

**From:** Bruce Drucker <[brucedrucker@yahoo.com](mailto:brucedrucker@yahoo.com)>  
**Subject:** Fw: Herring River Restoration MOU III Revised Draft [Mr. Corbo's 6/23/17 email]  
**Date:** September 25, 2017 at 4:58:57 PM EDT  
**To:** Richard Rosenthal <[richwellfleet@comcast.net](mailto:richwellfleet@comcast.net)>, Jeff Stewart <[stewartcape@comcast.net](mailto:stewartcape@comcast.net)>, Rick Swasey <[richard.swasey@gmail.com](mailto:richard.swasey@gmail.com)>, Susan Baumgarten <[sbaumgarten@aptispartners.com](mailto:sbaumgarten@aptispartners.com)>, Susan Baumgarten <[susanmbaumgarten@gmail.com](mailto:susanmbaumgarten@gmail.com)>, Claudia Drucker <[claudiarosed@hotmail.com](mailto:claudiarosed@hotmail.com)>  
**Reply-To:** Bruce Drucker <[brucedrucker@yahoo.com](mailto:brucedrucker@yahoo.com)>

FYI & please note the TA's points that Mr. Corbo's 6/23/14 opinion predated the completion of the MOU and an updated opinion is being requested.

Bruce D. Drucker

----- Forwarded Message -----

**From:** Dan Hoort <[Dan.Hoort@wellfleet-ma.gov](mailto:Dan.Hoort@wellfleet-ma.gov)>  
**To:** Bruce Drucker <[brucedrucker@yahoo.com](mailto:brucedrucker@yahoo.com)>  
**Sent:** Monday, September 25, 2017 12:27 PM  
**Subject:** FW: Herring River Restoration MOU III Revised Draft

Hi Bruce,

Listed below is the opinion expressed by Gregg Corbo in June 2014 prior to the completion of the MOU. Much has changed since then and I've recently requested an updated opinion from Mr. Corbo.

Dan

**Daniel R. Hoort**  
**Town Administrator**  
**Town of Wellfleet**  
300 Main Street  
Wellfleet, MA 02667  
(508) 349-0300

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**From:** Gregg J. Corbo  
**Sent:** Monday, June 23, 2014 11:55 AM  
**To:** [townadministrator@wellfleet-ma.gov](mailto:townadministrator@wellfleet-ma.gov)  
**Cc:** Elizabeth Lane  
**Subject:** RE: FW: Herring River Restoration MOU III Revised Draft

Dear Harry:

I have reviewed the latest draft of the proposed Memorandum of Understanding between the Town, Truro and the CCNS, and I continue to have concerns with respect to the Town's exposure to liability as a result of proceeding further with this matter. In connection with my review of the proposed MOU, I have also reviewed the October 2012 Draft

Environmental Impact Statement/Environmental Impact Report (hereinafter referred-to as the "DEIR"), published on the Town's website.

Pursuant to the MOU, the parties are agreeing to pursue a detailed restoration plan, referred-to as "Alternative D" in the DEIR. According to the DEIR, approximately 190 properties will be physically impacted by the changes in water levels as a result of the project. Most significantly, major portions of the Chequessett Yacht & Country Club Golf Course will be flooded as a result of the project. The authors of the DEIR suggest that portions of several holes will have to be relocated and/or elevated and that use of the course will have to be curtailed while the work is going on. As to other properties, the authors of the DEIR predict that driveways, landscaping and even structures will have to be elevated or relocated, and that easements may have to be taken due to permanent flooding of certain areas. The work proposed under Alternative D will also impact public ways within the Town, some of which will have to be elevated or relocated. As a result of these significant impacts, the authors of the DEIR suggested that "a process for formal agreements between substantially affected landowners and the project proponents will be developed and will be an important component of the third Memorandum of Understanding (MOU) between the towns and Seashore". DEIR, p. 258.

Notwithstanding the importance of this issue, the third MOU does not address the significant liability issues that will arise as a result of pursuing this project, and, in my opinion, proceeding in this fashion exposes the Town to significant financial liability. For example, this Office recently represented a client in a dispute whereby the municipality restored tidal flow through a culvert resulting in a change in water elevation of approximately 13-23 feet landward. As a result of this change, the property owner claimed the loss of 3,500 square feet of lawn (on a 3.1 acre parcel) and damage to and loss of use of a dock. After three years of litigation, the case went to mediation and ultimately resulted in a six figure settlement. In this case, it is not difficult to predict that damages suffered by the golf course alone will far exceed that number.

In my opinion, the proposed MOU does not contain sufficient safeguards to protect the Town from such liability. Section 6 of the proposed MOU states that "the obligations of the Towns hereunder shall be subject to the availability of during and staff, and nothing herein shall be construed as binding the Towns to expend in any one fiscal year any sums in excess of those appropriated by Town Meeting and made administratively available for the purposes of this Agreement for the fiscal year." In my opinion, however, this language will not protect the Town from claims asserted by private property owners affected by the project. To the contrary, the same section further provides that "each party shall bear its own costs associated with its participation in this Memorandum of Understanding without reimbursement." In the absence of a provision requiring the Seashore, the Commonwealth or some other entity to indemnify, defend and hold the Town harmless with respect to such claims, it is my opinion that this provision may be interpreted as meaning that that Town can be held solely responsible for costs incurred in connection with defending such claims and paying any damages awarded, not to mention the costs it may incur in connection with damage to its own property.

Given the serious financial consequences that may arise as a result of the Town's participation in this project, I recommend that these issues be addressed in the MOU before the Town proceeds any further.

Please do not hesitate to contact me if you have any questions in this regard.

Very truly yours,

Gregg J. Corbo, Esq.  
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**From:** Harry Terkanian [<mailto:harry.terkanian@wellfleet-ma.gov>]  
**Sent:** Wednesday, May 21, 2014 10:36 AM  
**To:** Gregg J. Corbo  
**Cc:** Elizabeth Lane  
**Subject:** Re: FW: Herring River Restoration MOU III Revised Draft

Gregg:

Some time ago I had asked you to comment on a draft of the above. We now have what we believe is a final draft, subject to review by Wellfleet and Truro's counsel and the Seashore's solicitor and approval by the parties. So I'd ask you to review and comment on the current draft which is attached.

Harry

Harry Sarkis Terkanian, Town Administrator  
Town of Wellfleet  
300 Main Street  
Wellfleet, MA 02667  
(508) 349-0300

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**From:** Gregg J. Corbo [<mailto:GCorbo@k-plaw.com>]  
**To:** [harry.terkanian@wellfleet-ma.gov](mailto:harry.terkanian@wellfleet-ma.gov) [<mailto:harry.terkanian@wellfleet-ma.gov>]  
**Cc:** Elizabeth Lane [<mailto:ELane@k-plaw.com>]  
**Sent:** Thu, 01 Aug 2013 08:40:47 -0500  
**Subject:** FW: Herring River Restoration

Hi Harry. It was a pleasure speaking with you yesterday. To confirm our telephone conversation, at this point I have only conducted a cursory review of the proposed Memorandum of Understanding between the Town, Truro and the CCNS. Based on that cursory review, I have identified the following issues that, in my opinion, should be followed up on before the Town goes further:

1. The proposed MOU contemplates the creation of a private non-profit corporation to manage the construction and initial operations of the project. In my opinion, to ensure that it can accomplish the parties' objectives, such an entity would have to have the ability to raise and expend funds, acquire property interests, enter into contracts and sue and be sued in its own name. Although I have not researched this issue, I am concerned that the parties lack the legal authority to create such an entity in the absence of special legislation. I am also concerned that the use of a private corporation for this purpose will raise issues under the Conflict of Interest and Procurement laws. Therefore, before expending Town resources on this issue, I recommend that you follow-up with representatives of the CCNS to see if its legal counsel has provided an opinion on these issues.
2. In 2012 I attended several meetings of the various stake holders to examine the potential liabilities associated with the project, with particular emphasis on potential liability as a result of flooding low lying private properties. As a result of those meetings, as well as my own independent research, I am unaware of any clearly established immunity that would shield the Town from such claims. In my opinion, the proposed MOU does not adequately address the issue of which party or entity is going to be responsible for funding the defense of any such claims and any judgments resulting therefrom. Therefore, I recommend that you discuss this with the other parties to ensure that the Town will be sufficiently indemnified.
3. In my opinion, the proposed MOU does not adequately define the financial responsibilities of the parties. Section 8 of the MOU states that it "shall not be construed as binding the Towns to commit their resources beyond what is financially and managerially possible within the limits of their municipal budgets." In my opinion,

this language is too vague to protect the interests of the Town. Rather, it is my opinion that, at this stage, the Town requires an agreement that clearly spells out its financial responsibilities with respect to permitting and construction of the project and operations upon completion.

Please do not hesitate to contact me if you would like me to follow-up on any of these issues or any other issues arising from this project.

-Gregg

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**From:** Elizabeth Lane  
**Sent:** Monday, July 29, 2013 3:07 PM  
**To:** Gregg J. Corbo  
**Subject:** Fw: Herring River Restoration

Gregg, can you take a look at this and let me know what issues you see there? Thank you.

*Connected by DROID on Verizon Wireless*

-----Original message-----

**From:** Harry Terkanian <[harry.terkanian@wellfleet-ma.gov](mailto:harry.terkanian@wellfleet-ma.gov)>  
**To:** Elizabeth Lane <[ELane@k-plaw.com](mailto:ELane@k-plaw.com)>  
**Cc:** Dennis Murphy <[capeliz10@hotmail.com](mailto:capeliz10@hotmail.com)>  
**Sent:** Mon, Jul 29, 2013 18:47:16 GMT+00:00  
**Subject:** Herring River Restoration

Betsy:

I don't know how involved you have been in this project in the past, so excuse me if this lengthy email covers familiar ground.

The planning for the restoration of the Herring River estuary has been in process since about 2007. Essentially, the project proposes reconstructing the Herring River dike to allow significantly greater tidal flow than at present as well as some improvements to additional structures. Prior to the construction of the dike in 1909 the Herring River estuary consisted of about one thousand acres of salt marsh. Currently, the existing tide gates restrict the tidal action so that the existing salt marsh encompasses about 85 acres. The project goal is to restore the salt mars to about 875 acres. A draft EIR has been prepared and a final EIR is due this fall. There have been two previous MOU's between the Town, Truro and the Seashore which culminated in the draft EIR. A third MOU (MOU III) is in progress and needs to accompany the final EIR this fall. It will identify the preferred alternative (alternative D which is the most extensive restoration) and will define the structure of the entity to be created to manage the design, permitting, construction and initial operation of the flood control structures. (The expectation is that once the system reaches a steady state this entity may dissolve and the infrastructure will then to be maintained and managed by the owners of the assets.)

This may be the largest salt marsh restoration project in New England.

The Town's concerns include possible liability associated with flooding or damage to low lying properties and the (possibly mutually exclusive) concern of insuring that the principal stakeholders (Wellfleet, Truro, CCNS and possibly the Commonwealth) retain control of the project.

Attached is the most recent draft of MOU III and the meeting notes from the last meeting. Let me know if you need more documents or information. (The draft EIR itself is massive). I'd like your comments and recommendations in time to include them in a review of this draft and any related issues with the Selectmen at their August 13th meeting (the working group will be meeting again the following week.)

Harry

Harry Sarkis Terkanian, Town Administrator  
Town of Wellfleet  
300 Main Street  
Wellfleet, MA 02667  
(508) 349-0300

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