

Chapter 160

WETLANDS

[HISTORY: Adopted at Special Town Meeting, October, 1985, with amendments (including a rewriting) adopted at Annual Town Meeting, May 5, 1987]

GENERAL REFERENCES

Zoning — See Ch. 164.

§ 160-1. Purpose. [Amended 10-7-1991 STM, Art. 22]

The purpose of this chapter is to protect the wetlands, related water resources and adjoining land areas in the Town of Orleans by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon wetland values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution prevention, fisheries, shellfish habitat, wildlife habitat, recreation, aesthetics, agriculture and aquaculture values (collectively, the public interests or the wetland values protected by this chapter).

§ 160-2. Jurisdiction. [Amended 11-7-2005 STM, Art. 12]

Except as permitted by the Conservation Commission or as provided in this chapter, no person shall remove, fill, dredge, alter or build upon or within one hundred (100) feet of any bank, beach, dune or flat; upon or within one hundred (100) feet of any freshwater wetland, coastal wetland, marsh, wet meadow, bog or swamp; upon or within one hundred (100) feet of any lake, pond, creek, river, stream, estuary or the ocean; upon any land under said waters; or upon or within one hundred (100) feet of any land subject to flooding or inundation by groundwater, surface water or tidal action; or upon land subject to coastal storm flowage; or upon an Area of Critical Environmental Concern (ACEC). Any activity proposed or undertaken outside any area specified above shall not be subject to regulation under this chapter unless, in the judgment of the Conservation Commission, said activity will result or has resulted in the removing, filling, altering or building upon any area specified above.

§ 160-3. Wetlands Replication.

In order to promote the wetland values and interests listed in § 160-1, no removal, filling, dredging or altering shall be mitigated by or compensated for in any way by the creation of a substitute or artificial freshwater wetland, coastal wetland, marsh, meadow, bog, swamp, pond or any land subject to tidal action, coastal storm flowage or flooding.

§ 160-4. Definitions. [Amended 10-7-1991 STM, Art. 22]

The following definitions together with the regulations promulgated by the Conservation Commission pursuant to § 160-11 shall apply to the interpretation of the bylaw. Unless otherwise defined in this section or in the regulations promulgated under this bylaw, the definitions contained in GL Chapter 131 Sec. 40 and in the regulations issued by the Department of Environmental Protection thereunder (310 CMR 10.00) as of October 16, 1987, shall also apply to this bylaw. Where definitions contained in GL Chapter 131 Sec. 40 and the regulations promulgated thereunder are determined to apply, all references contained therein to the Act shall be deemed to include a reference to this bylaw and the regulations promulgated hereunder.

ACEC:

An Area of Critical Environmental Concern (ACEC) established pursuant to M.G.L. c. 21A, §2(7) and any applicable provisions of the Code of Massachusetts Regulations. [Added 11-7-2005 STM, Art. 12]

AESTHETICS:

The natural scenery and appearance of any resource area, visually accessible to the public.

ALTER:

Includes, without limitation, the following activities when undertaken to, upon, within, or affecting resource areas protected by this chapter:

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

(2) Changing pre-existing drainage characteristics, flushing characteristics, sanitary distribution, sedimentation patterns, flow patterns or flood retention characteristics.

(3) Drainage or other disturbance of the water level or water table.

(4) Dumping, discharging, or filling with any material which may degrade water quality.

(5) Placing of fill or removal of materials, which would alter elevation.

(6) Driving of piles or erection or repair of buildings or structures of any kind.

(7) Placing of obstructions or objects in water.

(8) Destruction of plant life, including cutting or pruning of trees and shrubs.

(9) Changing water temperature, biochemical oxygen demand or other physical or chemical characteristics of water.

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

CUMULATIVE EFFECT:

The effect 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, present activities in a given area may be significant to said interests and values in the aggregate.

EROSION AND SEDIMENTATION CONTROL:

Erosion Control means the regulation of activities or processes which would threaten, by wearing away the surface soil or by undermining the interior portions of the landforms, the stability of landforms and resource areas, and the soil and/or vegetation associated with protected resources and adjoining land areas.

Sedimentation Control means the regulation of activities, or processes which would threaten the ability of wetlands to settle out sediments and other water-borne material beyond their capacity to do so without adverse effect on other wetland functions.

PERSON:

Includes any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, including the Town of Orleans, administrative agency, public or quasi-public corporation or body or any other legal entity or its legal representatives, agents or assigns.

POND, INLAND:

Any open body of fresh water, either naturally occurring or man-made by impoundment, which is never without standing water due to natural causes, except during periods of extended drought. For purposes of this definition, "extended period of drought" shall mean any period of four (4) or more months during which the average rainfall for each month is fifty percent (50%) or less of the ten year average for that same month. Basins or lagoons which are part of wastewater treatment plants shall not be considered nor shall swimming pools or other impervious man-made retention basins.

RECREATION:

Any leisure activity or sport taking place in, on, or within 100 feet of a resource area which is dependent on the resource area directly or indirectly for its conduct and enjoyment. Recreational activities include, but are not limited to, the following: non-commercial fishing and shellfishing, hunting, boating, swimming, walking, painting, birdwatching, and aesthetic enjoyment.

SHELLFISH:

Mollusks including but not limited to the following: clams, conchs, mussels, oysters, periwinkles, quahaugs, razor clams, scallops, sea clams; Crustaceans including lobsters and crabs.

SHELLFISH HABITAT:

Those areas below the mean high water line in any coastal resource area subject to this bylaw that provides or has provided the characteristics including but not limited to sediment type and grain size, circulation patterns, hydrologic regime, water chemistry, plant communities and food supply, necessary to support shellfish species.

WILDLIFE HABITAT:

These resource areas subject to Conservation Commission jurisdiction which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas or breeding areas for wildlife.

§ 160-5. Exceptions.

A. The application required by this chapter shall not be required for maintaining or repairing an existing and lawfully located structure or facility on private property or which is used in the service of the public to provide sewer, electric, gas, water, sanitary sewer, storm drainage, public roadway, telephone, telegraph or other telecommunication services, provided that written notice has been given to the Conservation Commission prior to the commencement of work, and provided that the structure or facility will not be, in the opinion of the Conservation Commission, substantially changed or enlarged, and provided that any work done conforms to the performance standards

and design specifications in regulations, policies or guidelines adopted by the Conservation Commission.

B. The application required by this chapter shall not apply to emergency projects necessary for the protection of the health or 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 prior to commencement of work or within twenty-four (24) hours after commencement, and provided that the Conservation 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 Conservation Commission for the limited purposes necessary to abate the emergency, and provided that, within twenty-one (21) days of commencement of an emergency project, an application shall be filed with the Commission for review as provided in this chapter. 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.

C. Other than stated in this section, the exceptions provided in the Wetlands Protection Act shall not apply.

§ 160-6. Application; Orders.

A. A written application shall be filed with the Conservation Commission to perform any work which will or which, in the opinion of the Conservation Commission, may affect resource areas within the jurisdiction of this chapter. Such application shall be sent by certified mail or be hand-delivered to the Commission at the town offices and shall include such plans and data as are deemed necessary by the Conservation Commission to describe the proposed activities and their effects on the wetland values and interests protected by this chapter. The Conservation Commission may require an application and plans under this chapter in addition to the Notice of Intent and plans filed pursuant to the Wetlands Protection Act, MGL C. 131, § 40.

B. No work or alteration shall commence without receiving and complying with Orders issued pursuant to this chapter nor until all appeal periods have elapsed. Upon its own initiative or upon the petition of any ten (10) registered voters of the Town, the Commission shall require any work commenced within the jurisdiction of this chapter without a set of Orders or before all appeal periods have elapsed to be ordered stopped and shall require a written application as provided in this section.

C. Any person desiring to know whether or not proposed work or an area is subject to this chapter may, in writing, request a Determination from the Conservation Commission. Such a Request for Determination shall contain data and plans, as specified by the Commission, pursuant to this chapter, and any regulations, policies and guidelines adopted pursuant thereto.

D. At the time of the application or Request for Determination, the applicant shall pay a filing fee specified in the regulations, policies or guidelines of the Commission. This fee is in addition to that required by the Wetlands Protection Act, MGL C. 131, § 40. The Commission may waive the filing fee and costs and expenses for an application or request for determination filed by a government agency.

§ 160-7. Notice and Hearing.

A. Any person filing a Notice of Intent or requesting a prior Determination under this chapter shall, at the same time, give written notice thereof by certified mail, return receipt requested, or by hand delivery to all abutters according to the most recent records of the Assessor, including those across a traveled way or stream and the owner of the subject property if such owner is different from the petitioner. The notice shall enclose a copy of the application or request with plans or state where copies may be examined and obtained by those so notified. A list of persons to whom notice must be given shall be presented to the Conservation Commission with said Notice of Intent or request for prior Determination, along with proof of notice either by affidavit or postal receipts. When a person requesting a Determination is other than the owner, the request, the notice of the hearing and the Determination itself shall be sent by the Commission to the owner as well as to the person making the request.

B. The Commission shall conduct a public hearing on any application or Request for Determination, with written notice given at the expense of the applicant and published at least five (5) working days prior to the hearing in a newspaper of general circulation in the municipality.

C. The Commission shall commence the public hearing within twenty-one (21) days from receipt of the completed application or Request for Determination.

D. The Commission shall issue its Determination, in writing, within twenty-one (21) days of the filing of the Request for Determination and shall issue its Orders, in writing, within twenty-one (21) days of the close of the public hearing called to consider the Notice of Intent.

E. The Commission shall have authority to continue or postpone the hearing to a date certain announced at the hearing for reasons stated at the hearing, which may include receipt of additional information offered by the

applicant or others or for information and plans required of the applicant, deemed necessary by the Commission in its discretion. In the event that the applicant objects to a continuance or postponement, the hearing shall be closed, and the Commission shall take action on such information as is available.

F. The Commission, in its discretion, may hear oral presentation under this chapter at the same public hearing required to be held under the provisions of MGL C. 131, § 40.

§ 160-8. Determinations and Conditions.

A. [Amended 10-7-1991 STM, Art. 22]

1. If, after a public hearing, the Conservation Commission determines that the activities which are the subject of a Notice of Intent are likely to have a significant or cumulative effect upon the wetland or buffer zone values protected by this bylaw, the Commission shall, within 21 days of the close of the hearing, issue an Order of Conditions denying the requested activity or permitting it subject to such conditions deemed necessary to protect those values and all activities shall be done in accordance with those conditions.

The Commission is empowered to deny a permit for any of the following reasons:

a) Failure to submit necessary information and plans required or requested by the Commission;

b) Failure to meet the design specifications, performance standards, policy guidelines or other requirements in regulations of the Commission;

c) Where no Order of Conditions is adequate to avoid or prevent unacceptable significant or cumulative effects upon the wetlands values protected by this by-law.

2. The applicant for an Order of Conditions shall have the burden of proving by clear and convincing evidence that the activity proposed in the Notice of Intent will not have an unacceptable significant or cumulative effect upon the wetland values protected by this bylaw.

B. If the Commission, after a public hearing, determines that the activities which are the subject of a request for prior Determination are not likely to have a significant or cumulative effect upon the wetland interests and values protected by this chapter, the Commission shall, within twenty-one (21) days of the filing of the request, issue a Negative Determination.

C. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

D. The Orders shall expire three (3) years from the date of issuance. Notwithstanding the above, the Commission, in its discretion, may issue Orders expiring five (5) years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of the time and location of

work is given to the Commission. Any Orders may be renewed once for an additional one-year period, provided that a request for a renewal is received, in writing, by the Commission thirty (30) days prior to expiration.

E. The Commission, in an appropriate case, may combine the Orders issued under this chapter with the orders issued under the Wetlands Protection Act.

§ 160-9. Appeals. [Amended 11-7-2005 ATM, Art. 12]

If the Conservation Commission has failed to hold a hearing within twenty-one (21) days of filing a Notice of Intent under this chapter, or if the Commission, after holding such hearing, has failed, within twenty-one (21) days therefrom, to issue an Order or if the Commission, upon written request by any person to determine whether this chapter is applicable to any work, fails, within twenty-one (21) days, to make said Determination or where an Order is issued by the Commission, the applicant, any person aggrieved by said Commission's Order or failure to act or any ten (10) residents of the Town of Orleans may, within twenty-one (21) days of the Commission's Order or failure to act, appeal therefrom to the Second Barnstable Division of the Trial Courts of the Commonwealth. Appeal shall be perfected by filing a Complaint with the Second Barnstable Division of the Trial Courts of the Commonwealth and by sending a copy thereof, certified mail, return receipt requested, to the Town Clerk and the Conservation Commission of the Town of Orleans and, if the appellants

is other than the petitioner, to the petitioner, all within twenty-one (21) days of said Order or failure to act. The Court shall hear all evidence pertinent to the authority and findings of the Commission and determine the facts and, upon the facts so determined, annul such decision if found to exceed the authority of the Commission or make such other decree as justice and equity may require.

§ 160-10. Enforcement.

A. The Commission, its agents, officers and employees shall have authority to enter upon privately owned land for the purpose of performing their duties under this chapter and may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary.

B. The Police Department, Conservation Commission and the Conservation Agent shall have the authority to enforce this chapter, its regulations and orders issued thereunder by violation notices, administrative orders and civil and criminal actions. [Amended 5-8-2000 ATM, Art. 25]

C. Upon request of the Commission or upon written request of any ten (10) residents of the Commonwealth, the Board of Selectmen and the Town Counsel shall take legal action for enforcement under civil law. Upon request of the Commission, the Chief of Police shall take legal action for enforcement under criminal law. In the alternative to criminal prosecution, the Commission may elect to utilize the noncriminal disposition procedure set forth in MGL C. 40, § 21D.

D. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Conservation Commission in enforcement.

E. [Amended 5-8-2000 ATM, Art. 25] Any person who violates any provision of this bylaw, regulations thereunder or Orders issued thereunder may be punished by a fine of two hundred dollars (\$200.00) for a first offense and three hundred dollars (\$300.00) for each offense thereafter. Each day or portion thereof during which a violation continues shall constitute a separate offense and each provision of the bylaw, regulations or Orders violated shall constitute a separate offense.

Violations may include but are not limited to:

1. Any activity subject to regulation under the bylaw as enumerated in § 196A-2.B.(1) and (2) of the Orleans Wetlands Regulations that is undertaken without a valid Order of Conditions.

2. Any activity undertaken without a valid Order of Conditions or Determination of Non-Significance by the Conservation Commission within the wetland resource areas and buffer zone (0 to 100 feet) enumerated in § 196A-2.A. of the Orleans Wetlands Regulations.

3. Failure to comply with Conditions contained in any Orders issued pursuant to 310 CMR Section 10.08 of the Wetlands Protection Act.

4. Violation of an Enforcement Order issued by the Orleans Conservation Commission or its agent.

§ 160-11. Regulations.

After public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purpose of this chapter. Public notice shall include publication of all proposed regulations in a newspaper of general circulation in the town not less than twenty-one (21) days prior to the public hearing. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this chapter.

§ 160-12. Security.

As part of Orders issued under this chapter, in addition to any security required by any other town or state board, agency or official, the Commission may require that the performance and observance of the Conditions imposed hereunder be secured wholly or in part by one (1) or more of the methods described below:

A. By a proper bond or deposit of money or negotiable securities or by other undertaking of financial responsibility sufficient in the opinion of the Commission.

B. By 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 and members of the public, whereby the Order of Conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

§ 160-13. Severability.

A. The invalidity of any section or provision of this chapter shall not invalidate any other section or provision thereof, nor shall it invalidate any Order of Conditions which previously has been issued.

B. If any court of the commonwealth shall invalidate any provision of this chapter or any regulation thereunder, the Conservation Commission shall present to the next Town Meeting after such invalidation amendments to this chapter which are designed to comply with any court decision invalidating such provision or shall promulgate such amendments to regulations promulgated hereunder pursuant to § 160-11.