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MEMORANDUM

TO: Herring River Concerned Citizens
From: William C. Henchy
Date: April 14, 2017
RE: Liability for Damage / Trespass to Private Property from Proposed Herring River Restoration

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This office has been requested to analyze the question of who, if anyone, would be legally responsible for the flooding of various private properties which is expected to result from the proposed Herring River Restoration project.

It is my opinion that primary responsibility would rest with the Town of Wellfleet, which is the owner of the dike at Chequessett Neck Road. Any flooding of private land will be proximately caused by the operations of the proposed tide gates at that location. Secondary to Wellfleet's liability, it appears to me that all signatories to the "Final Memorandum of Understanding" regarding this project, i.e. the Towns of Wellfleet, Truro, and the Cape Cod National Seashore / U.S. Department of the Interior have assumed some level of liability by virtue of the tasks outlined in that document.

This Memorandum will outline the basis for my opinions in some detail.

1. The Project

The Towns of Wellfleet, Truro, and the U.S. Department of the Interior are the project proponents of a proposed project described as the "Herring River Restoration Project". That project is described in great detail in the project proponents' Final Environmental Impact Report dated May, 2016. This document is available on-line here: https://parkplanning.nps.gov/document.cfm?parkID=217&projectID=18573&documentID=73471 The Federal Record of Decision, signed by the U.S. Department of the Interior's Northeast Regional Director is available on-line here: https://parkplanning.nps.gov/document.cfm?parkID=217&projectID=18573&documentID=75340 The Massachusetts Secretary of Environmental Affairs' MEPA Certificate on the Final Environmental Impact Report is available on-line here: http://170.63.40.34/EEA/emepa/mepadocs/2016/072016em/sc/eir/14272FEIR%20Herring%20River%20Restoration%20WELLFLEET%20TRURO.pdf

The proposed project is described as "Preferred Alternative D" in those documents. In summary, the proposal is to restore, to the extent practicable, the natural tidal range, salinity distribution and sedimentation patterns of the entire 1,100 acre Herring River estuary. Through "adaptive management", the stated goal of the project is to rebuild the Chequessett Neck dike owned by Wellfleet, and to raise the tidal levels within the estuary to "mean high water spring tides up to 5.6 feet and coastal storm driven tides of 7.5 feet in the lower Herring River" . Within the Mill Creek sub-basin mean spring tides will rise to 4.7 feet and storm driven tides to 5.9 feet in Mill Creek. At present, according to the FEIR, the dike restricts mean spring tides within the lower Herring River to 2.4 feet (See FEIS Introductions and Page 2, Figure 1.2).

The project proponents explain in the FEIS that the proposed raising of the tidal level in the lower Herring River and its tributaries by the expected 3.1 feet daily (more during storms) will result in the eventual restoration of the estuarine system, with caveats and explanations far too numerous to detail in this Memorandum.

2. Impacts to Private Property and Roads[1]

A. Low Lying Roadways

The FEIR indicates that there will be substantial flooding and impacts to "low-lying roadways" within the restoration area. Specifically, some 9,397 linear feet of paved road and an additional 10,727 linear feet of sand / fire roads will be subject to periodic flooding. The FEIR indicates that these roads would need to be raised or could be closed during periodic inundation. (See FEIR Table ES-1).

The roads to be flooded regularly as a consequence of the project are High Toss Road (3,299 feet flooded monthly, and another 1,017 feet flooded twice daily), Pole Dike Road, (3,105 feet flooded twice daily), Old County Road (289 feet flooded in Wellfleet and another 196 feet flooded twice daily in Truro), Bound Brook Island Road (3,700 feet flooded twice daily), Mill Creek Lane (100 feet flooded twice daily), Ryder Beach Road in Truro (55 feet flooded twice daily) and numerous fire / sand roads. Other sections of road will be flooded during storm events, which cannot be predicted as daily or monthly events, but which are nevertheless frequent and episodic events during Cape Cod winters (See MEPA Certificate, pg. 15-16).

The twice daily and twice monthly flooding of these roads presents an obvious issue of access to properties along them.

B. Private Properties

The FEIR describes in some detail the various impacts to private properties that will result from the project. Though the document seeks to break them down into various categories (See FEIR

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[1] All of the impacts described in this Memorandum are as described for Alternative D, the so-called "preferred alternative" described in the FEIR. This is the alternative the project proponent has indicated that will go forward and which was approved by the Secretary of Environmental Affairs in his MEPA Certificate dated July 15, 2016, EEA File No. 14272.

Volume I pages 287—291) the fact of the matter is that the impacts fall into two categories; (1) properties that will be flooded and (2) properties that are now in upland areas but will become subject to various regulatory programs, i.e. the Wetlands Act and the Riverfront Act, because of the additional flooding that will occur from the project.

I note that the project proponent has stated publicly that impacts to private properties must be mitigated only if the impact is to a structure. There is no basis in the law for such a conclusion; the Towns of Wellfleet and Truro and the Cape Cod National Seashore would have no more right to flood private property without permission than they would have to park Town DPW trucks in private driveways.

In addition, the project proponent stated in a public forum on April 4, 2017 that it has the right to flood "historic wetlands"[2] without the landowner's consent. There is no basis in the law for this assertion either.

According to the FEIR (See Table 4-23) 179 private property owners will experience flooding on their land as the result of the project. Whether it is characterized as frequent, infrequent, will affect cultivated areas, uncultivated areas, or structures, these properties will experience flooding as the result of the project.

In addition, another 169 property owners will be subject to the Riverfront Act's regulatory requirements that at present are not subject to that law.

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[2] The term "historic wetlands" has no regulatory or legal meaning. In point of fact a search of the entire FEIR and the MEPA Certificate reveals that the term does not even appear in the document.

The concept of "tidelands" under G.L. c. 91 and its regulations at 310 CMR 9.00 includes filled land below the historic mean high water mark, provided that such land (outside a designated port area) is within 250 feet of flowed tidelands or the first public way (See G.L. c. 91 sec. 1) but that has no relation to the concept of "historic wetlands" as articulated by the project proponent. The fact that structures or fill in historic tidelands requires a Chapter 91 license in many cases is not a basis for stating that the government may flood private land with impunity, even if some flooded areas constitute historic tidelands subject to Chapter 91 licensing. The presumptive boundaries of historic tidelands, and therefore c. 91 jurisdiction, have been extensively mapped by MassDEP. See http://www.mass.gov/anf/research-and-tech/it-serv-and-support/application-serv/office-of-geographic-information-massgis/datalayers/tidelands.html

This is not a small matter; any person whose property is subject to the Riverfront Act must demonstrate through an alternatives analysis that their proposed project cannot be re-designed to minimize or eliminate riverfront impacts. A general description of the law can be found here : http://www.mass.gov/eea/agencies/massdep/water/watersheds/rivers-protection-act-q-and-a.html

In general terms, according to the Executive Office of Environmental Affairs' website,

> *"the Rivers Protection Act clearly states that projects be located outside the Riverfront Area if they will result in significant adverse impacts to the eight purposes (of the statute) and when a practicable alternative is available. If a practicable alternative is available that could locate a project out of the Riverfront Area it should be chosen. If there is no practicable alternative to locating the project in the Riverfront Area, impacts must be minimized and mitigated so there are no significant adverse impacts to the Riverfront Area. If it is determined that the project will have significant adverse impacts to the Riverfront Area, the project should be denied. "*

The number of landowners who will both be flooded and have a new regulatory burden, according to the FEIR, totals some 322 property owners. Though the document is not completely clear, it appears that, in addition to these 322 properties, another 162 Wellfleet landowners who are not within Riverfront jurisdiction will have a new significant regulatory burden imposed on them after the project goes forward and their lands are brought within Riverfront Act jurisdiction.

Finally, individual landowners may be subject to flood insurance requirements following the establishment of new FEMA mapping following restoration and landward movement of high water lines.

3. Management of the Proposed Project

Restoration of the estuary will be accomplished primarily through the construction of a new dike at Chequessett Neck Road with a greatly increased volume of flow, and the

ability to raise the water levels up to the proposed new heights. The remainder of the project is essentially a series of actions, with some subsidiary flood control structures, to handle the physical and ecological effects of permitting vastly increased volumes of tidal flow into the estuary.

Management of the project is established by a certain "Final Memorandum of Understanding (MOU III)" between the Towns of Wellfleet, Provincetown and the Department of the Interior dated September 1, 2016.

Under the MOU III, the Town of Wellfleet will continue to own the Chequessett Neck Road Dike and Bridge, and will own the new tide gates. The Cape Cod National Seashore will own the proposed new Mill Creek dike and tide gates. Any new tide gate installed at Pole Dike Road would be owned by Wellfleet.

A management structure consisting of a "Herring River Executive Council" consisting of two members of the Selectmen of the Towns of Wellfleet and Truro, the Town Administrators of each Town, and the Superintendent of the Cape Cod National Seashore or designee. This Committee shall make all decisions relative to the changes in the tide gate levels throughout the project after receiving a recommendation from the advisory "Herring River Restoration Committee" created by the MOU III. The Herring River Restoration Committee contains "representation" from the Towns of Wellfleet and Truro, the Cape Cod National Seashore, the Massachusetts Division of Ecological Restoration, USFWS, U.S. Natural Resources Conservation Service, and NOAA.

Thus, the Towns of Wellfleet, Truro and the Cape Cod National Seashore will dictate control of the tide levels within the estuary by altering tide gates owned by the Town of Wellfleet. The MOU III makes no provision whatsoever for apportionment of liability to third parties, such as flooded landowners, amongst the three parties.

LIABILITY ISSUES

1. The Intentional Character of the Proposed Flooding of Private Land

It is important to point out that the *raison d'etre* of the entire project is to flood the Herring River system with vast quantities of salt water in order to bring about the "restoration" of the system as it is supposed to have existed prior to the construction of the Chequessett Neck Road dike, which has restricted tidal flow in the estuary. The stated intention of the project is to raise the average daily tidal levels in the system by several feet, with anticipated stormwater levels to rise even higher.

It therefore follows that the flooding of private properties is a natural and intended consequence of the project.

Logically, the project <u>must</u> result in some degree of flooding in order to introduce the required volume of salt water into the present system so that it may revert to a salt-water estuary—otherwise, the entire purpose of the project is defeated. It is entirely fair to state that the project proponents intend to flood a certain number of private properties. Such flooding logically must happen in pursuit of the project's stated goals.

In order to avoid the public backlash that will inevitably ensue, the proponents have engaged in various tactics to avoid facing this issue head-on. These tactics include such claims as asserting that anybody with "historic wetlands" may be flooded without consent. The proponent seeks to minimize the extent of flooding that is intended by asserting that only properties whose "structures" will be affected by the project would be entitled to object; and by insisting on "private discussions" of these issues with affected landowners out of respect for their "privacy". That may be so, but this approach also keeps these issues out of the public conversation.

As will be discussed below, this project, to the extent that it causes flooding to private lands, constitutes a direct and apparently intentional invasion by the government (both Federal and local) of private property. Large numbers of trees on private property may be expected to die as the freshwater environment in which they live is taken over by salt water, as intended by the project proponents. These facts result in considerable liability on the part of the governmental bodies responsible for such flooding, and may also be a proper basis for injunctive relief against these bodies from causing such harms.

The Town of Wellfleet has apparently been warned explicitly by its Counsel that it faces great potential liability (See Wicked Local Truro article from July 15, 2014, see http://capecod.wickedlocal.com/article/20140715/NEWS/140718089 (copy attached), but has chosen to participate as a project proponent and a signatory to the Final Memorandum of Understanding dated September 1, 2016 nevertheless. Such action may be a basis, among other things, for a claim of negligence against the Town, or for inferring intent, as discussed below.

2. **Landowner (Town of Wellfleet) Liability**

The Town of Wellfleet is the owner of the Chequessett Neck dike and its tide gates and, under the MOU III will engage in the opening of the tide gates. As such, it has the most direct and proximate liability for any flooding that occurs from the operation of the tide gates. Property owners are liable for harm that results from activities that occur on their land under various theories such as nuisance, trespass, and particularly in light of the clear warning that flooding and liability will ensue, negligence. All of these claims lie in tort, and therefore would have to be prosecuted as set forth in G.L. c. 258, the Massachusetts Tort Claims Act.

To the extent that the proposed project will result in the intentional destruction of trees—which is exactly what is proposed in order to convert freshwater wetlands and uplands to salt water estuaries—the Town of Wellfleet will have probable liability for up to three times the value of any trees which are destroyed in tort pursuant to G.L. c. 242 sec. 7. The proper measure of damages is the restoration cost of the trees destroyed or

the value of the timber (at the Plaintiff's option), which will be trebled if the Court finds that the destruction was intentional. See *Galvin v. Eckman*, 71 Mass. App.Ct. 313 (2008).

The fact that the government would be the agent of the flooding also imposes a unique basis of liability under the Constitution of the United States and the Massachusetts Constitution. Simply put, the government may not physically invade one's property without paying compensation, a doctrine that dates from the quartering of British Soldiers in Boston, mandated by the King's Intolerable Acts of 1774 which were one of the triggers of the Revolutionary War. John Adams, the author of the Massachusetts Constitution specifically prohibited the quartering of soldiers in Article XXVII of the Massachusetts Declaration of Rights in 1779. Article X prohibited the taking of any part of a person's property for public use without consent. The Fifth Amendment to the U.S. Constitution, proposed by James Madison and adopted in 1791 prohibits the taking of private land for public use without just compensation.

There are several types of "takings". The most direct, and the most common, is a direct condemnation, which in Massachusetts is prescribed in accordance with G.L. c. 79. An often claimed, but generally unsuccessful assertion is the so-called "regulatory taking", where the government by regulation takes away all practical use of private property, leaving the owner with only the burden of paying taxes on the land. [3] The third type of taking is when the government physically occupies private property.

The United States Supreme Court has discussed this issue in some detail in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case a New York statute required property owners to permit the installation of Cable television equipment on private land. The Court stated the following:

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[3] Recently, however, a Barnstable County jury awarded a private landowner over $950,000.00 to a Falmouth landowner whose land was reduced in value by over 92% by the action of the Falmouth Conservation Commission. That judgment is currently on appeal (personal communication with Plaintiff's counsel)

> In short, when the "character of the governmental action," *Penn Central,* 438 U.S. at 438 U. S. 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.
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> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, *cf. Andrus v. Allard,* 444 U. S. 51, 444 U. S. 65 66 (1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.
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> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v. General Motors Corp.,* 323 U. S. 373, 323 U. S. 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. (footnote omitted) *See Kaiser Aetna,* 444 U.S. at 444 U. S. 179-180; *see also* Restatement of Property § 7 (1936).
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> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, *see Andrus v. Allard, supra,* at 444 U. S. 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.
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> Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. As 458 U. S. *supra,* indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. *See* Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

The project proponent appears to rely for its position on an older Supreme Judicial Court decision involving the damming of the Charles River. In that case, a tidal flat that was "for the most part, just uncovered at low tide" would be covered to a depth of 8 feet after the construction of the dam. The landowner claimed a taking, and the Court disagreed

because the tidal flats were subject to a public easement of navigation under the Colonial Ordinances of 1641-47. The Court was explicit in stating "if the effect (of the dam) were to permanently inundate the Plaintiff's house and lands above the high water mark, the purpose of the legislature would leave the effect a taking that must be paid for". *Crocker v. Champlin*, 202 Mass. 437 (1909). This case has little bearing on the present facts—the proposed flooding will not be to tidal flats barely covered at low tide in a busy urban harbor where the right to navigate is critical. The proposed flooding here will in fact flood lands laterally above the high water mark as described in the FEIR. In such a case, the Court is clear that this would constitute "a taking that must be paid for".

Moreover, the public right of navigation is subject to a test of reasonableness, and it is far from clear that flooding private marshes, freshwater wetlands and private uplands for the purpose of restoring a salt water estuary has any reasonable connection to any reasonable public right of navigation. See *Wellfleet v. Glaze,* 403 Mass. 79, (1988). Finally, even if the land proposed to be flooded is within a historic tideland, such lands above the historic low water line (i.e. historic tidelands) may be owned in fee simple, and the public rights therein lost by prescription, i.e. the open continuous, and exclusive occupation of such land by 20 years or more, subject only to the reserved right of navigation. *Boston Waterfront Development Corp. v. Commonwealth,* 378 Mass. 629, 637 (1979).

There is no navigational interest implicated in the flooding of the estuary to turn it from freshwater to salt. Given the over 100 year period of ownership since the construction of the Chequessett Neck Dike, and the fact that the present water levels have been maintained since 1984 (MEPA Certificate pg. 3), proving prescriptive extinguishment of the public rights above the historic low water mark, other than the right of navigation, if any, would not be difficult.

In summary, it is my opinion that the Town of Wellfleet will likely be liable in tort for nuisance, trespass, negligence, and intentional damage to trees in violation of G.L. c. 242 sec. 7. It is my opinion that any physical occupation of property by floodwater

above the high tide mark will constitute a taking for which compensation must be paid. As I have noted, I am not alone in this judgment, as evidenced by the advice given to Wellfleet by its own Town Counsel who is well known to me and is a very able attorney (see attached). Further, the fact that Wellfleet has been advised by its counsel that it will likely incur liability to private landowners and proceeds with the project anyhow is excellent evidence that (1) its actions are intentional and (2) it has failed to use reasonable care to avoid causing harm to private landowners. Both of these conclusions are very helpful in the event that a landowner is forced to litigate these matters in the future.

3. Liability of Truro and the U.S. Department of the Interior Cape Cod National Seashore

The Town of Truro and the Cape Cod National Seashore would have liability very similar to that of Wellfleet, but on a somewhat different basis. The MOU III which governs the operation of the project indicates that any decisions to open the tide gates throughout the project would be taken by the HREC, which is comprised of Wellfleet, Truro, and the Cape Cod National Seashore. Therefore, Truro and the Seashore have undertaken a duty with respect to the tide levels established within the estuary, and will be liable for damages caused in the exercise of that duty. Moreover, the Cape Cod National Seashore will have ownership of the proposed Mill Creek tide control structures, and therefore as owner, will have liability in the same manner as the Town of Wellfleet.

4. Damages

The ordinary measure of damages is an amount that will be sufficient to place the Plaintiff in the same position as he or she was prior to the offending conduct. In the case of damage to real estate, such damages would include diminution in value, loss of use, and loss of rental income, all as determined by a competent real estate appraisal expert. In the case of damage to trees, as noted above, such damages include the loss of timber value or the replacement value of the trees, trebled if the Court determines that the damage was intentional. As noted above, it appears reasonably clear that one of the

main objects of the entire project is to cause the destruction of fresh-water vegetation including trees, and to replace the destroyed vegetation with salt dependent species. Under these circumstances, a finding of intentional conduct is certainly within the real of reasonable possibility.

5. Injunctive Relief

In addition to damages, a Court may grant injunctive relief to prevent trespass, to prevent or abate a nuisance, or perhaps to prevent damage to vegetation and trees. Takings may not be enjoined except in extraordinary circumstances, as the remedy is ordinarily compensation from the government body effecting the taking.

CONCLUSION

The Herring River Restoration Project is an undertaking by the governmental bodies of Wellfleet, Truro, and the U.S. Department of the Interior to flood the Herring River system with salt water in order to bring about its "restoration" as a salt-water estuary. As an integral and foreseeable consequence of this flooding, these government bodies will directly flood hundreds of property owners, miles of roadway, and a number of structures on private land. Hundreds of additional property owners will become subject to the Massachusetts Riverfront Act, the Wetlands Act, and perhaps will be required in the future to purchase Federal Flood Insurance.

The Town of Wellfleet has been advised by its Town Counsel that the project will "expose the town to significant financial liability".

I concur with the opinion of Wellfleet's Town Counsel. In my opinion, all three governmental bodies have significant financial exposure to hundreds of property owners who will experience flooding as the direct, proximate, foreseeable and intended consequence of this project. The Town of Wellfleet's exposure is clear, as it is the owner of the tide control structures that are intended to produce the flooding, but Truro and

the Cape Cod National Seashore are participants in the decision to open the tide gates by virtue of the management structure contained in the MOU III, and because they are the project's proponents. It is also reasonable to conclude that a Court could grant injunctive relief against the entire project if these matters are not addressed and an affected landowner commences litigation against the project's proponents.

I am happy to address any additional matters as they arise.