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April 10, 2007

Conservation Commission
Scituate Town Hall
600 Chief Justice Cushing Highway
Scituate, MA 02066

Re: Herring Brook Meadow Wetlands Issues: Delineation and Enforcement

Dear Members of the Conservation Commission:

At the request of the Board of Selectmen, I am providing the Commission with comments on two issues that have been raised in a matter now pending before the Commission, a Notice of Intent ("NOI") for a project identified as Herring Brook Meadows ("HBM"). I have been provided with two letters to the Commission from Attorney Curtis A. Connors on behalf of a group of individuals identified as "Citizens for the Protection of First Herring Brook," one dated April 2, 2007 and another dated April 10, 2007, both attaching affidavits. In his correspondence, Attorney Connors asserts on behalf of his clients that there has been unlawful alteration of land and resources under the jurisdiction of the Commission, and requests that the Commission take enforcement action. The Board of Selectmen asked me, as Town Counsel to the Town, and the Commission, to provide a legal opinion to the Commission as to the options open to the Commission in response to this request for enforcement, as a means of providing support and assistance in this novel situation.

For reasons more fully set out below, it is my opinion that the Commission may in fact modify or ignore the 2004 Order of Resource Area Delineation ("ORAD"), as Attorney Connors suggests, if the Commission finds that the ORAD was the product of misrepresentations or other wrongdoing that substantially affected the Commission's decision in that matter.

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1. Enforcement request

The letters by Attorney Connors and their attached affidavits assert that misrepresentations and/or unpermitted alterations of land subject to the jurisdiction of the Commission are sufficient grounds for the Commission to take such action, regardless of its apparent conflict with wetlands delineation of the property in its November 16, 2004 ORAD for the HMB property. In the NOI now before the Commission, there has been submitted to the Commission testimony in the form of affidavits that, in my opinion, collectively gives evidence of prior alteration of wetland resources sufficient to support a finding by the Commission that the applicant made misrepresentations in connection with the 2004 ORAD. The question then becomes whether the Commission is bound by the 2004 ORAD, because three years have not yet expired since the date of its issuance. As will be outlined below, the Commission may modify or refuse to apply an otherwise valid ORAD or other determination of wetlands boundary in cases where the decision was the result of substantial misrepresentation ("fraud") by the applicant, or where it was based upon mutual mistake as to significant and relevant facts.

2. Validity of 2004 Order of Resource Area Delineation (ORAD)

It may be anticipated the owner of the HBM property may raise in its defense to any enforcement action by the Commission the 2004 ORAD that conflicts with factual assertions in the various affidavits and analysis presented to the Commission. For that reason, this letter will address the force and application of the 2004 ORAD under current law that allows for the modification of determinations as to wetland boundaries within the three-year period following the Commission's determination.

As you are aware, the regulations issued by DEP pursuant to the Act provide that a determination of the Commission as to the delineation of a wetland is "valid" for a period of three years from issuance. 310 CMR 10.05 (6) (d). The purpose and effect of this period is to provide certainty for a limited period of time, as well as to protect a landowner, by freezing the wetlands delineation as found by the Commission as of the date of its Determination, and for a period of three years thereafter. This period does not provide protection from re-examination of the basis of the determination, however, where there are grounds to suggest that the original determination may have been the product of either fraud in the application or presentation of evidence to the Commission, or what is characterized "mutual mistake." Such exceptions allow a Commission to revisit, and, if necessary, to modify or reject a Determination that it made within the previous three years, in cases where there has been "mutual mistake" or fraud in the presentation to the Commission on which the Determination was based.

