

TITLE 5. INLAND WETLANDS AND WATERCOURSES REGULATION

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*History*

<u>Revision</u>	<u>Authorizing Actions</u>	<u>Description</u>
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***TITLE 5. INLAND WETLANDS AND WATERCOURSES REGULATION*****CHAPTER 1. GENERAL PROVISIONS****§ 1. Declaration of Purpose**

Tribal Council Resolution, TCR061997-01 OF 01, which adopted an Inland Wetland and Watercourses Regulation declared that:

- a. The Mashantucket Pequot Tribal Nation (MPTN) is committed to preserve and protect the inland wetlands and watercourses on the Mashantucket Pequot Tribal Lands.
- b. The purpose of this Inland Wetlands and Watercourses Regulation is to regulate activities on the Mashantucket Pequot Tribal Lands that affect inland wetlands and watercourses.
- c. The goal of the Inland Wetland and Watercourses Regulation is to balance the need to protect its natural resources for future generations with the need for social and economic growth.

**§ 2. Legal Authorities**

- a. Federal Recognition - The Mashantucket Pequot Tribe was recognized in 1983 by Congressional legislation (Pub.L 98-134, § 9, Oct. 1St, 1983 97 Stat 855, Title 25 U.S.C.A. § 1751-1760).
- b. Tribal Authority to Regulate Inland Wetlands and Watercourses
  - (1) The Mashantucket Pequot Tribe, pursuant to its inherent sovereignty and federal law, possesses the authority for the regulation of environmental quality and sustainability within the exterior boundaries of the Mashantucket Pequot Tribal Lands.
  - (2) The Tribal Council adopted an Inland Wetland and Watercourses Regulation (IWWR) in furtherance of the sovereign right of self-governance of the Mashantucket Pequot Tribe.
  - (3) Title 14 of Mashantucket Pequot Tribal Law, the "Land Use Law," established a Land Use Commission (LUC) charged with carrying out all tasks related to the regulation of Land Use activities within Mashantucket.
  - (4) Tribal Council Resolution, TCR061997-01 OF 01 declared that the MPTN Land Use Commission, with the assistance of the Natural Resources Protection Program (NRP), shall enforce all provisions of the IWWR and shall issue and deny permits for all regulated activities that affect the inland wetland and Watercourses on the Mashantucket Pequot Tribal Lands. The NRP shall be responsible for obtaining any wetland permits for the Mashantucket Pequot Tribe and shall assist the Land Use Commission in its review of compliance with Tribal standards for activities impacting wetlands on tribally owned fee lands.
- c. Federal Authority

The scope of this regulation includes activities which may also be subject to the jurisdiction of the US Army Corps of Engineers (Corps) under Section 404 of the Federal Clean Water Act (33 U.S.C.A. § 1344), and/or the US Environmental Protection Agency (EPA) under Section 401 of the Federal Clean Water Act (33 U.S.C.A. § 1341). Compliance with this regulation does not relieve the applicant of additional obligations beyond the specific jurisdiction of the MPTN LUC.

### § 3. Applicability

Requirements of this title are applicable to any person who seeks to engage in a Land Use Activity within a Regulated Review Area.

### § 4. Definitions

a. As used in this title, all terms not defined herein will have the meaning as defined within 14 M.P.T.L. ch. 2, or the Clean Water Act. The specific interpretation of terms defined within the Clean Water Act may be subject to Corps or EPA policy, memoranda, and guidance. Further, the meaning of such terms may evolve through subsequently promulgated procedures or standards. Therefore, in the event that a term defined herein may become inconsistent with the term further defined within the Clean Water Act, or contradictory to the interpretation by Corps or EPA at that time, the current accepted meaning shall govern.

#### b. Definitions

- (1) "Applicant" means the Person responsible for a Land Use Activity or project or any Person designated by the Tribal Council as being responsible for completing any Land Use activities or projects.
- (2) "Commission" means the Mashantucket Pequot Tribal Land Use Commission.
- (3) "Continual Flow" means a flow of water which persists for an extended period of time; this flow may be interrupted during the low flow period of the annual hydrological cycle, June through September, but recurs in prolonged succession.
- (4) "Corps" means the United States Army Corps of Engineers.
- (5) "Critical Terrestrial Habitat" means the area within 100-750 feet of the Vernal Pool.
- (6) "Fill material" generally means, in the context of discharge of fill material, material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water of the U.S. The specific meaning shall have that as defined with Title 33 CFR 323.2.
- (7) "Intermittent Watercourse" means those waterways which are characterized by non-persistent flow. For purposes of this Regulation, intermittent Watercourses are delineated by one or more of the following characteristics:
  - (a) A defined permanent channel with the evidence of scour deposits of recent alluvium or detritus.
  - (b) The presence of standing or flowing water for a duration longer than a particular storm incident. Ordinarily, the presence of water is supported by a component, however small, of ground water outflow or exfiltration.
  - (c) The presence of, or the ability to support the growth of, hydrophytic vegetation.
- (8) "Jurisdictional Wetlands" means wetlands which are also "Waters of the United States" the precise location of which shall be determined according to the following three criteria as defined by the Corps' Wetlands Delineation Manual:
  - (a) hydrophytic vegetation,
  - (b) hydric soils, and
  - (c) hydrology.

Jurisdictional wetlands include any wetland created as compensatory mitigation for an action covered by a permit from the U.S. Corps of Engineers.

- (9) “Major Activity” means any activity, including, but not limited to the following activities which may have a major effect or significant impact on the area for which an application has been filed or on another part of the inland wetland or watercourse system:
- (a) any activity involving a deposition or removal of material which will or may have a major effect or significant impact on the Regulated Review Area or on another part of the inland wetland or watercourse system;
  - (b) any activity which substantially changes the natural channel or may inhibit the natural dynamics of a watercourse system;
  - (c) any activity which substantially diminishes the natural capacity of any inland wetland or watercourse to support desirable fisheries, wildlife, or other biological life; or to open space; or to prevent flooding, supply water, assimilate waste, facilitate drainage, provide recreation or open space; or to perform other functions;
  - (d) any activity which causes a substantial turbidity, siltation, or sedimentation in a wetland or watercourse;
  - (e) any activity which may substantially diminish flow of a natural watercourse or ground water levels of the Regulated Review Area;
  - (f) any activity which causes or has the potential to materially affect the wetland environment or the health, safety, and welfare of the Tribe; or
  - (g) any activity which destroys unique wetland or watercourse areas having demonstrable scientific, cultural or educational value.
- (10) “Mashantucket” means the Mashantucket settlement lands held in fee by the Mashantucket Pequot Tribe and the property held in trust by the United States of America for the Mashantucket Pequot Tribal Nation.
- (11) “Material” means any substance, solid or liquid, organic or inorganic, including but not limited to, soil, sediment, aggregate, land gravel, clay, bog, peat, mud, 1251 et. Seq
- (12) “Natural Resources Protection Program” or “NRP” shall mean the tribal government department (formerly the NRPD) assigned the responsibility to monitor and protect natural resources and all staff within that department with experience and qualifications suitable for executing the duties necessary to fulfill that responsibility.
- (13) “Permit” means the whole or any part of any license, certificate, approval or similar form of permission which may be required of any person by provisions of this Regulation and the Land Use Law.
- (14) “Permittee” means the person to whom a Permit has been issued under the authority of the Land Use Law or this Regulation.
- (15) “Person” means any Tribal Member, Tribal employee, individual partnership, firm, company, subcontractor or contractor, corporation, association, organization, estate, governmental entity or any other legal entity or its representative, agents or assigns. Use of the singular shall also include the plural.
- (16) “Regulated Activity” means any operation within or use of a wetland or water course involving removal or deposition of material, or any obstruction, construction, alteration of such wetlands or watercourses; or any Land Use activity or project within a wetland or watercourses that has the potential to affect the wetland environment or the general health, safety, and welfare of the Tribe.
- (17) “Regulated Review Area” means any wetlands, watercourses, or buffers as defined in this regulation on the Mashantucket Pequot Tribal Lands.
- (18) “Regulated Vernal Pool” means a vernal pool within a jurisdictional wetland which has a sufficient hydroperiod necessary to support, and does support, essential breeding habitat for

fairy shrimp, marbled salamanders, spotted salamanders, or wood frogs. For the purpose of this regulation the following criteria shall be utilized to determine whether a pool supports this essential breeding habitat:

- (a) Has never been properly surveyed for the presence of obligate VP species;
  - (b) Has been surveyed only once during the VP monitoring period and shown evidence of obligate species breeding;
  - (c) Has been surveyed for three (3) consecutive years during which any of the following had been noted during any one year,
    - (i) fairy shrimp,
    - (ii) evidence of marbled salamanders, or
    - (iii) five (5) or more egg masses of wood frog or spotted salamander,
  - (d) Has been surveyed less than ten (10) but more than five (5) times during which any of the following were noted;
    - (i) fairy shrimp,
    - (ii) evidence of marbled salamanders,
    - (iii) two (2) or more surveys showed the presence of at least five (5) egg masses of either wood frog or spotted salamander, or
    - (iv) any one survey for which at least twenty (20) egg masses of either wood frog or spotted salamander were noted.
  - (e) Has been surveyed more than ten (10) times during which any of the following were noted within the most recent ten (10) surveys;
    - (i) fairy shrimp,
    - (ii) evidence of marbled salamanders,
    - (iii) four (4) or more surveys showed the presence of at least five (5) or more egg masses of either wood frog or spotted salamander, or
    - (iv) two (2) or more surveys showed the presence of at least twenty (20) or more egg masses of either wood frog or spotted salamander.
- (19) "Regulation" means this Inland Wetlands and Watercourses Regulation.
- (20) "Soil Scientist" means an individual duly qualified in accordance with standards set by the Office of Personnel Management (formerly the U.S. Civil Service Commission) or other qualified organizations employing or setting standards for qualified soil scientists.
- (21) "Tribal Council" means the governing body of the Mashantucket Pequot Tribe.
- (22) "Upland Review Area" means land areas situated within 50 feet from the boundary of any inland wetland or watercourse.
- (23) "Vernal Pool" or "VP" means a small body of standing fresh water that is most obvious in the landscape during the spring of the year. They are usually temporary in nature. In order to meet the definition of a vernal pool, a wetland must have the following physical characteristics: (1) it contains water for approximately two months during the growing season (2) it occurs within a confined depression or basin that lacks a permanent outlet stream (3) it lacks any fish population (4) it dries out most years, usually by late summer.
- (24) "VP Envelope" means the area within 100 feet of the vernal pool's edge.
- (25) "VP Survey Period" means
- (i) 1 to 3 weeks after wood frog full chorus is heard
  - (ii) 2 to 4 weeks after the spring migration of salamanders towards pools

- (26) "Waste" means sewage or any substance, liquid, gaseous, solid or radioactive, which may pollute or tend to pollute any of the wetlands or watercourses on the Mashantucket Pequot Tribal Lands.
- (27) "Waters of the United States" means waters of the United States as defined under Title 33 CFR 328.3(a).
- (28) "Wetlands" means those areas that are 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, and similar areas as defined under Title 33 CFR 328.3(b).
- (29) "Watercourses" are rivers, streams, brooks, water ways, lakes, ponds, marshes, swamps, bogs, and all other bodies of water, vernal or intermittent, which are contained within, flow through or border upon the Mashantucket Pequot Tribal Lands or any portion thereof. This definition does not include ephemeral waters which convey flow only during a short duration in response to a precipitation event.

## CHAPTER 2. INVENTORY OF REGULATED REVIEW AREAS

### § 1. Wetland Boundaries

a. The Natural Resources Protection program shall maintain mapping of wetlands within Mashantucket and abutting property owned by MPTN. The map shall depict general boundaries for all inland wetlands and watercourses, vernal pools and the precise boundary for any previously delineated jurisdictional wetlands or regulated vernal pools.

b. The precise location of jurisdictional wetlands shall be determined according to the following three criteria: (a) hydrophytic vegetation; (b) hydric soils; and (c) hydrology as defined by the U.S. Army Corps of Engineers Wetlands Delineation Manual. Such determinations shall be made by field inspection and testing conducted by a Soil Scientist where vegetation or soil classification are required or where watercourse determinations are required, by any qualified individual(s).

c. It shall be the responsibility of the Applicant to accurately determine, map and field identify the precise boundary of any wetland.

- (1) If not previously determined, or if the Applicant chooses to confirm, the precise boundary of a wetland shall be surveyed by the Applicant.
- (2) Survey data shall be provided to the Natural Resources Protection Program including all field sketches and delineation flag point data. Flag point data shall be furnished electronically in a form suitable for inclusion in the Programs current electronic mapping platform.

d. The NRP shall amend its wetland map as more accurate information becomes available.

- (1) Any person may petition for an amendment to the map. Such persons shall bear the burden of proof for all requested map amendments.
- (2) Boundaries depicted on the NRP map shall not preclude the NRP from reaching a contrary conclusion based upon the actual character of the land, or locations of wetlands or watercourses, where such factors have been demonstrated by competent evidence to be different.

**§ 2. Regulated Vernal Pools**

a. Factors assessed when determining whether pools are Regulated VPs vary from season to season, therefore the NRP shall provide the Applicant with all applicable survey data on file. The Applicant must utilize such data when determining the presence or absence of Regulated VPs.

b. The boundary of a Regulated VP must incorporate the mean high water level during the period of March through early April. When there is no distinct topographic edge of the pool the boundary shall be determined by:

- (1) Monitoring of the pool's high water mark weekly beginning the 1<sup>st</sup> of March and ending on the 15<sup>th</sup> of April, or
- (2) In the event that such monitoring is infeasible, the boundary of the pool shall be determined by calculating the water elevation resulting from a 2.6 inch/ 24 hour duration rainfall event projected upon the estimated seasonal high ground water elevation.

**§ 3. Upland Review Area**

To ensure that all land use activities with the potential to impact wetlands or watercourses receive the critical review specified within this regulation; the Regulated Review Area shall include an upland review area which shall extend 50 feet from the edge of any wetland or watercourse.

**CHAPTER 3. REGULATED ACTIVITIES****§ 1. Activities Subject to Supplemental Review**

a. Except as provided in §3 of this chapter, all Land Use Activities proposed within the Regulated Review Area are subject to the provisions of this regulation.

b. The Land Use Commission, based on the written findings of the Natural Resources Protection Program, shall issue or deny permits according to the procedures of the MPT Land Use Law. The Natural Resources Protection Program shall advocate their recommendation during Commission deliberations.

**§ 2. Activities Requiring Corps Permit**

Projects involving placement of fill within a jurisdictional wetland also require permitting by the U.S. Army Corps of Engineers.

**§ 3. Exempt Activities**

Unless subject to a Corps permit, the following Land Use Activities are exempt from the additional requirements of this title:

- a. Conservation activities including, but is not limited to:
  - (1) Erosion and Sedimentation Control activities,
  - (2) Silviculture management practices specified within the MPTN Forest Management Plan or otherwise authorized by a MPTN Land Clearing Permit,

- (3) Invasive species management as specific with the MPTN Non-Native Plant Management Plan
- b. Outdoor recreation including the use of play and sporting areas, field trials, nature study, hiking, horseback riding, swimming, skin and scuba diving, camping, boating, trapping, hunting, or fishing.
- c. Temporary events which do not require excavation or the erection of permanent structures.
- d. Creation of stormwater management structures provided that the major component of such system will be a created wetland.

## **CHAPTER 4. SUPPLEMENTAL REVIEW REQUIREMENTS**

### **§ 1. Submission and Processing of Permit Applications**

a. Each Applicant desiring to undertake an activity specified in Chapter 4 of this regulation shall submit a Permit Application to the Land Use Commission and proceed in accordance with processes and procedures in the Land Use Law.

b. In addition to the permit application requirements specified within the Land Use Law, Applicants for an activity within a Regulated Review Area shall:

- (1) Verify the location of all wetlands, watercourses and vernal pools located within 100 feet of the proposed Land Use Activity,
- (2) Depict the regulated review area boundary, on a project site map which shows the extent of the activity,
- (3) Calculate and provide the calculated areas (in square feet) of direct and indirect impact on any Wetland/Watercourse, Upland Review Area, Regulated Vernal Pool, VP Envelope and/or Critical Terrestrial Habitat,
- (4) Provide justification, including alternative analysis, for each distinct area of impact,
- (5) Calculate the distance, if less than 500 ft. between any Regulated Vernal Pool and the closest edge of the proposed activity,
- (6) Provide recommendations for any proposed mitigation activity.

c. For good cause shown the Commission may waive or modify any of the above requirements of §1b or the Commission may require the Applicant to submit additional information if it determines that such information is necessary to properly evaluate the impact of the proposed activity.

### **§ 2. Permit Review Process**

NRP shall review each application submitted to the Commissioner that includes a Regulated Activity as defined herein and submit written findings to the Commissioner concerning the proposed regulated activity.

### **§ 3. Considerations for NRP's Written Findings**

a. Criteria for Minimal Impact Activity

In carrying out the purposes of this Regulation, the Natural Resources Protection Department shall take into consideration all relevant facts and circumstances to evaluate a Land Use Activity or project that is not considered a major activity as defined by this Regulation, including but not limited to the following:



- (1) The environmental impact of the proposed action, including the effects on the inland wetland's and watercourse's capacity to support fish and wildlife, to prevent flooding, to supply and protect surface and ground waters, to control sediment, to facilitate drainage, to control pollution, to support recreational activities, and to promote public health and safety.
  - (2) The alternatives to the proposed action, including a consideration of alternatives, which might enhance environmental quality or have a less detrimental effect, and which could feasibly attain the basic objectives of the activity proposed in the application. This consideration should include, but is not limited to, the alternative of requiring actions of different nature which would provide similar benefits with different environmental impacts, such as using a different location for the activity.
  - (3) The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, including consideration of the extent to which the proposed activity involves trade-offs between short-term environmental gains at the expense of long-term losses, or vice versa, and consideration of the extent to which the proposed action forecloses or predetermines future options.
  - (4) Irreversible and irretrievable commitment of resources which would be involved in the proposed activity. This requires recognition that the inland wetlands and watercourses of the Mashantucket Pequot Tribe are an indispensable, irreplaceable and fragile natural resource, and that these areas may be irreversibly destroyed by deposition, filling, or removal of material, by the diversion, diminution or obstruction of water flow including low flows, and by the erection of structures and other uses.
  - (5) The character and degree of injury to, or interference with safety, health or the reasonable use of property which is caused or threatened by the proposed activity, or the creation of conditions which may do so. This includes recognition of potential damage from erosion, turbidity, or siltation, loss of fish and wildlife and their habitat, loss of unique habitat having demonstrable natural, scientific, cultural or educational value, loss or diminution of beneficial aquatic organisms and wetland plants, the dangers of flooding and pollution, and the destruction of the economic, aesthetic, recreational and other public and private uses and values of aesthetic, recreational and other public and private uses and values of wetlands and watercourses to the Mashantucket Pequot Tribe.
  - (6) The suitability or unsuitability of such activity to the area for which it is proposed.
  - (7) Measures which would mitigate the impact of any aspect of the proposed regulated activity. Such measures include, but are not limited to, actions which would avoid adverse impacts or lessen impacts to wetlands and watercourses and which could be feasibly carried out by the applicant and would protect the wetland's or watercourse's natural capacity to support fish and wildlife, to prevent flooding, to supply and protect surface and ground waters, to control sedimentation, to prevent erosion, to assimilate wastes, to facilitate drainage, to control pollution, to support recreational activities and open space, and to promote public health and safety.
- b. Criteria for Decision for Major Activity
- (1) In the case of any application which involves a major activity as defined by this Regulation, a Permit shall not be issued unless the Natural Resources Protection Department finds that the proposed alteration or destruction of wetlands or watercourses is unavoidable and that a feasible and prudent alternative to the alteration or destruction of wetlands or watercourses does not exist. In making this finding, the NRPD shall consider the facts and circumstances set forth in the proceeding subsection or the results of any physical inspection for personal knowledge of this site. This finding and the reasons therefore shall be stated in the record of the decision by the Land Use Commission.

- (2) In reaching a decision on any application, which involves a major activity, the Land Use Commission shall base its decision on relevant facts, NRP's written findings and the record of the permit application review meeting. See Ch. 5, §5 of the Land Use Law. A conclusion that a feasible and prudent alternative does exist does not create a presumption that a Permit should be issued. The applicant has the burden of demonstrating that this application is consistent with the purposes and policies of the Inland Wetlands and Watercourses Regulation and the Land Use Law.
- (3) **Criteria for Activities which may affect a Regulated Vernal Pool**  
Site clearing, grading and construction activities in proximity to a vernal pool may cause secondary, indirect or cumulative effects to the function of a vernal pool as special breeding habitat. Such effects are to be minimized to the extent practicable. In preparing their written findings, the Natural Resources Protection Program shall review the productivity of the pool, consider the cumulative impact on the Critical Terrestrial Habitat, and make such recommendations as necessary to preserve a directional buffer to support the life cycle requirements of those species utilizing the pool.

## **CHAPTER 5. APPEALS, ENFORCEMENT AND MONITORING**

### **§ 1. Appeals**

Any Applicant or person who has been denied a Permit or who has had an enforcement action commenced against them pursuant to this Regulation and the Land Use Law may appeal as stipulated within the MPTN Land Use Law (M.P.T.L. Title 14).

### **§ 2. Enforcement**

The requirements of this Regulation shall be enforced by the Land Use Commission and the Natural Resources Program in accordance with Ch.9 of the Land Use Law.

### **§ 3. Monitoring**

Activities regulated by this Regulation shall be monitored by the Commission and the Natural Resources Protection Program according to Chapter 9 of the Land Use Law.

### **§ 4. Amendments**

a. This Regulation and the MPTN Inland Wetlands and Watercourses Map may be amended, from time to time, by the Natural Resources Protection Program as new information regarding soils and inland wetlands and watercourses becomes available.

b. An application filed with the Commission which is in conformance with this Regulation as of the date of the decision of the Commission with respect to such application shall not be required thereafter to comply with any change in inland wetlands regulations, including changes to setbacks and buffers, taking effect on or after the date of the Commission's decision, provided that the project is underway within one year of said change. If the project is not underway within one year of the change, said change shall apply to the project. The provisions of the subdivision shall not be construed to apply to the establishment, amendment or change of boundaries of inland wetlands or watercourses.