



**Robert P. Astorino**  
County Executive

Department of Planning  
Edward Buroughs, AICP  
Commissioner

January 9, 2017

Hon. Peter Parsons, Supervisor  
Town of Lewisboro  
Town House  
11 Main Street  
P.O. Box 500  
South Salem, NY 10590

**RE: PROPOSED REVISIONS TO WETLAND AND WATERCOURSE PROTECTION  
REGULATIONS OF THE TOWN OF LEWISBORO**

Dear Supervisor Parsons:

Per your request in an email to County Planning Commissioner Edward Buroughs, dated November 10, 2016, and at the request of the Lewisboro Town Board, I have reviewed proposed revisions to the Town of Lewisboro's wetland and watercourse protection regulations on behalf of the Westchester County Department of Planning. Please find our attached comments, which you requested by January 10, 2017.

If you have any questions or need additional information, please do not hesitate to contact me at 914-995-4423 or [rrd1@westchestergov.com](mailto:rrd1@westchestergov.com).

Thank you for the opportunity to review the proposed revisions to these important regulations.

Sincerely,

Robert Doscher, PWS, CPESC  
Principal Environmental Planner

Attachment

cc: Members of the Town Board, Town of Lewisboro  
Jerome Kerner, Chair, Lewisboro Planning Board  
Janet Anderson, Chair, Lewisboro Conservation Advisory Council  
Edward Buroughs, Commissioner, Department of Planning  
David Kvinge, Director of Environmental Planning  
Mary Hafter, Confidential Secretary to the Supervisor/Benefits Administrator, Town of  
Lewisboro

NOTE: Underlined text is proposed added text to the regulations; [bracketed] text is proposed deleted text from the regulations; and **bold** text is commentary from the Westchester County Planning Department.

## Page 7

- 1. ENVIRONMENTAL QUESTIONNAIRE FORM** - That form of written clearance issued by the Town Wetland Consultant, indicating that a permit, as defined herein, is not required in order to carry-out any land altering activity or use requiring a permit or approval from the Town of Lewisboro, or which may affect wetlands, watercourses and/or buffer areas as defined in this section.

**This definition appears to give the Town Wetland Consultant authority to override all of the Town's wetland and watercourse protection regulations and circumvent review of all regulated activities by Town boards, including the Planning Board, which is a proposed Approval Authority. The definition's intent should be carefully re-considered. It should then be revised to avoid any ambiguity.**

## Page 10

- 2. PLANNING BOARD** - That body established by the Town Board pursuant to the Town Law of the State of New York. The Planning Board is the municipal board empowered to grant, deny or issue conditional wetland [activity] permits pursuant to this chapter, to require the posting of bonds as necessary, or to revoke or suspend a permit where lack of compliance with the permit is established, [or to adjudicate violations and assess penalties].

**Under this revised definition, the Planning Board will no longer have the ability to review or act upon certain violations of the Town's wetland and watercourse protection regulations. It will only have the ability to revoke or suspend previously issued permits. It will not be able to review or act upon other violations not associated with a permit or non-compliant activities that continue despite revocation or suspension of a permit.**

**Definitions of "adjudicate" are to "pass judgment on" and "to sit in judgment." The revised definition for "Planning Board," therefore, would eliminate the Board's ability to hear evidence or form opinions about certain violations of the regulations it administers.**

**Removing "or to adjudicate violations and assess penalties" from this definition also conflicts with a revised paragraph, under proposed section 217-10.I (1), page 39, which requires that a "hearing" be conducted by the Planning Board, after which the Board may "modify, suspend or revoke a permit and direct the Code Enforcement Officer to issue a stop-work order, notice of violation, and/or appearance ticket...."**

**Furthermore, the Planning Board's role in certain proposed, regulated activities will be curtailed and that role, in several cases, will be afforded the Wetland Consultant. Unfortunately, the delegation of such greater authority to the Wetland Consultant will lessen the public's ability to learn about and react to these regulated activities. The transparency of governmental actions and the public's ability to review and comment on projects that may have significant environmental impacts will, therefore, be reduced or eliminated.**

3. **WETLAND; FRESHWATER WETLAND** - Those areas within the Town of Lewisboro inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, vernal pools and similar areas. Refer to Appendix A at the end of this chapter for the Technical Criteria for Wetland Identification. [All areas that comprise hydric soils and/or are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation. Refer to Appendix A at the end of this chapter for the Technical Criteria for Wetland Identification.]

**This proposed, revised definition directly conflicts with “Technical Criteria for Wetland Identification,” or Appendix A, which this definition is supposed to complement. As written, the proposed definition, which is borrowed from the state to describe state-regulated wetlands, narrowly defines wetlands as only those areas having a “prevalence of vegetation typically adapted for life in saturated soil conditions.” The definition provided by Appendix A, however, states that wetlands should not only have a prevalence of wetland (hydrophytic) vegetation but also should possess two other wetland criterion: wetland (hydric) soil and wetland hydrology.**

**Under the “Federal Manual For Identifying and Delineating Jurisdictional Wetlands” (1989), on which Appendix A is based, takes into account that, for whatever reason(s), one of the three wetland criterion – vegetation, soil and hydrology - may not be clearly present in a wetland. It then provides for a redress of those relatively rare circumstances. The “Federal Manual” spells out the technical criteria needed to identify and then delineate wetlands. The “Federal Manual” defines wetlands as “areas that under normal circumstances have hydrophytic vegetation, hydric soils and wetland hydrology.”**

4. 217-3. Applicability; [nonconforming activities].
- A. This chapter shall apply to all lands defined as "wetlands," "watercourses" and "buffer areas" as set forth in § 217-2., except that no buffer area shall be applied to a wetland that has a geographic area of less than 2,500 s.f. and that does not meet the definition of a vernal pool, as defined herein. This chapter also identifies the activities and uses which are to be regulated and/or prohibited in accordance with the findings of fact as set forth in § 217-1 of this chapter.

**This added text limits the protection afforded to wetlands that may be as large as 50 feet by 50 feet and provide significant benefits for water quality, attenuation of flooding, fish and wildlife habitat, etc. It also may limit the protection afforded wetlands that, although of an individually smaller size, may be hydrologically or ecologically part of a larger network of wetlands that provides significant watershed-wide or regional benefits. This addition, therefore, will erode the protection and, as a consequence, the functional value of smaller but critically important wetlands.**

5. Regulated activities requiring an administrative wetland [activity implementation] permit.  
(1) The following regulated activities shall require an administrative wetland [activity implementation] permit as issued by the Town Wetland Consultant [Inspector]

(c) Animal feed lots, paddocks, pastures, pens or manure storage areas located within the buffer area and designed to include stormwater drainage controls and best management practices that properly mitigate impacts associated with stormwater runoff and only when no other reasonable alternative location exists outside of the buffer area and when serving a permitted use.

**The named agricultural uses, if proposed within wetland and watercourse buffers, will require just the simpler administrative wetland permit from the Town Wetland Consultant. They could, however, significantly and adversely impact wetlands and watercourses, especially due to the degradation of surface and ground water quality. Uses such as these directly adjacent to wetlands and watercourses should be reviewed by the Planning Board. In addition, much greater guidance should be provided in the regulations regarding “stormwater drainage controls” and “best management practices.” For example, for “stormwater drainage controls,” reference should be made to the “New York State Stormwater Management Design Manual” (2015) and “Standards and Specifications for Erosion and Sediment Control” (2016). Additionally, the Watershed Agricultural Council, East of Hudson Office, should be consulted to determine appropriate guidance documents for agricultural “best management practices.”**

(d) Recreational trails, bog bridges and foot bridges located within any regulated wetland, watercourse or buffer area.

(e) Vegetation removal and/or management within any regulated wetland, watercourse or buffer area.

**Clear-cutting of wetlands and wetland and watercourse buffers could significantly and adversely impact the functional value and benefits of wetlands and the buffers next to them. Although modest vegetation removal within wetlands and buffers, also defined as “selective cutting” in the regulations, should be handled under an administrative permit, provision also should be made that requires Planning Board review and approval of clear-cutting, which also is defined in the regulations. The term “vegetation removal,” as used in this section of the regulations, will provide an unnecessary loophole whereby landowners will be allowed to clear-cut with less scrutiny as afforded under an administrative permit.**

(f) Miscellaneous activities conducted with the buffer area on residential parcels which do not require a subdivision, site development plan, or special use permit approval and which results in less than 5,000 s.f. of land disturbance.

(g) Soil investigations within the buffer area including deep and percolation tests, conducted to assess the feasibility of a septic system or stormwater management practice.

(h) Town of Lewisboro municipal or capital improvement projects located within any regulated wetland, watercourse or buffer area, with the exception of projects that result in the installation of more than 1,000 s.f. of new impervious coverage or any project that has the potential to result in an adverse impact to a wetland, watercourse or buffer area as determined by the Town Wetland Consultant.

**Under this new provision, the Town is essentially giving itself unconditional authority to cause the loss of an unlimited quantity of any wetland, watercourse or water body, regardless of its quality or functional value, without any mitigation plan to compensate for adverse wetland, watercourse, water body and buffer impacts and losses. The Town Wetland Consultant, from a realistic standpoint, should not be expected to adequately challenge Town-sponsored municipal and capital improvement projects that could cause adverse impacts to wetlands. Therefore, this provision should be deleted and all Town and other governmental projects, including school district projects, should undergo the same scrutiny as projects proposed by the private sector, town residents, etc.**

Page 29

**217-8. Standards for wetland [activity] permit decisions.**

- A. In granting, denying, or conditioning a[ny] wetland [activity] permit, the Planning Board shall evaluate wetland, watercourse and/or buffer area functions and the role of the wetland, watercourse and/or buffer area in the hydrologic and ecological system, and shall determine the impact of the proposed activity upon public health and safety; special concern, rare, threatened and endangered species; water quality and additional wetland, watercourse and/or buffer area functions listed in § 217-1 of this chapter. In this determination, the Planning Board shall take into consideration the following factors:

**Standards for permit decisions continue to be required of the Planning Board, whose authority would be reduced under the proposed revisions to the wetland and watercourse protection regulations. However, they are not required of the Wetland Consultant, whose authority would be increased under the proposed revisions. It could then be inferred that the Wetland Consultant will make his/her decisions without benefit of any written standards. This should be a worrisome as it would allow the Wetland Consultant to make decisions regarding regulated activities without considering the same set of standards that are required of the Planning Board.**

**As an aside, the standards for permit decisions would benefit from the inclusion of “mitigation sequencing.” Under “mitigation sequencing,” a three-step process is established and must be followed prior to permitting any wetland losses: Step 1. Avoid - Adverse impacts to wetlands, watercourses and water bodies must be avoided and no loss of any of these water resources is permitted if there is a practicable alternative with less adverse impact. Step 2. Minimize - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken. Step 3. Compensate - Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts. The amount and quality of compensatory mitigation may not substitute for avoiding and minimizing impacts. This sequencing process may be applied, if desired, to water resource buffers.**

Pages 41-46

- 6. The enforcement section of the existing wetland and watercourse protection regulations has been significantly altered under the proposed regulations. The Planning Board’s enforcement powers have been eliminated (as mentioned earlier, this conflicts with revised section 217-10.I (1), page 39) and fines for violations have been significantly reduced. Under the proposed enforcement section, enforcement powers will be given exclusively to the Town’s Code Enforcement Officer, who may “rely upon the professional expertise of the Town Wetland Consultant.”**

**The Code Enforcement Officer’s enforcement powers, however, come from section 92-15 of the Town Code. Under this section, however, the Code Enforcement Officer is “authorized to order, in writing, the remedying of any condition or activity found to exist in, on or about any building, structure, or premises in violation of the Uniform Code, the Energy Code, or this chapter.” The Code Enforcement Officer, therefore, is charged only with enforcing the New York State Energy Conservation Construction Code and New York State Uniform Fire Prevention and Building Code, not the Town’s wetland and watercourse regulations.**

**The Code Enforcement Officer also may not have the expertise to identify wetlands and wetland boundaries in the field and violations of the regulations protecting them.**

**Either another Town enforcement agent should be chosen or the Town Code should be revised to accommodate enforcement of the Town’s wetland and watercourse protection regulations by the Code Enforcement Officer. The Code Enforcement Officer, if he/she is directly charged with detecting and pursuing violations of the regulations, also should receive adequate training in wetland science and the identification of wetland boundaries in accordance with the wetland and watercourse regulations.**

**Page 46**

**7. 217-13. General powers of the Planning Board.**

In order to carry out the purposes and provisions of this chapter, and in addition to the powers specified elsewhere in this chapter, the Planning Board shall have the following powers:

B. To consult or contract with expert persons or agencies in reviewing a permit application. [or violation action.]

[C. To hold hearings and subpoena witnesses in the exercise of its powers, functions, and duties provided for by this chapter.]

**These proposed deletions further weaken the Planning Board’s authority and strip it of any enforcement powers regarding the Town’s wetland and watercourse protection regulations. As a result, they are contrary to section 217-10.I (1), page 39, which allows the Planning Board to conduct a “hearing” and, in response to the hearing, “modify, suspend or revoke a permit and direct the Code Enforcement Officer to issue a stop-work order, notice of violation, and/or an appearance ticket.”**