

The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

Charles D. Baker
GOVERNOR

Karyn E. Polito
LIEUTENANT GOVERNOR

Matthew A. Beaton
SECRETARY

Tel: (617) 626-1000
Fax: (617) 626-1081
<http://www.mass.gov/eea>

February 23, 2018

CERTIFICATE OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS
ON THE
ENVIRONMENTAL NOTIFICATION FORM

PROJECT NAME : White Cap Shoreline Stabilization Project
PROJECT MUNICIPALITY : Sandwich
PROJECT WATERSHED : Cape Cod
EEA NUMBER : 15798
PROJECT PROPONENT : White Cape Realty Trust and Sandwich Shores Condominium Association
DATE NOTICED IN MONITOR : January 24, 2018

Pursuant to the Massachusetts Environmental Policy Act (MEPA; M.G. L. c. 30, ss. 61-62I) and Section 11.06 of the MEPA regulations (301 CMR 11.00), I hereby determine that this project **does not require** an Environmental Impact Report (EIR).

Project Description

The project involves protecting eroding coastal bank and coastal dune that lies along the frontage of several residential properties on White Cap Path. The project proposed the construction of a biodegradable sand-filled coir envelope system to protect the shoreline. The project area is subject to an accelerated erosion rate which poses a risk to the stability of the residential structures. The proposed 375 lf coir envelope system will consist of four stacked rows of coir. The stacked coir system will be approximately six to seven feet high with a 1.5:1 slope. Once installation is completed, the coir system will be buried to a depth of one foot with compatible sand and native beach grass plantings. The site will be renourished annually to maintain 6-12 inches of sediment cover over the coir rolls.

The Proponent indicates that the project is proposed because beach nourishment efforts have become financially unsustainable and have failed to prevent the continued erosion of the shoreline. The coir system is designed similar to stacked coir systems on adjoining waterfront properties. The project site includes a 10-foot wide easement which provides deeded beach access for homeowners in Town

Neck. The easement will be maintained by providing a “sand ramp” with additional beach nourishment at the easement site to reduce the slope of the coir system.

Project Site

The approximately 1.59 acre project site is located downdrift of the eastern end of the Cape Cod Canal on the shore of Town Neck. The project site includes seven residential units belonging to two separate condominium trusts. The site is bounded by White Cap Path to the west, Cape Cod Bay to the east and residential properties to the north and south. A 10-foot wide deeded easement exists in between the two condominium trusts. Eroded coastal bank is located at the northern portion of the site while eroded coastal dune is located on the southerly portion of the site. A portion of the project site is located within mapped *Estimated or Priority Habitat of Rare Species* according to the 14th Edition of the Massachusetts Natural Heritage Atlas. The entire project site is located in a Zone AE with base flood elevation of 14 ft North American Vertical Datum (NAVD) or Zone VE with base flood elevation of 16 ft NAVD according to the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM) number 5001C0338J, effective July 16, 2014.

Environmental Impacts and Mitigation

The project is expected to impact approximately 8,500 sf of Coastal Beach; 5,000 sf of Coastal Dune; 170 lf of Coastal Bank; and 13,500 sf of Land Subject to Coastal Storm Flowage. Measures to avoid, minimize or mitigate damage to the environment include using biodegradable materials, providing annual nourishment as well as adherence to time of year (TOY) restrictions for the protection of state-listed shorebirds.

Permitting and Jurisdiction

This project is subject to MEPA review and preparation of an ENF pursuant to 301 CMR 11.03(3)(b)(1)(a) because it requires a State Agency Action and involves the alteration of Coastal Bank and Coastal Dune. The project requires two Superseding Orders of Conditions from the Massachusetts Department of Environmental Protection (MassDEP). The project may require Federal Consistency review by the Office of Coastal Zone Management (CZM).

The project is not receiving Financial Assistance from the Commonwealth. Therefore, MEPA jurisdiction is limited to those aspects of the project that are within the subject matter of any required or potentially required State Agency Actions and that may cause Damage to the Environment as defined in the MEPA regulations. In this case, jurisdiction is limited to land alteration, wetlands and rare species.

Review of the ENF

The ENF provided a description of existing and proposed conditions, preliminary project plans, and identified measures to avoid, minimize and mitigate project impacts.

The alternatives analysis described four potential alternatives including a No-Build Alternative, a Sacrificial Sand Alternative, a Coastal Engineering Structure, and the Selected Alternative. The No-Build Alternative involved allowing the shoreline erosion to continue, potentially leading to the loss of

the residential structures and was therefore dismissed. The Sacrificial Sand Alternative involved the continued placement of sand after major coastal storms. This option was dismissed because, according to the Proponent, the sand nourishment does not offer enough protection for structures during more significant storms and is not financially sustainable. A Coastal Engineering Structure was the preferred alternative because it potentially required the least maintenance; however, this option was dismissed because of the difficulty of permitting a structure within a shoreline that includes a large portion of dune. The Selected Alternative is described herein.

Wetlands

As described above, the project will alter Coastal Dune, Coastal Bank and Coastal Beach. Two separate Orders of Conditions (OOC) were issued by the Sandwich Conservation Commission (DEP File Nos. SE66-1578 and SE 66-1764). Both OOCs were appealed by an abutter with beach access easement rights on the project site. The stacked coir system will be constructed landward of the MHW line. The ENF included a description of how the shoreline stabilization project would meet the performance standards for coastal wetland resources.

Comments from CZM recommend that the nourishment plan maintain a minimum 24-inch sediment cover to provide greater protection of the coir system and mitigate loss of sediment to downdrift resources. In addition, CZM recommends that the coir system be placed at the toe of the eroding bank to reduce interaction with waves and tides. Comments from an abutter indicate that the proposed sand ramp does not meet the performance standards in the Wetlands Protection Act (WPA). MassDEP will review the project for consistency with the Wetlands Protection Act (WPA) Regulations at 310 CRM 10.00 and associated performance standards.

Rare Species

As noted above the project site includes mapped Estimated or Priority Habitat of Rare Species. NHESP issued two determinations in response to the Notices of Intent filed by the Proponent. The project needs to be conditioned in order to avoid adverse effects to the Resource Area Habitats of state-listed wildlife species (310 CMR 10.37) and must be conditioned in order to avoid a prohibited Take of state-listed species (321 CMR 10.18(2)(a)). Conditions include a TOY restriction from April 1-August 31 unless prior written approval is granted by NHESP; a minimum amount of sediment, to be determined by NHESP, must be placed as cover over the coir system; regular monitoring and protection of any nests, scrapes, or unfledged chicks to be protected with symbolic fencing; and upon filing for renewal, extension, or amendment of the OOCs, NHESP must be notified of any additional resource impacts.

Construction

Construction will be completed from the land side for the project. The project must comply with Solid Waste and Air Pollution Control regulations, pursuant to M.G.L. c.40, s.54. If oil and/or hazardous materials are identified during construction, notification must be provided to MassDEP pursuant to the Massachusetts Contingency Plan (310 CMR 40.0000). To reduce construction-period air emissions, I encourage the Proponent to require its construction contractors to use equipment

manufactured to Tier 4 federal emission standards which are the most stringent emissions standards available for off-road engines. If equipment is not available in the Tier 4 configuration, the Proponent should consider equipment with after-engine emissions controls, such as oxidation catalysts or diesel particulate filters.

Conclusion

Based on a review of the ENF and comments received, and in consultation with State Agencies, I have determined that the ENF has sufficiently defined the nature and general elements of the project for the purposes of MEPA review and demonstrated that the project's environmental impacts will be avoided, minimized and/or mitigated to the extent practicable. No further MEPA review is required. The project may proceed to permitting.

February 23, 2018

Date



Matthew A. Beaton

Comments received:

| | |
|------------|---|
| 02/07/2018 | Division of Marine Fisheries (DMF) |
| 02/13/2018 | Natural Heritage & Endangered Species Program (NHESP) |
| 02/13/2018 | Office of Coastal Zone Management (CZM) |
| 02/13/2018 | Massachusetts Department of Environmental Protection - Southeast Regional Office (MassDEP – SERO) |
| 02/21/2018 | Attorney Sarah A. Turano-Flores on behalf of James and Bette Jane Bates |

MAB/EFF/eff



Sarah A. Turano-Flores
Direct Line: (508) 790-5477
Fax: (508) 771-8079
E-mail: sturano-flores@nutter.com

February 21, 2018

Via E-Mail & Hand Delivery

Ms. Erin Flaherty
Massachusetts Environmental Policy Act Office
Executive Office of Energy and Environmental Affairs
100 Cambridge Street
Suite 900
Boston, MA 02114
Erin.flaherty@state.ma.us

Re: White Cap Shoreline Stabilization Project
EEA No. 15798

Dear Ms. Flaherty:

This office represents James and Bette Jane Bates, who own and reside at 57 Freeman Avenue in Sandwich. Pursuant to our conversation on February 20, 2018, this letter is written on behalf of Mr. and Mrs. Bates in comment on the White Cap Shoreline Stabilization Project, EEA No. 15798.

By orders dated September 27, 2017, the Sandwich Conservation Commission approved Notices of Intent filings for a project at 1, 3, 5 and 2, 4, 6, 8 White Cap Path in Sandwich proposing to construct a 10' high coir envelope shoreline protection system in the middle of a Coastal Beach, on and across an easement owned by Mr. and Mrs. Bates for accessing that beach (the "Project.") Mr. and Mrs. Bates requested Superseding Orders of Conditions for the Project on October 11, 2017. Copies of the requests are attached hereto as **Exhibit A** and **Exhibit B**. I adopt and incorporate by reference herein the comments on the Project in Exhibits A and B, which set forth the ways in which this Project fails to meet the performance standards set forth in the Wetlands Protection Act.

Additionally, both site plans for the Project depict the Project Area as within the Department of Environmental Management Coastal Wetland Restriction Line. A copy of the Restriction is attached hereto as **Exhibit C**. The DEM Restriction is another important state interest that allows "any bank and dune stabilization and coastal engineering structures which are otherwise approved under all applicable municipal, state and federal laws, and only where such structures will have no adverse effects on adjacent property." Blocking Mr. and Mrs. Bates' adjacent easement is an adverse effect on adjacent property in violation of the Restriction. The Applicant should be required to make its proposed Project consistent with this requirement in the DEM Restriction.

February 21, 2018
Page 2

Sincerely,

A handwritten signature in black ink, reading "Sarah Turano-Flores". The signature is written in a cursive, flowing style.

Sarah A. Turano-Flores

SATF:vam

Cc: Jack Vaccaro (via U.S. Mail)

3804144.1

Exhibit A



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
**Request for Departmental Action Fee
Transmittal Form**

DEP File Number:

SE66-1758

Provided by DEP

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

A. Request Information

1. Location of Project

1, 3, 5 White Cap Path

Sandwich, MA 02563

a. Street Address

66102

b. City/Town, Zip

\$245

c. Check number

d. Fee amount

2. Person or party making request (if appropriate, name the citizen group's representative):

James & Bette Bates by their attorney Sarah Turano-Flores

Name

Nutter McClennen & Fish LLP, 1471 Iyannough Road, PO Box 1630

Mailing Address

Hyannis

MA

02601-1630

City/Town

508-490-5400

State

508-771-8079

Zip Code

Phone Number

Fax Number (if applicable)

3. Applicant (as shown on Determination of Applicability (Form 2), Order of Resource Area Delineation (Form 4B), Order of Conditions (Form 5), Restoration Order of Conditions (Form 5A), or Notice of Non-Significance (Form 6)):

White Cap Path Realty Trust

Name

PO Box 218

Mailing Address

Sherborn

MA

01770

City/Town

State

Zip Code

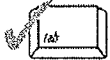
Phone Number

Fax Number (if applicable)

4. DEP File Number:

SE66-1758

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



B. Instructions

1. When the Departmental action request is for (check one):

☒ Superseding Order of Conditions – Fee: \$120.00 (single family house projects) or \$245 (all other projects)

☐ Superseding Determination of Applicability – Fee: \$120

☐ Superseding Order of Resource Area Delineation – Fee: \$120

Send this form and check or money order, payable to the *Commonwealth of Massachusetts*, to:

Department of Environmental Protection
Box 4062
Boston, MA 02211



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

DEP File Number: _____

**Request for Departmental Action Fee
Transmittal Form**

Provided by DEP

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

B. Instructions (cont.)

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office (see <http://www.mass.gov/eea/agencies/massdep/about/contacts/>).
4. 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.

Nutter, McClennen & Fish, LLPSeaport West
155 Seaport Boulevard
Boston, MA 02210-2604

Date:

October 11, 2017

Check No. **66102**

Santander Bank, N.A.

5-7515

0110

Pay: Two hundred forty-five and 00/100*****

\$ 245.00

PAY
TO THE
ORDER OF:

Commonwealth of Massachusetts



⑈0000066102⑈ ⑆011075150⑆ 62104972138⑈

Commonwealth of Massachusetts

Vendor ID: 001683

Check #:66102

| <u>Invoice Num</u> | <u>Invoice Date</u> | <u>Invoice Amount</u> | <u>Amount Paid</u> | <u>Discount Taken</u> | <u>Payment Amt</u> |
|--------------------|---------------------|-----------------------|--------------------|-----------------------|--------------------|
| 10/11/17-2 | 10/11/2017 | \$245.00 | \$245.00 | \$0.00 | \$245.00 |

| <u>Disb Date</u> | <u>Client</u> | <u>Matter</u> | <u>Disb</u> | <u>Description</u> | <u>Amount</u> |
|------------------|---------------|---------------|-------------|--------------------|---------------|
| 10/11/2017 | 0117782 | 00001 | FILFEE | Filing Fee | \$245.00 |

| | | | | |
|---------|----------|----------|--------|----------|
| Totals: | \$245.00 | \$245.00 | \$0.00 | \$245.00 |
|---------|----------|----------|--------|----------|



Sarah A. Turano-Flores
Direct Line: (508) 790-5477
Fax: (508) 771-8079
E-mail: sturano-flores@nutter.com

October 11, 2017
117782-1

Via Certified & Overnight Mail

James Mahala, Chief
Wetlands and Waterways Section
Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive; Route 105
Lakeville, Massachusetts 02347

Re: **Request for Superseding Order of Conditions; DEP File No. SE66-1758
1, 3, 5 White Cap Path, Sandwich, Massachusetts**

Dear Mr. Mahala:

This office represents James and Bette Jane Bates, who own and reside at 57 Freeman, Avenue in Sandwich. On behalf of Mr. and Mrs. Bates, this letter is written to request a negative Superseding Order of Conditions from the Department of Environmental Protection ("DEP") pursuant to the provisions of 310 CMR 10.05(7). A filing fee in the amount of \$245 was sent today to the DEP Lock Box in Boston. Copies of the transmittal form and check are enclosed herewith as **Exhibit A**.

By Order dated September 27, 2017, the Sandwich Conservation Commission (the "Commission") approved a Notice of Intent ("NOI") filing by the 5 White Cap Path Realty Trust (the "Applicants") for a project at 1, 3, 5 White Cap Path in Sandwich (the "Property").¹ A true and accurate copy of the Order of Conditions is enclosed herewith as **Exhibit B**.

The Applicants sought permission to construct a coir envelope shoreline protection system on a Coastal Beach, across an easement owned by Mr. and Mrs. Bates for accessing that beach (the "Project"). As owners of the land where the work of the Project is being proposed, Mr. and Mrs. Bates' permission for the Project has not been sought nor obtained, as mandated by 310 C.M.R. 10.05(4)(a). In addition, Mr. and Mrs. Bates object as the Project does not comport with performance standards for work proposed on a Coastal Beach, as set forth in 310 C.M.R. 10.27, and thus fails to protect the interests identified under the Wetlands Protection Act. For

¹ The Project is also approved in an Order approving a Notice of Intent for 2, 4, 6, and 8 White Cap Path, appealed separately by letter filed simultaneously herewith.

these reasons, as set forth more fully below, Mr. and Mrs. Bates respectfully request that the Department issue a negative Superseding Order of Conditions.

A. The Applicants Failed to Obtain the Prior Written Permission of the Landowners of the Land Where the Work is Being Proposed, in Violation of 310 CMR 10.05.

Mr. and Mrs. Bates, together with other landowners in the Town Neck subdivision, have a deeded easement over the 10' wide right of way shown as White Cap Path on the site plans filed with the NOI application. A copy of the site plan filed with the NOI is attached hereto as **Exhibit C**. This easement², referenced in Mr. and Mrs. Bates's deed, was created by a written grant in 1950 and affords the Bates the right to utilize the way "for all purposes for which ways are commonly used in the Town of Sandwich."

Pursuant to the provisions of the state Wetlands Protection Regulations, an applicant is required to obtain the written permission of the landowner prior to filing an NOI application for work proposed on the land of that landowner. *See*, 310 CMR 10.05(4)(a); *see also*, In the Matter of John Schindler, OADR Docket Nos. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011), at p. 2, adopted as Final Decision (December 27, 2011), where it was determined that a third party must consent "to the extent work is proposed to be located on, through, or over" any property owned by the third party.

The Wetlands Protection Act defines the term "landowner" broadly to include all those with an interest in the property. *See*, 310 C.M.R. 10.04. Importantly, DEP has held that easement holders such as the Bates are landowners within the meaning of 301 CMR. 10.05(4)(a). *See*, in the Matter of Sloan, Docket No. 2006-864 (DALA137-0874), Ruling on Motion for Summary Decision (March 7, 2007), Recommended Final Decision (June 13, 2007), adopted by Final Decision (October 16, 2007). There, it was decided that an easement holder (like the Bates) who held a common driveway easement on a neighbor's servient property was a "landowner" within the meaning of 310 CMR10.04(4)(a). *See also*, Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. 623, 411 N.E.2d 187 (1980).

The requirement that the landowners' permission be obtained before the NOI is filed is particularly important here, when the work of the Project will prevent the landowner from actually accessing the land they own. According to the site plans submitted with the two NOI applications and shown on **Exhibit C**, the Applicants are proposing to construct a shoreline

² These easement rights of the Bates in White Cap Path – as well as the easement rights of 47 other landowners in Town Neck with similar rights in White Cap Path - were recently affirmed by the Massachusetts Land Court in the Memorandum and Order (Foster, J.) entered in the matter of *Richard R. Alger, et als. v. Sandwich Shores Association, et al.*, Misc. Case No. 16-000624, on December 1, 2016. Thus, this not a situation where the property rights are in dispute.

protection system that will result in a ten (10) foot elevation change over a span of fifteen (15) lateral feet. The steepness of this grade change has prompted the Applicants to propose not one (1) but *three (3)* sets of elevated staircases on their own properties, so they can safely traverse the new shoreline protection system, after it is installed. No staircase is proposed within the easement.

The Sandwich Conservation Commission sought to address this issue by imposing Special Condition 24 in the Order, which requires the Applicant to maintain a proposed “gentle” sand slope to maintain access over White Cap Path, and to continue to maintain the sand slope in perpetuity. First, a condition cannot be imposed in perpetuity. Second, the condition is unenforceable³. Most importantly, the condition does not address the central issue; namely, that the Applicant failed to obtain the Bates’ permission prior to filing an application to construct a project on land in which they hold a property interest. *See*, 310 CMR 10.05(4)(a). The parties all agree that the Bates – and other property owners in Town Neck – have easement rights in White Cap Path. Indeed, these rights have already been confirmed and adjudicated by the Massachusetts Land Court. Thus, we are not asking the DEP to decide a property rights issue, which would be outside its jurisdiction. Instead, we are asking DEP only to apply the state wetlands regulations to require the consent of a landowner to a proposed project on his or her land, as is particularly necessary where the proposed project impedes access to that land⁴.

Simply put, the Bates are landowners within the meaning of 310 C.M.R. 10.05(4)(a). As such, their written permission was required prior to the filing of the NOI application. As the Applicants failed to obtain that prior permission, the DEP should issue a negative Superseding Order of Conditions.

B. The Project Fails to Meet the Coastal Beach Performance Standards

In addition to lacking the prior written permission of the landowners where the work is proposed to take place, the Applicants have also failed to design a Project that meets the performance standards set forth in the Wetlands Protection Regulations. Specifically, the Project fails to meet the performance standards for Coastal Beaches, set forth in 310 CMR 10.27.

In particular, the performance standards for Coastal Beaches set forth at 310 CMR 10.27(3) require that any project on a Coastal Beach not have an adverse effect by increasing erosion, decreasing the volume *or changing the form* of any such coastal beach.

³ The condition does not specify what grade constitutes “gentle” and does not include any enforcement mechanism in the event the slope is not maintained, as conditioned.

⁴ If the Commission had adhered to the requirements of the Act, and required the easement holders’ permission prior to voting on the application, the Applicants would have had no choice but to address the easement holders’ concerns, and propose a staircase as part of their Project.

The proposed fiber roll array is, in fact, proposed *in the middle of the coastal beach* and then the Applicants are proposing to backfill the area behind the array. Essentially, the Applicants are proposing to construct a 10' high wall, comprised of fiber rolls, in the middle of the Coastal Beach, and then are proposing to back fill the area behind it, thus drastically changing the form and volume of the Coastal Beach. Attached hereto as **Exhibit D** is a copy of the Applicant's site plan, with the various project areas colored in. Exhibit D clearly demonstrates the scope and extent to which the proposed project will change the form of the Coastal Beach, in violation of 310 C.M.R. 10.27. As presently designed, therefore, the Project does not meet the performance standards for Coastal Beaches. Therefore, the Project does not serve the interests of the Wetlands Protection Act, and the Commission's Order should be overturned.

For the foregoing reasons, the Commission's decision to issue an Order of Conditions for the Project is inconsistent with 310 CMR 10.00 et seq., and should be overturned. The Order of Conditions does not contribute to the protection of the interests identified under the Wetlands Protection Act, as it does not comply with the applicable performance standards for Coastal Beaches, in violation of 310 CMR 10.27. It further fails to comport with the regulations inasmuch as the Order was issued without the necessary permission of the landowners of the land on which the Project is proposed, in violation of 310 CMR 10.05. As such, the Bates respectfully request that the Department issue a negative Superseding Order of Conditions overturning the Commission's decision and denying the Project.

James Mahala
October 11, 2017
Page 5

Thank you and I remain,

Very truly yours,

A handwritten signature in black ink, appearing to read "Sarah Turano-Flores", with a stylized flourish at the end.

Sarah A. Turano-Flores

cc (w/enc.): Sandwich Conservation Commission
5 White Cap Path Realty Trust
Christopher Vaccaro, Esq.
James and Bette Bates
Jennifer Roberts, Esq.

3704520.1

Exhibit B



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

**Request for Departmental Action Fee
Transmittal Form**

DEP File Number:

SE66-1764

Provided by DEP

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

A. Request Information

1. Location of Project

2,4,6,8 White Cap Path

Sandwich, MA 02563

a. Street Address

66103

b. City/Town, Zip

\$245

c. Check number

d. Fee amount

2. Person or party making request (if appropriate, name the citizen group's representative):

James & Bette Bates by their attorney Sarah Turano-Flores

Name

Nutter McClennen & Fish LLP, 1471 Iyannough Road, PO Box 1630

Mailing Address

Hyannis

MA

02601-1630

City/Town

508-490-5400

State

508-771-8079

Zip Code

Phone Number

Fax Number (if applicable)

3. Applicant (as shown on Determination of Applicability (Form 2), Order of Resource Area Delineation (Form 4B), Order of Conditions (Form 5), Restoration Order of Conditions (Form 5A), or Notice of Non-Significance (Form 6)):

Sandwich Shores Condominium Association

Name

PO Box 84

Mailing Address

Sandwich

MA

02563

City/Town

State

Zip Code

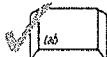
Phone Number

Fax Number (if applicable)

4. DEP File Number:

SE66-1764

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



B. Instructions

1. When the Departmental action request is for (check one):

☒ Superseding Order of Conditions – Fee: \$120.00 (single family house projects) or \$245 (all other projects)

☐ Superseding Determination of Applicability – Fee: \$120

☐ Superseding Order of Resource Area Delineation – Fee: \$120

Send this form and check or money order, payable to the *Commonwealth of Massachusetts*, to:

Department of Environmental Protection
Box 4062
Boston, MA 02211



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

DEP File Number:

**Request for Departmental Action Fee
Transmittal Form**

Provided by DEP

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

B. Instructions (cont.)

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office (see <http://www.mass.gov/eea/agencies/massdep/about/contacts/>).
4. 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.

Nutter, McClennen & Fish, LLPSeaport West
155 Seaport Boulevard
Boston, MA 02210-2604

Date:

October 11, 2017

Check No. **66103**

Santander Bank, N.A.

5-7515

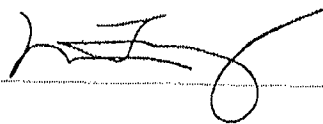
0110

Pay: Two hundred forty-five and 00/100*****

\$ 245.00

PAY
TO THE
ORDER OF:

Commonwealth of Massachusetts



⑈0000066103⑈ ⑆011075150⑆ 62104972138⑈

Commonwealth of Massachusetts

Vendor ID: 001683

Check #:66103

| <u>Invoice Num</u> | <u>Invoice Date</u> | <u>Invoice Amount</u> | <u>Amount Paid</u> | <u>Discount Taken</u> | <u>Payment Amt</u> | |
|--------------------|---------------------|-----------------------|--------------------|-----------------------|--------------------|---------------|
| 10/11/17 | 10/11/2017 | \$245.00 | \$245.00 | \$0.00 | \$245.00 | |
| | <u>Disb Date</u> | <u>Client</u> | <u>Matter</u> | <u>Disb</u> | <u>Description</u> | <u>Amount</u> |
| | 10/11/2017 | 0117782 | 00001 | FILFEE | Filing Fee | \$245.00 |
| Totals: | | \$245.00 | \$245.00 | \$0.00 | \$245.00 | |



Sarah A. Turano-Flores
Direct Line: (508) 790-5477
Fax: (508) 771-8079
E-mail: sturano-flores@nutter.com

October 11, 2017
117782-1

Via Overnight Mail and Certified Mail

James Mahala, Chief
Wetlands and Waterways Section
Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive; Route 105
Lakeville, Massachusetts 02347

Re: **Request for Superseding Order of Conditions; DEP File No. SE66-1764
2, 4, 6, 8 White Cap Path, Sandwich, Massachusetts**

Dear Mr. Mahala:

This office represents James and Bette Jane Bates, who own and reside at 57 Freeman, Avenue in Sandwich. On behalf of Mr. and Mrs. Bates, this letter is written to request a negative Superseding Order of Conditions from the Department of Environmental Protection ("DEP") pursuant to the provisions of 310 CMR 10.05(7). A filing fee in the amount of \$245 was sent today to the DEP Lock Box in Boston. Copies of the transmittal form and check are enclosed herewith as **Exhibit A**.

By Order dated September 27, 2017, the Sandwich Conservation Commission (the "Commission") approved a Notice of Intent ("NOI") filing by the Sandwich Shores Condominium Association (the "Applicants") for a project at 2, 4, 6, 8 White Cap Path in Sandwich (the "Property").¹ A true and accurate copy of the Order of Conditions is enclosed herewith as **Exhibit B**.

The Applicants sought permission to construct a coir envelope shoreline protection system on a Coastal Beach and Coastal Dune, across an easement owned by Mr. and Mrs. Bates for accessing that beach (the "Project"). As owners of the land where the work of the Project is being proposed, Mr. and Mrs. Bates' permission for the Project has not been sought nor obtained, as mandated by 310 C.M.R. 10.05(4)(a). In addition, Mr. and Mrs. Bates object to the Project because it does not comport with performance standards for work proposed on a Coastal

¹ The Project is also approved in an Order approving a Notice of Intent for 1, 3, and 5 White Cap Path, appealed separately by letter filed simultaneously herewith.

James Mahala
October 11, 2017
Page 2

Beach and Coastal Dune, as set forth in 310 C.M.R. 10.27 and 10.28, and thus fails to protect the interests identified under the Wetlands Protection Act. For these reasons, as set forth more fully below, Mr. and Mrs. Bates respectfully request that the Department issue a negative Superseding Order of Conditions.

A. The Applicants Failed to Obtain the Prior Written Permission of the Landowners of the Land Where the Work is Being Proposed, in Violation of 310 CMR 10.05.

Mr. and Mrs. Bates, together with other landowners in the Town Neck subdivision, have a deeded easement over the 10' wide right of way shown as White Cap Path on the site plans filed with the NOI application. A copy of the site plan filed with the NOI is attached hereto as **Exhibit C**. This easement², referenced in Mr. and Mrs. Bates's deed, was created by a written grant in 1950 and affords the Bates the right to utilize the way "for all purposes for which ways are commonly used in the Town of Sandwich."

Pursuant to the provisions of the state Wetlands Protection Regulations, an applicant is required to obtain the written permission of the landowner prior to filing an NOI application for work proposed on the land of that landowner. *See*, 310 CMR 10.05(4)(a); *see also*, In the Matter of John Schindler, OADR Docket Nos. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011), at p. 2, adopted as Final Decision (December 27, 2011), where it was determined that a third party must consent "to the extent work is proposed to be located on, through, or over" any property owned by the third party.

The Wetlands Protection Act defines the term "landowner" broadly to include all those with an interest in the property. *See*, 310 C.M.R. 10.04. Importantly, DEP has held that easement holders such as the Bates are landowners within the meaning of 301 CMR. 10.05(4)(a). *See*, in the Matter of Sloan, Docket No. 2006-864 (DALA137-0874), Ruling on Motion for Summary Decision (March 7, 2007), Recommended Final Decision (June 13, 2007), adopted by Final Decision (October 16, 2007). There, it was decided that an easement holder (like the Bates) who held a common driveway easement on a neighbor's servient property was a "landowner" within the meaning of 310 CMR10.04(4)(a). *See also*, Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. 623, 411 N.E.2d 187 (1980).

The requirement that the landowners' permission be obtained before the NOI is filed is particularly important here, when the work of the Project will prevent the landowner from

² These easement rights of the Bates in White Cap Path – as well as the easement rights of 47 other landowners in Town Neck with similar rights in White Cap Path - were recently affirmed by the Massachusetts Land Court in the Memorandum and Order (Foster, J.) entered in the matter of *Richard R. Alger, et als. v. Sandwich Shores Association, et al.*, Misc. Case No. 16-000624, on December 1, 2016. Thus, this not a situation where the property rights are in dispute.

actually accessing the land they own. According to the site plans submitted with the two NOI applications and shown on Exhibit C, the Applicants are proposing to construct a shoreline protection system that will result in a ten (10) foot elevation change over a span of fifteen (15) lateral feet. The steepness of this grade change has prompted the Applicants to propose not one (1) but *three (3)* sets of elevated staircases on their own properties, so they can safely traverse the new shoreline protection system, after it is installed. No staircase is proposed within the easement.

The Sandwich Conservation Commission sought to address this issue by imposing Special Condition 24 in the Order, which requires the Applicant to maintain a proposed “gentle” sand slope to maintain access over White Cap Path, and to continue to maintain the sand slope in perpetuity. First, a condition cannot be imposed in perpetuity. Second, the condition is unenforceable³. Most importantly, the condition does not address the central issue; namely, that the Applicant failed to obtain the Bates’ permission prior to filing an application to construct a project on land in which they hold a property interest. *See*, 310 CMR 10.05(4)(a). The parties all agree that the Bates – and other property owners in Town Neck – have easement rights in White Cap Path. Indeed, these rights have already been confirmed and adjudicated by the Massachusetts Land Court. Thus, we are not asking the DEP to decide a property rights issue, which would be outside its jurisdiction. Instead, we are asking DEP only to apply the state wetlands regulations to require the consent of a landowner to a proposed project on his or her land, as is particularly necessary where the proposed project impedes access to that land⁴.

Simply put, the Bates are landowners within the meaning of 310 C.M.R. 10.05(4)(a). As such, their written permission was required prior to the filing of the NOI application. As the Applicants failed to obtain that prior permission, the DEP should issue a negative Superseding Order of Conditions.

B. The Project Fails to Meet the Coastal Beach Performance Standards

In addition to lacking the prior written permission of the landowners where the work is proposed to take place, the Applicants have also failed to design a Project that meets the performance standards set forth in the Wetlands Protection Regulations. Specifically, the Project fails to meet the performance standards for Coastal Beaches and Coastal Dunes, set forth in 310 CMR 10.27 and 10.28.

³ The condition does not specify what grade constitutes “gentle” and does not include any enforcement mechanism in the event the slope is not maintained, as conditioned.

⁴ If the Commission had adhered to the requirements of the Act, and required the easement holders’ permission prior to voting on the application, the Applicants would have had no choice but to address the easement holders’ concerns, and propose a staircase as part of their Project.

In particular, the performance standards for Coastal Beaches set forth at 310 CMR 10.27(3) require that any project on a Coastal Beach not have an adverse effect by increasing erosion, decreasing the volume *or changing the form* of any such coastal beach. Additionally, 310 CMR 10.28(3) prohibit projects on a Coastal Dune from affecting the ability of waves to remove sand from the dune, disturbing any vegetative cover, causing any modification of the dune form, or interfering with the lateral or landward movement of the dune.

The proposed fiber roll array is, in fact, proposed *in the middle of the coastal beach* and then the Applicants are proposing to backfill the area behind the array, in an area identified on the plan as Coastal Dune. Essentially, the Applicants are proposing to construct a 10' high wall, comprised of fiber rolls, in the middle of the Coastal Beach, and then are proposing to back fill the area behind it labeled as Coastal Dune, thus drastically changing the form and volume of the Coastal Beach and inhibiting the ability of the Coastal Dune to respond and move in response to wind and wave action. Attached hereto as **Exhibit D** is a copy of the Applicant's site plan, with the various project areas colored in. **Exhibit D** clearly demonstrates the scope and extent to which the proposed project will change the form of the Coastal Beach and Coastal Dune, in violation of 310 C.M.R. 10.27 and 10.28. As presently designed, therefore, the Project does not meet the performance standards for Coastal Beaches or for Coastal Dunes. Therefore, the Project does not serve the interests of the Wetlands Protection Act, and the Commission's Order should be overturned.

For the foregoing reasons, the Commission's decision to issue an Order of Conditions for the Project is inconsistent with 310 CMR 10.00 et seq., and should be overturned. The Order of Conditions does not contribute to the protection of the interests identified under the Wetlands Protection Act, as it does not comply with the applicable performance standards for Coastal Beaches and Coastal Dunes, in violation of 310 CMR 10.27 and 10.28. It further fails to comport with the regulations inasmuch as the Order was issued without the necessary permission of the landowners of the land on which the Project is proposed, in violation of 310 CMR 10.05. As such, the Bates respectfully request that the Department issue a negative Superseding Order of Conditions overturning the Commission's decision and denying the Project.

James Mahala
October 11, 2017
Page 5

Thank you and I remain,

Very truly yours,

A handwritten signature in cursive script, reading "Sarah A. Turano-Flores".

Sarah A. Turano-Flores

cc (w/enc.): Sandwich Conservation Commission
Sandwich Shores Condominium Association
Christopher Vaccaro, Esq.
James and Bette Bates
Jennifer Roberts, Esq.

3702844.2

Exhibit C

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LEVERETT SALTONSTALL BUILDING
100 CAMBRIDGE STREET, BOSTON 02202

BARNSTABLE, SS

ORDER UNDER M.G.L., c. 130, s. 105

1. The Commissioner of Environmental Management, acting pursuant to M.G.L. c. 130, s. 105, for the purposes of promoting the public safety, health and welfare, and protecting public and private property, wildlife and marine fisheries, hereby adopts this Order regulating and restricting coastal wetlands in the Town of Sandwich, County of Barnstable, Commonwealth of Massachusetts, as delineated on plans entitled "Commonwealth of Massachusetts, Department of Environmental Management, Wetlands Restriction Program, Plan of Wetlands," Plans L-226, L-227, L-228, M-101, M-102, N-98, N-99, adopted March 18, 1980.
The plans and list of assessed owners of the land so affected are incorporated herein and recorded herewith.
2. This Order does not grant any property rights; it does not authorize any person to trespass or injure the property of another; it does not excuse any person from complying with other applicable laws, regulations, by-laws or ordinances.
3. The following activities and uses are allowed on land and waters affected by this Order provided the proposed activity or use has received approval as required by M.G.L. c. 131, s. 40 as most recently amended at the time the proposed work is to be undertaken:
 - A. The cultivation and harvesting of shellfish and worms and the excavation and construction of areas for the cultivation and harvesting of shellfish and other marine foods. Salt marsh haying, dune or marsh grass planting, and the harvesting of marine algae.

PL. 8X. 343 pps. 19-25

-2-

- B. The use or improvement of land or water for commercial agricultural purposes; provided that any subsequent non-agricultural use of land which was altered for agricultural purposes at a time when said land was subject to this Order may be regulated, restricted or prohibited in accordance with any conditions stated herein. Agricultural Purposes shall be defined as using land or water for one or more of the following purposes: raising, breeding or production of a specified type of animal or plant life, including but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, fish, bees, fur-bearing animals, and fruits, berries, nuts and other foods for human consumption, feed for animals, tobacco, flowers, ornamental plants, trees, forest products, nursery or greenhouse products, or sod.
- C. Structures related to passive outdoor recreation activities; provided that such structures do not substantially alter existing patterns of tidal flow, obstruct the movement of sediment or alter the natural contour of the coastal wetland.
- D. The installation of floats, provided they are located below mean low water and are otherwise approved under all applicable municipal, state and federal laws; construction and maintenance of boat launching ramps except on dunes, salt marsh areas or productive shellfish tidal flats as identified by the Division of Marine Fisheries or the local Shellfish Department, and only where such launching ramps will have no effect on adjacent property or downcoast areas.
- E. The construction and maintenance of temporary structures such as: catwalks, wharves, piers, docks, boathouses, boat shelters, fences, wildlife management shelters, foot bridges, observation decks and shelters; provided that such structures are constructed on pilings, do not destroy the existing vegetation, substantially alter existing patterns of tidal flow, obstruct the movement of sediment or alter the natural contour of the coastal wetland.
- F. Excavation for wildlife management impoundments; provided that no fill or other material shall be placed upon the area except as may be necessary to construct the retention structure and provide access thereto, and to provide bank stabilization.
- G. Beach nourishment except on salt marsh areas or productive shellfish tidal flats as identified by the Division of Marine Fisheries or the local Shellfish Department; dune nourishment; bank and dune stabilization and coastal engineering structures which are otherwise approved under all applicable municipal, state and federal laws, and only where such structures will have no adverse effects on adjacent property or downcoast areas.
- H. Maintenance dredging of existing channels and marine facilities; provided that such maintenance dredging shall not increase the scope of the initial dredge area. Expansion dredging of existing channels or marine facilities; provided that such dredging is otherwise approved under all applicable municipal, state and federal laws, and does not substantially alter existing patterns of tidal flow, or obstruct the movement of sediment. Said expansion dredging shall not be allowed in salt marsh areas or in productive shellfish tidal flats as identified by the Division of Marine Fisheries or the local Shellfish Department. Dredged spoil from maintenance or expansion dredging projects allowed under this section shall not be disposed of on any wetland restricted under this Order, except that clean spoil may be used for the purposes of beach nourishment under section G. of this Order.

- I. Dredging and/or construction for a boat channel of a size limited to single family use and which is otherwise approved under all applicable municipal, state and federal laws. Said dredging and/or construction shall be accomplished without dredging in salt marsh areas or productive shellfish tidal flats as identified by the Division of Marine Fisheries or the local Shellfish Department. In addition, such dredging shall not substantially alter existing patterns of tidal flow or obstruct the movement of sediment.
 - J. The construction and maintenance of a driveway or roadway of minimum legal and practical width where reasonable alternative means of access from a public way to unrestricted land of the same owner is unavailable. Such driveway or roadway shall be constructed in a manner which does not substantially alter existing patterns of tidal flow, obstruct the movement of sediment or alter the natural contour of the coastal wetland.
 - K. The enlargement to minimum legal and practical width and the maintenance of existing raised roadways.
 - L. The operation and maintenance of existing underground septic systems; The installation, operation, and maintenance of underground and overhead utilities limited to electrical, communication, sewer, potable water and gas lines; provided, in all of the above, the surface vegetation and contour of the coastal wetland is restored substantially to its original condition.
 - M. The installation and maintenance of underground conduits or other related structures associated with intakes and outfalls of any permitted and licensed electric generating facility in beaches, dunes and tidal flats not containing productive shellfish beds as identified by the Division of Marine Fisheries or the local Shellfish Department; provided that such structures do not destroy the existing vegetation, substantially alter existing patterns of tidal flow, obstruct the movement of sediment or alter the natural contour of the coastal wetland.
4. The following activities and uses are prohibited on land and waters affected by this Order, except those activities and uses needed to accomplish the above permitted uses:
- A. Filling, placing or dumping on said coastal wetlands any soil, loam, peat, sand, gravel, rock, or other mineral or chemical substance, refuse, trash, rubbish, debris or dredged material.
 - B. Draining, excavating or dredging said coastal wetlands or removing therefrom any soil, loam, peat, sand, gravel, rock, or other mineral substance.
 - C. Discharging hazardous substances, including but not limited to, heavy metals, pesticides or petroleum products from a power plant or other industrial source, or primary or secondary effluent from a sewage treatment facility.
 - D. Constructing habitable dwellings, commercial structures, and any accessory structures thereto, including parking lots.
 - E. In addition, no person shall perform any act or use any coastal wetland in a manner which would destroy the natural vegetation of the coastal wetland, substantially alter existing patterns of tidal flow, obstruct the movement of sediment or alter the natural contour of the coastal wetland.

-4-

5. As used herein, the word "person" shall include any individual, group of individuals, corporations, societies, associations, partnerships, governments and subdivisions and authorities thereof, except where exempted by statute.

6. The coastal wetlands, including banks, marshes, swamps, meadows, flats or other low land subject to tidal action or coastal storm flowage, and the contiguous lands that may be included in this Order are further described as follows:

Coastal Beach: unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water. Coastal beaches extend from the mean low water line landward to the dune line or coastal bankline, whichever is closest to the ocean, or to the seaward edge of existing man-made structures, when these structures replace one of the above lines.

Coastal Dune: any hill, mound or ridge of sand landward of a coastal beach deposited by wind action or storm overwash. Coastal dune shall also mean sand deposited by artificial means and serving the purpose of storm damage protection or flood control.

Salt Marsh: a coastal wetland subject to periodic tidal action and characterized by plants that are well adapted to or prefer living in saline soils. Dominant plants within salt marshes may include salt meadow cord grass (Spartina patens) and/or salt marsh cord grass (Spartina alterniflora). A salt marsh may contain tidal creeks and ditches.

Salt Pond: a shallow enclosed or semi-enclosed body of saline water that may be partially or totally restricted by barrier beach formation. Salt ponds may receive freshwater from small streams emptying into their upper reaches and/or springs in the pond itself.

Sea Cliff or Coastal Bank: the seaward face or side of any elevated landform other than a dune and which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

Tidal Flat: any area of land exposed at low tide which is composed of mud or sand and which is generally unvegetated.

7. Any person may request the Department of Environmental Management or its successor to conduct a review to determine if this Order has been violated. Upon receipt of the request, the Department shall conduct an on-site inspection and shall take such corrective measures as are warranted.

8. Any person who has an ownership interest in land affected by this Order, any lessee holding a lease of twenty-five years length or more, and any mortgagor who has an interest in land affected by this Order may request that the Department of Environmental Management or its successor conduct a review to determine whether change has occurred in land restricted under this Order. If the Commissioner determines, following examination, that significant change has occurred, the Department shall adopt an Amending, Modifying or Repealing Order or shall correct the Order.
9. Any person having an ownership interest, any lessee holding a lease of twenty-five years length or more and any mortgagor having an interest may, within ninety (90) days after receiving notice of this Order, petition the Superior Court to determine whether this Order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the Order constitutes the equivalent of a taking without compensation.

WITNESS my hand and seal this 18th day of March, 1980

Richard E. Kendall
Richard E. Kendall, Commissioner

APPROVED: BOARD OF ENVIRONMENTAL MANAGEMENT

Dana R. Dwyer

Sarah H. Bree

John Loupos

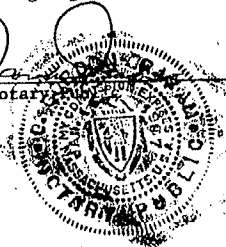
COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

Then personally appeared the said Richard E. Kendall, Commissioner of Environmental Management and acknowledged the foregoing instrument to be his free act and deed, before me.

My commission expires January 16, 1984

Notary



Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|--|---------------------|------------------------|-----------|
| Ahonen, Winthrop V. | 488/ 95 | M101 | 218, 217 |
| Allen, et ux David W. | 2608/ 74 | M101 | 218, 217 |
| Anderson, et al Alfred A. | 1369/ 1170 | M101 | 217, 218 |
| Antonellis, et ux Paul J. | 2537/ 121 | N99 | 210, 212 |
| Baker, Marie L. R. | 654/259 | M101 | 218, 217 |
| Baker, William R. | 2640/145 | M101 | 218, 217 |
| Bazzinotti, W. James & Cecile C. | 2168/23 1180/546 | L227 | 32 |
| Beach, Henry J. | 11410/769 | L226, L227, M101 | 32 |
| Beaulieu, Irene | | N99 | 236 |
| Bell, Hector H. & Margaret | 2441/52 | N98 | 114 |
| Belli, et al Raymond | 1246/362 | L228 | 62, 61 |
| Belli, et al Raymond | 1246/362 | L228 | 62, 61 |
| Berg, Thelma L. | | L227 | 32 |
| Besso, et al Diana | | M101 | 217, 218 |
| Bidgood, Donald F. & Joan B. | 2660/ 163 | L227 | 32 |
| Biggers, et ux W. Watts & Grace C. | 1254 82 | M101 | 217, 218 |
| Biggers, et ux W. Watts & Grace C. | | M101 | 217, 218 |
| Bixby, et al Ellen I. | | | 62, 61 |
| Bixby, Merle I. & Karen | 2321/68 | N98 | 114 |
| Blake, et ux Melcher P. | 723/361 | M101 | 217/218 |

Sandwich Coastal Wetland Restriction

Persuant to G. L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland # |
|---------------------------------|--------------------|--------------|-----------|
| Blake, et al Melcher | 547/300 | M101 | 217, 218 |
| Blake, et ux Melcher P. | 785/198 | M101 | 217, 218 |
| Blackburn, et ux Edward M. | 1277/193 | N99 | 210 |
| Borelli, et ux Angelo A. | 1477/140 | L228 | 62, 61 |
| Boylan, Jeanne R. | 527/264 | M101 | 217, 218 |
| Breunig, George W. | 1348/1038 | N98 | 114 |
| Briggs, et ux Richard S. | 1101/302 | M101 | 217, 218 |
| Briggs, et al William E. | 1476/567 | M101 | 217, 218 |
| Briggs, et al William E. | | M101 | 217, 218 |
| Buckley, Hazel | 1251/101 | M102 M102 | 32 |
| Buckley, Hazel S. | 764/98 1471/726 | M101 | 218, 217 |
| ? Cape Cod Bank | 2040/4 | L227 | 32 |
| Canal Electric Co. | L.C. | L227 | |
| Carleton, Joy | | N99 | 210, 209 |
| Carleton Shores Assoc., Inc. | 1495/458 | N99 | 210, 209 |
| Carr, James E. & Carol A. | 2163/320 | N98 | 114 |
| Carstens, Grace P. | 900/478 | N98 | 32 |
| Carstens, Grace P. | 1057/198 | N98 | 32 |
| Cary, Howard C. & Irene C. | 646/529 | N98 | 114 |
| Catto, et ux Alexander T. | 2070/5 | M101 | 217, 218 |
| Chapple Et al Richard F. | 2509/323 | M101 | 217, 218 |
| Chipman, Hrs., S. S. | | L227 M101 | 32 |
| Clark, Eugene S. | 562/461 | M101 102 | 32 |

Sandwich Coastal Wetland Restriction

Pursuant to G.L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland # |
|---|----------------------|--------------|-----------|
| Colman, et al Ernest W. | 1325/426 | N99 | 210, 209 |
| Connors, et ux Robert J. | 1240/151 | L228 | 62,61 |
| " " | 1240/150 | L228 | 62,61 |
| <u>FORMERLY F4, 5, 6 OCEANSIDE COTTAGE CONDO.</u> | | | |
| Coomey, et ux Edward A. & Lillian H. | 2600/116 | M101 | 217, 218 |
| Cronin, Ellen C. | 448/322 | M101 | 217,218 |
| Cross, et ux Chester E. | 672/593 | Inland | 76 |
| Crowell, David & Elizabeth W. | ABS. 239 | M101 | 217, 218 |
| Cross, Chester E. | 672/593 | M101 | 78 |
| Curry Co., Frank B. | 1449/299 | L227 | 32 |
| " " | 2125/204 | L227 | 32 |
| Curtis, John A. | 1233/484 | N99 | 210,209 |
| Cross, Lester E. | 1672/315 | M101 102 | 32 |
| Davidson, et al James L. | 528/134 | M101 | 217,218 |
| Dearborn, et al Trs., Eustis | 1475/276 | M101 | 217,218 |
| DeFelice, et al Theodore A. | 2600/179 | N99 | 210,209 |
| Denny, et ux Paul J. | 1470/609 1250/576 | L226 L227 | 32 |
| Dickett, George T. & Marilyn S. | 1497/572 | N98 | 14 |
| " " | " " | N98 | 114 |
| Dillingham, Lemuel Fish, Jonathan HRS. | | M101 102 | 32 |
| DiPietro, Bernard C. Mary E. | 2641/153 | L226 | 32 |
| DiTullio, et ux Silvio & Celia | 1078/427 | L228 | 62,61 |
| " " | 951/437 | L228 | 61,61 |
| DiTullio, et ux Silvio | 1358/1132 | L228 | 62,61 |

Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|---------------------------------------|--------------------|------------------------|-----------|
| Donovan Ann | 2381/139 | L228 | 62, 61 |
| Donovan, Ann | 2381/139 | L228 | 62, 61 |
| Donovan, Phyllis A. | 1395/1139 | L228 | 62, 61 |
| " " | 1475/1026 | L228 | 62, 61 |
| Dunbar, et ux Bruce S. | 2378/299 | L228 | 62, 61 |
| Drouin, Paul F. | 1765/120 | N99 | 210, 209 |
| Dunbar, et ux Clinton F. | 756/152 899/215 | M101 | 217, 218 |
| " " | 991/335 | M101 | 217, 218 |
| Dunbar, et ux Walter C. | 884/541 | M101 | 217, 218 |
| " " | 765/290 899/217 | M101 | 217, 218 |
| ? Dudgroun, Thomas P. C. Ruth R. | 1458/829 | N98 | 114 |
| Dwyer, John & Sibbel F. | 2229/44 | L228 | 61, 62 |
| Dwyer, et ux John | 2229/44 | L228 | 62, 61 |
| Ehret, John A. & Christine S. | 1392/123 | N98 | 114 |
| Eldridge, et ux Donald R. | 1926/94 | M101 | 217, 218 |
| Eldridge, et ux Roland R. | 198/18 | L226, L227, M101 | 32 |
| Ellis, Harold F. | 615/483 | L227 | 32 |
| Ellis, Thomas C. | 2195/327 | M102 | 78 |
| Fairbanks, et ux Albert M. | 2109/217 | L227 | 54 |
| Field, et ux John H. | 1493/312 | M101 | 32 |
| Fielding, Robert C. Patricia A. | 2529/308 | N98 | 114 |
| Fitzpatrick, et ux Robert & Sharon | 1 C. | L227 | 62, 61 |

Sandwich Coastal Wetland Restriction

Persuant to G. L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|--|-------------|--------------|-----------|
| Fleet, Edith L. | 656/55 | N99 M102 | 114 |
| " " | " " | " " | 114 |
| " " | 656/55 | " " | 114 |
| " " | " " | " " | 114 |
| " " | " " | " " | 114 |
| " " | " " | " " | 114 |
| " " | " " | " " | 114 |
| " " | " " | " " | 114 |
| Flynn, et ux Peter Y. | 2203/38 | L227 | 54 |
| Garland, Orville D. | | M101 | 217,218 |
| " " | 1341/688 | M101 | 217,218 |
| " " | | M101 | 217,218 |
| " " | 797/594 | M101 | 217,218 |
| Gaupp, Charles J. & Mory Louis | 1443/458 | N98 | 114 |
| Geary, et ux Lester E. & Adrienne M. | 1350/856 | L228 | 62,61 |
| George, Jean Wilkerson | | M101 | 217,218 |
| Gibbs, et al Elmer | | L228 | 61 |
| Foster, William E. | 670/88 | M101 | 32 |
| Fraser, et ux James L. | 1468/535 | M101 | 217,218 |
| Frederickson, et ux Emil W. | 923/367 | L227 | 54 |
| Freeman, Ella | 1044/325 | M101 M102 | 227,32 |
| Freeman, et ux Ella B. | 1044/325 | " " | 32 |
| Freeman, Ella B. | 1044/325 | M101 102 | 32 |
| Freitas, Ben & Jane A. | 2558/167 | N98 | 114 |

Sandwich Coastal Wetland Restriction

Pursuant to G. L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|--|-----------------------|----------------|-----------|
| Gagner, Henry O, Jr. Gagner, Raymond F. | | Inland L228 | 58 |
| " " | | " " | 58 |
| " " | 1430/902 | " " | 58 |
| Gallant, Dorothy E. | 673/250 | M101 | 217,218 |
| Gilberti, Richard P. & Joyce M. | 2315,294 | N98 | 114 |
| Gorman, et ux Albert T. | 886/101 | L228 | 214,61 |
| " " | 886/101 | L228 | 214,61 |
| Goulet, et ux Everett F. | 1117/61 | L228 | 62,61 |
| " " | 1098/11 | " " | 62, 61 |
| Govoni, Henry A. | 2633/226 | M101 M102 | 32 |
| Govoni, et ux Henry | | M101 M102 | 32 |
| Granger, Philip D. & Margaret | 884/195 | L227 | 34,32 |
| Graves, Wilfred H. Marion H. | 806/124 | N98 | 114 |
| Grillo, et ux Fortunato F. | 1095/426 | L228 | 214,61 |
| Grillo, et ux Fortunato, F | 1078/113 | L228 | 62, 61 |
| Grigas, et ux John J. & Florence C. | L.C. | M101 | 217, 218 |
| Hall, et ux Robert E. | 1848/44 | L228 | 62,61 |
| Hammond, Jr Wallace E. | 2718/252 | L227 | 32 |
| Hathaway, Jr., et ux James B. | 1640/13 | L228 | 62, 214 |
| Hinckley, Clayton T. | Probate 143417 | M101 | 217,218 |
| Holmes, Esther | 66125 L.C. | M101 | 215 |
| " " | 66125 L.C. | M101 | 215 |
| Homes, Inc. Nanly | 1507/597 | M101 | 217,218 |
| Hoxie, et ux Channing E | 1004/232 | L227 | 32 |

Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|-----------------------------------|-------------|----------------------|-----------|
| Hoxie, et ux Channing E. | 1004/232 | L227 | 32 |
| Huntress, FRANKLINE. | 667/55 | M101 | 32 |
| Jarvis, Mrs. Deming | | L-227 M101 | 32 |
| Jenkins, Wm. R. Nancy Landers | 2440/329 | N98 | 114 |
| Johnson, C. Armond | 1496/443 | N98 | 210 |
| Johnson, et ux Loring C. | 1408/947 | M101 | 217,218 |
| Kaipainen, Henry & Hili E. | 1137/127 | L227 | 32 |
| Kardell, Paul F. & Caroline L. | 2305/348 | N98 | 114 |
| Kendall, Henry W. | 1454/635 | M101 | 217,218 |
| Kendall, Henry W. | 1454,635 | M101 | 217,218 |
| Kinnarney, Mary A. | 2227/16 | L228 | 62, 61 |
| Kinnarney, Mary A. | 2227/15 | L228 | 62, 61 |
| Knight, Martha F. | p. 24888 | M101 | 32 |
| Knight, Martha F. | 659/24 | M101 | 32 |
| Knight Martha F. | P. 24888 | M101 | 32 |
| Knight, Martha F. | P.24888 | M101 102 | 32 |
| Knight, Martha F. | P.24888 | M101 102 | 32 |
| Koenig, Emil, Jr et ux | | N99 | 236 |
| Kueykenholm, et ux Robert | 1734/27 | L226 L227 M101 | 32 |
| Ladenburg, Richard | 1107/52 | N99 | 114 |
| Ladenbury, Richard | 1107/56 | N99 | 114 |
| Ladenburg, Richard | 1226/311 | N99 | 114 |
| Lake, Louise Lister | L.C. | M101 | 215 |
| Landry, Charles S. | 2300/289 | N98 | 114,191 |
| Lewis, Florence V. | 906/120 | L227 | 32 |
| Liberty, et ux Olga V. | 2687/36 | L226 L227 M101 | 32 |

Sandwich Coastal Wetland Restriction

Persuant to G. L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|--|-------------|--------------|-----------|
| Lightfoot, Joyce | 2262/77 | N99 | 217,218 |
| Lighthouse Cottages, Inc. | 2502/205 | N98 | 114 |
| Lighthouse Cottages, Inc. | 2502/205 | N98 | 114 |
| " " | 1975/184 | N99 M102 | 114 |
| Lockett, Carolyn J. | L.C. | M101 | 217,218 |
| Lynch, Edith M. | 1215/445 | M101 L227 | 32 |
| " " | " " | " " | 32 |
| " " | " " | " " | 32 |
| " " | " " | " " | 32 |
| Lynch, et al Edith M. | " " | " " | 32 |
| Luce, et ux Kenneth A | 792/75 | M101 | 217, 218 |
| Luce, et ux Kenneth A. | | M101 | 32 |
| Luciani, et al Peter J. | 1405/613 | L228 | 62,61 |
| Luciani, et al Peter J. | 2456/281 | L228 | 62,61 |
| Mabardy, Michael G. | 1095/422 | L228 | 62,61 |
| " " | 2359/247 | " " | 62, 61 |
| Macurdy, et al Ruth G., Herbert J., Roberta, Herbert J. Jr. | 649/382 | N99 M102 | 114 |
| Madonna, et ux Frank A. | 2430/35 | M101 | 32 |
| Magnusson, Alex T. | 398/316 | M101 | 220 |
| March, Andrew W. | 2446/217 | M101 | 74 |
| Masaschi, et als Pauline C. | 528/501 | M101 | 217, 218 |
| Masaschi, Pauline C. | 1028/508 | " " | 217,218 |
| Massi, Joseph J. | 1933/136 | N98 | 114 |
| McAfee, et ux Harold K. | 1495/756 | M101 | 32 |
| " " | 892/170 | " " | 217,218 |
| " " | 959/423 | " " | 217,218 |

Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland # |
|--|------------------------------|------------------------|-----------|
| McDonald, Thom. P. & Argyro | 2154/234 | N98 | 114 |
| McDonough, et ux Redmond M. | 1095/24 | L228 | 62, 61 |
| " " | Ab255 1123/234 1363/17 | L228 | 62, 61 |
| McGrath, Rbt. F. & Marie R. P. | 1748/107 | N98 | 114 |
| McGrath, et ux Robert F. | 1205/573 | M101 L227 | 32 |
| McKay, Edward G. & Rita G. | 1520/932 | N98 | 114 |
| Meredith, et ux Sumner W. | 824/292 | " " | 217, 218 |
| Merriam, et als Charles R. | 437/522 441/559 | L226, L227, M101 | 32 |
| Miller, Ellen E. | 2038/211 | L228 | #62, 214 |
| " " | 2179/46 | " " | " " |
| Monaghan, Frances | 1306/1066 | M101 | #218, 32 |
| Mooney, Wm. C. & Margaret M. | 1147/1140 | L227 | W# 32 |
| Moorehouse, Thomas Moorehouse, Natalie | 2769/308 | N98 | 114 |
| Morrow, Wallace S. Joan B. | 522/106 | N98 | 114 |
| Mulder, Delwyn J. & Jean E. | 2267/151 | N98 | 114 |
| Murphy, Gail C. | 2175/314 1918/14 | L226 | 32 |
| Murphy, et al Francis L. | 2308/120 | L227 | 32 |
| Murphy, Jeremiah F. | 1398/1076 | L228 | 62, 61 |
| Murray, et ux John W. & Margaret J. | 1393/67 | L228 | 61, 62 |
| N. E. Merchants Nat'l Bank. Tr. u/w of Elsie W. Haines | 928/450 | N98 | 171 |
| O'Hara, et ux Paul C. | 1486/796 | L228 | 62, 61 |

Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland# |
|---|-------------|--------------|----------|
| O'Hara, et al Catherine C. | 1208/479 | L228 | 62, 61 |
| Ohman, et ux John A. P. | 1294/338 | L227 | 32 |
| O'Neil, Richard D. & Maureen B. | 2155/325 | N98 | 114 |
| Pambuko, John T. & Salma E. | L.C. | L228 | 61, 62 |
| Panoff, Alfred M. | | N99 | 236 |
| Polli, et ux Herman A. | 1577/183 | L228 | 62, 61 |
| " " | " " | " " | 62, 61 |
| Pope, Jr., et als George B. & Marion C. | 1198/584 | N99 | 114 |
| Potter, et ux Armand H. | 1451/854 | M101 | 217, 218 |
| Powell, et ux Henry D. | 1095/42 | L228 | 62, 61 |
| " " | 700/191 | " " | 62, 61 |
| Powers, Anastasia F. | P.41569 | L227 | 52 |
| Pratt, Helen M. | 1520/336 | M101 | 217, 218 |
| Pyrofax Gas Corp. | 1189/99 | L227 | 32 |
| Quill, et ux Joseph G. | 1010/345 | M101 | 217, 218 |
| Ray, Marilyn M. | 1253/362 | L228 | 62, 61 |
| Reiss, et ux Malcolm & Lucia | 1143/303 | M101 | 217, 218 |
| " " | " " | M101, 102 | 32 |
| " " | 1143/303 | " " | 32 |
| " " | | " " | 32 |
| " " | | " " | 32 |
| Ricupero, et ux David G. | 2584/53 | M101 | 217, 218 |

Sandwich Coastal Wetland Restriction

Pursuant to G.L. Ch. 130, §. 105

| Name | Book & Page | Orthophoto | Wetland# |
|---|-------------|-------------|----------|
| Ricupero, et ux David G. | 2584/53 | M101 | 217, 218 |
| Ricupero, et ux David G. | 909/182 | M101 | 217, 218 |
| Ricupero, et ux David G. | 909/182 | M101 | 217, 218 |
| Ricupero, Mary I. | 609/550 | M101 | 217, 218 |
| Robertson, et ux Richard M. | 2002/310 | M101 | 217, 218 |
| Robertson, et ux Richard N. | 745/52 | M101 | 217, 218 |
| Robertson, et ux Richard N. | 1223/425 | M101 | 217, 218 |
| Rocci, et ux Frank A. | 2320/225 | L228 | 62, 61 |
| Rockwell, Jr. et ux Wells & Vivian D. | 1253/363 | L228 | 62, 61 |
| Rogowski, Florence H. | 1251/91 | N98 | 114 |
| Rowbotham, Allan C et ux Eileen | 2756/196 | M101 | 217, 218 |
| Russell, Joan M. | 2617/42 | N99 M101 | 76 |
| Sagamore Beach Imp. Ass. | 1103/132 | L228 | 62, 61 |
| " " | " " | " " | 62, 61 |
| Saltzberg, Robt. | 2710/329 | N98 | 114 |
| Sandwich Lands Inc. c/o Richard Lodenburg | | N99 | 236 |
| Sawyer, Cleta A. | 738/17 | M101 | 217, 218 |
| Schmidt, Jean A. | 320/84 | L227 | |
| Shaw, Johnathan A. | 2228/167 | L227 | 34 |
| Smythe, et ux Joseph F. | 1285/981 | L228 | 62, 61 |
| Shepard, et ux Omar H & Shirley May | 1434/707 | M101 | 217, 218 |
| Stadler, et ux Steven J. | 2157/86 | N99 | 210, 213 |
| Stout, Victor R Mary A. | 1179/109 | N98 | 114 |

Sandwich Coastal Wetland Restriction

Persuant to G.L. Ch 130, S. 105

| Name | Book & Page | Orthophoto | Wetland # |
|--|--------------------|--------------|-----------|
| Sutton, et ux George | 815/450 634/320 | M101 | 217, 218 |
| Sutton, et ux George | | M101 | 217, 218 |
| Sutton, et ux George | 638/403 | M101 | 217, 218 |
| Talboom, Jr. et ux Frank P. | 1433/57 | M101 | 217, 218 |
| Tallarida, Dorothy A. | 2084/114 | M101 | 217, 218 |
| Taylor, Harriett | 27409/B5 | N98 | 114 |
| Taylor, James P. & Barbara I. | 2646/143 | M101 | 217, 218 |
| Ternullo, et ux <i>John S?</i> Ann M. | 1708/194 | M101 | 217, 218 |
| Tighe, et ux Lawrence W. | 1321/166 | L228 | 62, 61 |
| " " | " " | " " | 62, 61 |
| Thompson, Jr. William | 2662/20 | N99 | 114 |
| Thomas, et ux Phillip Albert | 869/509 | M101 | 217, 218 |
| Toolas, et ux Arne & Julia A. | 1230/321 | Inland | 76, |
| Thaver, et ux Arne | 1107/182 | M101 | 217, 218 |
| Uccello, Sebastian Nancy Ann | 1796/348 | L226 | 61, 62 |
| Uccello, et ux Sebastian R. | 1796/348 | L228 | 62, 61 |
| Comm. of Mass. | | | 58, 214 |
| Vanderpyle, et ux Charles M. | 670/525 | L228 | 62, 61 |
| Van Gordon, et ux Donald J. & Marguerite | 1324/859 | M101, 102 | 32 |
| Wallace, et ux Arthur A. | 1056/113 | L228 | 62, 61 |
| Walton, George F. & Dorothy E. | 1359/429 | M101 | 32 |
| James B. & Mary P. | | | 114 |
| Ward, William W. & Catherrine B. | 2114/46 | N98 | 114 |
| " " | " " | " " | 114 |

Sandwich Coastal Wetland Restriction

Pursuant to G.L. Ch. 130, S.105

| Name | Book & Page | Orthophoto | Wetland # |
|---|--------------------|---------------|-----------|
| Ward, William W. & Catherine B. | 2114/46 | N98 | 114 |
| " " | " " | " " | 114 |
| " " | " " | " " | 114 |
| Weaving, et ux Howard M. | 1095/430 | L228 | 62, 61 |
| " " | 894/302 | L228 | 62, 61 |
| Weiss, Earle B. | 2181/9 | N98 | 210 |
| Wilkinson, Jr. Robert J. Scorton Realty Tr. | 1503/66 | N98 | 114, 170 |
| Williams, Jr. Seymour Trs. Coonebrook R. E. Tr. | 1360/340 | N98 | 114 |
| Wing Family of America, Inc. | 594/134 | M101 | 32 |
| " " | 1357/699 | M101 | 32 |
| Wing, HRS. Stephen R. | | L227, M101 | 32 |
| Wing, et al Frank | 1267/497 | M101 | 217, 218 |
| Yanaros, et ux Nicholas E. | 455/51 | L227 | 54 |
| Yoon, et ux <i>ILL YONG et ux Barbara Tench</i> | 1751/58 | M101 | 217, 218 |
| Young, et ux Leith B. | 1367/462 | L228 | 62, 61 |
| Young, Saimi M. | 696/451 693/147 | M101, 102 | 32 |
| Zappulo, David P. & Karen A. | 2441/67 | | 114 |

BOOK 3097 PAGE 074
Sandwich Coastal Wetland Restriction
Pursuant to G.L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland# |
|------------------|-------------------------------|------------|----------|
| Town of Sandwich | 881/29 | L227 | 32 |
| " | 2212/239 | L227 | 32 |
| " | 1095/15 | L227 | 32 |
| " | | L227 | 32 |
| " | 1450/826 | L227 | 32 |
| " | 1376/473 | L227 | 32 |
| " | 1391/886 | L227 | 32 |
| " | 886/418 | L227 | 32 |
| " | 1391/886 | M101, L227 | 32 |
| " | 295/422 | L227/M101 | 32 |
| " | | L227 | 32 |
| " | 881/129 | L227 | 32 |
| " | | M101 | 218, 219 |
| " | | M101 | 218, 219 |
| " | 1436/969 | L227 | 32, 34 |
| " | 1356/796 | N98 | 114 |
| " | | M101 | 218, 219 |
| " | 1436/969 | L227 | 32, 34 |
| " | 1356/796 | N98 | 114 |
| " | 1261/334 | N98 | 114 |
| " | 1287/1042 | N98 | 114 |
| " | 1265/356 | N98 | 114 |
| " | 1265/356 | N98 | 114 |
| " | 1419/415 | M101, L227 | 32 |
| " | 1391/886 | M101, L227 | 32 |
| " | Decree Tax Title #47518 | | 62, 61 |
| " | 1424/1043 | N99, M102 | 114 |
| " | 886/418 | L227 | 32 |
| " | 881/29 | L227 | 32 |
| " | | L227 | 32 |
| " | | M101 | 217, 218 |
| " | | M101 | 217, 218 |
| " | | M101 | 217, 218 |
| " | | M101 | 217, 218 |

Sandwich Coastal Wetland Restriction
 Pursuant to G.L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland# |
|------------------|-----------------|------------------|----------|
| Town of Sandwich | | M101 | 217,218 |
| " | | | 217,218 |
| " | | | 217,218 |
| " | 1283/592 | N99 | 114 |
| " | 1024/1043 | N99 | |
| | | GM102 | 114 |
| " | 2284/110 | N99 | |
| | | GM102 | 114 |
| " | 2284/110 | N99 | |
| | | GM102 | 114 |
| " | 1424/1043 | N99 | 114 |
| " | 1610/113 | M101 | 32 |
| " | 1879/230 | L226, L227, M101 | 32 |
| " | 1346/980 | L226, L227, M101 | 32 |
| " | 1336/373 | M101 | 217,218 |
| " | 2795/162 | M101 | 217,218 |
| " | | L227 | 54,53 |
| " | | M101 | 32 |
| " | | L228 | 58 |
| " | | L228 | 58 |
| " | | L228 | 58 |
| " | | M101 | 32 |
| " | | M101 | 32 |
| " | Decree 48678 | M101, 102 | 32 |
| " | | N99, M102 | 114 |
| " | | L228 | 61, 58 |
| " | 1747/239 | M101 | 217,218 |
| " | 1777/23 | M101 | 217,218 |
| " | 1777/25 | M101 | 217,218 |
| " | 1777/27 | M101 | 217,218 |
| " | 2397/37 | M101 | 32 |
| " | 2397/37 | M101 | 32 |
| " | 1621/336 | M101 | 32 |
| " | 2397/37 | M101 | 32 |
| " | 2397/37 | M101 | 32 |
| " | 1621/330 | M101, 102 | 32 |
| " | 1621/330 | N98 | 114 |
| " | 2426/294 | N99, M102 | 114 |

Sandwich Coastal Wetland Restriction

Pursuant to G.L. Ch. 130, S. 105

| Name | Book & Page | Orthophoto | Wetland |
|-------------------------|---------------|------------|---------|
| Town of Sandwich | 2397/30,31,32 | N99 | 114 |
| " | 2010/258 | L228 | 61,62 |
| " | 2413/70 | L228 | 32 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | | L228 | 61,58 |
| " | 2426/294 | N99,M102 | 114 |
| " | 2397/30,31,32 | N99 | 114 |
| " | 2010/258 | L228 | 61,62 |
| Commonwealth of Mass. | | L227 | 62,61 |
| Sandwich Water District | | M102 | 80 |
| Sandwich Water District | | M102 | 80 |
| Sandwich Water District | 1246/229 | M102 | 80 |

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THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

OFFICE OF COASTAL ZONE MANAGEMENT

251 Causeway Street, Suite 800, Boston, MA 02114-2136

(617) 626-1200 FAX: (617) 626-1240

MEMORANDUM

TO: Matthew A. Beaton, Secretary, EEA
ATTN: Erin Flaherty, MEPA Unit
FROM: Bruce Carlisle, Director, CZM
DATE: February 13, 2018
RE: EEA-15798 White Cap Shoreline Stabilization Project, Sandwich

The Massachusetts Office of Coastal Zone Management (CZM) has completed its review of the above-referenced Environmental Notification Form (ENF), noticed in the *Environmental Monitor* dated January 24, 2018, and does not recommend the development of an Environmental Impact Report.

Project Description

The proposed project involves the installation of a coir envelope system to protect eight condominium units located on the shore of Town Neck in Sandwich. The proposed stacked coir envelope system will be approximately 375 feet long, six to seven feet high, and installed at a 1.5:1 slope. The coir envelopes will be stacked four tall with the bottom row buried below the beach profile. The proposed project also includes annual sand nourishment of 144 cubic yards, designed to maintain 6-12 inches of sediment cover over the coir envelopes. Once installation and burial of the coir envelopes is complete the area landward of the envelopes will be planted with native beach grasses. Access to the beach area for re-nourishment will be accomplished using a temporary sand ramp via an access easement. The entire property is located within the 100-year flood hazard zone, which is mapped VE16 and AE12 on the FEMA flood maps.

Project Comments

The project site is located adjacent to the east end of the Cape Cod Canal and is exposed to high energy waves during winter storm events. Because the jetties at the east end of the canal interrupt sediment flow to this area, the site experiences significant erosion. The alternatives analysis presented in the supplement to the ENF describes efforts implemented by the proponent since 2013 to protect the project site by regular sand nourishment. Based upon this experience, the proponents have concluded that beach nourishment on its own is not a viable long-term solution due to the rate at which sand erodes from the property, and the frequency and the volume of nourishment that has been required to protect these properties.

The proposed project is consistent with similar projects located on abutting properties to the east and west of the project site and has been designed to connect and integrate with these existing coir envelope systems. The proposed annual sand nourishment, similar to that on the adjacent properties, provides protection to the coir envelope system and helps mitigate for the potential loss of sediment to adjacent coastal resources. CZM recommends that the proposed nourishment plan ensure a minimum 24 inch cover over the envelopes throughout the year. Increased nourishment will provide greater protection to the coir envelope system in storm events, minimize the maintenance requirements, and provide increased mitigation for the loss of sediment to down drift resources. In addition, CZM recommends that where feasible, the envelopes be placed at the toe of the existing eroded bank to reduce interaction with waves and tides. This placement will increase the longevity of the envelopes and minimize impacts to the fronting beach.



Federal Consistency

The proposed project may be subject to CZM federal consistency review. For further information on this process, please contact, Robert Boeri, Project Review Coordinator, at 617-626-1050 or visit the CZM web site at www.state.ma.us/czm/fcr.htm.

BKC/sm/rh

cc: Stephen McKenna, CZM Cape & Islands Regional Coordinator
Jim Mahala, DEP
Southeast Regional Office
Dave DeConto, Sandwich Director of Natural Resources
16 Sand Sabastian Drive, Sandwich, MA 02562
Jack Vaccaro, Epsilon Associates
3 Mill & Main Place, Maynard, MA 01754



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

February 13, 2018

Mathew A. Beaton,
Secretary of Environment and Energy
Executive Office of Environmental Affairs
ATTN: MEPA Office
100 Cambridge Street, Suite 900
Boston, MA 02114

RE: ENF Review EOEEA #15798 –
SANDWICH. White Cap Shoreline
Stabilization Project at 1, 2, 3, 4, 5, 6, and 8
White Cap Path

Dear Secretary Beaton,

The Southeast Regional Office of the Department of Environmental Protection (MassDEP) has reviewed the Environmental Notification Form (ENF) for the Proposed Town of White Cap Shoreline Stabilization Project at 1, 2, 3, 4, 5, 6, and 8 White Cap Path, Sandwich, Massachusetts (EOEEA # 15798). The Project Proponent provides the following information for the Project:

The project includes the stabilization of a coastal bank and coastal dune, which have been eroding at an accelerated rate in this area of Town Neck over the past several years. For the past several years, the owners of the property have performed periodic dune re-nourishment by placing sacrificial sand along its seaward face of the coastal bank and dune in order to replace eroded sand and provide storm damage prevention. This strategy seems to have slowed the rate of erosion, but is not sustainable since the sand must be replaced essentially after every significant coastal storm.

During the winter of 2016-2017, the Proponents re-nourished the artificial dune on three separate occasions, and each time the sacrificial sand was almost entirely stripped away by subsequent. Once the sacrificial sand is removed, additional land is eroded, and the ocean creeps ever closer toward the condominium units. With little land remaining between the condominium units and the encroaching shoreline, the Proponents can no longer rely on the periodic placement of sacrificial sand to protect the property, and a more resilient coastal dune stabilization strategy is needed. A coir envelope system seaward of the coastal bank and coastal dune is therefore proposed to limit further loss of land.

Bureau of Water Resources Comments

Wetlands and Waterways Program Comments. The Project is landward of high water and does not require Ch. 91 review. MassDEP Wetlands Program notes that the Sandwich Conservation Commission has issued Orders of Conditions approving the project with certain conditions under DEP File Nos. SE 66 – 1758 and SE 66 - 1764 on September 27th, 2017. An abutting neighbor with easement rights within the project location appealed both Orders of Conditions to DEP for Superseding Orders of Conditions (SOCs) on October 11th, 2017.

The project proposes to stabilize the eroding shoreline through the installation of biodegradable sand-filled coir envelopes, sand nourishment over the envelopes and ongoing beach nourishment.

The Department's SOC review will address the proposed project's compliance with coastal wetland performance standards and the project's ability to protect the interests of the Wetlands Protection Act.

Information already on file as well as supporting information gleaned during the MEPA review will be sufficient to adequately review the proposed project and issue a SOC. Therefore, the Department does not recommend that the preparation of an Environmental Impact Report be required for this project.

Bureau of Waste Site Cleanup Comments

The Bureau of Waste Site Cleanup (BWSC) searched its databases for disposal sites and release notifications that have occurred at or might impact the proposed Project area. A disposal site is a location where there has been a release to the environment of oil and/or hazardous material that is regulated under M.G.L. c. 21E, and the Massachusetts Contingency Plan [MCP – 310 CMR 40.0000].

There are no listed MCP disposal sites located at or in the vicinity of the site that would appear to impact the proposed Project. Interested parties may view a map showing the location of BWSC disposal sites using the MassGIS data viewer (Oliver)

at: http://maps.massgis.state.ma.us/map_ol/oliver.php Under “Available Data Layers” select “Regulated Areas”, and then “DEP Tier Classified 21E Sites”. The compliance status and report submittals for specific MCP disposal sites may be viewed using the BWSC Waste Sites/Reportable Release Lookup at: <http://public.dep.state.ma.us/SearchableSites2/Search.aspx>

The Project Proponent is advised that if oil and/or hazardous material are identified during the implementation of this Project, notification pursuant to the Massachusetts Contingency Plan (310 CMR 40.0000) must be made to MassDEP, if necessary. A Licensed Site Professional (LSP) should be retained to determine if notification is required and, if need be, to render appropriate opinions. The LSP may evaluate whether risk reduction measures are necessary if contamination is present. The BWSC may be contacted for guidance if questions arise regarding cleanup.

Bureau of Air and Waste Comments

Solid Waste Dredging. The dredged material has been classified as appropriate for beach nourishment, however, any solid waste found in the dredged material, must be disposed of at an appropriate facility.

Air Quality. Construction and operation activities shall not cause or contribute to a condition of air pollution due to dust, odor or noise. To determine the appropriate requirements please refer to:

310 CMR 7.09 Dust, Odor, Construction, and Demolition

310 CMR 7.10 Noise

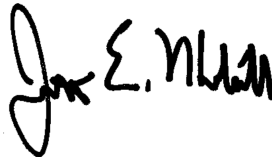
Construction-Related Measures. MassDEP requests that the Proponent use construction equipment with engines manufactured to Tier 4 federal emission standards, which are the most stringent emission standards currently available for off-road engines. If a piece of equipment is not available in the Tier 4 configuration, then the Proponent should use construction equipment that has been retrofitted with the best available after-engine emission control technology, such as oxidation catalysts or diesel particulate filters, to reduce exhaust emissions. The Proponent should provide a list of the engines, their emission tiers, and, if applicable, the best available control technology installed on each piece in the subsequent environmental filing.

Massachusetts Idling Regulations. MassDEP requests that the Proponent state specifically in the subsequent environmental filing how it plans to prohibit the excessive idling during the construction period. Typical methods of reducing idling include driver training, periodic inspections by site supervisors, and posting signage. In addition, to ensure compliance with this regulation once the Project is occupied, MassDEP requests that the Proponent establish permanent signage limiting idling to five minutes or less at the completed Project.

Proposed s.61 Findings

The “Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification Form” may indicate that this Project requires further MEPA review and the preparation of an Environmental Impact Report. Pursuant to MEPA Regulations 301 CMR 11.12(5)(d), the Proponent will prepare Proposed Section 61 Findings to be included in the EIR in a separate chapter updating and summarizing proposed mitigation measures. In accordance with 301 CMR 11.07(6)(k), this chapter should also include separate updated draft Section 61 Findings for each State agency that will issue permits for the Project. The draft Section 61 Findings should contain clear commitments to implement mitigation measures, estimate the individual costs of each proposed measure, identify the parties responsible for implementation, and contain a schedule for implementation.

Very truly yours,



Jonathan E. Hobill,
Regional Engineer,
Bureau of Water Resources

JH/GZ

Cc: DEP/SERO

ATTN: Millie Garcia-Serrano, Regional Director

David Johnston, Deputy Regional Director, BRP
Maria Pinaud, Deputy Regional Director, BWP
Gerard Martin, Deputy Regional Director, BWSC
Jennifer Viveiros, Deputy Regional Director, ADMIN
Greg DeCesare, Wetlands and Waterways
Jim Mahala, Chief, Wetlands and Waterways
David Hill, Wetlands and Waterways
Allen Hemberger, Site Management

From: [Hoenig, Amy \(FWE\)](#)
To: [Flaherty, Erin \(EEA\)](#)
Cc: [Cheeseman, Melany \(FWE\)](#)
Subject: 15798 - White Cap Path Shoreline Stabilization Project, Sandwich
Date: Monday, February 12, 2018 11:28:54 AM
Attachments: [Sandwich_13-32549_07212017.pdf](#)
[Sandwich_16-35428_05042017.pdf](#)

Good morning, Erin –

The Natural Heritage & Endangered Species Program of the MA Division of Fisheries and Wildlife (Division) received and reviewed the Environmental Notification Form for the proposed coir stabilization project at 1, 2, 3, 4, 5, 6 & 8 White Cap Path, Sandwich.

The Applicants, Sandwich Shores Condo Association and White Cap Realty Trust, filed two separate Notices of Intent in May and June 2017, respectively. At that time, the Division reviewed the projects pursuant to the rare species provisions of the WPA and the MESA. Included as attachments hereto, please find the determination letters containing conditions relative to state-listed species and their habitats associated with the proposed coir stabilization project.

If any questions arise please do not hesitate to contact our office.

Sincerely,

Amy Hoenig

Endangered Species Review Biologist
Natural Heritage & Endangered Species Program
Massachusetts Division of Fisheries & Wildlife
1 Rabbit Hill Road, Westborough, MA 01581
p: (508) 389-6364 | e: Amy.Hoenig@state.ma.us
mass.gov/masswildlife | facebook.com/masswildlife

From: [Logan, John \(FWE\)](#)
To: [Flaherty, Erin \(EEA\)](#)
Cc: ["Jack Vaccaro"](#)
Subject: White Cap Realty Trust, Shoreline Stabilization Project, ENF
Date: Wednesday, February 07, 2018 9:47:34 AM

Secretary Matthew A. Beaton
Executive Office of Energy and Environmental Affairs (EEA)
Attn: MEPA Office
Erin Flaherty, EEA No. 15798
100 Cambridge Street, Suite 900
Boston, MA 02114

Dear Secretary Beaton:

The Division of Marine Fisheries (MA DMF) has reviewed the Environmental Notification Form (ENF) for the proposed Shoreline Stabilization Project by the White Cap Realty Trust/Sandwich Shores Condominium Association on White Cap Path in the Town of Sandwich. The proposed project consists of the installation of a coir envelope system and annual burial of the system with compatible sand. The project was reviewed with respect to potential impacts to marine fisheries resources and habitat.

Based on the information provided, DMF has no recommendations for sequencing, timing, or methods that would avoid or minimize impact at this time.

Questions regarding this review may be directed to John Logan in our New Bedford office at (508) 742-9722.

John Logan, Ph.D.
MA Division of Marine Fisheries
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New Bedford, MA 02744
(508) 742-9722
<http://www.mass.gov/eea/agencies/dfg/dmf/>
https://www.researchgate.net/profile/John_Logan
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