H2198 – An Act Relative to the Protection of Wetlands and Water Resources in Chapter 40B Applications

FACT SHEET
June 2, 2021

SUMMARY OF THE ISSUE & IMPACT OF THE CURRENT LAW ON NATURAL RESOURCES

Under Mass. General Laws Chapter 40B, Section 20-23 ("Chapter 40B"), housing developers can apply for a "comprehensive permit" and obtain waivers from municipal bylaws and regulations when they agree to set aside a certain percentage of their housing units as "low- or moderate-income housing."

This law has been in existence since 1969, and the waiver component of the statute was deemed necessary in order to make the construction of multi-family housing and deed-restricted affordable housing economically viable. Specifically, many towns have zoning bylaws that restrict or prohibit multi-family housing, or otherwise restrict housing density through minimum lot size, frontage, setbacks and other dimensional requirements.

Chapter 40B limits zoning boards' discretion to deny waivers. In towns that have not met the statutory minimum for affordable housing, a denial of waivers is presumed to be "inconsistent with local needs" and would be vacated upon a developer appeal in most cases.

> H2198 would amend Chapter 40B by eliminating that presumption, but *only* for legitimate wetland and water resource protection bylaws that specifically protect surface waters and groundwater, require attorney general approval, and are enforced by the local conservation commission. Notably, zoning boards would still be authorized to grant waivers if they determined that the waiver would not be detrimental to surface and groundwater resources. The difference between the current law and the proposed amendment is that zoning boards would have the discretion to waive the bylaws regardless of the town's status under Chapter 40B.

Impact of the Current Law on Wetlands

It is well acknowledged that human alterations to wetlands and adjacent land areas cause adverse impacts to water quality and quantities, flood storage capacity, storm damage resilience, wildlife habitat and diversity, the capacity of wetlands to sequester and store carbon, and climate change resilience.[1] Nitrogen and Phosphorus pollution from stormwater and wastewater systems associated with residential and commercial development causes a host of environmental problems, including eutrophication, which can lead to algae blooms and the attendant loss of oxygen in water and suffocation of aquatic life. Nitrogen and related contaminants are harmful to human health when ingested through drinking water.[2]

Buffer zones around wetland resource areas, such as marshland, freshwater wetlands, and streams naturally remove, or "attenuate" Nitrogen, Phosphorus, sediment, coliform bacteria, and other pollutants.

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[1] *Wetlands Buffer Zone Guidebook,* Mass. Assoc. of Conservation Commissions, June, 2019, p. 14.
[2] MACC, p. 18.

Figure 1 – MACC, p. 22

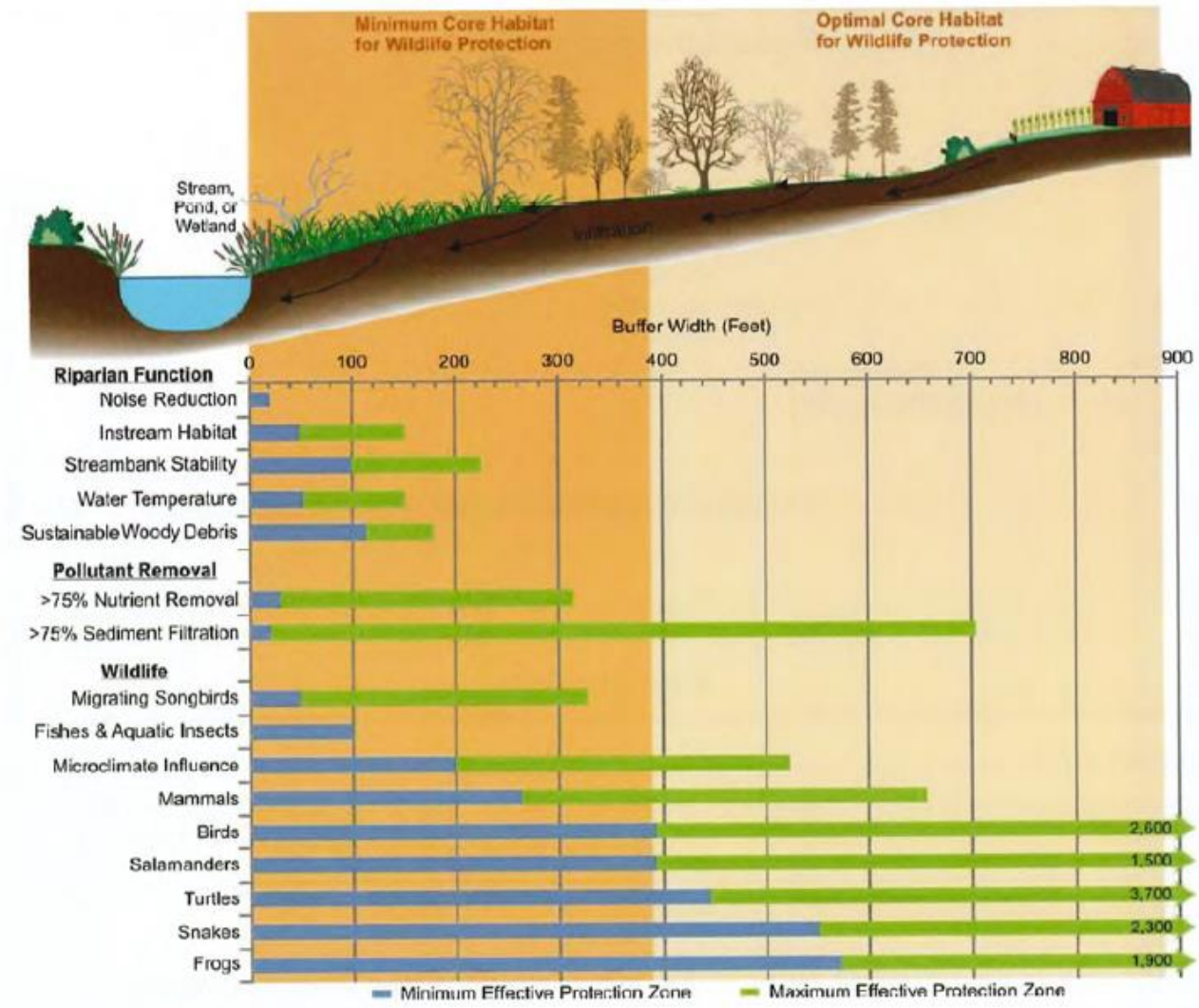


FIGURE 5: *Recommended widths of buffers to protect aquatic resources. Reproduced from: Hruby, T. (WDOE). (2013). Update on wetland buffers: The state of the science.*

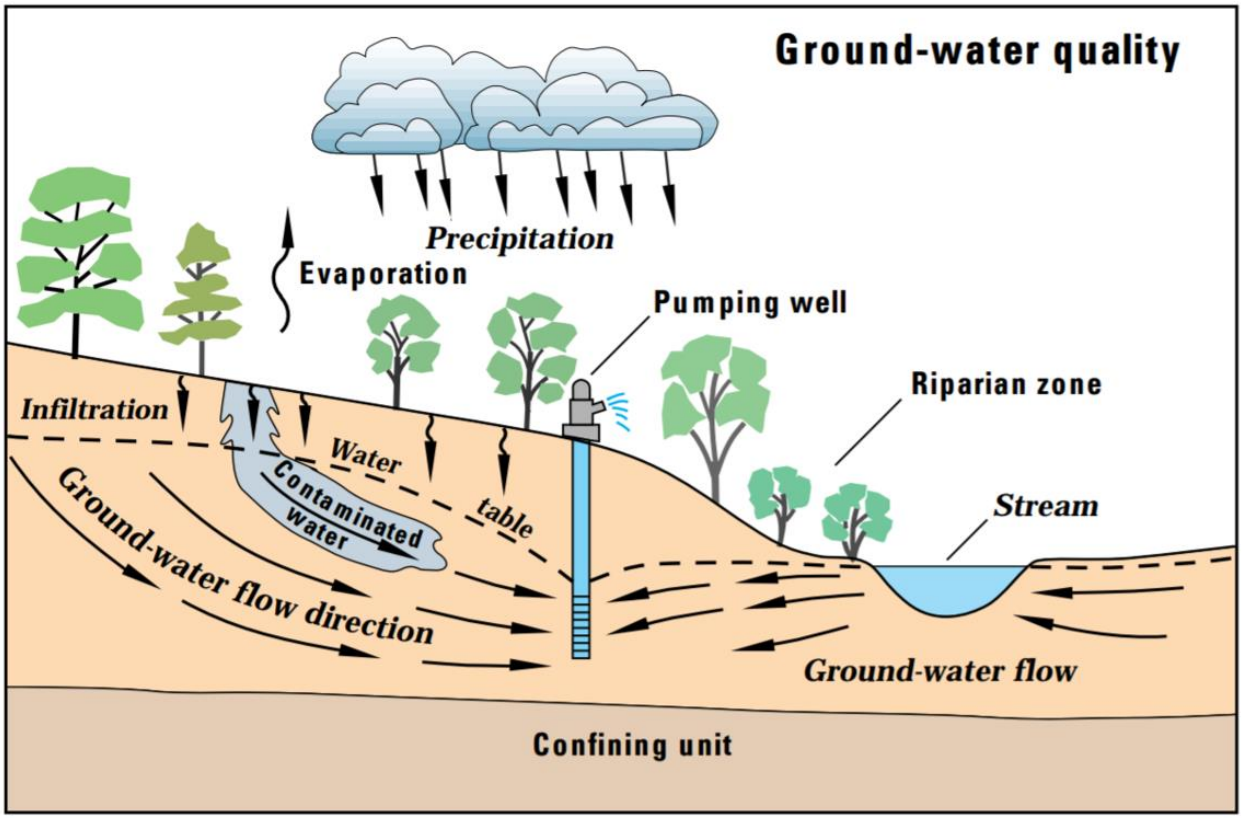
There is broad consensus in the environmental science community that the state Wetland Protection Act and its associated regulations (310 CMR 10.00) do not adequately protect buffer zones to wetland resource areas. Some resource areas, such as intermittent streams, vernal pools, and isolated land subject to flooding, do not have regulated upland buffer zones. Construction and related activity is allowed within buffer zones under state law in most cases. Many municipalities have adopted local buffer zone regulations under wetland protection bylaws governed by G.L. c. 40, § 32.

Under Chapter 40B, developers can request waivers from those bylaws and regulations (including those that mandate setbacks to wetlands and streams and prevent construction within vernal pool habitats) to build on these otherwise-protected buffer areas.

Impact of the Current Law on Drinking Water

State regulations governing water resource protection are also woefully inadequate to protect drinking water supplies, which are more and more vulnerable to contamination as land around them gets developed with septic systems and stormwater infiltration systems. State law imposes setbacks between septic systems and wells that are located on the same property, but not from wells located on adjacent or downgradient properties. The state setback requirements also do not differentiate between a septic system serving one house with four bedrooms, versus one serving an apartment complex with 90 bedrooms.

Figure 2 – USGS, *Pesticides in Groundwater*[3]

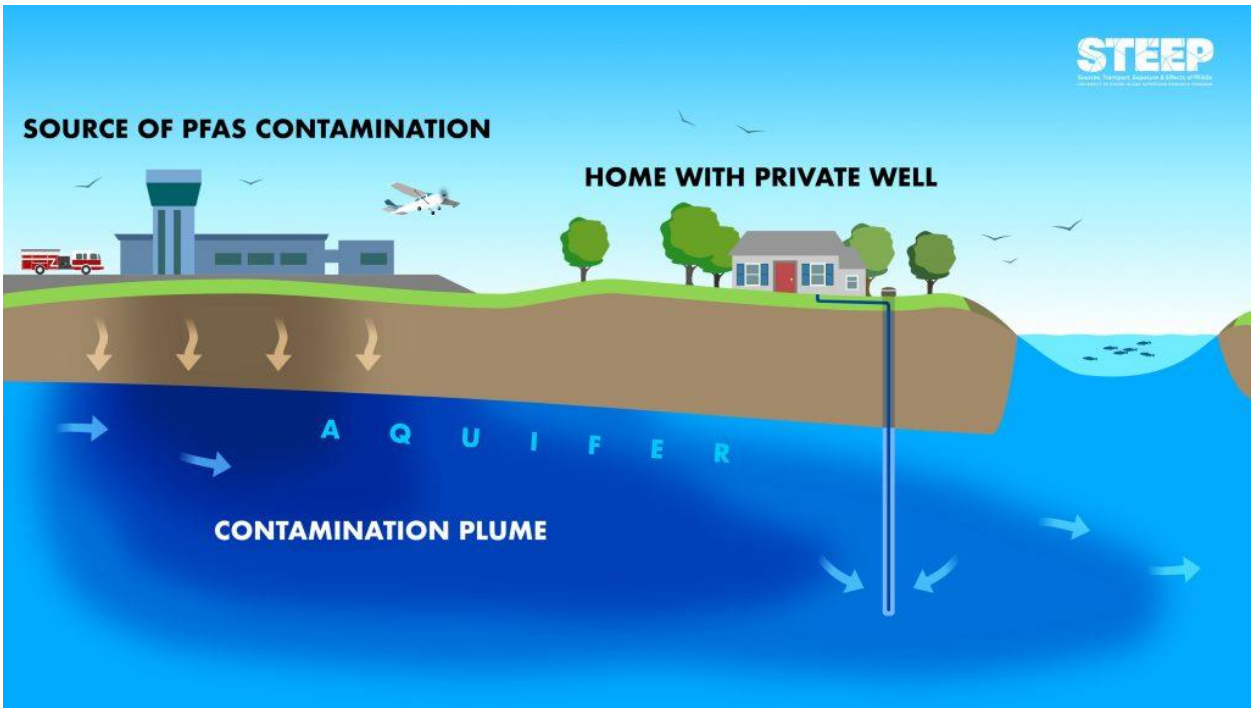


Many municipalities, especially those without town-wide municipal water delivery systems or that are not served by the MWRA, have adopted stronger bylaws to protect the groundwater that supplies their drinking water. As more and more towns across Massachusetts discover hazardous levels of PFAS and

[3] https://www.usgs.gov/special-topic/water-science-school/science/pesticides-groundwater?qt-science_center_objects=0#qt-science_center_objects, June 2, 2021.

other chemicals in their municipal water supply, local efforts to prevent further contamination become even more crucial.

Figure 3 – University of Rhode Island, *Sources, Transport, Exposure and Effects of PFAS*[4]



As with wetland bylaws, zoning board are generally powerless to deny waivers from water resource protection bylaws under Chapter 40B in towns that have not yet achieved their affordable housing quotas. However, unlike minimum lot sizes and other zoning dimensional standards, natural resource protection bylaws do not have the effect of making affordable housing uneconomic; they simply protect the environment.

ANTICIPATED RESISTANCE AND REBUTTAL

Chapter 40B developers and others who are commercially engaged in the Chapter 40B program might argue that any fiddling with the statutory waiver benefit is antithetical to the statute's overriding public policy objectives of creating as much affordable housing as possible. Some may argue that even modest changes like this amendment could be a slippery slope, emboldening critics to weaken the statute and make it harder to build affordable housing.

As noted above, there is a material distinction between blanket zoning restrictions prohibiting multi-family housing, and regulations that restrict septic systems and other pollution sources that threaten the environment and water resources. Chapter 40B was designed to break down exclusionary zoning practices, not weaken environmental protection. Environmentally-protected land is generally less expensive to acquire, making it more attractive to developers who can use Chapter 40B to obtain waivers from the same restrictions that make the land cheap. Requiring developers to justify their

[4] https://web.uri.edu/steep/communities/cape-cod/, June 2, 2021.

environmental waivers will naturally steer good housing projects towards more appropriate development sites.

Developers might argue that requiring compliance with environmental regulations will make affordable housing more costly to build. The economic viability of affordable housing projects is a function of unit density – having enough market-rate units to make up for the losses on the affordable units. Any negative economic impact from the applicability of environmental requirements can be offset by incremental density increases. Further, developers can still obtain waivers if they can demonstrate that the bylaw's environmental purpose can still be achieved.

Importantly, a 40B project's pollutant load to a well or aquifer can often be measured empirically, to allow planners and developers to set reasonable density limits on a site-by-site basis. Therefore, the risk of misappropriation of environmental bylaws to block affordable housing is low.