

**Town of Kittery  
 Planning Board Meeting  
 June 23, 2016**

**Town Code Amendments 16.9.4.2 Newly-created Wetlands and Water Bodies**

Action: Review amendment. Schedule a public hearing. The proposed amendment increases the required setbacks for created wetlands.

**PROJECT TRACKING**

REQ'D	ACTION	COMMENTS	STATUS
YES	Initial Planning Board Meeting	Scheduled for 6/23/2016	
NO	Secondary Planning Board Meeting	At the Board's discretion	
YES	Public Hearing (special notice requirements)		TBD
YES	Review/Approval/ Recommendation to Town Council		TBD

**Review**

Attached for the Board's consideration is an amendment proposed by the Conservation Commission (see attached memo dated 2/4/2016) to increase the required setbacks of created wetlands that have the functionality and attributes of a natural wetland, as defined in 16.2.2.

Staff recommends additional changes to clarify the difference between drainage and stormwater features that may become a wetland through the lack of maintenance. See lines 41 through 44. Also section 16.9.3.2 can be amended to provide more clarity on what a "regulated wetland" includes, see lines 5 through 10. In addition, the definitions for freshwater and forested wetlands should be placed in with the other wetland related definitions in 16.2.2., see lines 112 through 116.

Staff did not have the opportunity to discuss these changes with the Conservation Commission.

**Recommendation**

If the Planning Board is amenable to the proposed amendments and/or along with any revisions they find is warranted, the Board can...

*... move to schedule a public hearing for Town Code Amendment Title 16.9.4.2 Newly-created Wetlands and Water Bodies for July 28, 2016.*

2 **[PROPOSED AMENDMENT]**

3 **Chapter 16.9 DESIGN AND PERFORMANCE STANDARDS - NATURAL ENVIRONMENT**

4 **Article III. Conservation of Wetlands Including Vernal Pools**

6 **16.9.3.2 Regulated Wetlands and Boundaries.**

7 The definition of wetland boundaries is as described in this Section and in Section 16.2.2. All wetlands  
8 501 square feet and greater in size are considered regulated wetlands for the purposes of this Title.

9 Planning Board approval to alter a wetland area one acre or larger in size will not be issued until the  
10 applicant has submitted to the Town, as part of a completed application per section 16.9.3.12, a wetlands  
11 delineation map and summary report prepared by a qualified wetlands scientist or a Maine certified soil  
12 scientist, at the applicant's expense. The qualified wetlands scientist or Maine certified soil scientist must  
13 determine through field investigation the presence, location and configuration of wetlands on the area  
14 proposed for use.

16 A. Disturbed Areas. An area which has been disturbed or modified such that natural vegetation,  
17 hydrology or soils are altered or removed may still satisfy the wetland criteria. In the event disturbance of  
18 a wetland causes the wetland boundary to be altered, a new boundary may need to be delineated in  
19 order to determine if the wetland is a regulated wetland. Wetland boundaries are to be delineated  
20 according to procedures described in the Corps of Engineers Wetlands Delineation Manual - Waterways  
21 Experiment Station Technical Report Y-87-1, January 1987", (1987 Manual). Notwithstanding the above,  
22 areas legally disturbed or modified prior to May 13, 1987 will be considered "wetlands" for the purpose of  
23 this Code if such disturbed areas currently meet the normal criteria for delineating undisturbed wetlands.

25 B. Settling Disputes Over Wetland Boundaries. If there is a dispute regarding the existence or  
26 boundaries of the wetlands, the boundaries of the wetland are to be determined, at the expense of the  
27 applicant, by a qualified wetlands scientist or a qualified Maine certified soils scientist agreeable to both  
28 the Planning Board and the applicant.

30 C. Permits Required from Other Agencies. The determination of wetlands boundaries for Town  
31 jurisdiction by the Town Planning Board, the Conservation Commission, or the Code Enforcement Officer  
32 does not eliminate the need for the applicant to seek jurisdictional determinations and/or permits from the  
33 Maine Department of Environmental Protection and the US Army Corps of Engineers when required.

36 **Article IV. Wetland Setbacks for Special Situations**

38 **16.9.4.1 Wetland Setbacks Extending Beyond Publicly Accepted Streets.**

39 The required setback distances do not extend beyond the centerline of publicly accepted street that  
40 generally parallels the normal high-water line of a water body, tributary stream or the upland edge of a  
41 wetland.

42 **16.9.4.2 ~~Newly-c~~reated Wetlands and Water Bodies.**

43 Setbacks are ~~not~~ required from a wetland or water body created from upland land area ~~provided the~~  
44 ~~newly-created wetland or water body is not part of a required mitigation plan.~~ once the created wetland or  
45 water body attains the characteristics of a functioning wetland or waterbody as defined in Section 16.2.

47 A. Wetland setbacks for the zoning district and the shore land overlay district apply.

49 B. A performance guarantee, such as an escrow or bond, is required to guarantee that any new

50 vegetation will survive. Prior to the release or drawdown of funds in such accounts, a written statement  
51 from a qualified wetlands scientist that says the vegetation is thriving must be submitted to the Town  
52 Manager.  
53

54 **16.9.4.3 Setbacks from Altered Wetlands or Water Bodies.**  
55

56 The illegal altering of a water body or wetland area, where the surface area of the water body is  
57 decreased (lowered), after May 13, 1987 may not be used to change the location from which a setback is  
58 measured. The illegal filling of a water body or wetland area, where the normal water surface area of the  
59 water body is increased (raised), after May 13, 1987 must be measured from the most recent edge of the  
60 normal water surface elevation.  
61

62 Alterations to the wetland boundaries that have been approved by the Planning Board and are in  
63 compliance with regulations of the Army Corps of Engineers and the Maine Department of Environmental  
64 Protection, may be constructed per the Planning Board's approved wetlands alteration plan.  
65

66 **16.9.4.4 Setbacks for Utility Poles.**

67 Setbacks for utility poles must be shown and identified on the development plans. Distances from utility  
68 pole structures and the upland edge of wetlands of any type may not have to be set back from the  
69 wetland. Such setback distances require Planning Board approval.  
70

71 **16.9.4.5 Utilities within a Wetland.**

72 Where it is demonstrated that there is no alternative to avoid utilities within a wetland, the applicant's  
73 engineer must provide trench details for depth, distance between pipes, if applicable, fill materials,  
74 minimum compaction and or encasement.  
75

76 A. Rotted material, muck and unsuitable soils must be removed from the trench and replaced with select  
77 materials that provide the required compaction, pipe support and protection.  
78

79 B. Trenches for shallow depth pipes (having less than 4 feet of cover) must be designed to avoid pipe  
80 movement that may result in breakage.  
81

82 **Chapter 16.2 DEFINITIONS**

83 **16.2.2 Definitions.**  
84

85 **Forest management activities** means timber cruising and other forest resource evaluation activities,  
86 pesticide or fertilizer application, management planning activities, timber stand improvement, pruning,  
87 regeneration of forest stands, and other similar or associated activities, exclusive of timber harvesting and  
88 the construction, creation, or maintenance of roads.  
89

90 ~~**Forested wetland** means a fresh water wetland dominated by woody vegetation that is twenty (20) feet  
91 tall or taller.~~  
92

93 **Foundation** means the supporting substructure of a building or other structure including, but not limited  
94 to, basements, slabs, sills, posts, or frostwalls.  
95

96 **Freeboard** means a factor of safety usually expressed in feet above a flood level for purposes of  
97 floodplain management. Freeboard tends to compensate for the many unknown factors, such as wave

98 action, bridge openings, and the hydrological effect of urbanization of the watershed, that could contribute  
99 to flood heights greater than the height calculated for a selected size flood and floodway conditions.  
100 (Ordained 9/26/11; effective 10/27/11)

101  
102 ~~**Freshwater wetland** means non-coastal types of wetlands, including, but not limited to, freshwater~~  
103 ~~swamps, marshes, bogs, and similar areas.~~

104  
105 **Functionally Water-Dependent Uses** means those uses that require, for their primary purpose, location  
106 on submerged lands or that require direct access...

107 .....

108  
109 **Wetland enhancement** means an activity increasing the value of one or more functions in an existing  
110 wetland. Activities may also include improvements to upland buffers where timber harvesting or other  
111 activities have degraded the value for wildlife.

112  
113 **Wetland, Forested** means a fresh water wetland dominated by woody vegetation that is twenty (20) feet  
114 tall or taller.

115  
116 **Wetland, Freshwater** means non-coastal types of wetlands, including, but not limited to, freshwater  
117 swamps, marshes, bogs, and similar areas.

118  
119 **Wetland functions** means the roles wetlands serve which are of value to society or the environment  
120 including, but not limited to, flood water storage, flood water conveyance, groundwater recharge and  
121 discharge, erosion control, wave attenuation, water quality protection, scenic and aesthetic use, food  
122 chain support, fisheries, wetland plant habitat, aquatic habitat, and wildlife habitat.

123  
124 **Wetland hydrology** means in general terms, a condition where permanent or periodic inundation or  
125 prolonged soil saturation is sufficient to create anaerobic conditions in the soil. According to the 1989  
126 Manual, inundation or saturation for one week or more during the growing season and a water table  
127 within at least eighteen (18) inches of soil surface is required to meet the wetland hydrology criterion.

128



# Town of Kittery, Maine

## Conservation Commission

P.O. Box 808, Kittery, Maine 03904

DATE: February 4, 2016

TO: Chris DiMatteo, Kittery Town Planner  
Ann Grinnell, Planning Board Chair

FROM: Earledean Wells, Chair

RE: Manmade or created wetland protection

Not too long ago a developer referred to a manmade wetland as something other than a wetland when requesting to impact that wetland. The applicant's own soil scientist stated, in a letter included in the Planning Board packet, that the wetland in question had hydric soils, wetland vegetation and was functioning as a wetland and that he felt Kittery Ordinances were unclear and needed to be updated so that these wetlands would be protected.

Therefore, KCC requests that the following ordinance language be updated and we are suggesting:

16.9.4.2 **(Newly)** Created Wetlands and Water Bodies

Setbacks are **(not)** required from a wetland or water body created from upland area. **(provided the newly created wetland or water body is not part of a required mitigation plan.)**

Once the created wetland or water body attains the characteristics of a functioning wetland or water body it is considered a wetland or water body as defined in Section 16.2 for regulatory purposes.

- A. **(Wetland Setbacks)** All wetland setbacks for the zoning district and the shoreland overlay district apply.
- B. A performance guarantee, such as an escrow or bond is required to guarantee that any new vegetation will survive. Prior to release or drawdown of funds in such accounts, a written statement from a qualified wetland scientist that says the vegetation is thriving must be submitted to the Town Manager.

**NOTE:** All words or sentences in bold and parenthesis are intended to be deleted. All words or sentences that are underlined are intended to be added.

Also B. should likely be in another section—however, that is the decision of the Planning Board.