

## **ARTICLE 17**

### **WETLANDS PROTECTION**

#### **Section 1. Purpose**

The purpose of this by-law is to protect the wetlands, water resources, and adjoining land areas in Nahant by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, water pollution control, fisheries, shellfish, land containing shellfish, wildlife habitat, rare species habitat including rare plant species, agriculture, aquaculture, recreation, and aesthetic values deemed important to the community (collectively, the “resource area values protected by this by-law”). This by-law is intended to utilize the Home Rule authority of this municipality to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act (G.L. ch. 131, s.40) and Regulations thereunder (310 CMR 10.00).

#### **Section 2. Definitions**

Except as otherwise provided in this by-law or in regulations of the Conservation Commission, the definition of terms in this by-law and the regulations shall be as set forth in the Wetlands Protection Act or anything relative thereto (G.L. ch. 131, s. 40) and Regulations (310 CMR 10.00).

The following definitions shall apply in the interpretation and implementation of this by-law.

Alter – shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by the by-law:

- a. Removal, excavations, 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, or repair of buildings, or structures of any kind.
- g. Placing of obstructions or objects in water.
- h. Destruction of plant life including cutting of trees.
- 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 ground water.

- k. Incremental activities, which have, or may have, a cumulative adverse impact on the resource areas protected by this by-law.

Coastal Wetlands – are land under the ocean; coastal beaches; coastal dunes; barrier beaches; coastal banks; rocky intertidal shores; salt marshes; land under salt ponds; land containing shellfish; banks of land under the ocean, ponds, streams, rivers, lakes, or creeks that underlie anadromous/catadromous fish run (“fish run”); land subject to tidal action; and estimated habitats for rare wildlife (for coastal wetlands).

Freshwater Wetlands – are riverine wetlands (including rivers, freshwater banks, streams, creeks; estuaries); marshes; wet meadows; bogs; and swamps that meet *at least one* of the following requirements:

1. Fifty percent or more of the natural vegetative community consists of obligate or facultative wetland plant species, as included or identified in generally accepted scientific or technical publications (such as, the Wetlands Plant List, Northeast Region for the National Wetlands Inventory, U.S. Fish and Wildlife Service).
2. The presence of a hydrologic regime that indicates a wet condition in which the soils are annually saturated.
3. The presence of hydric soils associated with wetlands as defined in Delineating Bordering Vegetated Wetlands, a publication written and distributed by the MA Department of Environmental Protection, Division of Wetlands and Waterways (1995) or as amended.
4. Where the natural vegetative community has been destroyed, as for example by landscaping or agricultural use, or in violation of this by-law, the Commission may determine the area to be a Freshwater Wetland on the basis of annual soil saturation or soil analysis alone or may defer the determination until the natural vegetation has re-grown.
5. Further freshwater wetlands are vernal pools; banks; rivers; streams; creeks; reservoirs; lakes; ponds of any size; and quarry pits and motions which may or may not contain any of the above cited vegetative and hydric requirements.

Land Subject to Coastal Storm Flowage – as defined in the MA Wetlands Protection Act Regulations (310 CMR 10.04), means land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.

Land Subject to Flooding – means land subject to periodic inundation by ground water or surface water.

Land Subject to Tidal Action – as defined in the MA Wetlands Protection Act Regulations (310 CMR 10.04), means land subject to the periodic rise and fall of a coastal water body, including spring tides.

Native Plants – means those plants recognized as native in The Vascular Plants of Massachusetts: A County Checklist, First Revision (2011) by Melissa Dow Cullina, Bryan

Connolly, Bruce A Sorrie and Paul Somers (a MA Division of Fisheries and Wildlife (Natural Heritage & Endangered Species Program), or as amended.

Wetlands Resource Area – is any wetland resource area deemed significant to the protection of the values specified in this by-law, and includes any wetland (defined herein) and lands within 100 feet of any wetland.

Wetland – is any freshwater or coastal wetland; land subject to flooding or inundation by groundwater or surface water; or lands subject to coastal storm flowage or flooding.

### **Section 3. Jurisdiction**

Except as permitted by the Conservation Commission or as provided in this by-law, no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter within the following resource areas: any freshwater or coastal wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds of any size; rivers; streams; creeks; beaches; dunes; estuaries; the ocean; lands under water bodies; lands subject to flooding or inundation by groundwater or surface water; lands subject to tidal action, coastal storm flowage, or flooding; and lands within 100 feet of above cited resource areas (collectively the “resource areas protected by this by-law”). Said resource areas shall be protected whether or not they border surface waters.

### **Section 4. Exemptions and Exceptions**

The applications and permits required by this by-law shall not be required for work performed for normal maintenance or improvement of land in agricultural and aquacultural use as defined by the Wetlands Protection Act regulations at 310 CMR 10.04.

The applications and permits required by this by-law shall not be required for mosquito control work conducted by the State Reclamation and Mosquito Control Board (SRMCB) or a Mosquito Control District (MCD) pursuant to G.L. ch. 252.

The applications and permits required by this bylaw 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 Conservation Commission.

The applications and permits required by this by-law 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 Conservation Commission prior to commencement of work or within 24 hours after commencement; provided that the Conservation 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 Conservation 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 Conservation Commission for review as provided by this by-law. Upon failure to meet these and other requirements of the Conservation Commission, the Conservation Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

The application and permits required by this by-law shall not be required for the following, to the extent that they take place within 100 feet outside of a wetland (as defined herein):

- a. the mowing of existing lawns; planting native trees, shrubs or groundcover; mulching existing trees, shrubs or groundcover; pruning or maintenance of trees; cutting down of trees or planting of turf lawns, unless the extent of the tree cutting or turf lawn planting and/or its proximity to the Wetland Resource Areas protected by this by-law will adversely impact such resource areas;
- b. the repair or maintenance or improvement of any existing structure or building, unless the extent or proximity of said work to the Wetland Resource Areas protected by this by-law will adversely impact such resource areas; and
- c. any other activity qualifying as a “minor activity” under the regulations promulgated pursuant to the Wetlands Protection Act, G.L. ch. 131, s. 40, at 310 CMR 10.02(2)(b)2.

Other than stated in this by-law, the exceptions provided in the Wetlands Protection Act (G.L. ch. 131 s. 40) and regulations (310 CMR 10.00) shall not apply under this by-law.

### **Section 5. Applications for Permits and Requests for Determination (RFD)**

Written application shall be filed with the Conservation Commission to perform activities affecting resource areas protected by this by-law. The permit application shall include such information and plans as are deemed necessary by the Conservation Commission to describe proposed activities and their effects on the resource areas protected by this by-law. No activities shall commence without receiving and complying with a permit issued pursuant to this by-law.

The Conservation Commission in an appropriate case may accept as the permit application and plans under this by-law the Notice of Intent (NOI) and plans filed under the Wetlands Protection Act on anything relative thereto (G.L. ch. 131, s. 40) and Regulations (310 CMR 10.00).

Any person desiring to know whether or not a proposed activity or an area is subject to this by-law may in writing request a determination from the Conservation Commission. Such a Request

for Determination (RFD) shall include information and plans as are deemed necessary by the Conservation Commission.

At the time of a permit application or RFD, or application for a Certificate of Compliance the applicant shall pay a filing fee specified in Regulations of the Conservation Commission. The fee is in addition to that required by the Wetlands Protection Act on anything relative thereto (G.L. ch. 131, s. 40) and Regulations (310 CMR 10.00). The fee shall be deposited in a dedicated account, for use only for wetlands protection activities, from which the Conservation Commission may withdraw funds with the approval of the Board of Selectmen.

Pursuant to G.L. ch. 44, s. 53G and regulations promulgated by the Conservation Commission, the Conservation 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. Refusal to deposit funds to this account may result in the Conservation Commission voting to deny the application and/or project. Such funds shall be deposited with the town treasurer, who shall create an account specifically for this purpose. Expenditures from this account shall be made only in connection with the review of a specific project or projects for which a consultant fee has been collected from the applicant. Any funds remaining in the account after the Conservation Commission has rendered a decision will be returned to the applicant. Additional consultant fees may be requested where the requisite review is more expensive than originally calculated or where new information requires additional consultant services.

## **Section 6. Notice and Hearings**

Any person filing a permit application 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 within 100 feet of the property line of the parcel or parcels of land where the proposed activity is to take place 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, including any in another municipality or across a body of water. The notice to abutters shall have enclosed a copy of the permit application or request, with plans, or shall state where copies may be examined and obtained by abutters. The applicant shall obtain a certified list of names and addresses of all persons required to be notified from the Nahant Board of Assessor's Office. The applicant shall file with the Conservation Commission an affidavit of service signed by the person serving the notices, the certified list of names and addresses from the Nahant Board of Assessor's Office and a copy of the notices mailed and delivered. When a person requesting a determination is other than the owner of the property where the activity is proposed, the request (RFD) or permit application (NOI) shall also be mailed or delivered to the owner by the applicant and proof of service shall be filed with the Conservation Commission. The Conservation Commission shall send a copy of the notice of hearing and a copy of the determination or permit to both the owner and applicant.

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

The Conservation Commission shall commence the public hearing within twenty-one (21) days from receipt of a completed permit application or RFD unless an extension is authorized in writing by the applicant.

The Conservation Commission shall issue its permit or determination in writing within twenty-one (21) days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant.

The Conservation Commission in an appropriate case may combine its hearing under this by-law with the hearing conducted under the Wetlands Protection Act or anything relative thereto (G.L. ch. 131, s. 40) and Regulations (310 CMR 10.00)

The Conservation Commission shall have the authority to continue the hearing to a certain date announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information from the applicant or others deemed necessary by the Conservation Commission in its discretion, or comments and recommendations of other boards and officials.

### **Section 7. Areas of Rare & Endangered Species Habitat and Priority Natural Vegetation Community**

Any disturbance of areas where rare and endangered species habitats or priority natural vegetation communities are documented either by the Natural Heritage & Endangered Species Program or by observation, including anadromous and catadromous fish runs, shall require notification to the MA Division of Fisheries & Wildlife. For any project proposed within such an area, the Conservation Commission shall require that the applicant submit a copy of the RFD and/or the NOI to the MA Division of Fisheries & Wildlife, at the same time as the RFD and/or NOI is submitted to the Conservation Commission. The applicant shall submit a copy of any response received from the MA Division of Fisheries & Wildlife to the Conservation Commission.

The Conservation Commission may require a wildlife habitat study of the project resource area, to be paid for by the applicant, whenever it deems appropriate, regardless of the amount or type of alteration proposed. The decision shall be based upon the Conservation Commission's estimation of the importance of the habitat area or priority natural vegetation community considering (but not limited to) such factors as proximity to other areas suitable for wildlife, importance of wildlife "corridors" in the area, or possible presence of rare 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).

## **Section 8. Coordination with Other Boards**

Any person filing a permit application, RFD, or NOI with the Conservation Commission shall, as required in the discretion of the Conservation Commission, provide a copy thereof to the Board of Selectmen, Planning Board, Board of Appeals, Public Health Department, Harbormaster, Public Works Department, or Building Inspector.

## **Section 9. 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 upon the resource area values protected by this by-law, the Conservation Commission, within twenty-one (21) days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the commission shall impose conditions which the Conservation Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions. The Conservation Commission shall take into account the cumulative adverse effects of loss, degradations, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities.

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

To prevent wetlands loss, the Conservation Commission shall require applicants to avoid wetlands alteration wherever feasible; shall minimize wetlands alteration; and, where alteration is unavoidable, shall require mitigation. The Conservation Commission may authorize or require replication of wetlands as a form of mitigation, but only with adequate security, professional design, and monitoring to assure success, because of the high likelihood of failure of replication. Lands adjacent to resource areas, are presumed important to the protection of these resources because activities undertaken in close proximity to resource areas 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 loss of wildlife habitat. The Conservation Commission therefore may require that the applicant maintain a strip of

continuous, undisturbed vegetative cover within, or in some instances up to the full extent of the area within 100 feet outside of any wetland.

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Conservation 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 Conservation 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 Conservation Commission prior to expiration. Notwithstanding the above, a permit may contain requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all owners of the land.

For good cause the Conservation Commission may revoke or modify a permit or determination issued under this by-law after notice to the holder of the permit or determination, notice to the public, abutters, and town boards, pursuant to section 6 above, and a public hearing.

The Conservation Commission in an appropriate case may combine the permit or determination issued under this by-law with the Order of Conditions or Determination of Applicability issued under the Wetlands Protection Act on anything relative thereto (G.L. ch. 131, s. 40) and Regulations (310 CMR 10.00).

No work proposed in any permit application shall be undertaken until the permit issued by the Conservation 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 Conservation Commission that the permit has been recorded.

## **Section 10. Regulations**

After a public notice and public hearing, the Conservation Commission shall promulgate rules and regulations to effectuate the purposes of this by-law effective when voted and filed with the Town Clerk. Failure by the Conservation Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act on anything relative thereto to suspend or invalidate the effect of this by-law.

The Conservation 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 wetland resource areas, including without limitation strips of continuous, undisturbed vegetative cover. At a minimum these regulations shall define key terms in this by-law not inconsistent with the by-law and procedures governing the amount of filing fees.

## **Section 11. Security**

As part of a permit issued under this by-law, 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 more of the methods described below:

- a. By a proper bond or deposit of money or negotiable securities or other undertaking of financial responsibility sufficient in the opinion of the Conservation 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 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.

## **Section 12. Compliance**

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

The Conservation Commission, its agents, officers, and employees, may enter upon the land where the proposed work is to be done in response to a request for a prior determination, or for the purpose of carrying out its duties under this by-law, and may, or cause to be made such examination or survey as deemed necessary.

The Conservation Commission shall have the authority to enforce this by-law, its regulation, and permits issued thereunder by letters, phone calls, electronic communication and other informal methods, violation notices, non-criminal citations under G.L. ch. 40, s. 21D, and civil and criminal court actions. Any person who violated provisions of this by-law may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

Upon request of the Conservation Commission, the Town Counsel may take legal action for enforcement under civil law. Upon request of the Conservation Commission, the Chief of Police may take legal action for enforcement under criminal law.

Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Conservation Commission in enforcement, including without limitation, the authority to issue orders to stop work.

Any person who violates any provision of this by-law, or regulations, or permits issued there under, shall be punished by a fine of not more than \$300.00 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 by-law, regulations, or permits violated shall constitute a separate offense.

As an alternative to criminal prosecution in a specific case, the Conservation Commission may issue citations with specific penalties pursuant to the non-criminal disposition procedure set forth in G.L. ch. 40, s. 21D, which has been adopted by the Town in Article XIII of Nahant's Police by-Law.

### **Section 13. Burden of Proof**

The applicant for a permit shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the permit application will not have unacceptable significant or cumulative effect upon the resource area values protected by this by-law. Failure to provide adequate evidence to the Conservation Commission supporting this burden shall be sufficient cause for the Conservation Commission to deny a permit or grant a permit with conditions.

### **Section 14. Appeals**

A decision of the Conservation Commission shall be reviewable in the Superior court in accordance with G.L. ch. 249, s. 4.

### **Section 15. Severability**

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

