

**TOWN OF EASTHAM**  
**AGENDA**  
**BOARD OF SELECTMEN**  
**Wednesday, September 3, 2014**  
**5:00 p.m.**

**Location:**        Earle Mountain Room

- I.        Discussion of Strategy and Issues Concerning Nauset Spit in Anticipation of Joint Meeting w/Orleans Board of Selectmen
- II.       Discussion of Water Interconnect Options with Orleans System
- III.      Special Municipal Employee Request – Bob Sheldon
- IV.      Executive Session –  
            To discuss strategy with respect to collective bargaining or litigation when an open meeting may have a detrimental effect or the bargaining and litigating position of the public body and the chair is so declaring.

**Upcoming Meetings**

<i>Wednesday, September 10, 2014</i>	<i>7:00 p.m.</i>	<i>@Orleans Town Hall Joint w/Orleans Board of Selectmen</i>
		<i>Topics for Discussion – Nauset Spit/ Water Interconnect</i>
<i>Monday, September 15, 2014</i>	<i>5:00 p.m.</i>	<i>Regular Meeting</i>
<i>Wednesday, September 17, 2014</i>	<i>2:30 p.m.</i>	<i>Work Session</i>

*\*Per the Attorney General's Office: The Board of Selectmen may hold an open session for topics not reasonably anticipated by the Chair 48 hours in advance of the meeting.*

*\*If you are deaf or hard of hearing or are a person with a disability who requires an accommodation, contact Laurie Gillespie-Lee, 5900 x207*

September 2, 2014

To: Board of Selectmen

RE: Agenda Item – I

Herein is information on the Nauset Spit including,

- 1) the order of conditions from the Orleans Conservation Commission;
- 2) a memo and material from John Kelly and the Orleans Board of Selectmen, and;
- 3) a memo from the Conservation Agent issued Friday.

Should you need any other information please let me know. The purpose of this discussion is to prepare for the meeting on September 10, with Orleans.

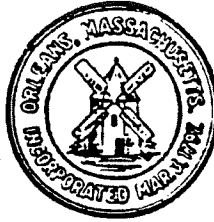
Order on  
SPit

310 CMR 10.99

Form 5



Commonwealth  
of Massachusetts



DEP File No. SE 54-723

(To be provided by DEP)

City/Town Orleans, MA

Applicant Town of Orleans

FILE COPY

Order of Conditions  
Massachusetts Wetlands Protection Act  
G.L. c. 131, §40

THE ORLEANS WETLAND  
PROTECTION BYLAW

From Orleans Conservation Commission  
Town of Orleans, Board of Selectmen  
To (Acting as Park Commissioners) Town of Orleans  
(Name of Applicant) (Name of property owner)  
19 School Street 19 School Street  
Address Orleans, MA 02653 Address Orleans, MA 02653

This Order is issued and delivered as follows:

- ☐ by hand delivery to applicant or representative on \_\_\_\_\_ (date)  
☒ by certified mail, return receipt requested on P 529 416 026 (2/13/91) (date)

This project is located at Nauset Spit, Callanan's Pass  
Orleans Tax Assessor's Map Sheet No. 30 Parcel No. N/A  
The property is recorded at the Registry of Barnstable  
Book \_\_\_\_\_ Page \_\_\_\_\_

Certificate (if registered) \_\_\_\_\_  
December 21, 1990  
The Notice of Intent for this project was filed on January 14, 1991 (Amended) (date)

The public hearing was closed on January 23, 1991 (date)

Findings

The Orleans Conservation Commission has reviewed the above-referenced Notice of Intent and plans and has held a public hearing on the project. Based on the information available to the Commission at this time, the Commission has determined that the area on which the proposed work is to be done is significant to the following interests in accordance with the Presumptions of Significance set forth in the regulations for each Area Subject to Protection Under the Act and with the Orleans Wetland Protection Bylaw: (check as appropriate):

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Public water supply                | <input checked="" type="checkbox"/> Land containing shellfish      | <input checked="" type="checkbox"/> Erosion & Sedimentation Control |
| <input type="checkbox"/> Private water supply               | <input checked="" type="checkbox"/> Fisheries                      | <input checked="" type="checkbox"/> Recreation                      |
| <input type="checkbox"/> Ground water supply                | <input checked="" type="checkbox"/> Protection of wildlife habitat | <input checked="" type="checkbox"/> Aesthetics                      |
| <input checked="" type="checkbox"/> Flood control           |  | <input type="checkbox"/> Agriculture                                |
| <input checked="" type="checkbox"/> Storm damage prevention |  | <input type="checkbox"/> Aquaculture                                |
| <input checked="" type="checkbox"/> Prevention of pollution |  |   |

Total Filing Fee Submitted N/A State Share \_\_\_\_\_  
City/Town Share \_\_\_\_\_ (1/2 fee in excess of \$25)  
Total Return Due \$ \_\_\_\_\_ City/Town Portion \$ \_\_\_\_\_ State Portion \$ \_\_\_\_\_  
(1/2 total) (1/2 total)

FEB 13 1991

Orleans

Therefore, the Conservation Commission hereby finds that the following conditions are necessary, in accordance with the Performance Standards set forth in the regulations, to protect those interests checked above. The Conservation Commission orders that all work shall be performed in accordance with said 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.

**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 Order.
2. This 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, by-laws 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 and both that date and the special circumstances warranting the extended time period are set forth in this Order.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order.
6. Any fill used in connection with this project shall be clean fill, containing no trash, refuse, rubbish or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles or parts of any of the foregoing.
7. No work shall be undertaken until all administrative appeal periods from this Order have elapsed or, if such an appeal has been filed, until all proceedings before the Department have been completed.
8. No work shall be undertaken until the Final Order 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 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 to be done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order prior to commencement of the work.
9. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words, "Massachusetts Department of Environmental Protection,  
File Number SE 54-723 clearly visible from the street and shall remain so displayed until construction is completed and a Certificate of Compliance has been granted.
10. Where the Department of Environmental Protection is requested to make a determination and to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before the Department.
11. Upon completion of the work described herein, the applicant shall forthwith request in writing that a Certificate of Compliance be issued stating that the work has been satisfactorily completed.
12. The work shall conform to the following plans and special conditions:



\*

Plan of  
DPV Routes & Plans:  
Parking Area  
on Nauset  
Spit

Title	Dated	Signed and Stamped by:	On File with:
Scale: 1" = 100'	January 7, 1991	Orleans Park Commissioners	ConsCom
_____	_____	_____	_____
_____	_____	_____	_____

This project is approved subject to the following and attached conditions:

Special Conditions (Use additional paper if necessary)

With the exception of the proposed temporary alternative crossovers to, and driving on, the Town Cove (West) side of Nauset Spit -  
The above plan is approved subject to Conditions listed below for Town of Orleans Nauset Spit, Callanan's Pass, DEP Number SE 54-723.

13. In issuing this Order of Conditions, the Commission has relied on the information and data which the applicant has provided in connection with his application. If, subsequent to the issuance of this Order, such information and data prove to be false, incomplete, or inaccurate, this Order may be reviewed, modified or withdrawn in whole or in part, and/or the Commission may, in addition, institute appropriate legal proceedings.

14. Members of the Conservation Commission or its agents shall have the right to enter upon and inspect the premises to evaluate compliance with this Order of Conditions. The Conservation Commission reserves the right to require, following field inspection, additional information or resource protection measures.

15. Any substantial change made or intended to be made in the plans shall require the applicant to file a new Notice of Intent or to inquire of the Conservation Commission, in writing, and by certified mail, whether the change is so substantial as to require a new filing.

16. This Order and the general and special conditions are ongoing and do not expire with the issuance of a Certificate of Compliance.

(Leave Space Blank)

Issued By \_\_\_\_\_ Orleans \_\_\_\_\_ Conservation Commission

Signature(s) \_\_\_\_\_

Barry Donaldson Arch B. Bunker  
Richard Houghton Jr. Andrew C. Yegan  
Cliff W. Hays Rafael O. Lamm

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

On this thirteenth day of February, 19 91, before me personally appeared RICHARD HOUGHTON JR. to me known to be the person described in and who executed the foregoing instrument and acknowledged that he/she executed the same as his/her free act and deed.

Nancy Ann Hurley  
Notary Public

May 11, 1995  
My commission expires

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the Department of Environmental Protection to issue a Superseding Order, providing the request is made by certified mail or hand delivery to the Department, with the appropriate filing fee and Fee Transmittal Form as provided in 310 CMR 10.03(7), within ten days from the date of issuance of this Determination. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and the applicant.

Orleans  
Detach on dotted line and submit to the Conservation Commission prior to commencement of work.

To Orleans Conservation Commission Issuing Authority

Please be advised that the Order of Conditions for the project at Nauset Spit, Callanan's Pass

File Number SE 54-723 has been recorded at the Registry of Barnstable and

has been noted in the chain of title of the affected property in accordance with General Condition 8 on \_\_\_\_\_ 19 \_\_\_\_\_

If recorded land, the instrument number which identifies this transaction is \_\_\_\_\_

If registered land, the document number which identifies this transaction is \_\_\_\_\_

Signature \_\_\_\_\_ Applicant

SPECIAL ORDER OF CONDITIONS RELATING TO ORV USE ON NAUSET SPIT

I. FINDINGS

A. THE ACTIVITY

The Orleans Conservation Commission finds, in accordance with the December 4, 1990 Superseding Determination of Applicability issued by the Massachusetts Department of Environmental Protection, that the activity for which the Town of Orleans seeks a permit under the provisions of State Wetland Protection Act MGL ch 131 Section 40 and the Town of Orleans Wetlands Protection Bylaw consists of the operation of ORV's on the Nauset Spit Barrier Beach system, 310 CMR 10.29. Although the permit request is narrowly defined to ORV use, where ORV use/management issues overlap pedestrian and boating uses, it is herein recognized by the Conservation Commission and the Park Commissioners that these uses will be controlled in a manner consistent with permitting requirements for the ORV use, i.e., signage, fencing, plantings, temporary closures, etc.

The Department of Environmental Protection further determined, and the Orleans Conservation Commission so finds, that the area in which the proposed activity will take place is a barrier beach, 310 CMR 10.29, a resource area which itself contains the following wetland resource areas: Land Subject to Coastal Storm Flowage (310 CMR 10.02(1)(d)), Land Under the Ocean (310 CMR 10.25), Coastal Beaches (310 CMR 10.27), Coastal Dunes (310 CMR 10.28) Salt Marshes (310 CMR 10.32) and Rare Species Habitat (310 CMR 10.37).

The above cited regulations, provide that where the proposed activity involves alteration of a resource area, the issuing authority shall presume the resource area to be significant to the interests noted in the regulations governing that specific area unless that presumption is overcome by a clear showing otherwise. No such showing has been made. The Commission therefore adopts the presumptions of significance for the resource areas cited in the previous paragraph.

B. PROJECT COMPLIANCE WITH MGL 131 ch. S.40 PERFORMANCE STANDARDS

Project compliance with MGL ch, 131 s.40 performance standards as cited in the attached regulations: Coastal Beaches, 310 CMR 10.27; Coastal Dunes, 310 CMR 10.28; Barrier Beaches, 310 CMR 10.19; and Rare Species Habitat, 310 CMR 10.37

The proposed project calls for the following activities designed to prevent adverse impact of ORV usage upon the resource areas of the Nauset Spit Barrier Beach cited above:

1. Placement of signage and wooden barrier posts, to be located as necessary to confine ORV traffic to defined access ways, to be maintained by hand, and spaced an average of 100 feet apart; signage to be attached to posts and/or fencing where possible, such posts to be placed in such a manner as not to disturb vegetative cover;
2. Placement of symbolic fencing and/or predator exclosures, as necessary, around potential nesting habitat and actual nesting and foraging sites;
3. Placement of fencing barriers for access closures and/or openings, as deemed necessary for tern and plover habitat, nesting, and foraging protection.

The Commission finds that the above activities as controlled by the conditions herein meet the performance standards set forth in 10.27 (3),(6), and (7); 10.28 (3),(5), and (6); 10.29 (3) and (4). See "Rare Species" for compliance with 10:27.

4. With regard to the primary activity proposed, ORV usage itself, the Commission finds the following:

a. Coastal Dunes (310 CMR 10.28)

i. Evaluation of ORV Access and Egress Trail Location

The suggestion was made that the more southerly access trail be closed and that the more northerly egress trail be expanded to accommodate two way traffic using pullover/bypass areas. Field inspection of

the southerly access trail showed it to be sensitive to environmental concerns with respect to sinuosity and topography. Its layout was not believed to promote wind tunnelling and erosion or wave overwash. According to historical data, this showed the greatest stability in terms of shoreline migration over a 100 year period. Therefore, although the more northerly egress trail had initially been proposed to be expanded in width to accommodate two way traffic based on the closure of the more southerly trail, the record suggested that the existing layout and orientation characteristics of the more northerly trail should not be changed and that maintenance of the existing two trail system was preferable. The Commission, therefore finds, based on the testimony and references of record, that maintenance of the existing two ORV trail routes is appropriate, and meets the performance standards set forth in 310 CMR 10.28 as follows:

10.28 (3)(b) Use of existing access and egress corridors through the dunes will be restricted to corridors already without vegetation due to previous ORV use, and no further devegetation and consequent destabilization should occur given appropriate posting as required in the Special Orders.

10.28 (3)(c) It is recognized that the ongoing use of an ORV corridor may cause limited modification to small dune areas. However, the Commission credits testimony that due to the orientation, location, restriction in size, and proposed maintenance activities, no significant increase from storm or flood damage is anticipated.

10.28 (3)(d) No interference with landward movement of coastal dunes will occur since the Special Orders provide that no ORV traffic, with the possible exception of temporary alternate routes provided in response to plover and tern protection needs, will be permitted on the Cove (west) side of

the spit, toward which the landward movement is directed.

10.28 (3)(f) See section on Rare Species

ii. North/South Corridor

Given the Special Orders requiring that this corridor be a minimum of 15 feet seaward of the toe of the Coastal Dune, no change in vegetation should occur and the performance standards set forth in 10.28 (3)(b) and (c) should be met. (10.28(3) see section on Rare Species)

iii. Dune Enhancement

Concern was expressed that inappropriately located dune enhancement projects could adversely impact potential plover and tern habitat areas. Based on the testimony received, the Conservation Commission finds that specific delineation of dune enhancement areas on the present project plans should not be shown at this time. Rather, delineation of specific areas will be made by the Park Commissioners and their agents in consultation with the Conservation Commission and/or its agent based on wildlife habitat observations and reports presented to both agencies as required by the Order of Conditions.

b. Coastal Beaches (310 CMR 10.27 (3)(7))

The continued use of the existing ORV corridors may cause temporary limited impact to the profile (form) of the beach area. The Commission credits testimony that given the climatic and geologic characteristics of the Nauset Spit, these changes will not result in significantly increasing the potential for wind and wave erosion.

The Commission credits testimony that sediment disturbed by the passage of ORVs is not lost from the beach resource area and that significant sediment movement is not attributable to ORV use. Therefore it finds ORV use as proposed will not result in a significant decrease to beach volume and that such significant changes in beach volume

are more likely to be influenced by climatic and/or meteorologic factors (also see Rare Species 10.27(7)).

## II. SPECIAL CONDITIONS

### A. PREAMBLE

The Orleans Conservation Commission, in setting the following Conditions, intends that they be flexible enough to reflect the needs of the changing environment they are designed to protect. The Nauset Barrier Beach system has been shown to be extremely dynamic over time. Significant changes in geomorphic form and wildlife habitat have occurred both prior to, and now during, recreational uses of this resource area. The challenge for this Commission is to manage the competing uses of this barrier beach system under the provisions of both the Massachusetts Wetlands Protection Act, MGL 131 Section 40 and the Town of Orleans Wetland Protection Bylaw, Chapter 160 of the Code of the Town of Orleans.

The following Conditions are designed to:

- protect coastal resource areas and identified wetland interests for the Nauset Barrier Beach system as it currently exists;
- allow for the ongoing recreational use of the barrier beach system, but at a lesser impact level than previously existed;
- require management of ORV use to be sensitive to any adverse environmental impact to the Nauset Barrier Beach system;
- require greater restrictions on ORV users with respect to environmental education, scheduled and unscheduled temporary closures of access routes, etc;
- require future management of the barrier beach system resource area to include hiring of specially qualified personnel to conduct detailed monitoring of and reporting on wildlife and wildlife habitat areas which will serve as basis

for modifying permitted management procedures/policies;

- require interdisciplinary and agency cooperation which will result in sensitive, flexible and responsive management of the barrier beach system.

B. RULES AND REGULATIONS

The Board of Selectmen, acting, and hereafter referred to, as the Park Commission, is responsible for implementing and enforcing Rules and Regulations for ORV use on Nauset Spit. These regulations shall be reviewed annually by the Conservation Commission and at a minimum require the following:

- a) That the figure set for a maximum number of ORV's allowed on the beach at any one time be reduced from the 300 maximum permitted in 1990 to an initial figure of 200 for 1991 which may be subject to a downward revision dependent upon general beach or nesting considerations.
- b) Posting of temporary closures due to tide conditions or nesting considerations.
- c) Driving on the Town Cove (west) side to be prohibited (see Page 8).
- d) Driving on the low beach to be permitted only during the winter season between the first Friday in November and the Friday before Memorial Day and at such other specially designated times and places to avoid disturbance of nesting birds.
- e) Parking to be permitted seaward of a 37' corridor consisting of 15' from the toe of the dune, plus 12' for the vehicle track, plus a 10' margin between the vehicle track and parking area.
- f) Closure of the beach between the hours of 11:00 PM and 6 AM except for active fishing. Driving in all but designated ORV corridors prohibited.



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- g) In posted areas near bird nesting or roosting areas, a speed limit of 5 mph.
- h) No jet ski launching or landing.
- i) No kite flying: March 15 - September 15.
- j) No pets: March 15 - September 15.
- k) All permittees to view educational film/slide presentation prior to issuance of and renewal of ORV permit.
- l) Minimum permissible equipment standards including tire size and pressure as listed in regulations issued by Park Commissioners
- m) Any other condition responsive to significant environmental changes and/or any conditions necessary to protect the Nauset Spit barrier beach system, the public health, safety and welfare of the users and/or property owners.
- n) Such fines and penalties as the Park Commission may invoke.
- o) Walking between the cove side and the ocean side to be prohibited in all but designated areas.

C. CLOSURE OF THE TOWN COVE (WEST) SIDE TO ORV TRAFFIC

In 1990, the Orleans Park Commission, on the recommendation of Dr. David Aubrey, coastal geologist with the Coastal Research Center of Woods Hole Oceanographic Institution and with the full concurrence of the Conservation Commission, closed the Town Cove side of the Nauset Spit to ORV traffic. Tidal flats and shellfish beds which adjoin the Town Cove side of the beach are extremely sensitive to ORV use, and ORV use should not be allowed in these resource areas under any circumstances. Barrier beaches migrate landward due to overwash events and consequent sand deposition of the barrier beach, 310 CMR 10.29(1). The operation of ORVs on the landward side of the beach could serve to inhibit dune formation through the formation of ruts and the crushing of ammophila rhizomes, stopping the landward migration of the inside, while the ocean side is continually eroded



by wave action. The net effect of these processes could be an ever narrower barrier spit, increasingly susceptible to overwash and inlet formation. This result would violate the performance standards for coastal dunes, which prohibit any modification of dune form that would increase the potential for storm or flood damage, or any interference with the landward or lateral movement of the dune, 310 CMR 10.28(3) and 10:29(3). Therefore, with the possible exception of temporary alternate routes as described below, the westerly (Town Cove) side of the barrier beach shall remain closed to ORVs except for emergency use by town officials.

D. TEMPORARY ALTERNATIVE ROUTES:

The applicant (Town of Orleans) has proposed that should the ORV corridor along the oceanside be closed to protect plovers foraging for food on that side, an alternate route along the Town Cove (west) side be approved on a temporary basis.

In answer to the concern that such temporary alternate routes could inhibit the landward migration of the barrier beach in violation of the performance standards and in CMR 10:28 and 10:29, the applicant has suggested that there is evidence relating to the seasonal climatic/meteorologic energy levels and historical storm or wind patterns documented during the summer months and evidence relating to the textural components (coarse sand and gravel) of the back shore area which would indicate it was unlikely that the limited seasonal use of proposed alternative routes, i.e., June, July and perhaps August, would result in increasing potential for storm and flood damage in violation of 310 CMR 10.28 (3)c or interfere with the landward movement of the dunes of the barrier spit in violation of 10.28 (3) (d) and 10.29 (3). Contradicting evidence was also offered.

However, the applicant has also suggested, and the Commission agrees, that the site specific delineation of temporary alternate routes is presently inappropriate. Therefore, the Commission makes no finding nor will it issue any orders as to the temporary alternate routes at this time.

When the need to protect specific habitat, nesting, and/or foraging sites by closure of the access routes

approved herein and shown on the plan of record is determined, the Town may file amended plans after consultation with its agents and the Conservation Commission or its agent and shall provide the Commission with information on such proposed temporary access routes including, but not limited to, delineation of the such proposed route or routes on the plan of record, an estimate of the duration of use, an estimate of the reduction or proposed reduction of daily vehicle traffic, a description of signage and fencing for such alternate ORV corridor, a description of proposed mitigating measures, etc. If the Commission finds that such plan meets the performance standards cited in the relevant regulations, the Commission may approve such temporary alternate ORV access route or routes.

E. RARE SPECIES

1. Project Compliance with Performance Standards

Based on the testimony provided by Massachusetts Natural Heritage Endangered Species Program, the Massachusetts Audubon Society and others, the Conservation Commission finds that a potential to alter the resource area which is part of the mapped habitat of State-listed species does exist. However, the Commission finds that the project as proposed and conditioned herein, inclusive of the hiring of a qualified habitat specialist and incorporation of temporary beach closure measures should provide the protection necessary so that no adverse effect on specified habitat sites will result.

The presumption that the maintenance activities requested in order to continue ORV use of Nauset Spit will adversely impact specified habitat sites, in the opinion of this Commission, has been overcome/rebutted/by the proposed species management plan as required by this Order of Conditions. This management plan will require, among other measures, observation and tracking of the plover and tern species to determine exact habitat sites, including foraging routes; will require temporary closures of the identified sites and routes to ORV and pedestrian use; and will provide emplacement of physical fencing and

predator barriers to afford habitat protection. The Commission, as issuing authority, therefore finds that the project as proposed and herein conditioned should not result in an adverse impact to specified habitat sites identified for plover and tern populations on Nauset Spit. If, however, these conditions prove inadequate to protect the wetland interests defined in MGL 131, Section 40 or to ensure that there is no adverse impact on rare species habitat as required by CMR 10:37, the Commission reserves the right to impose the necessary additional conditions and restrictions upon the use of ORVs on the Nauset Spit.

The Conservation Commission wishes here to note that the applicant, the Town of Orleans by its Selectmen serving as Park Commissioners, has, in fact, conducted a tern preservation project in cooperation with the Massachusetts Audubon Society which has contributed to the establishment of the largest least tern colony in New England. The Town has supported this preservation effort through the efforts of the Town's Parks Department under the direction of Paul Fulcher, Parks Superintendent with the financial support of the town. It now proposes to continue and broaden these efforts through the hiring of a plover habitat specialist to monitor the breeding, hatching, and fledging of the plovers, and by recognizing that temporary closures of the spit during critical plover breeding and fledging periods may be necessary.

2. Plover Monitor

The Park Commission, in cooperation with the Conservation Commission, shall be responsible for the hiring of a suitably qualified person to serve as a Piping Plover (and Tern) Habitat Analysis Specialist, hereafter referred to as "Monitor", responsible to the Park Superintendent. This person shall be selected by the Park Commissioners based on review of applicant qualifications and recommendations from the Conservation Commission, and will be required to participate in the site specific field training program developed and conducted cooperatively with the Massachusetts Division of Fisheries and Wildlife Natural

Heritage Program and the Cape Cod National Seashore Park experts on coastal bird habitats. Further, the Monitor shall cooperate and coordinate his/her activities with the Massachusetts Audubon Society Staff.

The Monitor will be employed annually from April 1 through August 31 to provide technical information relative to the habitat and characteristics of the Piping Plover and tern populations on Nauset Beach, and will be responsible for alerting the Park Superintendent and the Conservation Commission, or their designated agents, as to the need to temporarily close access to ORV traffic during plover nesting and fledgling activity periods. The Monitor will also be responsible for providing the Parks Commission and the Conservation Commission daily data on plover broods and tern nesting, and a season-end report relative to the Piping Plover population.

3. Limitation of access to prime nesting habitat areas

a. Vehicular Access

Parking in or vehicular access through identified plover and Least Tern habitat areas as shown on the attached map entitled "Approximate Rare Species Habitat", and as determined annually by the plover Monitor, shall be prohibited. This restriction will not necessarily prohibit vehicular access past (i.e. northward/southward) such areas if consistent with specific management guidelines.

b. Boater and Pedestrian Access

It has been the custom for many visitors to Nauset Spit to arrive by boat on the west or Town Cove side. Some remain on this west beach while others walk across the spit to the ocean side. This traffic is expected to increase as a result of increased ORV restrictions. Most boats land near the tip, beyond the dunes, the vegetation, and the

Least Tern colony, and they present a minimum threat to either birds or other resources. The other boaters, however, tend to come ashore in three areas where they must cross the dunes, either over the crest or through a washover area to reach the Atlantic side. Disturbance of the birds by these pedestrians may be minimized by: 1) Posts, signs and fencing to indicate closed areas and 2) installation of well-marked wooden walkways over the dunes in areas far from plover habitat. Since it is much easier to walk on these boardwalks than in the soft sand, pedestrians will be encouraged to use the designated walkways and thus they will help to protect dune form and vegetation as well as birds.

Pedestrians shall be excluded from existing washover areas in a manner which does not interfere with, or cause any adverse effect to, the ability of such washover areas to serve as nesting habitat for Piping Plover.

#### 4. Piping Plovers

The beach management strategy for the plovers includes devoting highest priority to encouragement of the earliest arriving birds to nest as quickly and successfully as possible. This means minimizing human disturbance. The result in addition to a high reproductive success rate, may be to minimize the period during which the beach is closed to ORV use.

##### Spring Arrival (March 16 - April 30)

Piping Plovers return from their southern winter quarters to establish nesting territories along Cape Cod beaches in early spring.

Management - Prior to the arrival of Piping Plovers, potential nesting areas shall be visited by a person familiar with their habitat requirements to evaluate the natural changes that have occurred through the winter and to identify areas of suitable nesting habitat. The nesting habitat shall be posted, with endangered species

nesting area signs, prior to the arrival of plovers - no later than April 1 - to reduce the potential disturbance by beachgoers upon plovers establishing their nesting territories. Vehicular access into or through posted areas shall be prohibited, though vehicles may pass by such areas at this time.

Laying and Incubation of Eggs (April 20 - August 10)

Normally the nest, a shallow scrape in the sand, is placed at the toe of the dune, in a washover, or along the spring tide wrack line. The first of the sand-colored eggs is laid in late April and may contain a full clutch of 4 eggs a week after the first egg is laid. Then both adults incubate the eggs, alternating every few hours, for the next 28 days.

Management - when a nest is located with one to four eggs, a welded wire fence shall be placed around the nest, using a design recommended by the Massachusetts Division of Fisheries and Wildlife. Endangered species signs shall be placed outside the fenced area and strung off with twine to add additional protection from curious passersby. Vehicular access within the area strung off with twine shall be prohibited.

Before eggs hatch, it is necessary to close the beach and to level the ORV ruts to prevent an adverse effect on the young hatchlings. This must be accomplished within a 28 day period after incubation commences. If ruts are to be leveled by natural process, one week should be allowed, and the beach should be closed 21 days after the last egg is laid or the start of incubation. If ruts are to be leveled by hand, the beach could remain open a few additional days. If the monitor does not know when the last egg was laid or when incubation commenced, the beach should be shut down and ruts leveled immediately.

Due to the narrowness of the Nauset barrier beach, in some portions of plover habitat, the closure shall extend from the ocean side through the dunes to the cove side in a line 100 yards south of the location of the first nest



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encountered for outbound travel (i.e., the southerly most nest on the spit). The point of closure would be designated with posts, rope, and signs.

Hatching Eggs and Movement of Young (May 20-August 20)

Piping Plovers have precocial young, capable of walking and feeding themselves within 24 hours after hatching. The most vulnerable stage in their breeding cycle is the period when hatchlings are less than 10 days old when they accompany the adults in their feeding forages. Normally, all eggs in a clutch hatch within a 24-hour period between the hatching of the first and last eggs. The hatchlings then accompany the adults to feed on small invertebrates along the wrack line, toe of the dunes, and interdunal blowouts. During their first week the young usually do not wander more than 100 yards from their original nest site. They do not use the nest after the first couple of days from their hatch date, but depend on their cryptic coloration to blend in with their surroundings. If an adult plover sounds an alarm note, the young either run for cover beneath one of the adults or seek cover in vegetation, among stones, along the wrack line, or in a vehicle rut. Plover chicks over a week old may accompany the adults for greater distances, up to 1/4 mile, and spend increasingly more of their time foraging along the wrack line and out into the intertidal zone.

Management - Plover chicks on Nauset Spit may be seen foraging with adults in areas anywhere between the Cove and the ocean intertidal zones in areas where there is little vegetation to obstruct their movements. Because they may go from the ocean side to the cove side of the spit within minutes, using existing blowouts and overwash areas, they are vulnerable to vehicular travel at all times. Also, the ruts left by vehicles are known to trap young chicks that subsequently may be run over by another vehicle using the same ruts, or they remain trapped in the rut and die from exhaustion or found in the rut by a predator.

Therefore, temporary closures to vehicular traffic shall be required in habitat areas used by young foraging plovers. The size of this closure will vary depending on the data collected by the Monitor. The closure point of 100 yards south of hatched eggs shall be used until the Monitor can establish the perimeter of the total feeding range.

Fledging of the Young (June 28 - August 20)

Young plovers are capable of flying short distances within 30 days of their hatch date. Typically, these novice fliers remain with the adults foraging in the same general area for anywhere from a few days to the rest of the summer. Adults may lead fledged young to more remote portions of neighboring beaches if they are disturbed by recreation or predation.

Management - Once the Monitor has determined that the young have fledged or left the beach, the area may be reopened to vehicular traffic.

5. Least Terns

Nauset Spit has been home to the largest Least Tern nesting colony in New England for the past two years. This is largely due to the extensive nesting area available on the sand spit which has increased in its length annually since the storm in 1978. Another factor that has contributed significantly to the size of this colony is the placement of welded wire fence by the Massachusetts Audubon Society in cooperation with the Town of Orleans Parks Department, which has reduced disturbance to the birds by beachgoers and predators.

Spring Arrival (May 7 - July 10)

Least Terns return from their winter quarters in South America to establish nesting colonies ranging in size from a dozen pairs to over 1,000 pairs. Least Terns have historically used Nauset Spit, and data over the past 20 years shows that colony size has varied between 100 to 600 pairs nesting annually.

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Management - Prior to the arrival of the terns, welded wire fence, three or four feet in height, with 4" x 2" mesh shall be used to encircle the Least Tern nesting area based upon the prior year's data. On Nauset Beach the Least Tern Colony increased in size annually, and it is likely that the fence will have to be adjusted to encompass additional portions of the colony.

The side of fence running parallel to the ocean-side wrack line shall be as close to the mean high tide line as possible. This will ensure that nests near the wrack line are included and that chicks that wander or fly outside the colony are less likely to become trapped in ruts and be run over by subsequent traffic. Endangered species signs should be placed five feet inside the fence, one every 50 feet along the entire perimeter.

Laying and Incubation of Eggs (May 20 - August 5)

Most clutches of 2-3 eggs are laid in early June. The nests are simple scrapes in the sand or on bare stone between the wrack line and the toe of the dune, or in an open blow-out. Typically, Least Terns nest in colonies of 10 to 1,000 pairs.

The adults incubate the eggs for 21 days after the last egg is laid. It is not uncommon for Least Terns to lose nests to storms or high tides. Least Terns will attempt to discourage mammalian, avian, or human intruders who come near their nests by attacking in unison, calling loudly, and dropping their "white wash".

Management - Incubation is the most vulnerable stage for breeding Least Terns. The presence of people, dogs, kites, and predators too close to a colony causes the entire flock of nesters to leave their nests during the disturbance. If the disturbance lasts more than 15 minutes, the eggs may be destroyed by exposure to the sun, rain, or wind-blown sand. Therefore, it is critical that the Monitor for the colony adjust the perimeter of the fence and signs to include a buffer zone wide enough to prevent disturbance to incubating adults. Research has shown a minimum distance of 80 to 150 feet is needed between the outermost

nests in the colony and the protective barrier.

Hatching of Eggs and Movement of Young (June 9-August 25)

The 2 to 3 semiprecocial young are active within 24 hours of hatching. Least Tern young are fed by the adults. Although the young are capable of running within a week of hatching, they typically do not wander more than 15 feet from their nest depression during the first 10 days. However, at ages between 10 and 28 days they will run longer distances to flee an intruder or to find better locations for hiding or awaiting the return of adults with food. These older juveniles, over 14 days old, are often difficult to see. Their plumage is camouflaged, and they hide in vegetation and cover on the wrack line.

Managment - Dogs and feral cats shall be excluded from colonies using welded wire fence. The young terns, however, pass through the fence outside the colony. Typically, the young try to migrate toward the tidal zone to be fed by the adults. The young often become trapped in vehicle ruts and are run over by subsequent traffic. To reduce this problem, vehicles shall be directed to drive below the high tide line when possible. Fewer chicks go far from the colony and flattened sand in the tidal zone makes the chicks more visible. Also, a finer mesh plastic or wire fence can be used to discourage the young terns from migrating into areas where there are vehicles. This, however, must not be used if a pair of Piping Plovers has a nest or young in the area of the Least Tern colony, because plover young could get separated from adults or be excluded from their foraging areas. Also, a finer mesh plastic or wire fencing will not keep the young terns from migrating outside the colony once they are capable of flight.

Fledging of Young (July 9 - September 10)

Least Terns young are capable of weak flight about 28 days after hatching. Most young in a colony fledge in mid-to late July in Massachusetts, unless the colony has been abandoned because of by tides, storms, or predators and the survivors

renest. Once the young are capable fliers, after a week of practice, they are led by the adults further from the busy colony to quieter portions of beaches and sandbars. The young will even fly out to the fishing grounds where they rest on the water and wait to be fed. Most Least Terns have left their breeding grounds by September 10 for the long journey to South America.

Management- If vehicles are permitted near the Least Tern nesting area they pose a threat to the fledging terns during the day and night. The Monitor shall use signs, and twine if possible, to post the boundaries of the roosting area to restrict and slow traffic.

The Monitor of the colony will determine when the terns have left the nesting area. As long as Least Terns are landing in the fenced area, it is likely that they are still nesting or rearing young. Most Least Terns will have left Massachusetts by early September.

F. MANAGEMENT AND ANNUAL REVIEW

Management of the resource areas in terms of ongoing use, use restrictions, etc. will be the primary responsibility of the Park Commission and Park Department with provisions for annual review of management guidelines and personnel hirings to be made cooperatively with Conservation Commission input prior to April 1st.

As part of the overall ORV management plan, the Park Commission will instruct the Park department personnel to maintain the approved ORV corridors and to install posts fencings, and signage as indicated on the plan of record dated January 7, 1991 or as revised and subsequently approved by the Conservation Commission and will instruct the Park Department personnel to continue ongoing revegetaiton and nourishment efforts as described and approved by the Conservation Commission. These actions and the overall ORV management plan will be reviewed and approved annually by the Conservation Commission based upon the reports and recommendations resulting from the implementation of this Order of Conditions.

G. ENFORCEMENT

The Park Commission shall require additional enforcement patrol of the Nauset Spit ORV corridor to include expanded patrol coverage during off-peak usage, specifically weekday and pre-season periods. Should expanded patrol prove inadequate to protect the natural and wildlife resources which are the subject of this Order, the Conservation Commission may require additional enforcement.

Overall enforcement responsibility for management of the Nauset Barrier Beach system as described by the attached Order of Conditions is designated by state and local statutory requirements to Town of Orleans officials. In this instance, primary enforcement responsibility will be shared by the Conservation Commission, Park Commission, and their respective agents.

Piping Plover and Least Tern  
Management Calendar - Approximate dates

ECOLOGY

MANAGEMENT

March

16 First plovers return

15-31 Post known plover habitat

April

28 First plover eggs laid

20 Fence and post known Least Tern areas

28 Fence and post each plover nest

May

7 First Least Terns arrive

1-31 Continue to fence and post new plover nests

20 First Least Tern eggs laid

20 Discontinue ORV travel post early plover nests

28 First plover eggs hatch

25 Adjust Least Tern fence to include new changes

June

1-6 Peak period of plover hatchings

1-30 Monitor feeding territory boundaries of plovers

9 First Least Tern eggs laid

1-30 Remove plover fences if not used by roosting plovers

July

1-31 Peak of Least Tern hatching

1-31 Direct traffic to pass Least Tern area in low tide zone when possible and enforce 5 mph speed limit

1-6 Peak of plover fledging

9 First Least Terns fledge

1-31 Re-open traffic when plovers have fledged

21-31 Peak of Least Tern fledging

1-31 Continue to monitor foraging plovers

August

1-31 Least Terns continue to fledge

1-31 Continue to remove plover fence

1-20 Piping Plovers continue to fledge

1-31 Continue to monitor foraging plovers

15-31 Least Terns and plovers begin to migrate south

1-31 Continue to maintain tern fence

1-31 Continue to direct traffic and enforce speed limits

September

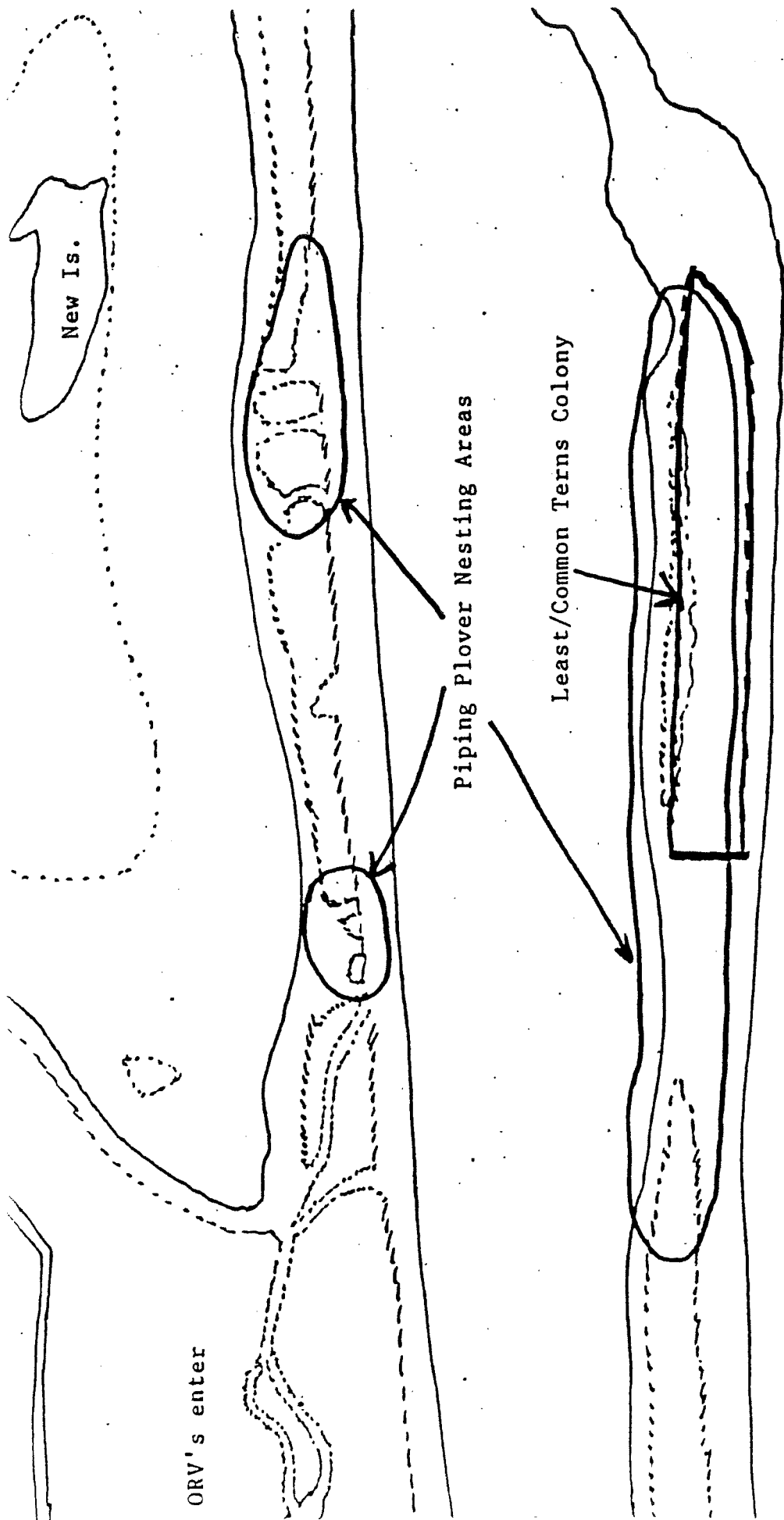
1-10 Least Terns continue to fledge and depart

10-15 Remove Least Tern fence

1-10 Last plovers depart

10-15 Remove all signs and symbolic fence

15-30 Prepare reports for conservation



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Approximate Rare Species Habitat

Based on 1990 Conditions

Nauset Spit Barrier Beach

(from Callahan's Pass to tip 2.1 mi.)

One inch = 515 feet



310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

10.27: Coastal Beaches

(1) Preamble. Coastal beaches, which are defined to include tidal flats, are significant to storm damage prevention, flood control and the protection of wildlife habitat. In addition, tidal flats are likely to be significant to the protection of marine fisheries and where there are shellfish, to land containing shellfish.\*

Coastal beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions.

Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves.

A coastal beach at any point serves as a sediment source for coastal areas down-drift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore.

Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by man-made structures reduce the ability of the coastal beach to perform these functions.

A number of birds also nest in the coastal berm, between the top of a dune and the high tide line. In addition, isolated coastal beaches on small islands are important as haul out areas for harbor seals.

Tidal flats are likely to be significant to the protection of marine fisheries and wildlife habitat because they provide habitats for marine organisms such as polychaete worms and mollusks, which in turn are food sources for fisheries and migratory and wintering birds. Coastal beaches are extremely important in recycling of nutrients derived from storm drift and tidal action. Vegetative debris along the drift line is vital for resident and migratory shorebirds, which feed largely on invertebrates which eat the vegetation. Below the drift line in the lower intertidal zone are infauna (invertebrates such as mollusks and crustacea) which are also eaten by shore birds.

Tidal flats are also sites where organic and inorganic materials may become entrapped and then returned to the photosynthetic zone of the water column to support algae and other primary producers of the marine food web.

When a proposed project involves the dredging, filling, removing, or altering of a coastal beach, the issuing authority shall presume that the coastal beach is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a coastal beach does not play a role in storm damage prevention, flood control, or protection of wildlife habitat, or that tidal flats do not play a role in the protection of marine fisheries or land containing shellfish, and if the issuing authority makes a written determination to such effect.

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\*For regulations concerning land containing shellfish see 310 CMR 10.34.

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

10.27: continued

When coastal beaches are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:

- (a) volume (quantity of sediments) and form, and
- (b) the ability to respond to wave action.

When coastal beaches are significant to the protection of marine fisheries or wildlife habitat, the following characteristics are critical to the protection of those interests:

- (a) distribution of sediment grain size,
- (b) water circulation
- (c) water quality, and
- (d) relief and elevation.

When tidal flats are in a designated port area, 310 CMR 10.26(1) through 10.26(4) shall apply. When tidal flats are significant to land containing shellfish, 310 CMR 10.34(1) through 10.34(8) shall apply.

(2) Definitions.

- (a) Coastal Beach means unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.
- (b) "Tidal Flat" means any nearly level part of a coastal beach which usually extends from the mean low water line landward to the more steeply sloping face of the coastal beach or which may be separated from the beach by land under the ocean.

WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATIONS SHALL APPLY:

(3) 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.

(4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:

- (a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume. In evaluating necessity, coastal engineering, physical oceanographic and/or coastal geologic information shall be considered.
- (b) Immediately after construction any groin shall be filled to entrapment capacity in height and length with sediment of grain size compatible with that of the adjacent beach.
- (c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically dredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

(5) Notwithstanding 310 CMR 10.27(3), beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

WHEN A TIDAL FLAT IS DETERMINED TO BE SIGNIFICANT TO MARINE FISHERIES OR THE PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATION SHALL APPLY:

(6) In addition to complying with the requirements of 310 CMR 10.27 (3) and 10.27(4), a project on a tidal flat 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 and wildlife habitat caused by:

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

10.27: continued

- (a) alterations in water circulation;
- (b) alterations in the distribution of sediment grain size; and
- (c) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(7) Notwithstanding the provisions of 310 CMR 10.27(3) through 10.27(6), no project may be permitted which will have any adverse effect on specified habitat sites or rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.28: Coastal Dunes

(1) Preamble. All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat.

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding.

A number of birds, most commonly terns and gulls, nest at the base or sides of dunes. In some dune systems other birds also nest in the interdunal area, the species being determined by the plant community structure, topography, and hydrologic regime of the area. In a few dune systems, wet meadows or vernal pool habitats occur, which serve as important feeding areas for a wide variety of bird species.

When a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect.

When a coastal dune is significant to storm damage prevention, flood control or the protection of wildlife habitat, the following characteristics are critical to the protection of those interest(s):

- (a) the ability of the dune to erode in response to coastal beach conditions;
- (b) dune volume;
- (c) dune form, which must be allowed to be changed by wind and natural water flow;
- (d) vegetative cover;
- (e) the ability of the dune to move landward or laterally; or
- (f) the ability of the dune to continue serving as bird nesting habitat.

(2) Definition. Coastal Dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

WHEN A COASTAL DUNE IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL OR THE PROTECTION OF WILDLIFE HABITAT, THE FOLLOWING REGULATIONS SHALL APPLY:

10.28: continued

- (3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:
- (a) affecting the ability of waves to remove sand from the dune;
  - (b) disturbing the vegetative cover so as to destabilize the dune;
  - (c) causing any modification of the dune form that would increase the potential for storm or flood damage;
  - (d) interfering with the landward or lateral movement of the dune;
  - (e) causing removal of sand from the dune artificially; or
  - (f) interfering with mapped or otherwise identified bird nesting habitat.

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28 (3)(b) through 10.28(3)(e). Such an accessory project may include, but is not limited to, a small shed or a small parking area for residences. It shall not include coastal engineering structures.

(5) The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

- (a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;
- (b) fencing and other devices designed to increase dune development; and
- (c) plantings compatible with the natural vegetative cover.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.29: Barrier Beaches

- (1) **Preamble.** Barrier beaches are significant to storm damage prevention and flood control and are likely to be significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, the protection of land containing shellfish.\*

Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds and fresh water marshes and ponds, which are in turn important to marine fisheries and protection of wildlife habitat. Barrier beaches and the dunes thereon are also important to the protection of wildlife habitat in the ways described in 310 CMR 10.27(1) (coastal beaches) and 10.28(1) (coastal dunes).

Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action. The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash and tidal inlet deposition. Barrier beaches in Massachusetts undergo a landward migration caused by the landward movement of sediment by wind, storm wave overwash and tidal current processes. The continuation of these processes maintains the volume of the landform which is necessary to carry out the storm and flood buffer function.

When a proposed project involves removal, filling, dredging or altering of a barrier beach, the issuing authority shall presume that the barrier beach, including all of its coastal dunes, is significant to the interest(s) specified above. This presumption may be overcome only upon a clear showing that a barrier beach, including all of its coastal dunes, does not play a role in storm damage prevention, flood control, or the protection of marine fisheries, wildlife habitat, or land containing shellfish, and if the issuing authority makes a written determination to such effect.

\*For regulations concerning land containing shellfish see 310 CMR 10.34.

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

10.29: continued

When a barrier beach is significant to storm damage prevention and flood control, the characteristics of coastal beaches, tidal flats and coastal dunes listed in 310 CMR 10.27(1) and 10.28(1) and their ability to respond to wave action, including storm overwash sediment transport, are critical to the protection of the interests specified above.

(2) Definition. Barrier Beach means a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system. A barrier beach may be joined to the mainland at one or both ends.

(3) When a Barrier Beach is Determined to be Significant to Storm Damage Prevention, Flood Control, Marine Fisheries or Protection of Wildlife Habitat. 310 CMR 10.27(3) through 10.27(6) (coastal beaches) and 10.28(3) through 10.28(5) (coastal dunes) shall apply to the coastal beaches and to all coastal dunes which make up a barrier beach.

(4) Notwithstanding the provisions of 310 CMR 10.29(3), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

10.37: Rare Species

Ninety (90) days or less prior to the filing of a Notice of Intent, the applicant shall notify the Massachusetts Natural Heritage and Endangered Species Program (hereinafter referred to as the Program) certified mail or hand delivery (so that the Program will have received such notification prior to the filing of the

Notice of Intent), of any proposed work which would alter a resource area identified on the most recent Estimated Habitat Map (if any) of state-listed vertebrate and invertebrate animal species occurrences in resource areas, provided to the conservation commission by the Program. Such map shall be based on the estimated geographical extent of the habitats of all such species for which a reported occurrence within the last 25 years has been accepted by the Program and incorporated into its official data base. Notification by the applicant to the Program shall include a completed copy of Appendix A of a Notice of Intent (Form 3) or Abbreviated Notice of Intent (Form 4), as well as a copy of an 8 1/2" x 11" section of the USGS quadrangle map of the area, containing sufficient information for the Program to locate the precise boundaries of the portion(s) of the wetland resource area(s) to be altered.

Within 45 days of receipt by the Program of a fully completed Appendix A, or within 30 days of the filing of a Notice of Intent for which a fully completed Appendix A has been received by the Program in a timely manner (whichever comes first), the Program shall determine whether any state-listed species identified on the aforementioned map are likely to continue to be located on or near the site of the original occurrence and, if so, whether the area to be altered by the proposed project is in fact part of such species' habitat. Such determination shall be presumed by the issuing authority to be correct. Any proposed project which would alter a resource area that is not located on the most recent Estimated Habitat Map (if any) provided to the conservation commission, shall be presumed not to be within a rare species' habitat. Both of these presumptions are rebuttable and may be overcome upon a clear showing to the contrary. If the conservation commission fails to receive a response from the Program within 30 days of the filing of a Notice of Intent for which an Appendix A is or should have been filed in a timely manner, it shall issue its Order of Conditions based on available information; however, the fact that a proposed project would alter a resource area that is located on an Estimated Habitat Map shall not be considered sufficient evidence in itself that such project is in fact within the habitat of a rare species.

If the Program determines that a resource area which would be altered by a proposed project is in fact within the habitat of a state-listed species, it shall provide in writing to the applicant and (after a Notice of Intent has been filed by the applicant) to the Conservation Commission and the Department, the identification of the species whose habitat would be altered by the proposed project, and all other relevant information which the Program has regarding the species' location and habitat requirements, insofar as such information may assist the applicant and the issuing authority to determine whether the project is or can be designed so as to meet the performance standard set in this Section, below.

Notwithstanding 310 CMR 10.24(7) and 10.25 and 310 CMR 10.27 through 10.35, if a proposed project is found by the issuing authority to alter a resource area which is part of the habitat of a state-listed species, such project shall not be permitted to have any short or long term adverse effects on the habitat of the local population of that species. A determination of whether or not a proposed project will have such an adverse effect shall be made by the issuing authority. However, a written opinion of the Program on whether or not a proposed project will have such an adverse effect shall be presumed by the issuing authority to be correct. This presumption is rebuttable and may be overcome upon a clear showing to the contrary.

The conservation commission shall not issue an Order of Conditions under 310 CMR 10.05(6) regarding any project for which an Appendix A is required for at least 30 days after the filing of the Notice of Intent or Abbreviated Notice of Intent, unless the Program before such time period has elapsed has either determined that the resource area(s) which would be altered by the project is not in fact within the habitat of a state-listed species or, if it has determined that such resource area(s) is in fact within rare species habitat, rendered a written opinion as to whether the project will have an adverse effect on that habitat.

Notwithstanding any other provision of this Section, should an Environmental Impact Report be required for a proposed project under the Massachusetts Environmental Policy Act, as determined by 301 CMR 11.00 the performance standard established under this Section shall only apply to proposed projects which would alter the habitat of a rare species for which an occurrence has been entered into the official data base of the Massachusetts Natural Heritage and Endangered Species Program prior to the time that the Secretary of the Executive Office of Environmental Affairs has determined, in accordance with the provisions of 301 CMR 11.09(4), that a final Environmental Impact Report for that project adequately and properly complies with the Massachusetts Environmental Protection Act (unless, subsequent to that determination, the Secretary requires supplemental information concerning state-listed species, in



## TOWN OF ORLEANS

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BOARD OF  
SELECTMEN

TOWN  
ADMINISTRATOR

August 21, 2014

Town of Eastham  
Conservation Commission  
555 Old Orchard Road  
Eastham, MA 02642

RE: Cease and Desist Order – Nauset Spit Over Sand Vehicle Program

Dear Commissioners:

We are in receipt of your cease and desist order dated August 13, 2014 for the Town of Orleans over sand vehicle program. We understand that this matter is on your August 26 meeting agenda to ratify the order issued by the Chairman.

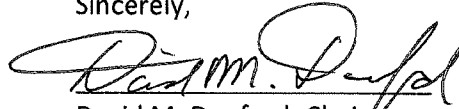
We respectfully request that you defer taking any action on August 26 and allow the Town of Orleans to continue to operate our over sand vehicle program for the remainder of the season. We have unanimously voted to file a Notice of Intent and will have an application to you by September 5 in order to make the agenda for the September 23 meeting.

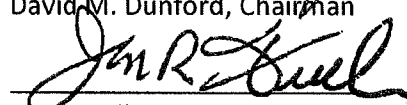
Orleans representatives including the Chairman of our Park Commission, Town Administrator, Natural Resources Manager and Conservation Agent will be in attendance at your August 26 meeting to review the Town's existing over sand vehicle program that Orleans has managed on the entire length of Nauset Spit since 1991 under an Order of Conditions from the Orleans Conservation Commission. In addition to answering any questions that you may have about the program, we would like to highlight the environmental safeguards and management requirements that are already in place to ensure the protection of the resource area as well as state and federal endangered and protected wildlife species on Nauset Spit.

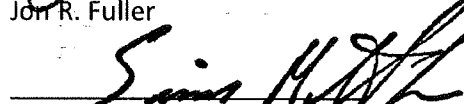
Finally, we are attaching a copy of our letter to the Eastham Board of Selectmen and our Town Counsel's letter to Superintendent Price at the Cape Cod National Seashore for your information and review.

Eastham Conservation Commission  
August 21, 2014  
Page 2

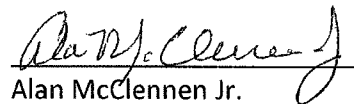
Sincerely,

  
David M. Dunford, Chairman

  
Jon R. Fuller

  
Simon McGrath Jr.

  
John Hodgson

  
Alan McClennen Jr.  
Board of Selectmen

Cc: Orleans Conservation Commission  
Eastham Board of Selectmen  
Superintendent George Price, CCNS



9/3  
Agenda

**LAW OFFICES OF MICHAEL D. FORD**

ATTORNEYS AT LAW

72 MAIN STREET, P.O. BOX 485

WEST HARWICH, MA 02671

TEL. (508)430-1900 FAX (508)430-9979

LAWOFFICEOFMICHAELFORD@VERIZON.NET

MICHAEL D. FORD

JEFFREY M. FORD

M. LINDSAY MARCHIO

August 21, 2014

George E. Price, Jr.  
Superintendent  
Cape Cod National Seashore  
99 Marconi Site Road  
Wellfleet, MA 02667

Dear Mr. Price:

As Town Counsel for the Town of Orleans, I am sending this letter in response to your email to Mr. Larry Spaulding (Orleans' CCNS Advisory Committee representative), dated August 19, 2014 concerning the Nauset Spit Orleans/Eastham issue. In your email message you state that much of the land north of the Orleans Town line is owned by the United States. Further, you advise that you received an enforcement notification from the Eastham Conservation Commission with a cease and desist order because you are allowing ORV's to cross NPS land without a permit and in violation of Eastham bylaws.

I am writing to advise you that research conducted on behalf of the Town of Orleans indicates that as a result of accretion the portion of Nauset Spit located in the Town of Eastham is owned by the Town of Orleans.

Specifically, the Woods Hole Group, Inc., at the request of the Town of Orleans, conducted extensive geological research of the Nauset Beach area and prepared a report dated January 2006 entitled "Final Report Analysis of Physical Changes and Management Alternatives for the Nauset Beach Area, Cape Cod, Massachusetts." The Woods Hole Group research revealed that certain land in the Town of Orleans just south of the Eastham Town line eroded from its southerly end and, as a result, no longer existed in the Town of Orleans by the year 1952. During the same time period, the land area known as Nauset Spit and located on the easterly side of the Nauset Heights subdivision in the Town of Orleans extended in a northerly direction as a result of accretion. This accreted land is the area known as Nauset Spit and by the year 1970 its northern terminus was located just southerly of the Eastham Town Line. As a result of additional accretion, by the year 1975 Nauset Spit extended over the line into the Town of Eastham. I am attaching copies of pictures showing the migration of Nauset Spit during the period 1938, 1952, 1970 and 1975. I am also attaching copies of Orleans Planning Maps for years 1990, 2001, 2005, 2009, 2010 and 2011. The 1990 Orleans Planning Map shows the

additional northerly migration of Nauset Spit. The 1997 Orleans Planning Map shows the break in Nauset Spit with the new inlet. The 2001, 2005, 2009, 2010 and 2011 Orleans Planning Maps show the additional accretion to the northern terminus of Nauset Spit and the 2011 Map shows the inlet in Eastham. As a result of the erosion of the land in Eastham, the CCNS parcels shown on your June 2011 map appear to no longer exist. Based on accretion and the northerly migration of the land, the portion of Nauset Spit in the Town of Eastham is owned by the Town of Orleans.

It is well-settled property law that where accretions to the shoreline result in gain to the uplands, "the line of ownership follows the changing water line." *Burke v. Commonwealth*, 283 Mass. 63, 68 (1933); see *Allen v. Wood*, 256 Mass. 343, 349 (1926). Similarly, erosions lost to the tide "result in a loss of the eroded property for the owner." *Lorusso v. Akapesket Improvement Ass'n, Inc.*, 408 Mass. 772 (1990); *Michaelson v. Silver Beach Improvement Ass'n, Inc.*, 342 Mass. 251, 258 (1961).

The Town of Orleans has also received a "cease and desist" Enforcement Order from the Eastham Conservation Commission with respect to the oversand vehicle program on the portion of Nauset Spit in Eastham. The Town of Orleans intends to file a Notice of Intent with the Eastham Conservation Commission for a permit authorizing the activities. The Town of Orleans currently manages the area in Eastham in accordance with an Order of Conditions issued by the Orleans Conservation Commission and intends to continue to manage and protect the area consistent with federal, state and local standards and guidelines, including without limitation, those pertaining to rare and endangered shorebirds.

If you have any questions or would like to discuss this matter in more detail please do not hesitate to call.

Very truly yours,



Michael D. Ford  
Town Counsel

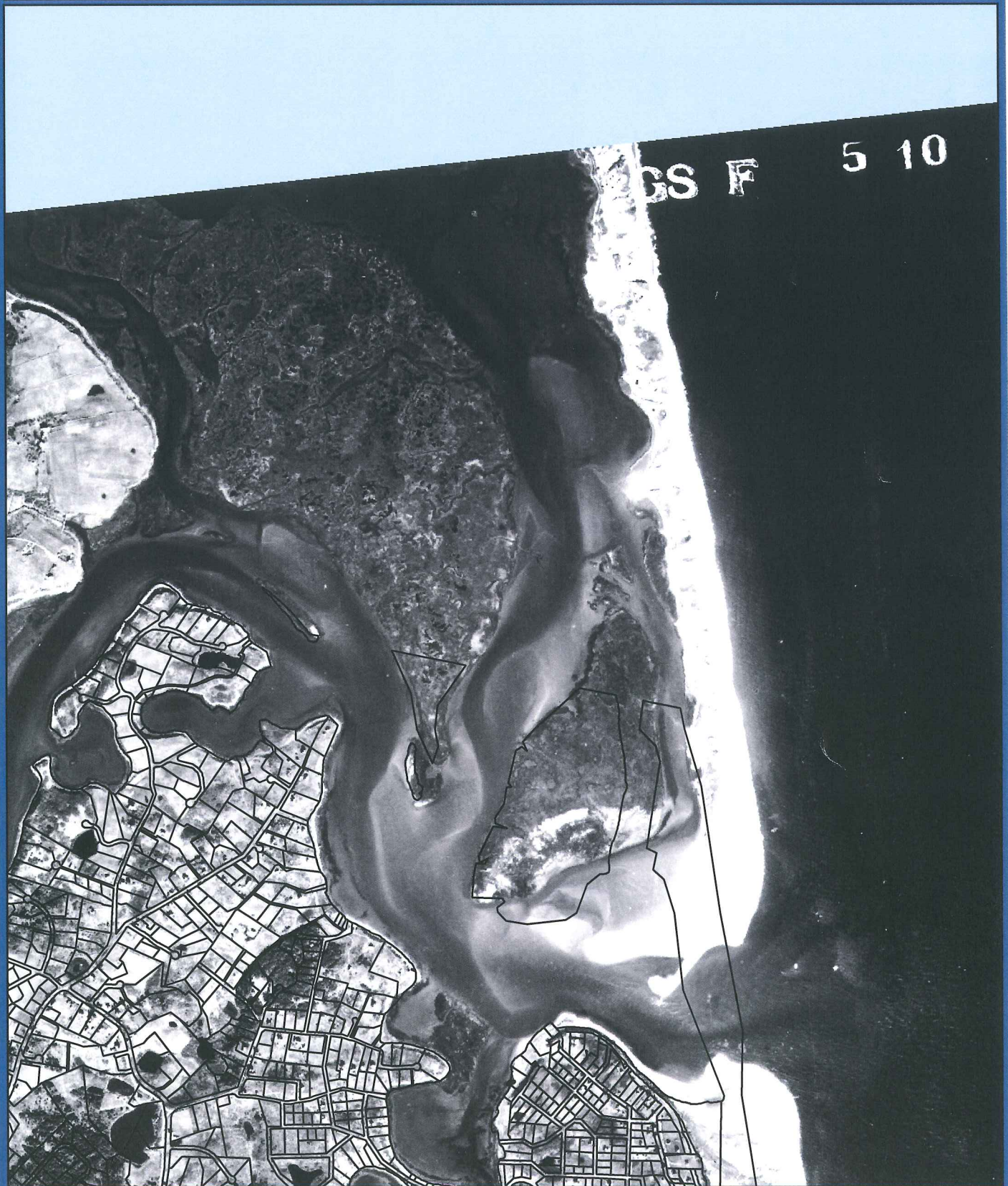
MDF/

cc: John Kelly, Town Administrator  
Orleans Conservation Commission





1938



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

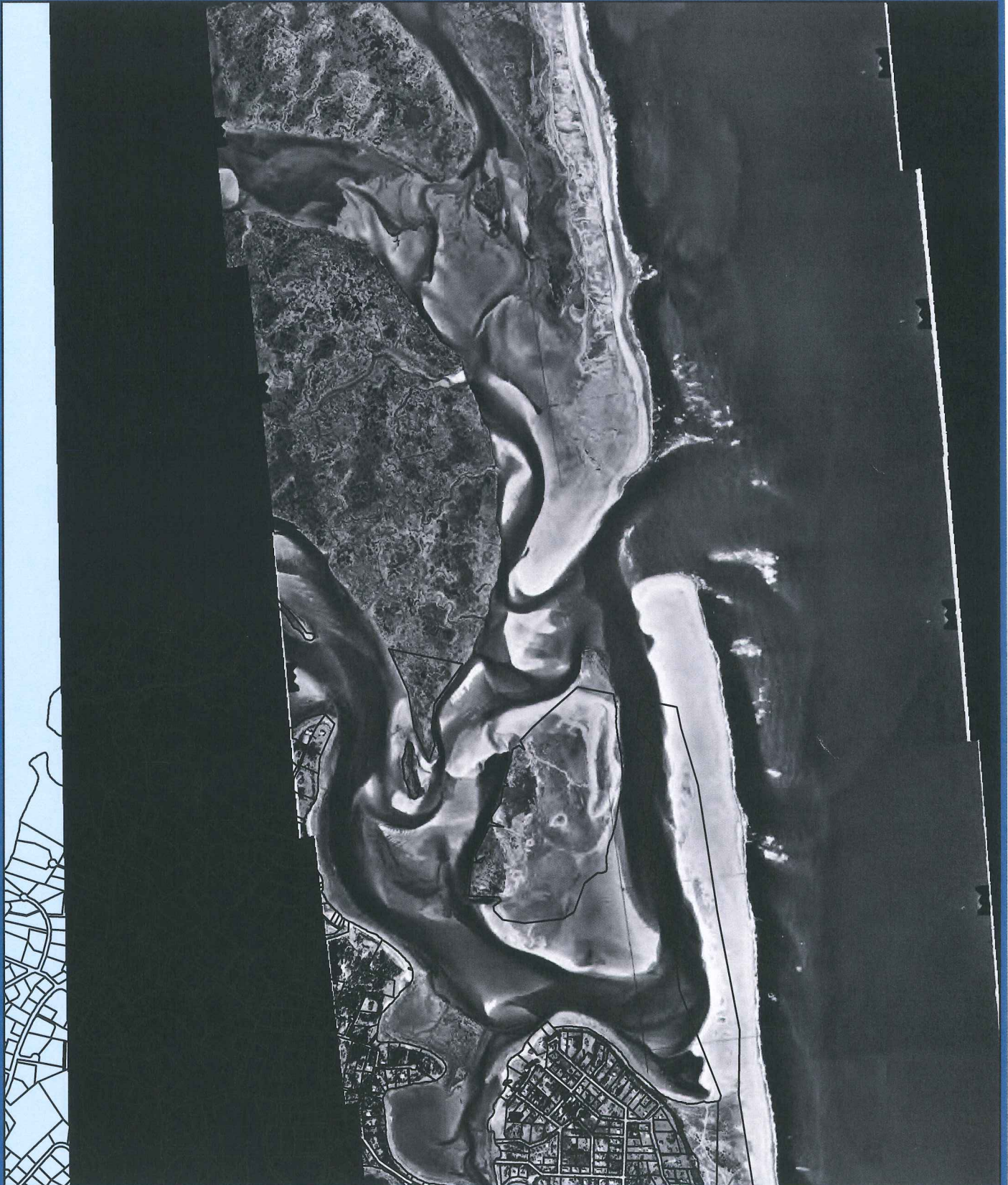


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1975



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

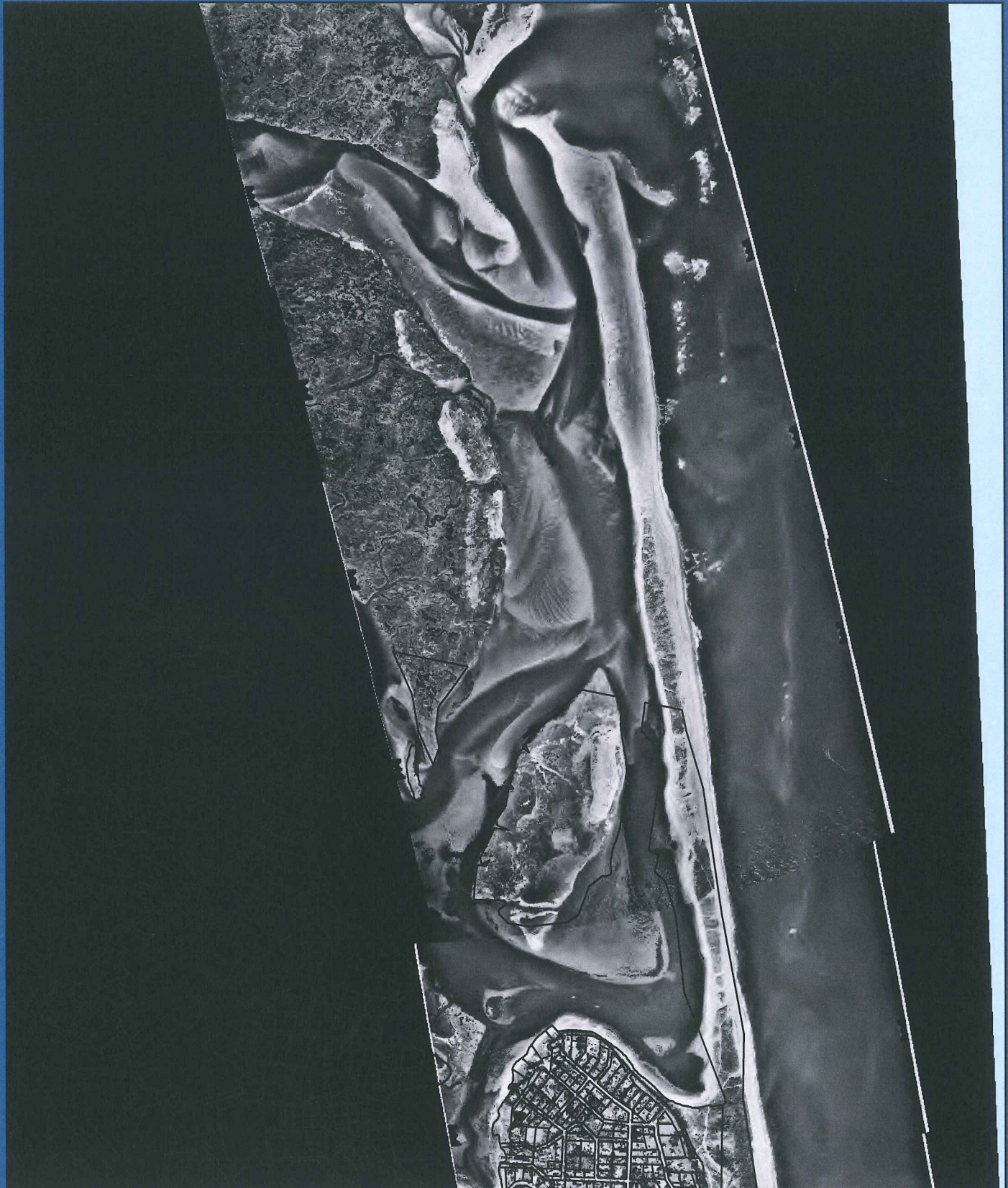


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1990



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011



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1997



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

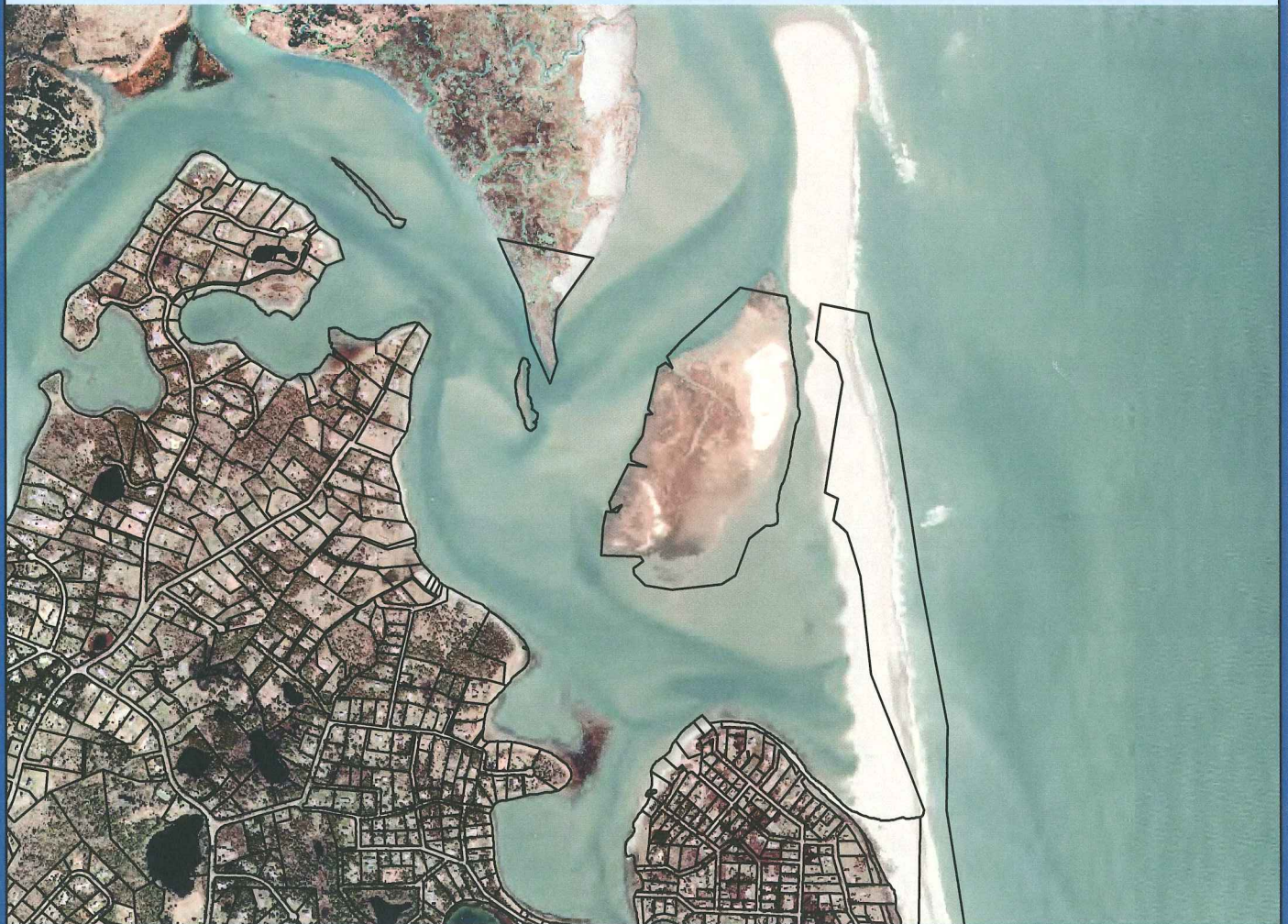


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2001



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

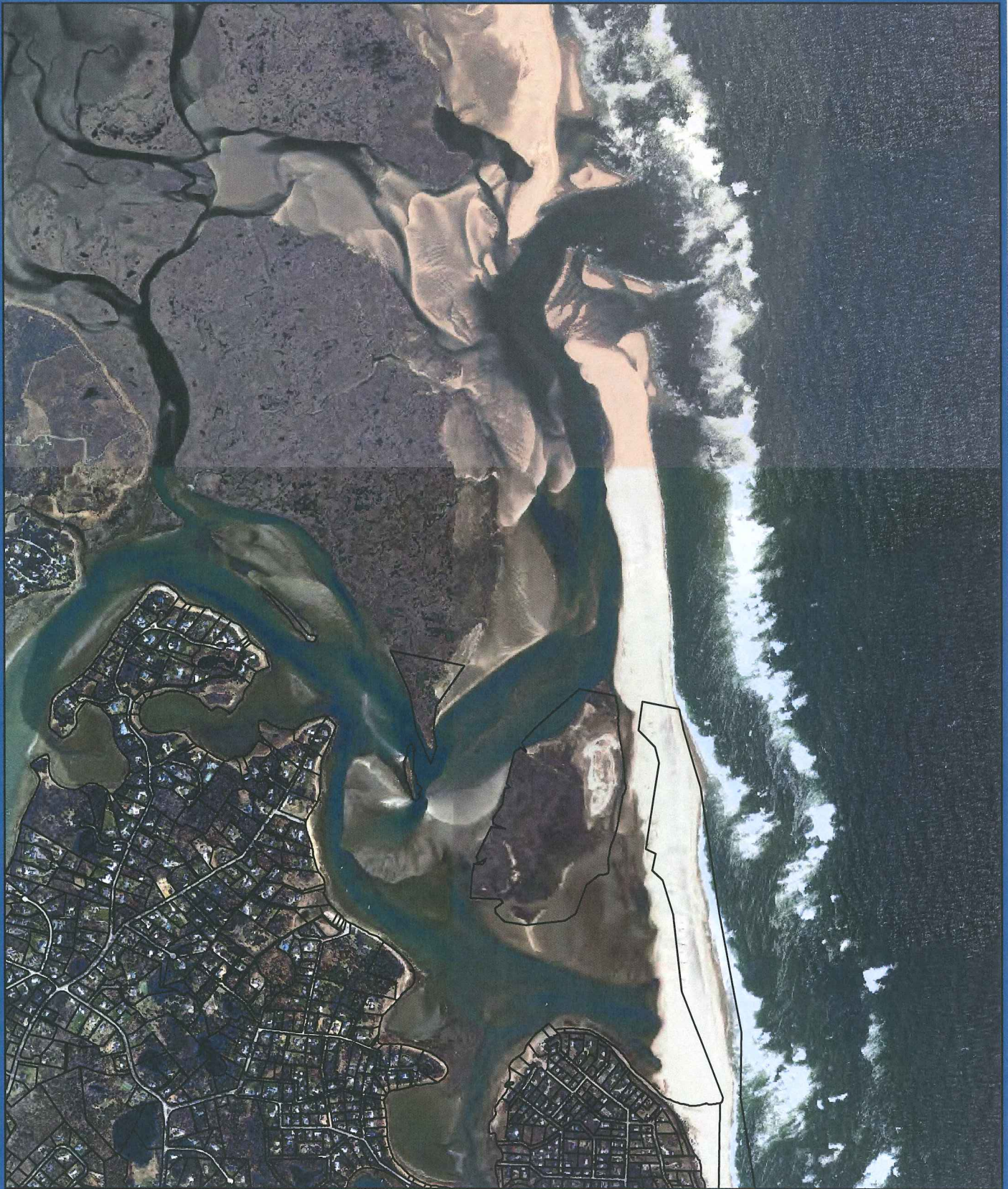


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2005



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

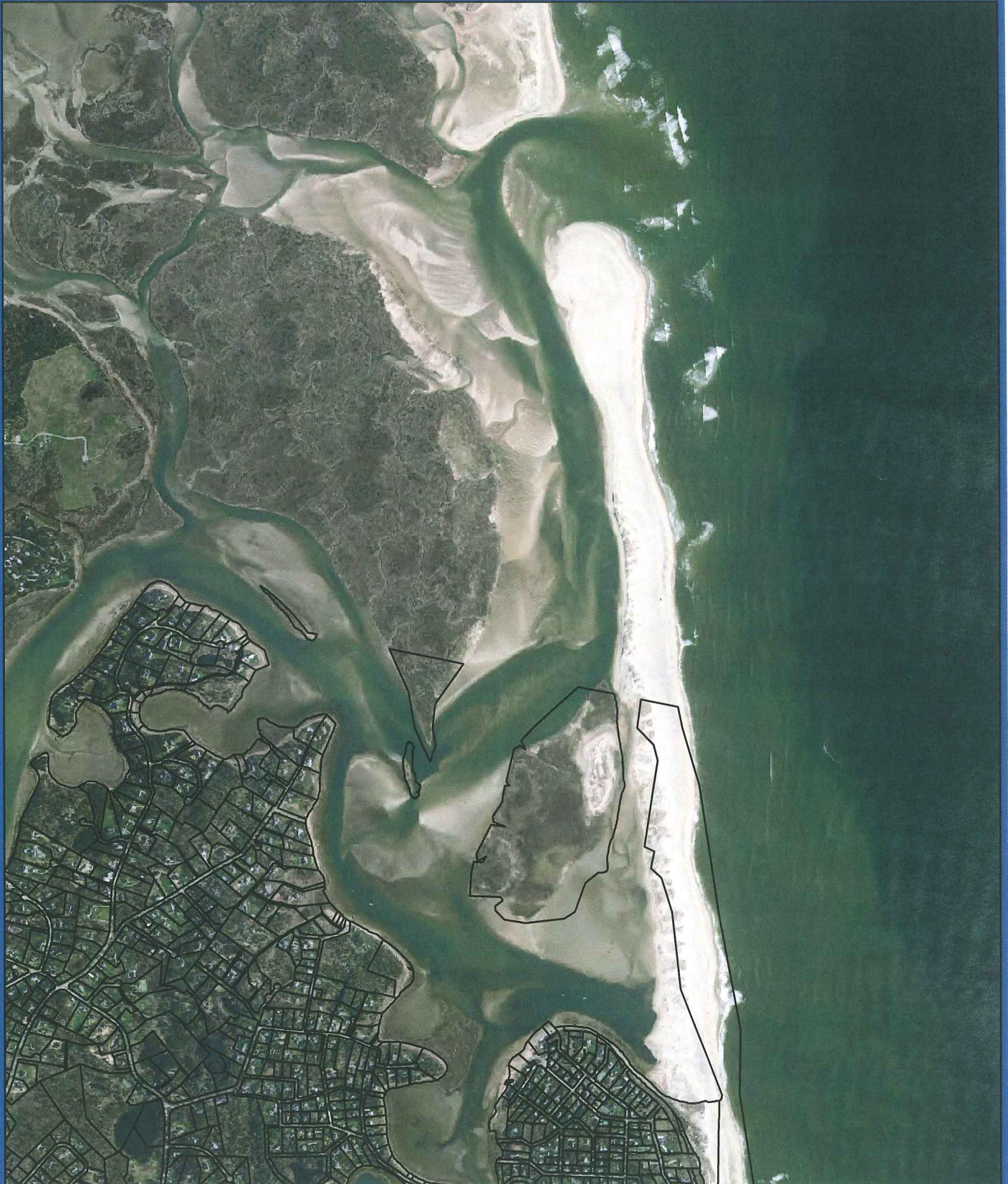


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2009



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011



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2010



This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

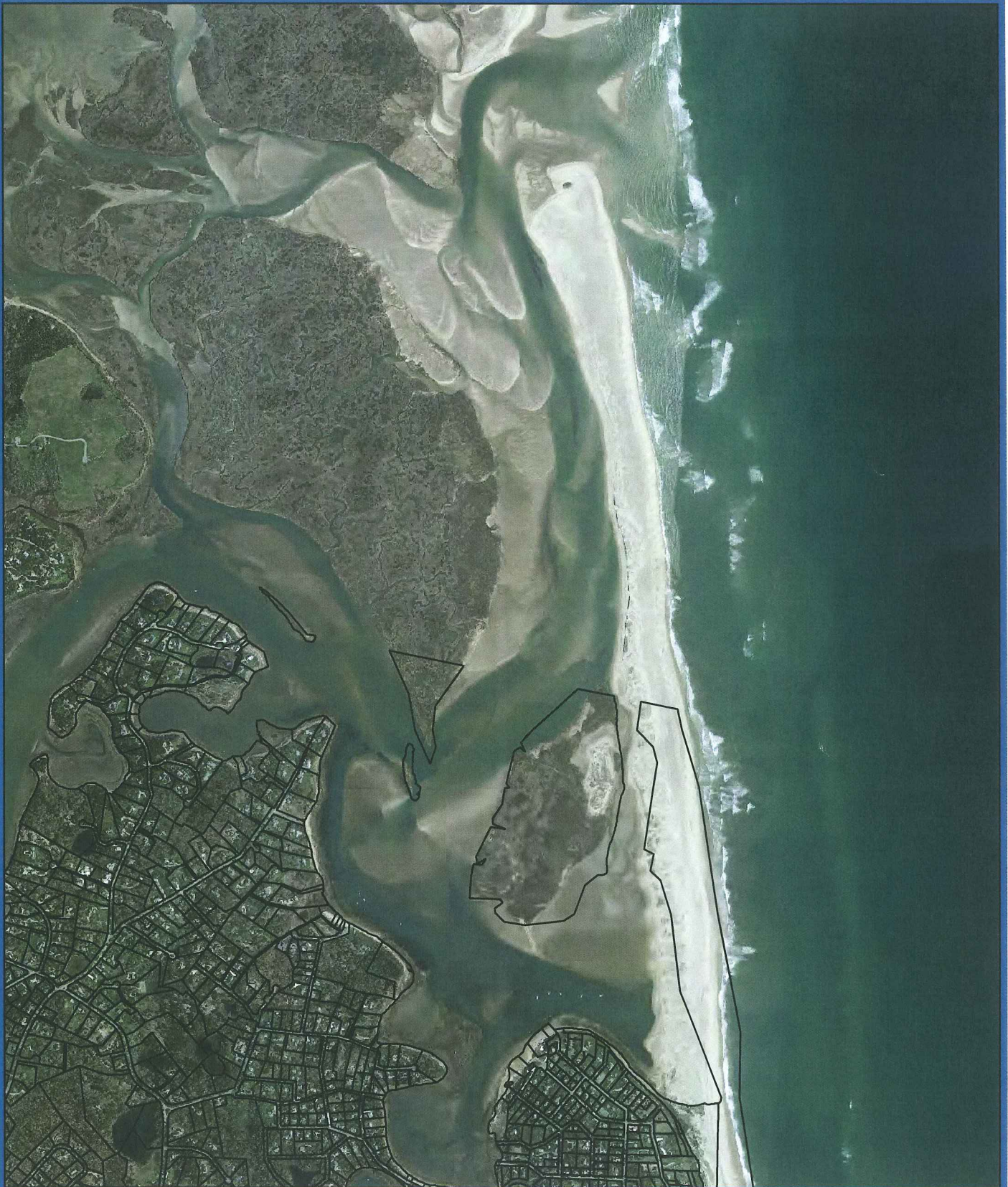


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2011

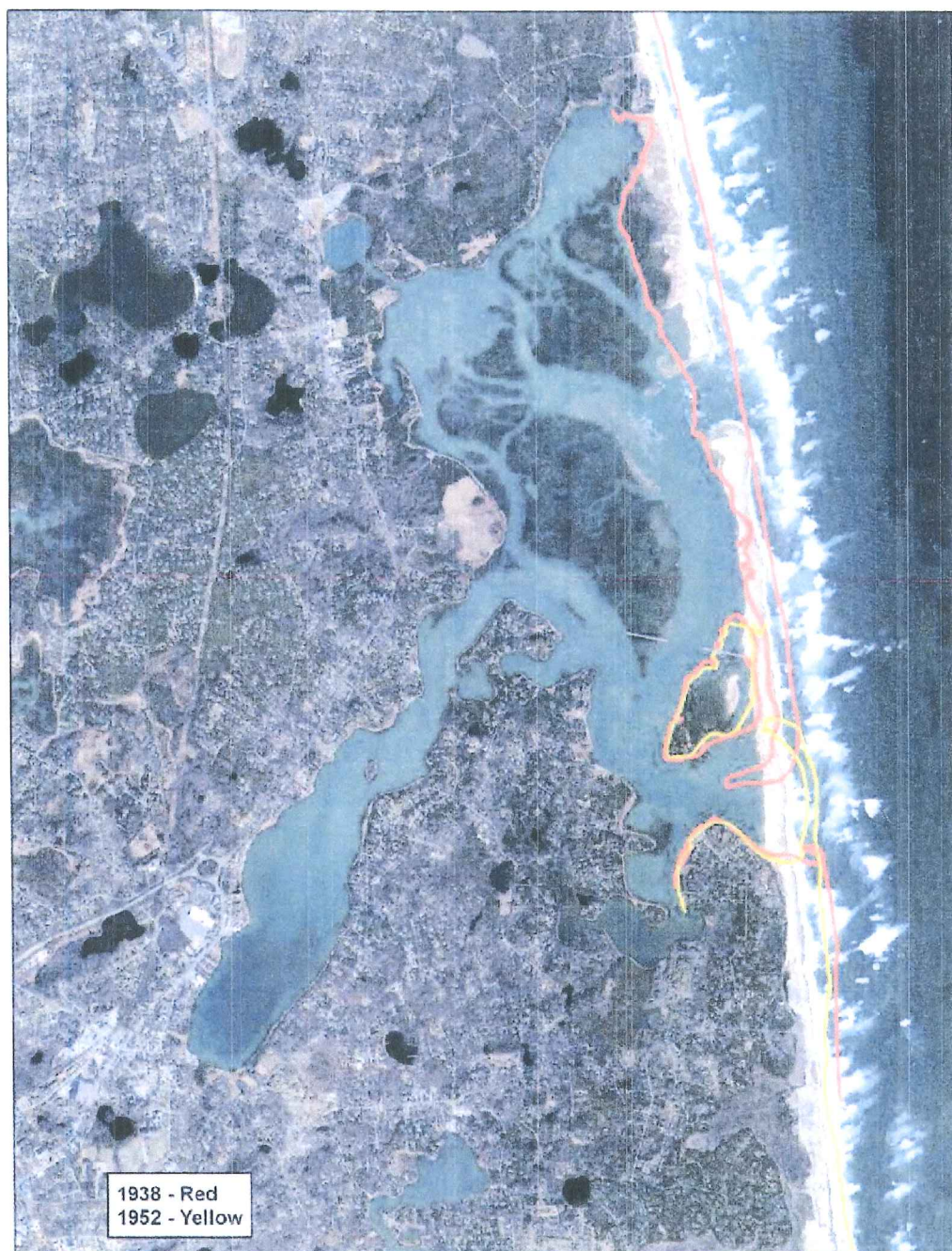


This map is illustrative and intended for planning purposes only. Orleans Planning, 2011

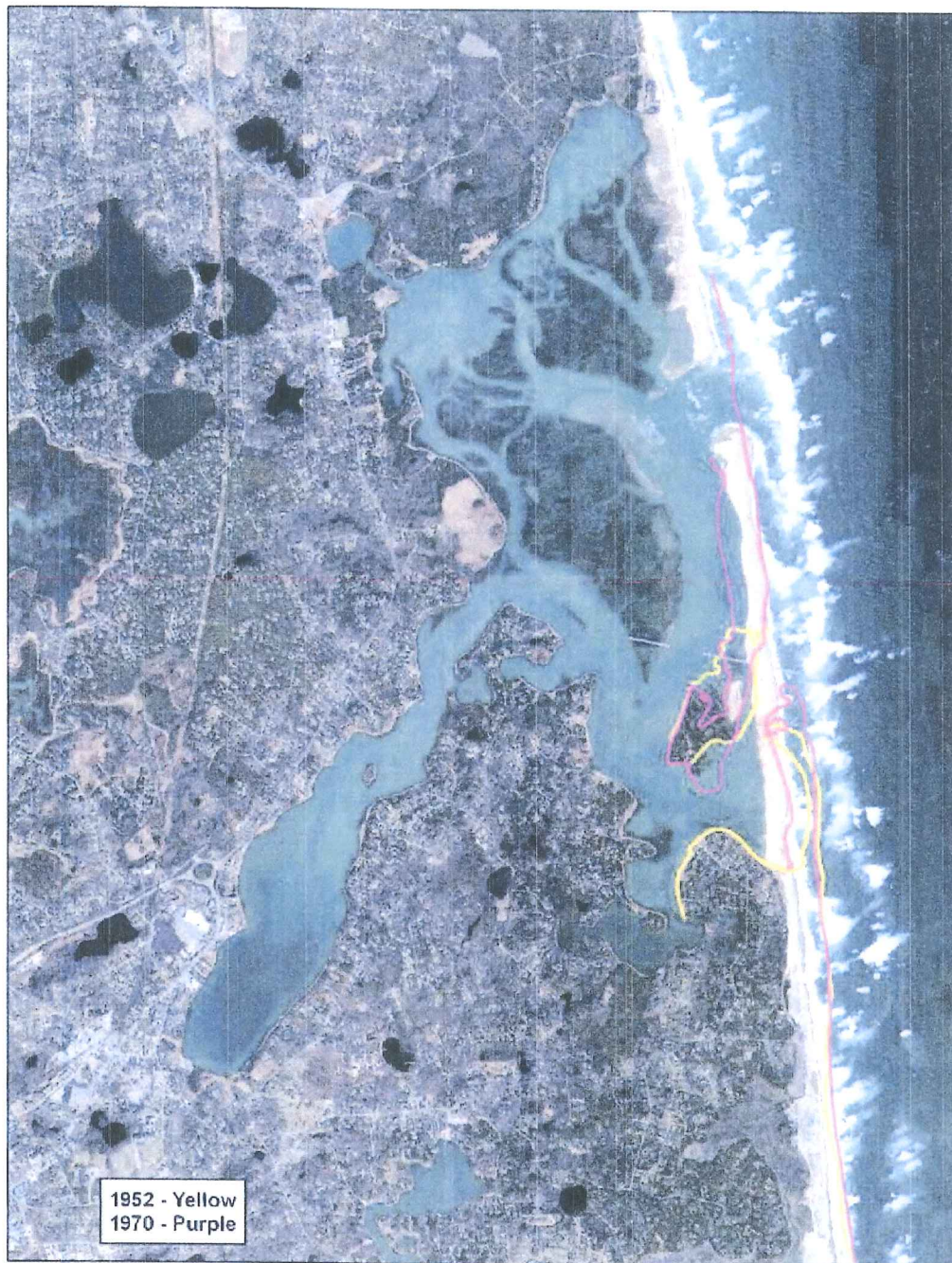


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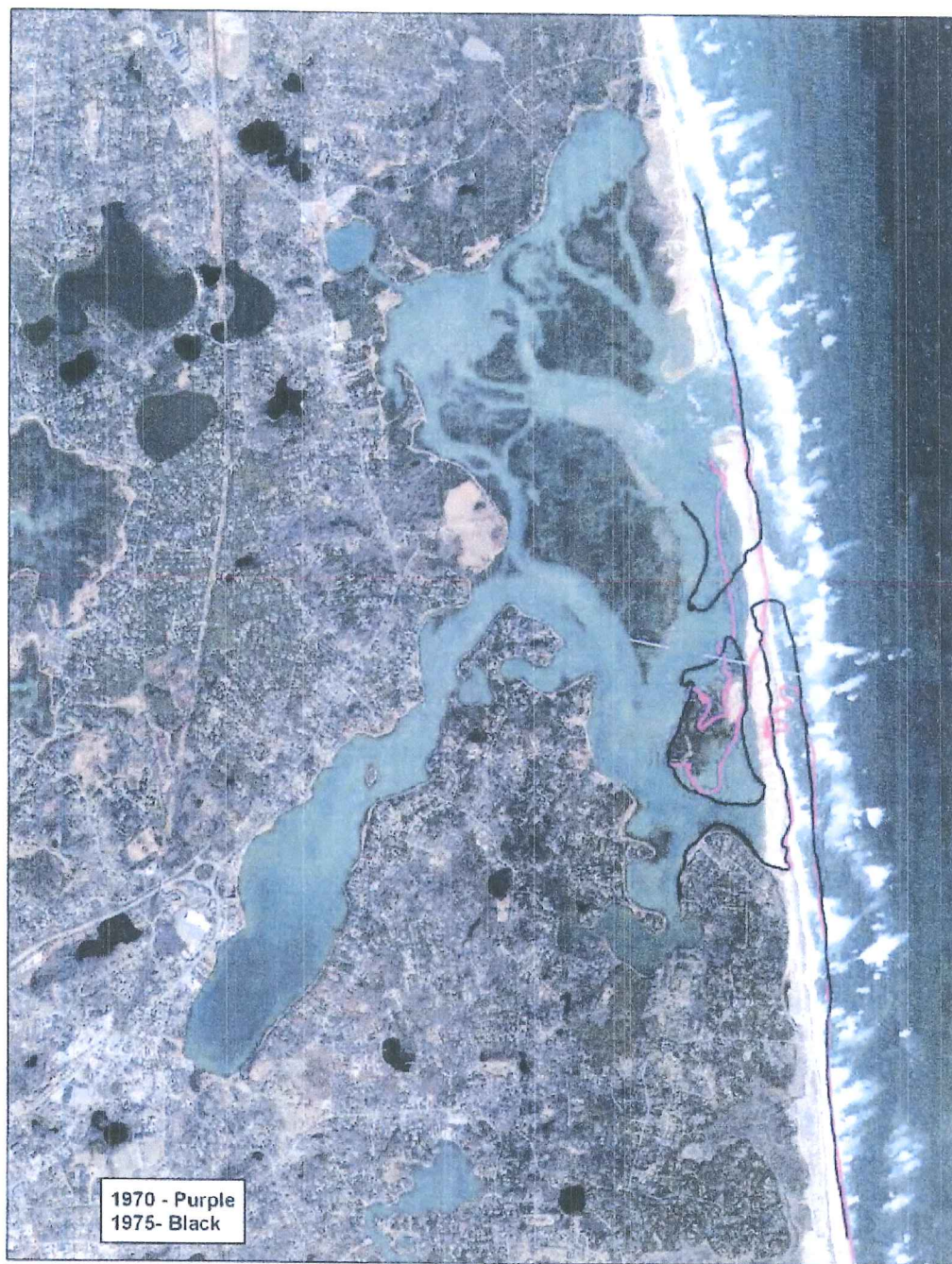














## TOWN OF ORLEANS

19 SCHOOL ROAD

ORLEANS

MASSACHUSETTS 02653-3699

Telephone (508) 240-3700 — Fax (508) 240-3703

<http://www.town.orleans.ma.us>

BOARD OF  
SELECTMEN

TOWN  
ADMINISTRATOR

August 21, 2014

Town of Eastham  
Board of Selectmen  
2500 State Highway  
Eastham, MA 02642

RE: Off Road Vehicles on Nauset Spit

Dear Colleagues:

Thank you for your letter dated August 7, 2014 confirming your attendance at our upcoming joint meeting on September 10, 2014 to discuss Nauset Spit.

With respect to the references in your letter to actions taken by your Conservation Commission, we acknowledge receipt of the cease desist order from your Conservation Commission but note that it was not issued until August 13, 2014.

Your letter goes on to state that the order will be issued to the Town of Orleans "*due to the management of your staff invites users to the area and the vehicle patrols by staff*". As you know, the Town of Orleans has managed an ORV program on the entire Nauset Spit since 1991 under an Order of Conditions from the Orleans Conservation Commission. To ensure public safety and the protection of the resource area and state and federal endangered species we continue to patrol the full length of Nauset Spit which is Town of Orleans property.

We have not invited ORV users to the area of the beach located in Eastham since April when we began distributing the attached addendum to the Nauset Beach Rules and Regulations for ORV's using the North End of Nauset Beach to all Orleans resident sticker holders when they purchased their 2014 stickers and posted the information on the Town's website. The map shows the boundary line with Eastham and includes the notation that ORV's are prohibited in Eastham. If you have specific instances or activities that support your contention that we continue to invite users to this area we would appreciate receiving the additional details.

As we indicated in our July 16 letter, the warning sign that we had previously posted at the Town boundary line on Nauset Spit was stolen soon after installation. We believe Town staff has made a good faith effort to educate our residents regarding the restrictions that exist on Nauset Spit and do not feel that that a "cease and desist" order being issued to the Town of Orleans is either necessary or warranted at this time.

Eastham Board of Selectmen  
August 21, 2014  
Page 2


Notwithstanding the above, be advised that the Board has voted unanimously to file forthwith a Notice of Intent with your Conservation Commission for your permission to conduct an ORV program on the Town of Orleans property located on that portion of Nauset Spit located in the Town of Eastham (see attached letter to Eastham Conservation Commission).

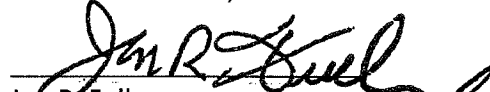
With respect to your reference to a cease and desist order sent to the National Park Service, please see attached letter to Mr. George Price, Superintendent of the Cape Cod National Seashore, from our Town Counsel, Michael D. Ford, which is self-explanatory.

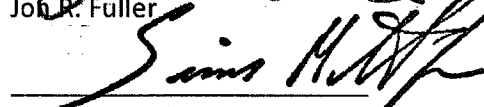
With respect to your statement that your Conservation Commission has notified our Conservation Commission of a violation of the their existing Order of Conditions, a check with our Conservation Agent indicates that as of this date no such notice has yet been received. Please advise when such notice was sent and forward a copy to our Board for review.

We look forward to our discussion of the issues involving Nauset Spit at our joint meeting.

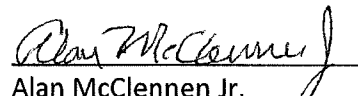
Sincerely,

  
David M. Dunford, Chairman

  
Jon R. Fuller

  
Sims McGrath Jr.

  
John Hodgson

  
Alan McClennen Jr.  
Board of Selectmen

Cc: Orleans Conservation Commission  
Eastham Conservation Commission  
Superintendent George Price, CCNS



# ADDENDUM TO

## Nauset Beach Rules and Regulations for ORVs

using the North End of Nauset Beach ~ Resident Orleans (R-O) Sticker only

Self-Contained, Pocket, Resident-Chatham, and Over-Sand Nonresident Prohibited on North End = Minimum Fine \$100

### ORLEANS

Inspections for permits may be obtained:  
9 am - 4 pm on all days open

May 1 - September 1  
Thursday through Monday  
139 Main Street  
(former American Legion Building, lower level)

**Note: No inspection/permit will be issued on July 4th.**

September 2 - April 30, 2015  
Weekdays by appointment only at  
Parks & Beaches Office:  
Call 508-240-3700 ext. 465

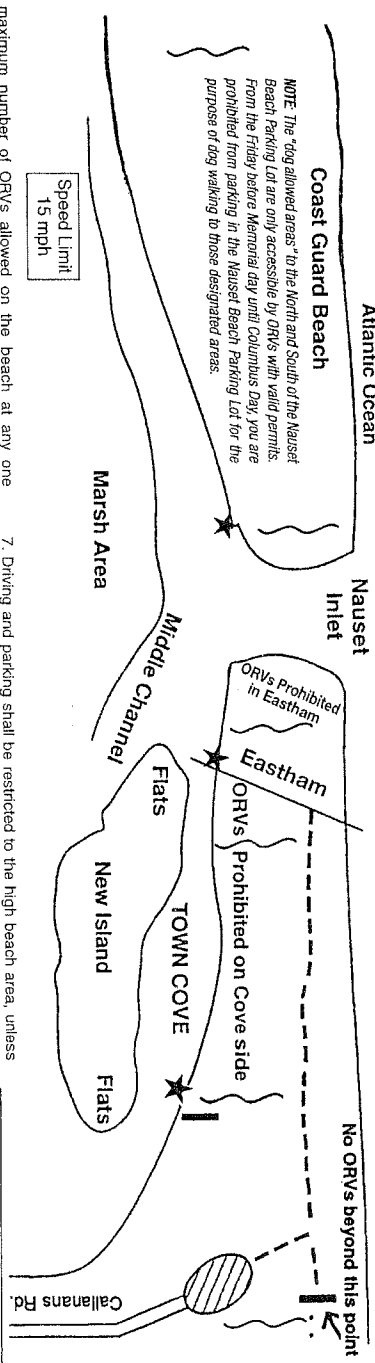
For information,  
please visit our website at  
www.town.orleans.ma.us

### INFORMATION

Please call the  
Nauset Beach Administration Bldg.  
for information June 14 - September 1  
(508) 240-3780

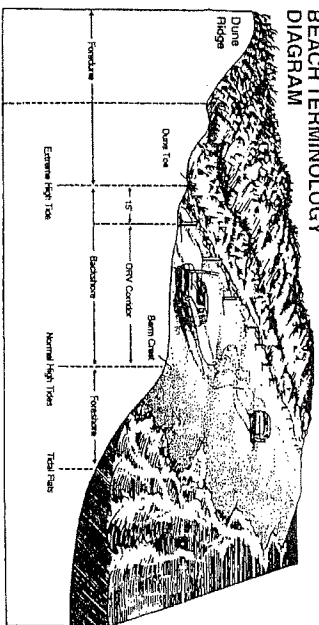
### CHATHAM RESIDENTS ONLY

Please visit [www.town.chatham.ma.us](http://www.town.chatham.ma.us)  
for Sticker Sale Days and Times  
Please call for  
Chatham Resident Information  
508-945-5176  
Chatham Coastal Resources Department



1. The maximum number of ORVs allowed on the beach at any one time shall be set each year and may be changed depending on prevailing conditions and the amount of usable beach.
2. No jet ski shall be launched or landed on any area of Nauset Beach.
3. Nesting Areas: no dogs or kite flying will be permitted on the beach during the Tern and Piping Plover nesting season (March 15 - September 15). Dates subject to change. Nesting areas will be fenced and signed, pedestrians and ORVs are requested to stay as far away from sites as possible. Speed limit when near nesting area is 5 mph. Vehicles and pedestrians are prohibited in symbolically fenced areas.
4. it because of high tides or storms the designated ORV routes become obstructed, the limit of ORVs may be reduced or the beach may be temporarily closed to ORV traffic.
5. Driving on Town Cove side of Nauset spit is prohibited.
6. Driving on the foreshore of the beach is prohibited from the Friday before Memorial Day until the first Friday of November, unless otherwise directed.
7. Driving and parking shall be restricted to the high beach area, unless otherwise directed.
8. All vehicles using the beach between the hours of 11 pm and 6 am must be actively fishing and must check on and off the beach at the Nauset Beach gate house during the summer season (Memorial Day to Labor Day).
9. Self-contained vehicles are prohibited from the North end of Nauset Beach.
10. Parasails are prohibited.
11. The Order of Conditions issued to the Orleans Park Commission, dated February 13, 1991, is hereby incorporated herein and made a part of these rules and regulations.

### BEACH TERMINOLOGY DIAGRAM



### Violations

Penalties for infractions of any of the above regulations shall be revocation of registration sticker, dismissal from the beach and/or a fine of not less than Fifty Dollars (\$50), nor more than Three Hundred Dollars (\$300), for each offense.  
Persons whose permits have been suspended or revoked have within seven (7) days a right to appeal to the enforcing authority, who upon receipt of written request shall arrange a hearing on the appeal to the Park Commissioners.  
Authority for the enforcement of the above regulations shall rest with the Orleans Natural Resources Manager and Orleans Chief of Police.  
Copies of the above regulations may be obtained at the Town Offices and Police Station in Orleans and the official on duty at Nauset Beach.  
These Rules & Regulations were adopted at a public hearing of the Orleans Park Commission dated 1/6/10.  
Copies of changes to be posted in Town Clerk's Office in Orleans.

Cap Cod National Seashore  
Illustration adapted for  
Nauset Beach

[Print](#)

[Close](#)

*Spit enforcement  
order status.*

From: **Shana Brogan** (conservation@eastham-ma.gov)  
Sent: Fri 8/29/14 2:02 PM  
To: Sheila Vanderhoef (svanderhoef@eastham-ma.gov)

Hello Sheila,

Based on the e-mail sent from the Town of Orleans yesterday, the overall feedback I have received from various conservation commissioners is that the Town of Orleans is making a good-faith effort to comply with the enforcement order ratification and therefore the commission would like to respond in the same manner and not issue fines for wetlands violations at this time. The situation will be re-assessed upon the Town of Orleans' implementation of an enforcement plan early next week.

This determination is subject to change based on the circumstances.

Thank you,

Shana

Shana Brogan

Conservation Agent

Town of Eastham

508-240-5971 x 603

September 2, 2014

To: Board of Selectmen

RE: Agenda Item – I I

Included on that agenda for the joint meeting is also a discussion of the interconnect opportunity with the Eastham water system. Agenda item 2. The map showing the interconnect is attached.

EASTHAM WATER SYSTEM  
ORLEANS CONNECTION COORDINATION  
AUGUST 2014

Town of  
Eastham

Cape Cod Rail Trail

Orleans/Eastham  
Town Line

Bridge Road, Eastham

Proposed  
Interconnection Location

Town of  
Orleans

Bridge Road, Orleans

Route 6, Orleans

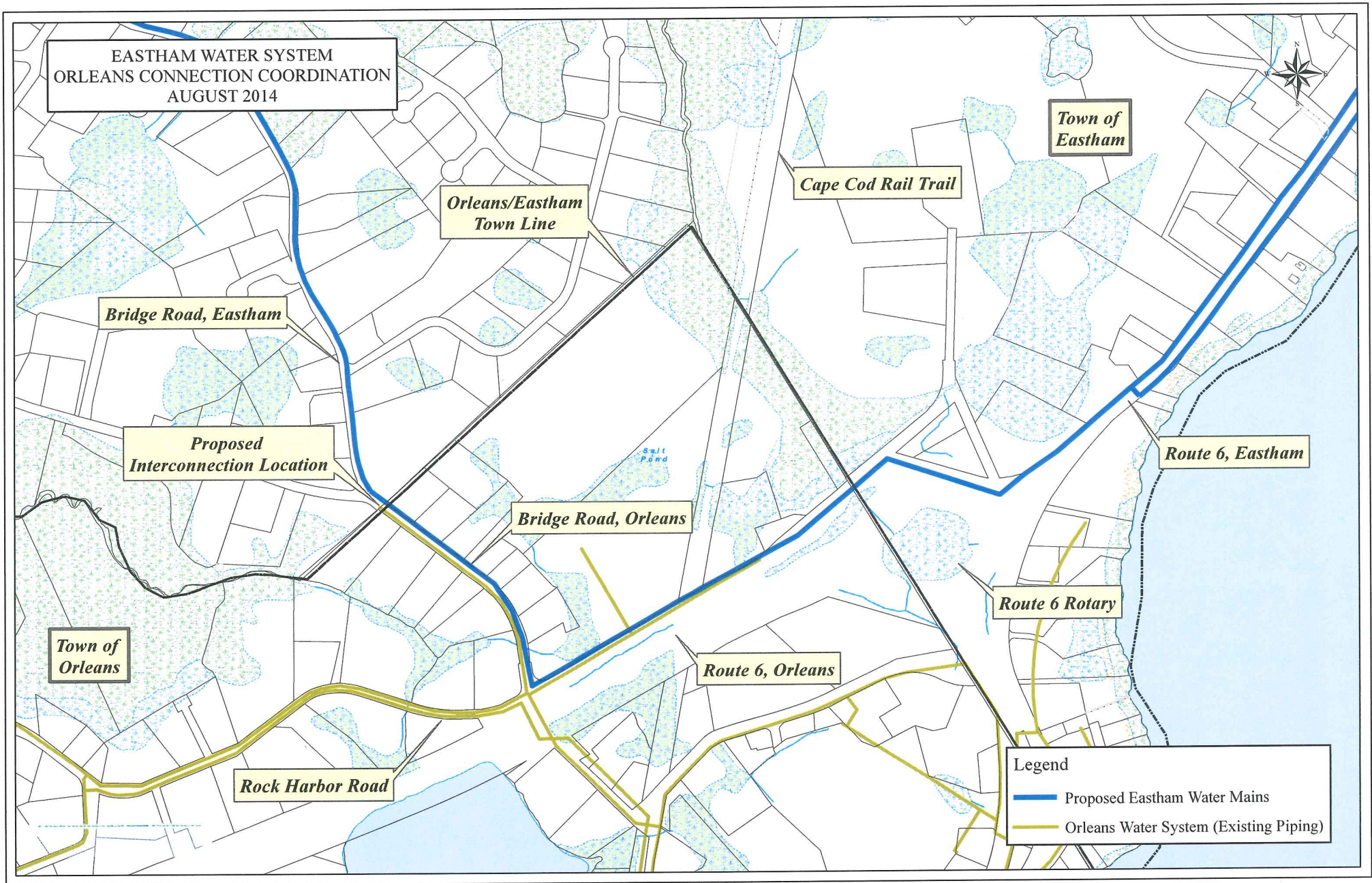
Route 6, Eastham

Route 6 Rotary

Rock Harbor Road

Legend

- Proposed Eastham Water Mains
- Orleans Water System (Existing Piping)



September 2, 2014

To: Board of Selectmen

RE: Agenda Item – III

Attached is a request from Bob Sheldon, a member (chair) of the ZBA and a member of the Affordable Housing Trust, to be designated as a Special Municipal Employee. Mr. Sheldon has been on the ZBA for several years and was recently appointed to the Housing Trust. I have included for you, information on the definition and meaning of the designation. Please remember that the designation, as Mr. Sheldon mentions, is not an individual designation if it pertains to the position on a multimember board. Mr. Sheldon would need all members of the trust and the ZBA to have this designation, and to agree to accept such designation.

Mr. Sheldon may be in to discuss this matter. He is aware that it is on the agenda. You are under no obligation to make a decision today. You may want to discuss with Town Counsel or the ethics commission before you make a final decision.

9/3<sup>05</sup>  
agenda

**Sheila Vanderhoef**

---

**From:** mreastham@comcast.net  
**Sent:** Friday, August 15, 2014 10:43 PM  
**To:** Sheila Vanderhoef  
**Subject:** ZBA and Affordable Housing Trust - 'Special Municipal Employees'

Sheila,

As discussed, I believe that it's important that the Selectmen designate the members of the ZBA and the Affordable Housing Trust as 'Special Municipal Employees'.

As I learned in the mandatory ethics training, non-special employees cannot present or represent others at other boards and commissions in the town. As a Realtor, I'm called on to advise and participate in the process that may include trips to the Planning, Health, & Conservation Boards. Additionally, I may be called on to work with builders on future projects that may, ultimately, come before several boards. As a non-special employee, all these activities would be banned.

I spoke to attorney Amy Mee, who was the attorney-of-the-day when I called the ethics hot-line. She indicated that both boards that I am on would need that designation for me to be able to freely be a Realtor and members of the boards.

Please present this situation to the Selectmen at your earliest convenience.

Thank you.

Bob Sheldon

Sent from Xfinity Connect Mobile App



# What is a 'special municipal employee'?



*May 31, 1999*

## **Q: What is a “special municipal employee”?**

**A:** The law gives broad discretion to municipalities to determine which positions should be designated as special municipal employees. **Municipalities should carefully consider this decision which balances the municipality’s interest in obtaining the expertise needed for its boards, commissions and other part-time or unpaid positions with the lesser restrictions that apply to special municipal employees as noted below.**

A list of all the “special municipal employee” positions should be on file at the town or city clerk's office. This list should also be filed with the Ethics Commission. Please review the designated “special municipal employee” list for your municipality and provide a copy of the list to the Massachusetts State Ethics Commission within 60 days.

“Special municipal employee” status can be assigned to certain municipal positions by a vote of the board of selectmen, board of aldermen, town council or city council. The designation may be made by a formal vote at any time. Votes should be taken individually for each board or position being designated -- expressly naming the positions being designated. Once a position is designated as having “special” status, it remains a “special municipal employee” position unless and until the classification is rescinded.

A position is eligible to be designated as a “special municipal employee” position provided that the municipal employee:

- \* is not paid; or
- \* holds a part-time position that allows him or her to work at another job during normal working hours; or
- \* was not paid by the city or town for more than 800 working hours (approximately 20 weeks full-time) during the preceding 365 days.

It is the municipal position that is designated as having “special” status, not the person holding the position. Therefore, all employees holding the same office or position must have the same classification as “special municipal employees.” For instance, one member of a school committee cannot be classified as a “special” unless all members are similarly classified.

Under no circumstances may a mayor, city councilor, town councilor, alderman, or selectman in a town with a population of more than 10,000 be designated as a “special”. However, in towns of 10,000 or less, selectmen are automatically considered “special” employees.

The Legislature may also designate certain positions to have “special municipal employee” status. For example, board members and certain part-time employees of local housing and

redevelopment authorities are defined by law as “special municipal employees” and do not need to have local authorities approve their designation as “specials” (see G.L. c. 121B, §7).

*Answer provided by State Ethics Commission*



# What restrictions are different for special municipal employees?



May 29, 2007

What restrictions are different for special municipal employees?

**Q: What restrictions are different for special municipal employees?**

**A:** The conflict of interest law (M.G.L. Ch. 268A) covers all municipal officials and employees, whether elected or appointed, paid or unpaid, full-time or part-time, but two sections of the conflict law apply less restrictively to those part-time or unpaid municipal officials who have been designated as “special municipal employees.”

Chapter 268A, Section 17, generally prohibits municipal employees from representing a private party before any municipal boards or departments. It also prohibits municipal employees from acting as agent (or attorney) for a private party in connection with any matter of direct and substantial interest to their city or town. Finally, it prohibits municipal employees from accepting pay or other compensation in connection with any matter of direct and substantial interest to their municipality.

The prohibitions of Section 17 for special municipal employees are less restrictive and only apply to matters that are before their own board or agency or are subject to their official responsibility. For example, a full-time school department employee would be prohibited from representing anyone before any town board or agency; in contrast, a school committee member who qualifies as and is designated a special municipal employee would be able to represent clients before boards other than the school department or any agency that falls under the responsibility of the school department.

Chapter 268A, Section 20, generally prohibits municipal employees from having a direct or indirect financial interest in a contract with their city or town. There are, however, many exemptions in this section, and the prohibitions for special municipal employees are less restrictive. For example, a special municipal employee may have a financial interest in a contract with a department which is completely independent of the one where she works, provided that she files a disclosure of her interest in the contract with the city or town clerk. A special municipal employee may even have a financial interest in a contract with her own department (or with a department that has overlapping jurisdiction with her department), provided that she files a disclosure of her interest in the contract with the city or town clerk and the board of selectmen, board of aldermen, town council or city council vote to grant her an exemption to Section 20.

*Answer provided by the State Ethics Commission.*

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## STATE ETHICS COMMISSION

### COMMISSION SUMMARY NO. 16

#### "SPECIAL" MUNICIPAL EMPLOYEES"

The conflict of interest law, G.L. c. 268A, covers all municipal officials and employees, whether elected or appointed, paid or unpaid, full-time or part-time. However, two sections of the conflict law apply less restrictively to those part-time or unpaid municipal officials who have been designated as "special municipal employees."

"Special municipal employee" status can be assigned to certain municipal positions by a vote of the board of selectmen, board of aldermen, town council or city council. Several specific municipal positions are automatically designated as "special" under the law. Your position is eligible to be designated as a "special municipal employee" position provided that:

1. you are not paid; or
2. you hold a part-time position which allows you to work at another job during normal working hours; or
3. you were not paid by the city or town for more than 800 working hours (approximately 20 weeks full-time) during the preceding 365 days.

It is the municipal position that is designated as having "special" status, not the individual. Therefore, all employees holding the same office or position must have the same classification as "special municipal employees". For instance, one member of a school committee cannot be classified as a "special" unless all members are similarly classified.

The designation may be made by a formal vote of the board of selectmen, board of aldermen, town council or city council at any time. Votes should be taken individually for each board or position being designated -- expressly naming the positions being designated. Once a position is designated as having "special" status, it remains a "special municipal employee" position unless and until the classification is rescinded. A list of all the "special municipal employee" positions should be on file at the town or city clerk's office. This list should also be filed with the Ethics Commission.

Under no circumstances may a mayor, city councillor, town councillor, alderman, or selectman in a town with a population of more than 10,000 be designated as a "special". However, in towns of 10,000 or less, selectmen are automatically considered "special" employees. Other municipal positions in towns with a population of less than 10,000 must still be designated as "special municipal employee" positions by the selectmen.

The Legislature may also designate certain positions to have "special municipal employee" status. For example, board members and part-time employees of local housing and redevelopment authorities are defined by law as "special municipal employees" and do not need to have local authorities approve their designation as "specials". (See G.L. c. 121B, §7.)

#### THE CONFLICT LAW IS LESS RESTRICTIVE FOR "SPECIALS"

Only two sections of the conflict of interest law apply less restrictively to "specials" -- §§ 17 and 20. All other sections of the conflict law that govern regular municipal employees apply to "special municipal employees" in exactly the same way. See the Summary of the Conflict Law for Municipal Managers or the Practical Guide to the Conflict Law for Municipal Employees for information on your responsibilities under the law (these publications are available from the State Ethics Commission). Remember that even if you serve on an unpaid part-time board or commission, you are still considered a regular municipal employee, unless your position has been expressly designated as having "special municipal employee" status.

## Section 17 - Acting on Behalf of Others

Section 17 generally prohibits municipal employees from representing a private party before municipal boards or departments. It also prohibits municipal employees from acting as agent (or attorney) for a private party in connection with any matter of direct and substantial interest to their city or town. Finally, it prohibits municipal employees from accepting pay or other compensation in connection with any matter of direct and substantial interest to their municipality.

However, if you are a "special municipal employee", you may:

1. represent private parties before municipal boards other than your own, provided that you have not officially participated in the matter and the matter is not now (and was not within the past year) within your official responsibility;
2. act as agent for private parties in connection with a matter of interest to your city or town, provided that you have not participated in the matters as a municipal official, and that the matter is not (and has not been, during the past year) within your official responsibility; and
3. receive pay or other compensation in connection with matters involving your city or town, provided that you have not officially participated in the matters and they are not (and have not been, within the past year) within your official responsibility.

Example: You are a Conservation Commissioner. The Commission has been given "special municipal employee" status. You are also an engineer in private practice in town.

You may be hired as site engineer and represent a private development company at a Planning Board hearing, as long as the hearing does not in any way involve Conservation Commission matter.

However, if the hearing is about a wetlands dispute, you could not represent the developer before the Planning Board because the matter is under your official responsibility as Conservation Commissioner.

Also, if you prepare site plans, blueprints, structural analyses or other professional documents, you may not allow the developer to submit those materials to the Conservation Commission (or to any other municipal boards, in connection with matters under the Conservation Commission's responsibility).

Also, you may not be paid for giving the developer advice about how to get his project approved by the Conservation Commission, or for any other activity related to the Conservation Commission review process.

Note that the prohibition against "acting as agent" covers any type of activity that involves representing someone other than your city or town. Activities which can be considered "acting as agent" include: serving as someone's spokesperson; making phone calls or writing letters; acting as a liaison; affixing professional seals or signing supporting documentation; and participating as an electrician, plumber or other contractor during municipal building inspections. For more information about §17, request Advisory No. 13: Municipal Employees Acting as Agent from the State Ethics Commission.

## Section 20 -- Restrictions on Having an Interest in Contracts with your City or Town

Section 20 generally prohibits municipal employees from having a direct or indirect financial interest in a contract with their city or town. However, there are many exemptions in this section of the law. For instance, a municipal employee may own less than 1% of the stock of a company that does business with the municipality.

Also, a municipal employee may have a financial interest in a contract with a municipal department which is completely independent of the one where he works, provided that the contract has been publicly advertised or competitively bid, and the employee has filed a disclosure of his interest in the contract with the city or town clerk. Note that there are additional requirements for personal services contracts: contact your town counsel or city solicitor or the State Ethics Commission's Legal Division for more information.

However, if you are a "special municipal employee", you have two additional exemptions to §20:

1. As a "special municipal employee", you may have a financial interest in a contract with a department which is



completely independent of the one where you work, provided that you file a disclosure of your interest in the contract with the city or town clerk (there is no "public notice" or "competitive bid" requirement for this "special municipal employee" exemption).

2. As a "special municipal employee", you may even have a financial interest in a contract with your own department (or with a department which has overlapping jurisdiction with your department), provided that you file a disclosure of your interest in the contract with the city or town clerk and the board of selectmen, board of aldermen, town council or city council vote to grant you an exemption to §20.

Example: You are a member of the School Committee, which has been given "special municipal employee" status. You also own a hardware store in town.

You may sell light bulbs to the town's Department of Public Works, because Public Works is not under the jurisdiction of the School Committee; however, you must file a disclosure of your interest in the lightbulb sales with the Town Clerk.

You also may sell light bulbs to the School Department (which is under the School Committee's jurisdiction), but only if you file a disclosure of your interest in the lightbulb sales with the Town Clerk and the Board of Selectmen vote to exempt your lightbulb sales from the restrictions of §20.

For more information about restrictions on holding an interest in municipal contracts, contact your city solicitor or town counsel or the Legal Division of the State Ethics Commission.

### **Section 20 -- Restrictions on Holding Multiple Municipal Positions**

Because the restrictions of §20 also apply to employment contracts, municipal employees are generally prohibited from holding more than one municipal position. However, there are many exemptions to this general prohibition. If you are a municipal employee -- regular or "special" -- you may:

1. hold any number of unpaid positions, because you do not have a financial interest in any of the positions (however, if you hold even one paid appointed position, you must look for other exemptions);
2. hold any number of elected positions, whether paid or unpaid, because you serve in those positions by virtue of your election, rather than because of an appointment or employment contract (however, if you hold even one paid appointed position, you must look for other exemptions); and
3. in some instances, you may hold more than one paid appointed position, provided that the jobs are in separate departments (which do not have overlapping responsibilities) and all paid jobs have been publicly advertised. However, your board of selectmen, board of aldermen, town council or city council must vote to exempt you from §20, and there are also other requirements you must meet. For more information, request Advisory No. 7: Multiple Office Holding from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.

If you serve in a town with a population of less than 3,500, you may hold more than one position with the town if the board of selectmen formally approves the additional appointments.

If you are a "special municipal employee", you may also:

1. hold any number of other "special municipal employee" positions, provided that the positions are with totally independent departments and you file a disclosure of your financial interest in all the positions with the city or town clerk;
2. hold any number of other "special municipal employee" positions, even if the departments' jurisdictions overlap, provided that you file a disclosure of your financial interest in all the positions with the city or town clerk, and the board of selectmen, board of aldermen, town council or city council vote to exempt you from §20.

Example: As a Cemetery Commissioner, you are a "special municipal employee".

You may also hold "special municipal employee" positions on the Board of Library Trustees and on the Waterways Commission, because the three positions are completely independent of each other. However, you must file a disclosure of your financial interest (e.g., stipends, per diem payments, salary) in the positions with the Town Clerk.

If you wish to hold a "special municipal employee" position with the Department of Public Works (which maintains buildings on the cemetery grounds) or as the town's Tree Warden (who cares for the trees on the cemetery grounds), you must file a disclosure of your financial interest in the positions with the Town Clerk, and the Board of Selectmen must vote to exempt you from §20.

For more information about holding more than one municipal position, request Advisory No. 7: Multiple Office Holding from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.

\* \* \*

The definition of "special municipal employee" can be found in Section 1(n) of the conflict of interest law (G.L. c. 268A). Note that town councils are empowered by G.L. c. 39, §1 to exercise all duties and powers of boards of aldermen.

\* \* \*

Commission Fact Sheets are prepared and issued by the Public Education Division of the State Ethics Commission. They are intended to provide guidance to public officials and employees concerning practical applications of the conflict law. For further information, contact your town counsel or city solicitor, or the Legal Division of the State Ethics Commission.

ISSUED: May 1987

REVISED: March 1990

REVISED: January 1991

REVISED: August 1992

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BOARD OF SELECTMENT'S POLICY RELATING TO  
GRANTING OF SPECIAL MUNICIPAL EMPLOYEE STATUS  
TO POSITIONS, COMMITTEES AND BOARDS  
PURSUANT TO MGL Ch. 268A

SAMPLE  
Policy

RATIONALE:

In general, the provisions of Massachusetts General Laws Chapter 268A, Section 17 prohibit a municipal employee from receiving compensation from or acting as agent or attorney for anyone other than the Town in a matter in which the Town has a direct and substantial interest. The Board is aware of the fact that the State Ethics Commission defines "municipal employee" as any person that provides services to the Town, regardless of how that person was hired, elected or appointed, or whether the person receives compensation for his/her services. The Board understands that the State Ethics Commission would find that virtually any matter which comes before a particular board or official which requires official action is a matter in which the Town has a direct and substantial interest. The provisions of Massachusetts General Laws Chapter 268A, Section 17 are intended to prevent divided loyalties and any appearance of unfair or special advantage.

As the State Ethics Commission states, cities and towns are entitled to undivided loyalty by their municipal employees. The Board of Selectmen strongly believes that in order to promote public confidence in the administration of the town government a municipal employee's loyalty must lie first with the Town and that Special Municipal Employee status should be granted only in very limited circumstances. The Board is of the opinion that in general, positions, committees, and boards that set public policy, have regulatory authority or have appointing authority should not be granted Special Municipal Employee status.

The Board of Selectmen also believes that there are occasional circumstances that can arise where a position, board or committee may benefit from a person's expertise or knowledge in a particular field or profession. In those limited circumstances Special Municipal Employee status *may* be warranted.

Under Massachusetts General Laws Chapter 268A, the Board of Selectmen may grant Special Municipal Employee status to a position, board or committee at any time and the Board may also revoke that status at any time. It is the municipal position that is designated as having Special Municipal Employee status, not the person holding the position. Therefore, all members of a board or committee holding the same office are considered Special Municipal Employees if the designation is granted by the Board of Selectmen.

POLICY:

1. Any person(s) holding an elected or appointed position or serving as a member of an elected or appointed committee or board may file a written request with the Board of Selectmen seeking designation of such position, committee or board as a Special Municipal Employee(s).
2. Any such request shall be made a part of the agenda of a regularly scheduled meeting of the Board of Selectmen.

3. The person(s) making such a request shall appear at the scheduled meeting of the Board of Selectmen to present such request. The person(s) making the request shall present to the Board of Selectmen the rationale for such request. The presentation shall include a demonstration of the need the position, committee or board has for the skills or professional knowledge that the person making the request possesses. Additionally, the presentation shall include how those skills or professional knowledge will benefit the position, committee or board as well as benefit the overall interests of the Town.

4. The Board of Selectmen shall consider the request and a vote shall be taken on the request. The granting of such status shall be by a majority vote of the Board.

5. Requests for Special Municipal Employee status will be voted upon individually for each position, committee or board requesting such status, expressly naming the position, committee or board being designated.

6. If Special Municipal Employee Status is granted to the position, committee or board, then annually, no later than May 25, any person intending to retain such status for the position, committee or board, shall resubmit a request to the Board of Selectmen for Special Municipal Employee status. The Board shall review and act upon the request in accordance with Paragraph 2 through Paragraph 5 of this policy at its first meeting in June. Additionally, at the first meeting of the Board of Selectmen in June, the Board shall review the list of positions, committees and boards granted Special Municipal Employee status to ensure compliance with this policy. A list of Special Municipal Employees shall be forwarded to the Town Clerk and the State Ethics Commission any time Special Municipal Employee status is granted or revoked by the Board and at least annually.

Adopted: Abington Board of Selectmen  
October 15, 2012

# Information





## **EASTHAM POLICE DEPARTMENT**

2550 State Highway • Eastham, MA 02642  
508-255-0551 • Fax: 508-255-5412



**EDWARD V. KULHAWIK**  
*Chief of Police*

**KENNETH J. RODERICK**  
*Deputy Chief*

August 27, 2014

✚To: Sheila Vanderhoef, Town Administrator  
Board of Selectmen

From: Edward V. Kulhawik  
Police Chief

Would you please appoint the following individual as Patrolman to the Eastham Police Department for the terms indicated below. Appointments are also for Assistant Harbormaster and Constable.

Jordan Proudfoot

Police Officer

9-8-2014 to 06-30-15

Cc: Sue Fischer