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April 2, 2007

Scituate Conservation Commission  
Scituate Town Hall  
600 Chief Justice Cushing Highway  
Scituate, MA 02066  
Attn: Michael Clark, Chair

RE: Notice of Intent; 126 & 132 Chief Justice Cushing Highway  
DEP#: SE 068-1988

Dear Chairman Clark and Commission Members:

As set forth in my letter delivered to the Commission earlier today, this firm represents the Citizens for the Protection of First Herring Brook ("Citizens") in their opposition to the above-referenced project. Beyond the serious enforcement issues raised in that earlier letter, this letter sets forth separate arguments against the Project, above and beyond the unreliability of the 2004 delineation.

The Commission has selected a competent and credible environmental firm, Horsley Whitten Group, Inc. ("HW"), to peer review the project and report its findings. Citizens suggest that if the Commission follows the findings of its own consultant (detailed in its March 5 Summary of Issues, February 28 draft letter and March 9 final letter), the Commission has no choice but to deny the requested relief. Given the number of critical resources likely to be adversely impacted by the broad scope of the proposed development, including the seven feet of proposed fill across acres of land, it is difficult to conceive of a set of conditions that could allow the project to move forward in any form.

In further support of denying the application, the Commission already has in its possession information and comments provided by the Citizens,<sup>1</sup> the Massachusetts Department of Environmental Protection ("DEP")<sup>2</sup> and the Massachusetts Office of Coastal Zone Management ("CZM"). In light of the findings, and even warnings, provided in those reports and highlighted below, there exists no reasonable basis for granting the requested relief. The most recent comments of HW, DEP and CZM are respectively attached hereto as Exhibits 1, 2 and 3.

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<sup>1</sup> Citizens have provided numerous site and aerial photos demonstrating the wet nature of the property, in addition to other relevant information.

<sup>2</sup> DEP's comments include the recently updated comments from Christine Odiaga, dated March 14, 2007.

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The import of HW's findings could not be more clear, as stated in Finding 1 of its Summary of Issues (Wetlands): "[W]e believe that this project will likely have *adverse impacts* to the land and water *resources on the site, as well as adjacent properties.*" (emphasis added). Its conclusions are reemphasized in the conclusion of the March 9 letter: "The proposed project will result in a considerable amount of fill within the coastal flood zone as well as within ILSF,<sup>3</sup> and will generate a significant amount of impervious surface. *We believe the proposed project, as designed, has the potential to contribute to flooding impacts on adjacent properties* and may contribute to *water quality impairment* downstream of the project." (emphasis added).

On March 14, 2007, the environmental consultant to the Zoning Board of Appeals, Woodard and Curran ("W&C"), walked the property as part of its separate but related review. Based on the site walk and its review of the NOI and Chapter 40B materials submitted, W&C issued its own, independent report, noting many of the same concerns raised by HW, but in addition raising further issues of concern. W&C's introductory paragraph concludes with reference to "data needs and deficiencies that were found to be significant and pose a potential *risk of harm to public health, abutting property owners and/or the environment.*" (emphasis added).

W&C's report was accompanied by the engineering report of Pennoni Associates, Inc. ("Pennoni"). The comments of W&C and Pennoni are respectively attached hereto as Exhibits 4 and 5.

Citizens respectfully request that the Commission receive and review the comments of W&C and Pennoni prior to closing its own hearing, and require the applicant to fully address the combined comments of HW, W&C, Pennoni, DEP, CZM, Citizens, the Commission and any other reviewing entity.

Citizens will not repeat the detailed, well-presented concerns of the other reviewing entities. Citizens do, however, wish to highlight key findings relevant to the ongoing permitting process and to identify further required permitting processes that have not been completed (even started or identified) by the applicant.

#### "Agricultural" Use

The property has no demonstrated history of corn or other commodity production for the five years prior to the 2003 unlawful alteration, as required under 310 CMR 10.04 to qualify as "Agriculture" use. Abutter and town officer observations support the fact that the field lay fallow for at least 10-15 years prior to the winter rye planting. In fact, W&C found during its

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<sup>3</sup> Although referencing the resource as labeled by the applicant (ILSF), HW was clear in its Finding 3 under Wetlands that the "ISLF likely qualifies as an Isolated Vegetated Wetlands (IVW) under the Federal *Clean Water Act.*"

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site walk, that the “area is labeled on the plans as “Existing Agriculture Field”; however, *no evidence of recent agricultural activity* was seen.” (emphasis added). The applicant has the burden of establishing predating continuous agricultural use. “The issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use.” 310 CMR 10.04. The applicant has made no such showing, and, in fact, experienced consultants who have walked the property have reported just the opposite.

### **Isolated Land Subject to Flooding / Isolated Vegetated Wetlands**

The applicant has identified an area of approximately 12,665 sq. ft. as ILSF per 310 CMR 10.57. It proposes to relocate and replicate the ISLF further to the east. HW concludes that the ISLF “likely qualifies as an Isolated Vegetated Wetlands (IVW) under the Federal *Clean Water Act*”. As such, HW, W&C and DEP have each emphasized that alteration of this area (in excess of 5,000 sq. ft.) automatically requires the following additional approvals:

- Section 401 Water Quality Certification from DEP
- Section 404 (CWA) dredge and fill permit from the US Army Corps of Engineers
- MEPA review by the Massachusetts Executive Officer of Environmental Affairs<sup>4</sup>

The applicant has not filed for any of the above approvals to Citizens’ knowledge.

The applicant has not met the Performance Standards for ILSF, including that it will not result in “flood damage due to filling which causes lateral displacement of water that would otherwise be confined within said area”. HW, W&C and Citizens have noted that the applicant has failed to provide data to demonstrate that the storage capacity of the ILSF/IVW will meet or exceed the capacity of the existing resource. Given that the ILSF is located in the AE Flood Zone, it is important to clarify this ambiguity.

### **Riverfront Alteration Prohibition**

HW notes that the applicant proposes at least 4,280 sq. ft. of alteration in the 200’ buffer zone. It is not clear whether the 4,280 sq. ft. calculation includes work related to the two outfall areas also located within the buffer zone. Taking these additional areas into account (including any piping and supporting infrastructure) likely brings the total altered square footage close to or in excess of 5,000 sq. ft.

Regardless of the square footage of the riverfront area altered (which in this case is substantial), the applicant has not even attempted, much less satisfied, its Herculean burden to establish that there is “no other practicable and substantially equivalent economic alternatives” to

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<sup>4</sup> Due to the federal permitting requirements, NEPA review (the federal counterpart to MEPA) may also be required.

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the proposed riverfront alteration. HW notes that the applicant has not even considered the no alteration alternative. Riverfront areas are afforded substantial protection, and the applicant has not, and cannot, make the required showing to overcome the presumptive prohibition on alternation with that area.

W&C stated its concerns with the proposed Riverfront Area alteration even more directly, as follows: “the Applicant relates the lack of an Alternatives Analysis to the opportunity for open space preservation of the open meadow area, rather than to specific technical feasibility or economic viability of the project. *We believe that the project alternatives should be viewed based on the technical merits of the project itself and not be interrelated with any “gifts” of open space or conservation easements that have been proposed along with this project’s approval.*” (emphasis added).

### **Land Subject to Coastal Storm Flowage**

Rebecca Haney with CZM stated to the Conservation Commission that it “can and should protect Land Subject to Coastal Storm Flowage if it is determined significant to the interests of storm damage prevention and flood control.” On behalf of CZM, she requested the following minimum additional information to be able to adequately review the NOI:

- Delineation of the flood zones on the project plans.
- “Topography of a larger area is needed to assess how the project may effect adjacent properties: the current plans do not extend far enough to the east to capture the limiting factors that appear to govern how the site floods. CZM requests that the plans be revised to extend at least as far east as Figure 2 in the Notice of Intent.”

Addressing similar concerns, HW stated that “This amount of fill [seven feet] has the potential for *altering storm surge flow patterns, increasing the potential for off-site flooding, and arguably altering existing drainage patterns* at the site.” (emphasis added).<sup>5</sup> W&C concluded that “no rigorous evaluation of off-property effects” had been performed and recommended that the applicant be required to “provide a detailed, quantitative analysis of off-property impacts, such as wave deflection, scouring and sediment deposition”. W&C emphasized that the “impact analysis should focus on the *immediately adjacent residential properties ... which are at the greatest risk of harm* during storm and flooding events.” (emphasis added).

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<sup>5</sup> HW also highlighted Section 10.38 of the Town of Scituate Wetlands Rules and Regulations, which mandates that activity in velocity zones (VE-Zones) and AE-Zones “*shall not have an adverse affect* by increasing the elevation or velocity of flood waters or by increasing flows due to a change in drainage of flowage characteristics on the subject site [or] adjacent properties...” (emphasis added).

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**National Heritage / Rare Wildlife, Species and Vernal Pools**

HW concludes that “a portion of this site occurs within both *Estimated Habitat of Rare Wildlife and Certified Vernal Pools* and *Priority Habitat of Rare Species*”. That no work is proposed directly in the estimated and priority areas is immaterial. The standard is whether the project will *impact* those resources. Given the size of the project, its immediate proximity to certified and estimated habitat and concerns raised by HW regarding flooding, sediment and storm flowage alteration, it is likely that the proposed project will *in addition* impact the neighboring estimated and protected habitat.<sup>6</sup>

The applicant has the heavy burden of demonstrating that the “significant alterations” (in the words of Amy Ball for HW) it proposes and which are expected to directly adversely affect on-site resource will not also secondarily affecting the immediately adjacent estimated and certified habitat.<sup>7</sup>

**MEPA Jurisdiction Applies**

The applicant’s project will impact a number of critical resources and resource areas. Substantial additional permitting, not disclosed by the applicant, will be necessary for the project, and may ultimately alter the project. Some of these required approvals should have been identified and addressed in the applicant’s Notice of Intent. The omission alone renders the NOI defective, in addition to the applicant’s failure to demonstrate no adverse impact to the resource areas it has identified. In any event, important permits that *must* be obtained by the applicant from the Commonwealth trigger MEPA review.

MEPA review is triggered when (i) one or more review thresholds are met or exceeded and (ii) the subject matter of at least one review threshold is within MEPA jurisdiction. 301 CMR 11.00 et seq. HW and DEP have already identified at least one MEPA review threshold that has been met, “alteration of 5,000 or more sf of bordering or isolated vegetated wetlands”, which requires Section 401 Water Quality Certification from DEP. 301 CMR 11.03(3)(b)(1)(d) and 314 CMR 9.04(1) and (6). There is no question that the Project in question, and the required

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<sup>6</sup> The potential for work outside estimated and certified habitat areas to nonetheless adversely impact those areas and trigger National Heritage jurisdiction was confirmed in a telephone conversation by undersigned counsel with Jenna Garvey of NHESP on March 15, 2007.

<sup>7</sup> This secondary jurisdiction and priority is reflected in Scituate’s own Wetlands Protection Rules and Regulations which provides the Commission jurisdiction over “any activity proposed or undertaken *outside* the areas specified in SWR 10.02”, provided that “in the judgment of the Conservation Commission, said activity will result or has resulted in removing, filling[,] dredging or *altering* an area specified in SWR 10.02.” SWR 10.02(2)(b) (emphasis added, removed).

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WQC Permit, fall with MEPA jurisdiction.<sup>8</sup> This same requirement also triggers the need for the applicant to obtain federal approval from the Army Corps of Engineers for a Section 404 dredge and fill permit.

W&C noted the above MEPA trigger and identified at least three additional bases for potential MEPA jurisdiction. Below are the additional MEPA triggers referenced by W&C:

- discharge of greater than 10,000 gpd of wastewater to the ground in an area of a Zone II waste supply protection zone (310 CMR 11.03(5)(b)4.c.i);
- new fill in a regulatory floodway (310 CMR 11.03(3)(b)e); and
- filling of a historic filled tideland for non-water-dependent use (M.G.L. c. 91).

Any permit the applicant might obtain may include conditions and restrictions that change the project, forcing further modified review by the Commission and requiring two hearings. Citizens respectfully request that the Commission require the applicant to file with DEP and MEPA for the required authorizations (and any others needed) prior to completing its review of the NOI and rendering a decision. If the applicant and/or the Commission do not seek at least an advisory opinion from EOE, Citizens are prepared to themselves file such a request.

If the Commission were to issue an Order of Conditions for the project, Citizens request, at a minimum, that the following condition be included as part of the Order:

*The effectiveness of this Order of Conditions is hereby made expressly subject to the applicant first filing for and obtaining any and all other necessary and appropriate permits and approvals (local, state and federal) for the project, including after the conclusion of any and all related appeals in any forum. Until the Commission has confirmed that each such permit and approval has been obtained and provided to the Commission, the Order of Conditions shall have no force or effect. The Commission, in consultation with its consultants and Town Counsel, shall make the initial determination whether and to what extent further permits or approvals are required. If the applicant disputes the Commission's finding that a particular permit or approval is required for the project, the applicant shall nonetheless file in good faith a request for determination or other available review from the appropriate agency to confirm its position that jurisdiction is not applicable to the project.*

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<sup>8</sup> Citizens believe that the Project falls within "broad" MEPA jurisdiction, since it "involves Financial Assistance". See 301 CMR 11.01(2)(a)(2) and 301 CMR 11.02 (definition of "Financial Assistance"). Even under "limited" jurisdiction, the applicant's Project clearly triggers jurisdiction. See 301 CMR 11.01(2)(a)(3).

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### **Stormwater Management**

Based on the deficient information provided by the applicant, HW found in its March 9 letter that it “is difficult to determine the effect that this will have on neighboring properties by simply reviewing the submitted materials.” It is the applicant’s burden to demonstrate compliance with the MSWMP and other requirements, and it falls far short. In addition to noting a host of missing data that needs to be provided to the Commission to even review compliance, HW also highlighted a number of miscalculations and inappropriate use of technical assumptions by SITEC that altered the outcome. DEP and W&C noted some of these same deficiencies.

Pennoni additionally noted that many components of the storm drainage collection system, and in particular the on-site sewage system, are proposed below the FEMA and Town 100-year flood elevations. In both cases, Pennoni recommended raising the entirety of both systems, especially the “gravity sewage collection, chemical treatment, and subsurface sewage disposal system”, above the 100-year flood elevations (1.2.8, 1.3.7). The Commission should require this change as a condition of any approval. Pennoni also recognized that the plans and reports submitted by the applicant lack the required registered engineer’s stamp.

### **Conclusion**

Citizens await Commission action regarding the provided sworn witness accounts of unlawful, fraudulent alteration at the property. However, their opposition to the applicant’s ill-conceived project is not wholly, or even principally, dependent on this evidence of bad acts.

The Commission has already been presented with a number of substantive concerns raised by its own consultant (HW), W&C, Pennoni, DEP, CZM and Citizens. The collective comments demonstrate that the project, as presented, is likely to have an adverse impact on resources protected under both Commonwealth and Scituate laws and regulations. One concern repeatedly identified and highlighted is the heightened risk of *flooding to adjacent residential properties* caused by the proposed seven feet of fill.

HW, W&C, Pennoni, DEP and CZM have each noted deficiencies in the analyses, assumptions and data used by SITEC in arriving at its conclusions. Citizens request that the Commission require the applicant to provide all the information which the reviewing entities identified as missing or inadequate. They also request that HW be permitted to review all supplement information requested and that the Commission take record notice of similar further comments from W&C and Pennoni to the ZBA.

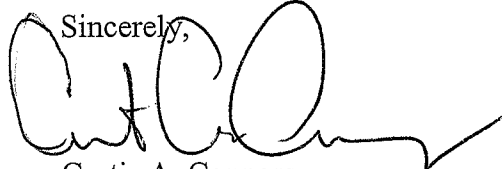
The application warrants denial as presented. Citizens believe that any supplemental (required) information provided by the applicant will continue to support that conclusion. If the Commission nonetheless determines to grant an Order of Conditions to the applicant for the

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project, Citizens request that the Commission appropriately limit the Project in ways that eliminate/minimize risk of flooding damage to abutters and protect and preserve the resources over which the Commission is guardian.

Sincerely,  
  
Curtis A. Connors

cc: Scituate Zoning Board of Appeals, John Danehy, Chair (via email)  
Neil Duggan, Zoning Enforcement Officer (via email)  
Scituate Board of Selectmen (via email)  
Alexandra Dawson, Massachusetts Association of Conservation Commissions (via email)  
Christine Odiaga, DEP (via email)  
Rebecca Haney, CZM (via email)  
Citizens for the Protection of First Herring Brook (via email)  
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