

September 28, 2023

Dear Town Counsel,

Below please find proposed minor draft amendments to the Reading Wetlands Protection Regulations (RWPR) and the Tree and Shrub policy (as defined below), following discussion by the Reading Conservation Commission (the "Commission") at public hearings over the past several months. This proposal is made per Section 1 of the RWPR, which provides in relevant part:

From time to time and after a public hearing, the Commission amends the Reading Wetlands Protection Regulations. Amendments are intended . . . to clarify the language used in the regulations[.] . . . The amendments are based on the current body of experience and knowledge that the Commission has accumulated in implementing both the Act and the Wetlands Protection Regulations. . . . The amendments are intended to further clarify and streamline the regulatory process [and] to be more consistent with aspects of the State regulations[.]

Be assured that any amended language was calculated to reflect routine Commission practices, and to be consistent with, if not identical to, relevant language in the RWPR, the Mass. Wetlands Protection Act (WPA) regulations, and the applicable local wetlands regulations of our peer communities (as you know, the latter would have gone through the initial mandatory review process by the Attorney General's Office before posting). Some corrections are to typographical errors/internal inconsistencies, as noted below. We proposed no substantive changes that would expand the scope of the current RWPR, realizing that doing so would require a more elaborate process of adoption. The Commission may wish to pursue such in the future, and of course would consult with you in a timely manner before doing so.

Thank you in advance for your prompt and much-valued review. We look forward to hearing from you at your earliest convenience.

Sincerely,

The Town of Reading Conservation Commission

Proposed amendments (edits and additions in [blue](#))

**Internal misnaming of the RWPR:** There are some internal references in the RWPR to the "Reading Wetland Regulations" (Sections 2I1 and 2J1) and the "Reading Wetland Protection Regulations" (Sections 2I1, 3K1, 5B2 & C1, and 6A2). These alternative names for the RWPR are nowhere in the RWPR identified as such, and so will be corrected for clarity.

**RWPR Sections 3D1, 2, and 4, Zone of Natural Vegetation:**

3D1: Bordering any wetland, the Commission ~~may~~ shall require a Zone of Natural Vegetation (ZNV) or No-Disturb Zone of sufficient width and vegetative community type to assure that . . . .

3D2: Under most conditions, a zone width of a minimum of twenty-five feet would be considered sufficient to accomplish this purpose. A wider ZNV may be required, depending on specific site conditions, such as grades, soil permeability or other impact potential, including but not limited to potential vernal pools, as defined in Section 3J2 of these regulations. A previously developed or disturbed ZNV shall be restored to a naturally vegetated state to the maximum extent feasible within the ZNV, as determined by the Commission, including but not limited to requiring that a buffer strip be created where none currently exists.

3D4: To protect the integrity of the Zone of Natural Vegetation or No-Disturb Zone, including the associated root system and canopy, no new structures or fixtures that may not require a building permit, foundations, including, but not limited to, foundations, footings, frost walls, retaining walls, pools and pool equipment, fences, patios, sports courts, driveways, sheds, or other in-ground fixtures, shall be permitted within ten feet of the ZNV. Depending on special site conditions, a greater distance may be required. The ZNV as otherwise defined in this Section 3D, plus this “ten feet” or “greater distance,” may be referred to as the “No-Structure Zone.” Associated structures, including but not limited to the following: cantilevered structures, bay windows, eaves, and, garrisons, or other overhangs, may protrude to no closer than seven feet from the ZNV.

**Clarifying the Burden of Proof, RWPR Sections 2F1 and 8D1:**

2F1: Any person who files a Request for Determination of Applicability, Notice of Intent or Abbreviated Notice of Intent to perform any work within an area subject to protection under the Bylaw, or within the Buffer Zone, has the burden of demonstrating to the Commission by a preponderance of the credible evidence that:

- a The area is not significant to any of the interests identified in the Bylaw; or
- b The proposed work will contribute to the protection of the interests identified in the Bylaw by complying with the performance standards listed in these regulations.

8D1: The applicant shall have the burden and obligation, demonstrated by a preponderance of the credible evidence, of bringing the property into compliance with the Order of Conditions.

**Clarifying the connection between the “Standard replacement Tree and Shrub policy Reading Wetland Protection Bylaw Section 7.1” (the “Tree and Shrub policy”) and the RWPR:**

Add new item 5 to the Tree and Shrub policy:

5. The Commission will apply this policy consistent with the need to protect the integrity of the Zone of Natural Vegetation or No-Disturb Zone, as provided in Section 3D of the Town of Reading Wetlands Protection Regulations.

Minor edits: The term “buffer zone” in item 1 of the Tree and Shrub policy will be capitalized for consistency with the use of the term in item 3; similarly, the term “buffer zone” is not capitalized in Section 2J1 of the RWPR but should be, as it is capitalized the sixteen other times the term is used in that document.

#### **Clarifying the Vernal Pools provisions in the RWPR:**

Additional information for Town Counsel: The WPA regulations at 310 CMR 10.04 provide regarding vernal pools, in relevant part:

Vernal Pool Habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations, as well as *the area within 100 feet of the mean annual boundaries of such depressions, to the extent that such habitat is within an Area Subject to Protection under M.G.L. c. 131, § 40 as specified in 310 CMR 10.02(1)*. These areas are essential breeding habitat, and provide other extremely important wildlife habitat functions during non breeding season as well, for a variety of amphibian species such as wood frog (*Rana sylvatica*) and the spotted salamander (*Ambystoma maculatum*), and are important habitat for other wildlife species. [(Emphasis added.)]

See also the WPA regulations at 310 CMR 10.57(2)(a)6.:

Vernal pool habitat shall include *the area within 100 feet of the boundary of the vernal pool itself, insofar as such area is contained within the boundaries of this resource area* [(i.e., Bordering Land Subject to Flooding; emphasis added)<sup>1</sup>].

However, the Commission’s reading of the plain language of the RWPR indicates that the local regulations already provide such a 100-foot buffer zone for vernal pools, without qualification, based on several provisions, though there is also one apparently inconsistent provision.

Specifically, **RWPR Section 2C1** explicitly “includ[es] vernal pools” in the “Areas Subject to Protection under the Bylaw (Resource Areas),” as follows:

Consistent with 310 CMR 10.55(2)(c)1 and 2, any fresh water wetland including marsh, meadow, or bog, that supports a preponderance of hydrophytic vegetation; the substrate in the uppermost foot is predominantly undrained hydric soil and the substrate is saturated with water or covered by shallow water at some time during the

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<sup>1</sup> The same restriction applies to vernal pool habitat within Isolated Land Subject to Flooding. See 310 CMR 10.57(2)(b)5.

growing season of each year; any creek, river, stream, *pond (including vernal pool)*, or lake whether permanent or intermittent; any land under water bodies; any land subject to flooding; and any riverfront area. [(Emphasis added.)]

Thus, a vernal pool is entitled to a 100-foot Buffer Zone under the terms of **RWPR Section 2C3**, which applies to “all areas specified above [(i.e., in Section 2C1)] except for land subject to flooding.” Note in this regard that “vernal pool” is included in the RWPR in the definition of “pond” and *not* “land subject to flooding.” The conclusion that the RWPR establish a Buffer Zone for vernal pools is reinforced by **RWPR Section 4G7d**, which refers to “[w]ork within 100 feet of a known vernal pool” as a “Buffer Zone project[.]”

The apparent inconsistency in the RWPR regarding vernal pool habitat is found in **Section 3J1**, which, without qualification, “accepts and adopts the current (effective Jan 1, 2012) requirements, *definitions*, performance standards, and *regulatory restrictions* for vernal pools as specified pursuant to” the WPA regulations (emphasis added). The Commission needed to reconcile, for the sake of clarity, this apparent inconsistency in the plain language of the RWPR provisions regarding vernal pools. (The Commission also noted that none of the regulations of our 17 relevant peer communities contained such an inconsistency). A straightforward way to do so was to clarify that the RWPR is relying on the WPA regulations regarding vernal pools, *except* where the RWPR is more stringent. The Commission recalled in this regard that 310 CMR 10.01(2) provides, in relevant part, “310 CMR 10.00 is intended solely for use in administering M.G.L. c. 131, § 40; nothing contained in 310 CMR 10.00 should be construed as preempting or precluding more stringent protection of wetlands or other natural resource areas by local by-law, ordinance or regulation.” Thus, the Commission proposes that Section 3J1 of the RWPR be amended to read as follows:

The Town of Reading accepts and adopts the current (effective Jan 1, 2012) requirements, definitions, performance standards, and regulatory restrictions for vernal pools as specified pursuant to 310 CMR 10.00 ([except as provided in Sections 2C, 3D2, 3J2, and 4G7d of these Reading Regulations](#)) and the Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program ([“Natural Heritage”](#)) criteria at 321 CMR 10.00. All Vernal Pools currently listed as certified by Natural Heritage and those that meet the criteria as so defined are protected by the Reading regulations.

After reviewing the local vernal pool provisions of the relevant peer communities with such, consulting relevant guidance documents from Natural Heritage,<sup>2</sup> as well as considering our

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<sup>2</sup> Specifically, the Commission reviewed the “Massachusetts Aerial Photo Survey of Potential Vernal Pools” (e.g., p. 4: “[I]n Massachusetts, vernal pools are defined by the wildlife that use them rather than by the physical characteristics that make them visible on aerial photographs. Since wildlife cannot actually be seen on aerial photographs, vernal pools identified on aerial photographs are known as “potential vernal pools” (PVPs) due to the possibility that they do not support vernal pool indicator wildlife.”). The Commission also reviewed “Guidelines for the Certification of Vernal Pool Habitat, March 2009,” and “Guidance on the Field Identification of Vernal Pools When Dry.”

routine practice, the Commission proposes defining the term “potential vernal pools” (as now proposed for reference in Section 3D2, above) in a new **Section 3J2**, as follows:

The term “vernal pool” shall include, in addition to scientific definitions found in 310 CMR 10.00 as referenced in Section 3J1, any pond which, except in years of drought, is free of adult predatory fish populations, holds water for a minimum of two consecutive months during the spring and/or summer, and exhibits evidence of vernal pool species as required for certification by Natural Heritage, or any successor organization. Certification by Natural Heritage is not required. Drought coincides with an “Advisory” or more severe drought as declared by the Massachusetts Drought Management Task Force in accordance with a statewide drought management plan. “Potential vernal pools” as referenced in Section 3D2 are uncertified vernal pools that have the characteristics of a vernal pool in that they are small, often shallow ponds characterized by a lack of fish and experience annual or semi-annual periods of dryness, as observed over two consecutive spring and/or summer breeding seasons.

**Clarifying that RWPR Section 8, Certificate of Compliance, is not less stringent than State law:**

Additional information for Town Counsel: As the Commission noted immediately above, local wetlands regulations can be more stringent, *but not less stringent*, than applicable State law, due to the well-established legal principle of State supremacy. 310 CMR 10.05(9)(d) provides regarding Certificates of Compliance:

*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 Order shall accompany the request for a Certificate of Compliance [(emphasis added)].*

**RWPR Section 8B1b** provides, on the other hand:

Upon completion of work under an Order of Conditions, the applicant or owner shall submit a written request for a Certificate of Compliance to the Commission. . . . The Commission *may* require that a request be accompanied by: . . . A written statement by a registered professional civil engineer and/or other qualified professional, as *may* be required by the Commission, certifying compliance with the approved plans referenced above and this Order of Conditions and setting forth what deviations, if any, exist. [(emphasis added)].

Again, this provision of the RWPR must be at least as stringent as State law, and so the Commission proposes that it be rewritten accordingly, and as informed by our routine practice:

*When requesting a Certificate of Compliance, if a project has been completed in accordance with plans stamped by a registered professional engineer and/or other*

qualified professional, the Applicant shall provide 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 Order; the Applicant shall also provide at that time as-built plans stamped by such a qualified professional.

**Clarifying that RWPR Section 2E2, Variance from Regulations, is routinely applied consistent with, rather than more stringently than, State law in this regard:**

Background information for Town Counsel: While the Reading regulations in Section 2E2 indicate that a request for a variance can be submitted only “as part of a Notice of Intent or a Request to Amend an Order of Conditions,” in practice Reading, like the State (per 310 CMR 10.05(10)), does not limit such requests in this manner. Thus, we propose amending Section 2E2, as follows:

Any request for a variance **from these Regulations** shall be submitted to the Commission in writing ~~as part of a Notice of Intent or a Request to Amend an Order of Conditions.~~ The applicant shall submit an analysis of alternatives explored that would allow the project to proceed in compliance with these Regulations and an explanation of why each alternative is unreasonable. The applicant shall also submit a description of the mitigating measures to be used to prevent adverse impacts upon wetland values. The applicant shall also submit evidence that an overriding public interest is associated with the project that justifies the variance. After holding a public hearing ~~on the Notice of Intent or Request to Amend an Order of Conditions,~~ the Commission shall issue a written decision concerning the request for a variance as part of the Commission’s decision **regarding the project** ~~on said Notice of Intent or Request to Amend an Order of Conditions.~~

Correcting other typographical errors:

- **RWPR Section 7D4** references that “a public hearing shall be held in accordance with Section 5.D of these Regulations.” The “Public Hearings” provision is found in Section 5.~~D~~.
- **RWPR Section 7E1** should abbreviate Resource Area Delineation as “**RAD**” rather than “RDA.”