

Wetlands & Watercourses Law –Frequently Asked Questions

1. Q. What is a wetland, a watercourse?

A. A wetland is defined under regulations established by the U.S. Army Corps of Engineers, and consists of an area that meets the criteria for each of the following: wetland soils (hydric), wetland hydrology (water retention capacity), and wetland plant life. It is a scientifically established set of conditions that is not dependent on the presence of water at all times, nor is it a wetland simply because water collects in a spot after a heavy rain. A watercourse is a river or stream or other any natural or manmade topographic feature which causes water to flow, either continuously or intermittently with a definite channel or bed, excluding under this law drainage ditches or swales constructed for the management of stormwater.

2. Q. Why is Milan proposing regulation to protect wetlands and watercourses?

A. Milan has a high dependency on its water resources. Our citizens rely on private wells for drinking water almost exclusively and septic systems are the predominant method of wastewater treatment. The nature of Milan's topography and highly interconnected wetlands and watercourses, from which our drinking water sources are recharged, place a special importance on such protection. Milan is also the headwaters for six watersheds, and protection of water quality here is an important contribution to clean water in our downstream region. In addition, the natural landscape of Milan is highly valued by its citizens and maintaining high quality wetland and watercourses is important to protection of wildlife, and particularly some rare species that utilize Milan's wet areas.

3. Q. Why has Milan concluded that there is a need for this protection beyond protections established by the State DEC and Federal Army Corps of Engineers?

A. For two straightforward reasons – they do not have the mandates to protect the wetlands and watercourses as is recommended by good science, and they are not staffed to fulfill the mandates they have. The ACOE protects most wetlands from dredging or filling, but has no regulations to protect wetlands from indirect impacts nor does it provide for protection of adjacent buffers, which compromises wetland quality. DEC has the mandate only to regulate wetlands of 12.4 acres and larger; their mapping of such areas is incomplete and inaccurate; and they do not have the resources to vigorously protect even the larger wetlands for which they have a mandate. The DEC recommends that local municipalities adopt local regulations. When a legal challenge arose a number of years ago to local wetlands jurisdiction, the NYS legislature immediately enacted new legislation to permit concurrent jurisdiction between municipalities and DEC. The Poughkeepsie Journal has repeatedly reported and editorialized on the importance for localities to adopt local water quality regulations.

4. Q. Does this mean that land owners will not have to go to DEC or ACOE for approvals in the future?

A. Milan's proposed law establishes concurrent jurisdiction, meaning that our regulations do not supercede DEC or ACOE requirements. It is important that Milan not do so, as it protects the Town from undertaking state and federal enforcement responsibilities and costs.

5. Q. What happens if DEC approves something and Milan does not?

A. Milan must approve any application before it can be implemented. Under concurrent jurisdiction, the stricter jurisdiction applies.

6. Q. Why does this law protect every wetland, regardless of size?

A. The simple answer is that this is consistent with the federal regulations that establish the definition of a wetland; any acreage limit would be arbitrary at whatever level, and difficult to support. But more importantly, even very small wetlands can in some circumstances be critical to water quality and habitat protection. Also, small wetlands are often connected to larger wetlands or to streams. Because something is a wetland, however, does not automatically preclude most landowner activities. It is the Planning Board's role to make a judgment in each case and balance the interests of the landowner with the interests of the Town and its citizens, and ensure that the proper precautions are in place when undertaking activities in regulated areas.

7. Q. Why isn't this law considered a 'taking' that requires landowner compensation?

A. A legislative action is a 'taking' under Supreme Court guidance only when substantially all value is removed from the property by this government action. This would not be the case in any event, however, the ability to apply for and obtain a permit for regulated activities retains property value, and precludes a finding of 'taking'.

8. Q. What is a vernal pool and how does this law propose to protect it?

A. A vernal pool is a particular kind of wetland, one that is intermittent in nature. Vernal pools are important habitats for some wetland animals – e.g. salamanders, frogs, and turtles – for breeding purposes because they are incapable of supporting fish, a natural predator of amphibian eggs and young. The surrounding uplands are also important for these species as they live some or most of their lives out of the wetlands, thus simply preserving the wetland does not preserve the habitat they require to survive. We are part of a unique area that does support some rare species which utilize high quality vernal pools in their life cycle. Milan's regulations are structured to treat vernal pools as the wetlands they are (i.e. 100 foot buffer and the same controls on activities in the buffer), and to give the Planning Board the flexibility to work with applicants, guided by scientific findings, to seek mutual solutions that meet everyone's objectives and provide the optimum level of protection possible for high quality vernal pools. Vernal pool and adjacent upland habitats are also covered in the Town's Habitat Assessment Guidelines which provide additional information.

9. Q. My lawn slopes away from the house and water collects after heavy rains – is that a vernal pool?

A. Very doubtful, and even more unlikely that it would be a 'high quality' vernal pool requiring and special consideration by the Planning Board

10. Q. What if my home or another building is in a wetland buffer?

A. There is no impact on you, except with respect to prohibited or regulated activities. Maintenance activities on existing conditions are permitted actions. As with any other wetland buffer, undertaking regulated activities will require a wetland permit and additional construction will require a wetland permit as a part of the building permit application process.

11. Q. Are pre-existing conditions and non-conforming uses in a wetland or watercourse buffer allowed to continue – i.e. 'grandfathered'?

A. Yes. However, this does not extend to activities that would be prohibited or regulated by the law that are 'new each time' activities, such as application of pesticides or dumping prohibited materials in the wetland, watercourse, or buffer. The grandfathering does extend to all structures, to any existing water control devices, to existing lawns or gardens in buffer areas and the use of motorized maintenance vehicles in such areas

12. Q. I want to put up a gazebo overlooking my pond/wetland - what do I need to do to get approval?

A. You will apply for a building permit as usual. Your application will be reviewed by the Wetlands Review Professional using computer-available maps, and, in all likelihood, you will be advised to apply for a wetland permit with the recommendation for approval, perhaps with a condition that a silt fence be installed to protect the pond/wetland from disturbance to the land associated with installation.

13. Q. I want to put an addition on my home, and come in for a building permit – what happens?

A. Your application for a building permit is referred to the Wetlands Review Professional (WRP) who will use computer-available maps to review your site for any potential wetlands or watercourses and their buffers which could require a wetland permit. If such possibility exists, the WRP will likely make a site visit to determine if a wetland or watercourse buffer is in fact involved. If not, there is no further action required as part of the building permit process. There is no additional charge to the applicant to this point in the process. If there is proposed activity in a regulated area, it will be necessary to obtain a wetlands permit. In all but the most extreme case where an addition may cause a significant impact on a regulated area, it is expected that approval will be straightforward. If the impact is on the regulated area is found to be substantial, the Planning Board may make a site visit and work with the applicant on various ways to minimize the impact of the proposed action.

14. Q. I want to construct a new home on vacant land – what is required to get approval to do so?

A. The process remains the same as it is today, except that disturbance in a regulated area will require the issuance of a wetland permit (in addition to any current approval requirements from ACOE or DEC); this will

introduce the planning board into the approval process where it has previously not had a role in single family home construction.

If proposing to build in a regulated wetland area as determined by the Wetlands Review Professional, it may be necessary for the applicant to have the wetland delineated to determine its boundaries. The planning board will then work with the applicant to determine appropriate siting and precautions to be taken in doing so, and, if appropriate in the Planning Boards' judgment, to issue a wetland permit. During the course of such permit approval, depending on the sensitivity of the areas affected and the need for environmental or engineering assistance, it may be necessary for the applicant to establish an escrow account to fund the town's review of the application. After wetland permit approval, the applicant would then return to the Building Inspector for the issuance of a building permit.

As has occurred in the past, siting a home on property constrained by a wetland may also require a variance for setbacks to accommodate the home location, in which situation, the applicant would be required also to seek the necessary variances from the ZBA. The best and most expedient course for the applicant, when feasible to do so, is to site a home on the property in a way that does not impinge on regulated area.

15. Q. I am subdividing a large parcel for development – what is the process that I will now need to follow?

A. The Wetlands and Watercourses Protection law will not change the process for subdivision. Application for subdivision will be made to the Planning Board. Two elements of the existing process will be affected. Today, the Planning Board begins the process with a "Habitat Assessment" which looks at all relevant environmental considerations on the site before entering the sketch plan process. Wetlands and watercourses and their buffers will need to be delineated on a subdivision map, reflecting the historical ACOE and DEC requirements as well as those of the new Milan requirements. (Applicants will need to pursue ACOE and DEC approvals as they have in the past.) The second element is the SEQR process which today includes an assessment of environmental impacts of development on a site. Wetlands and watercourses are always a consideration in SEQR; in the future, Milan's requirements will be reflected in SEQR review findings. Subdivision applications today require the establishment of an escrow account to fund the consulting assistance to the Planning Board, and costs for wetlands reviews will continue to be one of the costs processed against the escrow account. It is not expected that there will be significantly different costs associated with wetlands review in processing subdivision requests, although some applications could see incrementally more consulting time. The wetland permit would be issued as one of the elements in completing site plan approval. Any zoning variances required are also typically completed by Planning Board referral to the ZBA during the site plan approval process. Following site plan approval, the property would be ready for the issuance of a building permit following site plan approval, without further wetland review.

16. Q. Can I construct a pond?

A. To construct a pond, it will first be necessary to obtain any required approvals from the ACOE, DEC and the approval of a wetland permit by the Milan Planning Board if the construction is to occur within a regulated area.

17. Q. Can I collect firewood and log on my property (in a buffer or wetland area)?

A. Yes. You can collect firewood for personal use in a buffer area. Logging is permitted upon presentation of a forest management plan prepared by a New York State Department of Environmental Conservation Cooperating Forester in accordance with New York State's *Forestry Best Management Practices for Water Quality, Timber Harvesting Guidelines and Forest Road Construction Handbook*.

18. Q. How can you enforce things like the sale of firewood from a buffer vs. other firewood or some of the other things in the law?

A. It is hoped that law abiding citizens will respect the laws in the town. Not every law passed is easily enforced, however, such provisions do establish the basis for the town to deal with gross abuses when destructive activities occur.

19. Q. If I have land that is now determined to be wetland or wetland buffer and I can't build on it, will my taxes be lowered?

A. This is a matter for the assessor to consider. However, the town is not, by passing this law, determining that any land can't be built on. Such determinations can only be made after an application is made for a wetland permit.

20. Q. Who is going to pay, and how much will it cost to administer these regulations?

A. The town will pay for the initial review by a Wetlands Review Professional to determine the need for a wetland permit. It is expected that the volume of activity will result in no more than a few hours per month, and these costs will be covered by normal building permit fees. It is anticipated that the majority of building permit applications will incur no cost to the applicant. Any costs incurred by the Planning Board for professional consultation (including the Wetland Review Professional) in the course of their review or by the Building Department in completing inspections (including wetland reviews by the WRP) prior to issuing a certificate of occupancy, will be covered by the applicant through an escrow account established for that purpose.

21. Q. What has changed since the first version of this local law was released?

A. Actually quite a bit. Here's a list of some of the changes made in response to feedback from the Public Hearing and comment process:

- Moved a number of items from prohibited to regulated to eliminate confusion and be sure that there was the flexibility to grant approval where warranted to desired homeowner uses – e.g. a structure in a buffer area.
- Clarified the ability to replace existing septic systems within a buffer
- Added a clause to the prohibitions to make it clear that they applied only to the extent not more explicitly regulated.
- Changed the prohibition on ATV use to prohibition of motorized vehicles except for maintenance purposes.
- Changed the section on gathering firewood in a buffer area to say that it is permissible for personal use, eliminating a standard for measurement that the Town Board agrees is not enforceable.
- Added specific 'grandfather' provisions for existing structures and conditions.
- Created a section to deal with agricultural uses for clarity.
- Changed to 1000' notification requirement to the 200' commonly used with Planning Board and ZBA activities
- Added a clause to the 'Non-regulated Acts' section to indicate that anything not prohibited or regulated is considered a non-regulated act.
- Clarified the management of wetlands and buffers on town borders.
- Reworded some sections for clarity.
- Provided flexibility for the Wetlands Review Professional and the Planning Board to waive application requirements when they are duplicative or not required in the particular situation.
- Eased the standards for the renewal of wetlands permits.