Commission will issue one decision with conditions and findings under both the Act and the bylaw on the existing state forms.

8.4 Conditions

The Commission is authorized to impose conditions on any approved permit, Order of Conditions, or Negative Determination of Applicability that the Commission deems necessary to protect the interests of this bylaw or to ensure that a project or activity proceeds in accordance with any design specifications, performance standards and other requirements in regulations of the Commission. If an approved permit, Order of Conditions, or Negative Determination of Applicability contains conditions, all activities shall be conducted in accordance with those conditions.

A permit or Order of Conditions may include conditions with 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. These conditions may remain in full force and effect after issuance of a Certificate of Compliance if so noted on the Certificate of Compliance.

This section is consistent with the state regulations. See 310 CMR 10.05 (3)(b) [page 58 for RDAs] and 310 CMR 10.05(6) [page 66 for OOCs and ORADS]. Where possible the Commission will issue one decision with conditions and findings under both the Act and the bylaw on the existing state forms.

8.5 Entry

The Commission, its agents, officers, and employees shall have authority to request authorization to enter upon privately owned land to perform their duties under this bylaw subject to the constitutions and laws of the United States and the Commonwealth. They 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 refusal to authorize entry in connection with review of an application for a permit, Notice of Intent, Request for Determination of Applicability, or Abbreviated Notice of Resource Area Delineation shall be grounds for denial of that application.

This is consistent with the Act, see paragraph 17 of the act and 310 CMR 10.08 and 10.14.

8.6 Denials

The Commission is empowered to deny a permit or Order of Conditions or issue a Positive Determination of Applicability for reasons including, but not limited to:

- a. Failure to meet the requirements of this bylaw;
- b. Failure to submit necessary information and plans requested by the Commission;
- c. Failure to meet the design specifications, performance standards and/or other requirements in regulations of the Commission;
- d. Failure to meet the design specifications, performance standards and/or other requirements of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00);
- e. Failure to avoid or prevent significant or cumulative adverse effects upon the interests protected by this bylaw;
- f. The refusal to authorize entry of the Commission to a property in connection with review of an application for a permit, Notice of Intent, RDA or ANRAD; and/or
- g. Where no conditions are adequate to protect the interests of this bylaw, as determined by the

As today under the Act and regulations, the Commission is empowered to deny a permit or Order of Conditions or issues a positive determination of applicability if it finds a proposed project/work/or activity will adversely impact a resource area.

Commission in its sole discretion as the issuing authority.

Any denial issued under this bylaw may differ from any such permit, Order of Conditions, denial, or Determination of Applicability issued by the Commission under the provisions of the Act, where the bylaw and regulations of the Commission are more protective of any resource area(s) than the Act

Because the bylaw protects resource areas and resource area values beyond those protected in the Act it is possible that a project may be permissible under the Act but not permissible under the bylaw.

8.7 Amendments

An applicant may request an amendment to an Order of Conditions. Any request for an amendment to an OOC shall comply with MassDEP Wetlands Program Policy 85-4, and as may be modified or amended by MassDEP.

The existing policy to amend an Order of Conditions may be found at:

<https://www.mass.gov/info-details/wetlands-program-policy-85-4-amended-orders>

8.8 Expiration

A permit, Order of Conditions, Determination of Applicability, or Order of Resource Area Delineation shall expire three years from the date of issuance unless otherwise specified by the Commission at the time of issuance.

This follows the provisions of the regulations. See 310 CMR 10.05(3) (b) on Determinations: "Said determination shall be valid for three years from the date of issuance" [page 58] and 310 CMR 10.05(6) (d) on OOC/ORAD "an Order of Conditions, Order of Resource Area Delineation, or Notification of Non-significance shall be valid for three years from the date of its issuance" [page 68].

8.9 Extensions

Notwithstanding the above, the Commission in its discretion may extend a permit, Order of Conditions, or Order of Resource Area Delineation for one or more periods of up to three years each, upon written request from the applicant made at least 30 days prior to the expiration of the permit Order of Conditions, or Order of Resource Area Delineation.

This follows the provisions of the regulations. See 310 CMR 10.05(8) [page 86-87].

8.10 Revocation

For good cause the Commission may revoke or modify any permit, Order of Conditions, Order of Resource Area Delineation, or other decision issued under this bylaw after notice to the holder, the public, abutters, and after a public hearing.

This follows the provisions of the regulations. See 310 CMR 10.05(6) (j) [page 70].

8.11 Recordation of Order of Conditions or Permit

No work proposed in any application shall be undertaken until the permit, Order of Conditions, or amended Order of Conditions issued by the Commission with respect to such work has been recorded in the Southern Essex District Registry of Deeds or, if the land affected is registered land, in the registry section of the Land Court for the Southern Essex District Registry of Deeds, and until the holder of the permit, Order of Conditions, or amended Order of Conditions certifies in writing to the Commission that the document has been recorded or registered.

This follows the provisions of the regulations. See 310 CMR 10.05(6)(g) [page 70].

9. Security

As part of a permit or Order of Conditions issued under this bylaw, in addition to any security required by any other municipal or state board, agency, or official, the Commission may require that the performance and observance of the conditions imposed thereunder, including conditions requiring mitigation work, be secured wholly or in part by one or both of the methods described below:

- A. By a proper bond, a 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 Certificate of Compliance 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 the West Newbury Conservation Commission whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed. This method of accepting a conservation restriction, easement, or other covenant shall be used only with the consent of the applicant.

This is a new tool that is not provided for the Conservation Commission under the Act to help ensure that work is completed fully in compliance with any conditions that the Commission has issued and that the project is issued a Certificate of Compliance. Unfortunately, many past projects, often developments, have been completed without the applicant following all conditions of their permit and/or have been completed without the applicant ever seeking a Certificate of Compliance for the project to close out the recorded Order of Conditions with the Registry of Deeds. The Commission believes many of these scenarios may have been avoided if the applicant was motivated by funds held in escrow that would not be released unless and until all required conditions were met and a Certificate of Compliance was issued.

This ultimately protects current and future members of the community as the Commission has seen how failures of an applicant to meet all required conditions of their Order of Conditions and/or failure to close out a project with a Certificate of Compliance have often been ignored through many years and multiple property transactions, resulting in adverse impacts to wetlands and, as recorded Orders of Conditions follow the property and not the original applicant, leaving the obligation to satisfy the conditions of an Order of Conditions or to obtain a Certificate of Compliance with parties who were often completely uninvolved with the original project.

In most scenarios, security will be through option A., holding cash in escrow. However, open B. provides an alternative method of security by permanently protecting land in a conservation restriction, easement, or other covenant if the applicant consents to this option. It is expected that in most scenarios, security will be held in escrow through option A.

The ability for the Commission to hold funds or a conservation restriction as security for performance of a project and of the conditions imposed is similar to the process which allows the Planning Board to hold funds in escrow as security for a project.

10. Appeals

Any decision of the Commission issued under this bylaw and any regulations promulgated hereunder, shall be reviewable in the Essex County Superior Court in accordance with G.L. c. 249, §4.

Because the bylaw is not administered jointly by the Conservation Commission and MassDEP as is the case with the Act, the bylaw follows the appeals process outlined in G.L. c. 249 § 4. This process can be found here:

<https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleIV/Chapter249/Section4>

11. Enforcement

11.1 Scope

No person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this bylaw without the required authorization of the Commission, or cause, suffer, or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with a permit or an enforcement order issued pursuant to this bylaw. Any person who violates any provision of this section 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.

The scope of enforcement under the bylaw is consistent with the scope of enforcement in 310 CMR 10.08 [page 104].

11.2 Enforcement

The Commission, its agents, officers, and employees shall have authority to enforce this bylaw, its regulations, permits, Orders of Conditions, Orders of Resource Area Delineation, and Determinations of Applicability issued thereunder by letters, phone calls, electronic communication and other informal methods, violation notices, enforcement orders, non-criminal citations under G.L. c. 40 §21D, and civil and criminal court actions. Any person who violates provisions of this bylaw may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

This section provides the Commission with the ability to issue non-criminal citations for violations of the bylaw through the process outlined at G. L. c. 40 §21D. The Act gives power to MassDEP to issue fines for violators of the Act in paragraph 33 but this power does not extend to Conservation Commissions.

G. L. c. 40 §21D can be viewed online here:

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40/Section21D>

The tools currently provided to Conservation Commissions for enforcement are explained in the MassDEP enforcement manual which can be viewed online here:

<https://www.mass.gov/doc/enforcement-manual-for-wetlands/download>

11.3 Legal Action

Upon request of the Commission, the Select Board may authorize town counsel to take legal action for enforcement of this bylaw under civil law. Upon request of the Commission, the chief of police may take legal action for enforcement of this bylaw under criminal law. Municipal boards and officers, including any police officer or other officer having police

This provided the Commission the ability to undertake civil or criminal action against violators under the bylaw as the Commission is able to today under the Act. See the MassDEP Enforcement Manual for additional information on how the Commission may undertake civil or criminal action against violators, pages 48-53:

<https://www.mass.gov/doc/enforcement-manual-for-wetlands/download>

powers, shall have authority to assist the Commission in enforcement.

11.4 Fines

Any person who violates any provision of this bylaw, or regulations, permits, Orders of Conditions, Orders of Resource Area Delineation, Determinations of Applicability, enforcement order, or other administrative orders issued thereunder, shall be punished by a fine set by the Commission at \$200 per violation. Each day or portion thereof during which a violation continues, or unauthorized fill or other alteration remains in place, shall constitute a separate offense, and each provision of the bylaw, regulations, permit, or administrative orders violated shall constitute a separate violation.

As an alternative to criminal prosecution in a specific case, the Commission may, in its sole discretion, issue citations with specific penalties pursuant to the non-criminal disposition procedure set forth in G.L. c. 40 §21D, which West Newbury has adopted in §XXVIII of the Bylaws of the Town of West Newbury.

Under the Act, only MassDEP may issue fines against violators, see paragraph 33 of the Act. The bylaw affords similar remedies to the Conservation Commission. The bylaw is required to set a fixed fee schedule. Currently, every regulatory board, commission, committee, and entity in Town other than the Conservation Commission has the ability to issue discretionary fines against violators of their respective bylaws.

As long as any person in violation demonstrates, in the sole judgement of the Commission, a reasonable, good faith effort to comply with this bylaw, the Commission may refrain from issuing fines. However, the Commission may resort to issuing fines when the violator ceases to demonstrate a reasonable, good faith effort toward achieving compliance. This provision does not preclude the Commission from exercising its prosecutorial discretion to issue fines or preclude the Commission from simultaneously ordering mitigation and/or restoration of the affected resource areas.

This is an important addition that allows the Commission to *not* issue fines, in cases where there is a good faith effort shown by the violator to comply. This is not a provision written into the bylaws of any other regulator board, commission, committee, or entity in town.

11.5 Appeal of Fines

In addition to the appeal provisions under G.L. c. 40, §21D, persons fined may appeal in writing to the Commission within 21 days of issuance.

In addition to the appeals process provided by the state in G.L. c. 40, §21D to persons who have been fined, the Commission may also consider an appeal made directly the Commission.

11.6 Vacate Fines

The Commission may vacate fines where compliance has been established or where the issuance of fines is inconsistent with the interests of this bylaw. The Commission may suspend fines as long as the person in violation demonstrates a reasonable, good faith effort toward obtaining compliance. The Commission may restore suspended fines at any time during an existing violation. This provision does not preclude the issuance of fines in conjunction with orders for restoration or mitigation.

Even when fines are issued, the bylaw affords the opportunity for the Commission to later vacate those fines or to suspend the fines until enough information has been gathered to decide if fines should be vacated. This is in addition to the appeals period provided by the state for fines under G.L. c. 40, §21D.

12. Regulations

The Commission may promulgate regulations after public notice and a public hearing to effectuate the purposes of this bylaw, effective when voted by the Commission and filed with the town clerk. At a minimum, these regulations shall reiterate the terms defined in this bylaw, define additional terms and requirements not inconsistent with the bylaw, impose filing and consultant fees, and include design specifications and performance standards which provide for undisturbed vegetative buffers extending from the edge of resource areas. Failure by the Commission to promulgate such regulations or a legal declaration of their invalidity, in whole or in part, by a court of law shall not act to suspend or invalidate the effect of this bylaw.

As the regulations of the Act were promulgated to effectuate the purposes of the Act, the Commission may promulgate regulations to effectuate the purposes of the bylaw.

13. Relation to the Wetlands Protection Act

This bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) thereunder. It is the intention of this bylaw that the purposes, jurisdiction, authority, exemptions, regulations, specifications, standards, and other requirements shall be interpreted and administered as more protective than those of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00).

The expanded protections to resource areas and resource area values not included in the Act make the bylaw more protective than the Act.

14. Severability

The invalidity of any section or provision of this bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any permit, Order of Condition, Order of Resource Area Delineation, Determination of Applicability, enforcement or other administrative orders which previously has been issued.

This is standard language of most bylaws.

15. Effective Date

The effective date of this bylaw shall be the first day of the month following the approval of the bylaw by the Attorney General.

The Commission anticipates that if enacted at town meeting, approval of the Attorney General will likely occur within 6 months of the date of enactment of the bylaw.

This bylaw shall not be applicable to activity that is the subject of a Notice of Intent, Request for Determination of Applicability, or Abbreviated Notice of Resource Area Delineation filed with the Commission pursuant to the provisions of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) before the effective date of this bylaw. This bylaw shall not be applicable to activity that has been issued a permit, Order of Conditions, Order of Resource Area Delineation, or Determination of Applicability pursuant to the provisions of the Wetlands Protection Act (G.L. c. 131 §40) and regulations (310 CMR 10.00) before the effective date of this bylaw.

The Commission has included this provision to ensure fairness and clarity on what projects and filings will be subject to the bylaw should it be enacted and what projects and filings will not be subject to the bylaw.