

FALMOUTH WETLANDS REGULATIONS

July 15, 1998, Effective August 15, 1998

Includes 2003 and 2004 updates.

This is an unofficial copy.

Official code at www.town.falmouth.ma.us "Town Code" link

FWR 10.00: WETLANDS PROTECTION

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FWR 10.00 FALMOUTH CONSERVATION COMMISSION

Falmouth Wetland Regulations Part I Procedures and Regulations for all Wetlands

FWR 10.01 Introduction and Purpose

(1) Introduction. The Falmouth Wetland Regulations, FWR 10.00, is promulgated by the Falmouth Conservation Commission pursuant to the authority granted to them under the Falmouth Wetlands Bylaw, Chapter 235 of the Code of Falmouth. The FWR 10.00 shall complement Chapter 235 of the Code of Falmouth, and shall have the force of law upon their effective date.

FWR 10.01 through 10.15 provide definitions and procedures. FWR 10.01 through 10.19 pertains to both inland and coastal areas subject to protection under Chapter 235 of the Code of Falmouth. FWR 10.16 through 10.99 provide standards for work within those areas. FWR 10.21 through 10.40 pertains only to coastal resource areas and FWR 10.51 through 10.88 pertains only to resource inland areas. A project may be subject to regulation under Chapter 235 of the Code of Falmouth in which case compliance with all applicable regulations is required.

(2) Purpose. Chapter 235 of the Code of Falmouth sets forth a public review and decision-making process by which activities affecting Areas Subject to Protection Under Chapter 235 of the Code of Falmouth are to be regulated in order to contribute to the following resource area values:

- protection of public and private water supply
- groundwater
- flood control
- erosion and sedimentation control
- storm damage prevention
- water pollution control
- fisheries
- shellfish
- wildlife habitat
- agriculture
- aesthetics
- recreation
- aquaculture

In addition to the resource area values above, in the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, the following resource area values also apply:

- prevention of flood damage by limiting of development in flood hazard areas;
- prevention of damage to structures and natural resources as a result of erosion;
- improvement of water quality;
- protection and enhancement of existing vegetative cover in order to maintain water quality and wildlife habitat;
- protection of wildlife, waterfowl, and plant habitat and the maintenance of existing populations and species diversity;
- prevention of loss or degradation of critical wildlife and plant habitat;
- prevention of new stormwater runoff discharges and the improvement of existing stormwater runoff discharges;
- protection of coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat;
- public access to water and land;
- improvement of groundwater recharge; and
- the minimization of the impact of new development, reconstruction and/or expansion on the resource area values listed above.

The purpose of FWR 10.00 is to define and clarify that process by establishing standard definitions and uniform procedures by which the Commission may carry out its responsibilities under Chapter 235 of the Code of Falmouth.

FWR 10.00 is intended solely for use in administering Chapter 235 of the Code of Falmouth; nothing contained herein should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by other by-laws, ordinance or regulations.

FWR 10.02 Area of Jurisdiction (Resource Areas)

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(1) Areas Subject to Protection Under Chapter 235 of the Code of Falmouth. The following areas are subject to protection under Chapter 235 of the Code of Falmouth:

- (a) Any:
 - 1. bank,
 - 2. freshwater wetland,
 - 3. coastal wetland,
 - 4. beach,
 - 5. dune,
 - 6. flat,
 - 7. marsh,
 - 8. swamp,
 - 9. wet meadow,
 - 10. bog, or
 - 11. vernal pool;
- (b) any:
 - 1. reservoir,
 - 2. creek,
 - 3. estuary,
 - 4. stream,
 - 5. pond, or
 - 6. lake;
- (c) the ocean;
- (d) Land under waterbodies;
- (e) Land subject to tidal action;
- (f) Land subject to flooding or inundation by groundwater or surface water;
- (g) Land subject to coastal storm flowage;
- (h) Land subject to flooding;
- (i) Land within 100 feet of the areas listed in FWR 10.02(1)(a) through (h)
- (j) Lands and Waters within the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, and
- (k) Lands and Waters within the Waquoit Bay Area of Critical Environmental Concern.

(2) Activities subject to regulation under the Bylaw

(a) Activities within resource areas: any activity proposed or undertaken within an area specified in FWR 10.02(1) which, in the judgment of the Commission, will remove, fill, dredge, build upon, degrade, or otherwise alter an area subject to protection under the bylaw is subject to regulation under the bylaw and requires the filing of a Permit Application. If the applicant is in doubt as to whether a Permit Application shall be required by the Commission, a Request for a Determination of Applicability should be filed (FWR 10.05(4)(a)).

(b) Activities Outside the Areas Subject to Protection Under Chapter 235 of the Code of Falmouth. Any activity proposed or undertaken outside the areas specified in FWR 10.02(1) is not subject to regulation under Chapter 235 of the Code of Falmouth, and does not require the filing of a Permit Application unless and until that activity actually alters an Area Subject to Protection Under Chapter 235 of the Code of Falmouth referenced in FWR 10.02(1)(a) through (k).

In the event that the Commission determines that such activity has in fact altered an Area Subject to Protection Under Chapter 235 of the Code of Falmouth referenced in FWR 10.02(1)(a) through (k), it shall impose such conditions on the activity or any portion thereof as it deems necessary to contribute to the protection of the resource area values identified in Chapter 235 of the Code of Falmouth.

(3) Notwithstanding the provisions of FWR 10.02(1) and (2), any freshwater wetland, bank, land under waterbodies, land subject to flooding created for the purpose of stormwater management pursuant to FWR 10.16(3), shall not require the filing of a permit Application or a request for Determination of Applicability to maintain the stormwater management system, provided that the work is limited to the maintenance of the stormwater management system and conforms to a Permit issued after August 15, 1998, and that the area is not altered for other purposes.

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FWR 10.03 General Provisions

(1) Burden of Proof.

Any person who files a permit application to perform any work within an Area Subject to Protection Under Chapter 235 of the Code of Falmouth has the burden of demonstrating to the Commission:

- (a) that the area does not play a role in the protection of any of the resource area values identified in Chapter 235 of the Code of Falmouth: or
- (b) that the proposed work will contribute to the protection of the resource area values identified in Chapter 235 of the Code of Falmouth by complying with the general performance standards established by FWR 10.00 for that area.

(2) Burden of Production. The burden of production means having to produce at least some credible evidence from a competent source in support of the position taken.

(3) Subsurface Disposal of Sanitary Sewage (Title 5)

(a) Introduction. The State Environmental Code (310 CMR 15.00 et seq.), administered locally by the Falmouth Board of Health, is a minimal public health regulation that may be supplemented at the local level. This code was developed to protect public health against bacteria-caused disease; it was not designed to protect public health from viral contamination nor was it designed to protect environmental quality from septic-derived nutrient and toxic contamination. The use of septic systems is likely to have a significant or cumulative effect on the protection of public and private water supply, protection of ground water, water pollution control, shellfish, and fisheries.

(b) Presumptions concerning Septic Systems.

1. A septic system is presumed to protect the resource area values protected by the bylaw when it is sited according to the provisions of FWR 10.03(3)(c), and otherwise meets the provisions of Title 5 and the Board of Health regulations;
2. Any proposed septic system or repair to an existing septic system that is not in compliance with the setback requirements of FWR 10.03(3)(c) shall be presumed to have a significant or cumulative adverse effect on the resource values specified in FWR 10.03(3)(a); and
3. The presumptions in FWR 10.03(3)(b)1. and 2. may be overcome by credible evidence derived from a competent source, that the proposed septic system will have no more significant or cumulative effect to the resource area values of the Bylaw than one which would have met the setback requirement. The Commission may require credible evidence in the form of a hydrogeologic study, including a report on such parameters as surface and ground water conditions, ground water flow, ground water contours, analysis for total and fecal coliforms, nitrate, total nitrogen, ammonia nitrogen, total phosphate and any other applicable chemical or biological indicators, as required by the Commission to determine its effect on the resource area values of the bylaw. When the resource area setback requirement in FWR 10.03(3)(c)1. are not met solely due to the location of the system components relative to a coastal bank, the scope of the hydrologic study shall be limited to nitrogen loading of ground water and its effect on public and private water supplies and nitrogen sensitive embayments, as well as adverse phosphorous loading of freshwater systems.

(c) Septic System Location. A septic system is considered to be properly sited only if all of the following conditions are met:

1. none of the septic system components is located within a resource area as defined in FWR 10.02(1)(a) through (e);
2. the leaching facility of the disposal system is set back at least one hundred feet (100') horizontally from the boundary of said resource areas; and
3. the system components are not located in a beach, dune, or v-zone portion of Land Subject to Coastal Storm Flowage.

(d) Septic System Upgrades.

1. The 100-foot setback requirement shall not be required for the renovation or routine replacement of septic systems constructed prior to the date of promulgation of these regulations (except as provided in FWR 10.03(3)(d)2.) provided that no alternative location is available on the lot or other parcel under the ownership or control of the owner of the system proposed for upgrade, and, where applicable, provided that variance of property line and/or street layout setbacks have been applied for from the Falmouth Board of Health.
2. The setback requirement from the wetland resource areas listed in FWR 10.02(1)(a) through (e) shall be required for any enlargement of a system which accompanies the enlargement of an existing building or expanded scope of use.

(e) If a proposed septic system requires a variance from the requirements of 310 CMR 15.00 and/or the Board of Health regulations, the applicant must first apply for a variance from the Board of Health prior to submitting a Permit Application to the Commission.

(f) Notwithstanding the provisions of FWR 10.03(3)(b), a proposal for a septic system located in an area subject to protection under the bylaw, but in excess of 200 feet from the resource areas specified in FWR 10.02(a)2. through 4., 6

10.03: continued

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through 11., and 10.02(b) through (e) is exempt from the hydrogeologic study requirement.

(4) Work performed for Normal Maintenance of Land Actively in Agricultural Use Where the Bylaw requires written notice to the commission ten (10) days prior to the commencement of work performed for the normal maintenance of land actively in agricultural use, such notice may be provided on Form AG found in FWR 10.99.

(5) Where any section of FWR 10.00 provides that a proposed project "may be permitted" in certain circumstances, no such project shall be undertaken until all of the usual procedures required by Chapter 235 of the Code of Falmouth and FWR 10.00 have been followed and a Permit has been issued for the work. The Commission shall impose such conditions on such projects as may be necessary to contribute to the protection of the resource area values of Chapter 235 of the Code of Falmouth.

FWR 10.04 DEFINITIONS

ACEC means an Area of Critical Environmental Concern established pursuant to MGL Ch. 21A s.2(7)

Adverse effect means a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area to one or more of the specific resource area values of Chapter 235 of the Town of Falmouth, as determined by the Commission. "Negligible" means small enough to be disregarded.

Aesthetics means the relevant qualities to be protected under the Falmouth Wetlands Bylaw which are due to those natural and natively scenic impressions of our shores, ponds, lakes, streams, rivers, and the lands bordering them.

Agriculture. For the purposes of FWR 10.04 the following words and phrases have the following meanings:

(a) Land actively in agricultural use means land presently and primarily used in producing or raising one or more of the following agricultural commodities for commercial purposes:

1. animals, including but not limited to livestock, poultry, and bees;
2. fruits, vegetables, berries, nuts, and other foods for human consumption;
3. feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs; and
4. forest products under a planned program to improve the quantity and quality of a continuous crop.

Additionally, land actively in agricultural use means land presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities, including but not limited to: existing access roads and livestock crossings; windbreaks; hedgerows; bee yards; sand pits; fence lines; water management projects such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, and watering facilities; agricultural composting sites; agricultural storage and work areas; and land under farm structures.

Land actively in agricultural shall have produced a commercial crop, and have been subject to active agricultural practices for three (3) of the five (5) immediately preceding years.

The Commission may require appropriate documentation to demonstrate active agricultural use.

(b) Normal maintenance of land actively in agricultural use, which in all cases does not include placing substantial amounts of fill in Land Subject to Flooding or Freshwater Wetland, or filling or dredging a Salt Marsh, means the following activities, without enlargement as to geographical extent, that are occurring on land in agricultural use, when directly related to production or raising of the agricultural commodities referenced in FWR 10.04(Agriculture)(a), when undertaken in such a manner as to prevent erosion and siltation of adjacent water bodies and wetlands, and when conducted in accordance with federal and state laws:

1. all crop management practices, not to include drainage in a Freshwater Wetland, customarily employed to enhance existing growing conditions, including but not limited to: tillage, trellising, pruning, mulching, shading, and irrigating; and all customary harvesting practices such as digging, picking, combining, threshing, windrowing, baling, curing, and drying;
2. the use of fertilizers, manures, compost materials, and other soil amendments; pesticides and herbicides; and other such materials;

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3. the repair or replacement of existing access roads and livestock crossings;

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4. the maintenance of existing windbreaks and hedgerows;
5. the maintenance and repair of existing fences and the management of temporary fence lines;
6. the cleaning, clearing, grading, repairing, dredging, or restoring of existing man-made water management systems such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/channels, grass waterways, dikes, sub-surface drainage systems, watering facilities, and vents, all in order to provide drainage, prevent erosion, provide more effective use of water, or provide for efficient use of equipment, and all for the purpose of maintaining favorable conditions for ongoing growing or raising of agricultural commodities;
7. the repair and maintenance of existing farm structures;
8. the seeding of eroded or disturbed areas;
9. the keeping of livestock and poultry and the management of beehives;
10. the cultivation of cranberries, including the following practices:
 - a. the activities described in FWR 10.04(Agriculture)(b)1. through 11.;
 - b. the application of sand to existing bogs and the excavation of sand from sand pits;
 - c. the repair and reconstruction of water control structures including flumes, pumps, dikes, and piping above and below the ground;
 - d. the regrading, including modification of drainage, and replanting of existing cranberry bogs;
 - e. the repair and replacement of dikes;
 - f. water harvesting activities; and
 - g. flooding in a cranberry bog and flood release from a cranberry bog;
11. the cutting and removal of trees for the purpose of selling said trees or any products derived therefrom, when carried out in the following manner:
 - a. every reasonable effort shall be made to avoid or minimize access through Areas Subject to Protection Under the Bylaw;
 - b. where access through Areas Subject to Protection Under the Bylaw is necessary, every reasonable effort shall be made to gain said access without constructing new accessways including, but not limited to, maintaining and improving (but not substantially enlarging) existing accessways, and operations shall be conducted when the soil is frozen, dry or otherwise stable;
 - c. where access is determined impracticable without constructing new accessways, said accessways shall be designed, constructed and maintained in accordance with U.S. Forest Service logging road standards, and shall be removed and the site returned to previously existing conditions within one year;
 - d. all channel crossings shall be stabilized to prevent erosion, using standard U.S. Forest Service methods. When crossings involve fill or other closed or semi-closed structures which will obstruct flow, they shall be designed, constructed and maintained in accordance with U.S. Forest Service standards, shall allow the unobstructed passage of existing flows for at least the ten-year storm, and shall be removed and the site returned to existing conditions within one year of construction;
 - e. all soils which are exposed during and after work shall be stabilized to prevent said soils from eroding into open water bodies, in accordance with standard U.S. Forest Service methods;
 - f. all operations shall be conducted in accordance with a cutting plan approved by the Massachusetts Department of Environmental Management District Forester; and
 - g. a written notice describing the proposed cutting and removal of trees shall be submitted to the Commission not less than ten days prior to the commencement of operations.

Alter means to change the condition of any Area Subject to Protection under the Bylaw. Examples of alterations include, but are not limited to, the following:

- (a) removal, excavation or dredging of soil, sand, gravel, or aggregate materials of any kind;
- (b) changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics;
- (c) drainage or other 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 elevations;
- (f) driving of piles, erection or repair of buildings, or structures of any kind;
- (g) placing of obstructions or objects in water;

10.04: continued

- (h) destruction of plant life, including cutting of trees;
- (i) changing 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;

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or

(k) application of pesticides or herbicides.

Aquaculture means:

(a) the growing of aquatic organisms under controlled conditions, including one or more of the following uses: raising, breeding or producing a specified type of animal or vegetable life including, but not limited to, finfish such as carp, catfish, black bass, flatfishes, herring, salmon, shad, smelt, sturgeon, striped bass, sunfishes, trout, whitefish, eel, tilapia; shellfish such as shrimp, crabs, lobster, crayfish, oysters, clams, periwinkles, scallops, mussels, squid; amphibians such as frogs; reptiles such as turtles; seaweeds such as irish moss and dulse; and edible freshwater plants; and

(b) the commercial harvesting of shellfish for the purpose of selling said shellfish or any products derived therefrom, when carried out in a manner consistent with the rules and regulations of the Shellfish Constable relative to such commercial harvest.

Area Subject to Protection Under the Bylaw means any area specified in FWR 10.02(1). It is used synonymously with resource area, each one of which is defined in greater detail in FWR 10.18 and 10.20 through 10.60.

Applicant means any person who files a request for determination of applicability or permit application, or on whose behalf such a request or application is filed.

Bank (coastal) is defined in FWR 10.30(2)

Bank (inland) is defined in FWR 10.54(2)

Bank (of an estuary) is defined in FWR 10.36(2)

Bank (of salt pond) is defined in FWR 10.37(2)

Beach (coastal) is defined in FWR 10.27(2)

Beach (inland): a naturally occurring inland beach means an unvegetated bank as defined in FWR 10.54(2).

Bedroom means any room, other than a closet, hallway, dining room, living room, kitchen, or bathroom, that affords enough privacy for sleeping.

Best Available Measures means the most up-to-date technology or the best designs, measures or engineering practices that have been developed and that are commercially available.

Best Practical Measures means technologies, designs, measures or engineering practices that are in general use to protect similar interests.

Bog is a type of freshwater wetland.

Boundary means the boundary of a resource area. A description of the boundary of each resource area is found in the appropriate section of FWR 10.00. For coastal areas see FWR 10.21 through 10.40. For inland areas see FWR 10.51 through 10.60. For freshwater Wetlands see FWR 10.70 through 10.88, as well as FWR 10.55.

Bordering means touching. An area listed in FWR 10.02(1)(a) is bordering on a water body listed in FWR 10.02(1)(b) or (c) if some portion of the area is touching the water body or if some portion of the area is touching another area listed in FWR 10.02(1)(a) some portion of which is in turn touching the water body.

10.04: continued

Breeding areas mean areas used by wildlife for courtship, mating, nesting or other reproductive activity, and rearing of young.

Bylaw means Chapter 235 of the Code of Falmouth.

Certificate of Compliance means a written determination by the Commission that work or a portion thereof has been completed

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in accordance with a Permit. A Certificate of Compliance is issued on Form H.

Coastal Bank is defined in FWR 10.30(2).

Coastal Wetlands means any marsh, swamp, meadow, bank, flat or other lowland subject to tidal action.

Commission means the Conservation Commission of the Town of Falmouth.

Common Dock. A single pier or float serving two or more contiguous waterfront properties where each of the contiguous lots would qualify for an individual private dock. An essential element of any common dock shall be a finding by the Commission that the number of potential docks in the immediate area has been permanently reduced as demonstrated by the legal documentation submitted by a community dock applicant.

Community Dock. A single pier or float located approved by the Planning Board pursuant to Article XXV of the Zoning By-law for loading and unloading of passengers and/or cargo and the tying up of dinghies.

Compliance - A project is in compliance with these regulations and a Certificate of Compliance will be issued when the requirements set forth in FWR 10.05(11) have been fulfilled (i.e., project is consistent with plans submitted and Permit issued).

Conditions means those requirements set forth in a written Permit issued by the Commission for the purpose of permitting, regulating or prohibiting any activity that removes, fills, dredges, builds upon, degrades or otherwise alters an Area Subject to Protection Under the Bylaw. [See also FWR 10.05(7).]

Conservation Commission Administrator means the duly authorized representative of the Commission, with the authority to carry out certain of the Commission's functions. These shall include, but not be limited to, carrying out site visits, determination of application completeness, the issuance of Cease and Desist Orders, and reports to the Commission.

Creek means the same as a stream, as defined in FWR 10.04.

Critical wildlife and plant habitat means the following areas: areas utilized by threatened, rare, or endangered species, or species of special concern; or species on the "Watch List"; or Priority Sites of Rare Species habitat; or Exemplary Natural Communities; all of which are determined by the Massachusetts Division of Fisheries and Wildlife, Natural Heritage & Endangered Species Program, and areas utilized by species areas listed in the Cape Cod Critical Habitat Atlas (Association for the Preservation of Cape Cod, 1990).

Date of Issuance means the date a Permit is mailed, as evidenced by a postmark, or the date it is hand delivered, as evidenced by a signed receipt.

Determination.

(a) a Determination of Applicability means a written finding by the Commission as to whether a site or the work proposed thereon is subject to the jurisdiction of Chapter 235 of the Code of Falmouth, and is issued on Form B.

(b) a Determination of Significance means a written finding by the Commission, after a public hearing, that the area on which the proposed work is to be done, or which the proposed work will alter, is significant to one or more of the resource area values identified in Chapter 235 of the Code of Falmouth. It shall be made as part of the Permit.

(c) a Notification of Non-Significance means a written finding by the Commission, after a public hearing, that the area on which the proposed work is to be done, or which the proposed work will alter, will not have a significant or cumulative effect on any of the resource area values of Chapter 235 of the Code of Falmouth, and is issued on Form F.

Dinghy. A rowboat or small vessel powered by an engine less than 9 horsepower used to transit from a dock or pier to a mooring.

Dock means the entire structure of any pier, wharf, walkway, bulkhead or float, and any part thereof including pilings, ramps, walkways, float and/or tie-off pilings.

Dune means coastal dune, as defined in FWR 10.28(2).

Erosion means the wearing away of the land by running water, wind, ice, or other geological agents.

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10.04: continued

Estuary is defined in FWR 10.26(2).

Extension Permit means a written extension of time within which the authorized work shall be completed, and is issued on Form G.

FEMA means the Federal Emergency Management Agency.

Fill means to deposit any material so as to raise an elevation, either temporarily or permanently.

Final Decision means a decision made, pursuant to FWR 10.05(10), FWR 10.05(11), or FWR 10.08, after a hearing; or if no hearing is requested within ten days after issuance of a tentative decision, the tentative decision.

Flat is defined in FWR 10.27(2)(b).

Freshwater Wetland is defined in FWR 10.55(2).

General Performance Standards means those requirements established by FWR 10.00 for activities in or affecting each of the Areas Subject to Protection Under the Bylaw, Chapter 235 of the Code of Falmouth.

Ground Water means water below the earth's surface in the zone of saturation.

Hardship means the application of Chapter 235 of the Code of Falmouth to a particular piece of property, evaluated in its totality, owing to the unique characteristics of the property, that is unduly oppressive, arbitrary or confiscatory and would involve substantial economic loss to the applicant because of the literal enforcement of the By-law provided that the conditions and characteristics of the property are not the result of the actions of the applicant, or owner, or their agents, predecessors, successors or assignees. No hardship exists where there is established under the Code of Falmouth a right to transfer development rights.

Harvestable shellfish and finfish means shellfish and finfish species with commercial value.

Improvement of water quality means a reduction in discharges of pollutants to ground and/or surface waters. This may be accomplished by a reduction in lawn area, a reduction in impervious surfaces, an increase in distance between pollution sources and sensitive receptors, the substitution of organic practices for conventional lawn and garden maintenance practices, the substitution of indigenous tree and shrub species for landscaping requiring pesticides, and the treatment or improved treatment of storm water runoff and sewage, or other methods.

Isolated Land Subject to Flooding is defined in FWR 10.57(2)(b).

Lake means any open body of fresh water with a surface area of ten acres or more, and shall include great ponds.

Land Containing Shellfish is defined in FWR 10.34(2)

Land Subject to Coastal Storm Flowage is defined in FWR 10.38(2).

Land Subject to Flooding is defined in FWR 10.57(2).

Land Subject to Flooding or Inundation by Groundwater or Surface Water means land where water collects from flooding caused by storms or by flooding caused by high ground water levels, or a combination thereof, and may include land subject to flooding, freshwater wetlands, and/or vernal pools. Where these areas are utilized by vernal pool species, they are defined in FWR 10.58(2). When flooding is caused by rainfall it is defined in FWR 10.57(2). Where these areas have groundwater at the surface for a length of time sufficient to produce hydric conditions, they may be freshwater wetlands defined in FWR 10.55(2).

Land Subject to Tidal Action means land subject to the periodic rise and fall of a coastal water body, including spring tides.

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Land Under Estuaries is defined in FWR 10.26(2).

Land Under Salt Ponds is defined in FWR 10.33(2).

Land Under Waterbodies means the bottom of, or land under, the surface of the ocean or any estuary, creek, stream, pond, or lake. Land under inland water bodies is defined in FWR 10.56(2)

Lands and Waters within the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern is defined in FWR 10.39.

Lands and Waters within the Waquoit Bay Area of Critical Environmental Concern is defined in FWR 10.40.

Lawfully Located Structure or Facility means one that:

- (a) had a building permit and all other permit(s) required by law or regulation at the time of its construction and was constructed in accordance with state and local laws and regulations;
- (b) by virtue of state law or local zoning bylaw, is deemed to be in compliance with applicable regulations; or
- (c) on which no action may be taken to compel its removal.

Limit of Work means the boundary beyond which no work may take place.

Marsh is a type of freshwater wetland.

Minimize means to achieve the least amount of adverse effect that can be attained using best available measures or best practical measures, whichever is referred to in the pertinent section.

Modify means to amend.

NPDES (National Pollutant Discharge Elimination System) Permit means the permit issued jointly by the federal and state governments, in accordance with 33 U.S.C. 1342 and M.G.L. c. 21, § 43, regulating liquid discharges from a point source.

Naturally vegetated condition means an area on a lot or parcel of land, or portion thereof, that is left in a natural, undisturbed vegetative state; has existed in a primarily natural, undisturbed state, but has been enhanced with indigenous plantings conducive to improved wildlife habitat according to a plan approved by the conservation commission; or has been disturbed, but is revegetated with indigenous plantings that will return the land to its pre-disturbance condition according to a plan approved by the Commission.

Navigation means the ability to traverse a waterway and is part of the resource area value recreation under the Bylaw.

Ocean means Buzzards Bay, Vineyard Sound, Nantucket Sound and all contiguous waters subject to tidal action except salt ponds and estuaries.

Permit Application means an application for a permit to remove, fill, dredge, build upon, degrade, or otherwise alter an area subject to protection under the bylaw. It is made on Form C.

Person means any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to town bylaws, administrative agency, public or quasi-public corporation or body, Town of Falmouth, or any other legal entity or its legal representatives, agents or assigns.

Piers means the same as dock.

Plans means such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, deemed necessary by the Commission to describe the site and/or the work, to determine the applicability of Chapter 235 of the Code of Falmouth, or to determine the impact of the proposed work upon the resource area values identified in Chapter 235 of the Code

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of Falmouth.

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Pond (coastal) - means Salt Pond as defined in FWR 10.33(2)

Pond (inland) means any open body of fresh water with a surface area within the last ten years of at least 5,000 square feet. Ponds may be either naturally occurring or man-made by impoundment, excavation, or otherwise. Ponds shall contain standing water except for periods of extended drought. For purposes of this definition, extended drought shall mean any period of three or more months during which the average rainfall is 50% or less of the ten year average for that same period as measured by the Falmouth Department of Public Works.

Notwithstanding the above, the following man-made bodies of open water shall not be considered ponds:

- (a) basins or lagoons which are part of wastewater treatment plants;
- (b) swimming pools or other impervious man-made basins; and
- (c) individual gravel pits or quarries excavated from upland areas unless inactive for five or more consecutive years.

Prevention of damage to structures and natural resources as a result of erosion means preventing any activity, or the construction, improvement or repair of any structure, that inhibits or otherwise restricts beach, barrier beach, or dune movement. Prevention of damage to structures and natural resources as a result of erosion also means preventing the construction or substantial improvement of a structure in an area likely to be impacted by coastal erosion.

Prevention of new stormwater runoff discharges and the improvement of existing stormwater runoff discharges means the prevention of new stormwater discharges without proper mitigation as provided in FWR 10.39(24), and the implementation of measures to have existing discharges meet the provisions of FWR 10.39(25).

Protection and enhancement of existing vegetative cover in order to maintain water quality and wildlife habitat means to maximize the area of land in a naturally vegetated condition.

Protection of coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat means the protection of eel grass beds, salt ponds and salt marshes. The protection of coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat also means the protection of ecosystem elements such as the salinity regime and water quality.

Recreation means the use and enjoyment of our natural surroundings in a manner consistent with their preservation. Activities should not hinder access to coastal and inland resources. Activities that shall be considered part of the use and enjoyment of our natural surroundings in a manner consistent with their preservation shall include but not be limited to recreational boating, swimming and shellfishing. The Commission's analysis of the project's effect on the resource area value of recreation should be relative to a proposal's potential impacts on other wetland interests, with priority given to enhancing and protecting those recreational activities which are not detrimental to the continued natural function of wetlands.

Remove means to take away any type of material, thereby changing an elevation, either temporarily or permanently.

Request for Determination of Applicability means a written request made by any person to the Commission for a determination as to whether a site or work thereon is subject to Chapter 235 of the Code of Falmouth, and is made on Form A.

Resource Area means any of the areas specified in FWR 10.25 through 10.40 and FWR 10.54 through 10.60. It is used synonymously with Area Subject to Protection Under Chapter 235 of the Code of Falmouth, each one of which is enumerated in FWR 10.02(1)

Resource Values Identified in Chapter 235 of the Code of Falmouth means protection of public and private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution control, fisheries, shellfish, wildlife habitat, agriculture, aesthetics, recreation, and aquaculture. In the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, the following resource area values also apply: prevention of flood damage by limiting of development in flood hazard areas; prevention of damage to structures and natural resources as a result of erosion; improvement

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of water quality; protection and enhancement of existing vegetative cover in order to maintain water quality and wildlife habitat; protection of wildlife, waterfowl, and plant habitat and the maintenance of existing populations and species diversity; prevention of loss or degradation of critical wildlife and plant habitat; prevention of new stormwater runoff discharges and the improvement

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of existing stormwater runoff discharges; protection of coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat; public access to water and land; improvement of groundwater recharge; and the minimization of the impact of new development, reconstruction and/or expansion on the resource area values listed above.

Rocky Intertidal Shore is defined in FWR 10.31(2)

Salt Pond is defined in FWR 10.32(2).

Significant means plays a role. A resource area is significant to a resource area value identified in Chapter 235 of the Code of Falmouth when it plays a role in the provision or protection, as appropriate, of that resource area value.

Stream means a body of running water, including brooks, creeks, and rivers which moves in a definite channel in the ground due to a hydraulic gradient, and which flows within, into or out of an Area Subject to Protection Under Chapter 235 of the Code of Falmouth. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not flow throughout the year (*i.e.*, which is intermittent) is a stream except for that portion upgradient of all freshwater wetlands, bogs, swamps, wet meadows and marshes.

Swamp is a type of freshwater wetland.

Tentative Decision means a decision made, pursuant to FWR 10.05(10), FWR 10.05(11), or FWR 10.08, where no hearing was held. If no hearing is requested within ten days after issuance of a tentative decision, the tentative decision becomes a final decision.

V-zone means velocity zone.

Velocity Zone (including V-, VE-, & Vi-30) Is defined in FWR 10.38(2).

Vernal Pool is defined in FWR 10.58(2).

Vista Pruning means the selective thinning of tree branches or understory shrubs to establish a specific "window" to improve visibility. Vista pruning does not include the cutting of trees which would reduce the leaf canopy to less than 90% of the existing crown cover and does not include the mowing or removal of understory brush.

Water-dependent uses mean those uses and facilities which require direct access to, or location in, marine, tidal or inland waters and which therefore cannot be located away from said waters, limited to: marinas, public recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, crossings over or under water bodies (but limited to railroad and public roadway bridges, tunnels, culverts, as well as railroad tracks and public roadways connecting thereto which are generally perpendicular to the water body).

Water Pollution Control means the prevention or reduction of contamination of surface or ground water.

Wet Meadow is a type of freshwater wetland.

Wildlife means all animals and vegetation.

Wildlife habitat means areas which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide food, shelter, migratory or overwintering areas, or breeding areas for animals. This includes all areas in a naturally vegetated condition.

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FWR 10.05 Procedures

The following procedures shall apply to all filings under the Falmouth Wetlands Bylaw

(1) Time Periods. All time periods of ten days or less specified in Chapter 235 of the Code of Falmouth, and FWR 10.00 shall be computed using business days only. In the case of a determination, Permit or tentative decision, such period shall commence on the first day after the date of issuance and shall end at the close of business on the tenth business day thereafter. All other time periods specified in Chapter 235 of the Code of Falmouth, and FWR 10.00 shall be computed on the basis of calendar days, unless the last day falls on a Saturday, Sunday or legal holiday, in which case the last day shall be the next business day following.

(2) Actions by Conservation Commission. Where Chapter 235 of the Code of Falmouth, states that a particular action (except receipt of a request or notice) is to be taken by the Commission, that action is to be taken by more than half the members present at a meeting of at least a quorum. A quorum is defined as a majority of the members then in office.

Where Chapter 235 of the Code of Falmouth, states that the Commission is to receive a request or permit application, Commission means an individual designated by the conservation commission to receive such request or permit application.

(3) Administrative Review

(a) Scope. Some proposed projects that fall within the Commission's jurisdiction are of such small scale as to not remove, fill, dredge, build upon, degrade, or otherwise alter an area subject to protection under the bylaw even though they may be proposed in a resource area. Such projects should not undergo the scrutiny of a formal hearing before the Commission and can be adequately reviewed by the Administrator.

(b) Applicability. If a project meets the criteria in FWR 10.05(3)(b) 1. or 2., the work may be approved by the Administrator without the filing of a Request for a Determination of Applicability or a Permit Application. If the Administrator has any doubt that a project meets these conditions, the applicant will be required to request a hearing and file a Request for a Determination of Applicability or Permit Application.

1. A project may be approved by the Administrator pursuant to FWR 10.05(3) if it meets all of the following conditions:

- a. No work is proposed in any Resource Area defined in FWR 10.02(1)(a) through (e), and/or (j) through (k);
- b. No work is proposed in the Velocity Zone portion of Land Subject to Coastal Storm Flowage;
- c. Work is not proposed within seventy-five (75') feet from the inland edge of any resource areas defined in FWR 10.02(1)(a) through (e), and the resource area buffer is flat or nearly so;
- d. No uprooting of vegetation and no mowing to the ground or clear cutting is proposed;
- e. Any proposed addition to a principal structure does not exceed five percent (5%) of the first floor footprint, and no alteration to an existing septic system is proposed or required by other local or state agency; and
- f. No stormwater management system is required by the provisions of FWR 10.16(3) and FWR 2.00

2. A project may be approved by the Administrator pursuant to FWR 10.05(3) if it meets any one of the following conditions:

- a. All work is within the A-Zone portion of Land Subject to Coastal Storm Flowage and over one hundred feet from those resource areas specified in FWR 10.02(1) (a) through (e);
- b. ordinary repair (but not substantial repair) or maintenance of an existing single family house that is located over twenty-five feet (25 ft.) from the edge of all those resource areas specified in FWR 10.02(1) (a) through (e); or
- c. the project is an upgrade of a septic system that does not require or involve an increase in design flow or number of bedrooms, provided the system components will be over fifty feet (50 ft.) from those resource areas specified in FWR 10.02(1) (a) through (e).

3. Notwithstanding the provisions of FWR 10.05(3)(b) 1. and 2., if the Administrator is of the opinion that in their professional judgement that the project is not appropriate for Administrative Review, the Administrator may not approve the project.

(c) Procedure. The process is as follows:

1. The applicant will submit on Form AR sufficient information to determine where the project is located and whether it meets the requirements set forth in (b) above;
2. The Conservation Administrator will visit the site;
3. The Conservation Administrator will determine whether all conditions of this regulation are met;
4. The Conservation Administrator will issue an Administrative Review Decision (Form ARD) within 21 days of receipt of a written request that fulfills the information requirements.

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5. The decision will be filed as a permanent record with the Commission.

(d) Appeal. If the decision rendered by the Administrator is opposed by any party in interest, they may apply for a Request for a Determination of Applicability.

(4) Determinations of Applicability.

(a) Requests for Determination of Applicability.

1. Any person who desires a determination as to whether Chapter 235 of the Code of Falmouth, applies to land, or to work that may affect an Area Subject to Protection Under Chapter 235 of the Code of Falmouth, may submit to the Commission by certified mail or hand delivery a Request for a Determination of Applicability. Such request shall include such information as required in FWR 10.99, to enable the Commission to find and view the area and to determine whether the proposed work will remove, dredge, fill, build upon, degrade or otherwise alter an Area Subject to Protection Under the Bylaw.

2. A Request for a Determination of Applicability shall include certification that the owner of the area subject to the request, if the person making the request is not the owner, has been notified that a determination is being requested under Chapter 235 of the Code of Falmouth.

(b) Determination of Applicability.

1. Within 21 days after the date of receipt of the Request for a Determination of Applicability, the Commission shall issue a Determination of Applicability. Notice of the time and place of the public hearing at which the determination will be made shall be given by the Commission at the expense of the person making the request not less than five days prior to such meeting, by publication in The Enterprise and by mailing a notice to the person making the request, and the owner. Notice shall also be given in accordance with the Open Meeting Law, M.G.L. c. 39, § 23B. Said determination shall be signed by a majority of the conservation commission, and copies thereof shall be sent by the Commission to the person making the request, and to the owner. Said determination shall be valid for three years from the date of issuance.

2. The conservation commission shall find that Chapter 235 of the Code of Falmouth, applies to the land, or a portion thereof, if it is an Area Subject to Protection Under Chapter 235 of the Code of Falmouth, as defined in FWR 10.02(1). The conservation commission shall find that Chapter 235 of the Code of Falmouth applies to the work, or portion thereof, if it is an Activity Subject to Regulation Under Chapter 235 of the Code of Falmouth as defined in FWR 10.02(2).

3. Determinations made prior to effective date of FWR 10.39 Lands and Waters in the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern. Determinations of Applicability issued prior to April 17, 1997 shall be valid only for the resource areas specified in the Determination and not for Land and Waters in the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern.

4. If information significant to the Determination of Applicability becomes available which was previously not available or withheld, the Commission may issue a Cease and Desist Order pursuant to FWR 10.08. In such a case, the Cease and Desist Order shall state that no work is to be undertaken until a new or amended Determination of Applicability is issued. The Commission may revoke or amend a Determination of Applicability when new information has become available to the Commission which was not available at the time of Determination of Applicability issuance, or the Commission has determined that information submitted to the Commission upon which the Determination of Applicability was based is false, incorrect or misleading, provided procedures for a hearing are provided to the applicant pursuant to the provisions of FWR 10.05(6).

5. A Permit Application which is filed as a result of a positive determination shall be filed with the Commission, and all of the procedures set forth in FWR 10.05(5) shall apply.

(5) Permit Application

(a) Any person who proposes to do work that will remove, fill, dredge, build upon, degrade, or otherwise alter any Area Subject to Protection Under Chapter 235 of the Code of Falmouth shall submit a Permit Application, Form C of FWR 10.99, and other application materials in accordance with the submittal requirements set forth in FWR 10.99 *General Instructions for Filing a Permit Application*.

(b) For certain projects, applicants may at their option use the Abbreviated Permit Application, Form D of FWR 10.99. This latter form may only be used when all three of the following circumstances exist:

1. The proposed work is not within the areas specified in FWR 10.02(a) through (e), or (j) through (k);
2. The proposed work will alter less than 1,000 square feet of surface area; and

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3. An Order of Conditions pursuant to M.G.L. Chapter 131, sec. 40 is not required.

(c) Upon receipt of the application materials referred to in FWR 10.05(5)(a) and the applicable fee in FWR 10.09(2), the

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Commission, or its agent, shall issue a file number. The designation of a file number shall not imply that the plans and supporting documents have been judged adequate for the issuance of a Permit, but only that copies of the minimum submittal requirements contained in FWR 10.99 General Instructions for filing a Permit Application have been filed.

(d) A Permit Application shall expire where the applicant has failed to diligently pursue the issuance of a Permit in proceedings under FWR 10.00. A Permit Application shall be presumed to have expired one year after the date of filing unless the applicant submits information showing that (a) good cause exists for the delay of proceedings under FWR 10.00; and (b) the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay. No permit application shall be deemed expired under this section when an appeal is pending and when the applicant has provided all information necessary to continue with the prosecution of the case.

(e) Abutter Notification for Permit Application Any person filing a Permit Application with the conservation commission shall at the same time give written notification thereof, by delivery in hand, or certified mail, return receipt requested, to all abutters and other landowners within 100 feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private way, and in another municipality or across a body of water. Said notification shall be at the applicants expense, and shall state where the copies of the Permit Application may be examined and obtained or shall include a copy of the complete permit application and where information the date, time and place of the hearing may be obtained. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission.

(f) Permit Applications or Permits issued before April 17, 1997 do not need to reapply for the same activities pursuant to FWR 10.39 unless the Permit Application or Permit has expired.

(6) Public Hearings.

(a) A public hearing shall be held by the Commission within 21 days of receipt of the minimum submittal requirements and shall be advertised in accordance with Chapter 235 of the Code of Falmouth and the requirements of the Open Meeting Law, M.G.L. c. 39, § 23B.

(b) The advertising cost for a public hearing for a permit or request for determination shall be paid by the applicant (*see Fees, FWR 10.09*). The advertising cost for a public hearing for any other matter shall be paid by the person requesting said hearing.

(c) Public hearings may be continued as follows:

1. without the consent of the applicant to a date announced at the hearing, within 21 days, of receipt of the complete Permit Application;
2. with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
3. with the consent of the applicant for a period not to exceed 21 days after the submission of a specified piece of information or the occurrence of a specified action. The date, time and place of said continued hearing shall be publicized in accordance with Chapter 235 of Code of Falmouth, and notice shall be sent to any person at the hearing who so requests in writing.

(7) Permits

(a) Scope. A Permit is designed to permit the proposed construction activity while, at the same time, ensuring that valuable wetlands resources will be protected from either deliberate or accidental damage. Resource area protection is achieved by a combination of design elements within the approved plan and by additional conditions imposed by the Commission. All construction activities must be completed in compliance with the existing Permit.

(b) General Requirements. The following shall apply to all Permits:

Conditions may be for the construction period (e.g. straw bales for erosion control) or may be in perpetuity (e.g. buffer strips for erosion control and wildlife habitat). Conditions may be structural (e.g. hay bale barrier for erosion control) or may require a specified standard of performance (e.g., prevention of erosion).

(c) Standard Conditions. A standard set of conditions will be imposed on all Permits issued by the Commission. These standard conditions are found in Form E in FWR 10.99.

(d) Special Conditions. A special set of conditions will be imposed when applicable on Permits issued by the Commission.

(e) If information significant to the Permit becomes available which was previously not available or withheld, the

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Commission may issue a Cease and Desist Order pursuant to FWR 10.08. In such a case, the Cease and Desist Order shall state that no work is to be undertaken until a new or amended Permit is issued. The Commission may revoke or amend a Permit when new information has become available to the Commission which was not available at the time of Permit issuance, or the Commission has determined that information submitted to the Commission upon which the Permit decision

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was based is false, incorrect or misleading, provided procedures for a hearing are provided to the Permit holder pursuant to the provisions of FWR 10.05(6).

(f) Minimizing Resource Area Impacts

1. In the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, Permits can be issued only if the impact to the resource area is minimized by limiting the area which is removed, filled, dredged, built upon, degraded, or otherwise altered to less than 6000 square feet or 10% of the lot, whichever is greater.

a. The land area utilized for private subdivision roads and common driveways existing as of January 17, 1996, shall not be included in the computation of the area which is removed, filled, dredged, built upon, degraded, or otherwise permanently altered.

b. The land area used for determination of lot size shall not include those areas of the lot that are in the resource areas of: land under the ocean; land under a salt pond; land under an estuary; or saltmarsh.

2. In a barrier beach system where a proposed project is not proposed on a beach or dune, Permits shall be issued only if the impact to the resource area is minimized by limiting the area which is removed, filled, dredged, built upon, degraded, or otherwise permanently altered to less than 6000 square feet or 10% of the lot, whichever is greater a. The land area utilized for private subdivision roads and common driveways existing as of August 15, 1998, shall not be included in the computation of the area which is removed, filled, dredged, built upon, degraded, or otherwise permanently altered.

b. The land area used for determination of lot size shall not include those areas of the lot that are in the resource areas of: land under the ocean; land under a salt pond; land under an estuary; or saltmarsh.

(g) Notwithstanding the provisions of FWR 10.05(7)(f)1. and 2., a permit for a project that temporarily alters more than the amount specified in FWR 10.05(7)(f)1 during construction activities, may be permitted provided the area in excess of that specified in FWR 10.05(7)(f)1. and 2. is restored to a naturally vegetated condition immediately following construction.

(8) Amended Permits

(a) Following the issuance of a Permit, unforeseen circumstances sometimes arise which may require minor deviations from the project approved in that Permit. To allow for the smooth operation of the permitting procedure and to avoid unnecessary and unproductive duplication of regulatory effort after a Permit has been issued, it would not be reasonable to require a complete refile of the Permit Application when the changes sought in the Permit are relatively minor and will have unchanged or less impact on the resource area values protected by the Bylaw. Amended Permits provide assurances to applicants that modifications undertaken in the course of the project are within the scope of the deviations allowed for the receipt of a Certificate of Compliance at FWR 10.05(11). No amended permit shall be issued for a permit that has expired.

(b) Minor Changes. The most simple changes, such as correcting obvious mistakes such as citing a wrong file number or typographical errors, may be accomplished by correction of the Permit by the Commission or the Conservation Administrator.

(c) Moderate Changes.

1. The applicant shall make a request for an amendment to the Commission. The request for an amendment of the Permit is to be made either orally at a regularly scheduled meeting of the Commission or by submitting the request to the Commission in writing.

2. The Commission shall make a determination whether the requested change is of a relatively minor nature and can be considered as an amendment to the original Permit. In making this determination, the Commission shall consider such factors as whether the purpose of the project has changed, whether the scope of the project has increased, whether the project meets relevant performance standards, and whether the potential for adverse impacts to the protected statutory resource area values will be increased. Relatively minor changes which result in the same or decreased impact on the resource area values protected by the Bylaw shall be considered a Minor Change.

3. If the Commission determines that a new Permit Application is not necessary, the Commission shall publish newspaper notice (at the applicant's expense) in the same general manner as outlined in the Bylaw for new Permit Applications and as required by the Open Meeting Law, M.G.L. c. 39, §23B, to inform the public that the request for amendment to the Permit will be considered by the Commission at a public hearing.

4. The applicant shall follow the requirements of abutter notification as if filing a Permit Application as described in

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FWR 10.05(5).

5. The usual appeal procedure of the Permit shall apply to the amended permit, however the issues under appeal will be limited to those issues subject to the amendment(s) or the change(s) made in the Permit. Until there is a final resolution of the appeal, no work may continue on those portions of the project not permitted under the Permit but only permitted by the amendment(s) which has been appealed.

6. Under no circumstances shall the issuance of an Amended Permit extend the effective date of the original Permit.

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The Amended Permit shall run with the term of the original Permit or the effective date of an extended Permit.

7. The Amended Permit shall be issued on the form provided for a Permit, with the insertion of the word "Amended" and the amendment date. Amended Permits shall be recorded with the Registry of Deeds in the same manner as Permits.

(d) Significant Changes. Significant changes require the filing of a new Permit Application.

(9) Denials

(a) Procedural Denials.

If the Commission finds that the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the resource area values identified in the Bylaw, it may issue a denial prohibiting the work. The denial shall specify the information which is lacking and why it is necessary. In writing the procedural denial, the Commission shall:

1. State that the denial is specifically based on lack of information describing the site, the work and/or the effect of the work on the resource area values identified in the Bylaw;
2. List specific information needed in each of the three possible problem areas mentioned above, citing appropriate sections of FWR 10.00; and
3. State that the Commission encourages a resubmittal of a Permit Application with the above requested information.

(b) Substantive Denials. The Commission may deny permission for any activity within areas under its jurisdiction if, in its judgement, such denial is necessary to protect the resource area values identified in the Bylaw. Due consideration shall be given to all possible effects of the proposal on all resource area values protected under the Bylaw. Substantive denials are based on a reasoned analysis of the proposed activity and the likely effects of this activity on the resource area values. In most cases, neither the assumption of protection nor the assumption of damage will be able to be proven with certainty. The Commission will base its judgement on the best information available to it at the time and in all cases will act to protect the resource area values as defined in the Bylaw.

The written decision will include the reasons for the denial, citing resource area values protected, and relevant regulations. The written decision will be signed by a majority of the Commission.

(10) Extensions of Permits.

(a) The Commission may extend a Permit for one or more periods of one year each, which shall be made on Form G. The request for an extension shall be made to the Commission at least 30 days prior to expiration of the Permit.

(b) The Commission may deny the request for an extension and require the filing of a new Permit Application for the remaining work in the following circumstances:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;
2. where new information, not available at the time the Permit was issued, has become available and indicates that the Permit is not adequate to protect the resource area values identified in Chapter 235 of the Code of Falmouth;
3. where incomplete work is causing damage to the resource area values identified in Chapter 235 of the Code of Falmouth;
4. where work has been done in violation of the Permit or FWR 10.00; or
5. where applicable sections of the Chapter 235 of the Code of Falmouth and/or FWR 10.00 have been changed.

(c) Request for Hearing

1. Any party specified in FWR 10.10(1)(a) may request a hearing in writing prior to the issuance of the Extension Permit, or within 10 days of the issuance of the decision relative to the request for an Extension Permit.
2. Any decision regarding an Extension Permit where no hearing was held shall be a tentative decision.
3. Where no hearing has been held, and no request for a hearing has been made pursuant to FWR 10.05(10)(c)1, the tentative decision shall be final.

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4. Where a request for a hearing is made, the commission shall conduct a hearing and issue a final decision pursuant to the procedures specified in FWR 10.05(6).

5. Where a request for an hearing is filed after the tentative decision is issued, the Commission shall conduct a hearing regarding the issuance of a final decision without prejudice to all parties.

(d) The Extension Permit shall be signed by a majority of the commission.

(e) The Final Extension Permit shall be recorded in the Land Court or the Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the Commission on the form at the end of Form G. If work is undertaken without the applicant so recording the Final Extension Permit, the Commission may issue an Enforcement Order or may itself record the Final Extension Permit.

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(11) Certificate of Compliance

- (a) Upon written request by the applicant for a Certificate of Compliance, the Commission shall issue a decision regarding the request within 21 days of receipt thereof. A Certificate of Compliance is issued by the Commission on Form H of FWR 10.99 and may certify that the activity or portions thereof described in the Permit Application and plans has been completed in compliance with the Permit. The Certificate of Compliance shall be signed by a majority of the commission.
- (b) Prior to the issuance of a Certificate of Compliance, a site inspection shall be made by the Commission, or its agent, with prior notice to the applicant or the applicant's agent, of the date and time of said site inspection.
- (c) If the Commission determines, after review and inspection, that the work has not been done in compliance with the Permit, it may refuse to issue a Certificate of Compliance. Such refusal shall be issued within 21 days of receipt of a request for a Certificate of Compliance, shall be in writing and shall specify the reasons for denial.
- (d) If a project has been completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect or land surveyor, a written statement by such a professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Permit shall accompany the request for a Certificate of Compliance.
- (e) If the Permit contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue. The Certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the Permit.
- (f) The Final Certificate of Compliance shall be recorded in the Land Court or Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the Commission. Upon failure of the applicant to so record, the Commission may do so.
- (g) Request for Hearing
1. Any party specified in FWR 10.10 may request a hearing in writing prior to the issuance of the Certificate of Compliance, or within 10 days of the issuance of the decision relative to the request for a Certificate of Compliance.
 2. Any decision regarding a Certificate of Compliance where no hearing was held shall be a tentative decision.
 3. Where no hearing has been held, and no request for a hearing has been made pursuant to FWR 10.05(11)(g)1, the tentative decision shall be final.
 4. Where a request for a hearing is made, the commission shall conduct a hearing and issue a final decision pursuant to the procedures specified in FWR 10.05(6).
 5. Where a request for an hearing is filed after the tentative decision is issued, the commission shall conduct a hearing regarding the issuance of a final decision without prejudice to all parties.

(12) Recording in Registry of Deeds or Land Court

- (a) The following forms issued by the Commission shall be recorded in the Barnstable County Registry of Deeds or the Land Court, whichever is appropriate:
1. Permit
 2. Amended Permit
 3. Notification of Non-Significance
 4. Final Extension Permit
 5. Final Certificate of Compliance
- (b) If the applicant fails to timely record any of these documents (unless in accordance with paragraph c, below), the Commission is empowered to do so. As proof of recording, the applicant must deliver to the Commission the recording slip at the bottom of the Permit, Amended Permit, Notification of Non-Significance, Final Extension, Permit or Final

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Certificate of Compliance, as appropriate. If the Commission must record any of the above documents, the applicant will be charged the cost of recording plus a fee of \$75.00. In such cases, the Commission is also empowered to issue an Enforcement Order prohibiting any work.

(c) If the applicant desires to delay the recording of the Permit, they shall so state in writing to the Commission the reasons for the delay, and the estimated date of recording. In no case shall any construction commence unless and until the Permit has been recorded.

FWR 10.06 Emergency Work

- (1) Any person requesting permission to do an emergency project shall specify why the project is necessary for the protection

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of the health or safety of the citizens of the Commonwealth and what agency of the Commonwealth or subdivision thereof is to perform the project or has ordered the project to be performed. If the project is certified to be an emergency by the Commission, the certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency. A site inspection shall be made prior to certification.

- (2) An emergency certification shall be issued only for the protection of public health or safety.
- (3) Within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this bylaw.
- (4) Upon failure to meet the requirements or FWR 10.06, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.
- (5) Notwithstanding the provisions of FWR 10.06(2), the Commission may adopt emergency regulations in conformance with this bylaw for limited durations after severe coastal storms, notice of which shall be provided as soon as possible after their adoption.

FWR 10.07 Performance Guarantee

- (1) Introduction. The performance guarantee is a tool available to the Commission to insure that proposed work is done in compliance with a Permit.
- (2) Procedure. The Commission may require that the performance and observance of the conditions imposed by the Permit be secured wholly or in part by one or more of the methods described in FWR 10.07(2)(a) and (b).
 - (a) The following forms of security shall be released in whole or in part upon the issuance of a Certificate of Compliance:
 1. bond;
 2. deposit of money;
 3. negotiable securities; or
 4. other undertaking of financial responsibility.
 - (b) The following forms of security shall be executed and duly recorded in the Barnstable County Registry of Deeds by the owner of record running with the land the benefit of the Town of Falmouth whereby the applicable permits conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed:
 1. conservation restriction pursuant to Sections 31, 32, and 33 of Chapter 184 of the General Laws;
 2. easement; or
 3. other covenant enforceable in a court of law.
- (3) The performance guarantee specified in FWR 10.07(2)(a) should be extended to "The Town of Falmouth Conservation Commission" based on the Permit, (File _____), Special Condition No. _____. and shall state the specific work covered by the performance guarantee.
- (4) If it is required that a time period be stated for a form of performance guarantee specified in FWR 10.07(2)(a), the applicant

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shall insure that the bond performance guarantee be continued if the work is not successfully completed at the end of that period, or the commission may elect to utilize the performance guarantee to complete the work.

FWR 10.08 Enforcement

- (1) Cease and Desist Orders
 - (a) When the Commission determines that an activity is in violation of Chapter 235 of the Code of Falmouth or a Permit, the Commission may issue a Cease and Desist Order. Violations include, but are not limited to:
 1. failure to comply with a Permit, such as failure to observe a particular condition or time period specified in the Permit;
 2. failure to complete work described in a Permit, when such failure causes damage to the resource area values identified

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in Chapter 235 of the Code of Falmouth; or

3. failure to obtain a valid Permit or Final Extension Permit prior to conducting an Activity Subject to Regulation Under Chapter 235 of the Code of Falmouth as defined in FWR 10.02(2).

(b) The members, officers, employees and agents of the Commission may enter upon privately owned land for the purpose of performing their duties under this section with prior approval of the property owner, or other legal authority as provided by law.

(c) A Cease and Desist Order shall be signed by a majority of the commission. In a situation requiring immediate action, a Cease and Desist may be signed by a single member, agent of the commission, or Natural Resource officer, if said Order is ratified by a majority of the members at the next scheduled meeting of the commission.

(d) Request for Hearing

1. Any party specified in FWR 10.10(1)(a) may request a hearing in writing within 10 days of the issuance of the Cease and Desist Order.

2. Any decision regarding an Cease and Desist Order where no hearing was held shall be a tentative decision.

3. Where no hearing has been held, and no request for a hearing has been made pursuant to FWR 10.08(d)(1.), the tentative decision shall be final.

4. Where a request for a hearing is made, the commission shall conduct a hearing and issue a final decision pursuant to the procedures specified in FWR 10.05(6).

5. Where a request for an hearing is filed after the tentative decision is issued, the commission shall conduct a hearing regarding the issuance of a final decision without prejudice to all parties.

(2) Enforcement Orders

(a) When the Commission determines that an activity is in violation of Chapter 235 of the Code of Falmouth or a Permit and that action must be taken to correct the violation, the Commission may issue an Enforcement Order. Violations include, but are not limited to:

1. failure to comply with a Permit, such as failure to observe a particular condition or time period specified in the Permit;

2. failure to complete work described in a Permit, when such failure causes damage to the resource area values identified in Chapter 235 of the Code of Falmouth; or

3. failure to obtain a valid Permit or Final Extension Permit prior to conducting an Activity Subject to Regulation Under Chapter 235 of the Code of Falmouth as defined in FWR 10.02(2).

(b) The members, officers, employees and agents of the Commission may enter upon privately owned land for the purpose of performing their duties under this section with prior approval of the property owner, or other legal authority as provided by law.

(c) An Enforcement Order shall be signed by a majority of the commission after a hearing. Said hearing shall be conducted according to the provisions of FWR 10.05(6). In a situation requiring immediate action, an Enforcement Order may be signed by a single member, agent of the commission, or Natural Resource officer, prior to a hearing, provided a hearing is held at the soonest available time and said Order is ratified by a majority of the members after said hearing.

(3) Criminal Complaints filed pursuant to Chapter 1, section 1-1, of the Code of the Town of Falmouth

(a) Chapter 1, section 1-1 of the Code of the Town of Falmouth provides that "Whoever violates any provisions of the

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bylaws contained in the Code of the Town of Falmouth may be penalized by indictment or on complaint brought in the District Court. Except as may be provided by law and as the District Court may see fit to impose, the maximum penalty for each violation or offense, brought in such a manner, shall be three hundred dollars (\$300)."

(b) The commission, or its agent at the direction of the commission, may file a criminal complaint with the District Court if criminal intent has been demonstrated by those persons who have violated the provisions of Chapter 235 of the Code of the Town of Falmouth.

(4) Non-Criminal Dispositions pursuant to Chapter 1, section 1-2 of the Code of the Town of Falmouth and M.G.L. Chapter 40, section 21D

(a) Chapter 1, section 1-2 of the Code of the Town of Falmouth provides that "Whoever violates any provisions of the bylaws contained in the Code of the Town of Falmouth, the violation of which is subject to a specific penalty, may be penalized by a non criminal disposition as provided in MGL C40, s. 21D. The noncriminal method of disposition may also be used for violations of any rule or regulation of any municipal officer, board or department which is subject to a specific penalty."

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(b) The Conservation Agent may issue citations to those violating the provisions of Chapter 235 of the Code of the Town of Falmouth pursuant to Chapter 1, section 1-2 of the Code of the Town of Falmouth.

FWR 10.09 Fees

(1) General Fee Schedule:

- (a) Permit fees shall be calculated by the Commission according to the schedule in FWR 10.09. The fees shown below do not include an \$14.50 advertising fee (which is subject to change without notice by the Enterprise). Fees should be made payable to the Town of Falmouth.
- (b) The Commission reserves the discretion to waive all or a portion of the required fees filed by a government agency. No fee shall be required of the Town of Falmouth, or any political subdivision thereof.
- (c) No Certificate of Compliance, Permit, Determination of Applicability, or Extension Permit shall be issued under the Falmouth Wetlands Bylaw if any required fee pursuant to FWR 10.09(1) through (3) has not been paid to the town.
- (d) Permit fees pursuant to FWR 10.09(2) are payable at the time of application and are non-refundable.
- (e) There is no fee for a Request for Determination filed by a person having no financial connection with the property or project which is the subject of the request.

(2) <u>Fee Schedule (plus the required advertising fee*):</u>	<u>Fee/</u>	<u>advtg/</u>	<u>Total</u>
(a). Request for Determination of Applicability	\$35.00	14.50	\$49.50
(b) Permit Application (for single lot and house and projects thereon)	\$50.00	14.50	\$64.50
(c) Permit Application (for commercial and other construction)	\$60.00	14.50	\$74.50
(d) Permit Application (for coastal projects- including docks)	\$80.00	14.50	\$94.50
(e) Extension permit	\$25.00		\$25.00
(f) Consultant Fee See FWR 10.09(3)			
(g) Recording Fee See FWR 10.05(12)			
(h) Administrative Review ¹	\$25.00		\$25.00

*subject to change reflecting current rates

(3) Consultant Fee

(a) The Commission, at its discretion, is authorized to require the posting of a Consultant Fee by an applicant. This fee shall be used to hire an independent, expert consultant to investigate the site for the proposed project and to examine the

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plans or other information submitted by the applicant to assist the Commission in evaluating potential adverse impacts upon a resource area by the proposed project. This fee will be required in those cases where the complexity of the activity, the difficulty in determining the threat to the resource areas or the size of the request or project involves and requires more information and analysis than can reasonably be supplied to the Commission without independent technical professional assistance.

(b) The Commission may require the payment of the Consultant Fee at any time in the deliberations prior to a final decision.

(c) The Consultant Fee may be required for expert opinions regarding, but not limited to, wetland resource area surveys and delineations, analysis of resource area values, wetland resources area reports, hydrological and drainage analysis, wildlife habitat analysis, shellfish surveys, and environmental land use law.

(d) The commission is hereby authorized to charge for said consultant fee when the Permit Application, proposes any of the following:

1. five hundred (500) square feet or greater alteration of a resource area specified in FWR 10.02(a);
2. fifty (50) linear feet or greater of bank alteration to a coastal or inland waterway;
3. five hundred (500) square feet or greater alteration to land in a naturally vegetated condition that constitutes a resource area buffer as specified in FWR 10.18;

¹ This fee may be applied to the fee for a Request for Determination or Permit Application should one be required.

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- 4. five hundred (500) square feet or greater alteration of land under a water body;
- 5. discharge of any pollutants into or contributing to surface or groundwater of the resource area;
- 6. construction of any stormwater control facility, or water control structure; or
- 7. construction of a dock.

(e) Determination of Amount of Consultant Fee for a Permit Application

1. The maximum consultant fee charged to reimburse the commission for reasonable costs and expenses shall be according to the following schedule:

<u>Project Cost</u>		<u>Maximum Fee</u>
UP TO	\$100,000	\$500
\$100,001	- \$500,000	\$2,500
\$500,000	- \$1,000,000	\$5,000
\$1,000,001	- \$1,500,000	\$7,500
\$1,500,001	- \$2,000,000	\$10,000

2. Each additional project cost increment of \$500,000 over \$2,000,000 shall be charged at an additional \$2,500 maximum fee per increment;

3. The project cost means the estimated, entire cost of the project including, but not limited to, building construction, site preparation, landscaping, and all site improvements;

4. The consultant fee shall be paid on a pro rata basis for that portion of the project cost applicable to those activities within resource areas protected by this bylaw;

5. The project shall not be segmented to avoid being subject to the consultant fee;

6. The applicant shall submit estimated project costs at the Commission's request, but the lack of such estimated project costs shall not avoid the payment of the consultants fee.

(f) The applicant shall pay the consultant fee to the Town to be put into a special purpose account established by the Commission which may be drawn upon by the Commission at one of its public meetings.

(g) The Commission shall return any unused portion of the consultant fee to the applicant.

(h) Notwithstanding the provisions FWR 10.09(3)(a), no consultant fee shall be assessed under this section for the construction of a single family dwelling, and appurtenant facilities thereto, provided the only resource area impacted is Land Subject to Coastal Storm Flowage and none of the proposed work is within land in a naturally vegetated condition in a resource area buffer as specified in FWR 10.18.

(i) Notwithstanding the provisions of FWR 10.09(3)(a) through (e), the Commission may require a the payment of a consultant fee to hire an expert for the purposes to verify a resource area boundary determination submitted by an applicant.

1. The maximum consultant fee charged to reimburse the commission for reasonable costs and expenses of hiring an expert for the purpose of verifying a resource area boundary determination submitted by an applicant shall be according to the following schedule:

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<u># Wetland flags</u>	<u>Maximum Fee</u>
UP TO 25	\$100
25 - 50	\$175
50 - 75	\$250
75 - 100	\$325

2. Each additional number of wetland flags increment of 25 over 100 shall be charged at an additional \$75 maximum fee per increment;

(j) Notwithstanding the provisions FWR 10.09(3)(e), when the Commission determines an independent shellfish survey is required, the Consultant Fee shall be \$1200.

(k) Notwithstanding the provisions FWR 10.09(3)(e), the Consultant Fee for a variance request shall be \$2000.

(l) Any applicant aggrieved by the imposition of, or the amount of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

FWR 10.10 Appeal Procedure

(1) Procedure.

(a) The following persons may appeal a decision under the bylaw:

1. Any applicant;
2. owner;
3. abutter;
4. any party in interest aggrieved; or
5. any person as provided by law.

(b) Appeals shall be made to the Superior Court of Barnstable County pursuant to M.G.L. Chapter 249, section 4, or as otherwise provided by law.

(2) Mediation. Any person specified in FWR 10.10(1)(a) may, within ten (10) days of the issuance of a decision by the Commission, request that the matter be settled through a mediation process conducted by a professional environmental service. Any party may refuse to participate in, or may withdraw from the mediation proceeding at any time, and no settlement agreement shall be effective unless signed by all parties whose cooperation is necessary to its implementation.

(a) Professional environmental service shall mean a person(s) who is qualified to determine if the decision of the commission is consistent with the provisions of FWR 10.00.

FWR 10.11 Incorporation

Where applicable, the definitions, presumptions of significance, and performance standards, set forth in the Massachusetts Wetlands Regulations, 310 CMR 10.00 et seq., are hereby incorporated herein only when no definitions, presumptions of significance or performance standards are given in these regulations.

FWR 10.12 Severability

Should any portion of these regulations be declared invalid by a decision of court, the legislature or other body having jurisdiction, the remainder of these regulations shall remain in full force and effect.

FWR 10.13 Variance (revised 8/13/2003)

(1) Any individual who suffers a Hardship as defined in these regulations may petition for a variance from Chapter 235 and these regulations provided:

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- (a) The project does not meet one or more of the performance standards articulated in FWR 10.16 through 10.60; and
- (b) Mitigating measures are proposed by the Applicant that will allow the project to be conditioned so as to contribute to the protection of the Resource areas identified in Chapter 235; and
- (c) The project will not create a nuisance; and
- (d) The hardship was not created by the applicant or the applicant's agents; and
- (e) The resource areas delineated in Chapter 235 will be better protected if the project is allowed than if the project is denied, or the project has an overriding public benefit.

(2) Procedure.

(a) A request for a variance shall be made in writing at the time the Permit Application is filed and shall include, at a minimum, the following information:

- 1. A description of how the project qualifies for a variance in accordance with FWR 10.13(1); and
- 2. A description of alternatives explored that would allow the project to proceed in Compliance with FWR 10.16 through 10.60 and an explanation of why each is unreasonable or unrealistic; and
- 3. A description of the mitigating measures to be used to contribute to the protection of the Resource area values identified in Chapter 235 of the Code of Falmouth; and
- 4. A description of how the resource areas delineated in Chapter 235 will be better protected if the project is allowed than if the project is denied; or
- 5. Evidence that an overriding public interest is associated with the project which justifies waiver of FWR 10.16 through 10.60.

(b) The Commission shall consider the request for a variance as part of its review of the Permit Application pursuant FWR 10.05(5). The Commission shall grant, grant in part, deny in part or deny the variance request based upon its findings made in pursuant to FWR 10.13(1).

(c) The Commission may impose Conditions, safeguards and limitations on both of time and activity.

(3) If the rights authorized by a variance are not exercised within one (1) year of the date of grant of such variance such rights shall lapse provided, however, that the Commission may extend the time for the exercise of such rights for a period not to exceed six (6) months provided further that the application for any extension be submitted prior to the expiration of such rights.

Commentary

FWR 10.13, which provides that the Commission may waive the application of one or more of the regulations is intended to be employed only in rare and unusual cases.

FWR 10.14 Amendments

Amendments to these regulations shall be made in the manner set forth in Section 8 of the Falmouth Wetlands Bylaw.

FWR 10.15 Effective Date

(1) FWR 10.01 through 10.38, FWR 10.40 through 10.99, and FWR 2.00 shall take effect on August 15, 1998 and shall apply to all Permit Applications and Requests for Determinations of Applicability filed on or after that date and any subsequent procedures related to such filings made on or after that date. FWR 10.01 through 10.38, FWR 10.40 through 10.99, and FWR 2.00 shall not apply to any Notice of Intent filed prior to the effective date of FWR 10.00, or to any extensions of any Order of Conditions the Notice of Intent for which was filed prior to said effective date.

(2) The effective date of FWR 10.39 is April 17, 1997. FWR 10.39 shall not apply to any Notice of Intent filed prior to April 17, 1997, or to any extensions to an Order of Conditions when the Notice of Intent upon which such Order was based 10.15: continued

was filed prior to April 17, 1997.

(3) All proceedings and actions commenced under Chapter 235 of the Code of Falmouth prior to the effective date of FWR 10.00 shall remain in full force and effect under the prior applicable regulations.

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FWR 10.16 Specific Activities Regulated

Introduction - Under the Bylaw, activities in the following areas are subject to Conditions by the Commission. The complexity of these activities warrants the specific requirements set forth below.

(1) Coastal Docks and Piers.

(a) Introduction. The construction, use, and maintenance of docks and piers are likely to have a significant or cumulative adverse effect on the Resource area values of storm damage prevention, shellfish, fisheries, wildlife habitat, aesthetics, erosion and sediment control, aquaculture, and recreation. Construction, maintenance and use of private Docks can have adverse effects on Resource areas and navigation for recreational purposes. Further, docks destroyed by storm pose a threat to nearby properties by increasing water borne debris.

Turbulence and prop dredging generated by boat traffic significantly increase turbidity levels. High turbidity levels attenuate the sunlight necessary for photosynthetic processes responsible for the primary productivity and oxygen regeneration of the water. The suspended sediments settle on shellfish beds, smothering existing shellfish and altering the quality of the sand bottom essential for spat (mollusk larvae) settlement. Resuspension of bottom sediments causes redistribution of sediments, alteration in sediment grain size distribution and causes changes in bottom topography relief, elevation and grade, including creation of depressions in the bottom. Resuspension of sediments into depressions creates deep pockets of sediment which may not be able to physically support shellfish or which can become anoxic and therefore not support shellfish. Resuspension of sediments during the period of shellfish larval settlement hinders or prevents the effective settlement of shellfish larvae. Boat traffic generated from docks will add to this disruption and will cause erosion of banks and marshes.

Construction of docks and subsequent boat activity causes resuspension of nutrient-laden sediment particles which may cause a release of sediment-bound nutrients to the water column resulting in a "bloom" of vegetation, release of nutrients to the water column leads to eutrophication and anoxic bottom conditions. Anoxic sediments and anoxic bottom conditions create adverse impacts on benthic resources, including shellfish and fisheries.

While Dock construction is typically the least environmentally destructive method of crossing a marsh, it may adversely affect the physical characteristics and functional value of a marsh. Marsh plants provide the major energy flow (detritus food chain) between the autotrophic and heterotrophic levels in a marsh-estuarine system. Many species of sport and commercial fish and shellfish are dependent upon this system. Plants adapted to high ambient light intensity, such as marsh grasses, are ill-adapted to the shaded conditions created by a dock. Shading may result in the loss of vegetative biomass (decreased plant height, population density, and leaf thickness) or alteration of species composition. Reductions in plant density result in the loss of sediment normally trapped by roots and culms. Tidal washout of sediment could result in localized depressions which, through evaporation of trapped water, concentrate salt. High sediment salt levels effectively preclude recolonization by original vegetation. Localized tidal washout may lead to further vegetative regression, extension, and disruption of natural communities in the area.

Propeller turbulence near or in areas or submerged aquatic vegetation, such as eel grass, or salt marsh damages vegetation, thereby increasing the rate at which organic detritus is produced. If this organic detritus does not completely decompose aerobically, then anoxic bottom conditions will ensue, which adversely impact shellfish and fisheries.

Cumulative impacts of the construction, maintenance and use of docks threaten to decrease the overall productivity of the marsh ecosystem, to reduce its ability to absorb storm wave energy, and to reduce its contribution to groundwater and surface water quality.

Docks and piers when placed in land containing shellfish have an adverse impact on the resource area value of aquaculture. The placement length and size of the dock and the floats can interfere with the harvesting of quahogs and scallops.

Docks, depending on their length, can have an adverse impact on recreation by interfering with recreational boating activities. Not properly designed, docks can interfere with intertidal lateral access for recreational fishing and fowling. Any proposal that affects navigation is likely to have a significant or cumulative adverse effect on recreation. Depending on their height, length compatibility with surrounding environs and overall visibility docks can create an adverse impact to the aesthetics of the area. Excessive lighting on docks can interfere with recreational activities, cause temporary "night blindness" in recreational boaters, and have an adverse impact to the aesthetics of the night sky.

(b) Submission Requirements for all Docks:

If an incomplete submission is received, the Commission shall issue a procedural denial, without prejudice, in accordance

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with FWR 10.05(9)(a).

1. A narrative description of materials used, i.e., size of pilings, deck percent open area, spacing between planks, flotation materials, toxicity of any materials and potential for leaching into the water from the materials;
2. A narrative description of the construction process including the use of barges, pile driving technique, cranes and heavy equipment;
3. An accurate, detailed drawing showing type of construction, size, means for mooring if floating, exact location, depth of water within a fifty-foot radius of each side of dock, mean high water line (mhw), mean low water line (mlw), extreme low water line (elw), location of where boats will be tied to dock or pier (mooring field), water depths (mlw) throughout the mooring field, property boundary lines and edge of resource areas;
4. A note on the plan indicating the site for winter storage of floats and method of hauling (if any);
5. The dock's effect on navigation reviewed and approved by the Harbormaster;
6. A shellfish survey conducted in accordance with FWR 10.34 (4);
7. A shellfish mitigation plan if required by the performance standards;
8. Location of all docks and moorings within two hundred (200) feet of the proposed Dock and float;
9. Location of eel grass within one hundred (100) feet of the proposed structure;
10. Description of lighting, electrical and potable water connections including sufficient detail to demonstrate compliance with any lighting performance standards. (lighting); and
11. A locus and title box which includes the street address.
12. A signed statement by the owner, applicant, engineer, shellfish expert and other professional utilized in preparing the submittal that each such individual has reviewed the performance standards contained herein and that the proposed project meets each standard. Any consultant utilized in the application need only certify those areas that fall within the consultant's area of expertise. In the alternative, the applicant may submit an application for a Variance in accordance with FWR 10.13.
- 13 For community and common docks only, sufficient legal documentation to demonstrate the rights in interest of the locus and that the dock will remain as a community dock or common dock for the life of any such dock.

(c) Design Specifications and Performance Standards Commercial Harbors:

1. Docks and piers shall be constructed in proportion to vessel(s) that the dock or pier will serve. No dock may be constructed of a length that interferes with the recreational interests protected under the by-law.
2. To keep disturbance of the bottom minimal at all times during both construction and use, the water depth at the end of the Dock shall be a minimum of four (4) feet at the time of mean low water or three (3) feet greater than the draft of vessels served by the dock or pier whichever is the greatest depth.
3. The landward approach to a dock shall not harm vegetation on a coastal wetland, freshwater wetland or coastal bank (a marsh shall be crossed by a raised walkway, and coastal banks must be preserved by use of suitable stairs.);
4. Except for floating portions of a dock, the decking surface shall not reduce normal ambient lighting, i.e. sunlight, by more than 50 percent.

(d) Design Specifications and Performance Standards Recreational Harbors

1. Docks shall not exceed over one hundred (100) feet in length beyond mean high tide, or one hundred (100) feet in length beyond the landward edge of salt marsh, or otherwise prohibit or unreasonably impede legitimate passage along a beach or through navigation over the waters for recreational or aquacultural purposes;
2. To keep disturbance of the bottom minimal at all times during both construction and use, the water depth at the end of the dock shall be a minimum of three (3) feet at the time of mean low water.
3. The area of the terminal "L" or "T" shape in a fixed dock, or the float, or combination thereof, shall not exceed one hundred (100) square feet;
4. The design and construction shall not interfere with recreational intertidal lateral access;
5. No portion of the dock or pier may be closer than 10 feet from the property boundary or extended property boundary line into the intertidal and tidal zones.
6. Floating docks shall be fixed by piers utilizing a hoop roller or other approved designed fastening system;
7. The landward approach to a dock shall not harm vegetation on a coastal wetland, freshwater wetland or coastal bank (a marsh shall be crossed by a raised walkway, and coastal banks must be preserved by use of suitable stairs.);
8. An area where the float(s), if any, will be stored shall be designated on the plan;
- 9 Except for floating portions of a dock, the decking surface shall not reduce normal ambient lighting, i.e. sunlight, by more than 50 percent.
10. The maximum horizontal footcandle level as measured directly below each complete lighting unit shall not exceed two-tenths (0.2) footcandle (Fc)

(e) Design Specifications and Performance Standards - Areas of Critical Environmental Concern and Districts of Critical Planning Concern

1. No new docks shall be allowed unless the applicant demonstrates that a public benefit will derive from the

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construction of the dock or pier.

2. The design specifications for recreational harbors shall apply.

(f) Design Specifications and Performance Standards - Community Docks (except in Areas of Critical Environmental Concern or Districts of Critical Planning Concern)

1. Docks shall not exceed of the following: over one hundred (100) feet in length beyond mean high tide, or one hundred (100) feet in length beyond the landward edge of salt Marsh. The proposed dock or pier shall not otherwise prohibit or unreasonably impede legitimate passage along a beach or through navigation over the waters for recreational or aquacultural purposes;

2. To keep disturbance of the bottom minimal at all times during both construction and use, the water depth at the end of the dock shall be a minimum of three feet (3) at the time of mean low water.

3. The area of the terminal "L" or "T" shape in a fixed Dock, or the float, or combination thereof, shall not exceed one hundred (100) square feet;

4. The design and construction shall not interfere with recreational intertidal lateral access;

5. No portion of the dock or pier may be closer than 10 feet from the property boundary or extended property boundary line into the intertidal and tidal zones.

6. Floating docks shall be fixed by piers utilizing a hoop roller or other approved designed fastening system;

7. The landward approach to a dock shall not harm vegetation on a coastal wetland, freshwater wetland or coastal bank (a marsh shall be crossed by a raised walkway, and coastal banks must be preserved by use of suitable stairs.);

8. An area where the float(s), if any, will be stored shall be designated on the plan;

9. Except for floating portions of a dock, the decking surface shall not reduce normal ambient lighting, i.e. sunlight, by more than 50 percent.

10. The maximum horizontal footcandle level as measured directly below each complete lighting unit shall not exceed two-tenths (0.2) footcandle (Fc).

11. In addition to the marking contained in FWR 10.16(1)(i)(4), the following message shall be displayed on each section of the dock identified for the attachment of dinghies ? ?dinghies only.?

(g) Design Specifications and Performance Standards - Common Docks (except in Areas of Critical Environmental Concern or Districts of Critical Planning Concern)

1. Docks shall not exceed the following: over one hundred (100) feet in length beyond mean high tide, or one hundred (100) feet in length beyond the landward edge of a salt Marsh. The proposed dock or pier shall not otherwise prohibit or unreasonably impede legitimate passage along a beach or through navigation over the waters for recreational or aquacultural purposes;

2. To keep disturbance of the bottom minimal at all times during both construction and use, the water depth at the end of the dock shall be a minimum of three feet (3) at the time of mean low water.

3. No maximum size of a common dock is established. The Commission shall consider the reduction of the total number of potential docks in the area in permitting a common dock. In no case may the mooring field of a common dock be larger than what would have been permitted by the total area of the individual potential docks of common owners.

4. The design and construction shall not interfere with recreational intertidal lateral access;

5. Floating docks shall be fixed by piers or pilings utilizing a hoop roller or other approved designed fastening system;

6. The landward approach to a dock shall not harm vegetation on a coastal wetland, freshwater wetland or coastal bank (a marsh shall be crossed by a raised walkway, and coastal banks must be preserved by use of suitable stairs.);

7. An area where the float(s), if any, will be stored shall be designated on the plan;

8. Except for floating portions of a dock, the decking surface shall not reduce normal ambient lighting, i.e. sunlight, by more than 50 percent.

9. The maximum horizontal footcandle level as measured directly below each complete lighting unit shall not exceed two-tenths (0.2) footcandle (Fc).

(h) General Requirements and Prohibitions all Docks and Piers.

1. No new docks or piers or extension of an existing dock or pier may be constructed in any portion of FEMA designated velocity zone (V-Zone) unless the applicant demonstrates that there will be public benefit from the project. The Commission shall weigh the potential likelihood, damage and harm that any such dock or pier would cause during a storm event with the public benefit demonstrated by the applicant in determining whether the project should be allowed.

2. No new dock or pier shall be allowed if, within 35 feet of the area designated by the applicant as the mooring field, there are significant quantities of shellfish as defined by FWR 10.34 (3) and the area has been historically used for shellfishing or has potential for shellfishing, and the sediment provides a viable shellfish habitat.

3. If, within 50 feet of any portion of the dock or pier, there are significant quantities of shellfish as defined by FWR 10.34 (3) or the area has been historically used for shellfishing or has potential for shellfishing, or the sediment provides a viable shellfish habitat, the applicant shall provide a shellfish mitigation plan.

4. The Commission shall presume that there are significant quantities of shellfish in any area actively shellfished within

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the previous six months of the shellfish survey.

5. No new, replacement, or substantial alteration of an existing dock or pier shall be permitted within fifty (50) feet of an area of eel grass (*Zostera marina*).

6. No toxic materials may be used to construct a dock or pier.

7. Any floating section of a dock or pier shall have a minimum water depth of three feet under all portions of that floating section of the dock or pier including times of extreme low water. This depth shall be measured as the shortest distance from any portion of the bottom of the floating section to the seabed.

(i) The following shall be included as special conditions for all dock or pier projects:

1. Boats at the dock shall not be allowed to leak oil or other pollutants into water, nor shall oil or fuel be stored on the dock or pier.

2. Motor boats shall not be run in gear while tied to the dock, since prop wash disturbs shellfish beds, stirs up sediment and causes bank erosion.

3. Off-season storage of temporary/seasonal docks and floats shall be in upland areas.

4. The street address or business name shall be clearly displayed on the seaward face of the dock, using three-inch numbers/letters of a contrasting color.

5. If the use of the dock or pier causes actual damage to any resource areas through prop dredging, bottom scouring, oil or hazardous discharge, or destruction of shellfish resources, the dock or pier may be ordered removed at the owner's expense in accordance with the provisions of FWR 10.16. The owner shall be responsible for all costs associated with removal of the dock including any legal or other costs to include attorney's fees incurred by the Conservation Commission in enforcing this special condition.

6. If construction is not completed and a Certificate of Compliance issued within three years of the issuance of this permit, or affirmance of this permit after appeal, this permit is void. An applicant may request an extension of this time provided that such request is submitted at least 30 days prior to the end of the time.

7. If this permit and the plan of reference are not properly recorded in the Barnstable Registry of Deeds within 30 days of issuance, or 30 days of affirmance after appeal, this permit is void.

8. Normal maintenance and repair of a dock or pier is allowed. No extension, alteration or change from the plan of reference is permitted without first obtaining a modification to this permit in accordance with Conservation Commission procedures.

9. Boats shall be tied or attached only in those areas of the pier or dock so identified on the plan.

(j) Permits

1. Initial permits will be granted for a period of three years. After the initial period has expired the Conservation Administrator may issue a renewal of the permit for a period of five years provided there is no measurable adverse impact from the use of the pier or dock on any resource area protected by the by-law.

2. If the Conservation Administrator or Agent determines that adverse impacts are occurring from the use of the dock, the owner shall be notified in writing and the Commission shall hold a hearing on the renewal.

3. If the Commission, after hearing, determines that adverse impacts are occurring from the use of the dock or pier, the owner shall have one year from the hearing to correct and mitigate all harm caused by the use of the pier or dock.

4. If, after the one year, all damage has been corrected and properly mitigated, the Commission shall issue a permit for three (3) years.

5. If, after the one year, there is evidence of actual harm to resource areas, the dock shall be ordered removed at the owner's expense. Removal shall occur in accordance with a permit issued by the Commission within the time designated in the permit. The permit ordering removal of the pier or dock shall be recorded in the Barnstable Registry of Deeds within 14 days of issuance even if an appeal is taken.

(2) Projects to Control Coastal Erosion.

(a) Introduction. The function of projects to control coastal erosion through the use of coastal engineering structures is likely to have a significant or cumulative adverse effect on storm damage prevention, flood control, shellfish, fisheries, wildlife habitat, aesthetics, erosion and sediment control, and recreation.

These projects are typically proposed on beaches, dunes, barrier beaches, coastal banks, land subject to coastal storm flowage, and land under the ocean. Beaches, dunes, barrier beaches, and coastal banks are made up of unconsolidated sediment materials which permit a change in form due to wave action. As a result, they dissipate wave energy and are likely to be significant to storm damage prevention and flood control. They may supply essential sediments to "downdraft" and "offshore" areas. The public value of these resource areas lies in their dynamic nature and their ability to change shape in response to high energy situations such as storms. Interruptions of the natural processes of wave energy dissipation and sediment supply reduce the public value of these processes. Coastal sediment transport is a natural process that is critical to the resource area values listed above.

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Groins are used to build a protective beach by trapping sediment along a portion of shoreline where little beach exists. They are also used to retard erosion of existing or restored beaches. Historically groins have been considered necessary when certain updraft conditions have cut off the natural supply of sand feeding downdraft areas. For example, when natural erosion of bluffs or cliffs is halted, sediment starvation occurs in downdraft areas. Downdraft beaches start to disappear because their source of sediment is curtailed. Groins have traditionally been built in such cases to trap what little moving sediment remained. The usual result has been that while sediment was trapped immediately updraft of the groin, almost none was left to replenish downdraft areas. This resulted in the creation of groin fields," where each property owner installed separate groins in an attempt to catch whatever sand was available. Since groins do not address the initial cause of the decrease in littoral drift, i.e., a blockage of sediment transport from the source, groins have often produced unsatisfactory results.

Jetties are designed to protect inlets. On the flood-tide materials are brought into the inlet. At ebb-tide, an outer bar is formed. Neither occurrence is desirable when navigation is the primary need in the area. Thus, a jetty is constructed on the updraft side of the inlet to completely trap the sand before it reaches the inlet. To be successful, the jetty must be of sufficient height to trap all of the sand movement and long enough to extend from the upper reaches of waves on a beach seaward to the terminus of the zone in which movement of littoral drift takes place. Because of this impoundment of the sand at the updraft jetty, the sand supply to downdraft areas is terminated, resulting in erosion of the downdraft beach.

Where sediment supply is reduced or interrupted, mitigation may include artificial nourishment with downdraft areas. Dredge material from channel dredging, if proven to be clean and made up of similar mineral material, might be used to nourish downdraft areas adjacent to the dredging activity. Seawalls may require mitigation by a regular nourishment program.

10.16(2): continued

(b) Submittal requirements.² For any proposed coastal engineering structure that may affect sediment supply, a Permit Application shall include:

1. a quantitative description of the natural processes on site, including volume of sediment lost, size of transport cell, physical characteristics of sediment, and chemical contaminants;
2. an appropriate response to minimize the impact on downdraft areas;
3. a specific description of the project including construction details, access to the site, potential damage due to construction and continuing measures to mitigate downdraft damage; and
4. a beach profile and a nourishment plan designed to maintain the original beach profile.

(c) Projects proposed to control coastal erosion shall meet the performance standards of FWR 10.21 through 10.40.

(3) Stormwater Management

(a) The design of the system for stormwater management for each project shall accomplish the following:

1. Reproduce, as nearly as possible the hydrological conditions in the ground and surface waters prior to the development, as specified in FWR 10.16(3)(b); and
2. reduce stormwater pollution to the maximum extent possible using Best Management Practices (BMP's), as specified in FWR 10.16(3)(c);
3. Have an acceptable future maintenance plan covering method and execution;
4. Have a beneficial effect on the resource area values of the Bylaw;
5. be appropriate for the site, given physical constraints; and
6. provide a sufficient level of environmental protection during the construction phase.

(b) The design and construction of each project shall be done in a manner such that post-construction runoff will not exacerbate or create flooding conditions, or alter surface water flow paths such as to impact adjacent properties to the site during the 2, 10, 25, and 100-year 24 hour storm events. No increase will be allowed in the peak rate of runoff for any of the above design storms. The total volume of post-development runoff shall not exceed the pre-development runoff volume for the ten (10) year, twenty-four (24) hour design storm.

(c) The "first flush" of the stormwater shall be treated prior to discharge. The treatment system(s) shall be designed to accommodate the first flush from the entire project area. Treatment shall be provided to achieve 80% removal of total suspended solids from the first flush. In addition, any development in the watersheds of a coastal pond or other nitrogen

² These requirements are in addition to those specified in FWR 10.99.

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sensitive embayments shall incorporate physical treatment processes to remove nitrogen at an efficiency rate of 30% or greater. Development in the watershed of a freshwater pond shall incorporate phosphorous removal at a design rate of 50% or greater.

(d) The treatment volume (V_t) for the "first flush" shall be determined by the following formula: $V_t = (1.25/12 \text{ inches})(R_v)(\text{Site Area in square feet})$, where $R_v = 0.05 + 0.009(I)$, and $I =$ the % impervious area. Impervious area is defined as any manmade cover that is not vegetated. In residential areas, the % impervious is obtained from the TR-55 table "Runoff Curve Numbers for Urban Areas, Residential District by Average Lot Size."

(e) Compliance with FWR 10.16(3) shall be consistent with FWR 2.00 *Stormwater Management*.

FWR 10.17 Wildlife Habitat Evaluations

(1) Measuring Adverse Effects on Wildlife Habitat

(a) To the extent that a proposed project will remove, dredge, fill, build upon, degrade or otherwise alter other wildlife habitat beyond the thresholds permitted under FWR 10.36(7)(e), 10.37(7)(e), 10.54(5)(e), 10.56(4)(a)4. and 10.57(4)(a)3., such alterations may be permitted only if they will have no adverse effects on wildlife habitat. Adverse effects on wildlife habitat mean the alteration of any habitat characteristic listed in FWR 10.17(2), insofar as such alteration will, following two growing seasons of project completion and thereafter (or, if a project would eliminate trees, upon the maturity of replanted saplings) substantially reduce its capacity to provide the important wildlife habitat functions listed in FWR 10.17(2). Such performance standard, however, shall not apply to the habitat of rare species, which are covered by the performance standards established under FWR 10.18 and 10.21 through 10.60.

(b) An evaluation by the applicant of whether a proposed project will have an adverse effect on wildlife habitat beyond

10.17: continued

permissible thresholds shall be performed by an individual with at least a masters degree in wildlife biology or ecological science from an accredited college or university, or other competent professional with at least two years experience in wildlife habitat evaluation.

(c) Any wildlife habitat management practices conducted by the Division of Fisheries and Wildlife, and any wildlife management practices of any individual or organization if reviewed and approved in writing by said Division, or by the Cape Cod Commission shall be presumed to have no adverse effect on wildlife habitat. Such presumption is rebuttable, and may be overcome by a clear showing to the contrary.

(2) Wildlife Habitat Characteristics of Resource Areas:

(a) Inland Banks. The topography, soil structure, and plant community composition and structure of banks can provide the following important wildlife habitat functions:

1. Food, shelter and migratory and breeding areas for wildlife
2. Overwintering areas for mammals and reptiles.

(b) Land Under Waterbodies. The plant community and soil composition and structure, hydrologic regime, topography and water quality of land under water bodies can provide the following important wildlife habitat functions:

1. Food, shelter and breeding areas for wildlife;
2. Overwintering areas for mammals, reptiles and amphibians.

(c) Lower Floodplains: Land Subject to Flooding and Land Subject to Coastal Storm Flowage. The hydrologic regime, plant community and soil composition and structure, topography, and proximity to water bodies of lower floodplains can provide the following important wildlife habitat functions:

1. Food, shelter, migratory and overwintering areas for wildlife;
2. Breeding areas for birds, mammals and reptiles.

(d) Banks of Estuaries. The hydrologic regime, plant community and soil composition and structure, topography, and proximity to water bodies of banks of estuaries can provide the following important wildlife habitat functions:

1. Food, shelter, and migratory areas for wildlife;
2. Breeding areas for birds, mammals and reptiles.

(f) Banks of Salt Ponds. The hydrologic regime, plant community and soil composition and structure, topography, and proximity to water bodies of banks of salt ponds can provide the following important wildlife habitat functions:

1. Food, shelter, and migratory areas for wildlife;
2. Breeding areas for birds.

(3) Restoration and Replication of Altered Habitat. Alterations of wildlife habitat characteristics beyond permissible thresholds

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may be restored onsite or replicated offsite provided it is permitted by the applicable section of FWR 10.18 and 10.21 through 10.60, and performed in accordance with the following general conditions, and any additional conditions the Commission deems necessary to insure that the standard in FWR 10.17(1)(a) is satisfied:

- (a) the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
- (b) the elevation of groundwater relative to the surface of the replacement area shall be approximately equal to that of the lost area;
- (c) the replacement area shall be located within the same general area as the lost area. In the case of banks and land under water, the replacement area shall be located on the same water body or waterway if the latter has not been rechanneled or otherwise relocated. In the case of bordering land subject to flooding, the replacement area shall be located approximately the same distance from the water body or waterway as the lost area. In the case of vernal pool habitat, the replacement area shall be located in close proximity to the lost area;
- (d) interspersed and diversity of vegetation, water and other wildlife habitat characteristics of the replacement area, as well as its location relative to neighboring wildlife habitats, shall be similar to that of the lost areas, insofar as necessary to maintain the wildlife habitat functions of the lost area;
- (e) the project shall not alter five or more acres of Land Subject to Flooding, Land Under Water, and/or Land Subject to Coastal Storm Flowage found to be significant to the protection of wildlife habitat, 500 feet or more of Bank found to be significant to the protection of wildlife habitat (in the case of a bank of a stream or river, this shall be measured on each side of said stream or river), 250 feet or more of Bank of an Estuary found to be significant to the protection of wildlife habitat, or 100 feet or more of Bank of a Salt Pond found to be significant to the protection of wildlife habitat .
- (f) if the replacement area is located in an area subject to Chapter 235 of the Code of Falmouth, there shall be no adverse

10.17: continued

effect on the existing important wildlife habitat functions of said area as measured by the standards of FWR 10.17;

(g) the "thresholds" established in FWR 10.36(7)(e), 10.37(7)(e), 10.54(5)(e), 10.56(4)(a)4. and 10.57(4)(a)3. (below which alterations of resource areas are not deemed to impair capacity to provide important wildlife habitat functions) shall not apply to any replacement area; and

(h) the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in FWR 10.18 and 10.21 through 10.60.

FWR 10.18 Resource Area Buffer³⁴

(1) Introduction. Resource area buffers (buffers) are likely to be significant to the following resource area values: protection of public and private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution control, fisheries, shellfish, wildlife habitat, agriculture, aesthetics, recreation, and aquaculture.

The buffer to each resource area is presumed to be significant to the resource area values of that resource area.

Adverse impacts to resource area buffers (buffers) are likely to have a cumulative effect on the following resource area values: protection of public and private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution control, fisheries, shellfish, wildlife habitat, agriculture, aesthetics, recreation, and aquaculture.

A buffer of land in a naturally vegetated condition can act much like wetlands in removal of nitrate and phosphorous from entering receiving waters by serving as sinks, filters and transformers of suspended and dissolved nutrients. A buffer can remove 50-100% of sediments through filtration via organic litter layer. Absorption of ground water via mature trees can take up 14 times more water than an equivalent area of grass. Bank and stream channel stability is dependent on the anchoring ability of root systems and slowing of runoff velocity and flow diffusion provided by the buffer. Vegetation in the buffer can act to moderate water column temperatures and levels of dissolved oxygen.

³ Additional regulations regarding resource area buffers in the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern are found in FWR 10.39

⁴ Regulations for Vernal Pool Habitat are found in FWR 10.58.

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The higher the water temperature, the more deleterious the effects of phosphorous release from sediments. The more phosphorous, the lower oxygen levels and inducement of algae blooms. The buffer provides corridors and connector and dispersal routes for wildlife, breeding, cover and migratory habitat for wildlife, perching and basking strata for herptiles and avifauna.

Buffers reduce the adverse impacts of adjacent land uses to wetlands. Buffers also provide important habitat for wildlife which utilize wetlands and buffer areas for essential life needs. Buffers reduce wetland impacts by moderating impacts of stormwater runoff including stabilizing soil to prevent erosion; filtering suspended solids, nutrients, and harmful or toxic substances; and moderating water level fluctuations. They reduce the adverse impacts of human disturbance on wetland habitat including blocking noise and glare; reducing sedimentation and nutrient input; reducing direct human disturbance from dumped debris, cut vegetation, and trampling; and providing visual separation. They also provide essential habitat for wetland-associated species for use in feeding; roosting; breeding and rearing of young; and cover for safety, mobility and thermal protection.

Buffer effectiveness increases with buffer width. As buffer width increases, the effectiveness of removing sediments, nutrients, bacteria, and other pollutants from surface water runoff increases. However, for incrementally greater sediment removal efficiency (e.g., from 90 to 95%), disproportionately larger buffer width increases are required.

As buffer width increases, direct human impacts, such as dumped debris, cut or burned vegetation, fill areas, and trampled vegetation, will decrease.

As buffer width increases, the numbers and types of wetland-dependent and wetland-related wildlife that can depend on the wetland and buffer for essential life needs increases.

10.18: continued

Wetlands with important functions and values or wetlands which are sensitive to disturbance will require greater buffers to reduce the risk of disturbance. Wetland functions, values, and sensitivity are attributes that will influence the necessary level of protection for a wetlands. Those systems which are extremely sensitive or have important functions will require larger buffers to protect them from disturbances, which may be of lesser threat to a different site. Where wetland systems are rare or irreplaceable (e.g., high quality estuarine wetlands, mature swamps, and bogs) larger buffer widths will ensure a lower risk of disturbance.

The uplands immediately adjacent to the wetland vary in their ability to reduce adverse effects of development, most importantly in relationship to slope and vegetative cover. Buffers with dense vegetative cover on slopes less than 15% are most effective for water quality functions. Dense shrub or forested vegetation with steep slopes provide the greatest protection from direct human disturbance. Appropriate vegetation for wildlife habitat depends on wildlife species present in the wetland and buffer. Effectiveness is also influenced by ownership of the buffer.

Land uses associated with significant construction and post-construction impacts need greater buffers. Construction impacts include erosion and sedimentation, debris disposal, vegetation removal and noise. Post-construction impacts are variable depending on the land use, but residential land use, in particular, can have significant impacts. Residential land use is associated with yard maintenance debris, domestic animal predation, removal of vegetation and trampling.

Appropriate buffer widths vary according to the desired buffer function(s). Temperature moderation, for example, will require smaller buffer widths than some wildlife habitat or water quality functions. Buffer widths for wildlife may be generalized, but specific habitat needs of wildlife species depend on individual habitat requirements.

Buffers of less than 50 feet in width are generally ineffective in protecting wetlands. Buffers larger than 50 feet are necessary to protect wetlands from an influx of sediment and nutrients, to protect wetlands from direct human disturbance, to protect sensitive wildlife species from adverse impacts, and to protect wetlands from the adverse effects of changes in quantity of water entering the wetlands.

To retain wetland-dependent wildlife in important wildlife areas, buffers need to retain plant structure for the maximum distance allowed by the Bylaw. This is especially the case where open water is a component of the wetland or where the wetland has

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heavy use by migratory birds or provides feeding for heron. The size needed would depend upon disturbance from adjacent land use and resources involved. Priority species may need even larger buffers to prevent their loss due to disturbance or isolation of subpopulations.

A minimum distance of 50 feet is necessary to protect a wetland from direct human disturbance in the form of human encroachment (e.g., trampling, debris). The appropriate width to prevent direct human disturbance depends on the type of vegetation, the slope, and the adjacent land use. Some wetlands are more sensitive to direct disturbance than others.

(2) Definition, Critical Characteristics and Boundary

- (a) The resource area buffer is an area adjacent to a resource area specified in FWR 10.02(1)(a) through (e), and is "lands within 100 feet of any of the aforesaid resource areas" as specified in Section 2: Jurisdiction of the Falmouth Wetlands Bylaw.
- (b) Created (referring to parcels created prior to the effective date of this section) as used in section 10.18(7) and (8)) means the filing of an approved plan, or the filing of a deed describing said parcel, with the Barnstable County Registry of Deeds. The date the parcel was created is the date of filing with the Barnstable County Registry of Deeds.
- (c) Appropriate buffer widths are based on four variables:
 1. existing resource area functions, values and sensitivity to disturbance;
 2. buffer characteristics;
 3. land use impacts; and
 4. desired buffer functions.
- (d) The boundary of the buffer is the distance measure horizontally as specified in FWR 10.18(8).

10.18: continued

(3) Presumptions.

(a) Where a project involves removing, building upon, degrading, or otherwise altering of a resource area buffer adjacent to a resource area specified in FWR 10.02(1)(a) through (e), the Commission shall presume that such area is significant to, or will have a cumulative effect upon, the resource area values specified in FWR 10.18(1). This presumption is rebuttable and may be overcome upon a clear showing that said land does not play a role in the protection of said resource area values. In the event that the presumption is deemed to have been overcome, the Commission shall make a written determination to this effect, setting forth the grounds.

(b) Where a project:

1. involves removing, building upon, degrading, or otherwise altering of lands within 100 feet of any of the aforesaid resource areas" as specified in Section 2: Jurisdiction of the Falmouth Wetlands Bylaw, and said resource area is specified in FWR 10.02(1)(a) through (e); and

2. the resource area buffer as specified in FWR 10.18(8) is not present, the Commission shall presume that there is a significant or cumulative effect upon the resource area values specified in FWR 10.18(1). This presumption is rebuttable and may be overcome upon a clear showing that there is no significant or cumulative effect or cumulative effect the protection of said resource area values. In the event that the presumption is deemed to have been overcome, the Commission shall make a written determination to this effect, setting forth the grounds.

(4) General Performance Standards.

A resource area buffer shall be required for all activities adjacent to resource areas specified in FWR 10.02(1)(a) through (e). Any resource area created, restored or enhanced as compensation for approved resource area alterations shall also include the buffer required for the corresponding resource area(s). All buffers shall be measured from the resource area boundary as surveyed in the field. The width of the resource area buffer shall be determined according to FWR 10.18(5) through (8). The width of the buffer as determined by FWR 10.18(5) through (8) shall be presumed to protect the resource area values of the bylaw. Except as otherwise specified in FWR 10.18(9), resource area buffers shall be retained in a naturally vegetated condition. Where buffer disturbance has occurred during construction, revegetation with native vegetation may be required.

(5) Repair or Replacement of a Legally Permitted Facility

The commission shall allow the repair or replacement of a legally permitted facility, structure, or use existing as of August 15,

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1988, but not redevelopment activity pursuant to FWR 10.18(6), where no practicable alternative exists on the lot⁵ that would allow a resource area buffer of the width described in FWR 10.18(9), provided that the performance standards of FWR 10.18(8)(a) and (b) are met to the maximum extent feasible.

(6) Redevelopment Within Previously Developed Resource Area Buffer; Restoration and Mitigation (revised 8/13/2003).

The Commission may allow work to redevelop a previously developed resource area buffer, that does not meet the buffer requirements of FWR 10.18(8)(a) and (b), provided the proposed work improves existing conditions to any of the resource areas described in FWR 10.02(1)(a) through (e).

(a) Redevelopment means

1. Replacement, rehabilitation or expansion of existing structures and improvement of existing roads.
2. The construction of docks and piers: and
3. The armoring of a coastal bank

A previously developed resource area buffer contains areas degraded prior to August 15, 1998 by impervious surfaces from existing structures or pavement, absence of topsoil, junkyards, abandoned dumping grounds, or lack of a naturally vegetated condition. Evidence of these conditions must be in the form of documented photographs, either aerial or land based. Written testimony alone will not be acceptable evidence of a previously disturbed buffer.

(b) Work to redevelop previously developed resource area buffers shall conform to the following criteria:

1. At a minimum, proposed work shall result in an improvement over existing conditions of the capacity of the resource area buffer to protect the resource area values identified in Chapter 235 of the Code of Falmouth. When a lot is previously developed but no portion of the resource area buffer is degraded, the requirements of FWR 10.18(8) shall be met.

10.18 continued

2. Storm water management is provided according to FWR 10.16(3)
3. Proposed work, including expansion of existing structures, shall be located outside the resource area buffer or towards the resource area buffer boundary and away from the resource area, except in accordance with FWR 10.18(6)(b)5.
4. The area of proposed work shall not exceed the amount of previously degraded area except in accordance with FWR 10.18(6)(b)5.
5. When an applicant proposes restoration on-site of degraded resource area buffer, alteration may be allowed, within the resource area buffer, but in no case closer to the resource area, notwithstanding the criteria of FWR 10.18(6) 3 and 4. at ratios defined as follows:
If the current buffer is 0-25 feet in width restoration shall be at a 3:1 ratio
If the current buffer is 25-50 feet in width restoration shall be at a 2:1 ratio

If the current buffer is 50-100 feet in width restoration shall be at a 1:1 ratio
This is the ratio of restored area to the area of alteration not conforming to the criteria. Areas immediately adjacent to the resource area shall be selected for restoration. Alteration not conforming to the criteria shall begin at the resource area boundary. Restoration shall include:

- a. Removal of all debris, but retain any native trees and mature native shrubs (as defined by The Vascular Plants of Massachusetts. A County Checklist 1999 by the Massachusetts Division of Fisheries and Wildlife), non-native species with appealing habitat value may be allowed to remain;
- b. Grading to a topography which reduces runoff and increases infiltration;
- c. Coverage by topsoil at a depth consistent with natural conditions at the site; and
- d. seeding and planting with an erosion control seed mixture, following by the planting of herbaceous woody indigenous species found on the approved Falmouth Conservation Commission plant list.

(7) Activity on a parcel Created Prior to August 15, 1998, other than Repair or Replacement of a legally Permitted Facility or Redevelopment Activity (revised 8/13/2003)

The commission may issue a permit for activity on a parcel that existed as of August 15, 1998, where no practicable alternative exists on the parcel that would allow a resource area buffer the width required in FWR 10.18(8)(a) and (b) for new construction due to site constraints provided a resource area buffer is maintained as close as practicable to those required for new activity in

⁵ The repair or replacement of a legally permitted facility must "remove fill dredge, degrade, or otherwise alter an area subject to protection under the bylaw", for the Commission to exercise review pursuant to FWR 10.00. Proposed activities that meet the criteria for the issuance of Administrative Review or a negative Determination of Applicability are not subject to FWR 10.18.

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FWR 10.18(8)(a) and (b) and in no case less than 50 feet.

(8) New Activity on a Parcel Created on or after August 15, 1998 (revised 8/13/2003)

For new activity on a parcel created on or after August 15, 1998, the resource area buffer distance shall be:

- (a) 100 feet for:
 - 1. Critical wildlife or plant habitat, unless otherwise specified in 10.19.:
 - 2. Freshwater wetlands bordering a water body within Zone 2 of a public water supply; and
 - a. The zone 2 shall be presumed to be 1/2 mile if unmapped
 - b. The presumed Zone 2 extent can be overcome by credible evidence from a competent and credible source based upon site specific evidence submitted to the commission.
- (b) 75 feet for:
 - 1. A fish run;
 - 2. An eroding Coastal Bank located in a Velocity Zone;
 - 3. Land under water bodies;
 - 4. Land under the Ocean
 - 5. Salt Marsh
 - 6. Land Under a Salt Pond;
 - 7. Banks of Salt Ponds, Estuaries, and ponds, lakes, and streams which flow throughout the year;
- (c) 50 feet for:
 - 1. Land subject to Tidal Action;
 - 2. Freshwater wetlands not listed in FWR 10.18(8)(a or b);
 - 3. Banks of Intermittent streams; and
 - 4. An eroding Coastal Bank not in a Velocity Zone⁶.
- (d) 25 feet for:
 - 1. All other Coastal Banks.

(9) Activities Proposed in a Resource Area Buffer

The Resource Area Buffer should be left intact in a naturally vegetated condition. However there are some activities that may be allowed by the Commission that are not likely to have a significant or cumulative effect on the resource area values of the Bylaw, provided the other provisions of FWR 10.00 are met. These activities are:

- (a) Fencing, provided it will not constitute a barrier to wildlife movement;
- (b) Vista pruning;
- (c) Plantings of native species of trees, shrubs, or groundcover, but excluding turf lawns;
- (d) The conversion of impervious to vegetated surfaces, provided erosion and sedimentation controls are implemented during construction; and
- (e) Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, exploratory borings, sediment sampling and surveying).
- (f) pervious trails of a width 4 feet or less;
- (g) nonpermanent wildlife watching blinds; or
- (h) short term scientific or educational activities.

FWR 10.19 Rare Species

(1) Introduction.

The protection of rare species is significant to the protection of fisheries and wildlife habitat. Rare species can be animals or plants, and are not necessarily dependent upon coastal wetlands or freshwater wetland during their life cycle. Only a small portion of the areas subject to protection under Chapter 235 of the Code of Falmouth have rare species present.

(2) Definition and Boundary:

- (a) Rare species means those species officially listed as endangered, threatened, of special concern, or on the "watch list" by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 8.00, regardless of their preference for specific habitat.
- (b) The habitat site of rare species is determined by:

⁶Additional setbacks from the top of the Coastal Bank are found in FWR 10.30.

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1. sightings on file with the Natural Heritage Program;
2. data on file with the Commission that was available prior to the filing of the Permit Application; or
3. evidence of the presence of such species presented at a public hearing for the permit application; together with documentation of the habitat needs and species range.

(3) Presumption.

Any project proposed in a habitat site of rare species shall be presumed to have an adverse effect on wildlife habitat. This presumption is rebuttable and may be overcome upon a clear showing that such habitat site does not play a role in wildlife habitat. In the event that the presumption is deemed to have been overcome, the Commission shall make a written determination to this effect, setting forth the grounds.

(4) General Performance Standards.

No project shall be permitted which will have any adverse effect on habitat sites of rare species.

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