

**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 and
the West Tisbury Wetlands Protection Bylaw and Regulations

Provided by MassDEP:
SE79-364
MassDEP File #

eDEP Transaction #
West Tisbury
City/Town

A. General Information

Please note:
this form has
been modified
with added
space to
accommodate
the Registry
of Deeds
Requirements

1. From: WEST TISBURY
Conservation Commission

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

3. To: Applicant:

a. First Name _____ b. Last Name _____
Massachusetts Division of Marine Fisheries and the Town of West Tisbury Herring Warden
c. Organization _____
c/o West Tisbury Conservation Commission P.O. Box 278
d. Mailing Address _____
West Tisbury MA 02575
e. City/Town _____ f. State _____ g. Zip Code _____

4. Property Owner (if different from applicant):

See Attachment A
a. First Name _____ b. Last Name _____
c. Organization _____
d. Mailing Address _____
MA 02575
e. City/Town _____ f. State _____ g. Zip Code _____

5. Project Location:

James Pond West Tisbury
a. Street Address _____ b. City/Town _____
6 13 and 20
c. Assessors Map/Plat Number _____ d. Parcel/Lot Number _____

Latitude and Longitude, if known: _____
d. Latitude _____ e. Longitude _____

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





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A. General Information (cont.)

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):
Dukes
a. County See Attachment A b. Certificate Number (if registered land)
c. Book See Attachment A d. Page
7. Dates: February 4, 2016 January 23, 2018 February 13, 2018
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):
Site Plan in West Tisbury, Mass Prepared for the Town of West Tisbury
a. Plan Title
Vineyard Land Surveying & Engineering Inc unsigned and not stamped
b. Prepared By c. Signed and Stamped by
November 6, 2017 1"=40'
d. Final Revision Date e. Scale
Natural Heritage and Endangered Species Program Letter December 29, 2017
f. Additional Plan or Document Title g. Date

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 (the 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:

- a. 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.



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B. Findings (cont.)

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

	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
10. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below			
11. <input type="checkbox"/> Land Under the Ocean	<u> </u> a. square feet	<u> </u> b. square feet		
	<u> </u> c. c/y dredged	<u> </u> d. c/y dredged		
12. <input type="checkbox"/> Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
13. <input checked="" type="checkbox"/> Coastal Beaches	<u> </u> a. square feet	<u> </u> b. square feet	<u> </u> c. nourishment 30 cu yd	<u> </u> d. nourishment 30 cu yd
14. <input checked="" type="checkbox"/> Coastal Dunes	<u> </u> a. square feet	<u> </u> b. square feet	<u> </u> c. nourishment	<u> </u> d. nourishment
15. <input type="checkbox"/> Coastal Banks	<u> </u> a. linear feet	<u> </u> b. linear feet		
16. <input type="checkbox"/> Rocky Intertidal Shores	<u> </u> a. square feet	<u> </u> b. square feet		
17. <input checked="" type="checkbox"/> Salt Marshes	<u> </u> a. square feet	<u> </u> b. square feet	<u> </u> 600 c. square feet	<u> </u> 600 d. square feet
18. <input checked="" type="checkbox"/> Land Under Salt Ponds	<u> </u> a. square feet	<u> </u> b. square feet		
	<u> </u> c. c/y dredged	<u> </u> d. c/y dredged		
19. <input type="checkbox"/> Land Containing Shellfish	<u> </u> a. square feet	<u> </u> b. square feet	<u> </u> c. square feet	<u> </u> d. square feet
20. <input checked="" type="checkbox"/> Fish Runs	Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	<u> </u> 98 a. c/y dredged	<u> </u> 98 b. c/y dredged		
21. <input type="checkbox"/> Land Subject to Coastal Storm Flowage	<u> </u> a. square feet	<u> </u> b. square feet		
22. <input type="checkbox"/> Riverfront Area	<u> </u> a. total sq. feet	<u> </u> b. total sq. feet		
Sq ft within 100 ft	<u> </u> c. square feet	<u> </u> d. square feet	<u> </u> e. square feet	<u> </u> f. square feet
Sq ft between 100-200 ft	<u> </u> g. square feet	<u> </u> h. square feet	<u> </u> i. square feet	<u> </u> j. square feet



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B. Findings (cont.)

* #23. If the project is for the purpose of restoring or enhancing a wetland resource area in addition to the square footage that has been entered in Section B.5.c (BWV) or B.17.c (Salt Marsh) above, please enter the additional amount here.

23. Restoration/Enhancement *:

a. square feet of BWV

b. square feet of salt marsh

24. Stream Crossing(s):

a. number of new stream crossings

b. number of replacement stream crossings

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are 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.
 - c. If the work is for a Test Project, this Order of Conditions shall be valid for no more than one year.
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. An Order of Conditions for a Test Project may be extended for one additional year only upon written application by the applicant, subject to the provisions of 310 CMR 10.05(11)(f).
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on _____ unless extended in writing by the Department.
7. 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.



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C. General Conditions Under Massachusetts Wetlands Protection Act

8. 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.
9. 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 the 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.
10. 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, "MassDEP"]
 "File Number SE79-364 "
11. 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 MassDEP.
12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
13. The work shall conform to the plans and special conditions referenced in this order.
14. Any change to the plans identified in Condition #13 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.
15. 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.
16. 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.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

17. 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.
18. 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.
19. The work associated with this Order (the "Project")
- (1) is subject to the Massachusetts Stormwater Standards
- (2) is NOT subject to the Massachusetts Stormwater Standards

If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:

- a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.
- b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
- i.* all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
 - ii.* as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
 - iii.* any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

iv. all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;

v. any vegetation associated with post-construction BMPs is suitably established to withstand erosion.

c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement") for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following:

i.) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and

ii.) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.

d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.

e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.

f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

- g) The responsible party shall:
 - 1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
 - 2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
 - 3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.
- h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
- i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
- j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
- k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.
- l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

See Exhibit B attached hereto and incorporated herein by this reference.

- 20. For Test Projects subject to 310 CMR 10.05(11), the applicant shall also implement the monitoring plan and the restoration plan submitted with the Notice of Intent. If the conservation commission or Department determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent or modify the project as directed by the conservation commission or the Department.



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D. Findings Under Municipal Wetlands Bylaw or Ordinance

- 1. Is a municipal wetlands bylaw or ordinance applicable? Yes No
- 2. The West Tisbury hereby finds (check one that applies):
Conservation Commission
 - a. that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:

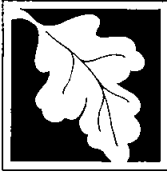
1. Municipal Ordinance or Bylaw	2. Citation
---------------------------------	-------------

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.

- b. that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:
West Tisbury Wetlands Protection Bylaw and Regulations

1. Municipal Ordinance or Bylaw	2. Citation
---------------------------------	-------------

- 3. 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.
The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):
See Exhibit B attached hereto and incorporated herein by this reference.



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E. Signatures

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

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, and the property owner, if different from applicant.

2/13/2018

1. Date of Issuance

6

2. Number of Signers

Signatures:

Michael Turnell

Binnie Rangel

Tara J. [Signature]

Peter Rodriguez

Madeline [Signature]

Whit Grinnold

by hand delivery on
2/13/2018

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 MassDEP 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 Request for 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.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

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.

ATTACHMENT A

Order of Conditions
James Pond
West Tisbury, MA
DEP File #SE79-364
NHESP File # 0619696

A. GENERAL INFORMATION (cont.)

4. Property Owners

Land under James Pond: Commonwealth of Massachusetts
Susan E. Trees
15 Old Herring Creek Road LLC

6. Property Located At:

Map 6 Lot 20	180 Old Herring Creek Road	Book 1325, Page 583
Map 6 Lot 13	15 Old Herring Creek Road	Book 1386, Page 102

James Pond Outlet Channel Maintenance, West Tisbury PROJECT NARRATIVE

The original project narrative filed with the Notice of Intent was dated February 8, 2016. The following represents the final approved project narrative. This revised narrative is based on comments from the West Tisbury Conservation Commission through the public hearing process, MassDEP, the Natural Heritage & Endangered Species Program (NHESP) by letters dated March 11, 2016 and December 12, 2017 for NHESP Tracking No: 06-19696 (NHESP Letter) and new information from (1) survey and plan development services provided by Vineyard Land Surveying & Engineering, Inc., contracted by the Town of West Tisbury, and (2) an ongoing cooperative river herring spawning and nursery habitat assessment for James Pond.

Survey. The Vineyard Land Surveying & Engineering, Inc., conducted a site survey in March 2017 as shown on a plan entitled, “Site Plan in West Tisbury, Mass. Prepared for the Town of West Tisbury”, dated March 27, 2017 and revised to 11.6.17, (the “Project Plan”) displaying 1 foot grade contours related to datum NAVD88. A copy of the Project Plan is on file with the Conservation Commission office.

Resource Delineation. The survey work conducted by Vineyard Land Surveying & Engineering, Inc., included delineation of the Mean High Water (MHW), edge of beach, beach grass, marsh vegetation, and subtidal depth contours, and terrestrial grades. These delineations confirm the resource area language provided in Section 2 of the NOI Project Narrative (2-8-2016), and the survey provides a base map for the project.

River Herring Spawning and Nursery Habitat Assessment. A two-year river herring spawning and nursery habitat assessment was conducted in 2016 and 2017 through a cooperative effort with Biodiversity Works of Martha’s Vineyard. The data analysis is not complete however; summary findings are relevant to channel maintenance and resource management goals. Observations from both seasons have confirmed that fish passage is limited by the closed beach outlet and sand accumulation at the channel’s point bar.

The preliminary 2016 water quality results had exceedances to water quality criteria but were generally supportive of river herring life history with the exception of uniform higher salinity that was marginal for supporting early life stages. This finding demonstrates the need for one aspect of the outlet channel maintenance plan that is based on the traditional practice of carefully timed openings to allow the freshening of the pond prior to spring spawning and seasonal salting of the pond for shellfish and to allow for diadromous fish emigration.

Property Permission. Project access for an excavator and work crew has been granted by several of the landowners on the eastern approach to the project site. The excavator path will be along the upland margin of the marsh grass shown on the site plan.

Work Time-of-Year. The project plan called for a work period of January 1st to March 31st to avoid impacts to diadromous fish resources, marine resources and recreational activities. Review of various barrier beach openings in MA that allow sea-run fish passage have shown that natural conditions can cause March openings to fail, causing disruptions to river herring migrations that typically peak from mid-April to mid-May. The applicant has worked with the Natural Heritage and Endangered Species Program (NHESP) to allow conditional openings until May 15th when necessary to sustain diadromous fish passage. As set forth in the NHESP Letter dated December 29, 2017, work between April 1st to August 31st shall be subject to the conditions set forth in the of any year to avoid impacts to a state-listed wildlife species as set forth in the NHESP letter.

Fiber Rolls and Woody Debris. The initial NOI proposed placing a row of fiber rolls and woody debris (a maximum of 200 ft. in length) to protect and define the northern border of the channel inside the barrier beach dune. The inclusion of fiber rolls will not be implemented during the first three years in order to see how the site reacts to the first maintenance actions planned for 2018. If it becomes necessary to stabilize this area, the applicant will seek an amendment to this Order of Conditions and permission from NHESP.

James Pond Channel Opening and Maintenance Plan – 2018 -2020

The James Pond outlet channel opening and maintenance plan seeks to resolve two limitations to marine fisheries: (1) the material in the channel prevents sufficient tidal flow to maintain adequate water quality in support of shellfish resources, diadromous fish and other aquatic life; (2) the material in the channel prevents the safe and efficient passage of diadromous fish seeking to migrate to spawning and nursery habitat in James Pond. The periodic opening of the channel and grooming the channel to enhance the water depth and the bank stability using the following means is proposed to improve the population status of shellfish (soft-shell clams and quahogs) and diadromous fish (alewife, white perch and American eel).

Two locations at the James Pond outlet require attention to prevent material deposition from blocking the channel: (1) the ocean outlet that receives west-to-east transport of material; and (2) the channel running inside of the barrier beach that extends past a shallow point bar at the confluence of the outlet channel to the pond (Figure 2). The maintenance plan proposes to:

- 1.) Starting in March 2018, bring an excavator to the project site through the abutting properties along a path on the upland margin of the marsh grass along James Pond. The excavator must be a model with low impact on adjacent resource areas that tracks well in a wet environmental with reduced ground pressure. The excavator will be used to remove material annually (or as needed) at two locations (1) to open the beach outlet channel, and (2) to maintain suitable depth at the inner pond channel (as shown on site plan).
- 2.) Excavator work will be under the direction of the Town of West Tisbury Herring Warden.

The location where the beach outlet is breached is below the water surface elevation of the pond and requires relatively minor excavation to release water, after which

outflow quickly establishes a suitable channel for fish passage. This has been done by hand in recent years. The excavator will be used in 2018 to breach the outlet by moving a small amount of material (1-2 CY) to get the flow moving. Secondly, the excavator will remove material from the inner pond channel along a 235 foot path to create a trapezoidal channel (see site plan cross section) with a maximum width of 7 feet and depth of 2 feet.

- 3.) The material will be distributed to fortify natural features at two locations at the project site as shown on the Project Plan. Sediment Disposal Area #1 is a sloped, shallow (1 foot.) berm adjacent to the inner pond channel that will be planted with Smooth Cord Grass (*Spartina alterniflora*); and (Sediment Disposal Area #2) located at the northern bank of the land between the beach outlet channel and pond-side channel a berm of 3-5 feet height will connect to the existing dune and planted with American beach grass (*Ammophila breviligulata*).
- 4.) Plant 150 marsh grass plugs at Area #1 above and plant 150 beach grass plugs at Area #2 as described above.
- 5.) The project intends to provide annual openings for sea-run fish passage and to support shellfish resources; however, it seeks to avoid an annual frequency of contracted excavator services. In years between excavator contracts, the plan allows manual digging to open the beach outlet and maintain the inner channel under supervision of the Town of West Tisbury Herring Warden.

Seasonality and Duration. Machine operations should occur during January- March 31st to avoid spawning and nursery periods for targeted marine resources, seasonal recreational uses, and impacts to state-listed species. However, work should be allowed during April 1st to May 15th in years when earlier openings were not successful due to natural conditions and/or the timing of earlier openings were not sufficient to allow sea run fish passage. Any work during the April 1st to May 15th period will require beach monitoring to confirm the presence or absence of protected species.

The pilot year to conduct this work is proposed as 2018. Three days of work is estimated to reach the targeted channel depth, with two additional days to transport the excavator to and from the work site and stage the project. Subsequent monitoring will determine how frequently machine work will be needed. Annual efforts may not be necessary and could be difficult to sustain given funding uncertainty.

Monitoring. A cooperative monitoring effort involving *Marine Fisheries*, The Town's Herring Warden and local partners is proposed to evaluate the success of the channel maintenance efforts, the sustainability of channel improvements, and improvements in habitat quality for marine resources. The monitoring is desirable to document the pond's response to openings and give guidance on future management. However, the openings are necessary to maintain diadromous fish passage and should occur with or without available funds for monitoring. Therefore, the proposed monitoring is recommended and should use the following protocols if funding is available for the project:

- 1.) Three depth loggers should be deployed to monitor changes and fluctuations in water depth before and after channel maintenance. One should be set outside the outlet in marine waters and two located in James Pond near the outlet and the upper pond. A staff gauge should also be set in the pond and related to a common benchmark as the pond depth logger.
- 2.) Water quality will be monitored during biweekly trips during March-October for three years following the first opening. Three fixed stations will be visited along a transect from the inside of the inlet to the opposite side of the pond. Protocols of the *Marine Fisheries* Quality Assurance Program Plan for Diadromous Fish Habitat Monitoring (Chase 2010) will be followed. In addition, two random-stratified sampling stations should be selected and sampled with each trip. With each visit, the following parameters should be recorded at suitable depth intervals: water temperature, dissolved oxygen (DO), pH, specific conductivity, salinity and Secchi disk. If funding allows, total nitrogen and total phosphorus should be measured also. If funding allows, a temperature/salinity continuous logger would also be deployed for this period.
- 3.) Photographs on the channel locations where improvements were made should be taken in March and October for each year of monitoring. The photograph locations should be documented with GPS locations and accompanied with brief notations on site changes and observations.
- 4.) Beach and marsh grass plantings should be visited and evaluated and counted each spring and fall to confirm survival percentage and planting success.
- 5.) When beach openings are necessary during the period of April 1st to May 15th, weekly visits will be conducted to the project site to document the presence/absence of protected species as set forth in the December 27, 2017 NHESP letter.

Annual reporting of the monitoring will be provided to the West Tisbury Conservation Commission by the monitoring partnership.

Alternative Monitoring Option: in the event that funding cannot be secured for all the above monitoring features, consideration can be made for removing the most costly item #2 and conducting monitoring for items #1, 3 and 5.

EXHIBIT B

Special Conditions**James Pond****15 and 180 Old Herring Creek Road****DEP File # SE79-364****NHESP # 06-19696****Project Description**

On February 4, 2016, Town of West Tisbury acting through its Herring Warden with assistance from the Division of Marine Fisheries (the “Applicant”) filed a Notice of Intent (NOI) for a project to improve fish passage for herring.

The full project narrative is attached to this Order of Condition as Exhibit A.

The Conservation Commission has conducted several site inspections and reviewed the Notice of Intent and submitted information. . In reviewing the Project the Commission has relied on technical assistance from Brad Chase of the Diadromous Fish Biology and Management Project at the Massachusetts Division of Marine Fisheries and Greg Berman, Coastal Processes Specialist at the Woods Hole Sea Grant Program. Mr. Berman’s report dated June 3, 2016 is on file with the Commission office.

Hearings were held on February 23, March 22, April 26, June 14, June 28, July 26, September 13, November 15, December 13, 2016, January 10, February 14, March 28, April 18, June 27, July 11, August 15, September 12, October 10, November 7, 2017, January 9 and January 23, 2018. The public hearing was closed at the January 23, 2018 hearing. The Commission voted to approve the final version of the project subject to the following special conditions.

Jurisdiction under the Wetlands Protection Act (the “Act”)

Whenever a proposed activity involves removing or altering the banks of and land under the ocean, ponds, stream rivers lakes or creeks that underlie an Anadromous/Catadromous fish run and land subject to coastal storm flowage, the Commission shall presume that said Resource Areas are significant to the protection of the following values: protection of marine fisheries, sedimentation control, storm damage prevention, and wildlife habitat.

The NOI and supporting documentation was reviewed for compliance under 310 CMR 10.35(Banks of or Land under the Ocean, Ponds, Stream, Rivers, Lakes or Creeks that Underlie an Anadromous/Catadromous Fish Run), Land Subject to Coastal Storm Flowage (10.24) and 10.37 (Estimated Habitat).

The property is located within Estimated or Priority Habitat as shown on the Massachusetts Natural Heritage Atlas, 13th Edition effective October 1, 2008, produced by the Massachusetts Division of Fisheries and Wildlife’s Natural Heritage and Endangered Species Program (NHESP).

Jurisdiction under the West Tisbury Wetlands Protection Bylaw (the “Bylaw”)

EXHIBIT B

Whenever a proposed activity involves removing or altering a coastal beach or bank, the Commission shall presume that the coastal beach and bank are significant to the protection of the following values: flood control, erosion and sedimentation control, storm damage prevention, and wildlife habitat.

The NOI was reviewed for compliance under Section VI (Coastal Beach) and Section IX (Coastal Bank), Section XIII (Land Subject to Coastal Storm Flowage) and Section XXI (Estimated Habitats of Rare Species and Wildlife).

Findings under the Act

- The Commission finds that each parcel of land and proposed project thereon has its own unique characteristics and impacts, therefore, every project brought before the Commission for approval will be considered on a site specific basis. And, because of this site specificity, each project will stand alone and shall not set a precedent in the decisions to be made on subsequent projects. In making a decision on the Project, the Commission has considered the magnitude of alteration, the environmental significance of the site, reasonable alternatives, the minimization of impact and the extent of mitigation measures. Due to the project location and project design, the proposed project, as conditioned, is allowed but the approval does not set any sort of precedent as each property and project are determined on their own merits.
- The Commission finds that this project meets the performance standards of 310 CMR 10.35 (3) and (5). The Division of Marine Fisheries has determined that it may be necessary to conduct work between March 15 and May 15. The applicant has received permission from NHESP to conduct work between April 1 and May 15 subject to the condition set forth in their December 27, 2017 letter (the "NHESP letter;").
- The Commission finds that the Project will require a significant amount of monitoring and maintenance to determine success. The maintenance plan is incorporated into this Order of Conditions at Exhibit A. It will take at least two growing seasons for the colonization of the plant communities and to determine the success of the channel to improve fish passage.

There are no additional Findings under the Bylaw

Special Conditions

- 1) The Applicant and the Applicant's agent(s) shall adhere to General Conditions 1 through 17 of this Order.
- 2) The term "Applicant" as used in this Order of Conditions shall refer to the owner, any successor in interest or successor in control of the property referenced in the Notice of Intent, supporting documents, and this Order of Conditions. The Commission shall be notified in

EXHIBIT B

writing within 30 days of all transfers of title of any portion of property that take place prior to issuance of the Certificate of Compliance.

- 3) The form provided at the end of this Order shall be completed and stamped at the Dukes County Registry of Deeds, after the expiration of the 10-day appeal period and if no request of appeal has been filed with the Department of Environmental Protection. This form shall be returned to the Commission in accordance with General Condition 8, and prior to the commencement of work.
- 4) The Commission has approved the Project in accordance with the specifications shown on the following plans and/or documents. The project shall be constructed in accordance with these plans and documents. No deviations from these plans or documents or from these orders are permitted without prior written approval from the Commission. See general conditions No. 13 and No. 14 regarding approval of changes in any of the following:
 - Plan prepared by Vineyard Land Surveying & Engineering, Inc. entitled, "Site Plan in West Tisbury, Mass. prepared for The Town of West Tisbury" dated March 27, 2017 as revised to November 6, 2017 (the "Project Plan").
 - Project Narrative for James Pond Outlet Channel Opening and Maintenance,
- 5) In accordance with the NHESP letter, all construction and initial nourishment shall be completed by March 30. In the event it becomes necessary to continue work between April 1 and May 15, the special conditions set forth in the NHESP letter attached here to as Exhibit C shall apply. **This is an ongoing condition that does not expire with the issuance of a Certificate of Compliance.**

Construction Requirements:

- 6) The West Tisbury Herring Warden shall serve as Project Manager. He shall consult with the Division of Marine Fisheries as necessary to ensure compliance with Marine Fisheries regulations. The Project Manager shall be responsible for the coordination of all construction activities.
- 7) The Project Manager shall contact the Commission office at least 72 hours prior to beginning any activity permitted under this Order, to arrange a pre- construction site visit to review the terms of this permit with the contractor.
- 8) Prior to the commencement of any activity at this site, the channel and Disposal Areas 1 and 2 as shown on the Project Plan shall be surveyed and flagged in the field.
- 9) It is the responsibility of the Applicant, Applicant's representative, Project Manager, owner and/or successor(s) to ensure compliance with all conditions of this Order. A copy of this Order of Conditions including the special conditions and Project Plan shall be included in any contracts and specifications and shall be available on-site upon commencement and during the performance of activities regulated by this Order. All contractors shall review and

EXHIBIT B

adhere to the Project Plan and these conditions of approval in performing the approved activities.

- 10) Any adverse impact to a Resource Area caused by vehicles, equipment or workers shall be mitigated immediately by the Applicant in consultation with the Commission.
- 11) Access to the construction site shall be via an inland route through private property as determined by the Project Manager and the Contractor. No access is permitted over the coastal beach without the prior written consent of the Conservation Commission and is subject to the conditions of the NHESP letter set forth in Exhibit C. Any damage to property along the access route shall be restored. Access for maintenance shall be same as for the initial construction.

Nourishment, Plantings and Monitoring

- 12) Initial nourishment and planting shall be done in accordance with the Project Plan. No excavated materials shall be removed from the site.
- 12) Plantings shall be done in accordance with the Project Plan and as following:
 - a) Rooted Grasses and Forbs shall be planted 12" on center.
 - b) If the plants do not survive, they shall be replaced at the next seasonal opportunity. Failed plantings shall be replaced no later than April 1 of each year.
 - c) Monitoring shall be conducted as set forth in Exhibit A.
- 27) Upon completion of work the Applicant shall submit the following to the Commission:
 - 1.A Completed Request for a Certificate of Compliance.
 - 2.A set of post-construction color photographs of the project immediately after completion.
- 28) In case of emergencies, problems or the need to discuss site conditions with the Commission; call the Board Administrator at 508-696-6404.



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EXHIBIT C

DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581
p: (508) 389-6300 | f: (508) 389-7890
MASS.GOV/MASSWILDLIFE

Jack Buckley, Director

December 29, 2017

West Tisbury Conservation Commission
P.O. Box 278
West Tisbury MA 02575

Town of West Tisbury
1059 State Road
PO Box 278
West Tisbury MA 02575

RE: Applicant: Town of West Tisbury, Herring Warden & Board of Selectmen
 Project Location: James Pond (15 & 180 Old Herring Creek Road)
 Project Description: James Pond Inner Channel Maintenance with Beneficial Reuse
 DEP Wetlands File No.: 079-0364
 NHESP File No.: 06-19696

Dear Commissioners & Applicant:

The Natural Heritage & Endangered Species Program of the Massachusetts Division of Fisheries & Wildlife (the "Division") received supplemental information from the Town of West Tisbury Conservation Commission (dated November 16, 2017 with site plans (dated March 27, 2017, revised 11/06/2017) for review pursuant to the rare wildlife species section of the Massachusetts Wetlands Protection Act Regulations (310 CMR 10.37) and the MA Endangered Species Act Regulations (321 CMR 10.18).

The Division has determined that this Project, as currently proposed, will occur **within** the actual habitat of the Piping Plover (*Charadrius melodus*) and Sea-beach Knotweed (*Polygonum glaucum*), species state-listed as Threatened and Special Concern, respectively. This species and their habitats are protected in accordance with the rare species provisions of the WPA and the MESA.

The project as proposed includes the dredge of James Pond Inner Channel. The outlet (channel across the barrier beach to the ocean) and middle channels have been removed from the proposed project. According to the Site Plan (dated 3/27/17 revised 11/6/17, prepared by Vineyard Land Surveying & Engineering, Inc.), beneficial reuse of dredge material (± 98 cubic yards) may be placed within two sediment disposal sites; DISPOSAL AREA #1, within the salt marsh and DISPOSAL AREA #2, for dune restoration. As proposed, a maximum of 25 cubic yards will be placed at DISPOSAL AREA #2.

The purpose of the Division's review of the proposed project under the WPA regulations is to determine whether the project will have any adverse effects on the Resource Areas Habitats of state-listed species. The purpose of the Division's review under the MESA regulations is to determine whether a Take of state-listed species will result from the proposed project.

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WETLANDS PROTECTION ACT (WPA) & MASSACHUSETTS ENDANGERED SPECIES ACT (MESA)

Based on the information provided and the information contained in our database, it is the opinion of the Division that this project, as currently proposed, **must 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)).** The following conditions must be implemented:

- 1) All access, dredging and beneficial reuse of dredged material is prohibited during the period April 1 – August 31. However, James Pond Inner channel dredging and associated nourishment may be permitted from April 1 – May 15 of the prohibited period provided the following conditions are met:
 - a. A minimum of one week prior to the proposed start of work, the applicant must provide the Division and the Conservation Commission with documentation (contract, MOU) that a qualified (determined by the Division) shorebird monitor has been retained to survey the entire site, access route, and staging areas for the presence of state-listed species for the duration of the project.
 - b. The qualified shorebird monitor shall identify and delineate (with symbolic fencing and warning signs) all suitable Piping Plover and Least Tern nesting habitat. 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/dune that is being nourished.
 - c. 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, to determine status and locations of breeding Piping Plovers, and/or Least Terns, their nests, and unfledged chicks. One of these surveys shall occur within the 48 hours immediately preceding the planned work.
 - d. Motorized vehicles that are deemed essential for excavating the inner pond channel 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 the Division, who has first determined the location of all unfledged chicks.
 - e. All work shall immediately cease if the shorebird monitor determines that breeding Piping Plovers or terns are disturbed by passing vehicles or the excavation work or that nests or unfledged chicks are likely to be harmed by the work. The Division and U.S. Fish and Wildlife Service shall be notified immediately for further consultation.
 - f. Notwithstanding a - e above, no dredging or nourishment shall be permitted within 100 yards of any active nest or unfledged chicks of Piping Plovers, Common Terns, or Least Terns.
- 2) Upon filing for renewal, extension, or amendment of the Orders of Conditions, the applicant shall contact the Division for written response regarding impacts to Resource Area habitat of state-listed wildlife.

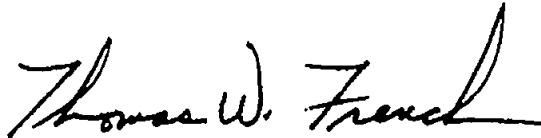
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Provided these conditions are included in any approving Orders of Conditions issued by the Conservation Commission, and the applicant complies with all the above noted conditions, the project will not result in an adverse impact to the resource area habitats of state-listed wildlife species pursuant to the WPA and will not result in a prohibited Take pursuant to the MESA. A copy of the final Order of Conditions shall be sent to the Division simultaneously with the applicant as stated in the Procedures section of the WPA (310 CMR 10.05(6)(e)).

This determination is a final decision of the Division of Fisheries and Wildlife pursuant to 321 CMR 10.18. *Any changes to the proposed project or any additional work beyond which was described in supplemental materials (dated 11/16/17) requires additional review, and may require an additional filing, with the Division pursuant to the MESA*. This determination is valid for five years.

Please note that this determination addresses only the matter of state-listed species and their habitats. If you have any questions regarding this letter please contact Amy Hoenig, Endangered Species Review Biologist, at (508) 389-6364.

Sincerely,



Thomas W. French, Ph.D.
Assistant Director

cc: MA DEP Southeast Region
Brad Chase, MA Division of Marine Fisheries

MASSWILDLIFE

ATTEST: Paulo C. DeOliveira, Register
Dukes County Registry of Deeds