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VIA EMAIL: concomm@westtisbury-ma.gov

West Tisbury Conservation Commission
c/o Maria McFarland, Board Administrator
1059 State Road
P.O. Box 278, 2nd Floor
West Tisbury, MA 02575

RE: Map 31 Lot 48/21 New Lane/Doane/Potential Wetlands Violation by Abutters at Map 31 Lot 68.1 41 Pond View Farm Road/Eppel/Ratification of Enforcement Order issued 9/2/2021 (EO)/ Formal hearing on restoration plan

Robert A. Doane, Trustee et als v. Nancy B. Eppel, Trustee et als.
Dukes County Superior Court #2174CV00030

Dear Members of the West Tisbury Conservation Commission (the "WTCC"):

This submittal I am presenting to augment my email of 11/4/21. I continue to reserve all rights of my client Cheryl Eppel. Before the hearing resumes tomorrow 11/9/21, I want to further emphasize that Cheryl's team of experts have been barred by the Doanes themselves from entering into the Area of Concern and performing a study and mapping and otherwise documenting in full the conditions there. Preserving a sense of those conditions is essential for both WTCC purposes but also for the lawsuit filed by the Doanes, for some reasons which may become apparent from presentations tomorrow but also from the regulations promulgated under the West Tisbury Wetlands Bylaw that I note below.

Despite being barred by the Doanes from being able to enter without threat of arrest, Lucas Environmental ("LE") will be submitting their own letter today which implicitly reminds the WTCC that if the WTCC were to allow planting, despite the fact that we've just had frosts in West Tisbury over the prior nights, this has effectively barred Cheryl from presenting a meaningful independent scientific study of the areas to support either her own "remediation plan," or to support alternative findings by the WTCC.

Wisely the WTCC has taken time to carefully view the area and understand what excess planting was involved in the Doanes' self-guided proposal (combined with blocking any real meaningful study and submittal by the Eppels) and asked that the plan be dialed back. Ironically, the Doanes' experts, OxBow presented on 11/4/21 a revised proposal that chose NOT to incorporate any of the "suggestions" requested by the WTCC. LE will be commenting on that further. Given that there has been a frost and the planting season has ended, my client asks that the WTCC further consider simply deferring any decision until one can see what re-grows in the spring and establishes through the summer of 2021, with the plan then to review the conditions and then determine what remediation plan would then be needed and then decided what plants if any would be needed for planting late in September 2022.

If I understood the sentiment of the WTCC from the last meeting, it makes ultimate sense to defer any planting from now until a future date to be determined from further study and review next summer, especially in light

of the recalcitrance of the Doanes as made evident from the 11/4/21 revised proposal rejecting all of the WTCC suggestions from 10/26/21, to work with the WTCC on the suggestions requested for a reasonable and plausible remediation proposal, keeping in mind that planting season is over, having ended with the first frost of several we have now experienced in West Tisbury.

As you are aware, Lucas Environmental, LLC (LE) was retained by Ms. Cheryl Eppel to assist with matters related to the Enforcement Order(s) (EO) issued by the West Tisbury Conservation Commission for alleged vegetation clearing that occurred at 21 New Lane in West Tisbury, Massachusetts and in regard to the pending lawsuit in Dukes County Superior Court entitled Doane v. Eppel, docket # 2174 CV 00030 (the "Lawsuit"). LE had been retained to review the areas of land where it was alleged that, in June, 2021, there were activities undertaken in terms of brush trimming which were violations of the Wetlands Protection Act (Massachusetts General Laws chapter 130 §40, the "WPA") and the West Tisbury Wetlands Bylaw ("WTWB") and the regulations promulgated under each ("Wetlands Laws"), to determine what vegetation had been trimmed, to map the area, and to propose a response plan to address the issues determined on a fact-based analysis in the "Area of Concern" under the various Wetlands Laws, and otherwise to provide expert information as needed in the Lawsuit.

The Doanes' experts, Ox Bow Associates through Scott Smyers submitted to the WTCC in mid-August, 2021, and the WTCC used, with what we understand was a site visit by either the WTCC Administrator or by some members of the WTCC prior to the meeting on August 24, 2021, as the sole basis for the manner of drafting of the EO issued on 9/2/2021 and subsequently amended, ratified and re-issued on 9/14/21, in which Cheryl and Nancy Eppel were named as violators and the Doanes as landowners, and asking the Doanes to present a "remediation plan" and suggesting that the Eppels could present their own such plan.

Please understand that ownership rights in the Area of Concern are in dispute in the Lawsuit, but merely note that the WTCC, in the EO, continue to retain only the "facts" from the presentation made by the Doanes' expert and supported by Robert Doane and his attorney during the proceedings under the EO. If the Eppels own or control the Areas in issue, then the basis for the EO being on whose land the violations are alleged to have occurred, and who were the "violators" may be quite different. I respectfully remind the WTCC that no quasi-adjudicatory hearing was held before the findings implicit in the EO were determined despite a request for a continuance at the two first meetings held on the matter.

Please understand further the impact that the Doanes have expressed through a claim in the Lawsuit for criminal and civil trespass. Furthermore, the Doanes have, since I had sought through the discovery process in the Lawsuit an understanding and stipulation that the LE team and other experts yet to be determined, could enter into the Area of Concern without threat of arrest or prosecution for criminal or civil trespass to perform the mapping and study at the earliest possible time (in regards to wetlands biologists on the LE team that would mean before a frost event could render such study more difficult). The Doanes refused to respond and instead posted (approximately at some point in time between September 25 and October 3, 2021) for the first time since the Eppels acquired their property at 37 Pond View Farm Road in 1986 the Area of Concern and other trails warning of the threat of criminal prosecution for trespass.

Only after this issue was brought to the attention of your Commission (by me during the October 12, 2021 hearing) did the Doanes' counsel thereafter agree to entertain our entry into the Area of Concern, only to

suddenly, within a day or two decide to bar Cheryl's experts entry entirely without a court order for the same. It appears the Doanes wish their own presentations, determinations and plan be the sole basis for the EO and for a remediation plan the WTCC can review under the EO, rather than to act cooperatively with Ms. Eppel and as the WTCC had implicitly believed was within the realm of lawful possibility in the EO, and to stipulate and allow the LE team entry to perform the study needed for us to try to study the area and develop a response plan from the point of view of Ms. Eppel.

Thus, Cheryl's team has unfairly continued to be barred from entry into the Area of Concern and cannot perform the study we had hoped to perform before the recent frost events in the area which have potentially and likely altered the presence of leaf re-growth which would have assisted greatly in determining the types of vegetation that had been present throughout the Area of Concern and where it was located through a mapping process.

My client respectfully submits that any order that would enable the Doanes' team to start planting before LE has been able to access the area, study and determine the vegetation cut, where it was cut, map it, and complete a report of those conditions, wholly undermines her ability to preserve that evidence that could be lost due to the disturbance of the Area of Concern by any digging or placement of plants. Roots and stumps and re-growth evident by leaves, etc., could all be lost to any planting as now proposed. Preservation of the evidence is critical to any fair hearing whether before the WTCC or the Superior Court. Destruction of the critical evidence existing in the Area of Concern and surrounding environs, either by delay and the impact of seasonal change or by human disturbance as proposed by the Doanes could have a severe adverse impact on Ms. Eppel's ability to defend herself.

On behalf of my client, I further respectfully submit that there is no specific standard of performance in the WTWB nor in the Regulations setting forth what is expected in a "remediation plan." The WTCC seems to be guided not by any specific "standard" but by a sense of what each Area of Concern under an EO requires for "remediation." By applying the common understanding of the term "remediation plan," I would respectfully suggest that to mean a plan for vegetative restoration in finding with some particularity and locational determination as to such vegetation as was removed or otherwise destroyed that will not simply re-grow over a reasonable period of time (which natural re-growth might restore the Area of Concern without further human intervention).

LE cannot perform any sort of independent review or effort to document and preserve evidence garnered simply on the basis of the photographs presented by Ox Bow, and not mapped in any manner with regard to what was removed and from what locations and comparing to the Eppels photographs and movie. The recent map/plan submitted by OxBow for the 10/26/21 continued hearing (with the "yellow line" indicating that most of bushes other than greenbriar had been present and seem to be re-sprouting in the area to the south of the "yellow line"), does not demonstrate that no more than a reasonable standard of a "one-for-one replacement bush for each destroyed bush" is being applied, which we believe is the proper performance standard. Please keep in mind that human soil disturbance and new plant introduction into an area near or within a buffer zone is generally not how the vegetation in such an area became established. The natural growth within the Area of Concern would have occurred over a long period of time as may have been allowed to establish save for general trimming or mowing or landscape maintenance performed in the area. The area would have had no remaining view but for the actions of Mr. Eppel since 1986 and the actions of the Eppel's predecessors in title.

As for other possible findings the WTCC might yet make, I note that the WTWB Regulations provide for certain exemptions which have apparently not been considered in the EO nor during the on-going hearing on the remediation plans under the EO.

Note that under WTWB Regulation Section III, the following activities are exempted:

III. Exemptions and Exceptions

No application or permit is required for:

A. Certain minor activities in the Buffer Zone or the Riverfront Area provided the activity is not within any other resource area:

6. Mowing of existing lawns, brush cutting existing meadows, and **normal maintenance of trees and shrubs.**

Further, under Section VIII. Definitions, the following exception is set forth:

Section VIII. Definitions

The following definitions shall apply in the interpretation and implementation of this bylaw.

The term "alter" shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this bylaw:

...

H. Destruction of plant life, including cutting or trimming of trees, shrubs and brush (mowing of existing lawns, brush cutting existing meadows, and **normal maintenance of trees and shrubs is not considered destruction**)

My client respectfully suggests to the WTCC that it has not yet been determined by any finder of fact (the WTCC or the Superior Court), after due adjudicatory hearing, whether the activities in June 2021 may have been exempt under the provisions of the WTWB Regulations. However, the EO implicitly makes such findings. On behalf of my client, I respectfully submit that the WTCC, in order for a balanced review, might wish to look into whether or not such regulation exemptions should be applied here based on the historical photographs and movies submitted by Ms. Eppel through her counsel, showing that a view of the Tisbury Great Pond from the Eppel home and property has been maintained for several decades.

Based upon the time of year, the understanding that frost events have occurred in the area, and the re-establishing vegetation observed by Oxbow and the WTCC during site visits, our experts, LE recommend that no planting now be allowed (as moot) and that the area be re-evaluated by the sometime near the end of June, 2022 or beginning of July of 2022, following the spring portion of the growing season, and determine if supplement plantings are warranted at that time for planting in September 2022.

My client thus requests the Conservation Commission to consider the following:

A. That any activities might have been considered exempt due to the long history of activities by Mr. Eppel since acquiring the lands in 1986 in trimming and cutting tree limbs and bushes to maintain the view over which he considered his view easement, or even as his own lands due to a long history of adverse possession by his predecessors in title.

B. If A is not found to be a possible scenario, then allow the Restoration Area to naturally revegetate through the Spring 2022 growing season.

C. If A is not found to be a possible scenario, then defer any planting at this time and inspect the impact area by June or July of 2022 to determine if sufficient growth is re-sprouting.

D. If A is not found to be a possible scenario, then allow time to Ms. Eppel through her counsel to gain an order for unfettered entry into the Area of Concern and elsewhere as needed for LE to perform the study of the vegetation, the biological and geographical nature of the area, to map the same and to prepare a report of the same, which would be used for Ms. Eppel to present an independent evaluation and proposal for the WTCC.

E. If A is not found to be a possible scenario, then defer any planting and then review again and adapt the OxBow remediation plan at or about June or July of 2022 to further reduce the quantity of plantings if sufficient growth of plants has re-established.

F. If A is not found to be a possible scenario, then defer any planting and then review again and require that the planting of new shrubs to occur within the fall portion of the growing season, following the June/July inspection, preferably in September of 2022.

Thank you for your consideration in this matter.

Sincerely,

/s/ Benjamin L. Hall, Jr.

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