

REGULATIONS: CHILMARK WETLANDS PROTECTION BYLAWS

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## PART I GENERAL PROVISIONS

### 1.01 Introduction and Purpose

#### (1) Introduction:

These regulations are promulgated by the Town of Chilmark Conservation Commission pursuant to the authority granted to it under Section 7 of the Town of Chilmark Wetlands Protection Bylaws (hereinafter referred to as the "Bylaws"). These regulations shall complement the Wetlands Protection Bylaws, and shall have the force of law upon their effective date.

#### (2) Purpose:

The Bylaws sets forth a public review and decision-making process by which activities affecting areas subject to Protection under the Bylaws are to be regulated in order to ensure the protection of the following interests:

- public water supply
- private water supply
- groundwater and groundwater quality
- water quality in the numerous ponds in the Town
- flood control
- erosion and sedimentation control
- storm damage prevention
- recreation
- fisheries
- shellfish
- wildlife and wildlife habitat
- agriculture and aquaculture

The purpose of these regulations is to define and clarify that process by establishing standard definitions and uniform procedures by which the Chilmark Conservation Commission may carry out its responsibilities under the Federal and State Environmental Protection laws and Local Wetlands Protection Bylaws.

### 1.02 Statement of Jurisdiction

#### (1) Areas subject to protection under the Bylaws and the Wetlands Protection Act (the 'Act'):

##### (A) The following areas are subject to protection under the Bylaws:

bank,	marsh,	pond,
beach,	meadow,	river,
dune,	bog,	stream,
flat,	vernal pool,	estuary,
freshwater wetland,	swamp,	ocean;
coastal wetland,	lake,	

(B) any land within 100 feet of any of the above areas and any land under any of the above water bodies as set forth in Section 1.02(a) above;

(C) any land subject to flooding or inundation by any of the following:  
groundwater,  
surface water,  
tidal action,  
or coastal storm flowage;

(D) any land within 100 feet of any of the areas set forth in Section 1.02(c) above;

(E) and the 100' Buffer Zone of the areas set forth in Section 1.02(a) above.

(F) Because of the demonstrated potential for contamination of ground and surface waters from effluent and nitrogen loading from septic systems, and for the protection of the public health, safety, and welfare, and for the protection of all public and private drinking water supplies, no leaching facility of any such system shall be permitted within or under any area specified in Section 1.02(1), except as provided in Section 5.01 Variances.

(2) Activities subject to Regulation under the Bylaws:

(A) Any activity proposed or undertaken which will constitute removing, filling, altering or building upon any area specified in Section 1.02(1) is subject to regulation under the Bylaws and requires the filing of a Notice of Intent.

(B) Any subsurface sewage disposal system, where any component thereof is within any area specified in Section 1.02(1), above.

(C) Any activity proposed or undertaken outside the areas specified in Section 1.02(1) above shall not be subject to regulation under the Bylaws unless, in the judgement of the Conservation Commission, said activity will result or has resulted in the removing, filling, altering, or building upon an area specified in Section 1.02(1) above. If the applicant wishes to have the Conservation Commission determine whether an activity may be subject to regulation under the Bylaws, he or she may do so by way of a Request for Determination of Applicability pursuant to Section 1.06 of these regulations.

### 1.03 No Net Loss Policy

There shall be no net loss of wetlands and wetland resource areas in Chilmark. The quality and quantity of Chilmark's wetlands and wetland areas shall be increased, and restoration and replacement shall undo past damage. All projects which alter a wetland resource area are required to study, document, disclose and pursue alternatives to wetland alterations. Highest priority will be given to avoidance of wetland alteration. If there is an alternative available for any non-water-dependent activity compensatory mitigation or wetland replication will not qualify as avoidance. Wetlands impact minimization and/or mitigation will be considered only in limited instances where no practicable alternatives to wetlands alteration exist.

### 1.04 General Provisions Concerning Burden of Proof and Burden of Going Forward

(1) The applicant shall have the burden of proving by clear and convincing evidence that the work proposed in the Request for Determination of Applicability and/or the Notice of Intent will not harm the interests protected in the Bylaws. Failure to meet the Burden of Proof shall be cause for the Conservation Commission to find a positive Determination and/or to deny a Notice of Intent application, along with any work or activity proposed therein.

(2) The applicant shall be responsible for providing credible evidence from a competent source in support of all matters asserted by the applicant in accordance with his or her burden of proof pursuant to Section 1.04(1) above.

### 1.05 Definitions

Abutter: the owner of land within 300' of the boundary of the Assessors Parcel of the proposed activity, including those across a travelled way and those within 300' across a body of water.

Activity: any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings; the construction or improvement of roads and other ways; the changing of runoff characteristics; the interception or diversion of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land, or changing of the physical or chemical characteristics of water.

Agriculture: land presently (present use may include lying fallow not more than five (5) years) and primarily used in the raising of animals, or land presently and primarily used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals.

Additionally, land in agricultural use means land presently and primarily used in the raising of foods for human consumption, feed for animals, trees, nursery or greenhouse products, and ornamental plants and shrubs; or land presently and primarily used in raising forest products under a planned program to improve the quantity and quality of a continuous crop; or land presently and primarily used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products.

Alter: to change the condition of any Area subject to protection under the Bylaws. The term "alter" shall include, without limitation, the following actions when undertaken in Resource Areas subject to protection under the Bylaws:

- (a) removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind;
- (b) changing of pre-existing 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;
- (e) placing of fill, or removal of material;
- (f) erection of buildings, or structures of any kind, driving of piles in a new location;
- (g) placing of obstructions or objects in water;
- (h) destruction of plant life, including cutting of trees;
- (i) changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water;
- (j) any activities, changes, or work which pollute in any way any body of water or groundwater;
- (k) and further provided that removing, filling, dredging, or altering of a salt marsh is not to be considered normal maintenance or improvement of land in agricultural use.

Applicant: any person who files an Application for Permit (Request for Determination and/or Notice of Intent), or on whose behalf such a notice is filed.

Aquaculture: land or water body presently and primarily used in 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; shellfish; mollusk; amphibians; reptiles; seaweeds; and edible freshwater plants.

Normal maintenance or improvement of land in aquacultural use means the following activities, when done in connection with the production of aquatic organisms as defined above: draining, flooding, heating, cooling, removing, filling, grading, compacting, raking, tilling, fertilizing, seeding, harvesting, filtering, rafting, culverting, or applying chemicals in conformance with all State and Federal laws; provided however, that such activities are clearly intended to improve and maintain land in aquacultural use, and further provided that removing, filling, dredging or altering of a salt marsh is not to be considered normal maintenance or improvement of land in aquacultural use.

Area Subject to Protection: any area specified in Section 1.02(1). It is used synonymously with Resource Area, each one of which is defined in greater detail in Parts II and III.

Bank (coastal): is defined in Part II, Section 2.05.

Bank (inland): is defined in Part III, Section 3.01.

Beach (barrier): is defined in Part II, Section 2.04.

Beach (coastal): is defined in Part II, Section 2.02.

Beach (drift line zone or backshore): the area of beach between normal high tide and the toe of the dune, the base of the coastal bank or the seaward edge of an existing manmade structure. The backshore vegetation of the beach is made up of a significant portion of one or more, but not limited to nor necessarily including all of the following plants or groups of plants: beach grass (*Ammophila brevigulata*), dusty miller (*Artemisia stelleriana*), sea rocket (*Cakile edentula*), beach heath (*Hudsonia tomentosa*), jointweed (*Polygonella articulata*), rushes (*Juncus sp.*), beach pea (*Lathyrus japonicus*).

Beach (foreshore): the area of beach between mean low tide and mean high tide.

Beach (high beach): the area of beach between mean high tide and spring high tide.

Beach (inland): a naturally occurring inland area of unvegetated bank as defined in Part III, Section 3.01.

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

Bordering: touching.

Boundary: the limits of an Area Subject to Protection Under the Act.

Buffer Zone: that area of land extending one hundred (100) feet horizontally outward from the boundary line of any area specified in Section 1.02(1).

Certificate of Compliance: a written determination by the issuing authority that work or a portion thereof has been completed in accordance with an issued Permit.

Coastal Wetlands: defined in Part II.

Conditions: those requirements set forth in a written Permit issued by a Conservation Commission for the purpose of permitting, regulating or prohibiting any activity that removes, fills, dredges or alters an Area Subject to Protection Under the Act and/or the Chilmark Wetlands Protection Bylaws.



Conservation Commission: that body comprised of members lawfully appointed pursuant to Massachusetts General Laws Chapter 40 & 8C.

Creek: a stream.

Date of Issuance: the date a permit is mailed, as evidenced by a postmark, or the date it is hand-delivered.

Date of receipt: the date of delivery of an application to the office of the Commission by mail or hand delivery.

Determination:

(A) A Determination of Applicability: a written finding by a Conservation Commission or the Department of Environmental Protection as to whether a site or the work proposed thereon is subject to the jurisdiction of the Act and/or the Bylaws.

(B) A Determination of Significance: a written finding by the Conservation 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 interests identified in the Act and/or the Bylaws.

(C) A Notification of Non-Significance: a written finding by the Conservation 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 not significant to any of the interests of the Act and/or the Bylaws.

Dredge: to deepen, widen, or excavate under water, either temporarily or permanently.

Dune: coastal dune, as defined in Part II, Section 2.03.

Estuary:

(A) Any area where fresh and salt water mix and tidal effects are evident; or

(B) any partially enclosed coastal body of water where the tide meets the current of any stream or river.

Extension Permit: a written notice of additional time within which the authorized work shall be completed.

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

Fisheries: all species of fresh and saltwater fish and shellfish including the nutrient sources and the habitat in which they live all or part of their life cycle.

Flat (tidal): is defined in Part II, Section 2.02.

Flood Control: the prevention or reduction of flooding and flood damage.

Freshwater (Inland) Wetlands: are defined in Part III.

Great Pond: any body of brackish or salt water over ten (10) acres subject to intermittent tidal action either natural or induced.

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

Hydric Soil: a soil that in its undrained conditions is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation including, but not limited in future definition to, those soils listed in Hydric Soils of New England, 1987.

Interests Identified in the Bylaw: are specified in Section 1 of the Bylaw and Section 1.01(2) of these regulations.

Issuing Authority: the Chilmark Conservation Commission.

Lake: any enclosed body of standing water with a surface area of 10 acres or more.

Land Containing Shellfish: is defined in Part II, Section 2.08.

Land Subject to Coastal Storm Flowage: land subject to any inundation caused by coastal storms up to and including that caused by the "100 year storm" surge of record or local storm of record, whichever is greater.

Land Subject to Flooding: is defined in Part III, Section 3.04.

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

Land Under Salt Ponds: is defined in Part II, Section 2.07.

Land Under Water Bodies and Waterways: land under the surface of the ocean or any estuary, creek, river, stream, pond or lake as further defined in Part II, Section 2.01 and Part III, Section 3.03.

Majority (Quorum): more than half of the members of the Conservation Commission then in office. Actions to be taken are by more than half the members present at a meeting of at least a quorum.

Marsh: is defined in Part II, Section 2.06 and Part III, Section 3.02.

Meadow (or Wet Meadow): is defined in Part III, Section 3.02.

MEPA: the Massachusetts Environmental Policy Act, General Laws Chapter 30, §62 - 62H, and the regulations promulgated pursuant thereto, 301 CMR 10.00 et seq.

Notice of Intent: the written notice filed by any person applying for permission to remove, fill, dredge or alter an Area Subject to Protection under the Massachusetts Wetland Protection Act, Massachusetts General Laws Chapter 131, §40, and/or the Chilmark Wetlands Protection Bylaws.

Ocean: the Atlantic Ocean and all contiguous waters subject to tidal action.

Order: an Order of Conditions, Superseding Order or Final Order, whichever is applicable, issued pursuant to Massachusetts General Laws Chapter 131, §40, the Chilmark Wetlands Protection Bylaws, or these regulations.

Order of Conditions: the document issued by a conservation commission, or the Department of Environmental Protection (DEP), containing conditions which regulate or prohibit an activity under Massachusetts General Laws Chapter 131, §40 and the Chilmark Wetlands Protection Bylaws.

Party to any proceeding: the applicant, the Conservation Commission and pursuant to Section 1.06 may include the owner of the site, any abutter, any person aggrieved, any ten residents of the city or town where the land is located and any ten persons pursuant to Massachusetts General Laws Chapter 30A, §10A.

Person Aggrieved: any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and

which is within the scope of the interests identified in the Bylaws. Such person must specify in writing sufficient facts to allow the Conservation Commission to determine whether or not the person is in fact aggrieved.

Plans: such data, maps, engineering drawings, calculations, specifications, schedules and other materials, if any, deemed necessary by the issuing authority to describe the site and/or the work, to determine the applicability of the Bylaws or to determine the impact of the proposed work upon the interests identified in the Bylaws.

Pond (Coastal): Salt Pond as defined in Section 2.07(1).

Pond (Inland): any open body of fresh water of greater than 5000 ft<sup>2</sup>, either naturally occurring or manmade by impoundment, excavation, confinement, restriction, restraint, obstruction or impediment, which is never without standing water due to natural causes, except during periods of extended drought. For purposes of this definition, extended drought shall mean any period of four or more months during which the average rainfall for each is 50% or less of the ten year average for that same month. Basins or lagoons which are part of wastewater treatment plants shall not be considered ponds, nor shall swimming pools or other impervious manmade retention basins.

Prevention of Pollution: the prevention or reduction of contamination of surface or ground water.

Private Water Supply: any source or volume of surface or ground water demonstrated to be in any private use or shown to have potential for private use.

Protection of Fisheries: protection of the capacity of an Area Subject to Protection Under the Bylaws (1) to prevent or reduce contamination or damage to fish and (2) to serve as their habitat and nutrient source. Fish includes all species of fresh and salt water finfish and shellfish.

Protection of Land Containing Shellfish: protection of the capacity of an Area Subject to Protection Under the Bylaws (1) to prevent or reduce contamination or damage to shellfish and (2) to serve as their habitat and nutrient source.

Protection of Wildlife: the protection of any plant or animal species listed as endangered, threatened, or of special concern, or on the Watch List by the Massachusetts Natural Heritage Program; listed as Federally Endangered or Federally Threatened by the US Fish and Wildlife Service; and means protection of the ability of any resource area to provide food, breeding habitat, or escape cover to any species falling within the definition of wildlife set forth in these regulations.

Public Water Supply: any source or volume of surface or ground water demonstrated to be in public use or approved for water supply pursuant to Massachusetts General Laws Chapter 111, §160 by the Division of Water Supply of the Department of Environmental Protection or shown to have a potential for public use.

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

Request for Determination of Applicability (Request for Determination): a written request made by any person to the Conservation Commission for a determination as to whether a site or work thereon is subject to the Bylaws.

Resource Area: any of the areas specified in Part II, Section 2.01 through 2.10 and Part III, Sections 3.01 through 3.04. It is used synonymously with Area Subject to Protection Under the Bylaws, each one of which is enumerated in Section 1.02(1) of this part.

River: a natural flowing body of water that empties to any ocean, lake or other river and which flows throughout the year.

Salt Marsh: is defined in Part II, Section 2.06.

Significant: plays a meaningful role. A resource area is significant to an interest identified in the Act when it plays a role in the provision or protection, as appropriate, of that interest.

Spring Tides: those tides which occur with the new and full moons, and which are perceptibly higher and lower than other tides.

Storm Damage Prevention: the prevention of damage caused by water from storms, including, but not limited to, erosion and sedimentation, damage to vegetation, property or buildings, or damage caused by flooding, waterborne debris or waterborne ice.

Stream: a body of running water, including brooks and creeks, which flow along an identifiable path. A portion of a stream may flow through a culvert or beneath a bridge. Such a body of running water which does not necessarily flow throughout the year (i.e. which is intermittent) is a stream.

Vegetated Wetlands: is defined in Part III, Section 3.02.

Work: the see activity as defined in Section 1.05.

Wildlife: any non-domesticated mammal, bird, reptile, amphibian, fish, mollusk, arthropod, or other invertebrate, other than a species of the Class Insecta which has been determined by the Commonwealth of Massachusetts or any agency thereof to be a pest whose protection under the provisions of the Bylaws would be a risk to humans.

Wrack Line (Drift Line): marine vegetation accumulated in a mass or piled up in heaps during High Spring tides or storms.

## 1.06 Procedures

### (1) Time periods

All time periods of ten days or less specified in the Bylaws and these regulations shall be computed using business days only. In the case of a Determination or Order 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 the Bylaws and these regulations 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 the Conservation Commission

Where the Bylaws state that a particular action (except receipt of a Request for Determination or Notice of Intent) is to be taken by the Conservation 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 the Bylaws state that an Order of Conditions or Determination shall be issued by the Conservation Commission, that action is to be by a majority of the members then in office, who need not convene as a body in order to sign said permit or notification, provided they met pursuant to the Open Meeting Law, Massachusetts General Laws Chapter 39, §23A - 23C, when voting on the matter.

Where the Bylaws state that the Conservation Commission is to receive a Request for Determination or Notice of Intent, Conservation Commission means a member of the Conservation Commission or an individual designated by the Conservation Commission to receive such Request for Determination or Notice of Intent.

### (3) Alternative Sites

Applicants should note alternative sites which are out of the Buffer zone or further away from a resource area for a proposed project and specify why these sites are not suitable in conjunction with the filing of any application.

### (4) Application Procedures and Requirements, and Forms

#### (A) Procedures and Requirements

(1) Any person filing an application for a Request for Determination or a Notice of Intent with the Chilmark Conservation Commission at the same time shall give written notice thereof to all abutters according to the most recent records of the Assessors, within 300 feet of the parcel boundary lines where the project is located, including those across a traveled way and those across a body of water. The notice to abutters shall enclose a copy of the application with plans, or shall state that copies may be examined or obtained by the abutters free of charge at the Town Hall. The notice shall indicate the date and time of the Meeting/Hearing at the Town Hall offices or that the Meeting/Hearing will be advertised in the newspaper, a brief description of the project, and indicate who the landowner is. The applicant shall file, with the application, a list of abutters to whom the notice was sent, and the date said notice was mailed.

(2) The Chilmark Conservation Commission advertises the Public Meeting/Hearing and the newspaper bills the applicant directly.

(3) The Chilmark Conservation Commission meets the 2nd and 4th Tuesday of each month. We must have all relevant documents by the Tuesday 2 weeks prior to the meeting to be able to advertise 5 days prior to the Public Meeting/Hearing.

(4) The Chilmark Conservation Commission meets the Thursday prior to the Meeting/Hearing date for a site review of the proposed project. Please schedule this with the Administrative Assistant at the same time the application is submitted.

(5) Contact the Administrative Assistant to the Chilmark Conservation Commission in the Town Hall office to determine if the proposed project is within Rare Species Habitat, or subject to the Wetlands Conservancy Program, prior to submitting the application to the Commission. If applicable, mail a complete Notice of Intent prior to filing the application with the Conservation Commission by certified, return receipt mail to:

Rare Species Habitat -  
The Natural Heritage and Endangered  
Species Program  
Division of Fisheries and Wildlife  
100 Cambridge Street  
Boston, MA 02202  
(617)727-9194, -3151

Wetlands Conservancy Program -  
Department of Environmental Protection  
The Wetlands Conservancy Program  
One Winter Street  
Boston, MA 02108  
(617)292-5908, -5704

(6) Send 1 copy for a Request for Determination, 2 copies for a Notice of Intent, of all documents by certified, return receipt mail, to:

DEP, Southeast Regional Office  
20 Riverside Drive, Lakeville Corporate Park  
Lakeville, MA 02347  
(508)946-2800

(7) There is a \$10.00 filing fee for a Request for Determination. Fees for a Notice of Intent are figured by the category and the number of activities. Please refer to the Fee Calculation Worksheet and the Notice of Intent Fee Transmittal Form.

(8) There is a 10 day appeal period after the Public Meeting/Hearing is officially closed and a Determination or an Order of Conditions had been signed by the Commission. Work can commence on a negative Determination during this period, but only at the applicant's own risk. Please refer to 310 CMR 10.05(3)d. 1 - 6.

(9) If a project is proposed for or on land owned by the Massachusetts Department of Environmental Management, notices shall be sent to both:

Office of the Commissioner  
Department of Environmental Management  
100 Cambridge Street  
Boston, MA 02202

Department of Environmental Management  
Region One Headquarters  
Cranberry Road/Box 66  
Carver, MA 02366

(5) Request for Determination of Applicability

(A) Request for Determination

(1) Any person, or his/her agent, who desires a Determination as to whether the Bylaws applies to land, or to work that may affect an Area Subject to Protection Under the Bylaws, may submit to the Conservation Commission by certified mail or hand delivery a Request for Determination of Applicability, Form 1 of Section 7.01.

(2) Any person who proposes to perform work within the Buffer Zone shall submit to the Conservation Commission either a Request for Determination or a Notice of Intent for such work. Said Request for Determination or Notice of Intent shall include sufficient information, i.e. staked project site, to enable the Conservation Commission to find and view the area, in the event that the applicant or applicant's agent can not be present, and to determine whether the proposed work will alter an Area Subject to Protection Under the Bylaws.

(3) A Request for Determination shall include certification that the owner of the area subject to the filing, if the person making the filing is not the owner, has been notified that a Request for Determination is being sought under the Bylaws.

(B) Determination

(1) Within twenty-one (21) days after date of receipt of the Request for Determination, the Conservation Commission shall hold a Public Meeting on the filing. Notice of the time, date and place of the Public Meeting at which the Determination will be made shall be given by the Conservation Commission at the expense of the person making the filing not less than five (5) calendar days prior to such meeting, by publication in a newspaper of general circulation in the town in which the land is located, and by mailing a

notice to the person making the filing and the owner, if different. Notice shall also be given by the Conservation Commission in accordance with the Open Meeting Law, Massachusetts General Laws Chapter 39, §23B. Notice shall also be given by the applicant to abutters in accordance with the Bylaws. Said Determination, Form 2 of Section 7.01, shall be signed by a majority of the Conservation Commission, and copies thereof shall be sent by the Conservation Commission to the person making the filing and/or to the owner within twenty-one (21) days of the close of the Public Meeting or any continuances thereof. Said Determination shall be valid for three (3) years from date of issuance.

(2) The Conservation Commission shall find that the Bylaw applies to the land, or to a portion thereof, if it is an Area Subject to Protection Under the Bylaws as defined in Section 1.02(1) above. The Conservation Commission shall find that the Bylaw applies to the work or the portion thereof, if it is an Activity Subject to Regulation Under the Bylaw as defined in Section 1.02(2) above. The Commission shall find that the Bylaw applies to the Buffer Zone when work in the Buffer Zone affects a resource area.

(3) A Notice of Intent shall be filed in the event of a positive Determination, and all of the procedures set forth in Section 1.06(5) shall apply.

(6) Notice of Intent

(A) Any person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection Under the Bylaws shall submit a Notice of Intent and other application materials in accordance with the submittal requirements as may be required for the Commission to make an informed decision.

(B) In the event that only a portion of a proposed project or activity lies within an Area Subject to Protection Under the Act and the remainder of the project or activity lies outside those areas, all aspects of the project must be described in the detail called for by the General Instructions and Forms 3 and 4. In the event that a water-related project is proposed, the Notice of Intent shall also contain a description and calculation of peak flow and estimated water quality characteristics of discharge from a point source (both closed and open channel) when the point of discharge falls within an Area Subject to Protection Under the Bylaws.

(7) Public Hearings by the Conservation Commission

(A) A public hearing shall be held by the Conservation Commission within 21 days of receipt of the Notice of Intent and shall be advertised in accordance with the Bylaws and the requirements of the Open Meeting Laws, Massachusetts General Laws Chapter 39, §23B.

(B) Public Hearings may be continued as follows:

(1) Without the consent of the applicant to a date announced at the Hearing, either for receipt of additional information offered by the applicant or others, or for the information required of the applicant deemed necessary by the Commission in its discretion.

(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 additional information or the occurrence of a specified action. The date, time and place of said continued hearing shall be publicized in accordance with the Bylaws, and notice shall be sent to any person at the hearing who so requests in writing.

(8) Order of Conditions Regulating the Work

(A) Within 21 days of the close of the hearing the commission shall either:

(1) Make a determination that the area on which the work is proposed is not significant to any of the interests identified in the Act; or

(2) Make a determination that the area on which the work is proposed is significant to one or more of the interests identified in the Bylaws and shall issue an Order of Conditions for the protection of said interest(s).

(B) The Order of Conditions (Order), or Permit, shall impose such conditions as are necessary for the protection of those areas found to be significant to one or more of the interests identified in the Bylaws. The Permit shall prohibit any work or any portion thereof that cannot be conditioned to meet the Bylaw standards. The Permit shall impose conditions upon work or the portion thereof that will, in the judgement of the Commission, result in the filling, dredging, altering or building within or upon an area subject to protection under the Bylaws. The Permit shall impose conditions setting limits on the quantity and quality of discharge from a point source (both closed and open channel) when said limits are necessary to protect the interests identified in the Bylaws.

(C) 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 interests identified in the Bylaws, it may issue an Order prohibiting the work. The Permit shall specify the information which is lacking and why it is necessary.

(D) An Order of Conditions shall be valid for three years from the date of its issuance.

(E) The Order of Conditions shall be signed by a majority of the Commission and shall be mailed or hand delivered to the applicant or his/her agent or attorney.

(F) A copy of the plans describing the work and the Order of Conditions shall be kept on file by the Commission and shall be available to the public at reasonable hours.

(G) Prior to the commencement of any work permitted by the Order of Conditions, the Order shall be recorded in the Dukes County Registry of Deeds or the Land Court, within the chain of title of the affected property. In the case of recorded land, the permit shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the Permit shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. Certification of recording shall be sent to the issuing authority on the form at the end of Form 5. If work is undertaken without the applicant first recording the Order of Conditions, no later than four (4) weeks from the date the Order was issued, the issuing authority may issue an Enforcement Order, or may itself record the Order at the applicant's expense.

(9) Extension Permits for work

(A) The Commission may extend an Order of Conditions for one period of up to one year. The request for an extension shall be made to the Conservation Commission at least 30 days prior to the expiration of the original Order.

(B) The issuing authority may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work in the following circumstances:

(1) when no work has begun on the project, except when such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;

(2) when new information, not available at the time the Order of Conditions was issued, has become available and indicates that the Order is not adequate to protect the interests identified in the Bylaws;



(3) when incomplete work is causing damage to the interests identified in the bylaws; or

(4) when work has been done in violation of the Order of Conditions or these regulations.

(C) If issued by the Commission, the Extension Permit shall be signed by a majority of the Commission. A copy of the Extension Permit shall be sent to the Commission or the Department, whichever is appropriate, by the issuing authority.

(D) The Extension Permit shall be recorded in the Land Court or the Dukes County Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of Form 7. If work is undertaken without the applicant so recording the Extension Permit, the Commission may issue an Enforcement Order or may itself record the Extension Permit at the applicant's expense.

#### (10) Certificate of Compliance

(A) Upon written request by the applicant, made within two (2) weeks of completion of the activity, a Certificate of Compliance may be issued by the Commission within 21 days of receipt thereof, and, if issued, shall certify that the activity or portion thereof described in the application for permit and plans has been completed in compliance with the permit. If issued by the Commission, 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.

(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 engineer, architect, landscape architect or land surveyor, a written statement by such professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Order of Conditions shall accompany the request for a Certificate of Compliance.

(E) If the Order of Conditions 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 Order of Conditions.

(F) The Certificate of Compliance shall be recorded in the Land Court or Dukes County Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the Certificate at the end of Form 8. Upon failure of the applicant to so record, the issuing authority may itself record the Certificate of Compliance at the applicant's expense.

### 1.07 Emergencies

#### (1) Requests

Any person requesting permission to do an emergency project shall specify why the project is necessary for the protection of the health or safety of the citizens of the Commonwealth and, if applicable, 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 Conservation Commission, its agents or employees, 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 issuing the certification.

(2) Issuance

An emergency certification shall be issued for the protection of public health or safety or for the protection of any interest specified in the Bylaws.

(3) Time Limitation

The time limitation for performance of emergency work shall not exceed 30 days.

(4) Project Completion

A Notice of Intent shall be filed for the remainder of the project as soon as the emergency has been abated.

(5) Storm Emergencies

Regulations for Emergencies after local storms are promulgated by the State DEP office in Boston immediately following the abatement of the storm conditions. These regulations provide for the Chilmark Conservation Commission to respond to emergencies quickly, usually the same day. The current Chair, Conservation Officer or Administrative Assistant must be notified prior to any work. The Emergency Certification under storm regulations must be requested within a specified time period, and the work must be completed by a set date.

1.08 Severability

The invalidity of any section or provision of the Bylaws or of these regulations shall not invalidate any other section or provision thereof, nor shall it invalidate any permit which previously has been issued.

If any Court of the Commonwealth shall invalidate any provision of the Bylaws or of these regulations, the Conservation Commission shall promulgate additional regulations, or present to the next Town Meeting after such invalidation, amendments to the Bylaws or regulations which are designed to comply with any Court decision invalidating such provision or regulation, as the case may be.

1.09 Effective Date

The effective date of these regulations shall be March 1, 1987 and the provision of these regulations shall apply to all work performed after that date.

Revised majority of Rules & Regulations January 26, 1993, effective date March 30, 1993. Added application procedure requirements September 28, 1993, effective date October 12, 1993.

## PART II REGULATIONS FOR COASTAL WETLANDS

Note: These Regulations are intended to complement regulations of activity in the Districts of Critical Planning Concern (Overlay Districts) under Zoning Bylaws Section 11 and the Squibnocket Pond District Section 12.

### 2.01 Land Under the Ocean

#### (1) Definitions

(A) Land Under the Ocean: land extending from the mean low water line seaward to the boundary of the Town's jurisdiction.

(B) Nearshore areas of Land Under the Ocean means that land extending from the mean low water line to the seaward limit of the Town's jurisdiction but not more than 80 feet below sea level.

#### (2) Preamble

Land Under the Ocean is likely to be significant to the protection of wildlife and wildlife habitat, marine fisheries and, where there are shellfish, to protection of land containing shellfish and shellfish habitat. Nearshore areas of land under the ocean are likely to be significant to storm damage prevention and flood control.

Land Under the Ocean provides feeding areas, spawning and nursery grounds, and shelter for many coastal organisms related to marine fisheries.

Nearshore areas of Land Under the Ocean help reduce storm damage and flooding by diminishing and buffering the high energy effects of storms. Submerged bars dissipate storm wave energy. Such areas provide a source of sediment for seasonal rebuilding of coastal beaches and dunes.

When a proposed project involves the dredging, removing, filling, or altering of Land Under the Ocean beyond the nearshore area, the Conservation Commission shall presume that such land is significant to the protection of marine fisheries and, where there are shellfish, to the protection of Land Containing Shellfish and that it is not significant to storm damage prevention or flood control.

These presumptions may be overcome only upon a clear showing that the area or land does not play a role in the protection of wildlife, marine fisheries, Land Containing Shellfish, storm damage prevention, or flood control, as appropriate, and if the Conservation Commission makes a written determination to such effect.

When nearshore areas of land under the ocean are significant to storm damage prevention or flood control, the bottom topography of such land is critical to the protection of those interests.

When nearshore areas or other Land Under the Ocean is significant to the protection of marine fisheries, the following factors are critical to the protection of such interests:

- (A) water circulation;
- (B) distribution of sediment grain size;
- (C) water quality; and
- (D) finfish and shellfish habitat.

#### (3) Regulations

When Land Under the Ocean or nearshore areas of Land Under the Ocean are found to be significant to the protection of wildlife, marine fisheries, storm damage prevention, or flood control, the following regulations shall apply:

(A) Improvement dredging for navigational purposes affecting Land Under the Ocean shall be designed and carried out using the best available measures so as to minimize adverse effects on such interests caused by changes in:

- (i) Bottom topography which will result in increased flooding or erosion caused by an increase in the height or velocity of waves which have an impact on the shore;
- (ii) Sediment transport processes which will increase flood or erosion hazards by affecting the natural replenishing of beaches;
- (iii) Water circulation which will result in an adverse change in flushing rate, temperature, or turbidity levels; or
- (iv) Marine productivity which will result from the suspension or transport of pollutants, the smothering of bottom organisms, or the destruction of habitat or nutrient source areas.

(B) Maintenance dredging for navigational purposes affecting Land Under the Ocean shall be designed and carried out using the best available measures so as to minimize adverse effects on such interests caused by changes in marine productivity which will result from the suspension or transport of pollutants, increases in turbidity, the smothering of bottom organisms, the accumulation of pollutants by organisms, or the destruction of habitat or nutrient source areas.

(C) Projects not included in Section 2.01(3a) or 2.01(3b) which affect nearshore areas of Land Under the Ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(D) Projects not included in 2.01(3) which affect Land Under the Ocean, i.e. coastal engineered structures, shall be designed and constructed so as to cause no adverse effects on wildlife, marine fisheries or shellfish caused by:

- (i) alterations in water circulation;
- (ii) destruction of eelgrass (*Zostera marina*) beds;
- (iii) alterations in the distribution of sediment grain size; or
- (iv) changes in water quality, including but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.02 Coastal Beaches and Tidal Flats

### (1) Definitions

(A) Coastal Beach: unconsolidated sediment subject to wave, tidal, or coastal storm action which forms the gently sloping shore of a body of salt water, including tidal flats and land which is separated from other land by a body of water or a marsh system. Coastal beaches extend from the mean low water line landward to the dune line, coastal bank line, or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean. If no bank or dune is present, the beach will extend to the landward limit of beach grasses (refer to Section 11.7 of the Chilmark Zoning Bylaws, Coastal District Regulations).

(B) Tidal Flat: any nearly level part of a coastal beach which usually extends from the mean low water line landward to the more steeply sloping face of the coastal beach or which may be separated from the beach by land under the ocean.

## (2) Preamble

Coastal beaches, which are defined to include tidal flats, are significant to wildlife and wildlife habitat, storm damage prevention, recreation usage, historic and natural views and vistas, and flood control. In addition, tidal flats are likely to be significant to the protection of wildlife and wildlife habitat, marine fisheries, and, where there are shellfish, to Land Containing Shellfish, recreation usage, and historic and natural views and vistas.

Coastal beaches dissipate wave energy by their gentle slope, their permeability, and their granular nature, which permit changes in beach form in response to changes in wave conditions.

Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an on-shore return of beach sediment, where it will be available to provide protection against future storm waves.

A coastal beach at any point serves as a sediment source for coastal areas downdrift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore.

Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, Land Under the Ocean, and other coastal beaches. Interruptions of these natural processes by man-made structures reduce the ability of the coastal beach to perform these functions.

Tidal flats are likely to be significant to the protection of marine fisheries because they provide habitats for marine organisms, such as polychaete worms and mollusks, which in turn are food sources for fisheries.

Tidal flats are also sites where organic and inorganic materials may become entrapped and then returned to the photosynthetic zone of the water column to support algae and other primary producers of the marine food web, together with the various forms of wildlife which feed on these organisms.

Coastal beaches and flats serve as important habitats for a wide variety of wildlife. They are used in particular by coastal birds for feeding areas and nesting sites. The natural erosional and depositional cycles, sediment grain size, water quality (including but not limited to turbidity, temperature, nutrients, pollutants, salinity, and dissolved oxygen), water circulation, and elevation of the land surface are all features of wildlife habitat that are critical characteristics for the protection of wildlife.

Land within 100 feet of a coastal beach or tidal flat is likely to be significant to the protection and maintenance of coastal beaches and flats, and therefore to the protection of the interests which these resource areas serve to protect.

When a proposed project involves the building upon or within, the dredging, filling, removing, or altering of a coastal beach or of land within 100 feet of a coastal beach, the Conservation Commission shall presume that the coastal beach is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a coastal beach does not play a role in storm damage prevention or flood control, that tidal flats do not play a role in the protection of land containing shellfish,

or that the work proposed will not affect the beach or flats, and if the Conservation Commission makes a written determination to such effect.

The provisions of Section 2.01(3)(a-d) (Land Under the Ocean) shall apply to coastal beaches and tidal flats.

### (3) Characteristics

Characteristics of coastal beaches and flats that are critical to:

(A) protection of marine fisheries and shellfish include, but are not limited to: distribution of sediment grain size, movement of sediment, water quality (including but not limited to the characteristics given above), water circulation, and beach relief and elevation.

(B) storm damage prevention, erosion control, or flood control include, but are not limited to: sediment volume and form, depositional cycles, and wave intensities.

(C) natural and historic views and vistas include, but are not limited to: natural erosion and deposition cycles, beach relief and elevation, and a sense of openness and solitude.

(D) recreation include, but are not limited to: topography, sediment grain size, water quality, water circulation rates and patterns, unobstructed access along the shore, natural erosional and depositional cycles and wave intensity.

When coastal beaches, tidal flats, and land within 100 feet thereof are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:

- (A) volume (quantity of sediments) and form, and
- (B) the ability to respond to wave action.

When coastal beaches, tidal flats, and land within 100 feet thereof are significant to the protection of marine fisheries, the following characteristics are critical to the protection of those interests:

- (A) distribution of sediment grain size;
- (B) water circulation;
- (C) water quality, and
- (D) relief and elevation.

### (4) Prohibitions

No over-sand motor vehicles will be allowed except for emergencies and pond maintenance.

No new bulkheads or coastal engineering structures shall be permitted. Existing bulkheads may be repaired or reconstructed on a location similar to the existing location and only to its original length, if it is protecting an existing house built prior to August of 1978. Bulkheads may be rebuilt according to, but not limited to, guidelines in the Army Corps of Engineers "Shore Protection Manual", so as to minimize, using best available measures, adverse effects on adjacent, nearby coastal beaches and structures due to changes in wave action, and only if the Commission determines there is no environmentally better way to control an erosion problem, including in appropriate cases the moving of the threatened building.

No fill shall be placed within 25 feet of a coastal beach or tidal flat. If a project is water dependent, the Commission may allow limited placement of fill after making a written finding that there is no feasible way to avoid filling the beach, or tidal flat, or within 25 feet of the beach or tidal flat. All

possible mitigation measures shall be taken as determined by the Commission to limit the adverse effects of the fill.

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of coastal beaches or tidal flats, or of any land within fifty (50) feet of any coastal beach or tidal flat, shall be permitted by the Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

No newly constructed septic system, except for an upgrade/replacement of a failed cesspool (as determined and/or ordered by the Board of Health or other such Agency), or a septic system that has been determined will fail in the immediate future, (as determined by a RPE, Registered Sanitician or the Health Inspector) shall be placed in shifting sands or on a coastal beach. No newly constructed septic system shall be within one hundred (100) feet of the landward edge of a coastal beach or tidal flat. No newly constructed septic system shall be installed in soils with a percolation rate of five (5) minutes per inch where the distance of naturally occurring ground elevation to maximum ground water elevation is less than five (5) feet, and in soils with a percolation rate of less than five (5) minutes per inch where the distance of naturally occurring ground elevation to maximum ground water elevation is less than seven (7) feet.

Cleaning and raking of a coastal beach is prohibited in the Drift Line Zone due to the sensitive nature of this portion of the high beach and when the area adjacent to the spring high tide zone is designated a nesting habitat for any species of tern or the piping plover. The Drift Line Zone consists chiefly of organic material deposited on the backshore during high spring tides or storms. Drift Lines may contain large quantities of marine algae, eelgrass, and marsh detritus. Bacteria and fungi quickly break down this organic matter, releasing nutrients into the sand and eventually back to the sea.

#### (5) Fertilizers

The application of any inorganic fertilizers, pesticides, fungicides or other quick release chemicals is prohibited within 100 feet of a coastal beach or tidal flat. The Commission may grant a waiver for the application of all but inorganic fertilizers upon a clear and convincing showing that the application of such chemicals is necessary to control:

- (A) a pest deemed a health hazard by the local Board of Health, or
- (B) a pest which has damaged 20% of a commercial crop or a crop necessary for livestock

The request for the waiver must be accompanied by a recommendation including the amount, frequency and specific chemical to be applied by the Dukes County (or nearest) Cooperative Extension Service or Pesticide Bureau.

Applications of organic fertilizers are prohibited within 100 feet of a coastal beach or tidal flat unless a permit is first granted by the Commission. The permit request must be accompanied by the results of a soil analysis and recommendations from the Dukes County Cooperative Extension Service or Soil Conservation Service.

#### (6) Water Dependent Projects

Dredging projects in flats must be done in accordance with such procedures as the Commission determines would disturb the absolute minimum amount of habitat possible.

All work on projects which are not water dependent shall maintain at least a 25 foot natural undisturbed area adjacent to a coastal beach or tidal flat. All structures which are not water dependant shall be at least 50 feet from a coastal beach or tidal flat.

In areas of eroding shoreline, the distance from all buildings to the coastal beach shall be 20 times the average annual shoreline erosion or 50 feet, whichever is the greater. The average annual shoreline erosion rate shall be determined by averaging the annual erosion over a 150 year period ending the date the Notice of Intent was filed, or if no Notice of Intent was filed, the date construction began. If erosion data is not available for the 150 year period, the Commission shall determine the average erosion rate from the lesser time period for which erosion data is available.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

### 2.03 Coastal Dunes

#### (1) Definition

Coastal Dune: any natural hill, mound, or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune sediment deposited by artificial means also serves the purpose of storm damage prevention or flood control.

#### (2) Preamble

All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the dunes nearest the water in any area are especially significant.

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

Coastal dunes are important habitats for a wide variety of wildlife, particularly birds, for feeding and nesting areas. Amount of vegetation, dune height and slope, sediment grain size, and degree of isolation from human-caused disturbances are all features of dunes which are critical characteristics for the protection of wildlife.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding.

Land within 100 feet of a coastal dune is likely to be significant to the protection and maintenance of coastal dunes, and therefore to the protection of the interests which these resource areas serve to protect.

Raking is likely to destroy or impair dune vegetation and thereby destabilize the dune. Raking may modify the dune form, thereby increasing the potential for storm and flood damage. Raking of the drift line zone would remove the fragments and seeds of dune plants and would impede the development of new dunes. Regeneration of beach grass on open sand and new dune development on open sand is almost exclusively composed of plant fragments washed from eroding dunes and redeposited on the beach as drift. Once the plants are established, embryonic dunes can develop, provided they are not destroyed by raking or other impacts.



When a proposed project involves the dredging, filling, removal, or alteration of a coastal dune or of the land within 100 feet of a coastal dune, the Commission shall presume that the area is significant to the interests of storm damage prevention and flood control. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention or flood control, and if the Commission makes a written determination to that effect.

### (3) Characteristics

Characteristics of coastal dunes that are critical to natural and historic views and vistas are: dune form, slope, and elevation; size of dune field; proportion and scale of dunes in relation to other land forms.

When a coastal dune is significant to storm damage prevention, flood control, wildlife and wildlife habitat, and historic and natural views and vistas, the following characteristics are critical to the protection of those interests:

- (A) the ability of the dune to erode or move in response to coastal beach conditions;
- (B) dune volume;
- (C) dune form, which must be allowed to be changed by wind and natural water flow;
- (D) amount, continuity, and density of vegetative cover for habitat and stability; and
- (E) the degree of isolation from human disturbance.

### (4) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of a coastal dune or any land within 100 feet of any coastal dune shall be permitted by the Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

No newly constructed septic system, except for an upgrade/replacement of a failed cesspool (as determined and/or ordered by the Board of Health or other such Agency), or a septic system that has been determined will fail in the immediate future, (as determined by a RPE, Registered Sanitician or the Health Inspector) shall be placed in shifting sands or on a coastal dune. No newly constructed septic system shall be within 100 feet from the landward edge of the coastal dunes. No newly constructed septic system shall be installed in soils with a percolation rate of 5 minutes per inch where the distance of naturally occurring ground elevation to maximum ground water elevation is less than 5 feet, and in soils with a percolation rate of less than 5 minutes per inch where the distance of naturally occurring ground elevation to maximum ground water elevation is less than seven feet.

No activity shall be permitted, other than the maintenance and repair of a structure existing on the effective date of these regulations, that will result in construction of a building upon a coastal dune or within 100 feet from any delineated coastal dune.

No new bulkheads or coastal engineering structures shall be permitted in dune areas. An existing bulkhead may be repaired or reconstructed on a location similar to the existing location and only to its original length, if it is protecting an existing house built prior to August of 1978. All coastal engineering structures, built or rebuilt, shall be designed according to, but not limited to, guidelines in the Army Corps of Engineers "Shore Protection Manual", using best available measures, so as to minimize adverse effects on adjacent, nearby coastal dunes and structures due to changes in wave action, and only if the Commission determines there is no environmentally better way to control an erosion problem, including in appropriate cases the moving of the threatened building. Commercially zoned uses and properties are exempt.

No excavation or disturbance of vegetative cover shall be allowed on a coastal dune unless the area is completely and successfully restored, replanted and stabilized to its original form and volume.

(5) Activity allowed under a variance

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

- (A) affecting the ability of waves to remove or deposit sand from the dune;
- (B) disturbing the vegetative cover so as to destabilize the dune;
- (C) causing any modification of the dune form that would increase the potential for storm and/or flood damage;
- (D) interfering with the landward or lateral movement of the dune; or
- (E) causing removal of sand from the dune artificially;

(6) Fertilizers

Applications of organic fertilizers are prohibited within 100 feet of coastal dunes unless a permit is first granted by the Commission. The permit request must be accompanied by the results of a soil analysis and recommendations from the Dukes County (or nearest) Cooperative Extension Service or the Soil Conservation Service.

The application of any inorganic fertilizers, pesticides, fungicides, herbicides, or other quick release chemicals is prohibited within 100 feet of coastal dunes. The Commission may grant a waiver for the application of all but inorganic fertilizers upon a clear and convincing showing that the application of such chemicals is necessary to control:

- (A) a pest deemed a health hazard by the local Board of Health, or
- (B) a pest which has damaged 20% of a commercial crop or a crop necessary for livestock

The request for the waiver must be accompanied by a recommendation including the amount, frequency and specific chemical to be applied by the Dukes County (or nearest) Cooperative Extension Service or Pesticide Bureau.

(7) Water dependent projects

All projects which are water dependent shall maintain at least a 25 foot natural undisturbed area adjacent to the landward edge of a coastal dune. All structures which are not water dependent shall be at least 50 feet from the landward edge of a coastal dune.

(8) Fill, eroding shorelines and cleaning

Fill may be used only if the Commission authorizes its use and only if such fill is to be used for beach and dune nourishment projects or for habitat improvement for rare and endangered species.

In areas of eroding shoreline, the distance from all buildings to the coastal dune shall be at least 20 times the average annual shoreline erosion or 50 feet, whichever is the greater. The average annual shoreline erosion rate shall be determined by averaging the annual erosion over a 150 year period ending the date the Notice of Intent was filed, or if no Notice of Intent was filed, the date construction began. If erosion data is not available for the 150 year period, the Commission shall determine the average erosion rate from the lesser time period for which erosion data is available.

Cleaning and/or raking of a dune system is prohibited from the dunes and from the drift line zone.

(9) Permitted activities

The following projects may be permitted, provided that they adhere to the provisions of Section 2.03(4):

(A) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;

(B) fencing and other devices designed to increase dune development using best practical measures;

(C) plantings compatible with the natural vegetative cover using native species only; and

(D) vehicular traffic through or within 100 feet of a coastal dune for access to existing houses, fishing areas, shellfishing areas, beaches and/or other recreational areas shall be in accordance with such procedures as the Commission determines will minimize any adverse effect(s) on the dunes.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.04 Barrier Beaches

(1) Definitions

**Barrier Beach:** a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast including, but not limited to, those shown on the Federal and Coastal Zone Management Barrier Beach Maps. It is separated from the mainland by a narrow body of fresh, brackish, or saline water, a marsh system, or other wetland system. A barrier beach may be joined to the mainland at one or both ends.

(2) Preamble

Barrier beaches are significant to wildlife, storm damage prevention, and flood control and are likely to be significant to the protection of marine fisheries and, where there are shellfish, the protection of land containing shellfish, the protection of recreation usage, wildlife and wildlife habitat, and historic views and vistas.

Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds, and fresh water marshes and ponds, which are in turn important to marine fisheries.

Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action. The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash, and tidal inlet deposition. Barrier beaches undergo migration caused by movement of sediment by wind, storm wave overwash, and tidal current processes. The continuation of these processes maintains the volume of the landform, which is necessary to carry out the storm and flood buffer function.

When a proposed project involves removal, filling, dredging, or altering of a barrier beach, the Conservation Commission shall presume that the barrier beach, including all of its coastal dunes, is

significant to the interests specified above. This presumption may be overcome upon a clear showing that a barrier beach, including all of its coastal dunes, does not play a role in storm damage, flood control, or the protection of recreation usage, wildlife and wildlife habitat, historic views and vistas, the protection of marine fisheries, or land containing shellfish and if the issuing authority makes a written determination to such effect.

When a barrier beach is significant to storm damage prevention and flood control, to the protection of recreation usage, wildlife and wildlife habitat, and historic views and vistas, the characteristics of coastal beaches, tidal flats and coastal dunes listed in Sections 2.03(1) and 2.04(1) and their ability to respond to wave action, including storm overwash sediment transport, are critical to the protection of the interests specified above.

### (3) Provisions

The provisions of Section 2.02(3), coastal beaches, and 2.03(3) through 2.03(6), coastal dunes, shall apply to the coastal beaches and to all coastal dunes which make up a barrier beach.

### (4) Regulations

When a barrier beach or land within 100 feet of a barrier beach is determined to be significant to an interest protected by the bylaw, the following regulations shall apply:

(A) Fill may be used only if the Commission authorizes its use and only if such fill is to be used for beach and dune nourishment projects.

(B) Excavation of sand around existing houses may be permitted, but no new projects shall be permitted which will require periodic sand removal for maintenance. All disturbed areas (including blowouts) shall be stabilized through planting of vegetation. The excavated sand must be retained in the area and be a part of the barrier beach.

(C) Vehicular access for existing houses, fishing areas, or shellfishing areas shall be done in accordance with such procedures as the Commission determines will minimize any adverse effect on the beach.

**(D) Projects such as Pond openings for the enhancement of fisheries and shellfisheries may be permitted if they are performed in a manner which will not permanently adversely affect the interests of storm damage prevention and flood control, wildlife and wildlife habitat (see DEP Policy 91-2).**

### (5) Prohibitions

No coastal revetments or coastal engineering structures of any type shall be constructed, rebuilt, or repaired unless they are designed to maintain historic navigational channels using best available measures. Commercially zoned water dependant properties and uses in Menemsha are exempt.

No septic systems or buildings shall be constructed on a barrier beach. Buildings and septic systems which pre-exist these regulations may be maintained and repaired, but not enlarged.

Piers are prohibited from barrier beaches, including, but not limited to, those State and/or Federally listed barrier beaches (CZM). Commercially zoned properties and uses in Menemsha are exempt.

Asphalt or bituminous paving is prohibited except in Menemsha.

The use or storage of fertilizers, herbicides, insecticides, or fungicides or other quick release chemicals is prohibited.

The storage or possession of any hazardous chemical substance, as classified by the Federal Environmental Protection Agency or the Massachusetts Department of Environmental Protection, other than common household substances in volumes or concentrations not to exceed twice that found in the normal retail size container is prohibited.

The Commission may impose such additional requirements as are necessary to protect the interests protected by the bylaws.

## 2.05 Coastal Banks

### (1) Definition

Coastal bank: the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland. Refer to DEP Policy 92-1.

### (2) Preamble

Coastal banks, coastal banks that supply sediment to coastal beaches, coastal dunes and barrier beaches, and coastal banks that, because of their height provide a buffer to upland areas from storm waters are significant to storm damage prevention and flood control, wildlife and wildlife habitat, and historic views and vistas.

Coastal banks composed of unconsolidated sediment and exposed to vigorous wave action serve as a major continuous source of material for beaches, dunes, and barrier beaches (as well as other land forms caused by coastal processes). The supply of sediment is removed from banks by wave action, and this removal takes place in response to beach and sea conditions. It is a naturally occurring process necessary to the continued existence of coastal beaches, coastal dunes and barrier beaches, which in turn dissipate storm wave energy, thus protecting structures and coastal wetlands landward of them from storm damage and flooding.

Coastal banks, because of their height and stability, may act as a buffer or natural wall, which protect upland areas from storm damage and flooding. While erosion caused by wave action is an integral part of shoreline processes and furnishes important sediment to downdrift landforms, erosion of a coastal bank by wind and rain runoff, which plays only a minor role in beach nourishment, should not be increased unnecessarily. Disturbances to a coastal bank reduce its natural resistance to wind and rain erosion, cause cuts and gullies in the bank, increase the risk of its collapse, increase the danger to structures at the top of the bank, and decrease its value as a buffer to upland areas.

Coastal banks are important habitats for a wide variety of wildlife, particularly birds for feeding and nesting areas. Amount of vegetation, bank height and slope, sediment grain size, and degree of isolation from human-caused disturbances are all features of banks which are critical characteristics for the protection of wildlife. A particular coastal bank may serve as a sediment source, as a buffer, as wildlife habitat, as a historic view or natural vista, or it may serve only one role.

Bank vegetation tends to stabilize the bank and reduce the rate of erosion due to wind and rain runoff. Pedestrian and vehicular traffic damages the protective vegetation and frequently leads to gully

erosion or deep "blowouts" on unconsolidated banks. Therefore, any project permitted on a coastal bank should incorporate, when appropriate, elevated walkways.

When a proposed project involves dredging, removing, filling, or altering a coastal bank or land within 100 feet of a coastal bank, the Conservation Commission shall presume that the area is significant to storm damage prevention and flood control, wildlife and wildlife habitat, and historic and natural views and vistas. This presumption may be overcome only upon a clear showing that a coastal bank does not play a role in storm damage prevention, flood control, wildlife habitat, historic or natural views and vistas and if the issuing authority makes a written determination to that effect.

When the Conservation Commission determines that a coastal bank is significant to storm damage prevention, flood control, wildlife habitat, historic or natural views and vistas because:

(A) it supplies sediment to coastal beaches, coastal dunes or barrier beaches, the ability of the coastal bank to erode in response to wave action is critical to the protection of that interest(s);

(B) it is a vertical buffer to storm waters, the stability of the bank, i.e. the natural resistance of the bank to erosion caused by wind and rain runoff, is critical to the protection of that interest and the following regulation shall apply: any project on such a coastal bank or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

### (3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of a coastal bank or of any land within 100 feet of any coastal bank shall be permitted by the Conservation Commission, except for activity which is allowed under a variance from the regulations granted pursuant to Section 5.01.

### (4) Activity allowed under a variance

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on a coastal bank or within 100 feet of a coastal bank shall comply with the following regulations:

(A) No new bulkhead, revetment, seawall, groin, vertical walls or other coastal engineered structure shall be permitted on such a coastal bank except that such a coastal engineered structure may be permitted when required to prevent storm damage to buildings constructed prior to August 10, 1978 or constructed pursuant to a Notice of Intent filed prior to August 10, 1978, including reconstructions of such buildings subsequent to August 10, 1978, using the best available measures acceptable to the State DEP, Coastal Zone Management and/or the Army Corps of Engineers, provided that the following requirements are met:

(i) a coastal engineered structure or a modification thereto shall be designed and constructed so as to minimize adverse effects on adjacent or nearby coastal beaches due to changes in wave action, using best available measures, as per the guidelines of the Shore Protection Manual or other guidelines, and

(ii) the applicant demonstrates that no alternative method of protecting the building other than the proposed coastal engineered structure is feasible, including moving the structure.

(iii) protective planting designed to reduce erosion may be required.

(B) Any project on a coastal bank or within 100 feet landward of the top of a coastal bank, other than a structure permitted by Section 2.05(4)(a), shall not have an adverse effect on the movement of sediment by wave action from the coastal bank to coastal beaches or land subject to tidal action.

(C) The Order of Conditions and the Certificate of Compliance for any new building within 100 feet landward of the top of a coastal bank permitted by the Conservation Commission under this Bylaw shall contain the specific condition: "Section 2.05 of the Wetlands Regulations, promulgated under the Chilmark Wetlands Protection Bylaw requires that no coastal engineered structure, such as a bulkhead, revetment, or seawall shall be permitted on the bank at any time in the future to protect the project allowed by this permit."

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.06 Salt Marshes

### (1) Definitions

(A) Salt Marsh: a coastal wetland that extends landward up to the highest Spring Tide line of the year, and is characterized by a plant community consisting of 50% or more of a composite of the following species: Salt marsh cord grass (*Spartina alterniflora*); Salt meadow cord grass (*Spartina patens*); Spike grass (*Distichlis spicata*); Sea lavender (*Limonium nashii*); Seaside plantain (*Plantago juncooides*); Aster (*Aster subulatus*); Seaside goldenrod (*Solidago sempervirens*); Salt bush (*Atriplex patula*); Sea-Blites (*Suaeda sp.*); Black-grass (*Juncus Gerardi*); Samphire (*Salicornia europaea*); Glasswort (*S. bigelovii*) and (*S. virginica*); Reed (*Phragmites australis*); Saltmarsh Bulrush (*Scirpus robustus*); or Cattails (*Typha sp.*). A salt marsh may contain tidal creeks and pools.

(B) Spring Tide: the tide of the greatest amplitude during the approximately 14-day tidal cycle. It occurs at or near the time when the gravitational forces of the sun and the moon are in phase (new and full moons).

### (2) Preamble

Salt marshes are significant to protection of wildlife and wildlife habitat, marine fisheries, where there are shellfish to protection of land containing shellfish, recreation, historic and natural views and vistas, prevention of pollution, storm damage prevention, and ground water supply.

A salt marsh produces large amounts of organic matter. A significant portion of this material is exported as detritus and dissolved organics to estuarine and coastal waters, where it provides the basis for a large food web that supports many marine organisms, including finfish and shellfish. Salt marshes also provide a spawning and nursery habitat for several important estuarine forage finfish and juvenile sport fish.

Salt marsh plants and their substrate remove pollutants from surrounding waters. The network of salt marsh vegetation roots and rhizomes binds sediments together. The sediments absorb chlorinated hydrocarbons and heavy metals such as lead, copper, and iron. The marsh also retains nitrogen and phosphorous compounds, which in large amounts can lead to algal blooms in coastal waters.

Salt marsh cord grass and underlying peat are resistant to erosion and dissipate wave energy, thereby providing a buffer that reduces wave damage. The underlying peat also serves as a barrier between fresh ground water landward of the salt marsh and the ocean, thus helping to maintain the level of such ground water.

A salt marsh is an important feeding and breeding area for many types of fish and aquatic and terrestrial wildlife. The marsh, including its creeks and open water, also provides important shelter for many aquatic migratory birds. Salt marshes provide excellent areas for bird watching, canoeing, and hunting.

Land within 100 feet of a salt marsh is likely to be significant to the protection and maintenance of salt marshes, and therefore to the protection of the interests which these resource areas serve to protect.

When a proposed project involves the dredging, filling, removing, or altering of a salt marsh, the Conservation Commission shall presume that such area is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a salt marsh does not play a role in the protection of marine fisheries, prevention of pollution, ground water supply, or storm damage prevention, and if the issuing authority makes a written determination to such effect.

When a salt marsh is significant to one or more of the interests specified above, the following characteristics are critical to the protection of such interests:

(A) the growth, composition and distribution of salt marsh vegetation for the protection of marine fisheries, prevention of pollution, storm damage prevention, recreation, and wildlife;

(B) the flow and level of tidal and fresh water for the protection of marine fisheries and prevention of pollution; and

(C) the presence and depth of peat which affects ground water supply, prevention of pollution, and storm damage prevention.

### (3) Prohibitions

No activity, which will result in the building within or upon, removing, filling, or altering of a salt marsh, or land within 100 feet of any salt marsh, shall be permitted by the Conservation Commission except for the maintenance of an already existing structure and activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

### (4) Activity allowed under a variance

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on a salt marsh, or within 100 feet of a salt marsh, shall comply with the following regulations:

(A) A proposed project in a salt marsh, or on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh, shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects on productivity. Also note Section 4.02 of these regulations.

(B) Notwithstanding the provisions of Section 2.06(3), a small project within a salt marsh, such as an elevated walkway (no walkway lower than 3.5 feet above the salt marsh will be allowed) or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each day, may be permitted if such a project complies with all other applicable requirements of these regulations.

(C) Notwithstanding the provisions of Section 2.06(2) and (3) a project which will restore or rehabilitate a salt marsh, or create a salt marsh, may be permitted; provided, however, that the section shall not be construed to allow the alteration of one salt marsh on a given site by (or contingent upon) the creation of another.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.07 Land Under Salt Ponds and Land Within 100 Feet of the Banks of Salt Ponds



### (1) Definition

Salt Pond: a shallow enclosed or semi-enclosed body of saline water that may be partially or totally restricted by barrier beach formation. Salt ponds may receive freshwater from streams emptying into their upper reaches and/or springs in the salt pond itself. See CZM "Guide to the Coastal Wetlands Regulations" for specific identification.

### (2) Preamble

Land under salt ponds is significant to the protection of marine fisheries, wildlife and wildlife habitat, recreation, and, where there are shellfish, to the protection of land containing shellfish. The productivity of salt ponds and the food web they support provides an ideal habitat for many types of wildlife, particularly various ducks and shore birds. The enclosed nature of the ponds also provides shelter for wildlife.

Salt ponds and the area around them provide the public with many recreational opportunities including: shellfishing, fishing, sailing, swimming, hunting, and wildlife observation. Because of their enclosed nature, salt ponds are sensitive to pollution or nutrient input. These inputs can change the plant and animal species composition of the pond, and thus can be detrimental to fish, shellfish, wildlife, and recreation.

Land under salt ponds provides an excellent habitat for marine fisheries. The high productivity of plants in salt ponds provides food for shellfish, crustaceans, and larval and juvenile fish. Salt ponds also provide spawning areas for shellfish and are nursery areas for crabs and fish, and shelter for migratory birds.

Land within 100 feet of the bank of a salt pond is likely to be significant to the protection and maintenance of land under salt ponds, and therefore to the protection of the interests which these resource areas serve to protect.

When a proposed project involves the dredging, filling, removing, or altering of land under a salt pond or land within 100 feet of the bank of a salt pond, the Conservation Commission shall presume that such land is significant to the protection of marine fisheries, and, where there are shellfish, to the protection of land containing shellfish. This presumption may be overcome only upon a clear showing that land under a salt pond and land within 100 feet of the banks of salt ponds does not play a role in the protection of marine fisheries or land containing shellfish, and if the Conservation Commission makes a written determination to such effect.

When land under a salt pond is significant to the protection of marine fisheries, the following factors are critical to the protection of that interest:

- (A) water circulation,
- (B) distribution of sediment grain size,
- (C) freshwater inflow,
- (D) productivity of plants, and
- (E) water quality.

### (3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of land under a salt pond or land within 100 feet of the bank of a salt pond, shall be permitted by the Conservation Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

(4) Activity allowed under a variance

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on land under a salt pond or land within 100 feet of the bank of a salt pond shall comply with the following regulations:

(A) Any project on land under a salt pond, on lands within 100 feet of the mean high water line of a salt pond, or on land under a body of water adjacent to a salt pond shall not have an adverse effect on the marine fisheries or shellfish habitat of such a salt pond caused by:

- (i) alterations of water circulation;
- (ii) alterations in the distribution of sediment grain size and the relief or elevation of the bottom topography;
- (iii) modifications in the flow of fresh and/or salt water;
- (iv) alterations in the productivity of plants; or
- (v) alterations in water quality, including, but not limited to, other than normal fluctuations in the level of dissolved oxygen, nutrients, temperature, turbidity or salinity, or the addition of pollutants.

(5) Pond openings

Notwithstanding the provisions of 2.07(3) and (4), activities specifically designed and intended to maintain the depth and the opening of the salt pond to the ocean in order to maintain or enhance the marine fisheries or for the specific purpose of fisheries management, may be permitted. Written notice shall be given to the Conservation Commission prior to any such activity. The Conservation Officer or Chair of the Commission may be notified by telephone. Refer to DEP Policy 91-2.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.08 Land Containing Shellfish

(1) Definitions

(A) Land containing shellfish: land under the ocean, tidal flats, salt marshes, and land under salt ponds when any such land contains shellfish.

(B) Shellfish: the following species: Bay scallop (*Argopecten irradians*); Blue mussel (*Mytilus edulis*); Ocean quahog (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria merceneria*); Razor clam (*Ensis directus*); Sea clam (*Spisula solidissima*); Sea scallop (*Placopecten magellanicus*); Soft shell clam (*Mya arenaria*); Lobster (*Homarus americanus*); Grass shrimp (*Palaemonetes sp*); Sand shrimp (*Crangon septemspinosa*); Blue crab (*Callinectes sapidus*); Green crab (*Carcinus maenas*); Fiddler crab (*Uca sp*); Rock crab (*Cancer irroratus*); freshwater mussel (*Andonata implicata*) and (*Elliptio complanata*); conchs and whelks.

(C) DMF: the Division of Marine Fisheries or its successor.

(2) Preamble

Land containing shellfish is found within certain of the resource areas under the jurisdiction of the Bylaw. The purpose of this section is to identify those resource areas likely to contain shellfish and to establish regulations for projects which will affect such land.

Land containing shellfish is significant to the protection of marine fisheries and to the protection of shellfish.

Shellfish are a valuable renewable resource important for both recreational, commercial and economic resources. The maintenance of productive shellfish beds not only assures the continuance of shellfish themselves, but also plays a direct role in supporting fish stocks by providing a major food source. The young shellfish in the planktonic larval stage that are produced in large quantities during spring and summer are an important source of food for the young stages of marine fishes and many crustaceans.

When a resource area is found to be significant to the protection of land containing shellfish, and is, therefore, also significant to marine fisheries the following factors are critical to the protection of those interests:

- (A) shellfish
- (B) water quality and salinity
- (C) water circulation
- (D) the natural relief, elevation, and distribution of sediment grain size of such land
- (E) presence and population of competitive and predatory fauna and competitive flora.

### (3) Regulations

Except as provided in Section 2.08(4) and (5) below, any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land caused by:

- (A) alterations of water circulation;
- (B) alterations in the distribution of sediment grain size;
- (C) alterations in the relief or elevation of the bottom topography, except that use of normal shellfishing equipment shall be permitted;
- (D) alterations of aquatic flora;
- (E) the compacting of sediment by vehicular traffic;
- (F) alterations in natural drainage from adjacent land; or
- (G) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of salinity, dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants.

### (4) Removing Shellfish

Except in Areas of Critical Environmental Concern, the Conservation Commission may, after consultation with the Shellfish Constable, permit the shellfish to be moved from such area under the guidelines of, and to a suitable location approved by, DMF, in order to permit a proposed project on such land. Any such project shall not be commenced until after the moving and replanting of the shellfish have been completed.

### (5) Habitat Restoration

Notwithstanding Section 2.08(3), projects approved by DMF that are specifically intended to increase the productivity of land containing shellfish may be permitted in the discretion of the Conservation Commission. Aquaculture projects approved by the appropriate Local and State authority may also be permitted, within the discretion of the Conservation Commission.

### (6) Prohibitions

Permanent fixed piers are prohibited from proven shellfish and eelgrass beds and from areas with a high potential for development of shellfish when identified and/or mapped by the Commission and/or Shellfish Constable as follows:

- (A) based upon maps and/or designations by the Division of Marine Fisheries; or

(B) based upon maps and/or designations by the Martha's Vineyard Commission; or  
(C) based upon maps and/or written documentation from the Shellfish Constable, the Shellfish Committee, or the Martha's Vineyard Shellfish Group.

In making such identification or maps the following factors shall be taken into account and documented: the density of shellfish, the size of the area, and the historic and current importance of the area to recreational or commercial shellfishing.

In the course of determining the potential impact of a pier or the importance of a shellfish or eelgrass bed, the Commission may solicit and review comments from groups and individuals, including, but not limited to, the Marine Advisory Committee, the Shellfish Committee, the Shellfish Constable, and the Martha's Vineyard Shellfish Group.

Projects shall not obstruct the ability of the public to gather shellfish recreationally or the ability of commercial fishermen to harvest shellfish.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

#### 2.09 Banks of or Land Under the Ocean, Ponds, Streams, Rivers, Lakes, or Creeks that Underlie an Anadromous/Catadromous Fish Run ("Fish Run")

##### (1) Definitions

(A) Anadromous fish: fish that enter fresh water from the ocean to spawn, such as alewives, shad and salmon.

(B) Catadromous fish: fish that enter salt water from fresh water to spawn, such as eels.

(C) Anadromous/Catadromous Fish Run: that area within estuaries, ponds, streams, creeks, rivers, lakes or coastal waters, which is a spawning or feeding ground or passageway for anadromous or catadromous fish. Such fish runs shall include those areas which have historically served as fish runs and are either being restored or are planned to be restored at the time the Notice of Intent is filed.

##### (2) Preamble

The banks of and land under the ocean, ponds, streams, rivers, lakes or creeks that underlie an anadromous/catadromous fish run are significant to protection of marine fisheries and land within 100 feet of such banks is significant to the protection and maintenance of these banks, and therefore to the protection of the interests which these resource areas serve to protect.

Anadromous and catadromous fish ("the fish") are renewable protein resources that provide recreational, aesthetic, and commercial benefits. In addition, throughout their life cycle such fish are important components of freshwater, estuarine, and marine environments and are food sources for other organisms.

The spawning migrations of such fish also provide a direct link between marine and freshwater ecosystems. This link plays a role in maintaining the productivity of fisheries. When a proposed project involves the dredging, filling, removing, or altering of a bank of a fish run, or land under the ocean, or under a pond, stream, river, lake or creek which is a fish run, the Conservation Commission shall presume that such bank or land is significant to the protection of marine fisheries. This presumption may be overcome only upon a clear showing that such bank or land does not play a role in the protection of marine fisheries, and if the Conservation Commission makes a written determination to that effect.

When such a bank of a fish run, or land under the ocean or under a pond, stream, river, lake or creek which is a fish run is significant to the protection of marine fisheries, the following factors are critical to the protection of such interest:

- (A) the fish,
- (B) accessibility of spawning areas,
- (C) the volume or rate of the flow of water within spawning areas and migratory routes,
- (D) spawning and nursery grounds, and
- (E) water quality.

### (3) Prohibitions

No activity which will result in the building within or upon, removing, filling, dredging, or altering of the bank of a fish run and/or land under a fish run, shall be permitted by the Conservation Commission, except for:

- (A) the maintenance of an already existing structure;
- (B) activity which is allowed under a variance granted pursuant to Section 5.01.

### (4) Regulations

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on the bank of a fish run, or on land under a fish run shall comply with the following regulations:

(A) Any project on such land or bank shall not have an adverse effect on the anadromous or catadromous fish run by:

- (i) impeding or obstructing the migration of the fish; or by causing mortality to adult or juvenile fish; or
- (ii) changing the volume or rate of flow of water within the fish run; or impairing the quality of water within or tributary to the fish run; or
- (iii) impairing the capacity of spawning or nursery habitats necessary to sustain the various life stages of the fish.

(B) Dredging, disposal of dredged material, or filling in a fish run shall be prohibited except where such dredging has been approved by DMF as needed to maintain the fish run.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## 2.10 Land Subject to Coastal Storm Flowage

### (1) Characteristics and Protected Interests

(A) The Commission finds that regulations applicable to activities involving land subject to coastal storm flowage are necessary and proper for the following reasons:

(i) Land subject to coastal storm flowage (the coastal floodplain) buffers and protects upland areas from severe storm conditions.

(ii) Since the floodplain contains areas where the water table is close to the surface (as well as other wetland resource areas), pollutants in a floodplain - including contents of septic systems and fuel

tanks - may affect private water supply, groundwater quality, wildlife and wildlife habitat, fisheries, and shellfish during and after a storm.

(iii) Direct and collateral damages to manmade structures in the floodplain are caused by wave impacts and inundation by floodwaters and storm driven debris. Protecting property in floodplains during a storm can be expensive to the Town of Chilmark and unsafe for its police, fire, and medical personnel involved in such efforts. Desires of property owners to protect their property from the effects of storms can lead to pressure on the Town and its regulatory bodies to erect engineering structures in wetlands that can have detrimental effects on wetland values and surrounding lands.

(iv) Land subject to coastal storm flowage which also contains salt marshes may serve as shelter and nesting sites for marsh birds and for small mammals which utilize the marsh as a food source. Land subject to coastal storm flowage may be inhabited by species listed as rare, endangered, of special concern or on the watch list by the Massachusetts Natural Heritage Program.

(B) In view of the foregoing, whenever a proposed project involves removing, filling, dredging, altering, or building upon land subject to coastal storm flowage, the Commission shall find that the land is significant to the protection of the following interests:

(i) flood control, erosion control, and storm damage prevention; and

(ii) in areas adjacent to salt marshes or in areas designated as rare species habitat by the Massachusetts Natural Heritage Program the Commission shall find that the land is significant to wildlife and their habitats.

These findings may be overcome only upon a clear and convincing showing that the land subject to coastal storm flowage does not play a role in one or more of the interests given above and only upon a specific written determination to that effect by the Commission.

## (2) Regulations

When land subject to coastal storm flowage or land within 100 feet of land subject to coastal storm flowage of the 100 year flood (as determined by using the FEMA Flood Maps or similar base map) is determined to be significant to an interest protected by the Bylaw, the following regulations shall apply:

(A) The work shall not reduce the ability of the land to absorb and contain floodwaters, or to buffer inland area from flooding and wave damage.

(B) Projects shall be designed in such a way to protect ground, surface, or salt water from pollution triggered by coastal storm flowage. All newly constructed septic tanks and leach facilities shall be outside the 100 year floodplain unless the Commission is presented with documentation by a Registered Professional Engineer or Health Sanitician which documents that the waste disposal system would eliminate infiltration of floodwaters into the system and discharges from the system into floodwaters.

(C) Septic systems are prohibited in the velocity zone.

(D) The proposal shall not alter land subject to coastal storm flowage which is significant to wildlife and their habitats.

The Commission may impose such additional requirements as are necessary to protect the Interests Protected by the Bylaw.

## PART III REGULATIONS FOR INLAND WETLANDS

### 3.01 Inland Banks (Naturally Occurring Banks and Beaches)

#### (1) Definition, Critical Characteristics and Boundary

(A) A bank is the portion of the land surface which normally abuts and confines a water body. A bank may be partially or totally vegetated or it may be comprised of exposed soil, gravel, stone beach, or inland beach.

(B) The physical characteristics of a bank, as well as its location, as described in the foregoing subsection (2)(a) are critical to the protection of the interests specified in Section 3.01(1).

(C) The upper boundary of a bank is the first observable break in the slope from the top or the mean annual flood level, whichever is higher. The lower boundary of a bank is the mean annual low flow level.

#### (2) Preamble

Banks are significant to wildlife and wildlife habitat, public or private water supply, ground water supply, flood control, storm damage prevention, the prevention of pollution, and the protection of fisheries. Banks composed of concrete, asphalt or other artificial impervious material, are likely to be significant to flood control and storm damage prevention.

Banks are areas where ground water discharges to the surface and where, under some circumstances, surface water recharges the ground water.

Where banks are partially or totally vegetated, the vegetation serves to maintain the bank's stability, which in turn protects water quality by reducing erosion and siltation.

Banks act to confine floodwaters during the most frequent storms, preventing the spread of water to adjacent land. An alteration of a bank that permits water to frequently and consistently spread over a larger and more shallow area increases the amount of property which is routinely flooded, as well as elevating water temperature and reducing fish habitat within the main channel, particularly during warm weather.

Land within 100 feet of a bank is likely to be significant to the protection and maintenance of the bank, and therefore to the protection of the interests which these resource areas serve to protect.

#### (3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of a bank, shall be permitted by the Conservation Commission except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

#### (4) Regulations

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on a bank or on land within 100 feet of a bank shall comply with the following regulations:

(A) Any proposed work on a bank or within 100 feet of a bank shall not impair the following:

(i) the physical stability of the bank;

- (ii) the water carrying capacity of the existing channel within the bank;
- (iii) ground water and surface water quality;
- (iv) the capacity of the bank to provide breeding habitat, escape cover, and food for fish.

### 3.02 Vegetated Wetlands (Wet Meadows, Marshes, Swamps, and Bogs)

#### (1) Definition, Critical Characteristics and Boundary

(A) Vegetated Wetlands are freshwater wetlands, classified as wet meadows, marshes, swamps and bogs. They are usually areas where the topography is relatively flat, or areas of sheet flow on moderate slopes, and where the soils are perennially saturated. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in Section 3.02(1)(c) below. Freshwater wetlands also include: disturbed areas such as, but not limited to, filled or devegetated wetlands where the substrate is composed of hydric soils.

(B) The physical characteristics of Vegetated Wetlands, as described in the foregoing subsection (1)(a), are critical to the protection of the interests specified in Section 3.02(2) below.

(C) The boundary of Vegetated Wetlands is the line within which 50 percent of the vegetational community consists of the wetland plant species identified in Section 3.02(1)(c)(i) through (iv), below:

(i) The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (Sphagnum sp.); disturbed areas such as, but not limited to, filled or devegetated areas where the substrate is composed of hydric soils and where the vegetational community is made up of a significant portion of one or more, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (Aster nemoralis), azaleas (Rhododendron canadense and R. viscosum), black spruce (Picea mariana), bog cotton (Eriophorum), cranberry (Vaccinium macrocarpon), high bush blueberry (Vaccinium corymbosum), larch (Larix laricina), laurels (Kalmia augustifolia and K. polifolia), leatherleaf (Chamaedaphne calyculata), orchids (Arethusa, Calopogon, Pogonia), pitcher plants (Sarracenia purpurea), sedges (Cyperaceae), sundews (Droseraceae), sweet gale (Myrica gale), white cedar (Chamaecyparis thyoides), rushes (Juncaceae), and cinnamon fern (Osmunda cinnamomea and O. regalis).

(ii) The term "swamps", as used in this section, shall mean areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface; disturbed areas such as, but not limited to, filled or devegetated areas where the substrate is composed of hydric soils and where a significant part of the vegetational community is made up of, but not limited to nor necessarily including all of the following plants or groups of plants: alders (Alnus), ashes (Fraxinus), azaleas (Rhododendron canadense and R. viscosum), black alder (Ilex verticillata), black spruce (Picea mariana), button bush (Cephalanthus occidentalis), American or white elm (Ulmus americana), white Hellebore (Veratrum viride), hemlock (Tsuga canadensis), highbush blueberry (Vaccinium corymbosum), larch (Larix laricina), cowslip (Caltha palustris), poison sumac (Toxicodendron vernix), red maple (Acer rubrum), skunk cabbage (Symplocarpus foetidus), sphagnum mosses (Sphagnum), spicebush (Lindera benzoin), black gum tupelo (Nyssa sylvatica), sweet pepper bush (Clethra alnifolia), white cedar (Chamaecyparis thyoides), willow (Salicaceae), maleberry (Lyonia ligustrina), netted chain-fern (Woodwardia areolata) and Osmunda ferns.

(iii) The term "wet meadow", as used in this section shall mean areas where ground water is at the surface for a significant part of the growing season and near the surface throughout the year and where a significant part of the vegetational community is composed of various grasses, sedges and rushes; disturbed areas such as, but not limited to, filled or devegetated areas where the substrate is



composed of hydric soils; made up of, but not limited to nor necessarily including all, of the following plants or groups of plants: blue flag (*Iris*), vervain (*Verbena*), thoroughwort (*Eupatorium*), dock (*Rumex*), false loosestrife (*Lythrum*), marsh fern (*Dryopteris thelypteris*), rushes (*Juncaceae*), sedges (*Cyperaceae*), sensitive fern (*Onoclea sensibilis*), smartweed (*Polygonum*), horsetails (*Equisetaceae*), hydrophilic grasses (*Gramineae*).

(iv) The term "marshes", as used in this section, shall mean areas where a vegetational community exists in standing or running water during the growing season; disturbed areas such as, but not limited to, filled or devegetated areas where the substrate is composed of hydric soils and where a significant part of the vegetational community is composed of, but limited to nor necessarily including all, of the following plants or groups of plants: arums (*Araceae*), bladder worts (*Utricularia*), bur reeds (*Sparganiaceae*), button bush (*Cephalanthus occidentalis*), cattails (*Typha*), duck weeds (*Lemnaceae*), eelgrass (*Vallisneria*), frog bits (*Hydrocharitaceae*), horsetails (*Equisetaceae*), hydrophilic grasses (*Poaceae*), leatherleaf (*Chamaedaphne calyculata*), pickerel weeds (*Pontederiaceae*), pipeworts (*Eriocaulon*), pond weeds (*Potamogeton*), rushes (*Juncaceae*), sedges (*Cyperaceae*), smartweeds (*Polygonum*), sweet gale (*Myrica gale*), water milfoil (*Haloragaceae*), water lilies (*Nymphaeaceae*), water starworts (*Callitrichaceae*), water willow (*Decodon verticillatus*).

(v) In many cases, the species found may include plants from 2 or more of the lists in i-iv.

## (2) Preamble

Vegetated Wetlands are areas where ground water discharges to the surface and where, under some circumstances, surface water discharges to the ground water.

Vegetated Wetlands are significant to wildlife and wildlife habitat, public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, the protection of fisheries, and the protection of shellfish.

The plant communities and soils of vegetated wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous), and toxic substances (such as heavy metal compounds) that occur in run-off and flood waters.

Some nutrients and toxic substances are detained for years in plant root systems or in the soils. Others are held by plants during the growing season and are released as the plants decay in the fall and winter. This latter phenomenon delays the impacts of nutrients and toxins until the cold weather period, when such impacts are likely to be lessened.

Wetlands help maintain water quality or improve degraded water by removing, transforming, and retaining nutrients; processing chemical and inorganic wastes and pollutants; and reducing sediment loads. Wetlands intercept runoff from uplands before it reaches the water and help filter sediments, nutrients, and wastes from flood water. It is important, however, to recognize that wetlands do not have an infinite capacity to perform this function.

Inland wetlands located along major streams and around lakes stabilize shorelines and channel banks and buffer developed uplands from storm, wave, or erosion damage. During dry periods the water retained in vegetated wetlands is essential to the maintenance of base flow levels in streams and recharge into the groundwater.

Undisturbed natural wetland communities have high value as prime examples of their community type, as areas of study and comparison, and for protection as a unique resource. The existence of a buffer area of undisturbed natural vegetation adjacent to a wetland is important because many wetlands species spend the majority of their non-breeding and non-feeding lives in the areas immediately adjacent to a wetland.

The profusion of vegetation and the relatively flat topography of vegetated wetlands slows down and reduces the passage of flood waters during periods of peak flows by providing temporary flood water storage, and by facilitating water removal through evaporation and transpiration. This reduces downstream flood crests and resulting damage to private and public property. During dry periods the water retained in vegetated wetlands is essential to the maintenance of base flow levels on rivers and streams, which in turn is important to the protection of water quality and water supplies.

Wetland vegetation provides shade that moderates water temperatures critical to fish life. Wetlands flooded by adjacent water bodies and waterways provide food, breeding habitat and cover for fish. Fish populations in the larval stage are particularly dependent upon food provided by overbank flooding which occurs during peak flow periods (extreme storms), because most river and stream channels do not provide quantities of the microscopic plant and animal life required.

Wetland vegetation supports a wide variety of insects, reptiles, amphibians, mammals, and birds which are a source of food for important game fish. These wetlands are also important to the protection of rare and endangered wildlife, flora and fauna species. Vegetated wetlands serve to moderate and alleviate thermal shock and pollution resulting from run-off from impervious surfaces which may be detrimental to wildlife, fisheries, and shellfish downstream of the vegetated wetland.

The maintenance of base flows by vegetated wetlands is likely to be significant to the maintenance of a proper salinity ratio in estuarine areas downstream of the vegetated wetland. A proper salinity ratio, in turn, is essential to the ability of shellfish to spawn successfully, and to therefore provide for the continuation of shellfisheries.

Vegetated Wetlands support sport fishing, hunting, birdwatching, nature observation and study, and other wetland-related uses which in turn generate capital for a local economy and pure enjoyment for those participating in these forms of recreation.

Land within 100 feet of a Vegetated Wetland is likely to be significant to the protection and maintenance of vegetated wetlands, and therefore to the protection of the interests which these resource areas serve to protect.

### (3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of a vegetated wetland, shall be permitted by the Conservation Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

### (4) Regulations

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations upon a vegetated wetland shall not impair in any way the vegetated wetland's ability to perform any of the functions set forth in Section 3.02(2).

## 3.03 Land Under Water Bodies (under any Creek, River, Stream, Pond or Lake and Flats)

### (1) Definition, Critical Characteristics and Boundaries

(A) Land Under Water Bodies is the land beneath any creek, river, stream, pond or lake. Said land may be composed of organic muck or peat, fine to coarse sediments or rocks.

(B) The physical characteristics and location of Land Under Water Bodies and Waterways specified in the foregoing subsection 1(a) are critical to the protection of the interests specified in Section 3.03(2) below.

(C) The boundary of Land Under Water Bodies is the mean annual low water level.

## (2) Preamble

Land Under Water Bodies and Waterways are significant to wildlife and wildlife habitat, public and private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, and the protection of fisheries.

Where Land Under Water Bodies and Waterways is composed of pervious material, such land represents a point of exchange between surface and ground water.

The physical nature of Land Under Water Bodies and Waterways is highly variable, ranging from deep organic and fine sedimentary deposits to rocks. The organic soils and sediments play an important role in the process of detaining and removing dissolved and particulate nutrients (such as nitrogen and phosphorous) from the surface water above. They also serve as traps for toxic substances (such as heavy metal compounds).

Land Under Water Bodies and Waterways, in conjunction with banks, serves to confine floodwater within a definite channel during the most frequent storms. Filling within this channel blocks flows which in turn causes backwater and overbank flooding during such storms. An alteration of Land Under Water Bodies and Waterways that causes water to frequently spread out over a larger area at a lower depth increases the amount of property which is routinely flooded. Additionally, it results in an elevation of water temperature and a decrease in habitat in the main channel, both of which are detrimental to fisheries, particularly during periods of warm weather and low flows.

Land under rivers, streams, and creeks that is composed of gravel allows the circulation of cold, well oxygenated water necessary for the survival of important game fish species. River, stream and creek bottoms with a diverse structure composed of sands, gravel, and large and small boulders provide escape cover and resting areas for game fish species. Such bottom type also provides areas for the production of aquatic insects essential to fisheries.

Land under ponds and lakes is vital to a large assortment of warm water fish during spawning periods, when nests are built on the lake and bottom substrates within which they shed and fertilize their eggs.

Land within 100 feet of any bank abutting land under a water body is likely to be significant to the protection and maintenance of land under a water body, and therefore to the protection of the interests which these water bodies serve to protect.

## (3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of land under a water body shall be permitted by the Conservation Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

## (4) Regulations

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on land under a water body shall comply with the following regulations:

(A) Any proposed work upon land under a water body shall not impair the following:

(i) the water carrying capacity within the defined channel, which is provided by said land in conjunction with the banks;

(ii) ground and surface water quality; and

(iii) the capacity of said land to provide breeding habitat, escape cover and food for fish.

### 3.04 Land Subject to Flooding (both Bordering and Isolated Areas, and Vernal Pools)

#### (1) Definitions, Critical Characteristics and Boundaries

(A) Bordering Land Subject to Flooding:

(i) Bordering Land Subject to Flooding is usually an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies; where a bordering vegetated wetland occurs, it extends from said wetland.

(ii) The topography and location of Bordering Land Subject to Flooding specified in the foregoing subsection 1(a) are critical to the protection of the interests specified in Section 3.04 (2) (a) below.

(iii) The boundary of Bordering Land Subject to Flooding is the estimated maximum lateral extent of flood water which will theoretically result from the statistical 100 year frequency storm. Said boundary shall be that determined by reference to the most recently available flood profile data prepared for Chilmark under the National Flood Insurance Program (NFIP, currently administered by the Federal Emergency Management Agency (FEMA), successor to the US Department of Housing and Urban Development). Said boundary, so determined, shall be presumed accurate. This presumption may be overcome only by credible evidence from a registered professional engineer or other professional competent in such matters.

Where NFIP Profile data are unavailable, the boundary of Bordering Land Subject to Flooding shall be the maximum lateral extent of flood water which has been observed or recorded.

(B) Isolated Land Subject to Flooding and Vernal Pools:

(i) Isolated Land Subject to Flooding and Vernal Pools are isolated depressions or closed basins without an inlet or an outlet. They are areas which at least once a year confine standing water.

Isolated Land Subject to Flooding and Vernal Pools may be underlain by pervious material, which in turn may be covered by a mat of organic peat or muck.

(ii) The characteristics specified in the foregoing subsection 1(b)i are critical to the protection of the interests specified in Section 3.04 (2)b below.

(iii) The boundary of Isolated Land Subject to Flooding or of Vernal Pools is the perimeter of the largest observed or recorded volume of water confined in said area.

#### (2) Preamble

(A) Bordering Land Subject to Flooding:

Bordering Land Subject to Flooding is an area which floods from a rise in a bordering waterway or water body. Such areas are significant to flood control and storm damage prevention.

Bordering Land Subject to Flooding provides a temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basis of a pond or lake. During periods of peak runoff, flood waters are both retained (i.e. slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by Bordering Land Subject to Flooding. Over time, incremental filling of these areas causes increase in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties.

(B) Isolated Land Subject to Flooding and Vernal Pools:

Isolated Land Subject to Flooding and Vernal Pools are isolated depressions or closed basins which serve as a ponding area for runoff or high ground water which has risen above the ground surface. Such areas are likely to be locally significant to flood control and storm damage prevention. In addition, where such areas are underlain by pervious material they are likely to be significant to public or private water supply and to ground water supply. Where such areas are underlain by pervious material covered by a mat of organic peat and muck, they are also likely to be significant to the prevention of pollution. Isolated Land Subject to Flooding provides a temporary storage area where runoff and high ground water pond and slowly evaporate or percolate into the substrate. Filling causes lateral displacement of the ponded water onto contiguous properties, which may in turn result in damage to said properties. Isolated land subject to flooding and Vernal Pools provide important breeding habitat for amphibians and some rare plants. Vernal Pools hold water for at least two continuous months, but contain no fish predators.

Isolated Land Subject to Flooding, where it is underlain by pervious material, provides a point of exchange between ground and surface waters.

Contaminants introduced into said area, such as septic system discharges and road salts, find easy access into the ground water and neighboring wells. Where these conditions occur and a mat of organic peat or muck covers the substrate of the area, said mat serves to detain and remove contaminants which might otherwise enter the ground water and neighboring wells.

(3) Prohibitions

No activity, other than the maintenance of an already existing structure, which will result in the building within or upon, removing, filling, or altering of land subject to flooding shall be permitted by the Conservation Commission, except for activity which is allowed under a variance from these regulations granted pursuant to Section 5.01.

(4) Regulations

Any activity which is allowed under a variance granted pursuant to Section 5.01 of these regulations on land subject to flooding shall not result in the following:

(A) Flood damage due to filling which causes lateral displacement of water that would otherwise be confined within said area.

(B) An adverse effect on public and private water supply or ground water supply, where said area is underlain by pervious material.

(C) An adverse effect on the capacity of said area to prevent pollution of the ground water, where the area is underlain by pervious material which in turn is covered by a mat of organic peat and muck.

## PART IV: CATEGORICAL PERMISSION FOR MOSQUITO CONTROL PROJECTS, POWER AND COMMUNICATION CABLES

### 4.01 Installation of Power or Communication Cables

Following written notice to the Conservation Commission and an examination of the site by the Commission or its Conservation Officer, cables for the transmission of electricity or information may be laid across a wetland or within 100 feet of a wetland by use of a vibrator or a drop-plow.

### 4.02 Mosquito Control Projects

Pursuant to Section 2 of the Bylaws, the Conservation Commission categorically gives permission for mosquito control projects performed pursuant to the provisions of Clause 36 of MGL Chapter 50, Section 5, of MGL Chapter 252, or of any special act, provided that adequate written notice has been given to the Conservation Commission at least 24 hours prior to the commencement of any work. Mosquito control projects shall use the most recent and ecologically advanced methods which are available and accepted.

### 4.03 Other Categorical Permission

There shall be no other categorical permission granted by the Conservation Commission except by amendment to this part of these regulations, and in accordance with the provisions of the bylaws.

## PART V: WAIVERS AND APPEALS

### 5.01 Variances

(1) The Conservation Commission may, in its discretion, grant waiver from the operation of one or more of these regulations pursuant to this Section. Such waivers are intended to be granted only in rare and unusual cases, and shall be granted only in accordance with the provisions of this Section.

A waiver may be granted only for the following reasons and upon the following conditions:

(A) The Conservation Commission may grant a waiver from these regulations upon a clear and convincing showing by the applicant that any proposed work, or its natural and consequential impacts and effects, will not have an adverse effect upon any of the interests protected in the Bylaws. It shall be the responsibility of the applicant to provide the Conservation Commission with any and all information which the Commission may in writing request in order to enable the Commission to ascertain such adverse effects, and the failure of the applicant to furnish any information which has been so requested shall result in the denial of a request for a variance pursuant to this subsection.

(B) The Conservation Commission may grant a waiver from these regulations when it is necessary to avoid so restricting the use of the property as to constitute an unconstitutional taking without compensation. If an application for a waiver pursuant to the subsection is received by the Conservation Commission, the Commission may request an opinion from Town Counsel as to whether the application of these regulations to a particular case will result in such a taking without compensation.

### (2) Appeals

(A) LOCAL APPEALS: An appeal of a decision of the Conservation Commission regarding the operation of these Bylaws may be made to a special meeting of a joint committee of the majority of each of the following permitting boards: Board of Health, Board of Selectmen and Planning Board. The meeting shall be called by the chairman of the Board of Selectmen and written notice shall be made to the applicant and to all members of the boards concerned. After hearing all the evidence provided by the applicant and the Conservation Commission, said committee shall, by majority vote, decide if the proposed activity is likely to have a significant or cumulative effect upon the value of Chilmark resources protected by this law.

(B) LEGAL APPEALS: An appeal of a decision of the Conservation Commission regarding the operation of these Bylaws may be made within sixty (60) days of the decision by the Conservation Commission to Court pursuant to the Attorney General's office.

## PART VI: REGULATION OF NON-CRIMINAL DISPOSITION FOR WETLANDS VIOLATIONS

### 6.01 Jurisdiction

Pursuant to Section 10 of the Town of Chilmark Wetlands Protection Bylaw, any person who violates any provision of said bylaw shall be punishable by a fine established by the Conservation Commission under the non-criminal disposition procedure set forth in Massachusetts General Laws Chapter 40, Section 21D.

### 6.02 Authority

The Conservation Commission members and agents, Municipal Boards and Officers, and Town Police Officer having police powers, shall have the authority to issue citations assessing monetary fines.

### 6.03 Stipulations

Any person who violates any provision of this Bylaw, regulations thereunder, or permits issued thereunder, shall be punishable by a fine of not more than three hundred dollars (\$300). Each day or portion thereof during which a violation continues shall constitute a separate offense, and each provision of the bylaw, regulations, or permit violated shall constitute a separate offense.

### 6.04 Time Limit

Failure to pay a fine assessed under this bylaw within twenty-one (21) calendar days shall result in appropriate action to collect.

### 6.05 Responsible Parties

The current owner(s) of a property on which a violation has occurred is the party responsible and therefore liable for any fines and/or legal action regardless of any contract with a second party to obtain necessary permits, perform work, or adhere to conditions of a permit.

### 6.06 Commencement of Violation(s)

An offense begins when a party fails or refuses to comply with any provision of the bylaw, regulations, or permit issued by the Conservation Commission. If the site has a history of violations of permits issued by the Conservation Commission, the offense is immediately assessable by a fine.

### 6.07 Determining Factors

The Conservation Commission shall consider the following factors in imposing fines:

1. Actual and potential impact on public health, safety, and the environment;
2. Actual and potential damages suffered and actual or potential cost incurred by the Town of Chilmark or any other person(s);



3. Whether the applicant took steps to prevent the violation(s);
4. Whether the applicant promptly took steps to come into compliance after the occurrence of the violation(s);
5. Whether the applicant took steps to remedy and mitigate whatever harm occurred as a result of the violation(s);
6. Whether the applicant has previously failed to comply with any regulations, orders, licenses, or approval issued or adopted by the Conservation Commission, or any laws which the Conservation Commission has the authority or responsibility to enforce;
7. Deterring future non-compliance by both the applicant and others;
8. The public interest.

#### 6.08 Definition

Any activity undertaken without a valid Order of Conditions or Negative Determination which constitutes removing, filling, dredging, building upon, or altering, including cutting of vegetation, the following resource areas: any freshwater wetland, coastal wetland, marsh, wet meadow, bog, swamp, or vernal pool and land lying within 100' thereof; any bank, beach, dune, or flat and land lying within 100' thereof; any lake, river, pond, stream, estuary, or the ocean, any land under said waters, or any land subject to flooding or subject to inundation by groundwater, surface water, tidal action, or coastal storm flowage and land lying within 100' thereof is a violation.

Any activity undertaken without a valid Order of Conditions or Negative Determination by the Conservation Commission within 100' of the above named resource areas and within 500' of Squibnocket Pond (in Squibnocket Pond District) as specified in the Chilmark Zoning Bylaws Section 11.7 and 12 is a violation.

Failure to comply with any conditions contained in any Order of Conditions or Negative Determination issued pursuant to Section 4 of the Chilmark Wetlands Bylaw is a violation.

Refusal to comply with an enforcement Order issued by the Conservation Commission or its agents is a violation.

#### 6.09 Fine Structure

1. Unauthorized activity in absence of valid Order of Conditions or Negative Determination:

- A. Buffer Zone - \$50
- B. Resource Area - \$100

2. Unauthorized activity beyond scope of Valid Order of Conditions or Negative Determination:

- A. Buffer Zone -\$50
- B. Resource Area -\$100

3. Failure to file for a permit as mandated by an Enforcement Order: \$200

4. Failure to comply with mitigating measures contained in an Enforcement Order: \$300

5. Failure to comply with Special Conditions contained in a Valid Order of Conditions:  
\$50 per condition violated, \$300 maximum

6. Failure to record at the Dukes County Registry of Deeds an Order of Conditions prior to commencement of permitted activity: \$25

7. Failure to post DEP file number at the site: \$25

8. Activity in violation of an Order of Conditions which prohibits said activity: \$300

#### 6.10 Appeals

Any of the above fines may be first appealed to the Conservation Commission and then, if not satisfied, to the Dukes County Clerk Magistrate.

## PART VII: FORMS

### 7.01 Application Forms

The forms provided for the Massachusetts Wetland Protection Act, Massachusetts General Laws Chapter 31, Section 40, shall be used for the functions of the Bylaw.