

Chapter 119

WETLANDS PROTECTION

- § 119-1. Purpose.
- § 119-2. Jurisdiction.
- § 119-3. Exceptions.
- § 119-4. Requests for determination and applications for permits.
- § 119-5. Notice and hearings.
- § 119-6. Coordination with other Boards.
- § 119-7. Determinations, permits, conditions and denial.
- § 119-8. Regulations.
- § 119-9. Definitions.
- § 119-10. Security.
- § 119-11. Enforcement; violations and penalties.
- § 119-12. Burden of proof.
- § 119-13. Relation to the Wetlands Protection Act.
- § 119-14. Severability.

[HISTORY: Adopted by the Annual Town Meeting of the Town of Pelham 5-2-1987, Art. 19. Amendments noted where applicable.]

GENERAL REFERENCES

Zoning — See Ch. 125.

§ 119-1. Purpose.

The purpose of this chapter is to protect the wetlands, related water resources and adjoining land areas in the Town of Pelham 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 (collectively, the "wetland values protected by this chapter"):

- A. Public or private water supply.
- B. Groundwater and groundwater quality.
- C. Surface water and surface water quality.

- D. Flood control.
- E. Erosion and sedimentation control.
- F. Storm damage prevention.
- G. Water pollution.
- H. Storm drainage.
- I. Runoff.
- J. Wildlife habitat.
- K. Agriculture.
- L. Aquaculture.
- M. Recreation.

§ 119-2. Jurisdiction.

- A. Except as permitted by the Conservation Commission or as provided in this chapter, no person shall remove, fill, dredge, build upon or alter the following resource areas:
 - (1) Any freshwater wetland, including isolated wetlands, any marsh, wet meadow, bog or swamp; within 100 feet of any wetland, marsh, wet meadow, bog or swamp.
 - (2) Any pond; any surface, subsurface or intermittent stream or headwaters to a stream; within 100 feet of any pond, stream or headwaters; any land under said waters.
 - (3) Any land subject to flooding or inundation by groundwater, surface water or storm flowage, or within 100 feet of the one-hundred-year storm line. Land subject to flooding shall include temporary ponds, ephemeral ponds, vernal pools and the like.
- B. Where natural vegetation is absent as a result of mowing, grazing or other disturbance, or where vegetation is transitional or borderline wetland vegetative type, hydric soil type indicated on United States Soil Conservation Service maps supplemented by field investigation of hydric soil profiles and application of Soil Conservation Services definitions and criteria for hydric soils shall provide positive determination of jurisdiction. (See § 119-9, Definitions, of this chapter.) [**Amended 5-7-1988 ATM, Art. 26**]

§ 119-3. Exceptions.

- A. Existing structures or facilities. The application and permit required by this chapter 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 all of the following conditions are met:
 - (1) The structure or facility is not substantially changed or enlarged.
 - (2) Written or oral notice has been given to the Commission prior to commencement of work.

(3) The work conforms to any performance standards and design specifications in regulations adopted by the Commission.

B. Emergency projects.

(1) The application and permit 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 following conditions are met:

(a) The work is to be performed by or has been ordered to be performed by an agency of the Town of Pelham, of Hampshire County, the Commonwealth of Massachusetts or the federal government.

(b) Advance notice, oral or written, has been given to the Commission prior to commencement of work or within 24 hours after commencement.

(c) The Conservation Commission or its agent certifies the work as an emergency project.

(d) The work is performed only for the time and place certified by the Conservation Commission for the limited purposes necessary to abate the emergency.

(e) Within 21 days of commencement of an emergency project an application for a permit shall be filed with the Commission for review as provided in this chapter.

(2) 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. Right of access. Access from an accepted Town road shall be allowed through areas protected by this chapter, provided that the applicant demonstrates to the satisfaction of the Commission that no other feasible means of gaining entrance to a property can be obtained and that all possible options have been explored. However, the Commission shall have the authority to rule that this access shall be routed so as to minimize the square footage of the portion that crosses areas protected by this chapter, as well as to rule that the width of said portion shall be no wider than necessary to accommodate emergency vehicles. Construction of said access shall be subject to all provisions of this chapter and its regulations. All wetlands affected by this minimum allowable access through them shall be replaced according to regulations established by the Commission. Culverts, bridges or overflows shall be provided at all drainways with a minimum capacity to pass a twenty-five-year frequency twenty-four-hour duration storm. Where drainways in wetlands are not well defined, the Conservation Commission shall determine the number of crossings (culverts, bridges, etc.) needed.

D. Other exceptions. Other than stated in this section, the exceptions provided in the Wetlands Protection Act, MGL c. 131, § 40, shall not apply.

§ 119-4. Requests for determination and applications for permits.

A. A request for determination of applicability of this chapter and the Wetlands Protection Act (MGL c. 131, § 40) shall be filed with the Commission prior to any proposed construction. Any person desiring to know whether or not a proposed activity or an area is subject to this chapter shall in writing request a determination of applicability from the Commission. Such a request for determination shall contain data and plans specified by the regulations of the Commission. The

rendering of determinations may be deferred at the discretion of the Commission during periods of snow cover.

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

C. For any proposed construction, including but not limited to subdivisions, that will require the regrading or excavation of land, other than that required for construction of one single-family residence or an accessory structure thereto, the applicant shall submit a mapped and written description of measures to be taken to manage stormwater and control erosion and sedimentation both during and after construction.

D. The Commission, at its discretion in an appropriate case, may accept as the application and plans under this chapter the notice of intent and plans filed under the Wetland Protection Act (MGL c. 131, § 40).

E. When filing a request for determination or an application for a permit under the provisions of this chapter, the applicant shall pay filing fees specified in the regulations of the Commission. These fees are in addition to those required by the Wetlands Protection Act (MGL c. 131, § 40).

F. If, in the judgment of a majority of the members of the Commission, consulting services are necessary or appropriate for the Commission to completely understand the project, the applicant, prior to a decision on the request for determination or application for permit, shall reimburse the Town for the full cost of such services contracted by the Commission in order to review the project. Failure to pay the filing fee, or failure to provide full reimbursement for consulting services, shall be sufficient grounds to deny the application or request.

G. The Commission may waive all or part of the filing fee and reimbursement for consulting services for an application or request filed by the Town of Pelham or other government agency.

§ 119-5. Notice and hearings.

A. Filing. [**Amended 5-7-1988 ATM, Art. 27**]

(1) Requests for determination of applicability of this chapter shall be filed by certified mail or by delivery in hand to the Town Clerk during regular business hours with the required fee. When a person requesting a determination is other than the owner, the notice of the public meeting and the determination itself shall be sent by the Commission to the owner as well as to the person making the request.

(2) Any person filing an application for a permit with the Commission to work in an area subject to protection under this chapter shall do so by certified mail or by delivery in hand to the Town Clerk during regular business hours and shall, at the same time, give written notice thereof, by certified mail with return receipt request, to all abutters and to the owner if the applicant is not the owner. This notice to abutters shall state where copies of plans may be examined. (See § 119-9, Definitions.)

B. Plans, drawings, sketches and calculations shall be stamped, signed and dated by the person(s) responsible for their preparation. Plans and drawings involving the practice of surveying or engineering shall be stamped, signed and dated by the appropriate professional who shall be

registered in the Commonwealth of Massachusetts and shall be drawn to the same scale required by the Pelham Board of Health.

C. Public meeting and hearing. [**Amended 5-7-1988 ATM, Art. 27**]

(1) The Commission shall render a determination of applicability at an advertised and posted public meeting within 21 days of receipt of a completed request for determination with written notice given five working days prior to the hearing in a newspaper of general circulation in the Town and by mail to the applicant and/or owner.

(2) The Commission shall conduct a public hearing on any application for a permit to do work in areas protected by this chapter with legal notice given five working days prior to the hearing in a newspaper of general circulation in the Town and by mail to the applicant and abutters.

D. The Commission shall commence the public hearing within 21 days from receipt of a completed application or request for determination.

E. The Commission shall issue its determinations or permit in writing within 21 days of the close of the public meeting or hearing. Delivery shall be by certified mail or delivery in hand to the applicant and owner and by regular mail to abutters. [**Amended 5-7-1988 ATM, Art. 27**]

F. The Commission, at its discretion in an appropriate case, may combine its hearing under this chapter with the hearing conducted under the Wetlands Protection Act (MGL c. 131, § 40).

G. The Commission shall have authority to continue 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, information and plans required of the applicant deemed necessary by the Commission in its discretion or comments and recommendations of boards and officials listed in § 119-6. In the event 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.

§ 119-6. Coordination with other Boards.

Any person filing a request for determination or any application for a permit with the Commission shall provide a copy thereof at the same time to the Board of Health, Building Inspector, Planning Board, Superintendent of Public Works and, in the case of proposed shared driveways, the Board of Appeals. The Commission shall not take final action until such boards and officials have had 14 days from receipt of notice to file written comments and recommendations with the Commission or to present oral testimony at a public hearing; the Commission shall take into account any such comments, recommendations or testimony in reaching its decision, but they shall not be binding on the Commission. The applicant shall have the right to receive any such comments and recommendations and to respond to them at a hearing of the Commission prior to final action.

§ 119-7. Determinations, permits, conditions and denial.

A. If the Commission after a public hearing determines that the activities which are the subject of the permit application are likely to have a significant or cumulative effect upon the wetland values protected by this chapter, the Commission, within 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 Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions.

B. The Commission is empowered to deny a permit for failure to meet the requirements of this chapter; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the wetland values protected by this chapter, 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.

C. A permit shall expire three years from the date of issuance. Nevertheless, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one-year period, provided that a request for a renewal is received in writing by the Commission prior to expiration.

D. For good cause, the Commission may revoke or modify a permit issued under this chapter after notice to the holder of the permit and public notice and public hearing.

E. The Commission, at its discretion in an appropriate case, may combine the permit or other action on an application issued under this chapter with the order of conditions issued under the Wetlands Protection Act (MGL c. 131, § 40). Orders of condition issued under this chapter shall be recorded with the Registry of Deeds of Hampshire County within 10 days of receipt and notification sent to the Commission.

§ 119-8. Regulations.

After public notice of not less than 14 days prior to a public hearing, the Commission shall promulgate and from time to time revise regulations to promote the purposes of this chapter. Failure by the Commission to promulgate such 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.

§ 119-9. Definitions.

The following definitions shall apply in the interpretation and implementation of this chapter:

ABUTTER — Any property owner whose land adjoins the subject property, including those persons whose land is separated from the subject property by a body of water or traveled way. Abutters shall be determined according to the most recent records of the Board of Assessors. [Added 5-7-1988 ATM, Art. 27]

ALTER — Includes the following activities when undertaken upon, within or in a manner affecting resource areas protected by this chapter:

- A. Removal, excavation or dredging of soil, sand, gravel or aggregate materials of any kind.
- B. Changing of preexisting drainage characteristics or soil profiles.
- 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 the original contour of the land.

- 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 but not limited to cutting of trees.
- I. Changing water temperature, biochemical oxygen demand or other physical or chemical characteristics of water.
- J. Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater.

CONSULTANTS or CONSULTING SERVICES — Includes, but is not limited to, architects, biologists, soil scientists and other environmental experts, chemists, engineers, geologists, landscape architects, lawyers, sanitarians and surveyors.

HYDRIC SOIL

- A. Soil that in its undrained condition is saturated, flooded or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. The hydric soil list includes Soil Conservation Service map units which themselves are not hydric units but commonly have inclusions, less than 2.5 acres to five acres in size depending on map scale, of soils that are hydric. Such map units are so noted as containing such inclusions on the lists.
- B. Criteria for hydric soils:
 - (1) All histosols except folists, or
 - (2) Soils in aquic suborders. aquic subgroups. albolls suborder, salorthids great group, or Pell great groups of vertisols that are:
 - (a) Somewhat poorly drained and have a water table less than 0.5 feet from the surface at some time during the growing season, or
 - (b) Poorly drained or very poorly drained and have either:
 - [1] A water table at less than 1.0 feet from the surface at sometime during the growing season if permeability is equal to or greater than 6.0 inches per hour in all layers within 20 inches, or
 - [2] A water table at less than 1.5 feet from the surface at some time during the growing season if permeability is less than 6.0 inches per hour in any layer within 20 inches, or
 - (3) Soils that are ponded during any part of the growing season, or
 - (4) Soils that are frequently flooded for long duration or very long duration during the growing season.

PERSON — Any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivisions thereof to the extent subject to Town bylaws, administrative agency, public or quasi-public corporation or body, the Town of Pelham, and any other legal entity, its legal representatives, attorneys, agents, heirs, successors or assigns.

POND — Any open body of fresh water, either naturally occurring or man-made by impoundment, with a surface area observed or recorded within the last 10 years of at least 100 square feet and which is never

without standing water due to natural causes, except during periods of extended drought. For purposes of this definition, "extended drought" shall mean any period of four or more months during which the average rainfall for each month is 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 ponds, nor shall swimming pools or other impervious man-made retention basins.

STREAM — A body of running water, including brooks and creeks whether constantly or intermittently flowing, which moves in a definite channel in the ground due to a hydraulic gradient, and which may flow through a culvert or beneath a bridge.

TEMPORARY PONDS (EPHEMERAL PONDS, VERNAL POOLS, ETC.) — Bodies of fresh or brackish water with little or no flow that periodically become dry to such an extent that they cannot support sustained fish populations. These ponds form during periods of high water table and high input from spring runoff or heavy precipitation, and do not persist year round, but support populations of nontransient macroorganisms or serve as breeding habitat for select species of amphibians. These areas are likely to be locally significant to flood control and storm damage prevention, and as critically important habitat for species of wetland plants, aquatic invertebrates, amphibians and reptiles.

WETLANDS — Vegetation and type as in the Wetlands Protection Act (MGL c. 131, § 40). This chapter does not require that wetlands border on a body of surface water nor does it restrict the size of the resource area to be protected.

§ 119-10. Security.

As part of a permit issued under this chapter, 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 hereunder be secured wholly or in part by one or more of the methods described below:

- A. By a performance bond secured by surety or deposit money or negotiable securities. Such bond or money or negotiable securities must be approved as to form and manner of execution by the Town Counsel or counsel to the Commission. Any surety must be approved by the Commission and may be required at a level adequate to allow restoration work or completion of the project by the Town if necessary; an additional deposit may be required for replication work.
- B. By a conservation restriction, easement or other covenant running with the land and enforceable in a court of law, duly executed by the record owner and recorded in the Hampshire County Registry of Deeds (or in the case of registered land, with the recorder of the Land Court). Such covenant shall provide in part that the permit conditions shall be performed and observed before the land, or any lot or other part thereof, may be conveyed other than by mortgage deed.

§ 119-11. Enforcement; violations and penalties.

- A. The Commission, its agents, officers, employees and consultants 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 Commission shall have authority to enforce this chapter, its regulations and permits issued thereunder by issuing violation notices and administrative orders, and by taking civil and criminal court actions. While said authority shall include the right to secure the services of qualified legal counsel, the authority to involve Town Counsel in civil or criminal court actions shall remain

exclusively with the Select Board. Prior to initiating a court action, the Commission shall consult with the Select Board and discuss the issues involved and possible options. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement. [Amended 6-27-2020 ATM by Art. 17]

C. (Reserved)¹

D. Any person who, after being issued an enforcement order, continues to violate this chapter, regulations thereunder or permit issued thereunder, shall be subject to a fine of \$300. Each day, or portion thereof, during which a violation continues shall constitute a separate offense, and each provision of the chapter, regulations or permit violated shall constitute a separate offense. [Amended 5-6-2000 ATM, Art. 24]

E. In the alternative to criminal prosecution the Commission may elect to utilize the noncriminal disposition procedure set forth in MGL c. 40, § 21D.

§ 119-12. 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 application will not have an unacceptable, significant or cumulative effect upon the wetland values protected by this chapter. Failure to provide evidence which is, in the opinion of the Commission, adequate to support this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.

§ 119-13. Relation to the Wetlands Protection Act.

This chapter is adopted under the Home Rule Amendment of the Massachusetts Constitution and the home rule statutes, independent of the Wetlands Protection Act, MGL c. 131, § 40, and regulations thereunder.

§ 119-14. Severability.

If any section, paragraph, sentence, clause, provision, phrase or word of this chapter shall be adjudged not valid, the adjudication shall apply only to the material so adjudged, and the remainder of this chapter shall be deemed to remain valid and effective. Any such adjudication shall not invalidate any permit or determination which previously has been issued.

¹1. Editor's Note: This subsection was deleted by the Attorney General.
