

CB

July 13, 2009

RACKEMANN
STRATEGIC CONSULTING, INC.

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Honorable Ian A. Bowles, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, Massachusetts 02114

Attention: Richard Bourré - MEPA Office

RECEIVED

JUL 13 2009

MEPA

Re: Request for Advisory Opinion – Routine Maintenance
Periodic Opening of Oyster Pond – Edgartown, Massachusetts

Dear Secretary Bowles:

My client, The Pohogonot Trust (the "Trust"), is the owner of a large tract of land in Edgartown in the area known as Pohogonot, lying generally between Oyster Pond and Job's Neck Pond, including the barrier beach at Oyster Pond. Since at least 1909, the Trust and its predecessors have opened the Pond to the sea several times a year to reduce water level and maintain salinity in the Pond. I request an advisory opinion under the provisions the Massachusetts Environmental Policy Act ("MEPA") Regulations at 301 CMR 11.01(6) as to whether the periodic opening of Oyster Pond to the sea is a Routine Maintenance project and thus exempt from the MEPA review thresholds.

Background

The shareholders of the Trust are descendants of George D. Flynn and Elizabeth D. Flynn, who purchased the Pohogonot property in 1909. The Trust and its predecessors have been involved in opening Oyster Pond since George D. Flynn's purchase of Pohogonot. License No. 1219 was issued to Elizabeth D. Flynn and the Watcha Club (a riparian owner on Oyster Pond at the time) under the provisions of MGL c. 91 to cut and maintain an opening to connect Oyster Pond with the sea by the Massachusetts Department of Public Works on October 28, 1930 (the "DPW License"), and the DPW License remains in effect. The DPW License was recorded with Dukes County Registry of Deeds in Book 182, Page 181 and is included as Attachment 1. After the death of Elizabeth D. Flynn in 1951, the Pond was opened by the Flynn family and, since the death of George D. Flynn, Jr. in 1991, by the Trust. For the last two decades or more, the openings also have been made in consultation with the Edgartown Shellfish Constable.

On May 21, 2009, the Trust received an Order of Conditions (the "Order") from the Edgartown Conservation Commission to continue the routine opening of the Pond. Special Condition 10 indicates that the "...order shall be considered a maintenance permit and shall be in effect for a period of five years from the date of issue. At the end of this period, the applicant may apply for renewal." The Order (File Number SE020-1172) is included at Attachment 2, along with an

April 2, 2009, letter from the Natural Heritage and Endangered Species Program (the "NHESP") referred to in the Order. Together, the Order and the NHESP letter set stringent conditions on the opening of the Pond to protect wetland resources and endangered species. The Order has been appealed to the Massachusetts Department of Environmental Protection (the "MassDEP") by some abutters to Oyster Pond, likely as part of an unrelated access dispute. As a result, the MassDEP issued a letter on June 17, 2009 indicating that action on a Superseding Order would be stayed until MEPA review is completed. That letter is included as Attachment 3.

Project Description

Oyster Pond has been opened to the sea an average of four to five times a year for at least 100 years. The initial opening is usually in March. It often is opened again in May or June and then again in the summer or fall and as late as November or December. The timing of the opening is arranged in consultation between the Trust and the Edgartown Shellfish Constable, Paul Bagnall. He regularly samples the salinity level of the Pond. Openings are scheduled when the salinity of the water is low, when the water level of the Pond is approximately four feet above Mean Low Water, and (if possible) when the wind is from the north on a falling tide with calm seas.

The opening is dug by Watercourse Construction with an excavator, as illustrated in Attachment 4. The contractor selects a position to dig an 8-foot wide trench in the middle of the section of beach where there are no dunes, casting the excavate to the west. A small portion of beach at the Pond edge is left to serve as a dam while the channel is cut. The contractor then breaches this last area of sand to let the Pond run to the sea. The water running from the Pond pulls sand from the channel into the sea, eventually resulting in a channel about fifty feet wide. The Pond continues to drain until the water level is near to Mean Low Water, and the next high tide brings ocean water into the Pond. The first trench of the year runs roughly 200 feet between the ocean and the Pond shore. Subsequent openings routinely are dug along the remains of the previous opening channel. This usually requires a trench only about 100 feet long. The opening to Oyster Pond closes naturally due to the prevailing easterly currents along the south shore of the island. This occurs in as few as three days, but may take a month or more.

Effects of Opening Oyster Pond

The opening of Oyster Pond by excavating a channel across the barrier beach has been performed for at least a century, and probably for centuries more. It is generally believed that the English settlers learned to cut such openings from the Native Americans, and openings routinely have been cut at Edgartown Great Pond, Tisbury Great Pond, and Chilmark Great Pond, in addition to Oyster Pond. These openings are for the purpose of maintaining the salinity of the ponds, supporting salt water fish and shellfish (oysters, clams, blue crabs, white perch, etc.). These openings also aid the migration of herring and eels to the fresh water coves of the ponds. By its very name, it appears that Oyster Pond has had a salt water/brackish ecosystem since the earliest settlement of Martha's Vineyard. Oyster Pond routinely has been

opened to the sea to maintain the salt water/brackish ecosystem for well over 100 years. Failure to open Oyster Pond over a period of time would alter the salt water/brackish environment that currently exists.

Maintaining the level of Oyster Pond by opening it to the sea has the ancillary benefit of protecting upland banks and Pond shores from flooding, preventing intrusion of groundwater into septic systems and leaching fields, and preventing flooding of cellars of the houses around the Pond, which will eventually occur if the Pond is not opened. The periodic flushing of Oyster Pond from the opening also helps to remove nitrogen from the Pond. Just these concerns have led to the issuance of two Emergency Orders to open the Pond this year (on April 16 and June 5, 2009) and may lead to others, given the unusual rainfall rate so far this summer. The two Emergency Certification Forms, which lay out the negative effects of high water in the Pond, are included as Attachment 5.

Finally, the opening of the Pond has few adverse effects and those are well-mitigated. The wetland vegetation communities around the Pond are adapted to the current salinity regime and, in fact, would be altered by failing to open the Pond. There are no public water supplies in the vicinity of Oyster Pond. The residences around Oyster Pond are served by private wells, which are set back from the shore. Groundwater hydrology is such that the fresh water aquifer runs to the Pond (even more so when the water level is lowered from the opening), and there is no known intrusion of salt water into private wells from Oyster Pond. And, as can be seen in Attachment 2, the conditions attached to the Order protect wetland resources and the shore birds that use the beach area for nesting.

Discussion

Granting of a Superseding Order of Conditions for the opening of Oyster Pond ordinarily would meet the MEPA review threshold at 301 CMR 11.03(3)(b)1.a for "alteration of a coastal dune, barrier beach or coastal bank." However, 301 CMR 11.03 indicates that "[t]he review thresholds do not apply to...Routine Maintenance;" which is defined at 301 CMR 11.02 as:

"Any maintenance work or activity carried out on a regular or periodic basis in a manner that has no potential for Damage to the Environment or for which performance standards have been developed that avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable."

This definition establishes a two-prong test. The first prong asks whether the activity has been carried out on a regular or periodic basis. The second prong asks whether the activity has the potential to damage the environment or, alternatively, whether it is subject to appropriate performance standards. As regards the first prong, the opening of Oyster Pond, as noted, has been carried out regularly several times a year for over 100 years. As regards the second prong, the opening has little or no potential for Damage to the Environment, since the Pond has long since adapted to the salinity regime supported by the opening. In fact, failure to open the

Secretary Ian A. Bowles
July 13, 2009
Page 4

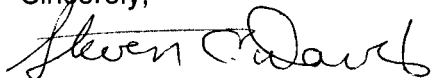
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Pond would have much more serious negative effects than continuing the historic practice. Even if there were a small potential for negative effects, the opening meets the second prong of the test because it is the subject of performance standards in the Order and in the NHESP letter which protect resources to the maximum extent practicable. It is to be expected that these performance standards will be reflected in the Superseding Order of Conditions, as well.

I hope that you will agree with this analysis, issue an Advisory Opinion that the opening of Oyster Pond is Routine Maintenance, and allow the MassDEP to act on the Superseding Order promptly without the requirement for filing an Environmental Notification Form.

I would be pleased to answer any questions that you may have on this Request and to provide any additional information that you may need. I can be reached by telephone at 617/951-1146 or by e-mail at sdavis@rackemann.com.

Sincerely,



Steven C. Davis

Enclosures: Attachment 1 – DPW Chapter 91 License No. 1219
Attachment 2 – Order of Conditions SE020-1172 and
NHESP Letter of April 2, 2009
Attachment 3 – MassDEP Letter of June 17, 2009
Attachment 4 – Plan and Profile of Oyster Pond Opening dated March 16, 2009
Attachment 5 – Emergency Certification Forms of April 16 and June 5, 2009

Cc: Eric L. Peters, Pohogonot Trust
Brian M. Hurley, RS&B
Tena Davies, MassDEP SERO
Scott Melvin, NHESP
Paul Bagnall, Edgartown Shellfish Constable
Edgartown Conservation Commission
Richard Friedman and the Trustees of the Oyster Pond EP Trust

SCD/sd

Secretary Ian A. Bowles
July 13, 2009

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ATTACHMENT 1
DPW Chapter 91 License No. 1219

Dukes County Registry of Deeds Book 182, Page 181

mortgagee Eugene J. Fitch, Jr., do hereby release to the mortgagee all rights of dower and homestead and other interests in the mortgaged premises. Witness our hands and seals this seventeenth day of March, 1931.

Raymond J. Peltz

Eugene Fitch, Jr. seal

May S. Fitch seal

Commonwealth of Massachusetts

Dukes County ss. March 17, 1931. Then personally appeared the above-named Eugene J. Fitch, Jr. and May S. Fitch, and acknowledged the foregoing instrument to be their free act and deed, before Mildred Penear, Notary Public. My commission expires Dec. 29, 1932. Groll seal. Edgartown, March 17, 1931 at 3 o'clock and 0 minutes P.M. Received and entered with Dukes County Deeds Book 182 Page 179.

Attest Philip J. Norton

Register

no. 1219. The Commonwealth of Massachusetts
 whereas, the Watcha Club and Elizabeth D. Flynn, of Edgartown, in the County of Dukes County and Commonwealth aforesaid, have applied to the Department of Public Works for license to cut and maintain an opening through the beach from Oyster Pond to the Atlantic Ocean in the town of Edgartown, and have submitted plans of the same, and whereas due notice of said application, and of the time and place fixed for a hearing thereon, has been given, as required by law, to the selectmen of the town of Edgartown, Now, said Department having heard all parties desiring to be heard and having fully considered said applica-

tion, hereby, subject to the approval of the Governor and Council, authorizes and licenses the said Watch Club and Elizabeth D. Flynn, subject to the provisions of the ninety-first chapter of the General Laws and of all laws which are or may be in force applicable thereto, to cut and maintain an opening through the beach from Oyster Pond to the Atlantic Ocean in the town of Edgartown, in conformity with the accompanying plan no. 1219. An opening through the beach may be cut and maintained to connect Oyster Pond with the Atlantic Ocean, as shown in cross section on said plan. This license is granted subject to the laws of the United States.

The plan of said work, numbered 1219, is on file in the office of said Department, and duplicate of said plan accompanies the license, and is to be referred to as a part hereof. Nothing in this license shall be so construed as to impair the legal rights of any person. This license shall be void unless the same and the accompanying plan are recorded within one year from the date hereof in the Registry of Deeds for the County of Dukes County. In witness whereof, said Department of Public Works have hereunto set their hands this twenty-eighth day of October, in the year one thousand, hundred and thirty.

J. C. Lyman } Department
Richard K. Hale } of Public Works

The Commonwealth of Massachusetts
Boston, Oct. 29, 1930

Approved by the Governor and Council.

William L. Reed, Executive Secretary.

Edgartown, Mass., Nov. 29, 1931 at 11 o'clock and 30 minutes P.M. received and entered with Deeds.

County Records Book 122 Page 181

Attest

Philip J. Norton

Register.

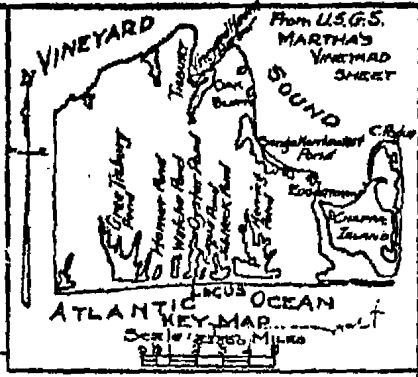
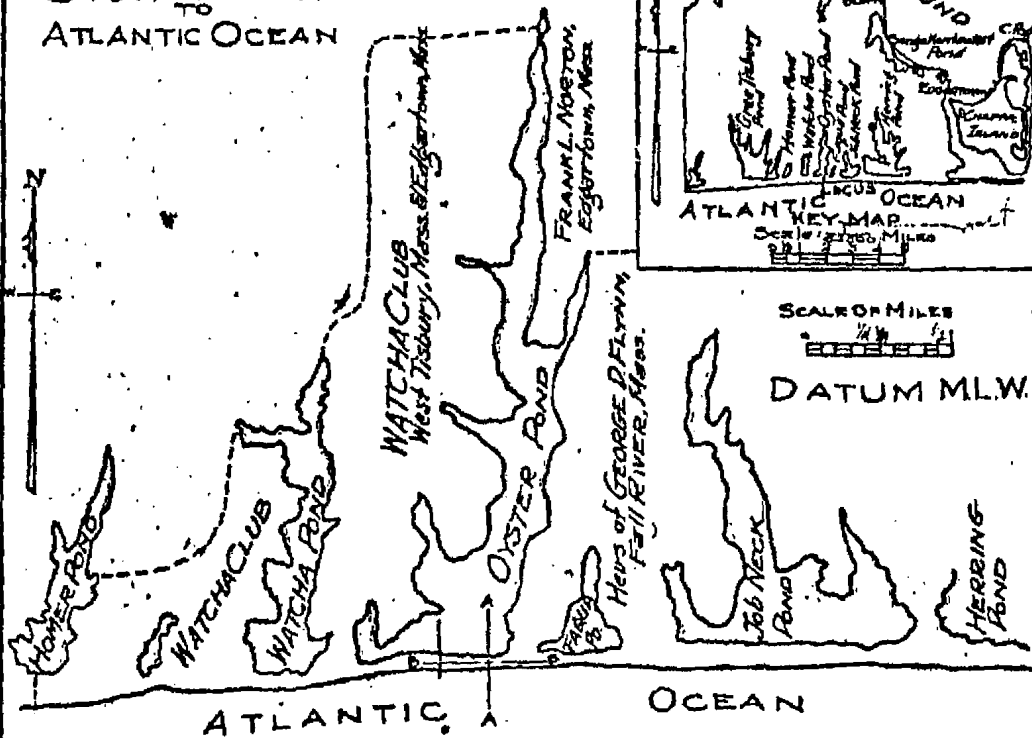
I, Arthur M. Bettencourt, of Edgartown, Dukes County, Massachusetts, being unmarried, for consideration paid, grant to Julia A. Bettencourt of said Edgartown with quitclaim covenants the land in said Edgartown, with the buildings thereon, bounded and described as follows, viz: Commencing in its easterly corner, on the way running from School Street past the residence formerly of Celeb. Chapter and later of Antonio Andrade; thence southwesterly by land of Mary Furtado Enos, formerly of the heirs of James Kent, about ninety feet; to land of the heirs of Jared W. Coffin; thence northwesterly by land of said Coffin heirs, fifty seven feet more or less to other land of said Coffin heirs, thence northeasterly by said last named Coffin land to the above-mentioned way, thence southwesterly by said way fifty seven feet, to the point of beginning. Being the same premises conveyed to Manuel A. Bettencourt by deed of Joao Ferreira Branco, dated September 13, 1870, and recorded with Dukes County Records, Book 125 page 296. Witness my hand and seal this 12th day of March, 1931.

Arthur M. Bettencourt seal

The Commonwealth of Massachusetts
Dukes County, on March 12th, 1931. Then personally appeared the above named Arthur M. Bettencourt, and acknowledged the foregoing instrument to be his free act and deed, before me Arthur W. Davis, Justice of the Peace. My commission expires Dec. 20th 1935

Sheet One of One Sheet.

PLAN OF PROPOSED OPENING OYSTER POND TO ATLANTIC OCEAN

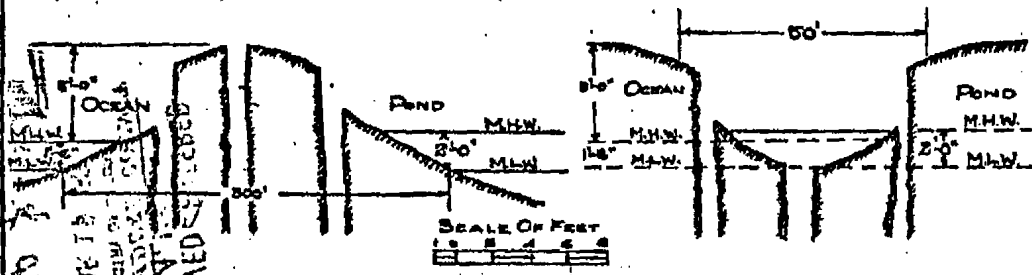


SCALE OF MILES

 DATUM MLW.

SECTION AA

SECTION B-B



AN ACCOMPANYING PETITION OF
WATCHA CLUB
 BY **ELIZABETH D. FLYNN**
 TO MAINTAIN OPENING FROM
 OYSTER POND TO ATLANTIC OCEAN
 OCTOBER 2, 1930. Vineyard Haven, Mass.

NO. 1219
 APPROVED BY DEPARTMENT OF PUBLIC WORKS
 OCTOBER 20, 1930
 Commissioner of Public Works
 Associate Commissioners

Secretary Ian A. Bowles
July 13, 2009

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ATTACHMENT 2
Order of Conditions SE020-1172 and
NHESP Letter of April 2, 2009



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

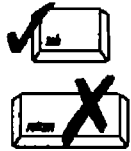
SE20-1172



Bk: 1180 Pg: 515 Doc: ORD
Page: 1 of 8 05/27/2009 01:48 PM

A. General Information

Important:
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



From: Edgartown
1. Conservation Commission

2. This issuance is for (check one): Order of Conditions Amended Order of Conditions

3. To: Applicant:
The Pohaganot Trust Yo Eric Peters, Esq.
a. First Name b. Last Name c. Company
P.O. Box 1117
d. Mailing Address
Edgartown MA 02539
e. City/Town f. State g. Zip Code

4. Property Owner (if different from applicant):
a. First Name b. Last Name c. Company
d. Mailing Address
e. City/Town f. State g. Zip Code

5. Project Location:
Oyster Pond Barrier Beach Edgartown
a. Street Address b. City/Town
42 1. 101
c. Assessors Map/Plat Number d. Parcel/Lot Number
Latitude and Longitude, if known (note: electronic filers will click for GIS locator):
N41° 20' 59" W70° 36' 09"
e. Latitude f. Longitude

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):
Dukes
a. County b. Certificate (if registered land)
320 387
c. Book d. Page

7. Dates: a. Date Notice of Intent Filed b. Date Public Hearing Closed c. Date of Issuance

8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):
Barrier Beach Opening
a. Plan Title
Vineyard Land Surveying
b. Prepared By c. Signed and Stamped by
16 March 2009
d. Final Revision Date e. Scale
f. Additional Plan or Document Title g. Date

9. Total WPA Fee Paid: 500 (+25) 237.50 262.50
a. Total Fee Paid b. State Fee Paid c. City/Town Fee Paid
local bylaw (+ 25.)



Massachusetts Department of Environmental Protection
 Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:
SE20-1172

B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act. Check all that apply:

- a. Public Water Supply
- b. Land Containing Shellfish
- c. Prevention of Pollution
- d. Private Water Supply
- e. Fisheries
- f. Protection of Wildlife Habitat
- g. Groundwater Supply
- h. Storm Damage Prevention
- i. Flood Control

2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

Denied because:

the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect these interests, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**

the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
3. <input type="checkbox"/> Bank	a. linear feet _____	b. linear feet _____	c. linear feet _____	d. linear feet _____
4. <input type="checkbox"/> Bordering Vegetated Wetland	a. square feet _____	b. square feet _____	c. square feet _____	d. square feet _____
5. <input type="checkbox"/> Land Under Waterbodies and Waterways	a. square feet _____ e. cu.yd dredged _____	b. square feet _____ f. cu.yd dredged _____	c. square feet _____	d. square feet _____



Massachusetts Department of Environmental Protection
 Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

SE21-1172

B. Findings (cont.)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
6. <input type="checkbox"/> Bordering Land Subject to Flooding	a. square feet	b. square feet	c. square feet	d. square feet
Cubic Feet Flood Storage	e. cubic feet	f. cubic feet	g. cubic feet	h. cubic feet
7. <input type="checkbox"/> Isolated Land Subject to Flooding	a. square feet	b. square feet		
Cubic Feet Flood Storage	c. cubic feet	d. cubic feet	e. cubic feet	f. cubic feet
8. <input type="checkbox"/> Riverfront area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet		
Sq ft between 100-200 ft	e. square feet	f. square feet		

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

9. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below			
10. <input type="checkbox"/> Land Under the Ocean	a. square feet	b. square feet		
	c. cu.yd dredged	d. cu.yd dredged		
11. <input checked="" type="checkbox"/> Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
12. <input checked="" type="checkbox"/> Coastal Beaches	a. square feet	b. square feet	c. c/y nourishmt.	d. c/y nourishmt.
13. <input type="checkbox"/> Coastal Dunes	a. square feet	b. square feet	c. c/y nourishmt.	d. c/y nourishmt.
14. <input type="checkbox"/> Coastal Banks	a. linear feet	b. linear feet		
15. <input type="checkbox"/> Rocky Intertidal Shores	a. square feet	b. square feet		
16. <input type="checkbox"/> Salt Marshes	a. square feet	b. square feet	c. square feet	d. square feet
17. <input type="checkbox"/> Land Under Salt Ponds	a. square feet	b. square feet		
	c. cu.yd dredged	d. cu.yd dredged		
18. <input type="checkbox"/> Land Containing Shellfish	a. square feet	b. square feet	c. square feet	d. square feet
19. <input type="checkbox"/> Fish Runs	Indicate size under Coastal Banks, inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	a. cu.yd dredged	b. cu.yd dredged		
20. <input checked="" type="checkbox"/> Land Subject to Coastal Storm Flowage	a. square feet	b. square feet		



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:
SE20-1172

C. General Conditions Under Massachusetts Wetlands Protection Act

(only applicable to approved projects)

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
 - a. the work is a maintenance dredging project as provided for in the Act; or
 - b. the time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order.
6. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
7. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.
8. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to this Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.
9. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words,

"Massachusetts Department of Environmental Protection" [or, "MA DEP"]

"File Number SE20-1172"



**Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands**

DEP File Number:

WPA Form 5 – Order of Conditions

SE20-1172

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

C. General Conditions Under Massachusetts Wetlands Protection Act

10. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before DEP.
11. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
12. The work shall conform to the plans and special conditions referenced in this order.
13. Any change to the plans identified in Condition #12 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.
14. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.
15. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.
16. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.
17. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

Special Conditions:

See attached p. 5-1

If you need more space for additional conditions, select box to attach a text document

Plans

Title:	Date:	Signed & Stamped by:	On file with:
Barrier Beach Opening	16 March 2009	Vineyard Land Surveying	Commission

1. This order permits the excavation of a channel for the periodic opening of Oyster Pond to the Atlantic Ocean as described in the Notice of Intent and attachments and as shown on the above-captioned plan.
2. The Commission finds this channel necessary for the continued health of the pond and to increase salinity for the benefit of Oyster Pond fisheries, to facilitate the introduction of alewife and other finfish, to flush nitrogen out of the pond, and to negate the possible threats to human health and safety due to compromised septic system and flooded basements.
3. For any change in approved plans or work, the applicant shall file a new Notice of Intent or inquire, in writing, of the Conservation Commission whether the change is substantial enough to require a new filing.
4. It is the responsibility of the applicant to ensure that all conditions of this order are complied with. The contractors are to be provided with copies of this order and referenced documents before any work begins on site.
5. The applicant shall inform the Conservation Commission or its agent 48 hours in advance of the anticipated work dates.
6. The conditions outlined in the letter from the Division of Fisheries and Wildlife dated 2 April 2009 shall be considered part of this order.
7. A representative of the Pohogonot Trust shall consult with the Edgartown Shellfish Constable prior to each periodic opening of Oyster Pond. After the Shellfish Constable determines that an opening is appropriate, the opening - depending on wind, tide and other atmospheric conditions - shall take place approximately seven days after the determination.
8. Traditionally, the pond is opened four to five times a year between the months of March and December.
9. The Trust shall inform the riparian owners of the timing of the openings. The Trust and the Shellfish Constable shall have final authority to proceed with the opening, at their sole discretion, should they determine that such opening is necessary and appropriate.
10. This order shall be considered a maintenance permit and shall be in effect for a period of five years from the date of issue. At the end of this period, the applicant may apply for renewal.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

DEP File Number:

WPA Form 5 – Order of Conditions

SE26-1172

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

D. Findings Under Municipal Wetlands Bylaw or Ordinance

- 1. Furthermore, the Edgartown Conservation Commission hereby finds (check one that applies):
- 2. that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw specifically:

a. Municipal Ordinance or Bylaw

b. Citation

Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

- 3. that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

a. Municipal Ordinance or Bylaw

b. Citation

The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.

- c. The special conditions relating to municipal ordinance or bylaw are as follows:

See attached

If you need more space for additional conditions, select box to attach a text document

E. Issuance

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

21 May 2009
1. Date of issuance

Please indicate the number of members who will sign this form:

This Order must be signed by a majority of the Conservation Commission.

2. Number of Signers

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically (see Appendix A), and the property owner, if different from applicant.

Signatures:

x [Signature] _____

x [Signature] _____

x [Signature] _____

x [Signature] _____



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

DEP File Number:

WPA Form 5 – Order of Conditions

SE 20-1172

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

E. Issuance (cont.)

Notary Acknowledgement

Commonwealth of Massachusetts County of Dukes

On this 20th Day of May Month, 2009 Year

Before me, the undersigned Notary Public, personally appeared

Robert Avakian
Name of Document Signer

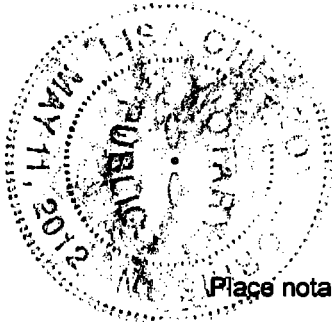
proved to me through satisfactory evidence of identification, which was/were

PERSONAL KNOWLEDGE OF IDENTITY

Description of evidence of identification

to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

As member of Edgartown City/Town Conservation Commission



Place notary seal and/or any stamp above

[Signature]
Signature of Notary Public
Lisa C. Morrison
Printed Name of Notary Public

11 May 2012
My Commission Expires (Date)

This Order is issued to the applicant as follows:

- by hand delivery on 21 May 2009 Date
- by certified mail, return receipt requested, on _____ Date

F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate DEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Appendix E: Request of Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act, (M.G.L. c. 131, § 40) and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.

Deanne E. Powers Registrar



MassWildlife

Commonwealth of Massachusetts

Division of Fisheries & Wildlife

Resubmitted April 6
rec April 9, 2009

Wayne F. MacCallum, Director

April 2, 2009

Edgartown Conservation Commission
P. O. Box 1065
Edgartown, MA 02539

The Pohogonot Trust
c/o Eric Peters, Esq.
P.O. Box 1117
Edgartown, MA 02539

RE: Project Location: Oyster Pond Barrier Beach
Project Description: To periodically open Oyster Pond to the Ocean by making a cut in the barrier beach
DEP Wetlands File No: 020 1172
NHESP File No.: 09-26421

Dear Commissioners and Applicant

The applicant listed above has submitted a Notice of Intent and site plans (dated 3/16/2009) to the Natural Heritage & Endangered Species Program (NHESP) of the Massachusetts Division of Fisheries & Wildlife, in compliance with the rare wildlife species section of the Massachusetts Wetlands Protection Act Regulations (310 CMR 10.37 & 10.59).

Based on a review of the information that was provided and the information contained in our database, the NHESP has determined that this project, as currently proposed, will occur within the actual habitat of the following state-listed species

Scientific Name	Common Name	Taxonomic Group	State Status
<i>Charadrius melodus</i>	Piping Plover	Bird	Threatened*
<i>Sterna antillarum</i>	Least Tern	Bird	Special Concern
<i>Sterna hirundo</i>	Common Tern	Bird	Special Concern

These species are state-listed in accordance with the Massachusetts Endangered Species Act (MESA, MGL c131A) and its implementing regulations (321 CMR 10.00). *The Piping Plover is also federally protected as "Threatened" pursuant to the U.S. Endangered Species Act (ESA, 50 CFR 17.11). In Massachusetts, Piping Plovers nest on sandy coastal beaches and dunes which are relatively flat and free of vegetation. They often build their nests in a narrow area of land between the high tide line and the foot of the coastal dunes. Terns also nest on dunes and beaches with some or no vegetation and forage for small fish, crustaceans, and other invertebrates in bays, inlets, salt marshes, etc. Fact sheets for these species can be found at www.nhesp.org.

www.masswildlife.org

Division of Fisheries and Wildlife
Field Headquarters, One Rabbit Hill Road, Westborough, MA 01581 (508) 389-6300 Fax (508) 389-7891
An Agency of the Department of Fisheries, Wildlife & Environmental Law Enforcement

NHESP File No 09-26421, Edgartown Page 2 of 3

Based on a review of the information that was provided and the information that is currently contained in our database, the NHESP has determined that this project, as currently proposed, will not adversely affect the actual Resource Area Habitat of state-protected rare wildlife species (310 CMR 10.37 & 10.59) and will not result in a prohibited "take" of state-listed rare species (321 CMR 10.18) provided that the applicant adheres to the following conditions.

- No excavation of the barrier beach or dunes or associated intertidal areas shall occur between 1 April and 31 August unless the following conditions are met:
 1. All areas of suitable Piping Plover, Common Tern, or Least Tern nesting habitat, as determined by the NHESP, shall be identified and delineated with symbolic fencing and warning signs on or before April 1 each year. Fenced areas shall be expanded if more areas of suitable nesting habitat become available because of changing beach profiles or tide conditions, or if plovers or terns are disturbed by passing or parked vehicles, or if such disturbance is anticipated. All vehicular access into or through delineated habitats shall be prohibited, except in the immediate vicinity of the section of beach that is being excavated, by equipment that is being used to excavate the channel.
 2. On at least 2 days during the week immediately preceding the planned excavation work, all sections of beach through which vehicles associated with the work will pass, and all sections of beach within 500 yards of the anticipated excavations, shall be surveyed by a qualified shorebird monitor, as determined by NHESP, to determine status and locations of breeding Piping Plovers, Common Terns, and Least Terns, their nests, and unfledged chicks. One of these surveys shall occur within the 2 days immediately preceding the planned work.
 3. Motorized vehicles that are deemed essential for excavating the pond opening shall travel on sections of beach where unfledged plover or tern chicks are present *only* if such travel is absolutely necessary and no other reasonable travel routes are available. Such vehicles shall travel through sections of beach that are within 100 yards of unfledged chicks only if escorted by a qualified shorebird monitor, as determined by NHESP, who has first determined the location of all unfledged chicks.
 4. All work shall immediately cease if the shorebird monitor determines that breeding Piping Plovers, Common Terns, or Least Terns are disturbed by passing vehicles or the excavation work or that nests or unfledged chicks are likely to be harmed by the work, and NHESP and U.S. Fish and Wildlife Service shall be notified immediately for further consultation.
 5. Notwithstanding conditions #1- 4 above, no excavation shall be permitted within 100 yards of any active nest or unfledged chicks of Piping Plovers, Common Terns, or Least Terns
 6. Regardless of the timing of the beach excavation and pond opening, all materials excavated from the barrier beach and associated intertidal areas shall be graded to a slope no steeper than 10:1 horizontal: vertical. Sand fencing shall not be placed on these materials, nor shall they be planted with dune grass or other vegetation.
 7. On or before September 30 of the year in which excavations occur, the applicant shall provide to NHESP a brief report that summarizes the date(s) on which excavations occurred, the width of the channel at the time of excavation, the maximum width of the channel that resulted from the excavation and subsequent pond opening, the approximate time it took to excavate the channel, the approximate time between completion of excavation and maximum width of channel after pond opening, the name(s) and affiliation of the shorebird monitor(s).

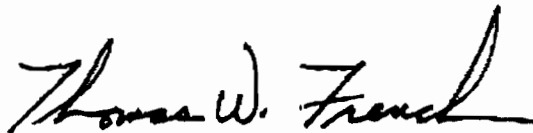
NHESP File No. 09-26421, Edgartown Page 2 of 3

the status of any breeding Piping Plovers, Common Terns, or Least Terns, their nests, or unfledged chicks on or about the time that excavations occurred. The report shall also contain a map with the locations of the excavated channel, the location and approximate width of the subsequent opening, and the location of any territorial pairs, nests, or unfledged chicks of plovers or terns that were present within 500 yards of the opening.

Provided the above-listed conditions are included in any Orders of Conditions issued by the Conservation Commission, and the applicant complies with all the conditions, the project will not result in an adverse impact to the Resource Area I habitats of state-listed wildlife species nor in a prohibited "take" of state-listed species. A copy of the final Order of Conditions shall be sent to the NHESP simultaneously with the applicant as stated in the Procedures section of the WPA (310 CMR 10.05(6)(e)).

This evaluation is based on the most recent information available in the Natural Heritage database, which is constantly being expanded and updated through ongoing research and inventory. Please note that this determination addresses only the matter of state-listed wildlife habitat and does not pertain to other wildlife habitat issues that may be pertinent to the proposed project. Should your site plans change, or new rare species information become available, this evaluation may be reconsidered. If you have any questions regarding this letter please contact Dr. Scott Melvin at (508) 389 6345.

Sincerely,



Thomas W. French, Ph.D.
Assistant Director

cc: Vineyard Land Surveying & Engineering
Susi von Oettingen, U.S. Fish & Wildlife Service
MA DEP Southeastern Region, Wetlands Program

Secretary Ian A. Bowles
July 13, 2009

RACKEMANN
STRATEGIC CONSULTING, INC.

ATTACHMENT 3
MassDEP Letter of June 17, 2009



COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 SOUTHEAST REGIONAL OFFICE

20 RIVERSIDE DRIVE, LAKEVILLE, MA 02347 508-946-2700

rec 6/18/9

DEVAL L. PATRICK
 Governor

IAN A. BOWLES
 Secretary

TIMOTHY P. MURRAY
 Lieutenant Governor

LAURIE BURT
 Commissioner

JUN 17 2009

Richard Friedman and the Trustees
 of the Oyster Pond EP Trust
 c/o Patrick van der Voom
 WILMERHALE
 60 State Street
 Boston, MA 02109

RE: EDGARTOWN - Wetlands
 File No. SE 20-1172,
 Appeal/Acceptance
 for Superseding Order of Conditions -
 Compliance with MEPA

Dear Mr. Friedman and Trustees:

Please be advised that the Department of Environmental Protection has received your appeal to the Order of Conditions issued on the above-referenced file and that, in accordance with General Laws, Chapter 131, Section 40, the Department of Environmental Protection will make a determination on whether the area on which the proposed work is to be done is significant to public or private water supply, to the ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of fisheries, and to the protection of wildlife habitat.

By copy of this letter, the applicant (the Pohogonut Trust) is advised that the Department's review of the project referenced above has been stayed because the project proposal exceeds the following Wetlands, Waterways and Tidelands threshold(s) as found in 301 CMR 11.03 (3)(b):

ENF and other MEPA Review if the Secretary So Requires.

1. Provided that a Permit is required:
 - a. alteration of coastal dune, barrier beach or ...

Therefore, the project is subject to review under the Massachusetts Environmental Policy Act (MEPA), Massachusetts General Laws, Chapter 30, Sections 61-62H. Before the Department can complete its review of the project and issue an appropriate Superseding Order of Conditions, an Environmental Notification Form (ENF) must be filed with The Secretary of Environmental Affairs. Blank ENF's may be obtained from:

Secretary
 Executive Office of Environmental Affairs
 MEPA Office
 100 Cambridge Street, Suite 900
 Boston, Massachusetts 02114

or on-line at:

<http://www.mass.gov/cnvir/mepa/secondlevelpages/filingwithmepa.htm>

This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057, TDD# 866-539-7622 or 617-574-6868.

DEP on the World Wide Web <http://www.mass.gov/dep>

Printed on Recycled Paper

Failure to file an ENF within seventy (70) days of this notification may result in the Department issuing a Superseding Order of Conditions denying the proposed project without prejudice.

After completion of the MEPA process, the Department of Environmental Protection will issue a Superseding Order imposing such conditions as will contribute to the protection of the interests described herein.

The applicant is advised that no work, as proposed in the Notice of Intent for the above-referenced file, shall be undertaken until the Final Order is issued by the Department of Environmental Protection, and all administrative appeal periods have elapsed.

If you have any questions regarding this matter PLEASE CONTACT Tena J. Davies at (508) 946-2804.

Very truly yours,



Elizabeth A. Koulouheras
Bureau of Resource Protection

cc: Edgartown Conservation Commission

Pohogonut Trust
c/o Eric Peters, Esq.
PO Box 1117
Edgartown, MA 02539

DEP-SERO Waterways
c.91 licensing and permits

Secretary Ian A. Bowles
July 13, 2009

RACKEMANN
STRATEGIC CONSULTING, INC.

ATTACHMENT 4
Plan and Profile of Oyster Pond Opening dated March 16, 2009



Assr. No. 41-1.15
Oyster Watcha Midlands Assoc.

OYSTER POND

Assr. Parcel 42-1.101
The Pohogonot Trust

dune and beach grass
beach

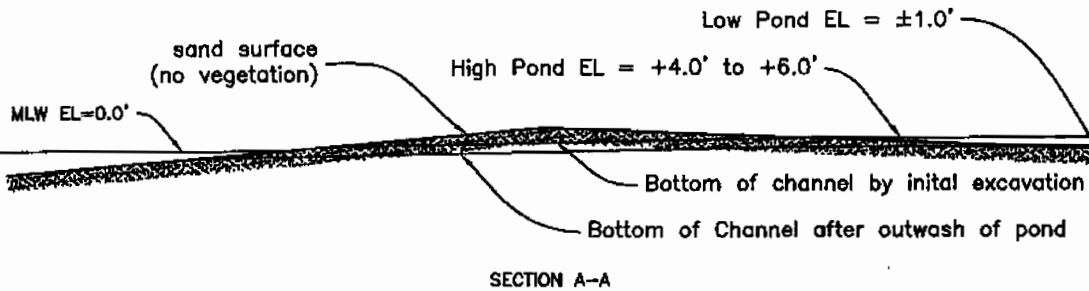
approximate location of
proposed channel

dune and beach grass
beach

Pogona Pond

ATLANTIC
OCEAN

PLAN SCALE 1" = 500'



SECTION SCALE 1" = 40'

Sketch Plan of Land in
EDGARTOWN, MASS.

Surveyed For
THE POHOGONOT TRUST

Showing
The Barrier Beach of the Oyster Pond
and the approximate location of the
proposed cut to the Ocean

Scale 1" = 500'
March 16, 2009

Vineyard Land Surveying & Engineering, Inc.
P.O. Box 421, West Tisbury, MA 02575
508-693-3774

Secretary Ian A. Bowles
July 13, 2009

RACKEMANN
STRATEGIC CONSULTING, INC.

ATTACHMENT 5
Emergency Certification Forms of April 16 and June 5, 2009



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Emergency Certification Form
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. Emergency Information

Important:
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key



Issuance From Edgartown Conservation Commission
Issuing Authority
barrier beach at Oyster Pond

1. Site Location: Oyster Pond has been closed since late December 2008. It needs to be opened to raise the salinity, lower the water level, allowing migrating fish to enter the pond, and to reduce levels of nitrogen in the pond.
2. Reason for Emergency: to be opened to raise the salinity, lower the water level, allowing migrating fish to enter the pond, and to reduce levels of nitrogen in the pond.

3. Applicant to perform work: The Pohogonot Trust

4. Public agency to perform work or public agency ordering the work to be performed:

5. Date of Site Visit: 4/1/09 Start Date: 4/16/09 End Date: May 14, 2009

* no later than 30 days from start date or 60 days in the case of an Immediate Response Action approved by DEP in address an oil/hazardous material release

6. Work to be allowed*: To cut a channel across the barrier beach so that Oyster Pond can be opened to the sea. See Notice of Intent filed by The Pohogonot Trust March 20, 2009.

DEP file #

* May not include work beyond that necessary to abate the emergency.

B. Signatures

Certified to be an Emergency by this Issuing Authority

Signature: [Signature] Date: 4/15/09
 Chairman (or designee): [Signature]
[Signature]
[Signature]

A copy of this form must be provided to the appropriate DEP Regional Office.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Emergency Certification Form
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

C. General Conditions

- 1 Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Emergency Certification or subject to enforcement action.
- 2 This Emergency Certification does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of property rights
- 3 This Emergency Certification does not relieve the applicant or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
- 4 Any work conducted beyond that described above, and any work conducted beyond that necessary to abate the emergency, shall require the filing of a Notice of Intent.
- 5 The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Emergency Certification at reasonable hours to evaluate compliance with this Certification, and may require the submittal of any data deemed necessary by the Conservation Commission or the Department for that evaluation
- 6 This Emergency Certification shall apply to any contractor or any other person performing work authorized under this Certification.
- 7 No work may be authorized beyond 30 days from the date of this certification without written approval of the Department.

D. Special Conditions

see attached

E. Appeals

The Department may, on its own motion or at the request of any person review an emergency certification issued by a conservation commission and any work permitted thereunder; a denial by a conservation commission of a request for emergency certification; or the failure by a conservation commission to act within 24 hours of a request for emergency certification. Such review shall not operate to stay the work permitted by the emergency certification unless the Department specifically so orders. The Department's review shall be conducted within seven days of issuance by a conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification. If certification was improperly granted, or the work allowed thereunder is excessive or not required to protect the health and safety of citizens of the Commonwealth, the Department may revoke the emergency certification, condition the work permitted thereunder, or take such other action as it deems appropriate.



EDGARTOWN CONSERVATION COMMISSION
BOX 1065 EDGARTOWN, MASSACHUSETTS 02539
TELEPHONE: 508-627-6165
FAX: 508-627-6123

ATTACHMENT FOR EMERGENCY PERMIT
ISSUED TO THE POHOGONOT TRUST

The Edgartown Conservation Commission voted unanimously at a regular public meeting to issue the attached Emergency Certification for the opening of Oyster Pond to the sea. The Commission finds the opening necessary to protect the public health and safety for the following reasons.

The Commission was presented with evidence that several of the older septic systems, which met minimum separation requirements when they were designed, are now in non compliance with Title V. Specifically, one property at the upper end of Oyster Pond had a septic designed in 1981. The separation from the leach trenches to the groundwater was four feet. This separation was based upon the level of Oyster Pond not exceeding four feet above mean sea level (msl). The increased elevation of the pond waters results in a rise in groundwater.

The Edgartown Shellfish Warden, who monitors the elevation and salinity levels in Oyster Pond, testified that the level of the pond was currently at five feet above msl. Weather reports for next week indicate several days of rain. Without a managed opening the pond could rise to eight feet above msl.

The Edgartown Board of Health Agent estimates that several properties on the pond should be experiencing similar problems with a rise in ground water. This is either compromising the minimum separation to groundwater, and/or has resulted in other components of a system being in groundwater. As the pond gets higher more septic systems and basements will be jeopardized. Please see the attached memo from the Health Agent.

The Commission was presented with photos of water seepage in a guesthouse basement along the main body of the pond. The finished basement of the main house has sensors that indicate the groundwater is two feet above the floor of the foundation. A series of seven sump

pumps has to date kept the water from infiltrating. The property manager expressed concern that a power failure would result in catastrophic flooding.

In addition to the concerns regarding protection of human health and safety from compromised septic systems and flooding basements, the pond needs to be opened to flush the nitrogen out of the pond; increase the salinity for the benefit of target shellfish species; allow the introduction of alewife and other finfish, all of which are critical to the health and ecosystem of this estuary. It is anticipated that the Mass. Estuaries Report on Oyster Pond will recommend frequent openings to the sea as the primary management tool to prevent degradation of the ecosystem.

Attending the meeting were attorneys for the major stakeholders on the pond. No objections for the approval were voiced. Mr. Richard Friedman voiced support for the approval.

Conditions for approval:

1. This approval is for one opening this spring.
2. The Trust shall inform the riparian owners of the timing of this opening as per their past practices and those recently agreed upon in private settlements.

Date of issuance: April 16, 2009



TOWN OF EDGARTOWN
OFFICE OF
BOARD OF HEALTH

70 MAIN STREET
P. O. BOX 1596
EDGARTOWN MASSACHUSETTS 02539
PHONE: 508-627-6120
FAX: 508 627 6124

MEMO

TO: Jane Varkonda, Edgartown Conservation Agent

FROM: Matthew Poole, Edgartown Health Agent *MSP*

RE: Pond height and groundwater elevations in Oyster Pond watershed, Edgartown, MA

DATE: April 16, 2009

Dear Jane,

In response to your inquiry about the potential for septic system components to be subjected to increased risk of failing to meet minimum design code requirements if Oyster Pond is allowed to exceed it's customary high pond levels, I offer the following response:

There are several septic systems along Oyster Pond Rd. and Oyster Watcha Rd. based on engineered designs that assume a maximum pond height and groundwater elevation of approximately elevation +4, mean sea level. If Oyster Pond is allowed to exceed this historic maximum pond height (elevation) for extended periods of time, some of these septic systems will experience groundwater elevations higher than reasonably contemplated when designed and constructed. The elevated groundwater elevation resulting from the high pond will place the performance of some of these septic systems at risk. Namely, septic tanks placed deep in the ground to accept gravity flow from basement plumbing fixtures and pump chambers to then pump the effluent to higher ground are at risk for ground water inundation. Groundwater inundation into a septic tank or pump chamber will cause system failure. Also, elevated groundwater table will potentially compromise leaching area separation requirements.

It is assumed that any system components that fail to meet these basic code and design requirements are a risk to public health and the environment.

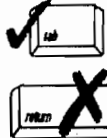
Please feel free to contact me with any questions you have on this matter.



Massachusetts Department of Environmental Protection
 Bureau of Resource Protection - Wetlands
WPA Emergency Certification Form
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. Emergency Information

Important:
 When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



- Issuance From: Edgartown Conservation Commission
 Issuing Authority: barrier beach at Oyster Pond
1. Site Location: _____
 2. Reason for Emergency: Oyster Pond has been closed since April 22. It needs to be opened to raise the salinity, lower the water level, allowing migrating fish to enter the pond, and to reduce levels of nitrogen in the pond.
 3. Applicant to perform work: The Pohogonot Trust
 4. Public agency to perform work or public agency ordering the work to be performed: _____

5. Date of Site Visit: 6/3/09 Start Date: 6/5/09 End Date*: 7/5/09
* no later than 30 days from start date or 60 days in the case of an Immediate Response Action approved by DEP to address an oil/hazardous material release.
6. Work to be allowed*:
To cut a cheannel across the barrier beach so that Oyster Pond can be opened to the sea. See Notice of Intent filed by The Pohogonot Trust March 20, 2009 and Order of Conditions issued May 21, 2009 (DEP file No.

* May not include work beyond that necessary to abate the emergency.

B. Signatures

Certified to be an Emergency by this Issuing Authority.

Signatures:

Chairman (or designee)	Date
<input checked="" type="checkbox"/> <u>[Signature]</u>	<input checked="" type="checkbox"/> <u>Elizabeth W. Potter</u>
<input checked="" type="checkbox"/> <u>[Signature]</u>	<input checked="" type="checkbox"/> <u>[Signature]</u>
<input checked="" type="checkbox"/> <u>[Signature]</u>	_____
<input checked="" type="checkbox"/> <u>[Signature]</u>	_____

A copy of this form must be provided to the appropriate DEP Regional Office.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Emergency Certification Form
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

C. General Conditions

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Emergency Certification or subject to enforcement action.
2. This Emergency Certification does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of property rights.
3. This Emergency Certification does not relieve the applicant or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. Any work conducted beyond that described above, and any work conducted beyond that necessary to abate the emergency, shall require the filing of a Notice of Intent.
5. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Emergency Certification at reasonable hours to evaluate compliance with this Certification, and may require the submittal of any data deemed necessary by the Conservation Commission or the Department for that evaluation.
6. This Emergency Certification shall apply to any contractor or any other person performing work authorized under this Certification.
7. No work may be authorized beyond 30 days from the date of this certification without written approval of the Department.

D. Special Conditions

see attached.

E. Appeals

The Department may, on its own motion or at the request of any person, review: an emergency certification issued by a conservation commission and any work permitted thereunder; a denial by a conservation commission of a request for emergency certification; or the failure by a conservation commission to act within 24 hours of a request for emergency certification. Such review shall not operate to stay the work permitted by the emergency certification unless the Department specifically so orders. The Department's review shall be conducted within seven days of: issuance by a conservation commission of the emergency certification; denial by a conservation commission of the emergency certification; or failure by a conservation commission to act within 24 hours of a request for emergency certification. If certification was improperly granted, or the work allowed thereunder is excessive or not required to protect the health and safety of citizens of the Commonwealth, the Department may revoke the emergency certification, condition the work permitted thereunder, or take such other action as it deems appropriate.



EDGARTOWN CONSERVATION COMMISSION
BOX 1065 EDGARTOWN, MASSACHUSETTS 02539
TELEPHONE: 508-627-6165
FAX: 508-627-6123

ATTACHMENT FOR EMERGENCY PERMIT
ISSUED TO THE POHOGONOT TRUST

The Edgartown Conservation Commission voted unanimously at their meeting on June 3, 2009 to issue an Emergency Permit for the opening of Oyster Pond to the sea. The Commission finds the opening necessary to protect the public health and safety for the following reasons. This evidence was presented at the hearing for the April 2009 opening. The Commission finds that the facts have not changed from those presented in April.

The Commission was presented with evidence that several of the older septic systems, which met minimum separation requirements when they were designed, are now in non-compliance with Title V. Specifically, one property at the upper end of Oyster Pond had a septic designed in 1981. The separation from the leach trenches to the groundwater was four feet. This separation was based upon the level of Oyster Pond not exceeding four feet above mean sea level (msl). The increased elevation of the pond waters results in a rise in groundwater.

The Edgartown Shellfish Warden, who monitors the elevation and salinity levels in Oyster Pond, testified that the level of the pond was currently at five feet above msl. Weather reports for next week indicate several days of rain. Without a managed opening the pond could rise to eight feet above msl.

The Edgartown Board of Health Agent estimates that several properties on the pond should be experiencing similar problems with a rise in ground water. This is either compromising the minimum separation to groundwater, and/or has resulted in other components of s system being in groundwater. As the pond gets higher more septic systems and basements will be jeopardized. Please see the attached memo from the Health Agent.

The Commission was presented with photos of water seepage in a guesthouse basement along the main body of the pond. The finished

basement of the main house has sensors that indicate the groundwater is two feet above the floor of the foundation. A series of seven sump pumps has to date kept the water from infiltrating. The property manager expressed concern that a power failure would result in catastrophic flooding.

In addition to the concerns regarding protection of human health and safety from compromised septic systems and flooding basements, the pond needs to be opened to flush the nitrogen out of the pond; increase the salinity for the benefit of target shellfish species; allow the introduction of alewife and other finfish, all of which are critical to the health and ecosystem of this estuary. It is anticipated that the Mass. Estuaries Report on Oyster Pond will recommend frequent openings to the sea as the primary management tool to prevent degradation of the ecosystem.

Conditions for approval:

1. This approval is for one opening within 30 days time.
2. The Trust shall inform the riparian owners of the timing of this opening as per their past practices and those recently agreed upon in private settlements.

Date of issuance: June 5, 2009