

**Final Memorandum of Understanding (MOU III)
Herring River Restoration Project
September 1, 2016**

The following is a list of acronyms used herein:

CCNS: Cape Cod National Seashore
CNR: Chequessett Neck Road
CRP: Conceptual Restoration Plan
DRP: Detailed Restoration Plan
FEIS/EIR: Final Environmental Impact Statement/Report
HREC: Herring River Executive Council
HRRC: Herring River Restoration Committee
MEPA: Massachusetts Environmental Policy Act
MOU: Memorandum of Understanding
NEPA: National Environmental Policy Act
NPS: National Park Service

This Memorandum of Understanding (MOU) is effective upon signature by and among the National Park Service (NPS), a bureau of the United States Department of the Interior, acting through the Superintendent of the Cape Cod National Seashore (CCNS), and the Towns of Wellfleet and Truro, municipal corporations located in Barnstable County, Massachusetts, acting through their Boards of Selectmen. The purpose of this MOU is:

- 1) To ratify the Detailed Restoration Plan (DRP) set forth in the Final Environmental Impact Statement/Report (FEIS/EIR) for the restoration of the Herring River estuary, completed by the Herring River Restoration Committee (HRRC) pursuant to a previous (November 2007) Memorandum of Understanding (referred to as MOU II) between NPS and the Towns of Wellfleet and Truro;
- 2) To enable additional planning, engineering, funding, construction and implementation of the agreed-upon restoration plan, using an Adaptive Management Plan, as set forth in the FEIS/EIR.
- 3) To set forth the structure and responsibilities of an intergovernmental team to direct the Restoration Project.
- 4) To generally describe the responsibilities of an independent organization which the parties could engage to undertake specified activities in the restoration process.

WITNESSETH

WHEREAS, the National Park Service (hereinafter NPS) administers and manages the Cape Cod National Seashore (hereinafter CCNS), located partially within the Towns of Wellfleet and Truro (hereinafter “the Towns”) and including more than 800 acres within

the Herring River floodplain; and whereas CCNS is legally authorized by U.S.C. Sections 1-3, 459b-459b-8 as a unit of the National Park System to enter into memoranda of understanding, and;

WHEREAS, the Town of Wellfleet maintains ownership of the Chequessett Neck Road (CNR) Dike, which currently controls tidal flow to the Herring River system, and the Town includes lands and waters within the Herring River estuary that may be affected by the restoration of tidal flow through the Dike, and;

WHEREAS, the Town of Truro includes lands and waters within the Herring River estuary that may be affected by the restoration of tidal flow through the Chequessett Neck Road Dike, and;

WHEREAS, High Toss Road, which crosses the Herring River floodplain, is located within Cape Cod National Seashore and is on land owned by the National Park Service, while the Town of Wellfleet holds rights for public access across it and maintains the road, and;

WHEREAS, the Town of Wellfleet and CCNS, pursuant to a (August 2005) MOU (referred to as MOU I) worked together to determine that restoration of the natural functions to the Herring River estuary is feasible and desirable, and to complete a Conceptual Restoration Plan (CRP), which was accepted by both the Towns of Wellfleet and Truro and CCNS pursuant to a second MOU (MOU II) executed in November 2007, and;

WHEREAS, pursuant to MOU II, the Towns and CCNS agreed that it was imperative that a Detailed Restoration Plan (DRP) be developed with continued public involvement and, when completed, the DRP represent the full consensus of the three primary entities; and whereas, the Towns and the CCNS agreed that alternatives analysis and public involvement approaches of the Massachusetts Environmental Policy Act (MEPA) and the National Environmental Policy Act (NEPA) would provide a mechanism for accomplishing these objectives, and;

WHEREAS, pursuant to MOU II, the Towns and the CCNS organized an interdisciplinary team, the Herring River Restoration Committee (hereinafter HRRC) to develop a detailed and comprehensive plan for restoration of the estuary and directed the Committee to:

- a. Review the Herring River Conceptual Restoration Plan (CRP) accepted under MOU II.
- b. Review all scientific and engineering reports in support of the CRP;
- c. Develop a Detailed Restoration Plan (DRP) that addresses environmental and social concerns through an integrated MEPA/NEPA process of alternatives analysis and public involvement;
- d. Develop a Detailed Restoration Plan that is suitable for local, state and federal permitting requirements of procedures;

- e. Seek funding sources;
- f. Inform the public on a regular basis through public meetings, reports or other forms of outreach, in addition to the public process required by MEPA and NEPA;
- g. Produce a third MOU for the Towns' and CCNS's approval, agreeing to collaborate on project implementation per the Detailed Restoration Plan;
- h. Deliver products of the MEPA/NEPA process, and;

WHEREAS, the HRRC has developed a DRP that addresses environmental and social concerns through an integrated MEPA/NEPA process of alternatives analysis and public involvement procedures as set forth in the Final Environmental Impact Statement/Report, and;

WHEREAS, the parties have determined that it is in the public interest to enter into this Memorandum of Understanding setting forth a cooperative arrangement between the parties for the next phase of the Herring River Restoration Project including additional planning, engineering, funding, construction and implementation of the agreed-upon Detailed Restoration Plan, using an Adaptive Management Plan, as set forth in the FEIS/EIR, this phase to be known as the implementation phase, and;

WHEREAS, the implementation phase will continue for many years, but at some point in time management responsibilities for tidal control infrastructure will be greatly reduced, this phase to be known as the long-range phase;

NOW THEREFORE, in consideration of the foregoing, the Towns and the CCNS agree as follows:

1. The Town of Wellfleet, the Town of Truro and CCNS hereby accept the Detailed Restoration Plan, including the Preferred Alternative D as set forth in the Final Environmental Impact Statement/Report, attached to this MOU. Implementation of the Detailed Restoration Plan (including but not limited to operation of proposed tide gates at Chequessett Neck Road, Mill Creek and Pole Dike Road) shall be in compliance with federal, state, regional and local permits and the provisions of an approved Herring River Adaptive Management Plan.

2. The Town of Wellfleet, the Town of Truro and CCNS agree to cooperate on implementation of the Detailed Restoration Plan, as set forth below. Representatives of the Town of Wellfleet, the Town of Truro and CCNS will form an intergovernmental team to direct the Restoration Project consisting of the following elements:

- a. The Towns and Cape Cod National Seashore shall form a Herring River Executive Council (HREC) to: coordinate project implementation activities; serve as a forum for establishing and providing policy direction; review and approve the Adaptive Management Plan; monitor progress; and ensure compliance with laws, policies and regulations of member towns and the CCNS, project permits and

agreements and other applicable legal regulations. The HREC shall meet quarterly or as needed and shall consist of seven members as follows:

- 1) Two members of the Wellfleet Board of Selectmen and the Town Administrator;
- 2) Two members of the Truro Board of Selectmen and the Town Administrator;
- 3) The Superintendent of Cape Cod National Seashore or his/her designee(s).

The HREC shall operate by consensus decision-making (agreement among the two towns and CCNS), recognizing that the towns and Cape Cod National Seashore all have obligations to their own established laws, policies and regulations. In the event that there is dissent among the representatives of one of the towns, they shall determine among themselves the town's position. The HREC shall operate in Open Meetings according to MGL Chapter 30A.

- b. The Herring River Restoration Committee (HRRC) established in MOU II as an interdisciplinary management team shall continue to exist and shall serve as an advisory group to the HREC, with representation from the Towns of Wellfleet and Truro, the Cape Cod National Seashore, Commonwealth of MA Division of Ecological Restoration (DER), U.S. Fish and Wildlife Service (USFWS), U.S. Natural Resources Conservation Service (NRCS) and the National Oceanic and Atmospheric Administration (NOAA). The HRRC will:

- 1) Make project management and funding recommendations to the Herring River Executive Council (HREC);
- 2) Direct and oversee approved elements of the Restoration Project, as set forth in the FEIS/EIR and Restoration Project permits;
- 3) Provide planning, engineering, technical, operational and scientific coordination for the Project.

- c. The HREC and the HRRC will work with any regulatory oversight group as may be established through federal, state and regional permitting processes.
- d. The HREC may consult other individuals or organizations, as needed, such as stakeholder groups and/or science advisors.
- e. Any decision to modify or alter tide gate openings at Chequessett Neck Road, Mill Creek and/or Pole Dike Road shall be made by the HREC, only after receiving a recommendation from the HRRC. Such decisions must be in compliance with federal, state, regional and local permits and the provisions of an approved Herring River Adaptive Management Plan.

3. Through separate contracts for services and/or Cooperative Agreements, the Towns and/or the CCNS may engage the services of an independent organization to undertake some or all of the responsibilities and functions outlined below, in coordination with HRRC:

- a. Provide and manage professional level technical and administrative staff necessary for the completion of all project elements;
- b. Compete for, receive, and administer available project funding from state, federal, and private sector sources;
- c. Prepare and submit permit applications, ensure compliance with all permit conditions, noticing requirements, and other environmental compliance obligations;
- d. Prepare and advertise bid solicitation packages, manage and oversee competitive bidding processes, select and manage contractors, oversee construction activities, pay invoices, and comply with funder and contractor stipulations subject to the provisions of MGL Chapters 30, 30B and 149, if applicable;
- e. Facilitate agreements with affected landowners;
- f. Conduct operations and maintenance of public infrastructure in cooperation with the towns and CCNS as stipulated in any contract agreement(s);
- g. Implement the adaptive management plan under the technical direction of HRRC;
- h. Perform public outreach and education activities.

4. The Town of Wellfleet, the Town of Truro and CCNS generally agree that the owners of the underlying land should own the components of the new project infrastructure during the implementation phase and for the long-term, as follows¹:

- a. Chequessett Neck Road (CNR) Bridge: *The Town of Wellfleet should continue to own the CNR dike/bridge.*
- b. Chequessett Neck Road Tide Gates: *The Town of Wellfleet should own the new CNR tide gates.*
- c. Mill Creek Dike: *CCNS should own the new Mill Creek dike.*
- d. Mill Creek Tide Gates: *CCNS should own the new Mill Creek tide gates.*
- e. High Toss Road: *High Toss Road is within the NPS boundary and located on land under federal ownership, with the Town of Wellfleet holding rights for public access. In order to facilitate tidal flow, the parties agree that the portion of High Toss Road bounded on the west by its intersection with Duck Harbor Road and bounded on the east by its intersection with Rainbow Lane (a distance of approximately 1000') should be removed. Maintenance of this portion of High Toss Road was discontinued by a vote of the Wellfleet Board of Selectmen on July 12, 2016.*
- f. Pole Dike Road: *The Town of Wellfleet should continue to own Pole Dike Road. The Herring River Restoration Project should fund the raising of the road.*

¹ It is not the intent of this document to make determinations about ownership of assets; the language is descriptive only and thus uses the verb “should” to describe anticipated ownership of the Project infrastructure components.

g. Pole Dike culvert/tide gate: *If a tide gate is installed at Pole Dike Road, the Town of Wellfleet should own the new tide gate.*

h. Old County Road/culverts: *The Town of Wellfleet should continue to own Old County Road and its culverts. The Herring River Restoration Project should fund the raising of the road and installation of new culverts.*

i. Bound Brook Road/culverts: *The Town of Wellfleet should continue to own Bound Brook Road and its culverts. The Herring River Restoration Project should fund the raising of the road and installation of new culverts.*

5. The owners (i.e. the Towns and/or CCNS) of the different elements of Restoration Project tide control infrastructure may wish to engage the services of an independent management organization to construct, operate and maintain this infrastructure (such as bridges, dikes, tide gates and culverts) during the implementation phase, or the owners may wish to perform these functions in-house. Long-term, operation and maintenance responsibilities should be the responsibility of the owner of each element of Project infrastructure.

6. Funding

a. This Memorandum of Understanding and the obligations of the NPS hereunder shall be subject to the availability of funding and staffing, and nothing contained herein shall be construed as binding the NPS to expend in any one fiscal year any sum in excess of appropriations made by Congress and administratively allocated for the purpose of this Agreement for the fiscal year, or to involve the NPS in any contract or other obligation for the further expenditure of money in excess of such appropriations or allocations.

b. This Memorandum of Understanding and the obligations of the Towns hereunder shall be subject to the availability of funding and staff, and nothing herein shall be construed as binding the Towns to expend in any one fiscal year any sums in excess of those appropriated by Town Meeting and made administratively available for the purpose of this Agreement for the fiscal year.

c. Each party shall bear its own costs associated with its participation in this Memorandum of Understanding without reimbursement.

7. This Memorandum of Understanding and the obligations of the NPS hereunder are subject to the laws, regulations and policies governing the NPS and CCNS whether now in force or hereafter enacted or promulgated.

8. This Memorandum of Understanding and the obligations of the Towns hereunder are subject to the laws, regulations, Town Meeting votes and policies governing the Towns, whether now in force or hereafter enacted or promulgated.

9. No Member of, Delegate to, or Resident Commissioner in, Congress shall be admitted to any share or part of this Agreement or to any benefit to arise therefrom, unless the share or part or benefit is for the general benefit of a corporation or company.

10. No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct foreign policy, counter-intelligence, intelligence or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

11. This Agreement contains the sole and entire agreement of the parties. No oral representations of any nature form the basis of or may amend this Agreement.

12. Failure to enforce any provision of this Agreement by either party shall not constitute waiver of that provision, nor a waiver of a claim for subsequent breach of the same type, nor a waiver of any other term of this Agreement. The waiver of any provision must be express and evidenced in writing.

13. This Memorandum of Understanding may be amended by a unanimous vote of all of the participating parties. It shall remain in effect until superseded by a further MOU or inter-municipal agreement(s) to implement its purposes.

IN WITNESS WHEREOF, the parties have cause this instrument to be executed by their respective duly authorized representatives on the day and year indicated.

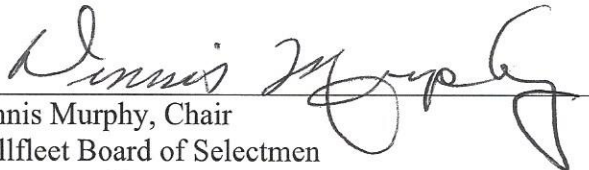
Name:

Date:



Michael Caldwell, Northeast Regional Director
National Park Service

9/21/16



Dennis Murphy, Chair
Wellfleet Board of Selectmen

9/13/16



Paul Wisotzky, Chair
Truro Board of Selectmen

7/13/16