

Staff Report

Date: February 5, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **746 Sconticut Neck Road – Request for Certificate of Compliance – DEP# 023-0725, Fairhaven CON 023-204**

DOCUMENTS REVIEWED

- Request for Certificate of Compliance and associated documents
- Notice of Intent dated July 2000
- Order of Conditions dated August 8, 2000
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)

RESOURCE AREAS ON/NEAR SITE

- Barrier Beach
- Salt Marsh
- Bordering Vegetated Wetland
- Buffer Zone
- Land Subject to Coastal Storm Flowage

PERFORMANCE STANDARDS

- **Barrier Beach:** 10.29
(3) ...Significant to Storm Damage Prevention, Flood Control, Marine Fisheries, or Protection of wildlife habitat, 310 CMR 10.27(3) through (6) (coastal beaches) and 10.28(3) through (5) (coastal dunes) shall apply to the coastal beaches and to all coastal dunes which make up barrier beaches.
10.27 (3) Any project on a coastal beach...shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.
10.27 (5) Beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.
10.28 (3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:
 - (a) affecting the ability of waves to remove sand from the dune;
 - (b) disturbing the vegetative cover so as to destabilize the dune;
 - (c) causing any modification of the dune form that would increase the potential for storm of flood damage;
 - (d) interfering with the landward or lateral movement of the dune;

- (e) causing removal of sand from the dune artificially; or
- (f) interfering with mapped or otherwise identified bird nesting habitat.

- **Salt Marsh: 10.32**

(3) A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects of productivity.

(4) A small project within a saltmarsh, such as an elevated walkway or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each day may be permitted if such a project complies with all other applicable requirements of [the regulations for coastal wetlands].

- **Bordering Vegetated Wetland: 10.55(4)**

(a) work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of the BVW

(b) The ConCom may permit the loss of up to 5000 square feet of BVW when said area is replaced IF:

1. The area is equal;
2. The ground water and surface elevation are approximately equal;
3. The overall horizontal configuration and location are similar;
4. There is an unrestricted hydraulic connection to the same water body or waterway;
5. It is in the same general area of the water body;
6. At least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons; and
7. The replacement area is provided in a manner which is consistent with all other regs in 310 CMR 10.00.

(c) The ConCom may permit the loss of a portion of BVW when;

1. Said portion has a surface area less than 500 square feet;
2. Said portion extends in a distinct linear configuration ("finger-like") into adjacent uplands; and
3. In the judgment of the issuing authority it is not reasonable to scale down, redesign or otherwise change the proposal.

(d) No project may be permitted which will have any adverse effect on specified habitat sites of rare species

(e) No work shall destroy or otherwise impair any Area of Critical Environmental Concern

- **Buffer Zone General Provisions: 10.53(1)** "For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work."
- **LSCSF General Provisions: 10.24(1)** "If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests."

PROJECT SUMMARY

- This Order of Conditions was issued as part of the grant-funded Winsegansett Marsh Restoration project completed in November 2000.
- The Order of Conditions approved the replacement of undersized culverts under three privately-owned footpaths to alleviate tidal restrictions to the upper marsh.

COMMENTS

- The COC request states that the project was for the reconstruction of a building on the property, which is incorrect. However, the request notes that the bank withheld money from the property owner until the Order of Conditions is cleared from the deed.
- This Order of Conditions covers grant-funded work on three privately-owned parcels under one DEP file number. The request for Certificate of Compliance came from one of the property owners listed on the Order of Conditions.
- The final grant report for the project indicates it was completed successfully.
- No special conditions were noted on the Order of Conditions.
- There were three separate Orders of Conditions issued for the same file number because three separate properties were involved. The other two property owners will need to be contacted and asked to submit requests for certificates of compliance for the remaining two orders related to the file number.

RECOMMENDATION

- I recommend issuing a Certificate of Compliance for Complete Certification for SE 023-0725, 746 Sciticut Neck Road.

Staff Report

Date: February 2, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **60 Bayview Avenue – Request for Determination of Applicability – No DEP#, Fairhaven CON 023-202**

DOCUMENTS REVIEWED

- Request for Determination of Applicability and associated documents
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)

RESOURCE AREAS ON/NEAR SITE

- Coastal Dune
- Buffer Zone
- Land Subject to Coastal Storm Flowage (LSCSF) Zone VE

PERFORMANCE STANDARDS

- **Coastal Dune:** 10.28
(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:
 - (a) affecting the ability of waves to remove sand from the dune;
 - (b) disturbing the vegetative cover so as to destabilize the dune;
 - (c) causing any modification of the dune form that would increase the potential for storm of flood damage;
 - (d) interfering with the landward or lateral movement of the dune;
 - (e) causing removal of sand from the dune artificially; or
 - (f) interfering with mapped or otherwise identified bird nesting habitat.
- **Buffer Zone General Provisions:** 10.53(1) “For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work.”
- **LSCSF General Provisions:** 10.24(1) “If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests.”

PROJECT SUMMARY

- The applicant is seeking to expand the existing driveway and install native plantings.

COMMENTS

- The current driveway is 9 feet by 31.5 feet. They are seeking to widen the existing driveway by three feet and extend it by 19 feet so the new area of driveway will be 12 feet by 50.5 feet.
- The applicant is also proposing to add a 7-foot-by-24-foot parking area across the front of the property, consistent with the four neighbors to the south.
- Current estimated impervious surface on the property: 1350 square feet
 - Current driveway area: 283.5 square feet
- Proposed estimated impervious surface on the property: 1800 square feet
 - New proposed driveway area: 606 square feet
 - New proposed parking area: 168 square feet
- The new driveway coverage is nearly triple the current driveway coverage.
- The applicant notes that the areas they are proposing to pave are already used for parking and the grass has been damaged and ground compacted.
- If the ground is already compacted from parking cars, it is likely functioning as a semi-impervious surface already.
- The applicant has proposed native planting areas along the areas of proposed new driveway, including sweet pepperbush (*Clethra*), lowbush blueberry, and bearberry.
- The proposed planting areas are predominantly lawn currently.
- MassGIS Oliver shows a coastal dune diagonally across the street, but it doesn't appear that the proposed work will have an adverse impact on the dune.

RECOMMENDATION

- I recommend closing the public hearing for 60 Bayview Avenue and issuing a Negative 3 and Negative 6 Determination with the following recommended conditions:
 - 1) CAP-3
 - 2) All work shall conform to the requirements of local, state, and federal floodplain regulations.
 - 3) A list of native plantings to be installed shall be provided to the Conservation Commission or its Agent for review and approval prior to planting.

Staff Report

Date: February 5, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **1 Bella Vista Island – Notices of Intent – DEP# 023-1309, Fairhaven CON 023-110 – DEP# 023-1340, Fairhaven CON 023-195**

DOCUMENTS REVIEWED

- Notice of Intent and associated site plans and documents
- MassDEP Administrative Consent Order with Penalty and Notice of Noncompliance dated June 25, 2019
- Previous Notices of Intent, Order of Conditions, Enforcement Orders
- Division of Marine Fisheries comments dated January 7, 2020
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)
- Preliminary Peer Review Report, prepared by LEC Environmental Consultants, Inc. dated February 13, 2020
- Overall Site Plan dated April 16, 2020
- Existing Conditions plan dated June 6, 2020
- Additional revised documents submitted February 1, 2021

RESOURCE AREAS ON/NEAR SITE

- Salt Marsh
- Coastal Beach
- Coastal Dune
- Coastal Bank
- Land Containing Shellfish
- Land Under the Ocean
- Buffer Zone
- Land Subject to Coastal Storm Flowage (LSCSF)
- Isolated Vegetated Wetlands

PERFORMANCE STANDARDS

- **Salt Marsh: 10.32**
 - (3) A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects of productivity.
 - (4) A small project within a saltmarsh, such as an elevated walkway or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each

day may be permitted if such a project complies with all other applicable requirements of [the regulations for coastal wetlands].

- **Coastal Beach: 10.27**

(3) Any project on a coastal beach...shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.

(5) Beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

- **Coastal Dune: 10.28**

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;

(b) disturbing the vegetative cover so as to destabilize the dune;

(c) causing any modification of the dune form that would increase the potential for storm of flood damage;

(d) interfering with the landward or lateral movement of the dune;

(e) causing removal of sand from the dune artificially; or

(f) interfering with mapped or otherwise identified bird nesting habitat.

- **Coastal Bank: 10.30**

(4) Any project on a coastal bank or within 100 feet landward of the top of a coastal bank...shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

(6) Any project on [a coastal bank significant to storm damage prevention or flood control] or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

- **Land Containing Shellfish: 10.34**

(4) Any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land...

(6) ...the issuing authority may, after consultation with the Shellfish Constable, permit the shellfish to be moved from such area under the guidelines of, and to a suitable location approved by, the Division of Marine Fisheries, in order to permit a proposed project on such land.

- **Land Under Ocean: 10.25**

(3) Improvement dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects...

(4) Maintenance dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects...

(5) Projects...which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(6) Projects...shall...be designed and constructed...so as to minimize adverse effects [or] have no adverse effects on marine fisheries habitat or wildlife habitat...

- **Buffer Zone General Provisions: 10.53(1)** "For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work."

- **LSCSF General Provisions:** 10.24(1) “If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests.”

PROJECT SUMMARY

- This NOI is a result of an Administrative Consent Order with Penalty (ACOP) with MassDEP that establishes corrective actions to bring the property into compliance.
- The applicant proposes to:
 - repair the existing eastern groin and provide beach nourishment
 - dredge under the bridge to allow the bridge channel to be deep enough for small crafts to navigate and place the dredged sand on the beach for nourishment purposes
 - repair the southeast end of the causeway side slope by placing large stones
- The applicant is seeking after-the-fact approval for:
 - Wooden posts and rope line that extend north and south perpendicular to the causeway along the eastern property line
 - Reconstruction of the existing stone seawall, including removing the southern end of the seawall

COMMENTS

- MA DMF has provided commentary on the project with regard to potential impacts to several marine fisheries resources and habitat.
 - Prohibit silt-producing activities or dredging from January 15 through May 31 of any year
 - Plan does not indicate where beach fill will be deposited. Disposal of beach fill in the intertidal area should be consistent with DEP’s Beach Nourishment Guide and be of equal grain size and appropriate slope to avoid premature loss from the beach and impacts to nearshore bottom habitat.
 - Proposed relocated seawall shall not be constructed below the mean high water line within the intertidal area
 - Plan does not depict the groin work. MA DMF recommends that groin repairs remain within the existing footprint. Groin shall be constructed with interstitial spaces to support marine fisheries habitat for macroalgae
- The NOI is missing the square footage of Land Subject to Coastal Storm Flowage impacted and the square footage of Land Containing Shellfish impacted.
- A portion of the proposed dredging is located within Natural Heritage Estimated Habitat.
- The applicant has submitted to Natural Heritage.
- The peer reviewer provided a preliminary review, stating “due to the complicated and extensive history of enforcement actions and Conservation filings dating back to the Applicant’s purchase of the property in 2009, this letter is intended to be a preliminary review report outlining our initial comments and requests for information. Once the comments provided below are addressed, we will provide a more specific review of the project.”
- The peer review letter provided an overview of the background, previous filings, and the current filing.
- The peer review letter outlined findings and recommendations, including the following:
 - The site plans submitted with the NOI are lacking information and should be updated to reflect existing conditions and clarify scope of work proposed. The plans are lacking a current wetland delineation.

- The existing conditions plan should be based on a current land survey...[and] should clearly label all features which are subject to the ACOP and current NOI. No proposed features or activities should be depicted on the existing conditions plan.
- The applicant should clarify which activities have been completed and which activities have not been completed under the previous filings.
- The Commission should seek additional clarification on the permitting status of the “toe plate” located at the base of the seawall.
- Numerous items should be removed from resource areas as soon as possible, including booms, anchors, and associated wires, the wooden float, and the 6” x 6” wooden posts along the property line near the entrance.
- The Commission should not issue a COC for File No. Se 023-1127
- The applicant should address the comments provided in DMF’s letter in response to the NOI dated January 7, 2020.
- A site visit was performed on May 11, 2020 with the applicant’s engineer.
- The applicant’s representative submitted additional information including revised plans, revised Notice of Intent, photographs of the dredge area, and some photographs of areas that had debris, but not all.
- The submitted photographs of debris removal do not document all areas where debris was located.
- *Question for Applicant’s Representative:* Have you been out on the site and personally confirmed that all of the debris in the resource areas has been removed?
- Previously the Commission had discussed doing another site visit once the additional information was submitted. If the Commission feels that would be helpful at this juncture before moving forward with in-depth additional discussion on the two filings.
- It appears that a majority of the information requested by the Commission has been submitted. The second filing has been revised to only include unpermitted items that are existing on site and nothing new. The first filing has been revised to only address the Administrative Consent Order items.

RECOMMENDATION

- If the Commission feels a site visit would be helpful at this juncture, I would recommend asking the applicant request a continuance to the March 8 meeting to allow time to set up and conduct a site visit.
- If the Commission feels a site visit is not necessary, I would recommend asking the applicant to request a continuance to the February 22 meeting to allow time for the peer review and the Agent to thoroughly review all of the submitted revised documentation for both filings for compliance with the Administrative Consent Order with Penalty, previously issued Orders of Conditions, and all applicable regulations.



TOWN OF FAIRHAVEN, MASSACHUSETTS

CONSERVATION COMMISSION

Town Hall · 40 Center Street · Fairhaven, MA 02719

Memorandum

Date: February 3, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

RE: Draft buffer zone policy

Buffer Zone Policy

1.0 Preamble

- 1.1 The Town of Fairhaven considers 100 feet from a resource area as the buffer zone and consequently an additional protected resource. Floodplains, lands within 100 feet of other resource areas and within 200 feet of rivers and perennial streams, and the resource areas, are presumed significant to the protection of functions and characteristics of these areas because activities undertaken in close proximity have a high likelihood of adverse impact upon them, 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, damage to or reduced water quality, and damage or loss of wildlife habitat. Any person in Fairhaven that proposes a project that is within the 100-foot buffer zone resource area is required to submit a Notice of Intent or other applicable application such as a Request for Determination of Applicability to the Fairhaven Conservation Commission (the Commission).
- 1.2 A growing body of research evidence suggests that even “no disturbance” areas reaching beyond 25 feet from resource areas may be insufficient to protect many important characteristics and values. Problems of nutrient runoff, water pollution, siltation, erosion, vegetation change, and habitat destruction are greatly exacerbated by activities within 100 feet of resource areas. Thus, work and activity within the 100-foot buffer zone shall be avoided and discouraged and reasonable alternatives pursued. The applicant may site all construction activities, including grading, beyond the 100-foot buffer zone resource area and avoid a public hearing and the permitting process through the Commission.
- 1.3 Currently as established by precedent, the Commission has instituted a no disturb buffer zone that extends 25 feet from the defined/delineated edge of the resource area. This policy will codify this requirement. Extensive work in this zone,

particularly clearing of natural vegetation and soil disturbance, is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received. Soil and water chemistry within resource areas may be adversely affected by work in the buffer zone. As a result of buffer zone alterations, biological conditions in adjacent resource areas may include changes in plant community composition and structure, invertebrate and vertebrate biomass and species composition, and nutrient cycling. The effects from work in the buffer zone will most likely result in the disruption and erosion of soil, loss of shading, reduction in nutrient inputs, and changes in litter and soil composition that filters runoff and serves to attenuate pollutants and sustain wildlife habitat within resource areas. For these stated reasons, the Commission is codifying the requirement not to disturb the 0-25 foot buffer zone around the defined/delineated resource area.

- 1.4 This policy will also characterize and provide guidance as to the type of projects that would most likely be acceptable to the Commission in the zone that extends 25-50 feet from the defined/delineated resource area (“25-50 foot buffer zone”), as well as the buffer zone that extends 50-100 feet from the defined/delineated resource area (“50-100 foot buffer zone”) in order to be consistent with the Massachusetts Wetlands Protection Act Regulations (310 CMR 10.00) relative to the simplified review process, as well protect the 50-foot buffer zone resource area where the functions and characteristics of the resource area are most critical.
- 1.5 The science supporting the protection of buffer zones is documented in the Massachusetts Association of Conservation Commissions Buffer Zone Guidebook. The Commission shall utilize this guidebook in evaluating buffer zone projects.
- 1.6 The requirements for a Minor Buffer Zone Activity (MBZA) area as follows:
 - 1.6.1 The Commission shall presume that the MBZA proposed will occur:
 - 1.6.1.1 Exclusively within a previously disturbed or clearly delineated buffer zone; and
 - 1.6.1.2 The alteration is less than 1,000 square feet or 5% of the buffer zone on the lot, whichever is less; and
 - 1.6.1.3 At a minimum, a 25-foot-wide area is preserved between the activity and the resource area boundary; and
 - 1.6.1.4 The buffer zone does not contain estimated wildlife habitat which is indicated on the most recent Estimated Habitat Map of State Listed Rare and Endangered Species; and
 - 1.6.1.5 Erosion and sedimentation controls, if required, are provided at the limit of work to protect the resource areas; and
 - 1.6.1.6 Shall constitute activities within the buffer zone that would be eligible for a Negative Determination of Applicability with conditions.
 - 1.6.2 The Commission may determine that this presumption shall not apply based on unusual circumstances such as steep slopes, the potential for negative impacts over time, or because the proposed project would require oversight

through continuing conditions. The Commission may waive any or all of the above requirements if they find that there is an emergency situation. In order for the site to be declared an emergency, a vote of the Commission shall be required.

- 1.6.3 The Commission may, in its discretion, permit a MBZA in a location closer than 25 feet to the resource area if, and only if, the proposed activity occurs exclusively within a previously disturbed area and is located no closer to the resource area than existing structures, activities, or disturbances. However, it is encouraged to increase the width of the buffer zone where possible.

2.0 0 to 25 Foot Buffer Zone Resource Area

- 2.1 An applicant shall demonstrate that no work/disturbance, including grading activities, is proposed within the 0-25 foot buffer zone resource area. Any applicant proposing a project within the 0-25 foot buffer zone resource area will have an irrefutable presumption of significant adverse impact to the functions and characteristics of the resource area, unless otherwise determined by the Commission to be a Minor Buffer Zone Activity (MBZA), as described in Section 1.4 of this policy.

3.0 25 to 50 Foot Buffer Zone Resource Area

- 3.1 Any applicant proposing a project within the 25-50 foot buffer zone resource area shall indicate that there are no structures including, but not limited to, concrete, stone, or other impervious foundations and/or slabs for construction purposes that would significantly increase runoff. Alteration of the 25-50 foot buffer zone resource area is limited to grading, tree clearing, stormwater management system components, lawns, gardens, and other low-impact uses as determined by the Commission or otherwise approved by the Commission by the variance procedures set forth in Section 6.0 of this policy. Footings for building structures, such as a deck, as opposed to slabs or foundations, shall be used when technically feasible. The Commission may condition the applicant to use Best Management Practices (BMPs) for stormwater management consistent with the best available data, most up-to-date local and state stormwater regulations, and taking into account impacts from climate change. Stormwater management systems or individual components, including drainage piping and construction of detention/retention ponds, shall be allowed by the Commission based on an alternative analysis and review of design and space limitations as indicated in the final approved plans.
- 3.2 Previously disturbed areas: When there is a pre-existing disturbance (disturbed as part of a previously recorded Certificate of Compliance or Determination of Applicability or disturbed prior to the enactment of the Massachusetts Wetlands Protection Act (MGL Ch. 131 §40) and the Fairhaven Wetlands Bylaw (Chapter 192)), and the work proposed is entirely within this previously disturbed area, an applicant may propose impervious surfaces or other uses, such as pools, buildings, porches, and sheds within the 25-50 foot buffer zone resource area. The Commission shall evaluate the proposed uses based on the demonstration by the applicant that the functions, characteristics, and values of the resource area will not be adversely impacted.

4.0 50 to 100 Foot Buffer Zone Resource Area

- 4.1 Alterations including structures are allowed in the 50-100 foot buffer zone resource area. The Commission may require additional mitigation offsets when the slope within the buffer zone is steeper than 10%. Additionally, mitigation offsets may be required by the Commission when the applicant proposes that more than 30% of the 50-100 foot buffer zone resource area is proposed to be impervious surface.
- 4.2 Mitigation offsets may include, but are not limited to, plantings, conversion of impervious surfaces to pervious surfaces, and other practices consistent with best available data.

5.0 Vernal Pool and Its Associated 100-Foot Buffer Zone Resource Area

5.1 Findings

- 5.1.1 Vernal pools and their associated 100-foot no-disturbance zones are likely to be significant to the protection of wildlife habitat and rare plant and animal habitat. Vernal pools constitute a unique and increasingly rare type of wetland that is inhabited by many species of wildlife, some of which are completely dependent on vernal pools and their associated habitat for survival. Areas in the immediate vicinity of vernal pools (i.e., the 100-foot buffer zone) provide these species with important non-breeding habitat functions, such as migratory pathways, feeding, shelter, and over-wintering sites. Many other species utilize vernal pools and their associated 100-foot buffer zone resource area for breeding and non-breeding functions, although such species are not limited to this type of wetland. The protection of vernal pools and their associated 100-foot buffer zone resource area is essential for the survival of wildlife species that depend on these unique and threatened resource areas. Vernal pools need not be state-certified in order to be protected under the Fairhaven Wetlands Bylaw (Chapter 192) or this policy.
- 5.1.2 The extreme edges of vernal pool habitat represent one of the most ecologically valuable portions of these habitats. Shallow water at the edges of a pool generally are the first to thaw in the spring. This provides early access to the pool for the earliest breeding species. The shallow water zones also tend to be significantly warmer than the deeper portions of a vernal pool throughout the spring. Egg masses of early breeding amphibians benefit from the warmer water temperatures at the pool edges that promote rapid egg development.

5.2 Definition, Critical Characteristics, and Boundary

- 5.2.1 Vernal pools exhibit a tremendous variation in physical, geographic, hydrologic and vegetative conditions, and therefore, for the purposes of these Regulations, these conditions are not considered reliable criteria for their identification. A vernal pool is a temporary freshwater body, which, in most years holds water for a minimum of two (2) months and is free of established, reproducing fish populations, and is protected by this policy if it meets any of the following criteria:

- 5.2.1.1 The vernal pool contains evidence of the presence of any one (1) of the following obligate indicator species: Spotted Salamander,

Blue-Spotted Salamander, Jefferson Salamander, Marbled Salamander, Wood Frog or Fairy Shrimp, or;

5.2.1.2 In the absence of any obligate indicator species, the Vernal Pool contains evidence of two (2) of any of the following facultative indicator species: Spring Peeper, American Toad, Green Frog, Pickerel Frog, Gray Tree Frog, Four-Toed Salamander, Spotted Turtle, Caddisfly larvae or cases of Caddisfly larvae, Dragonfly or Damselfly larvae or shed skins (exuvia) of Dragonfly or Damselfly larvae, adults, juveniles or shells of either Fingernail Clams or Amphibious, air-breathing Snails.

5.2.2 The boundary of vernal pool is the lower of:

5.2.2.1 the maximum elevation of a topographic depression that holds water for a minimum of two (2) continuous months each year; or

5.2.2.2 the maximum observed or recorded water level in a topographic depression.

5.2.3 The boundary of vernal pool may be defined differently for the purpose of state or federal protection. The boundary of vernal pool is not established when a vernal pool certification number is issued by the Commonwealth.

5.3 Timing of Evidence Collection: Many of the indicators of Vernal Pool habitat are seasonal. For example, certain salamander egg clusters are found only between late March and late May; Wood Frog chorusing occurs only between late March and late May, and then only at night.

Consequently, failure to find evidence of breeding must be tied explicitly to those periods during which the evidence is most likely to be available. Accordingly, in the case of challenges to the presumption of Vernal Pool habitat, the Commission may require that the determination be postponed until the appropriate time period consistent with the evidence being presented. The Commission may also require its own site visit(s) as necessary to confirm the evidence.

5.4 Presumptions of Significance for 100-foot Buffer Zone to a Vernal Pool: Where a proposed activity involves the removing, filling, dredging, or altering of a Vernal Pool or its 100-foot buffer zone resource area, the Commission shall presume that the Vernal Pool and its 100-foot buffer zone resource area are significant to the protection of wildlife habitat and rare plant and animal habitat.

5.5 Performance Standards for 100-foot Buffer Zone Resource area: Unless the presumption set forth in Section 5.4 of this policy is overcome, the following standards shall apply to Vernal Pools and their 100-foot buffer zone resource area:

5.5.1 100-foot Buffer Zone Resource Area: No activity shall be permitted within 100 feet of the delineated edge of a Vernal Pool, or in the case of a wetland resource area that encompasses the pool, within 100 feet of the delineated edge of said wetland resource area. Prohibited activities include, but are not limited to, grading, landscaping, vegetation control, pruning, cutting, filling, excavation, roadway construction and/or driveway construction.

- 5.5.2 100-foot Buffer Zone to Vernal Pool Demarcation: To maintain the perpetual integrity of the 100-foot Buffer Zone Resource Area and to ensure that there will be no encroachments into this Area by the applicant or future owners of the subject property, the Commission may require the 100-foot Buffer Zone Resource Area to be marked on the ground, at the applicant's expense, with permanent markers. These markers shall be made of weather resistant material (e.g. granite, concrete, other), and the Commission shall determine their number, location and size. The Commission may require the maintenance of such markers in any certificate of compliance issued for the project.

6.0 Variance Procedure

- 6.1 The Commission may grant a variance from this policy upon a showing by the applicant that any proposed work, or its natural and consequential impacts and effects, will not have any adverse effect upon any of the interests protected in Chapter 192 of the Code of the Town of Fairhaven (Wetlands). It shall be the responsibility of the applicant to provide the Commission, in writing, with any and all information, which the Commission may request, in order to enable the Commission to ascertain such adverse effects. The failure of the applicant to furnish any information, which has been requested, shall result in the denial of a request for a variance pursuant to the applicable subsection of this policy.
- 6.2 The Commission may grant a variance from this policy when it is necessary to avoid so restricting the use of the property as to constitute an unconstitutional taking without compensation. If the Commission receives an application for a variance pursuant to an applicable subsection of this policy, the Commission may request an opinion from Town Counsel as to whether the application of this policy to a particular project will result in such a taking without compensation.
- 6.3 Variance process: To request a variance, the applicant shall submit a variance request in writing at the time of the application for the Notice of Intent or Request for Determination of Applicability. The request shall explain why the variance is needed and shall describe in detail how the project can be completed without significant adverse impacts on the functions, characteristics, and values of the resource areas. Such detail must include, but is not limited to, an alternatives analysis.



TOWN OF FAIRHAVEN, MASSACHUSETTS

CONSERVATION COMMISSION

Town Hall · 40 Center Street · Fairhaven, MA 02719

Memorandum

Date: February 3, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

RE: Draft winter delineation policy

Winter Conditions Wetlands Delineation and Certificate of Compliance Policy

Delineating or verifying resource area boundaries during the winter months, especially with deep snow cover or frozen soil conditions, is difficult and under extreme conditions, virtually impossible. Vegetation and other indicators of hydrology that are used to determine wetland boundaries are not readily observable or may be misleading during these times.

MassDEP recommends that resource area delineations be avoided when deep snow cover or “deep freeze” conditions exist. When these conditions exist, it is also not possible to conduct a field verification of a delineation that was performed earlier, under favorable conditions, but was not submitted to the Commission until unfavorable conditions existed.

Based on this, the Fairhaven Conservation Commission finds that it may be necessary and appropriate to continue any hearing on a filing with unapproved wetland delineation until conditions have improved sufficiently to permit field verification of the submitted delineation. The Conservation Agent, in consultation with the Commission Chair, is authorized and directed to determine when such conditions exist and thereafter perform such evaluation and/or schedule a Commission site visit for evaluation purposes.

Exceptions to this policy may be granted upon a written request, stating the reasons for the exceptions sought. Each request shall be evaluated on its own merits, on a case-by-case basis, taking into account the type(s) of resource areas being delineated, the type of work proposed, and the distance between the work and the unapproved resource area delineation. The grant of an exception on any given property or for any particular application, when warranted, shall be for that one instance only.

If the applicant does not agree to a meeting or hearing continuance in order to allow the Commission to complete an adequate field verification of the wetland resource boundaries affecting a particular application, the Commission shall close the hearing and render a decision based on the information available, which may result in a denial for lack of information. For the same reasons, it

is also difficult or impossible for the Commission to issue Certificates of Compliance under adverse winter weather conditions involving deep snow or other significant weather events. The Commission will defer final action on Certificates of Compliance using the same procedures described above until conditions improve sufficiently to permit a site visit.

This policy is intended to be consistent with the Massachusetts DEP's "Winter Delineation" guidance as set forth in the MassDEP manual: "Delineating Bordering Vegetated Wetlands under the Massachusetts Wetlands Protection Act" (1995), on page 49 thereof and shall apply to applications submitted under the Wetlands Protection Act and the Fairhaven Wetlands Bylaw.