



PLAINTIFF(S): SIASCONSET BEACH PRESERVATION FUND, INC. ADDRESS: P.O. Box 2279, Nantucket, Massachusetts 02554	COUNTY: Nantucket
ATTORNEY: David Weiss ADDRESS: Goulston & Storrs, P.C., 400 Atlantic Avenue, Boston, Massachusetts 02110 BBO: 521090	DEFENDANT(S): TOWN OF NANTUCKET CONSERVATION COMMISSION ADDRESS: 2 Bathing Beach Road, Nantucket, Massachusetts 02554

TYPE OF ACTION AND TRACK DESIGNATION (see reverse side)

CODE NO.	TYPE OF ACTION (specify)	TRACK	HAS A JURY CLAIM BEEN MADE?
EO3, D13, AE1	Certiorari Action, G.L. c. 249, s. 4	X, A	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO

***If "Other" please describe:** Declaratory Judgment, G.L. c. 231A; Administrative Action involving Municipality

STATEMENT OF DAMAGES PURSUANT TO G.L. c. 212, § 3A

The following is a full, itemized and detailed statement of the facts on which the undersigned plaintiff or plaintiff counsel relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS
(attach additional sheets as necessary)

A. Documented medical expenses to date:		
1. Total hospital expenses	\$	_____
2. Total doctor expenses	\$	_____
3. Total chiropractic expenses	\$	_____
4. Total physical therapy expenses	\$	_____
5. Total other expenses (describe below)	\$	_____
Subtotal (A):	\$	N/A
B. Documented lost wages and compensation to date	\$	_____
C. Documented property damages to dated	\$	_____
D. Reasonably anticipated future medical and hospital expenses	\$	_____
E. Reasonably anticipated lost wages	\$	_____
F. Other documented items of damages (describe below)	\$	_____
G. Briefly describe plaintiff's injury, including the nature and extent of injury:		TOTAL (A-F): \$
		N/A



CONTRACT CLAIMS
(attach additional sheets as necessary)

Provide a detailed description of claims(s):

TOTAL: \$ N/A

Signature of Attorney/Pro Se Plaintiff: X **Date:** 6-20-14

RELATED ACTIONS: Please provide the case number, case name, and county of any related actions pending in the Superior Court.

CERTIFICATION PURSUANT TO SJC RULE 1:18

I hereby certify that I have complied with requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods of dispute resolution.

Signature of Attorney of Record: X **Date:** 6-20-14

CIVIL ACTION COVER SHEET INSTRUCTIONS

SELECT CATEGORY THAT BEST DESCRIBES YOUR CASE

AC Actions Involving the State/Municipality *

- AA1 Contract Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AB1 Tortious Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AC1 Real Property Action involving Commonwealth, Municipality, MBTA etc. (A)
- AD1 Equity Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AE1 Administrative Action involving Commonwealth, Municipality, MBTA, etc. (A)

CN Contract/Business Cases

- A01 Services, Labor, and Materials (F)
- A02 Goods Sold and Delivered (F)
- A03 Commercial Paper (F)
- A04 Employment Contract (F)
- A06 Insurance Contract (F)
- A08 Sale or Lease of Real Estate (F)
- A12 Construction Dispute (A)
- A14 Interpleader (F)
- BA1 Governance, Conduct, Internal Affairs of Entities (A)
- BA3 Liability of Shareholders, Directors, Officers, Partners, etc. (A)
- BB1 Shareholder Derivative (A)
- BB2 Securities Transactions (A)
- BC1 Mergers, Consolidations, Sales of Assets, Issuance of Debt, Equity, etc. (A)
- BD1 Intellectual Property (A)
- BD2 Proprietary Information or Trade Secrets (A)
- BG1 Financial Institutions/Funds (A)
- BH1 Violation of Antitrust or Trade Regulation Laws (A)
- A99 Other Contract/Business Action - Specify (F)

* Choose this case type if ANY party is the Commonwealth, a municipality, the MBTA, or any other governmental entity UNLESS your case is a case type listed under Administrative Civil Actions (AA).

† Choose this case type if ANY party is an incarcerated party, UNLESS your case is a case type listed under Administrative Civil Actions (AA) or is a Prisoner Habeas Corpus case (E97).

ER Equitable Remedies

- D01 Specific Performance of a Contract (A)
- D02 Reach and Apply (F)
- D03 Injunction (F)
- D04 Reform/ Cancel Instrument (F)
- D05 Equitable Replevin (F)
- D06 Contribution or Indemnification (F)
- D07 Imposition of a Trust (A)
- D08 Minority Shareholder's Suit (A)
- D09 Interference in Contractual Relationship (F)
- D10 Accounting (A)
- D11 Enforcement of Restrictive Covenant (F)
- D12 Dissolution of a Partnership (F)
- D13 Declaratory Judgment, G.L. c.231A (A)
- D14 Dissolution of a Corporation (F)
- D99 Other Equity Action (F)

PA Civil Actions Involving Incarcerated Party †

- PA1 Contract Action involving an Incarcerated Party (A)
- PB1 Tortious Action involving an Incarcerated Party (A)
- PC1 Real Property Action involving an Incarcerated Party (F)
- PD1 Equity Action involving an Incarcerated Party (F)
- PE1 Administrative Action involving an Incarcerated Party (F)

TR Torts

- B03 Motor Vehicle Negligence - Personal Injury/Property Damage (F)
- B04 Other Negligence - Personal Injury/Property Damage (F)
- B05 Products Liability (A)
- B06 Malpractice - Medical / Wrongful Death (A)
- B07 Malpractice - Other (A)
- B08 Wrongful Death, G.L. c.229 §2A (A)
- B15 Defamation (A)
- B19 Asbestos (A)
- B20 Personal Injury - Slip & Fall (F)
- B21 Environmental (F)
- B22 Employment Discrimination (F)
- BE1 Fraud, Business Torts, etc. (A)
- B99 Other Tortious Action (F)

RP Real Property

- C01 Land Taking (F)
- C02 Zoning Appeal, G.L. c. 40A (F)
- C03 Dispute Concerning Title (F)
- C04 Foreclosure of a Mortgage (X)
- C05 Condominium Lien & Charges (X)
- C99 Other Real Property Action (F)

MC Miscellaneous Civil Actions

- E18 Foreign Discovery Proceeding (X)
- E97 Prisoner Habeas Corpus (X)
- E22 Lottery Assignment, G.L. c. 10 §28 (X)

AB Abuse/Harassment Prevention

- E15 Abuse Prevention Petition, G.L. c. 209A (X)
- E21 Protection from Harassment, G.L. c. 258E(X)

AA Administrative Civil Actions

- E02 Appeal from Administrative Agency, G.L. c. 30A (X)
- E03 Certiorari Action, G.L. c.249 §4 (X)
- E05 Confirmation of Arbitration Awards (X)
- E06 Mass Antitrust Act, G. L. c. 93 §9 (A)
- E07 Mass Antitrust Act, G. L. c. 93 §8 (X)
- E08 Appointment of a Receiver (X)
- E09 Construction Surety Bond, G.L. c. 149 §§29, 29A (A)
- E10 Summary Process Appeal (X)
- E11 Worker's Compensation (X)
- E16 Auto Surcharge Appeal (X)
- E17 Civil Rights Act, G.L. c.12 §11H (A)
- E24 Appeal from District Court Commitment, G.L. c.123 §9(b) (X)
- E25 Pleural Registry (Asbestos cases) (A)
- E95 Forfeiture, G.L. c.94C §47 (F)
- E99 Other Administrative Action (X)
- Z01 Medical Malpractice - Tribunal only, G.L. c. 231 §60B (F)
- Z02 Appeal Bond Denial (X)

SO Sex Offender Review

- E12 SDP Commitment, G.L. c. 123A §12 (X)
- E14 SDP Petition, G.L. c. 123A §9(b)

RC Restricted Civil Actions

- E19 Sex Offender Registry, G.L. c.6 §178M (X)
- E27 Minor Seeking Consent, G.L. c.112 §12S (X)

TRANSFER YOUR SELECTION TO THE FACE SHEET

EXAMPLE:

CODE NO.	TYPE OF ACTION (specify)	TRACK	HAS A JURY CLAIM BEEN MADE?	
B03	Motor Vehicle Negligence-Personal Injury	_F_	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO

STATEMENT OF DAMAGES PURSUANT TO G.L. c. 212, § 3A

DUTY OF THE PLAINTIFF - The plaintiff shall set forth, on the face of the civil action cover sheet (or attach additional sheets as necessary), a statement specifying the facts on which the plaintiff relies to determine money damages. A copy of such civil action cover sheet, including the statement as to the damages, shall be served with the complaint. **A clerk-magistrate shall not accept for filing a complaint, except as otherwise provided by law, unless it is accompanied by such a statement signed by the attorney or pro se party.**

DUTY OF THE DEFENDANT - If the defendant believes that the statement of damages filed by the plaintiff is inadequate, the defendant may file with his/her answer a statement specifying the potential damages which may result if the plaintiff prevails.

**A CIVIL COVER SHEET MUST BE FILED WITH EACH COMPLAINT.
FAILURE TO COMPLETE THIS COVER SHEET THOROUGHLY AND ACCURATELY
MAY RESULT IN DISMISSAL OF THIS ACTION.**

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

SIASCONSET BEACH PRESERVATION
FUND, INC.,

Plaintiff,

v.

TOWN OF NANTUCKET CONSERVATION
COMMISSION,

Defendant.

Civil Action No. _____

COMPLAINT

This action seeks relief, in two counts, with respect to so much of an Order of Conditions in the form of a denial (the “Denial”), issued on or after June 3, 2014 by the Town of Nantucket Conservation Commission (the “Commission”), as purports to constitute an order under Nantucket Code § 136-4(G) (the “Local Bylaw”) and the Nantucket Wetland Protection Regulations (the “Local Regulations”). The Denial concerns attempts by local homeowners and the Town of Nantucket (the “TON”) to halt the ongoing dramatic erosion of Sconset Bluff and the irreparable and catastrophic consequences to pre-1978 residences and public infrastructure, including that public infrastructure that serves those homes, which will occur if the bluff is not protected. The Commission’s Denial is arbitrary and capricious because it ignores the substantial scientific evidence demonstrating the project’s compliance with all applicable regulations and is not based on any substantial evidence and therefore constitutes an error of law. Moreover, in issuing its Denial, the Commission purports to rely on provisions of the Local Regulations and Local Bylaw that exceed home rule authority because those regulations are inconsistent with the mandate that expressly permits the work proposed by this project under state wetlands law. The local power to regulate wetlands in the Commonwealth of

Massachusetts applies only where the comprehensive state system of regulation sets a floor, rather than where it mandates a specific outcome, as is the case with respect to the project that is the subject of this Complaint.

The first count of this Complaint is an appeal of the Denial pursuant to G.L. c. 249, § 4 and Superior Court Standing Order 1-96. The second count seeks declaratory relief in the form of a declaration that: (i) select provisions of the Local Bylaw and the Local Regulations are invalid insofar as they infringe on the express protections provided to homeowners under 310 CMR 10.30(3) and are thereby inconsistent with the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (the “Act”); and (ii) the Commission was without authority to issue a decision that is inconsistent with the express requirements of 310 CMR 10.30(3).

The Plaintiff, Siasconset Beach Preservation Fund, Inc. (“SBPF”), has demonstrated through undisputed facts and well-supported scientific evidence that its proposed bluff stabilization project is and can continue to be conditioned so as to adequately protect the wetland resources and wetland interests protected by the Act. The Commission’s Denial inexplicably ignores the requirement under the Act that expressly requires that owners of pre-1978 homes “shall” be allowed to protect their property from shoreline erosion and is comprised, in its entirety, of conclusory and unsupported findings that SBPF has not demonstrated that its proposed project complies with performance standards under the Local Bylaw. The Commission’s decision, by its Denial, is arbitrary and capricious, lacking in substantial evidence, and constitutes an error of law.

Jurisdiction

1. This Court has jurisdiction over this matter pursuant to G.L. c. 249, § 4 and G.L. c. 231A, § 1.

2. Venue is proper in this county under G.L. c. 223, § 1 and § 8 and Nantucket Code § 136-4(G).

Parties

3. The Plaintiff SBPF is a 501(c)(3) organization that was formed approximately twenty years ago by a group of Sconset homeowners concerned about erosion of the Sconset Bluff and the threat it poses to the village of Sconset.

4. The Defendant Commission is a duly constituted conservation commission of the Town of Nantucket established pursuant to G.L. c. 40, § 8C, with a principal office at 2 Bathing Beach Road, Nantucket, Massachusetts. The Commission is the permit-granting authority under the Act and under the Nantucket Wetlands Bylaw, Chapter 136 of the Nantucket Code.

Facts Common to All Counts

5. The coastal bank at the east end of Nantucket Island, known as Sconset Bluff, has experienced ongoing erosion for decades, resulting in continued decrease in the setback distance between the top of Sconset Bluff and the numerous homes and public infrastructure on Baxter Road located at the top of the bluff.

6. During the winter storms of 2012-2013, significant retreat of the Sconset Bluff occurred, leaving the top of the bank as close as 30 to 40 feet to the edge of Baxter Road in several areas and only 60 to 70 feet in many others. Pre-1978 homes are as close as eight feet from the top of the bank.

7. As a result of the eroding bluff, Baxter Road and the homes and public infrastructure serving those homes are in imminent danger. Another storm season similar to 2012-2013, or indeed a single moderate storm of sufficient duration, could render Baxter Road impassable, breach the public water supply, and leave the residences at the north end of Baxter

Road landlocked. The failure of Baxter Road would also leave the TON unable to provide fire protection or safe drinking water to the impacted residents and would cut off access to the Sankaty Head Lighthouse.

8. During a period of approximately 20 years, SBPF has worked closely with environmental and engineering experts, as well as the local community, to develop and propose various protective measures for Sconset Bluff, including stabilization of the toe of the slope, in order to avoid the complete erosion of Sconset Bluff and the potentially disastrous circumstances.

The Notice of Intent

9. In October 2013 SBPF jointly filed, with the TON, a Notice of Intent for a coastal engineering structure consisting of four tiers of geotubes and other features along approximately 1,500 linear feet of a highly endangered area of Sconset Bluff between the property located at 85 and 107A Baxter Road (the “October 2013 NOI”). Attached as **Exhibit A** to this Complaint is a true and accurate copy of the October 2013 NOI.

10. The geotube containers proposed in the October 2013 NOI were to be made from a woven polypropylene geotextile material, manufactured in a sand color, and woven in a rip-resistant weave pattern for maximum resistance to mechanical damage.

11. The proposed geotube system consisted of four tubes, each with a 45-foot circumference (approximately 19 feet wide and 6.5 feet tall). The bottom tube was to be buried in the beach to elevation 0.0 mean low water (“MLW”) and the top tube was to be set at elevation 26.0 MLW to account for anticipated conditions during a 100-year storm. The tubes were to be 100 or 200 feet long, with returns set at a 45-degree angle constructed with 50-foot long tubes. Following construction of the tubes, sand cover was to be provided, and ongoing

nourishment performed to protect the tubes and mitigate for loss of the bank as a sediment source. Sand fill was to be secured from on-island sources of compatible sand, which was to be the same sand used in similar projects and had previously been tested for compatibility.

12. In conjunction with the October 2013 NOI, the TON agreed to work with property owners to reduce runoff that discharges over the top of the slope and to provide a low berm along the easterly side of the roadway to direct water toward Baxter Road. In addition to redirecting runoff, biodegradable jute netting was to be placed on the bank face to protect the exposed soil. Netting was to be placed in the fall of 2013 immediately upon receipt of approval to proceed. Native plantings (e.g. beach grass and woodier species) were to be added to the slope in spring 2014 to further reduce erosion.

13. The October 2013 NOI specifically proposed an initial five-year lifespan, later reduced to a proposed three-year lifespan (with the possibility of three 1-year extensions), intended to provide a minimum but adequate level of protection for the intermediate term while monitoring occurred to determine the appropriate long term solution. The October 2013 NOI also addressed matters of sand nourishment and delivery, construction methodology, monitoring and maintenance, failure criteria and removal procedures, and analysis of alternative projects.

14. The Commission held five public hearings to consider the October 2013 NOI, on October 30, November 6, November 13, November 20, and December 4, 2013. By the conclusion of the November 20, 2013 public hearing, the Commission had yet to take any action on the October 2013 NOI.

The 2013 Storm Season Emergency

15. With the 2013-2014 winter storm season rapidly approaching and the erosion of Sconset Bluff presenting an immediate threat to the stability of Baxter Road and the homes

situated thereon, SBPF and the TON made a series of attempts to obtain approval to address the emergency situation pursuant to § 136-5 of the Local Bylaw and 310 CMR 10.06.

The First Request

16. On November 26, 2013, SBPF filed an emergency certification request for the same four tier geotube system, and related work proposed in the October 2013 NOI, but only at the most endangered 900 linear feet of the bluff, from 91-105 Baxter Road. A true and accurate copy of the emergency certification request (without exhibits) is attached hereto as **Exhibit B**.

17. The Commission denied the request on November 27, 2013.

18. On appeal, the Department of Environmental Protection (“DEP”) overturned the Commission’s denial and approved the emergency certification on December 10, 2013. A true and accurate copy of DEP’s approval is attached hereto as **Exhibit C**.

19. DEP’s emergency certification stated that it “deems the allowed work necessary to abate the present threat to public safety from storm damage to buildings, Baxter Road and water infrastructure.” As a part of its Special Conditions, DEP laid out a sand mitigation schedule at a rate of 22 cubic yards per linear foot (more than 1.5 times the 14.3 cubic yards per linear foot average annual volume of erosion from the bank) that included annual monitoring and nourishment requirements and stated that the sand mitigation addressed any difference between the four tier geotube structure and a hybrid geotube/jute system. DEP’s emergency certification also required SBPF to file a Notice of Intent seeking an Order of Conditions regarding nourishment and mitigation within thirty days of the DEP Emergency Certification.

The Second Request

20. On December 4, 2013, the Commission approved a separate emergency certification request filed by the TON for a variation on the October 2013 NOI that included two

lower tiers of 45-foot circumference geotextile tubes topped by four upper tiers of smaller (30-foot circumference) jute bags, with a top elevation of +27.0 MLW.

The Third Request

21. On December 17, 2013, SBPF and the TON jointly filed an emergency certification request with the Commission which sought approval, on an emergency basis, for the four tier geotube project as described in the first request but modified by incorporating the conditions DEP included in its December 10, 2013 emergency certification.

22. On December 18, 2013, the Commission certified the emergency, allowing an emergency project consisting of three tiers of geotubes along approximately 900 linear feet. A true and accurate copy of the Commission's certification is attached hereto as **Exhibit D**.

23. In the Commission's December 18, 2013 emergency certification, the Commission found that: (1) the proximity of Baxter Road to the eroding coastal bank constituted imminent danger and was an emergency; (2) the failure of the public way and damage of the public utilities posed a risk to public health and safety; and (3) the project as designed was necessary to abate the emergency situation. The Commission also adopted DEP's Special Conditions from its approval of the SBPF emergency certification request.

24. The emergency work was performed pursuant to the Commission's December 18, 2013 emergency certification and three tiers of geotubes were installed at a cost to SBPF of approximately \$3 million in private funds.

Notice of Intent for the emergency work

25. Each of the DEP emergency certification, the Commission emergency certification, and Local Bylaw § 136-5(F) require that a Notice of Intent be filed following an emergency certification to allow for full review of the emergency project.

26. On March 14, 2014, SBPF and the TON jointly designated the October 2013 NOI for 1,500 feet of four tiers of geotubes as the required Notice of Intent (the “March 14 SBPF Submission”). A true and accurate copy of the joint designation (without exhibits) is attached hereto as **Exhibit E**.

27. The information in the March 14 SBPF Submission addressed key elements of the October 2013 NOI being proposed and reviewed, as follows:

- (i) The geotubes, as-built and as proposed, including the construction process, system location, system length, system height, tube materials, tube plugs, and new returns;
- (ii) Drainage and storm mitigation, as installed and as proposed;
- (iii) Bluff protection through re-vegetation and soil retention netting; and
- (iv) Sand Contributions, as-built and as proposed, including sand volumes (for construction and sacrificial template), schedule of future contributions/maintenance, and bluff face augmentation.

28. The Commission held four additional public hearings in the spring of 2014 to consider the October 2013 NOI on March 19, April 2, April 30, and May 14, 2014. Throughout the application and public hearing process, SBPF and the TON submitted substantial additional information to the Commission including reports and written documentation that demonstrate the project’s compliance with all applicable laws.

29. Between the March 19 and April 2 public hearings, on March 28, 2014, SBPF and the TON sent a letter to the Commission which, while not modifying the October 2013 NOI, indicated that SBPF and the TON would not appeal if an Order of Conditions were issued for the existing three tier geotube structure with “appropriate conditions.” A true and accurate copy of the letter is attached hereto as **Exhibit F**.

30. At the April 2, 2014 public hearing, the Commission appeared to reach a consensus to approve the three tier geotube system, as had been installed under the Commission

emergency certification, with the returns and plantings, provided that the Order of Conditions included monitoring, mitigation, and conditions addressing removal requirements and funding.

31. Following the April 2, 2014 hearing, SBPF and the TON spent more than a month supplying information the Commission requested, answering questions, providing more details on the mitigation program, adding more monitoring, and adding failure criteria to account for the Commission's concerns.

Amended NOI

32. Although on April 25, 2014, SBPF and the TON amended the October 2013 NOI to reflect guidance that had been received from DEP that the project should not be treated as a "limited project," and in that amendment reduced the length of the project from 1,500 feet to 900 feet, the remainder of the project as described in the October 2013 NOI remained generally unchanged, including the four tiers of geotubes (the "Amended NOI"). A true and accurate copy of the Amended NOI is attached hereto as **Exhibit G**.

33. At the conclusion of the May 14, 2014 public hearing, the Commission indicated that it had no further questions and SBPF formally requested that the hearing be closed. The Commission voted unanimously to close the hearing on the October 2013 NOI, as amended, and set a special meeting date of May 21, 2014 to discuss the Order of Conditions.

Issuance of Order of Conditions (the Denial)

34. The Commission held three public meetings to discuss the Order of Conditions related to the October 2013 NOI, as amended, on May 21, May 29, and June 3, 2014.

35. During the course of these public meetings, it became clear that the majority of the members of the Commission did not intend to issue an Order of Conditions permitting the already-installed three tier geotube system, subject to the conditions concerning monitoring,

mitigation, and removal that had been discussed during the four 2014 public hearings on the October 2013 NOI. Instead, at the conclusion of the June 3, 2014 public meeting, the Commission voted 4-2 to issue the Denial. A true and accurate copy of the Denial is attached hereto as **Exhibit H**.

36. In its Denial, the Commission purported to find that SBPF had not met its burden of proof to demonstrate compliance with the following Sections of the Regulations: 2.01(B)(7-8), 2.02(B)(2, 4), 2.05(B)(1, 3), and 2.10(B)(1).

37. The Denial states that SBPF and the TON have not met the burden of proof to demonstrate compliance with sections of the Local Regulations but fails to identify any factual issues supporting its purported findings.

38. On June 17, 2014, SBPF filed a Request for Superseding Order with DEP, seeking review of so much of the Denial as purports to constitute an action under the Act, and its implementing regulations. DEP is without jurisdiction to review so much of the Denial as purports to constitute an action taken under the Local Bylaw and the Local Regulations.

Relation Between the Local Regulations and Wetlands Protection Act

39. Under the Local Regulations §§ 2.01(B)(7) and 2.02(B)(2), “No new bulkheads or coastal engineering structures shall be permitted to protect structures constructed or substantially improved after 8/78 . . . Other coastal engineering structures may be permitted only upon a clear showing that no other alternative exists to protect a structure built prior to 9/78 . . . not substantially improved, from imminent danger.”

40. Under the Nantucket Wetlands Protection Regulations § 2.05(B)(1), “No new bulkheads, coastal revetments, groins, or other coastal engineering structures shall be permitted to protect structures constructed, or substantially improved, after 8/78, except for public

infrastructures . . . Other coastal engineering structures may be permitted only upon a clear showing that no other alternative exists to protect a structure that has not been substantially improved or public infrastructure built prior to 9/78, from imminent danger.”

41. Under 310 CMR 10.30(3), “No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure **shall be permitted** when required to prevent storm damage to buildings constructed prior to . . . August 10, 1978 . . . including reconstructions of such buildings subsequent to [August 10, 1978] . . .” (emphasis added). 310 CMR 10.30(3) is also expressly identified as an exception to the requirements of 310 CMR 10.27(3) and 310 CMR 10.30(4).

COUNT I
(G.L. c. 249, § 4)

42. SBPF repeats and incorporates herein by reference the allegations set forth in paragraphs 1-41 above.

43. The Commission’s Denial is arbitrary and capricious, lacking in substantial evidence, and constitutes an error of law because:

(i) The project as proposed in the October 2013 NOI as amended is and can be conditioned so as to adequately protect the wetland resources and wetland interests protected by the Act;

(ii) It is arbitrary and capricious for the Commission to determine that the project cannot be conditioned so as to adequately protect the wetland resources and wetland interests protected by the Act, and the Denial contains no substantive findings or evidence to support the Commission’s conclusory findings, which are inconsistent with permits the Commission has issued in similar circumstances;

(iii) The Local Bylaw and Local Regulations are invalid insofar as they

infringe on the express protections provided to homeowners under 310 CMR 10.30(3) and are thereby inconsistent with the Act;

(iv) The Commission was without authority to issue a decision that is inconsistent with the express requirements of 310 CMR 10.30(3); and

(v) The Commission was without authority to issue the Denial based on provisions of the Local Bylaw and Local Regulations which are no more stringent than the Act.

44. As a result, the Denial is arbitrary and capricious, not supported by substantial evidence, and constitutes an error of law.

COUNT II
(Declaratory Judgment Under G.L. c. 231A, § 1)

45. SBPF repeats and incorporates herein by reference the allegations in paragraphs 1-44 above.

46. 310 CMR 10.30(3) states that a coastal engineering structure shall be permitted when required to prevent storm damage to pre-1978 buildings.

47. The Local Regulations purport to impose limitations on the express requirements of 310 CMR 10.30(3).

48. The Regulations are therefore inconsistent with 310 CMR 10.30(3).

49. There is an actual and present controversy between SBPF and the Commission regarding, among other things: (i) whether the Local Bylaw and Local Regulations are invalid insofar as they infringe on the express protections provided to homeowners under 310 CMR 10.30(3) and are thereby inconsistent with the Act; and (ii) whether the Commission was without authority to issue a decision that is inconsistent with the express requirements of 310 CMR 10.30(3).

50. The controversy would be terminated by the rendering of the declaratory judgment requested herein.

WHEREFORE, SBPF respectfully requests that this Court:

1. Annul the Commission's Denial and order that the Commission's decision of June 3, 2014 be, from the date of entry of judgment, deemed an Order of Conditions approving the work proposed by the October 2013 NOI as amended;

2. Enter judgment declaring and decreeing that:

(a) the Local Bylaw and Local Regulations, to the extent they infringe on the express protections provided to homeowners under 310 CMR 10.30(3), are invalid;

(b) the Commission was without authority to issue a decision that contradicts the express requirements of 310 CMR 10.30(3);

(c) the Denial is a nullity to the extent it purports to issue under the Local Bylaw and Local Regulations which do not govern nor apply to the October 2013 NOI as amended;

(d) the work proposed in the October 2013 NOI as amended requires no approval under the Local Bylaw and Local Regulations, and may proceed without such approval or Order of Conditions, subject to obtaining a final Order of Conditions under the Act, under the procedures applicable thereto;

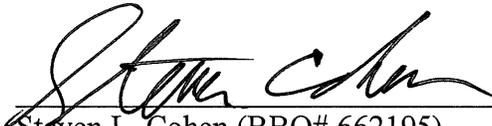
3. Grant SBPF any other and further relief as is just under the circumstances.

SIASCONSET BEACH PRESERVATION
FUND, INC.

By its attorneys,

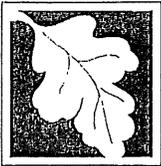


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Dated: June 23, 2014



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 3 – Notice of Intent
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

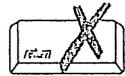
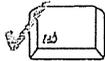
Provided by MassDEP:

MassDEP File Number

Document Transaction Number

City/Town

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



Note:
Before completing this form consult your local Conservation Commission regarding any municipal bylaw or ordinance.

A. General Information

1. Project Location (Note: electronic filers will click on button to locate project site):

85-107A Baxter Road
a. Street Address
Nantucket
b. City/Town
02554
c. Zip Code
Latitude and Longitude:
41°16'36.748"N
d. Latitude
69°57'40.559"W
e. Longitude
48
f. Assessors Map/Plat Number
8, 14, 14.1, 15, 17, 18, 19, 21, 22, 35
g. Parcel /Lot Number

2. Applicant:

Kara Buzanoski
a. First Name
Steven Cohen (for SBPF)
b. Last Name
Nantucket DPW and Siasconset Beach Preservation Fund, Inc
c. Organization
188 Madaket Road &
d. Street Address
Nantucket
e. City/Town
MA
f. State
02554
g. Zip Code
508-228-7244
h. Phone Number
508-228-7289
i. Fax Number
kbuzanoski@nantucket-ma.gov / slc@readelaw.com
j. Email Address

3. Property owner (required if different from applicant): Check if more than one owner

multiple owners list attached
a. First Name
b. Last Name
Town of Nantucket
c. Organization
16 Broad Street
d. Street Address
Nantucket
e. City/Town
MA
f. State
02554
g. Zip Code
508-228-7255
h. Phone Number
i. Fax Number
j. Email address
lgibson@nantucket-ma.gov

4. Representative (if any):

a. First Name
b. Last Name
c. Company
d. Street Address
e. City/Town
f. State
g. Zip Code
h. Phone Number
i. Fax Number
j. Email address

5. Total WPA Fee Paid (from NOI Wetland Fee Transmittal Form):

0.00
a. Total Fee Paid
0.00
b. State Fee Paid
0.00
c. City/Town Fee Paid



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A. General Information (continued)

6. General Project Description:

Stabilization of roadway and utilities in the public layout of Baxter Road.

7a. Project Type Checklist:

- | | |
|---|---|
| 1. <input type="checkbox"/> Single Family Home | 2. <input type="checkbox"/> Residential Subdivision |
| 3. <input type="checkbox"/> Limited Project Driveway Crossing | 4. <input type="checkbox"/> Commercial/Industrial |
| 5. <input type="checkbox"/> Dock/Pier | 6. <input checked="" type="checkbox"/> Utilities |
| 7. <input type="checkbox"/> Coastal Engineering Structure | 8. <input type="checkbox"/> Agriculture (e.g., cranberries, forestry) |
| 9. <input type="checkbox"/> Transportation | 10. <input type="checkbox"/> Other |

7b. Is any portion of the proposed activity eligible to be treated as a limited project subject to 310 CMR 10.24 (coastal) or 310 CMR 10.53 (inland)?

1. Yes No If yes, describe which limited project applies to this project:

Maintenance of public roadway and public utilities.

2. Limited Project _____

8. Property recorded at the Registry of Deeds for:

Nantucket

a. County _____

b. Certificate # (if registered land) _____

c. Book _____

d. Page Number _____

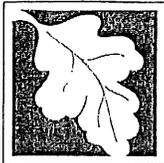
B. Buffer Zone & Resource Area Impacts (temporary & permanent)

- Buffer Zone Only – Check if the project is located only in the Buffer Zone of a Bordering Vegetated Wetland, Inland Bank, or Coastal Resource Area.
- Inland Resource Areas (see 310 CMR 10.54-10.58; if not applicable, go to Section B.3, Coastal Resource Areas).

Check all that apply below. Attach narrative and any supporting documentation describing how the project will meet all performance standards for each of the resource areas altered, including standards requiring consideration of alternative project design or location.

For all projects affecting other Resource Areas, please attach a narrative explaining how the resource area was delineated.

<u>Resource Area</u>	<u>Size of Proposed Alteration</u>	<u>Proposed Replacement (if any)</u>
a. <input type="checkbox"/> Bank	1. linear feet _____	2. linear feet _____
b. <input type="checkbox"/> Bordering Vegetated Wetland	1. square feet _____	2. square feet _____
c. <input type="checkbox"/> Land Under Waterbodies and Waterways	1. square feet _____ 3. cubic yards dredged _____	2. square feet _____



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B. Buffer Zone & Resource Area Impacts (temporary & permanent) (cont'd)

<u>Resource Area</u>	<u>Size of Proposed Alteration</u>	<u>Proposed Replacement (if any)</u>
d. <input type="checkbox"/> Bordering Land Subject to Flooding	1. square feet _____ 3. cubic feet of flood storage lost _____	2. square feet _____ 4. cubic feet replaced _____
e. <input type="checkbox"/> Isolated Land Subject to Flooding	1. square feet _____ 2. cubic feet of flood storage lost _____	3. cubic feet replaced _____
f. <input type="checkbox"/> Riverfront Area	1. Name of Waterway (if available) _____	

2. Width of Riverfront Area (check one):

- 25 ft. - Designated Densely Developed Areas only
- 100 ft. - New agricultural projects only
- 200 ft. - All other projects

3. Total area of Riverfront Area on the site of the proposed project: _____ square feet

4. Proposed alteration of the Riverfront Area:

a. total square feet _____ b. square feet within 100 ft. _____ c. square feet between 100 ft. and 200 ft. _____

5. Has an alternatives analysis been done and is it attached to this NOI? Yes No

6. Was the lot where the activity is proposed created prior to August 1, 1996? Yes No

3. Coastal Resource Areas: (See 310 CMR 10.25-10.35)

Check all that apply below. Attach narrative and supporting documentation describing how the project will meet all performance standards for each of the resource areas altered, including standards requiring consideration of alternative project design or location.

Online Users:
Include your document transaction number (provided on your receipt page) with all supplementary information you submit to the Department.

<u>Resource Area</u>	<u>Size of Proposed Alteration</u>	<u>Proposed Replacement (if any)</u>
a. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below	
b. <input type="checkbox"/> Land Under the Ocean	1. square feet _____ 2. cubic yards dredged _____	
c. <input type="checkbox"/> Barrier Beach	Indicate size under Coastal Beaches and/or Coastal Dunes below	
d. <input checked="" type="checkbox"/> Coastal Beaches	69,900 1. square feet _____	24,560(16cy/lf) 2. cubic yards beach nourishment _____
e. <input type="checkbox"/> Coastal Dunes	1. square feet _____	2. cubic yards dune nourishment _____



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C. Other Applicable Standards and Requirements (cont'd)

If yes, the project is also subject to Massachusetts Endangered Species Act (MESA) review (321 CMR 10.18). To qualify for a streamlined, 30-day, MESA/Wetlands Protection Act review, please complete Section C.1.C, and include requested materials with this Notice of Intent (NOI); OR complete Section C.1.d, if applicable. *If MESA supplemental information is not included with the NOI, by completing Section 1 of this form, the NHESP will require a separate MESA filing which may take up to 90 days to review (unless noted exceptions in Section 2 apply, see below).*

1. c. Submit Supplemental Information for Endangered Species Review*

1. Percentage/acreage of property to be altered:

(a) within wetland Resource Area

_____ percentage/acreage

(b) outside Resource Area

_____ percentage/acreage

2. Assessor's Map or right-of-way plan of site

3. Project plans for entire project site, including wetland resource areas and areas outside of wetlands jurisdiction, showing existing and proposed conditions, existing and proposed tree/vegetation clearing line, and clearly demarcated limits of work ****

(a) Project description (including description of impacts outside of wetland resource area & buffer zone)

(b) Photographs representative of the site

(c) MESA filing fee (fee information available at:

http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_fee_schedule.htm).

Make check payable to "Commonwealth of Massachusetts - NHESP" and **mail to NHESP** at above address

Projects altering 10 or more acres of land, also submit:

(d) Vegetation cover type map of site

(e) Project plans showing Priority & Estimated Habitat boundaries

d. OR Check One of the Following

1. Project is exempt from MESA review.
Attach applicant letter indicating which MESA exemption applies. (See 321 CMR 10.14, http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_exemptions.htm; the NOI must still be sent to NHESP if the project is within estimated habitat pursuant to 310 CMR 10.37 and 10.59.)

2. Separate MESA review ongoing.

_____ a. NHESP Tracking #

_____ b. Date submitted to NHESP

* Some projects not in Estimated Habitat may be located in Priority Habitat, and require NHESP review (see <http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm>, regulatory review tab). Priority Habitat includes habitat for state-listed plants and strictly upland species not protected by the Wetlands Protection Act.

** MESA projects may not be segmented (321 CMR 10.16). The applicant must disclose full development plans even if such plans are not required as part of the Notice of Intent process.



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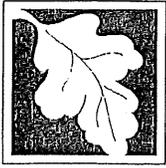
C. Other Applicable Standards and Requirements (cont'd)

3. Separate MESA review completed.
Include copy of NHESP "no Take" determination or valid Conservation & Management Permit with approved plan.
2. For coastal projects only, is any portion of the proposed project located below the mean high water line or in a fish run?
- a. Not applicable – project is in inland resource area only
- b. Yes No If yes, include proof of mailing or hand delivery of NOI to either:
- | | |
|---|--|
| South Shore - Cohasset to Rhode Island, and the Cape & Islands: | North Shore - Hull to New Hampshire: |
| Division of Marine Fisheries - Southeast Marine Fisheries Station
Attn: Environmental Reviewer
1213 Purchase Street – 3rd Floor
New Bedford, MA 02740-6694 | Division of Marine Fisheries - North Shore Office
Attn: Environmental Reviewer
30 Emerson Avenue
Gloucester, MA 01930 |

Also if yes, the project may require a Chapter 91 license. For coastal towns in the Northeast Region, please contact MassDEP's Boston Office. For coastal towns in the Southeast Region, please contact MassDEP's Southeast Regional Office.

3. Is any portion of the proposed project within an Area of Critical Environmental Concern (ACEC)?
- a. Yes No If yes, provide name of ACEC (see instructions to WPA Form 3 or MassDEP Website for ACEC locations). **Note:** electronic filers click on Website.
-
- b. ACEC
4. Is any portion of the proposed project within an area designated as an Outstanding Resource Water (ORW) as designated in the Massachusetts Surface Water Quality Standards, 314 CMR 4.00?
- a. Yes No
5. Is any portion of the site subject to a Wetlands Restriction Order under the Inland Wetlands Restriction Act (M.G.L. c. 131, § 40A) or the Coastal Wetlands Restriction Act (M.G.L. c. 130, § 105)?
- a. Yes No
6. Is this project subject to provisions of the MassDEP Stormwater Management Standards?
- a. Yes. Attach a copy of the Stormwater Report as required by the Stormwater Management Standards per 310 CMR 10.05(6)(k)-(q) and check if:
1. Applying for Low Impact Development (LID) site design credits (as described in Stormwater Management Handbook Vol. 2, Chapter 3)
 2. A portion of the site constitutes redevelopment
 3. Proprietary BMPs are included in the Stormwater Management System.
- b. No. Check why the project is exempt:
1. Single-family house

Online Users:
Include your document transaction number (provided on your receipt page) with all supplementary information you submit to the Department.



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C. Other Applicable Standards and Requirements (cont'd)

- 2. Emergency road repair
- 3. Small Residential Subdivision (less than or equal to 4 single-family houses or less than or equal to 4 units in multi-family housing project) with no discharge to Critical Areas.

D. Additional Information

Applicants must include the following with this Notice of Intent (NOI). See instructions for details.

Online Users: Attach the document transaction number (provided on your receipt page) for any of the following information you submit to the Department.

- 1. USGS or other map of the area (along with a narrative description, if necessary) containing sufficient information for the Conservation Commission and the Department to locate the site. (Electronic filers may omit this item.)
- 2. Plans identifying the location of proposed activities (including activities proposed to serve as a Bordering Vegetated Wetland [BVW] replication area or other mitigating measure) relative to the boundaries of each affected resource area.
- 3. Identify the method for BVW and other resource area boundary delineations (MassDEP BVW Field Data Form(s), Determination of Applicability, Order of Resource Area Delineation, etc.), and attach documentation of the methodology.
- 4. List the titles and dates for all plans and other materials submitted with this NOI.

a. Plan Title

b. Prepared By

c. Signed and Stamped by

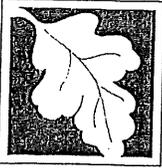
d. Final Revision Date

e. Scale

f. Additional Plan or Document Title

g. Date

- 5. If there is more than one property owner, please attach a list of these property owners not listed on this form.
- 6. Attach proof of mailing for Natural Heritage and Endangered Species Program, if needed.
- 7. Attach proof of mailing for Massachusetts Division of Marine Fisheries, if needed.
- 8. Attach NOI Wetland Fee Transmittal Form
- 9. Attach Stormwater Report, if needed.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

Provided by MassDEP:

WPA Form 3 – Notice of Intent

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

MassDEP File Number _____

Document Transaction Number _____

City/Town _____

E. Fees

1. Fee Exempt: No filing fee shall be assessed for projects of any city, town, county, or district of the Commonwealth, federally recognized Indian tribe housing authority, municipal housing authority, or the Massachusetts Bay Transportation Authority.

Applicants must submit the following information (in addition to pages 1 and 2 of the NOI Wetland Fee Transmittal Form) to confirm fee payment:

2. Municipal Check Number _____ 3. Check date _____

4. State Check Number _____ 5. Check date _____

6. Payor name on check: First Name _____ 7. Payor name on check: Last Name _____

F. Signatures and Submittal Requirements

I hereby certify under the penalties of perjury that the foregoing Notice of Intent and accompanying plans, documents, and supporting data are true and complete to the best of my knowledge. I understand that the Conservation Commission will place notification of this Notice in a local newspaper at the expense of the applicant in accordance with the wetlands regulations, 310 CMR 10.05(5)(a).

I further certify under penalties of perjury that all abutters were notified of this application, pursuant to the requirements of M.G.L. c. 131, § 40. Notice must be made by Certificate of Mailing or in writing by hand delivery or certified mail (return receipt requested) to all abutters within 100 feet of the property line of the project location.

Steven Cohen for SBPF

1. Signature of Applicant _____ *Steven Cohen* _____ 2. Date _____ *10/23/13* _____

3. Signature of Property Owner (if different) _____ *Kare Ba* _____ 4. Date _____ *10/23/13* _____

5. Signature of Representative (if any) _____ 6. Date _____

For Conservation Commission:

Two copies of the completed Notice of Intent (Form 3), including supporting plans and documents, two copies of the NOI Wetland Fee Transmittal Form, and the city/town fee payment, to the Conservation Commission by certified mail or hand delivery.

For MassDEP:

One copy of the completed Notice of Intent (Form 3), including supporting plans and documents, one copy of the NOI Wetland Fee Transmittal Form, and a copy of the state fee payment to the MassDEP Regional Office (see Instructions) by certified mail or hand delivery.

Other:

If the applicant has checked the "yes" box in any part of Section C, Item 3, above, refer to that section and the Instructions for additional submittal requirements.

The original and copies must be sent simultaneously. Failure by the applicant to send copies in a timely manner may result in dismissal of the Notice of Intent.

November 26, 2013

Mr. Ernie Steinauer, Chair
Nantucket Conservation Commission
Town of Nantucket
16 Broad Street
Nantucket, MA 02554

Re: Request for Certification of Emergency: Sconset Bluff – Baxter Road

Dear Chairman Steinauer:

This firm, together with Messrs. Reade and Cohen of Reade, Gullicksen, Hanley, Gifford & Cohen, LLP, is counsel to Siasconset Beach Preservation Fund, Inc. (“SBPF”). This letter constitutes a request for permission to perform an emergency project, and for certification that the project is an emergency under 310 CMR 10.06 and §136-5 of the Nantucket Town Code.

The work that is proposed (the “Emergency Project”) is required in response to the ongoing erosion of Sconset Bluff (sometimes called “Siasconset Bluff”) which has reached the point of posing an immediate threat in the current storm season to Baxter Road, a public way, and associated utilities as well as the homes seaward and landward of Baxter Road in the “Emergency Project Area” shown on the project plans submitted herewith. Because significant analysis has been done in connection with two distinct notices of intent (Baxter Road Temporary Stabilization Project, DEP File No. 048-2610 and Baxter Road and Sconset Bluff Storm Damage Prevention Project, DEP File No. 048-2581), both of which are presently pending before the Commission, we are able to present more complete information than is sometimes the case with respect to a request for emergency certification.

The Emergency Project is proposed for 91-105 Baxter Road in accordance with the emergency criteria set forth in the memo from Epsilon Associates dated November 25, 2013, submitted herewith. Other than the proposed reduction in length of coverage, the Emergency Project is similar to the Baxter Road Temporary Stabilization Project (DEP File No. 048-2610) for 85-107A Baxter Road described in detail in the letters and plans submitted during the NOI process by Milone & MacBroom dated October 25, 2013, November 1, 2013, November 5, 2013, and November 19, 2013, submitted herewith. In overview, the Emergency Project involves the installation of four 45-foot circumference geotextile tubes, which are approximately 19 wide, 6.5 feet tall, and 100-200 feet long. The bottom tube will be buried in the beach to elevation 0.0 MLW and the top tube will be set at elevation 26.0 MLW. A scour apron and four-foot-diameter anchor tube are included, extending five feet seaward of the lowest geotextile tube

at elevation 0.0 MLW. The four geotubes will overlap by approximately 1/3 of their circumference, yielding an effective slope of 2 Horizontal:1 Vertical. There will be shorter return tubes on the return ends to minimize flanking. Jute fabric will be placed on the upper bank face; and vegetation will be planted in the following spring. The Project will be installed at the toe of the bank parallel to Baxter Road from 91-105 Baxter Road (only the narrowest portion of 105 Baxter Road will be included), for an approximate length of just under 900 feet. The geotextile tubes will be covered with sand. The sand cover will be maintained and sacrificial sand will be added for protection and to ensure a minimum volume (equivalent to the annual volume contributed by the eroding coastal bank) is contributed annually. The Project is readily removable. Failure criteria and information related to protocols for and cost of removal are set forth in the October 25, 2013, November 5, 2013, and November 19, 2013 letters from Milone & MacBroom, submitted herewith.

There can be no doubt that because of the conditions giving rise to the emergency, to be performed effectively, the Emergency Project cannot await compliance with the notice requirements and appeal period associated with the filing of a notice of intent. As is established by the memos from Epsilon Associates dated November 1, 2013 and November 25, 2013 submitted herewith, the average long-term rate of retreat of the Bluff from 85-107A Baxter Road has been 4.6 feet/year, though erosion greater than or less than this rate can occur in a given year. Indeed, last year, in particular locations, the edge of the Bluff retreated landward as much as 40 feet, as presented in the memo from Epsilon Associates dated November 25, 2013. The Town of Nantucket had already concluded that "certain private homes located on or near Siasconset Bluff and Baxter Road, a public way, may be imminently threatened with damage and/or loss and destruction due to severe erosion of the bluff which has intensified since the winter of 2012-2013... [and] an emergency exists that threatens public roads and other assets from imminent destruction" (Memorandum of Understanding between the Town of Nantucket and Sconset Beach Preservation Fund, Inc. entered into July 5, 2013, a copy of which is submitted herewith. Indeed, on October 9, 2013, in an amendment to the Memorandum of Understanding, the Town of Nantucket identified "an immediate need for emergency measures to protect Baxter Road and the associated utilities temporarily, in order to maintain vehicular access and utility service to the residential properties on Baxter Road... and there is an emergency need for an emergency response action plan outlining how the Town will provide emergency vehicular access, water supply and sanitary services to the residences at the north end of Baxter Road in the event of a failure of the roadway and that there is also a need for long-term planning for the potential eventual loss of Baxter Road..." (A copy of the Amendment to the Memorandum of Understanding is submitted herewith.) On November 8, 2013, the Town's consultant Milone & MacBroom, Inc. reported to the Director of the Department of Public Works after reviewing site conditions and conferring with Haley & Aldrich (which Milone & MacBroom identify as a well-respected geotechnical engineering firm that has been retained by SBPF) that "[t]he town can maintain travel on Baxter Road until such time as the top of the bluff is 25 feet or less from the edge of pavement. When the top of the bluff is within 25 feet of the pavement edge, the road should be closed to traffic until a detailed assessment can be completed by a geotechnical engineer." And, on November 20, 2013, the Town adopted an "Emergency Management and Marine Safety" Plan, a copy of which is submitted herewith. Nantucket's Wanacommet Water

Company is mobilizing to move the water line from the east side of Baxter Road to the west side, at considerable expense, because it has determined that the east side is in immediate danger.

An analysis demonstrating the imminent risk to the roadway, utility and homes within the Emergency Project area is included in the memo from Epsilon Associates dated November 25, 2013 submitted herewith. As that analysis demonstrates, these assets are at risk of imminent loss in the current storm season. The proposed Emergency Project can, under anticipated conditions, be completed in thirty days, and SBPF as an agreement with an experienced contractor to perform the work as soon as authorization is received.

The proposed Emergency Project will simultaneously have two effects. It will protect Baxter Road, a public way, and the associated utilities, some or all of which constitute pre-1978 structures or infrastructure, and the residences on Baxter Road in the Emergency Project area, both seaward and landward of the road, all of which were constructed prior to 1978. Apart from direct danger to the structures themselves, loss of access to the residences by reason of the closure or failure of Baxter Road constitutes imminent danger to those pre-1978 residences. The pre-1978 status of the homes in the Emergency Project area is presented on Figure 11 (titled "Pre-1978 House Status") prepared by Epsilon Associates, submitted herewith. Accordingly, the Emergency Project is within the scope of work that "shall be permitted" under 310 CMR 10.30 and within the scope of parallel provisions of the Nantucket Wetlands Regulations.¹

The proposed Emergency Project is necessary to abate the emergency. Other proposed mechanisms for protection of the Bluff have been mooted. They range from the rock revetment which is the subject of SBPF's NOI DEP File No. 048-2581 to substituting less sturdy materials for the geotextiles which are proposed for the Emergency Project. As is shown in the letter from Milone & MacBroom dated November 1, 2013, submitted herewith, the use of jute bags in lieu of geotextiles will be inadequate to protect the roadway and utility infrastructure or the residences along Baxter Road. The principal problem is that, as was seen over time and especially in the course of last year, when multi-day storms or successive storms come close together there will not be adequate time to restore to the jute bags the sand which they give up during the earlier of the storms. The jute bags will fail (as shown on the photographs submitted herewith) and the bluff will be left unprotected during severe storms, multi-day storms, or successive storms, at the point when protection is most needed. Jute is inadequate for properties that no longer have enough room to survive a likely loss of the bluff, as here. The geotextiles proposed solved this problem and provide protection during the course of successive storms. The geotextile installation proposed for the Emergency Project is substantially different from

¹ We note the "20% change" language incorporated into certain aspects of the portions of the Nantucket Wetlands Regulations which address pre-1978 structures. That language does not of course apply to infrastructure. Nothing in this request is, or is intended to be, a waiver, admission, or acknowledgment adversely affecting any claim or argument available to SBPF that a municipality has jurisdiction or authority to impose more stringent limitations on projects that "shall be permitted" under the Wetlands Protection Act Regulations than those provided for in those Regulations. SBPF expressly reserves all of its rights with respect thereto.

previous geotextile installations permitted on Nantucket, as detailed in the memo from Epsilon Associates dated November 26, 2013, submitted herewith, and is not expected to generate significant debris, as presented in the correspondence from Dr. Michael Bruno dated November 25, 2013, submitted herewith.

As a result of the substantial analysis that has been undertaken in connection with the pending Notices of Intent, sufficient information has been developed so that the proposed Emergency Project minimizes, mitigates, and provides monitoring protocols for any perceived impacts on third-parties, as is more fully set forth in the memos from Milone & MacBroom dated November 1, 2013, November 12, 2013, and November 19, 2013; the memo from Epsilon Associates dated November 1, 2013; and the correspondence from Dr. Michael Bruno dated November 25, 2013, submitted herewith. The harm that will result from failing to certify that emergency and permit the Emergency Project to go forward together with the potential for removal of the Proposed Project should that prove necessary, far outweighs any risks thought to be associated with the proposed work.

We note that the Regulations contemplate action by the Commission within twenty-four hours of a request for emergency certification (310 CMR 10.6(5)), and in the event the Commission does not act within that period of time the request may be brought to the Department of Environmental Protection for action by it in lieu of the Commission. The Regulations also contemplate that an NOI is to be filed after any emergency certification, in the course of which compliance with performance standards will be evaluated. Although that evaluation is for that subsequent proceeding, submitted herewith is a second memo from Epsilon Associates dated November 26, 2013 presenting an analysis showing satisfaction of the relevant standards.

We are prepared to work with you to facilitate a response to this request as expeditiously as possible.

Respectfully submitted,



David S. Weiss

DSW:vmm
Enclosures

- Emergency Project Plans
- Memo from Epsilon Associates dated November 1, 2013
- Memo from Epsilon Associates dated November 25, 2013
- Two Memos from Epsilon Associates dated November 26, 2013
- Figure 11 (titled "Pre-1978 House Status") prepared by Epsilon Associates
- Photographs of Jute Terraces

Nantucket Conservation Commission

November 25, 2013

Page 5

- Letters from Milone & MacBroom dated October 25, 2013, November 1, 2013, November 5, 2013, November 12, 2013 and November 19, 2013
- Memorandum of Understanding between the Town of Nantucket and Sconset Beach Preservation Fund, Inc. dated July 5, 2013
- Amendment to the Memorandum of Understanding dated October 9, 2013
- Emergency Management and Marine Safety Plan of November 20, 2013
- Correspondence from Dr. Michael Bruno dated November 25, 2013

cc: Mr. Jeffrey Carlson (Conservation Agent)
Ms. Libby Gibson (Town Manager)
Ms. Kara Buzanoski (Director of DPW)
Mr. Robert DeCosta (Board of Selectmen)
Mr. David Johnston (Deputy Regional Director DEP SERO)

SBPF

Messrs. A Reade and S. Cohen, Esqs.

Epsilon Associates

GSDOCS2287039.2



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

Southeast Regional Office • 20 Riverside Drive, Lakeville MA 02347 • 508-946-2700

DEVAL L. PATRICK
Governor

RICHARD K. SULLIVAN JR.
Secretary

KENNETH L. KIMMELL
Commissioner

BY EMAIL AND FIRST CLASS MAIL

December 10, 2013

Siasconset Beach Preservation Fund
c/o David S. Weiss, Esq.
Goulston & Storrs
400 Atlantic Avenue
Boston, Massachusetts 02110-3333

RE: NANTUCKET—Wetlands
Emergency Certification
91-105 Baxter Road

Dear Attorney Weiss:

The Department of Environmental Protection is in receipt of your November 29, 2013, request on behalf of the Siasconset Beach Preservation Fund ("SBPF") for an Emergency Certification ("Request") proposing the installation of 4 layers of sand-filled Geotubes in a terrace pattern along the toe and face of an eroding coastal bank and on a coastal beach to abate the threat of coastal erosion to several existing pre-1978 dwellings and a section of Baxter Road with associated underground public utilities. In considering your request, the Department also exercised its authority pursuant to 310 CMR 10.06(5) to review the Emergency Certification application filed by the Town of Nantucket, filed subsequent to your request, and approved by the Conservation Commission on December 12, 2013 ("Certification") for an area of the bank and beach that overlaps and extends beyond the area that is the subject of your request.

The Department applied the criteria at 310 CMR 10.06(1) that the work allowed under an emergency certification not include work beyond that which is necessary to abate the emergency. In reviewing the extensive information in the Request and the Certification that documented the threat presented by storm-related erosion, the Department also applied the criterion at 310 CMR 10.30(3) which provides that a coastal engineering structure "shall be permitted" to protect homes constructed prior to 1978 from storm damage. This regulation creates an exception to the general rule that precludes the installation of hard armoring of coastal banks. Based on the facts presented in the Request, this exception applies to the homes identified in the area subject to the determination of an emergency.

The Department concludes that the design of the coastal structure proposed in the Request does not go farther than necessary to protect these homes and essential public infrastructure serving the homes. In making this determination, the Department considered the specific facts presented

This information is available in alternate format. Call Michelle Waters-Ekanem, Diversity Director, at 617-292-5751. TDD# 1-866-539-7622 or 1-617-574-8868
MassDEP Website: www.mass.gov/dep

Printed on Recycled Paper

by the proponents including, without limitation, the proximity of the homes and infrastructure to the edge of the coastal bank, the ability of the four Geotubes to withstand a significant storm event and the threat posed by successive storm events.

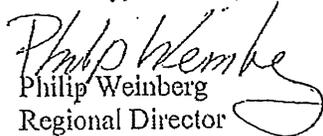
The total length of the SBPF proposed project is approximately 900 feet long running between 91-105 Baxter Road. In the documentation supporting SBPF's conclusion of the emergency status for the homes and public infrastructure, it was concluded that the engineering criteria for installation of a coastal structure also applied to Lot 87. This Lot also retreated 40' in the previous year. The Town's Certification also concluded that an emergency condition existed at Lot 87. We concur that an emergency condition exists at this location and encourage the SBPF and the Town to coordinate efforts to abate the emergency.

In addition, the Request has proposed to place an initial sand cover over the Geotubes and annually thereafter as mitigation. This Emergency Certification requires that SBPF promptly file a Notice of Intent (NOI) under the Wetlands Protection Act for installation and maintenance of the proposed Geotubes, as well as for ongoing beach nourishment as mitigation. The Emergency Certification sets out a mitigation and nourishment plan that will remain in effect pending the issuance of a final Order of Conditions. The implementation of the nourishment plan will mitigate any potential difference in down drift impacts between the four Geotube designs and the hybrid design approved in the Town's Certification.

The Department is issuing the enclosed Emergency Certification allowing the installation of the requested sand-filled Geotubes as conditioned herein. The Department deems the allowed work necessary to abate the present threat to public safety from storm damage to buildings, Baxter Road and water infrastructure. This Emergency Certification is issued pursuant to the Wetlands Protection Act, MGL, c. 131, s. 40, and subject to certain special conditions.

If you have any questions concerning this matter please contact Jim Mahala at (508) 946-2806.

Sincerely,


Philip Weinberg
Regional Director

W/JM

Enclosure

cc: Nantucket Conservation Commission



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Emergency Certification Form

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

A. Emergency Information

Issuance From: MassDEP-Southeast Regional Office
Issuing Authority

Issued To: Siasconset Beach Preservation Fund (SBPF), c/o David S. Welss, Esq.
Name
Goulston & Storrs, 400 Atlantic Ave., Boston, MA 02110-3333
Address

1. Site Location: 91-105 Baxter Road

2. Reason for Emergency:

Eroding coastal bank imminently threatens pre-1978 dwellings and Baxter Road and associated underground public utilities. The erosion poses an immediate threat to public safety.

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

Massachusetts Department of Environmental Protection. The Town of Nantucket and the Nantucket Conservation Commission concurred on the emergency conditions in the area subject to the Certification.

4. Date of Site Visit: 12/5/2013 Start Date: 12/11/2013 End Date: 1/10/2014

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

5. Work to be allowed*:

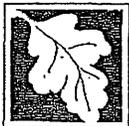
Installation of 900 linear feet of 4 layers of sand-filled Geotubes with sand cover as shown on plans entitled: Baxter Road Temporary Stabilization NOI Submission, revised November 5, 2013 with the exception that this Emergency Certification is only for 91-105 Baxter Road.

B. Signatures

Certified to be an Emergency by this Issuing Authority.

Signature: *Philip Weinberg*
Philip Weinberg, Regional Director

Date: 12/10/13



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Emergency Certification Form

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

C. General Conditions

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

D. Special Conditions

SEE ATTACHED SHEET

E. Appeals

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

Special Conditions for Slasconset Beach Preservation Fund Emergency Certification for 91-105 Baxter Road:

1. This Emergency Certification authorizes the installation of 900 linear feet of 4 layers of sand filled Geotubes as shown on the referenced plans. The SBPF also proposes the placement of 14.3 cubic yards per linear foot of sand. The Department, however, requires the initial placement of 18 cubic yards per linear foot of sand for mitigation purposes. Ongoing beach nourishment shall be in accordance with condition 8 below.
2. All sand used to fill and cover the Geotubes shall be imported from an off-site source and shall be compatible with the existing beach sediments.
3. The sand-filled Geotubes shall be tapered into the beach/bank at the southern and northern ends to minimize end effects.
4. Within 30 days of this certification, the SBPF shall file a Notice of Intent in order to (a) install and maintain the Geotubes and (b) incorporate mitigation (beach nourishment) into the proposed project design. The SBPF shall diligently pursue and obtain a Final Order of Condition under the Wetlands Protection Act for ongoing beach nourishment and other appropriate mitigation as deemed necessary.
5. The SBPF shall be responsible for the retrieval and proper disposal of all geotextile products associated with this emergency project in the event wave action and erosion destroys or otherwise causes damage to the Geotube system.
6. This Emergency Certification does not relieve the applicant/owner from complying with the Town of Nantucket Wetland Bylaw.
7. The beach shall continue to be monitored through the ongoing quarterly surveying program conducted by Woods Hole Group.
8. Sand mitigation will be at a rate of 22 cubic yards per linear foot in accordance with the following schedule:
 - a. Provide initial cover of 18 cubic yards per linear foot immediately following construction (December 2013). The reason for this is to provide the initial cover and to provide a large upfront volume of sand while observing how the entire system performs into the first months of installation.
 - b. January through March 2014: Provide the remaining four cubic yards per linear foot on an as-needed basis.
 - c. Annual in April starting in 2014: Provide additional sand to obtain a minimum of 12 cubic yards per linear foot of sand cover. Twelve cubic yards per linear foot is the minimum sand volume required to provide the desired two minimum feet of cover. If some portion of the previous year's sand is in place at the time of April nourishment then the volume needed to get to 12 cubic yards per linear foot will be provided, with the remaining sand added in November. For example, if 10 cubic yards per linear foot of sand is needed in April to meet the 12 cubic yard minimum, then the remaining two cubic yards will be added in November instead of April.
 - d. Annually in November starting in 2014; Add an additional six cubic yards per linear foot plus any excess volume left over from April requirement. The reason for this is to ensure that the bulk of the mitigation volume is available in November for potential mobilization during winter storms.
 - e. Annually November through March: Add the remaining four cubic yards per linear foot on an as-needed basis, in accordance with the replenishment trigger presented in our November 12, 2013 letter. If the 22 cubic yards per linear foot volume is not placed in its entirety before March 1, the balance of the sand will be placed on March 1.
 - f. End volumes will be replaced and nourished on the same schedule as outlined above. Delivery tickets from sand supplier will be provided to the Department and Conservation Commission to document the total volume of sand provided.



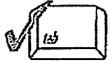
Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Emergency Certification Form

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40
AND THE NANTUCKET WETLANDS BYLAW CHAPTER 136

A. Emergency Information

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



Issuance From: Nantucket Conservation Commission
Issuing Authority
91-105 Baxter Road

1. Site Location:
2. Reason for Emergency:
Eroding Coastal Bank

3. Applicant to perform work: Town of Nantucket/Siasconset Beach Preservation Fund

4. Public agency to perform work or public agency ordering the work to be performed:
Board of Selectmen/Department of Public Works

5. Date of Site Visit: 12/17/2013 Start Date: 12/17/13 End Date*: 1/18/14

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

6. Work to be allowed*:
See attached

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

B. Signatures

Certified to be an Emergency by this Issuing Authority.

Signatures:

Ernest Skowronek (opposed)
Chairman (or designee)

12/18/2013
Date

[Signature]
Blank OK by (opposed)
Heather Johnson

Andy Bunnath
Michael [Signature]

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



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

C. General Conditions

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

D. Special Conditions

See attached

E. Appeals

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

FINDINGS and ADDITIONAL CONDITIONS
Massachusetts Wetlands Protection Act (MGL Chapter 131, Section 40)
Town of Nantucket Wetlands Bylaw (Chapter 136)

Address: 91-105 Baxter Road
Applicant: Town of Nantucket and Siasconset Beach Preservation Fund
Filing Date: December 17, 2013
Date Hearing Closed: December 18, 2013
Date Emergency Certified: December 18, 2013

Permit Overview:

This certification allows for a three geotextile tube coastal engineering structure with sand cover to be installed on a Coastal Beach and Coastal Bank.

Additional Findings:

1. The Commission finds that the proximity of the road to the eroding Coastal Bank is in imminent danger and is an emergency.
2. The Commission finds that the failure of the public way and damage of the public utilities to be a risk to public health and safety.
3. The Commission finds that the project as designed is necessary to abate the emergency situation.

In addition to the General Conditions contained elsewhere in this document, the Commission includes the following Special Conditions pursuant to MGLCh131s40 and the Town of Nantucket Wetlands Protection Bylaw, Chapter 136:

18. All work shall be performed in accordance with the Site and Work Description contained within the Emergency Certification request and plan notes set out on the plan of record, provided project narratives, and protocols.
19. The sand cover is to be maintained in accordance with the narrative provided during the emergency period.
20. The applicant shall be required to comply with the attached conditions as issued by MassDEP.

Special Conditions for Siasconset Beach Preservation Fund Emergency Certification for 91-105 Baxter Road:

1. This Emergency Certification authorizes the installation of 900 linear feet of 4 layers of sand filled Geotubes as shown on the referenced plans. The SBPF also proposes the placement of 14.3 cubic yards per linear foot of sand. The Department, however, requires the initial placement of 18 cubic yards per linear foot of sand for mitigation purposes. Ongoing beach nourishment shall be in accordance with condition 8 below.
2. All sand used to fill and cover the Geotubes shall be imported from an off-site source and shall be compatible with the existing beach sediments.
3. The sand-filled Geotubes shall be tapered into the beach/bank at the southern and northern ends to minimize end effects.
4. Within 30 days of this certification, the SBPF shall file a Notice of Intent in order to (a) install and maintain the Geotubes and (b) incorporate mitigation (beach nourishment) into the proposed project design. The SBPF shall diligently pursue and obtain a Final Order of Condition under the Wetlands Protection Act for ongoing beach nourishment and other appropriate mitigation as deemed necessary.
5. The SBPF shall be responsible for the retrieval and proper disposal of all geotextile products associated with this emergency project in the event wave action and erosion destroys or otherwise causes damage to the Geotube system.
6. This Emergency Certification does not relieve the applicant/owner from complying with the Town of Nantucket Wetland Bylaw.
7. The beach shall continue to be monitored through the ongoing quarterly surveying program conducted by Woods Hole Group.
8. Sand mitigation will be at a rate of 22 cubic yards per linear foot in accordance with the following schedule:
 - a. Provide initial cover of 18 cubic yards per linear foot immediately following construction (December 2013). The reason for this is to provide the initial cover and to provide a large upfront volume of sand while observing how the entire system performs into the first months of installation.
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 - e. Annually November through March: Add the remaining four cubic yards per linear foot on an as-needed basis, in accordance with the replenishment trigger presented in our November 12, 2013 letter. If the 22 cubic yards per linear foot volume is not placed in its entirety before March 1, the balance of the sand will be placed on March 1.
 - f. End volumes will be replaced and nourished on the same schedule as outlined above. Delivery tickets from sand supplier will be provided to the Department and Conservation Commission to document the total volume of sand provided.

READE, GULLICKSEN, HANLEY, GIFFORD & COHEN, LLP
SIX YOUNG'S WAY
NANTUCKET, MASSACHUSETTS 02554

ARTHUR I. READE, JR., P.C.
KENNETH A. GULLICKSEN
MARIANNE HANLEY
WHITNEY A. GIFFORD
STEVEN L. COHEN

(508) 228-3128
FAX: (508) 228-5630

MAILING ADDRESS
POST OFFICE BOX 2009
NANTUCKET, MASS. 02584

March 14, 2014

Nantucket Conservation Commission
2 Bathing Beach Road
Nantucket, MA 02554

Re: SBPF/TON NOI
Baxter Road Protection

Dear Chairman Steinauer:

This package of information is to supplement and update the joint Notice of Intent of the Town of Nantucket and the Siasconset Beach Preservation Fund Inc., in compliance with the Emergency Certification issued by the Nantucket Conservation Commission on December 18, 2013.

Given the complicated process and history, a brief review of the filings and actions is in order. As you know, SBPF originally applied in June 2013 for a coastal engineering structure (CES) consisting of roughly 4000 linear feet of rock revetment and other features, which is a separately pending NOI. As the 2013/14 storm season approached, SBPF suspended consideration of that revetment NOI and jointly applied with the Town of Nantucket in October 2013 for a different CES, consisting of four tiers of geotubes and other features along roughly 1,500 linear feet of a highly endangered area of the bluff between 85 and 107A Baxter Road. When the winter storm season was upon us, SBPF filed an Emergency Certification request for four geotubes and related work at the most endangered 900 linear feet of the bluff, which was denied locally by the Conservation Commission but approved on appeal at the state DEP level. The TON filed a separate EC request for a hybrid geotube/jute system, which was approved. However, because that system could not be physically installed within in the 30-day allotment, or even during the 2013/14 storm season, a jointly filed Emergency Certification was approved by the ConCom on December 18, 2013 that allowed for three tiers of geotubes along roughly 900 linear feet. The emergency work was performed under the December 18, 2013 Certification and is complete. The October 2013 NOI for 1,500 feet of four tiers of geotubes has been designated as the NOI called for under the EC as a way to seek an Order of Conditions for the geotube system, as-built and with proposed alterations.

The information contained herein addresses the key elements of the NOI being proposed and reviewed, as follows:

- 1) The geotubes, as-built and as proposed, including the construction process, system location, system length, system height, tube materials, tube plugs, and new returns.

READE, GULLICKSEN,

HANLEY, GIFFORD & COHEN, LLP

- 2) Drainage and storm mitigation, as installed and as proposed.
- 3) Bluff protection through re-vegetation and soil retention netting.
- 4) Sand Contributions, as built and as proposed, including sand volumes (for construction and sacrificial template), schedule of future contributions/maintenance, and bluff face augmentation.

SBPF is aware that the ConCom (and the public) will need time to consider this information and may request additional information. However, there is one issue that cannot wait for the process. Despite the protection afforded to the toe of the bluff by the geotubes, the same threat to public health and safety recognized by the Town, the ConCom and the DEP in the Emergency Certification process is still posed by the unprotected upper bluff, which remains in imminent danger due to the closeness of the top of the continually eroding bluff to the historic homes, the road and the utilities. Fortunately, this emergency can be substantially addressed in a relatively simple and environmentally friendly way: planting native species beach grass on the face of the bluff in a dress coat of beach compatible sand that is stabilized with biodegradable netting. This would have no negative impact, will improve wetland scenic views and wildlife habitat, and would be entirely on private property. As you will recall, re-vegetation was part of the original EC filings, and both NOIs, and has been discussed during previous Con Com hearings. However, it was removed from the emergency certification only because it could not be accomplished when 30- day window was for work in December and January. Unfortunately, this type of planting must be done before mid-April, 2014 to provide protection this summer and for the 2014/15 storm season. Due to process requirements, and notice and appeal periods, the only way for this to happen is through the Emergency Certification process. While it may be possible to do some planting later 2014 without an EC, it would not provide sufficient protection for 2014/15. Therefore SBPF is planning to file such an EC request, to be heard at the regular March 19th meeting.

SBPF recognizes that its erosion control effort continues to generate considerable interest on island. We appreciate the hard work that the Commission and Town officials have put into this project and, particularly the BOS, Town Administration and the DPW. While SBPF is proud that the toe of the bluff at Baxter Road has now been protected in this most vulnerable section, likely saving the Town many millions of dollars, keeping open access to Sankaty Lighthouse, and protecting the homes on the northern end of Baxter Road, it does regret the few missteps and misunderstandings that have occurred along the way. SBPF looks forward to working cooperatively with Town under the MOU and with the Con Com to complete the permitting of this portion of our Sconset Bluff protection effort. This NOI review is the next step in that effort.

Sincerely,



Steven Cohen
Counsel to SBPF

READE, GULLICKSEN, HANLEY, GIFFORD & COHEN, LLP

SIX YOUNG'S WAY
NANTUCKET, MASSACHUSETTS 02554
(508) 228-3128
FAX: (508) 228-5630

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MARIANNE HANLEY
WHITNEY A. GIFFORD
STEVEN L. COHEN

MAILING ADDRESS
POST OFFICE BOX 2609
NANTUCKET, MASS. 02584

March 28, 2014

Nantucket Conservation Commission
2 Bathing Beach Road
Nantucket, MA 02554

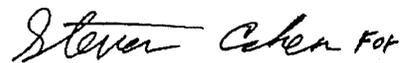
Re: SBPF/TON NOI
Baxter Road Protection

Dear Chairman Steinauer:

We respectfully submit this letter regarding the joint Notice of Intent for the Baxter Road Temporary Stabilization Project (DEP File No. 048-2610). As you know, this NOI is a follow-up to the previously issued Emergency Certification for a three geotube Coastal Engineering Structure. This project has many aspects that were not addressed in the Emergency Certification. However, rather than continuing to try to roll everything into this NOI, SBPF and the Town instead seek approval of the existing CES, with minimal alterations, if they are acceptable to the Commission, all under appropriate terms and conditions to be set by the Commission. That is, we seek an Order of Conditions for the CES as built, plus returns, to be made of biodegradable material and with no bluff excavation, and also with re-vegetation of the bluff face with appropriate plantings. If this is acceptable, we would drop other features from this NOI, including the request for a fourth tier, the request to activate the drainage pipe, and the request for further augmentation of the bluff. The requested returns and planting can be done with substantially less construction than the geotubes and we anticipate that the Commission would want these, but we could also drop them from the NOI if the Commission is opposed to adding either at this time.

If an appropriate Order of Conditions is issued for the existing CES, we would not appeal it and would also suspend consideration of any expanded system, geotube or revetment, while we monitor while we monitor the performance of what is built and provide for maintenance and substantial sand mitigation. We look forward to discussing the above proposal with you on April 2, 2014.

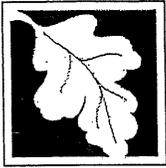
Sincerely,



Josh Posner, President, SBPF



Kara Buzanoski, Director of Public Works



WPA Form 3 – Notice of Intent

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

Provided by MassDEP:
SE048-2610

MassDEP File Number

Document Transaction Number

Nantucket

City/Town

A. General Information (continued)

6. General Project Description:

Construction of geotube system to stabilize coastal bank supporting Baxter Road and associated infrastructure. Vegetation of upper bank face. See attached narrative.

7a. Project Type Checklist:

- | | |
|--|---|
| 1. <input type="checkbox"/> Single Family Home | 2. <input type="checkbox"/> Residential Subdivision |
| 3. <input type="checkbox"/> Limited Project Driveway Crossing | 4. <input type="checkbox"/> Commercial/Industrial |
| 5. <input type="checkbox"/> Dock/Pier | 6. <input checked="" type="checkbox"/> Utilities |
| 7. <input checked="" type="checkbox"/> Coastal Engineering Structure | 8. <input type="checkbox"/> Agriculture (e.g., cranberries, forestry) |
| 9. <input type="checkbox"/> Transportation | 10. <input type="checkbox"/> Other |

7b. Is any portion of the proposed activity eligible to be treated as a limited project subject to 310 CMR 10.24 (coastal) or 310 CMR 10.53 (inland)?

1. Yes No If yes, describe which limited project applies to this project:

2. Limited Project

8. Property recorded at the Registry of Deeds for:

Nantucket

a. County

b. Certificate # (if registered land)

c. Book

d. Page Number

B. Buffer Zone & Resource Area Impacts (temporary & permanent)

- Buffer Zone Only – Check if the project is located only in the Buffer Zone of a Bordering Vegetated Wetland, Inland Bank, or Coastal Resource Area.
- Inland Resource Areas (see 310 CMR 10.54-10.58; if not applicable, go to Section B.3, Coastal Resource Areas).

Check all that apply below. Attach narrative and any supporting documentation describing how the project will meet all performance standards for each of the resource areas altered, including standards requiring consideration of alternative project design or location.

Resource Area	Size of Proposed Alteration	Proposed Replacement (if any)
a. <input type="checkbox"/> Bank	1. linear feet	2. linear feet
b. <input type="checkbox"/> Bordering Vegetated Wetland	1. square feet	2. square feet
c. <input type="checkbox"/> Land Under Waterbodies and Waterways	1. square feet 3. cubic yards dredged	2. square feet

For all projects affecting other Resource Areas, please attach a narrative explaining how the resource area was delineated.



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 3 – Notice of Intent

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

Provided by MassDEP:

SE048-2610

MassDEP File Number

Document Transaction Number

Nantucket

City/Town

B. Buffer Zone & Resource Area Impacts (temporary & permanent) (cont'd)

Resource Area	Size of Proposed Alteration	Proposed Replacement (if any)
d. <input type="checkbox"/> Bordering Land Subject to Flooding	1. square feet	2. square feet
	3. cubic feet of flood storage lost	4. cubic feet replaced
e. <input type="checkbox"/> Isolated Land Subject to Flooding	1. square feet	
	2. cubic feet of flood storage lost	3. cubic feet replaced
f. <input type="checkbox"/> Riverfront Area	1. Name of Waterway (if available)	

2. Width of Riverfront Area (check one):

- 25 ft. - Designated Densely Developed Areas only
- 100 ft. - New agricultural projects only
- 200 ft. - All other projects

3. Total area of Riverfront Area on the site of the proposed project: _____ square feet

4. Proposed alteration of the Riverfront Area:

a. total square feet _____ b. square feet within 100 ft. _____ c. square feet between 100 ft. and 200 ft. _____

5. Has an alternatives analysis been done and is it attached to this NOI? Yes No

6. Was the lot where the activity is proposed created prior to August 1, 1996? Yes No

3. Coastal Resource Areas: (See 310 CMR 10.25-10.35)

Check all that apply below. Attach narrative and supporting documentation describing how the project will meet all performance standards for each of the resource areas altered, including standards requiring consideration of alternative project design or location.

Resource Area	Size of Proposed Alteration	Proposed Replacement (if any)
a. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below	
b. <input type="checkbox"/> Land Under the Ocean	1. square feet _____ 2. cubic yards dredged _____	
c. <input type="checkbox"/> Barrier Beach	Indicate size under Coastal Beaches and/or Coastal Dunes below	
d. <input checked="" type="checkbox"/> Coastal Beaches	35,500 sf 1. square feet _____	2. cubic yards beach nourishment _____
e. <input type="checkbox"/> Coastal Dunes	1. square feet _____	2. cubic yards dune nourishment _____

Online Users:
Include your document transaction number (provided on your receipt page) with all supplementary information you submit to the Department.



WPA Form 3 – Notice of Intent

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

Provided by MassDEP:

SE048-2610

MassDEP File Number

Document Transaction Number

Nantucket

City/Town

B. Buffer Zone & Resource Area Impacts (temporary & permanent) (cont'd)

	<u>Size of Proposed Alteration</u>	<u>Proposed Replacement (if any)</u>
f. <input checked="" type="checkbox"/> Coastal Banks	<u>900 feet</u> 1. linear feet	
g. <input type="checkbox"/> Rocky Intertidal Shore s	1. square feet	
h. <input type="checkbox"/> Salt Marshes	1. square feet	2. sq ft restoration, rehab., creation
i. <input type="checkbox"/> Land Under Salt Ponds	1. square feet	
	2. cubic yards dredged	
j. <input type="checkbox"/> Land Containing Shellfish	1. square feet	
k. <input type="checkbox"/> Fish Runs	Indicate size under Coastal Banks, inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above	
	1. cubic yards dredged	
l. <input checked="" type="checkbox"/> Land Subject to Coasta l Storm Flowage	<u>35,500 sf</u> 1. square feet	
4. <input type="checkbox"/> Restoration/Enhancement	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.2.b or B.3.h above, please enter the additional amount here.	
	a. square feet of BVW	b. square feet of Salt Marsh
5. <input type="checkbox"/> Project Involves Stream Crossings		
	a. number of new stream crossings	b. number of replacement stream crossings

C. Other Applicable Standards and Requirements

Streamlined Massachusetts Endangered Species Act/Wetlands Protection Act Review

- Is any portion of the proposed project located in **Estimated Habitat of Rare Wildlife** as indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetland Wildlife published by the Natural Heritage and Endangered Species Program (NHESP)? To view habitat maps, see the *Massachusetts Natural Heritage Atlas* or go to http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/priority_habitat/online_viewer.htm.

a. Yes No **If yes, include proof of mailing or hand delivery of NOI to:**

Natural Heritage and Endangered Species Program
Division of Fisheries and Wildlife
100 Hartwell Street, Suite 230
West Boylston, MA 01583

October 1, 2008

b. Date of map



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 Town of Nantucket Wetlands Bylaw Chapter 136

Provided by MassDEP:

SE48-2610

MassDEP File #

eDEP Transaction #

Nantucket

City/Town

A. General Information

1. From: Nantucket
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 _____
Siasconset Beach Preservation Fund and the Town of Nantucket
c. Organization _____
16 Broad Street
d. Mailing Address _____
Nantucket MA 02554
e. City/Town _____ f. State _____ g. Zip Code _____

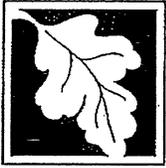
4. Property Owner (if different from applicant):

See attached list
a. First Name _____ b. Last Name _____
c. Organization _____
d. Mailing Address _____
e. City/Town _____ f. State _____ g. Zip Code _____

5. Project Location:

85-107A Baxter Road Nantucket
a. Street Address _____ b. City/Town _____
48 8, 14, 14.1, 15, 17, 18, 19, 21, 22, 35
c. Assessors Map/Plat Number _____ d. Parcel/Lot Number _____

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



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Bureau of Resource Protection - Wetlands

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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):

Nantucket See attached list
a. County b. Certificate Number (if registered land)

c. Book d. Page

7. Dates: October 25, 2013 5/14/2014 6/3/2014
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):

Record Drawing Emergency Installation of Sand Filled Geotubes
a. Plan Title
Blackwell & Associates, Inc. Leo C. Asadoorian, P.L.S.
b. Prepared By c. Signed and Stamped by
4/24/2014 1"=30'
d. Final Revision Date e. Scale

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
- j. Wetland Scenic Views (bylaw)
- k. Recreation (Bylaw)

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.



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 Town of Nantucket Wetlands Bylaw Chapter 136

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Nantucket
City/Town

B. Findings (cont.)

Denied because:

- b. the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**
- c. the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**
- 3. Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) _____ a. linear feet

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

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. <input type="checkbox"/> Bank	_____ a. linear feet	_____ b. linear feet	_____ c. linear feet	_____ d. linear feet
5. <input type="checkbox"/> Bordering Vegetated Wetland	_____ a. square feet	_____ b. square feet	_____ c. square feet	_____ d. square feet
6. <input type="checkbox"/> Land Under Waterbodies and Waterways	_____ a. square feet _____ e. c/y dredged	_____ b. square feet _____ f. c/y dredged	_____ c. square feet	_____ d. square feet
7. <input type="checkbox"/> Bordering Land Subject to Flooding	_____ a. square feet	_____ b. square feet	_____ c. square feet	_____ d. square feet
Cubic Feet Flood Storage	_____ e. cubic feet	_____ f. cubic feet	_____ g. cubic feet	_____ h. cubic feet
8. <input type="checkbox"/> Isolated Land Subject to Flooding	_____ a. square feet	_____ b. square feet		
Cubic Feet Flood Storage	_____ c. cubic feet	_____ d. cubic feet	_____ e. cubic feet	_____ f. cubic feet
9. <input type="checkbox"/> Riverfront Area	_____ a. total sq. feet	_____ b. total sq. feet		
Sq ft within 100 ft	_____ c. square feet	_____ d. square feet	_____ e. square feet	_____ f. square feet
Sq ft between 100-200 ft	_____ g. square feet	_____ h. square feet	_____ i. square feet	_____ j. square feet



WPA Form 5 – Order of Conditions

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



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40
And the Town of Nantucket Wetlands Bylaw Chapter 136

Provided by MassDEP:
SE48-2610
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Nantucket
City/Town

B. Findings (cont.)

22. Restoration/Enhancement *:

a. square feet of BVW

b. square feet of salt marsh

23. 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.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order.
6. 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 6/3/2017 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.
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.



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

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 SE48-2610 "
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.
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.



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

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.

NOTICE OF STORMWATER CONTROL AND MAINTENANCE REQUIREMENTS

19. The work associated with this Order (the "Project") is (1) is not (2) 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;
- 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.



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

- 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):



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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 Nantucket 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.

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

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):

Please view additional findings and conditions page(s)

DENIAL

Massachusetts Wetlands Protection Act (MGL Chapter 131, Section 40)
Town of Nantucket Wetlands Bylaw (Chapter 136)

Address: 85-107A Baxter Road
Assessor's Map and Parcel: 48-8, 14, 14.1, 15, 17, 18, 19, 21, 22, 35
Property Owner: Town of Nantucket/see attached list
Applicant: Siasconset Beach Preservation Fund, Inc. and Town of Nantucket
DEP File Number: SE48-2610
Filing Date: October 25, 2013
Date Hearing Closed: May 14, 2014
Date Orders Issued: June 3, 2014
Plan of Record Information: "Record Drawing Emergency Installation of Sand Filled Geotubes", dated 1/27/2014, Final revision of 4/24/2014, and stamped by Leo C. Asadoorian, P.L.S.

Permit Overview:

This order **denies** a permit to maintain a three tier geotube system with sand nourishment, and replanting of the bank face on a Coastal Bank, Coastal Beach and Land Subject to Coastal Storm Flowage.

Project Proposal:

The Order of Conditions is based on information submitted in the Notice of Intent dated October 23, 2013, its attachments and the plan of record, "Record Drawing Emergency Installation of Sand Filled Geotubes", dated 1/27/2014, Final revision of 4/24/2014, and stamped by Leo C. Asadoorian, P.L.S. The Commission also considered and relied upon other pertinent supplemental information including and not limited to:

1. Original Filing Package by the Town of Nantucket (TON) and the Siasconset Beach Preservation Fund (SBPF), dated 10/23/2013
2. 2014-5-14 NLC Submission
3. 2014-5-14 Van Lieu Submission
4. 2014-5-14 Roggeveen Quidnet Squam Submission
5. 2014-5-14 Atherton Submission
6. 2014_5_9 SBPF Submission
7. 2014_5_9 SBPF Submission Regulatory Compliance
8. 2014-5-2 Trillos Submission
9. 2014_4_30 Van Lieu Submission
10. Sconset Presentation 2014-4-30
11. 2014_4_28 Sconset Bluff Updated Returns Plans
12. 2014_4_25 SBPF Submission
13. 2014_4_2 Ian Golding Submission
14. Applied Coastal 2013_11_8
15. Baxter Road Homeowners 2013_11_12
16. Case Study 2013_10_30
17. Cottage and Castle 2014_2_17
18. DPW Submission 2013_11_13
19. Enforcement Order 2014_2_5

Town of Nantucket and Siasconset Beach Preservation Fund, SE48-2610; 85-107A
Baxter Road

20. FishTec Inc 2014_2_12
21. Flint Industries 2014_2_18
22. Jim OConnell Letter 2013_11_4
23. Kopelman and Paige 2013_11_13
24. Mary Wawro Submission 2013_11_6
25. Memo from Ocean and Coastal Consulting 2013_12_6
26. Milone and MacBroom 2013_10_25 Attachments
27. Milone and MacBroom 2013_10_25 Narrative and Plans
28. Milone and MacBroom 2013_11_1
29. Milone and MacBroom 2013_11_05
30. Milone and MacBroom 2013_11_19
31. Milone and MacBroom 2013_12_03
32. Milone and MacBroom 2013_12_03 Nantucket PlanSet
33. Milone and MacBroom Letter 2013_11_12
34. Milone and MacBroom Plans 2013_10_30
35. Nantucket Land Council and Applied Coastal 2013_11_1
36. Nantucket Land Council Letter 2014_2_18
37. NLC 2013_11_01
38. NLC Submission 2014_3_28
39. Notice of Intent Application
40. Posner Letter 2013_11_18
41. Quidnet Squam 2013_11_19
42. Roggeveen Submission 2013_10_30
43. SBPF- ASBUILT-JAN-30-2014
44. SBPF Letter 2014_2_12
45. SBPF Letter 2014_3_28
46. SBPF Submission 2013_11_1
47. SBPF Submission 2013_11_6
48. SBPF Submittal 2014_3_19
49. Submission from D. Anne Atherton
50. USACE 2014_2_4

Findings:

1. The Commission finds that areas subject to regulation are land under the ocean coastal beach, coastal bank, land subject to coastal storm flowage and their associated buffer zones.
2. The Commission finds that the property is not located within Priority Habitat of Rare Species or Estimated Habitat of Rare Wildlife as defined by the Massachusetts Natural Heritage and Endangered Species Program.
3. The Commission finds that the geotube system is a coastal engineering structure.

The following findings pertain to the Commonwealth of Massachusetts Wetlands Protection Act (MGL Chapter 131 Section 40)

4. The Commission finds that land under the ocean is determined to be significant to the protection of marine fisheries, protection of wildlife habitat, storm damage prevention and flood control.

5. The Commission finds that coastal beach is determined to be significant to storm damage prevention, flood control and protection of wildlife habitat.
6. The commission finds that the coastal bank is determined to be significant to storm damage prevention and flood control because it supplies sediment to the coastal beach.
7. The Commission finds that the coastal bank is determined to be significant to storm damage prevention and flood control because it is a vertical buffer to storm waters
8. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.25 (5) that projects not included in 310 CMR 10.25(3) or 10.25 (4) which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.
9. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.25 (6) that projects not included in 310 CMR 10.25(3) which affect land under the ocean shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries habitat or wildlife habitat caused by: (a) alterations in water circulation; (c) alterations in the distribution of sediment grain size; (d) changes in water quality, including, but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants.
10. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.27 (3) that any project on a coastal beach, except any project permitted under 310 CMR 10.30 (3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.
11. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.30 (3) that no new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effective date of 310 CMR 10.21 through 10.37 (August 10, 1978), including reconstructions of such buildings subsequent to the effective date of 310 CMR 10.21 through 10.37, provided that the following requirements are met:
 - a. A coastal engineering structure or a modification thereto shall be designed and constructed as to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and
 - b. The applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.
 - c. Protective planting designed to reduce erosion may be permitted.
12. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.30 (4) that any project on a coastal bank or within 100 feet landward of the top of a coastal bank, other than a structure permitted by 310 CMR 10.30(3), shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

13. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.30 (6) that any project on such a coastal bank or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.
14. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with 310 CMR 10.30 (7) that bulkheads, revetments, seawalls, groins or other coastal engineering structures may be permitted on such a coastal bank except when such bank is significant to storm damage prevention or flood control because it supplies sediment to coastal beaches, coastal dunes and barrier beaches.

The following findings pertain to the Town of Nantucket Wetlands Protection Bylaw (Chapter 136)

15. The Commission finds that the coastal beach is significant to the protection of the following interests: flood control, erosion control, storm damage prevention, fisheries, shellfish, wildlife, recreation and wetland scenic views.
16. The Commission finds that the coastal bank is significant to the protection of the following interests: flood control, erosion control, storm damage prevention, wildlife, and wetland scenic views.
17. The Commission finds that land subject to coastal storm flowage is significant to the protection of the following interests: flood control, erosion control, storm damage prevention, water quality, erosion and sediment control, and wildlife.
18. Pursuant to Section 2.02B(1) of the Nantucket Wetlands Protection Regulations the provisions of Section 2.01B(1-8)(Land Under the Ocean) shall apply to coastal beaches and tidal flats. Therefore the Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.01B(7) that no new bulkheads or coastal engineering structures shall be permitted to protect structures constructed or substantially improved after 8/78. Bulkheads may be rebuilt only if the Commission determines there is no environmentally better way to control an erosion problem, including in appropriate cases the moving of the threatened building. Other coastal engineering structures may be permitted only upon a clear showing that no other alternative exists to protect a structure built prior to 9/78, but not substantially improved, from imminent danger.
19. Pursuant to Section 2.02B(1) of the Nantucket Wetlands Protection Regulations the provisions of Section 2.01B(1-8)(Land Under the Ocean) shall apply to coastal beaches and tidal flats. Therefore the Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.01B(8) that water dependent projects shall be designed and performed so as to cause no adverse effects on wildlife, erosion control, marine fisheries, shellfish beds, storm damage prevention, flood control and recreation.
20. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.02B(2) that new bulkheads or coastal engineering structures shall be permitted to protect structures constructed, or substantially improved, after 8/78. Bulkheads may be rebuilt only if the Commission determines there is no environmentally better way to control an erosion problem, including in appropriate cases the moving of the threatened building. Other coastal engineering structures may be permitted only upon a clear

- showing that no other alternative exists to protect a structure built prior to 9/78, but not substantially improved, from imminent danger.
21. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.02B(4) that clean fill of compatible grain size may be used on a Coastal Beach but not on a Tidal Flat, only if the Commission authorizes its use, and only if such fill is to be used for a beach or dune nourishment project. All possible mitigation measures shall be taken, as determined by the Commission, to limit the adverse effects of the fill.
 22. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.05B(1) that new bulkheads or coastal engineering structures shall be permitted to protect structures constructed, or substantially improved, after 8/78 except for public infrastructures. Bulkheads and groins may be rebuilt only if the Commission determines there is no environmentally better way to control an erosion problem, including in appropriate cases the moving of the threatened buildings and/or public infrastructure. Other coastal engineering structures may be permitted only upon a clear showing that no other alternative exists to protect a structure that has not been substantially improved or public infrastructure built prior to 9/78, from imminent danger.
 23. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.05B(3) that all projects shall be restricted to an activity as determined by the Commission to have no adverse effect on bank height, bank stability, wildlife habitat, vegetation, wetland scenic view or the use of a bank as a sediment source.
 24. The Commission finds that the applicant has not met the burden of proof to demonstrate compliance with Section 2.10B(1) that the work shall not reduce the ability of the land to absorb and contain flood waters, or to buffer inland areas from flooding and wave damage.

Therefore, based on the referenced findings, the Nantucket Conservation Commission **DENIES** the project SE48-2610 for the Town of Nantucket and the Siasconset Beach Preservation Fund at 85-107A Baxter Road pursuant to the Massachusetts Wetlands Protection Act (MGL Chapter 131 §40), Massachusetts Wetlands Protection Regulations (310CMR 10.00), the Town of Nantucket Wetlands Protection Bylaw (Chapter 136) and the Town of Nantucket Wetlands Protection Regulations. The Commission finds that the given information, historical site conditions and current site conditions that no conditions can be set for the project as proposed that would adequately protect the wetland resources and wetland interests protected by the Massachusetts Wetlands Protection Act and the Town of Nantucket Wetlands Protection Bylaw. Further the Commission finds that the applicant has not met the burden of proof required for the Nantucket Conservation Commission to grant a permit.



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 Town of Nantucket Wetlands Bylaw Chapter 136

Provided by MassDEP:
SE48-2610
MassDEP File #

eDEP Transaction #
Nantucket
City/Town

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.

6/3/2014

1. Date of Issuance

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

6

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

2. Number of Signers

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

Signatures:

Ernest Steinhauer
Ernest Steinhauer

Sarah Oktay
Sarah Oktay

Andrew Bennett (opposed)
Andrew Bennett

Ian Golding
Ian Golding

Michael Glowacki
Michael Glowacki

Jennifer Karberg
Jennifer Karberg

by hand delivery on

6/4/2014
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 of Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

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.



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 Town of Nantucket Wetlands Bylaw Chapter 136

Provided by MassDEP:
SE48-2610
MassDEP File #

eDEP Transaction #
Nantucket
City/Town

G. Recording Information

Prior to commencement of work, this Order of Conditions must be 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 subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

Conservation Commission

Please be advised that the Order of Conditions for the Project at:

Project Location

MassDEP File Number

Has been recorded at the Registry of Deeds of:

County

Book

Page

for: _____
Property Owner

and has been noted in the chain of title of the affected property in:

Book

Page

In accordance with the Order of Conditions issued on:

Date

If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant