

CHAPTER 172 -- WETLANDS

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CHAPTER 172 -- WETLANDS

HISTORY: Adopted by the Town of Mashpee, 2-1-88 Special Town Meeting, approved 3-16-88.¹ Amendments noted where applicable.

GENERAL REFERENCES

Conservation lands - See Ch. 173.

Zoning - See Ch. 174.

§172-1. **Purpose.** The purpose of this Chapter is to protect the Wetlands, related water resources and adjoining land areas in the Town of Mashpee by prior review and control of activities deemed by the Conservation Commission likely to have significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, water pollution control, fisheries, shellfish, wildlife habitat and biodiversity, rare species habitat including rare plant species, recreation, agriculture and aquaculture values (collectively, “the wetland values protected by this chapter”.) This Chapter is intended to utilize the Home Rule authority of this municipality to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act, G.L. Chapter 131, Section 40 and Regulations thereunder, 310 CMR 10.00.

History: Amended 10-2-1995 ATM, Article 11, approved by Attorney General on 12-1-1995.

§172-2. **Jurisdiction.** Except as permitted by the Conservation Commission or as provided in this bylaw, no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas: any freshwater or coastal wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; lakes; ponds; streams; creeks; beaches; dunes; estuaries; the ocean; lands under waterbodies; lands subject to flooding or inundation by ground water or surface water; lands subject to tidal action, coastal storm flowage, or flooding; lands within 100 feet of any of the aforesaid resource areas; rivers; and lands within 200 feet of rivers (collectively the “resource areas protected by this bylaw”). Said resources shall be protected whether or not they border surface waters.

History: Amended 5-6-1997, ATM, Article 33, approved by Attorney General on 9-25-1997.

§172-3. **Exceptions.**

A. The permit and application required by this chapter shall not be required for maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph or other communication services, provided that written notice has been given too the Commission prior to commencement of the work, and provided that the work conforms to performance standards in regulations adopted by the Commission.

¹ Editor’s Note: This bylaw superseded former Ch. 4, Art. 4.3, of the 1980 Code, Rules and Regulations Regarding Wetlands.

- B. The permit and application required by this chapter shall not be required for work performed for normal maintenance or improvement of land in agricultural use, provided that written notice has been given to the Commission prior to the application of any agricultural chemical, and provided that the work conforms to the performance standards in regulations adopted by the Commission.
- C. The normal application and permit prior to commencement of work (as described in other sections of this Chapter) shall not be required for emergency work. Emergency work may go forth under an emergency project approval, provided that:
- (1) The work must be certified by the Commission or its Agent and some other agency of the Commonwealth or the Commissioner of the Department of Environmental Protection, as necessary for the protection of the health and safety of the public.
 - (2) The emergency work must be performed within 30 days of issuance of an Emergency Certificate by the Commission and shall be limited to the place designated on said Emergency Certificate. Emergency work shall be further limited to only work/activities deemed necessary to abate the emergency.
 - (3) Prior to the start of work, or within 48 hours thereafter, a plan and/or written narrative describing the nature of the emergency work must be submitted to and approved by the Commission or its Agent.
 - (4) No emergency work may begin until after an on-site meeting with the Mashpee Conservation Agent/Assistant Conservation Agent or a designated representative of the Commission.
 - (5) At this on-site meeting, the Agent/Assistant Agent or other designated representative of the Commission may impose conditions (relating to work/construction methodology) deemed necessary to protect the wetland values of Chapter 172 of the Mashpee Code. If so, said conditions will be provided in writing at the time of said on-site meeting, or as soon thereafter as possible. Failure to agree to or follow these conditions shall be due cause for stopping all work.
 - (6) Upon failure to meet the above requirements, the Commission may order all such work stopped and, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.
 - (7) A permit application, as per normal procedures as described in other sections of this Chapter, may be required by the Commission at any time from the commencement of work until 60 days thereafter. Said application, if required, shall address the emergency work and/or restoration/mitigation work deemed necessary to protect the wetland values of Chapter 172.

History: Amended 10-6-1997, ATM, Article 13, approved by Attorney General on 3-9-1998.

- D. Other than as stated in this section, the exceptions provided in the Wetlands Protection Act, MGL C. 131, §40, shall not apply.

§172-4. Application for Permits and Requests for Determination.

- A. A written application shall be filed with the Commission to perform activities regulated by this chapter affecting resource and adjacent areas protected by this chapter. The application shall include such information and plans as are required by the rules and regulations of the Commission, and such application shall be amended to include such further information and plans as may subsequently be deemed necessary by the Commission upon review to describe proposed activities and their effects on the environment. No activities shall commence without receiving and complying with a permit issued pursuant to this chapter.

History: Amended 10-3-1994 ATM, Article 20, approved by Attorney General on 1-18-1995.

- B. The Commission may accept as the application and plans under this chapter the following:

History: Amended 10-7-1991 ATM, Article 19, approved by Attorney General on 1-7-1992.

- (1) An Administrative Review - Level 1 application, including a request for determination of applicability (Form 1 of 310 CMR 10.99) and a form as required by the rules and regulations of the Commission. [Such form will require by Massachusetts regulations, 310 CMR 10.05(3)(b)(1), notice in a local newspaper of the required hearing.]
 - (2) An Administrative Review - Level 2 application, including a request for determination of applicability (Form 1 of 310 CMR 10.00) and a form as required by the rules and regulations of the Commission. [Such form will require, by Massachusetts regulations, 310 CMR 10.05(3)(b)(1), notice in a local newspaper of the required hearing and abutter notification as prescribed in §172-5A(2) of the Mashpee Code.]
 - (3) A notice of intent (Form 3 of CMR 10.00) filing as prescribed in 310 CMR 280.21 through 280.25 and Chapter 172 of the Mashpee Code and its regulations.
- C. Any person desiring to know whether or not a proposed activity or an area is subject to this chapter may, in writing, request a determination from the Commission. Such a request for determination shall contain data and plans specified by the regulations of the Commission.
- D. At the time of an application or request, the applicant shall pay a filing fee specified in regulations of the Commission. This fee is in addition to that required by the Wetlands Protection Act, MGL C. 131, §40. The Commission

may waive the filing fee on an application or request filed by a government agency.

§172-5. Notice and Hearings.

A. Notification.

History: Amended 5-7-1991 ATM, Article 20, approved by Attorney General on 1-7-1992.

- (1) Any person filing an Administrative Review - Level 1 application with the Commission shall, after being given written notice by the Commission of the time and date of the required hearing, pay a fee as required by the Commission to have notice of said hearing posted, not less than five (5) days prior to said hearing, in a newspaper of general circulation in the Town of Mashpee. Said notice shall be in a form prescribed by the Commission, shall specify the time and date of said hearing, shall describe the proposed activity and the location thereof and shall state where the application and plans may be examined by interested parties.
- (2) Any person filing an Administrative Review - Level 2 application with the Commission shall, after being given written notice by the Commission of the time and date of the required hearing, and in addition to the requirements of Subsection A(1) above, notify all immediate abutters (those abutters whose property physically adjoins the property of the applicant) of said hearing. Said notice shall be by certified mail, return receipt requested, and shall be received by said abutters no less than five (5) days prior to the date of the hearing. Said notice shall be in a form prescribed by the Commission, shall specify the time and date of said hearing, shall describe the proposed activity and the location thereof and shall state where the application and plans may be examined by interested parties. The Commission and/or its agent, at its discretion, may require the applicant to notify (in the same aforementioned manner) additional property owners, to include all property owners within one hundred (100) feet of the boundary of the property on which the work is proposed, according to the most recent records of the Assessors, including those property owners across a way or a body of water and in another municipality. If such additional notification is deemed necessary by the Commission, notice of such shall be provided to the applicant with the written notice of the time and date of the hearing for said request for determination of applicability.
- (3) Any person filing a notice of intent with the Commission shall, after being given written notice by the Commission of the time and date of the hearing required, notify all property owners within one hundred (100) feet of the boundary of the property on which the work is proposed, according to the most recent records of the Assessors, including those property owners across a way or a body of water and in another municipality, of said hearing. Said notice shall be by certified mail, return receipt requested, and shall be received by said abutters no less than five (5) days prior to the date of the hearing. Said notice shall be in a form prescribed by the Commission, shall specify the time and date of said hearing, shall

describe the proposed activity and the location thereof and shall state where the application and plans may be examined by interested parties. The Commission and/or its Agent, at its discretion, may require the applicant to notify (in the same aforementioned manner) additional property owners, to include all property owners within three hundred (300) feet of the boundary of the property on which the work is proposed. If such additional notification is deemed necessary by the Commission, notice of such shall be provided to the applicant with the written notice of the time and date of the hearing for said notice of intent.

- B. When the filer of a request for determination is other than the owner, the notice and copy of the request shall also be mailed to the owner.
- C. The sworn affidavit of the applicant, or his/her representative, as to such notification, together with a copy of the notice, a list of addresses and return receipts, shall be filed with the Commission prior to the hearing.
- D. The Commission shall conduct a public hearing within twenty-one (21) days after receipt of a complete application or request for determination. Notice thereof, at the expense of the applicant, shall be published in a newspaper of general circulation in the Town not less than five (5) business days prior to the hearing.
- E. No such application shall be deemed complete until all other obtainable local permits and licenses for the proposed activity have been issued and copies thereof filed with the Commission. In the event of a demonstrated hardship, the Commission may waive this requirement upon request of the applicant.
- F. The Commission shall issue its determination or an order of conditions concerning the proposed activity within twenty-one (21) days after the close of the public hearing. The public hearing may be continued by the Commission, with the consent of the applicant, to a date certain announced at the hearing, for the receipt additional information or plans deemed necessary by the Commission from the applicant or others or for comments and recommendations of boards and officials as provided in §172-6. In the event that an applicant objects to a continuance or neglects to furnish information requested by the Commission, the hearing shall be closed, and the Commission shall act upon such information as is before it.
- G. The Commission in an appropriate case may combine the hearing under this chapter with that conducted pursuant to the Wetlands Protection Act, MGL C. 131, §40.

§172-6. Coordination With Other Requests. Any person filing an application or a request for determination with the Commission shall provide such notice thereof at the same time to Town agencies as prescribed by regulations of the Commission. The applicant or his/her representative shall furnish a sworn affidavit as to such notification.

§172-7. Permits, Determinations and Conditions.

- A. If the Commission, after a public hearing, determines that the activities which are the subject of the application are likely to have significant or cumulative effect upon the wetland values protected by this chapter, the Commission, within twenty-one (21) days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the Commission shall impose conditions which the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions.

History: Amended 10-2-1995 ATM, Article 10, approved by Attorney General on 12-1-1995.

History: Amended 5-6-1997 ATM, Article 34, approved by Attorney General on 9-25-1997.

- (1) Lands within 100 feet of specific resource areas, and lands within 200 feet of rivers, are presumed important to the protection of these resources because activities undertaken in close proximity to wetlands, rivers, streams, lakes, ponds, creeks, estuaries, the ocean and/or other resource areas have a high likelihood of adverse impact upon them, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of activities. These adverse impacts from construction and use can include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality, and loss of wildlife habitat. The Commission therefore may require that the applicant maintain a continuous naturally vegetated buffer strip (NVBS) within the aforesaid 100 foot (or 200 feet for rivers) area with the aim of minimizing adverse impacts to resource areas and the wetland values of Chapter 172. (This requirement will not preclude access pathways through said NVBS, as determined by regulations for this Chapter.) Said NVBS shall be a minimum of 50 feet in width unless the applicant convinces the Commission (as per the provisions of Section 12 of this Chapter) that:
 - (a) The NVBS (or part of it) may be disturbed and/or diminished without harm to the values protected by this Chapter, or
 - (b) That reducing the scope of work/alteration is not possible.
- (2) Areas within 2000 feet of rivers.
 - (a) Notwithstanding the above, in the case of areas within 200 feet of rivers, no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this Chapter, has proved by a preponderance of credible evidence that there is no practicable alternative to the proposed project with less adverse effects, and, as well, should there be no such practicable alternative, that such activities, including proposed mitigation measures, will have no significant adverse impact on the areas or values protected by this bylaw. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purposes,

logistics, existing technology, costs of the alternatives, and overall project costs.

(3) Waivers of Requirements.

History: Amended 10-2-2000 ATM, Article 25, approved by Attorney General on 1-12-2001.

History: Amended 5-7-2001 ATM, Article 27, approved by Attorney General on 8-17-2001

(a) The Commission may, at its discretion for good cause shown, grant waivers from the requirements of one or more of the regulations and/or performance standards pursuant to Chapter 172. Such waivers are intended to be granted only in rare and unusual cases, and only when resource protection would be enhanced relative to preexisting conditions.

(b) A waiver shall be granted only for the following reasons and conditions:

[1] It shall be the responsibility of the applicant to provide the Commission with the necessary information and plans which the Commission may request in writing and/or at a public hearing, in order to enable the Commission to ascertain impacts to the wetland values of Chapter 172. The failure of the applicant to furnish any information which has been so requested shall result in the denial of a request for a waiver pursuant to this subsection.

[2] The Commission may grant a waiver from the regulations for Chapter 172 when portions of the Buffer Zone between the proposed project and adjacent resource area(s) are previously altered and/or are not within the control of the project owner/applicant, such as public or semi-public pedestrian and vehicular access-ways.

[3] The Commission may grant a waiver from the regulations for Chapter 172 only upon a finding by the Commission that a project will improve the natural capacity of a resource area to protect the wetland values identified in Section 1 of this Bylaw. Further, any waiver pursuant to this sub-section, will only be granted when: (1) best-available technologies/methodologies are utilized to improve the natural capacity of any resource area to protect the relevant wetland values inherent to the site, and (2) any adverse effects on wetland values are minimized, to the greatest extent feasible, by carefully considered conditions. However, no such waiver may be permitted for any project which could have an adverse effect on rare wildlife species.

[4] The Commission may impose additional conditions in granting a permit pursuant to this Section, as deemed necessary or desirable to protect the wetland values of Chapter 172. Said conditions may include (but are not limited to) imposing limits on project size or effect, or requiring other compensatory measures, such as wetland replication, wildlife habitat enhancement and pollution attenuation measures.

- B. The Commission is empowered to deny a permit for failure to meet the requirements of this chapter; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the wetland values protected by this chapter; and where no conditions are adequate to protect those values.
- C. Unless a certificate of compliance is issued, a permit shall expire three (3) years from the date of issuance. Notwithstanding the above, the Commission, in its discretion, may issue a permit expiring five (5) years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one-year period, or, in the Commission's discretion, a longer period of time, provided that a request for renewal is received in writing by the Commission prior to expiration.
- D. For good cause the Commission may revoke or modify a permit issued under this chapter after public notice and public hearing and notice to the holder of the permit. The time requirements specified in §172-5 shall be applicable.
- E. The Commission, in an appropriate case, may combine the permit or other action on an application issued under this chapter with the order of conditions issued under the Wetlands Protection Act.
- F. The Commission shall require that a permit issued hereunder (an Order of Conditions) be recorded in the Registry of Deeds, or, if the land affected thereby be registered land, in the registry district of the Land Court for the district wherein the land lies. The work proposed in said Order of Conditions shall not begin until the holder of the Order of Conditions provides documentation in a form prescribed by the Commission as proof that said Order of Conditions has been recorded.

History: Amended 10-3-94 ATM, Article 20, approved by Attorney General on 1-18-95.

- G. Certificate of Compliance

History: Amended 10-3-94 ATM, Article 21, approved by Attorney General on 1-18-95.

- (1) Upon completion of the work performed under an Order of Conditions, the holder of the permit shall forth-with request in writing that a Certificate of

Compliance be issued, stating that the work has been satisfactorily completed. Said Certificate of Compliance shall be processed and issued in conformity with the provisions as noted in 310 CMR 10.5(90,(a) through (f).

- (2) Before any sale of property that is under the jurisdiction of a Chapter 172 Order of Conditions, the holder of said permit must either request and receive a Certificate of Compliance (as per the provisions of 1, (above) or request that the permit will be in the name of the new property-owner.
- (3) Failure to carry out the provisions of Chapter 172, Section 7-G. (2), above, shall constitute a violation of Chapter 172 and be subject to penalty as per the provisions of Section 11.F of Chapter 172.

§172-8. Promulgation of regulations. After a public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purposes of this chapter and may, from time to time, amend them. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this chapter.

§172-9. Definitions.

A. The following definitions shall apply in the interpretation and implementation of this chapter:

ALTER - Includes, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this chapter, as defined in §172-2:

- (1) Removal, excavation or dredging of soil, sand, gravel or aggregate materials of any kind.
- (2) Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns or flood-retention characteristics.
- (3) Change of drainage or other disturbance of water level or water table.
- (4) Dumping, discharging or filling with any material which may degrade water quality.
- (5) Driving of piles, erection or exterior repair of buildings or structures of any kind.
- (6) Placing of fill.
- (7) Placing of obstructions of objects in water.
- (8) Destruction of plant life, including cutting of trees.

- (9) Changing water temperature, biochemical oxygen demand or other physical or chemical characteristics of water.
- (10) Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater.
- (11) Application of pesticides or herbicides.

PERSON - Includes any individual, group or individuals, association, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to Town bylaws, administrative agency, public or quasi-public corporation or body, this municipality and any other legal entity, its legal representatives, agents or assigns.

- B. Except as otherwise provided in regulations promulgated by the Commission, all other definitions shall be as set forth in MGL C. 131, §40, and in Wetlands Protection Act Regulations promulgated by D.E.Q.E. pursuant to MGL C. 131, §40.

§172-10. Security. As part of a permit issued under this chapter, in addition to any security required by any other municipal or state board, agency or official, the Commission may require that the performance and observance of the conditions imposed hereunder be secured wholly or in part by one (1) or more of the methods described below:

- A. By a proper bond with sureties satisfactory to the Commission payable to the Town or deposit of money or negotiable securities to be held by the Town Treasurer or other undertaking of financial responsibility sufficient in the opinion of the Commission to secure compliance with the order of conditions. Such bond or deposit shall be released upon issuance of a certificate of compliance.
- B. By a conservation restriction, easement or other covenant enforcement in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of this municipality whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed. A certificate of compliance may extinguish any such restriction, easement or other covenant.

§172-11. Enforcement; Violations and Penalties.

- A. The Commission, its agents, officers and employees shall have the authority to enter upon privately owned land for the purpose of performing their duties under this chapter and may make a cause to be made such examinations, surveys or sampling as the Commission deems necessary.
- B. The Commission shall have the authority to enforce this chapter, its regulations and permits issued thereunder by violation notices, administrative orders and civil and criminal court actions.

- C. Upon request of the Commission, the Town Counsel/Board of Selectmen shall take legal action for the enforcement under civil law. Upon request of the Commission, the Chief of Police shall take legal action for the enforcement under criminal law.
- D. Municipal boards and officers, including any police officers or other officers having police powers, shall have authority to assist the Commission in enforcement.
- E. Any person who violates any provision of this chapter, regulations thereunder or permits issued thereunder shall be punished by a fine of not more than three hundred dollars (\$300.). Each day a portion thereof during which a violation continues shall constitute a separate offense, and each provision of the chapter, regulations or permit violation shall constitute a separate offense.
- F. As an alternative to criminal prosecution, the Commission may elect to utilize the noncriminal disposition procedure set forth in MGL C. 40, §21D, and the Commission may establish, by regulation, a penalty schedule for violation of this chapter, with no penalty to exceed three hundred (\$300.). The Conservation Commission Agent is empowered to take cognizance of any violation and to enforce the same by noncriminal disposition as provided for herein
History: Added 11-13-1989 STM, Article 33, approved by Attorney General on 2-16-1990.

§172-12. Burden of proof.

- A. The applicant for a permit shall have the burden of proving by a preponderance of credible evidence that the work proposed in the application will not have unacceptable significant or cumulative effect upon the wetland values protected by this chapter. Failure to provide evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.
- B. The Commission is authorized to require the applicant to pay the reasonable costs and expenses borne by the Commission (Town) for specific expert engineering and consultant services deemed necessary by the Commission to review the notice of intent and/or the request for determination of applicability, up to a maximum of two thousand five hundred dollars (\$2,500.). Said payment can be required at any point in the deliberations prior to a final decision being rendered. Said services may include, but are not limited to, wetland resource area surveys and delineations, wetland resource area reports, hydrogeological and drainage analysis, wildlife evaluation, shellfish surveys and environmental/land-use law. The Commission is hereby authorized to charge for said fee when the notice of intent and/or the request for determination of applicability proposes any of the following: five hundred (500) square feet or greater alteration of a coastal or inland wetland resource area; fifty (50) linear feet or greater of bank alteration to an inland or coastal waterway; five hundred (500) square feet or greater alteration to the buffer zone; alteration of greater than five hundred (500) square feet of land under a water body or the ocean; discharge of any pollutants into or contributing to surface or groundwater or the

wetland resource area or water control structure. Said fee shall be paid by the applicant to the Town of Mashpee. Any unused portion of said fee shall be returned by the Commission to the applicant within forty-five (45) calendar days of written request for the same by the applicant, unless the Commission decides in a public meeting that other action is necessary. Any applicant aggrieved by the imposition of or the size of the fee or any act related thereto may appeal according to the provisions of Massachusetts General Laws.

History: Added 5-7-1990 ATM, Article 38, approved by Attorney General on 10-15-1990.

§172-13. **Relation to Wetlands Protection Act.** This chapter is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act, MGL C. 131, §40, and regulations thereunder.

§172-14. **Appeal procedure.** Any applicant, owner or abutter, any person aggrieved or any ten (10) residents of Mashpee may appeal an order of the Commission under this bylaw to the Superior Court of Barnstable County within sixty (60) days following the date of issuance of the order. However, if an appeal has been made to the Southeast Regional Office of the Department of Environmental Protection, then said appeal period commence upon the date of issuance of a superseding order from D.E.Q.E. and shall continue for no more than sixty (60) days from that date (even though a further appeal has been made for a final order of conditions before an adjudicatory hearing). [NOTE: Appeals must be made within ten (10) days of the Commission's decision to the D.E.Q.E. as set forth in 310 CMR 10.05(7). The sixty-day appeal period under the local bylaw will be tolled (suspended) during this period of appeal for the superseding order.]

History: Added 5-6-1991 ATM, Article 20, approved by Attorney General on 10-15-1990².

§172-15. **Severability.** The Invalidity of any section or provision of this Chapter shall not invalidate any other section or provision thereof.

² Editor's Note: This bylaw also provided for the renumbering of former § 172-14 as § 172-15.