



To: Falmouth Town Council  
From: Falmouth Conservation Commission (FCC)  
Date: January 11, 2017

Re: FCC's Review of the Long-Range Planning Advisory Committee October 15, 2009, Report to the Falmouth Town Council: **Recommended ordinance amendments for natural resource protection**

In accordance with the Town Council's recommended tasks for the Falmouth Conservation Commission (FCC) pursuant to the Town's Comprehensive Plan, the FCC has reviewed a 2009 report (*Report to the Falmouth Town Council Recommended Ordinance Amendments of Natural Resource Protection. October 15, 2009* ["Report"]) prepared by the Long-Range Planning Advisory Committee (LPAC) and Jeff Simmons, an environmental consultant formerly with Normandeau Associates and currently with Stantec, Inc. in Topsham, Maine. The Report evaluated the efficacy of the Town's natural resource protection ordinances (inclusive of wetlands, vernal pools, and natural resources in general), and made recommendations for changes in ordinance language and implementation. The following is a brief summary of the report and FCC's recommendations for adopting any of the recommendations made in the report that have not been acted on to date. Attached (Exhibit A) is the Executive Summary from the original 2009 report.

### **Summary**

The LPAC undertook a multi-year study of the Town's natural resource regulations, with a focus on wetlands and vernal pools. Part of the impetus behind this study and subsequent Report was the May 2008 wetlands/vernal pool policy adopted by the Council. The Report makes eight specific recommended changes to the Town's Zoning and Site Plan Review Ordinance as detailed in Exhibit A. The rationale behind these recommendations was to "improve protection of the most valuable and fragile vernal pools and wetlands." The Report claims that the current (at the time of the Report, and given that the Town Ordinance language does not appear to have changed regarding wetlands/vernal pools, at the present also) ordinance does not adequately protect natural resources. The Report's recommendations were based on committee deliberations with guidance and insight from natural resource professionals. It is the FCC's opinion that the methods and approach taken by LPAC in 2009 were appropriate, well thought out, and thorough. Our position on the recommendations made by LPAC at that time is summarized below.

### **FCC Position**

The Report makes eight substantive recommended ordinance changes and five administrative recommendations. These are summarized in the Report's executive summary and are dealt with in depth elsewhere in the document. The FCC recommends that if the Council is considering reviewing the Town's natural resource ordinances (as defined in the Report), then the Substantive Recommendations of the Report numbered 1-2, 6-8 should be adopted as written. Recommendations 3, 4, and 5



should also be considered but may need to be revised to become more closely aligned with recent changes in state regulation of vernal pools and wetlands under the Natural Resource Protection Act (NRPA), specifically Recommendation 3. The FCC supports the recommendations made in the original Report. The following clarifications are not meant to supplant the work done in 2008 but are intended to illuminate potentially alternative pathways to altering the Town's regulations to make them more consistent with state regulations.

### **Recommendation 3. Vernal Pool Restrictions**

Falmouth has been a leader statewide in adopting vernal pool regulations; however, Maine Inland Fisheries and Wildlife regulations under NRPA have caught up with Town regulations in recent years and may present a simpler alternative to a bespoke Town ordinance. The Report recommends the Town consider altering vernal pool regulations to increase the building setback around vernal pools and expand the buffer zone around pools. It is our recommendation that the Town adopt vernal pool regulations as they are described in the Report, but the proposed buffer adjustments and definitions should more closely align with the state level NRPA. Adopting the NRPA regulatory requirements into the Town's vernal pool ordinance would simplify the regulations of vernal pools at the Town level and provide a greater degree of certainty that pools are being protected in a manner consistent with best practices statewide.

The one variance between NRPA and current Town regulation is that the FCC recommends that the Town continue to regulate all vernal pools and not just significant pools. Additionally, the FCC recommends that any ordinance changes clearly place the burden on the developer to have the property surveyed for vernal pools by a qualified professional in accordance with MDIFW qualification requirements. As currently written, there is no requirement for surveys for vernal pools, and only the presently mapped pools are regulated by the Town. This is problematic in two respects: 1) although existing Town vernal pool maps are extensive and FCC members survey for additional pools annually, these surveys are restricted to publicly accessible land, so it is probable that there are numerous other pools on private lands subject to development; and 2) state level permitting under Site Location of Development requires conformance with NRPA for larger developments but excludes smaller scale development. FCC recommends that Falmouth adopt the NRPA vernal pool rules<sup>1</sup> for commercial and subdivision-type developments but not for smaller single-home-type developments as described more thoroughly in the Report.

### **Conclusion**

The FCC recommends the council take up again the issue of vernal pools, wetlands, and natural-resource-related ordinances that were the subject of the Report. The Town's current ordinance is still deficient in providing clear protection to sensitive natural resources. However, any adjustments to the ordinance or administrative implementation policies should be done in a manner that clarifies the process for citizens and developers and is in line with the current state level requirements.

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<sup>1</sup> <http://www.maine.gov/dep/land/nrpa/vernalpools/>

**Report to the Falmouth Town Council**  
**Recommended ordinance amendments for natural resource protection**  
**October 15, 2009**

**Executive Summary**

After nearly two years of work, the Long-Range Planning Advisory Committee recommends making a number of amendments to the town's current regulatory provisions governing the protection of certain natural resources, primarily wetlands and vernal pools. The Council Adopted Policy - May 2008, was used as the basis for drafting ordinance language. During this process the committee deviated from the policy where they found there was a different approach that would better implement the policy objectives or where the policy was too difficult or too burdensome to translate into regulation. The resulting recommended amendments are both administrative and substantive in nature.

**Substantive Recommendations**

The substantive recommendations, which would require amendments to the Zoning and Site Plan Review Ordinance and the Subdivision Ordinance, are as follows. These changes are intended to improve protection of the most valuable and fragile vernal pools and wetlands. The current language does not adequately protect natural resources that are vital to maintain water quality as well as healthy and diverse wildlife and wildlife habitat.

During their deliberations, committee members carefully weighed the protection supported by scientific research on vernal pools and wetlands in conjunction with the goal of minimizing impacts on property owners. They reviewed state and federal laws that regulate these resources and found that each agency regulates differently and at times those agencies' provisions are more or less restrictive than the proposed provisions. Both the state and federal regulatory processes allow a great deal of discretion to the permitting staff that cannot be easily transferred to the local level due to legal and practical considerations. The provisions are drafted to give clearer definitions and set design parameters to provide the permitting authority more flexibility to make informed decisions within the confines of the ordinance.

1. **Exemptions, residential.** Legally existing residential lots will be exempt from the new provisions for either the establishment of a residential use or the expansion of use on a currently developed lot. Lots approved by the Planning Board, applications in review by the Planning Board at the time of adoptions and all other lots that have been lawfully created under the subdivision exemption will be exempt. For example, a deck or garage could be added to a home near a vernal pool. A building permit would be required. Vacant lots developed for residential lots would also be exempt. State permits may still be required.
2. **Exemptions, commercial.** All lots in commercial districts that have been approved by the Planning Board are exempt. All other lots would be required to meet the provisions but compensation would be required only for the resource if altered.
3. **Vernal Pool Restrictions** - Buffers around vernal pools will increase, especially for significant vernal pools. Currently, the ordinance requires a buffer of 50 feet and a building setback of 75 feet for any vernal pool. This will increase to a buffer of 100 feet for all vernal pools and a restriction of up to 25% disturbance for the area within 250 feet of significant vernal pools. The restrictions for significant vernal pools

- mirror the state requirements. Current town regulation applies to all vernal pools; the state regulates only significant vernal pools.
4. **Wetland Restrictions** - Similar to state regulation, alteration of freshwater wetlands up to 4,300 square feet is permitted without town approval. With a change in definitions of types of wetlands to be consistent with the state, restrictions for building near less significant wetlands will be diminished. Wetlands of special significance will be regulated more stringently, requiring protection of associated upland habitat.
  5. **Area of Concern** – The amendment adds the concept of area of concern. This is the area around a resource that provides important upland habitat and includes the buffer area. The area of concern is typically larger than the required buffer and requires that the applicant use best development practices for alteration within the area of concern that is not otherwise regulated.
  6. **Alteration Allowed** - The Planning Board conceivably may approve alteration of any resource and its area of concern beyond the maximum allowances in accordance with specified criteria. If alteration is approved, the applicant must compensate by preservation of other resources or by monetary compensation.
  7. **Development Design Process** - With the introduction of flexibility to allow resources to be altered, the amendment calls for a process of site design, the Development Design Process, that requires property be designed to first avoid resources when possible, secondly to minimize impacts if avoidance is not possible, and thirdly to compensate when resources are altered. This Development Design Process will replace the Four Step Process currently required for development within the Resource Conservation Overlay District and will be applicable for all property where resources occur.
  8. **Compensation** – Compensation is required for alteration of resources and their buffer areas and may be provided either through preservation of property not part of the site development area or by monetary compensation. Preservation ratios are set at 8:1 for wetlands and 20:1 for vernal pools. Preservation areas may include resources and their associated uplands.

#### **Administrative Recommendations**

The administrative changes are intended to make the town's regulations more consistent, readable and aligned with state and federal regulations where feasible. Terminology has been updated, sections of the ordinance have been reorganized to provide clarity and minimize repetition in the ordinance and administrative processes have been amended to reflect current practices.

1. **Definitions** – Many definitions have been updated based on current science and state terminology. Others have been added to clarify terms or been moved out of the body of the ordinance and into the definitions section.

2. **Section 3.13, Resource Conservation Zoning** – Staff redrafted this section to consolidate standards and clarify requirements as well as incorporate the new provisions for natural resources.
3. **Section 4, Development Design Process** – This section has been added to the Zoning Ordinance and the Four Step Process removed from the Subdivision Ordinance.
4. **Section 5.34, Fill Material** – This section was updated and moved to a subsection of Natural Resources, 5.38
5. **Other Sections** – other sections were modified to reference the new Natural Resources section.

### **Background**

The Community Development Committee was charged by the Council in 2007 to work with the then Comprehensive Plan Advisory Committee (now the Long-range Planning Advisory Committee) to develop a process for reviewing our natural resources provisions within the Zoning and Site Plan Review Ordinance. CDC and CPAC with staff retained the services of Jeff Simmons, wetlands scientist at Normandeau Associates and Beth Della Valle, AICP, professional planner.

The process for review was designed to be a transparent and systematic process and guided by four principles: (1) start with scientific principles and best management practices, (2) be informed about state, federal and local regulations, (3) maximize protection of resources while minimizing impacts on land owners, and (4) strive to be consistent with smart growth principles.

The goal of the project was to review the existing provisions protecting natural resources and to determine whether changes, if any, were warranted based on the four principles. Committee members agreed to move through the process with no assumption that changes were required. The process resulted in a great deal of dynamic discussion with a series of debates and resulting compromises ultimately with members finding middle ground.

Conclusions that emerged from this process include:

1. Our current vernal pool regulations are ineffective in protecting the resource as the critical upland habitat is not protected, and the significant migration distances of amphibians are not addressed. Current science research supports protection of all vernal pools and their associated upland habitat. State regulation, although an improvement over the Town's ordinance, fails to completely protect the critical 100 foot area around the vernal pool.
2. Our current wetlands regulations distinguish between "high value and low value wetlands," but do not focus the attention of the ordinance on wetlands that are significant from both a water quality perspective and a wildlife perspective. The Committee found that the NRPA definition of wetlands of special significance was more appropriately focused, but still found that the state did not go far enough in

protecting the critical upland areas around these wetlands. The preservation of a 100 foot area around these wetlands would be effective in preserving both the wildlife habitat and water quality.

To balance this enhanced protection of wetlands of special significance, the committee lessened the protection of freshwater wetlands by permitting the filling of 4,300 square feet of these wetlands, and by recommending that these wetlands be protected by a structural setback, limiting where buildings can be placed, as opposed to a buffer which prohibits disturbance to natural vegetation.

3. By using a development design process, the proposed amendment will protect the resources to a greater extent than State regulations and will do so in a manner which also minimizes the impact of the regulation on the land owner. The amendment provides for the process used to create conservation developments to be applied to all development where wetlands or vernal pools are present.

In summary, LPAC and the CDC worked diligently to maintain a balanced approach during the review of the current provisions and the development of the policy. Following that method, LPAC members have produced a set of final recommendations that we believe adhere to the guiding principles and the charge of the Town Council.

