

MEMORANDUM OF UNDERSTANDING IV BETWEEN
THE NATIONAL PARK SERVICE AND THE TOWN OF WELLFLEET
Herring River Restoration Project
June 25, 2019

This fourth successive Memorandum of Understanding ("MOU IV" or the "Agreement") is entered into by and between the NATIONAL PARK SERVICE ("NPS"), a bureau of the United States Department of Interior, acting through the Superintendent of the Cape Cod National Seashore ("CCNS"), and the TOWN OF WELLFLEET, MASSACHUSETTS, a municipal corporation, with its primary address of 300 Main Street, Wellfleet, Massachusetts, 02667 (the "Town" or "Wellfleet"), acting through its Selectboard, on this 25th day of June, 2019.

RECITALS

WHEREAS, the Herring River is a tidal river located in Wellfleet, Massachusetts that, through a large tidal estuary system and floodplain, connects to the Cape Cod Bay;

WHEREAS, the Herring River estuary includes lands and waters in Wellfleet, the Town of Truro ("Truro"), and the CCNS;

WHEREAS, the NPS administers and manages the CCNS, located partially within the Wellfleet and Truro and including the Herring River floodplain; and CCNS, as a unit of the National Park System, is legally authorized by 54 U.S.C. §§ 100101 *et seq.* and 16 U.S.C. § 459b-6 to regulate and conserve CCNS lands by entering into this Agreement to facilitate the restoration of tidal flow to the Herring River estuary;

WHEREAS, Wellfleet owns the Chequessett Neck Road ("CNR") Dike, which currently controls tidal flow to the Herring River system, and the CNR Dike has included since, approximately 1909, tidal gates that artificially restrict tidal flow in and out of the Herring River;

WHEREAS, the artificial restriction of tidal flow has impaired the waters of the Herring River and the proper functioning of the tidal estuary system, including tidal wetland habitat and salt marsh;

WHEREAS, to prevent ongoing degradation of the Herring River estuary, reclaim its ecological and environmental benefits, and replace a 40-year old waterfront structure with resilient infrastructure, Wellfleet and CCNS wish to remove the existing CNR Dike and tide gates at the CNR Dike and replace them with a bridge with tide gates that can restore the natural tidal flow over time, and to take other appropriate steps to rebuild infrastructure and provide mitigation as necessary to facilitate this goal (the "Herring River Restoration Project" or the "Project");

WHEREAS, through three previous Memoranda of Understanding ("MOUs"), Wellfleet, Truro, and CCNS have worked together, as well as with National Oceanic and Atmospheric Administration's Restoration Center, the U.S. Fish and Wildlife Service, the U.S. Department of

Agriculture's Natural Resources Conservation Service, and the Massachusetts Division of Ecological Restoration (collectively, the "Project Partner Agencies") towards planning the Project;

WHEREAS, on December 18, 2018, the Truro Board of Selectmen voted to cease its role in the Project's planning and to not participate in the future design and implementation of the Project as a proponent, permit applicant, or party to contracts, and to instead take on the role of interested municipal stakeholder; and

WHEREAS, following the Truro Board of Selectmen's vote, Wellfleet and CCNS agree that it is in the public interest to enter into this MOU IV to restate and reaffirm their efforts towards Project planning, engineering, funding, construction, implementation and operation, to clarify governance and decision making responsibilities concerning the Project, and to supersede existing MOUs concerning the Project.

WHEREAS, the following is a list of acronyms used herein:

ADR: Alternative Dispute Resolution
CCNS: Cape Cod National Seashore
CNR: Chequessett Neck Road
HREC: Herring River Executive Council
HRSG: Herring River Stakeholder Group
HRTT: Herring River Technical Team
MEPA: Massachusetts Environmental Policy Act
MOU: Memorandum of Understanding
NPS: National Park Service

AGREEMENT

NOW THEREFORE, in consideration of the foregoing, Wellfleet and CCNS (collectively, the "Parties") agree as follows:

1. Superseded MOU. This Agreement supersedes the three existing MOUs concerning the Project: MOU I (August 2005), MOU II (November 2007), and MOU III (2016), as those MOUs are amended. Notwithstanding the foregoing, this MOU IV does not supersede, disturb, or invalidate declarations of Project support expressed in earlier agreements, prior MOUs, and in Truro's December 18, 2018 vote. Rather, in light of Truro's December 2018 vote to exit from MOU II and MOU III (to which Truro was a party), this MOU IV updates the status of the Project, identifies next steps, and clarifies governance structures going forward. Nothing in this MOU IV is intended to alter the validity of terms established, affirmations given, or decisions made under previous MOUs, but instead to build on those decisions as the Project moves forward. All Project activities and decisions hereafter shall be undertaken by Wellfleet and CCNS, consistent with this MOU IV, and shall no longer include Truro, unless as an interested municipal stakeholder.

2. Project Status. To date, the Parties, in concert with the Project Partner Agencies, have performed several significant actions in support of the Project, including but not limited to the following:
 - a. Developing Conceptual and Detailed Restoration Plans for the Project;
 - b. Undertaking comprehensive data collection, modeling and ecological assessments necessary to establish and characterize pre- and post-restoration conditions;
 - c. Completing review under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* and the Massachusetts Environmental Policy Act ("MEPA"), M.G.L. Chapter 30, §§ 61-62I in July 2016;
 - d. Developing conceptual and detailed plans for Project-related construction and mitigation;
 - e. Obtaining in March 2019 a Scoping Decision from the Cape Cod Commission concerning Development of Regional Impact Review;
 - f. Conducting numerous Project-related meetings and public outreach with Project abutters and the community; and
 - g. Developing, as needed, mitigation plans to protect all public and private structures from any potential adverse effects related to the restoration of tidal flow.

3. Next Steps and Approach. To complete and operate the Project, the Parties agree that they will work together cooperatively, and in concert with Project Partner Agencies, to take the following steps, subject to the terms of this Agreement:
 - a. Make all significant decisions concerning Project development, implementation, and operation;
 - b. Compete for, receive, and administer funding from appropriate federal, state, local, and private entities to perform the Project and related mitigation, and to take the next steps identified in this Agreement;
 - c. Develop in further detail policies and plans for governance of Project construction and Project operation;
 - d. Further refine and review the Project's Adaptive Management Plan, and implement that Adaptive Management Plan seeking the technical advice of Project Partner Agencies through the Herring River Technical Team ("HRTT");
 - e. Facilitate agreements with landowners that the Project may potentially affect;
 - f. Draft, review, and submit all Project permits to appropriate federal, state, and local entities;

- g. Ensure compliance with all permit conditions, noticing requirements, and other environmental compliance obligations;
- h. 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 M.G.L. Chapters 30, 30B and 149, if applicable;
- i. Provide and manage professional level technical and administrative staff necessary for the completion of all Project elements;
- j. Conduct operations and maintenance of public infrastructure as stipulated in any contract agreement(s);
- k. Monitor Project progress; and
- l. Perform public outreach and education activities.

These actions may be undertaken by one or many of the Parties or Project Partner Agencies, or their designees. These actions may be accomplished through separate contracts for services or cooperative agreements, or through the services of an independent third-party organization including, but not limited to, Friends of Herring River. Recognizing, however, that each Party shall undertake contracting responsibilities pursuant to their individual obligations and requirements and neither intends to assign or delegate such authority by this Agreement to any entity described or established herein or otherwise. Additionally, any activities on federally owned property conducted by other than federal employees will require a separate agreement, license, or contract so authorizing.

- 4. Ownership of Project Infrastructure. Implementation of the Project may require development of new infrastructure and modification of existing infrastructure. The owners¹ of existing infrastructure shall continue to own any modifications, replacements or improvements to it, and the owners of the underlying land shall own any new components of Project infrastructure (as described in Project planning and permitting documents) as follows:
 - a. *CNR Water Control Structures:* Wellfleet shall continue to own any improved or new CNR water control structures;
 - b. *Pole Dike Road:* Wellfleet shall continue to own Pole Dike Road and any modifications or improvements to it;
 - c. *Pole Dike Water Control Structures:* If a water control structure(s) is installed at Pole Dike Road, Wellfleet shall own that structure(s);

¹ The ownership described throughout this Section is not intended to affirm a particular legal status and, with respect to roads, no distinction has been made between ownership of an underlying fee versus ownership of a right of way interest.

- d. *Old County Road/Culverts*: Wellfleet shall continue to own Old County Road and its culverts, except those that are located in Truro, and any modifications or improvements to them;
- e. *Bound Brook Road/Culverts*: Wellfleet shall continue to own Bound Brook Road and its culverts and any modifications or improvements;
- f. *High Toss Road*: High Toss Road and related improvements or modifications shall continue in its present ownership and maintenance status; and
- g. *Mill Creek Water Control Structures*: If a water control structure(s) is installed at Mill Creek, the NPS shall own the new structure(s).

Notwithstanding the foregoing, this provision is not intended to and does not purport to allow or provide for a *change* in land or property ownership as a result of modification of existing infrastructure.² The Parties agree that they may revisit the proposed ownership structure set forth in this Section 4 as the Project is developed, permitted, and implemented.

- 5. Operation of Project Infrastructure. The owners (Wellfleet or CCNS) of the different elements of Project infrastructure set forth in Section 4 may wish to engage the services of third-party entities to construct, operate and maintain Project infrastructure, or the owners may wish to perform these functions through their established governmental structures. The Project will consult with Truro to determine the preferred method to perform any Project-related work affecting public infrastructure in Truro. Long-term operation and maintenance responsibilities should be the responsibility of the owner of each element of Project infrastructure. The Parties agree that they may revisit the proposed operation structure set forth in this Section 5 as the Project is developed, permitted, and implemented.
- 6. Project Governance.
 - a. Herring River Executive Council.
 - i. Purpose and Responsibilities. The Herring River Executive Council ("HREC") shall function as the executive group that approves all major Project decisions and activities. The HREC's responsibilities include, but are not limited to, establishing and providing policy direction; reviewing and approving the Project's Adaptive Management Plan; monitoring Project progress; modifying or altering Project infrastructure water control structure openings (after receiving advice and recommendations from the technical staff, including those of the Project Partner Agencies, through

² For example, if an existing road must be modified and expanded beyond the boundaries of the existing right of way in order to implement the project, such expansion and modification does not result, by operation of this provision, in the owner of the right of way acquiring ownership of the expanded area. Neither Party can, through this Agreement, nor does hereby release its rights or interests in its existing real and personal property.

the HRTT); and ensuring compliance with laws, policies and regulations of Wellfleet and CCNS.

ii. Membership and Decision-making. The HREC shall meet as it may deem necessary or appropriate and shall consist of five members as follows:

- a) The Wellfleet Town Administrator and two members of the Wellfleet Selectboard, or alternatively, up to three designee(s) appointed by the Selectboard;
- b) The Superintendent of the CCNS or his/her designee, and one additional CCNS designee.

The HREC shall by-and-large operate by a consensus decision-making process or from time-to-time by taking a vote. A quorum of three members may make decisions if HREC wishes. Members of the HREC may, in their discretion, make a motion during a meeting for a vote on a particular topic or decision to be taken, at which point the HREC members will vote whether to take a vote. Voted decisions are effective only through unanimous vote of the members present, provided that such unanimous vote includes at least one vote by a member or designee of each Party.

The Parties shall seek Project Partner Agency input as to how and to what extent they wish to coordinate efforts and provide advice regarding Project decisions. The HREC may seek technical guidance and assistance from the expert technical personnel of the Parties and Project Partner Agencies individually as members of the HRTT.

Individual HREC members shall not possess any authority to set goals, priorities, or positions on behalf of the HREC.

The Parties recognize that decisions made by HREC may require or warrant further votes, approvals, reviews, or appropriations from Wellfleet and/or NPS in order to effectuate HREC decisions, and that neither Party is obligated to implement or move forward with any HREC decision that is inconsistent with or has not received such required or warranted further votes, approvals, reviews or appropriations.

The Parties further recognize that in emergency situations or unforeseen circumstances, Wellfleet and CCNS may each make emergency decisions regarding Project infrastructure as provided for in their applicable laws and authorities concerning Project elements or property owned by each governmental entity. Both parties shall make every reasonable attempt to communicate in an emergency.

iii. Term. Each representative on the HREC shall serve until their designating entity notifies the HREC of a change in designation.

- iv. Public Meetings. The HREC shall conduct its meetings consistent with the Massachusetts Open Meeting Law, M.G.L. Chapter 30A, §§ 18-25.

7. Technical Advice and Input.

a. Herring River Technical Team.

- i. Purpose and Responsibilities. The Herring River Technical Team (“HRTT”) shall function as an informal, sounding board composed of intergovernmental technical staff to provide technical input for Project-related decisions as necessary or appropriate. These opportunities for input include, but are not limited to planning, permitting, engineering, technical, operational and scientific coordination for the Project. The HRTT will coordinate with the Regulatory Oversight Group (which was established through Project’s July 15, 2016 MEPA Certificate) consistent with the provisions of that MEPA Certificate.
- ii. Membership and Decision-making. The HRTT shall have no set number of members, it meets as needed or desired, and may consist of staff members from the following federal, state, and local governmental entities: Wellfleet, CCNS, the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, the Massachusetts Division of Ecological Restoration, the U.S. Natural Resources Conservation Service, and other entities with appropriate technical knowledge to assist the Project. Participating staff members shall be designated at the sole discretion of any participating agency.

The HRTT shall have no quorum requirement and is not a tribunal making governmental decisions. The HRTT does not possess any authority to make decisions that bind the Project, Wellfleet, the CCNS, or the Project Partner Agencies; is not empowered by any Party to act collectively; and does not have any power to take actions for the Project. The Parties disclaim any intention to create in the HRTT a public body for purposes of the Massachusetts Open Meeting Law or the federal or Massachusetts Public Records Act.

8. Consultation with Stakeholder Groups and Others. In accordance with the MEPA Certificate, the HREC has formed a Herring River Stakeholder Group (“HRSG”) to provide advisory input on Project implementation issues. The HREC may consult the HRSG or other individuals or organizations for advisory input, as needed, to develop, permit, and administer the Project.

9. Governmental Provisions.

- a. Governmental Authority. As used in this Agreement, the “Town” or “Wellfleet” shall mean the Town of Wellfleet as a municipal corporation, including its Selectboard members, employees, agents, and consultants. “CCNS” shall mean the Cape Cod National Seashore, including its employees, agents, and consultants.

Project Partner Agencies, other governmental entities, non-profit groups affiliated with the Project and their employees, agents, and consultants shall not be deemed to represent Wellfleet or CCNS, and Wellfleet and CCNS make no representations or warranties that they possess any authority to bind such entities to any of the obligations set forth in this Agreement.

Nothing in this Agreement shall be construed as (i) in any way impairing the authority of the NPS or Wellfleet to supervise, regulate, and administer its respective property and concerns under applicable laws, regulations, and management plans or policies as they may be modified from time-to-time, or (ii) inconsistent with or contrary to the purpose or intent of any Act of Congress.

- b. Finance and Approvals. No terms in this Agreement shall be construed to obligate either party or the United States of America to: (i) take any actions or approve any actions that would violate the requirements of federal, state, or local laws; (ii) approve any permit or approval applications submitted to federal or Town departments or boards in furtherance of the Project; (iii) commit any current or future funding or staffing resources to fulfill the obligations of this Agreement in advance of appropriate appropriation, administrative allocation, approval and/or vote; or (iv) spend any funds on any particular project or purpose, even if funds are available.
- c. Costs of Participation. Each party shall bear its own costs associated with its participation in this MOU IV and Project-related activities without reimbursement, and nothing contained herein shall be interpreted as obliging any payment by one party to the other, unless specifically authorized through appropriate procedures of Wellfleet or the CCNS.
- d. Disclaimers of Government Endorsement. Neither Wellfleet, nor any other Project Partner, shall publicize or circulate materials (such as advertisements, solicitations, brochures, press releases, speeches, pictures, movies, articles, manuscripts, or other publications), suggesting, expressly or implicitly, that the United States of America, the Department, NPS, CCNS or any government employee endorses any business, brands, goods, services, or activities, without the express approval of the NPS. In addition, any non-Federal entity must obtain prior written approval for any public information releases that refer to the Department of Interior, any bureau, park unit, or employee (by name or title), or to this Agreement. The specific text, layout, photographs, etc., of the proposed release must be submitted with the request for approval. The NPS will make a good-faith effort to expeditiously respond to such requests.
- e. Intellectual Property. Neither party of this Agreement shall use any intellectual property (including, without limitation, trademarks, service marks, logos, and corporate and brand identification and indicia) of the other party for any purpose without the prior written consent of the other party, which consent may be withheld in such other party's sole discretion.

- f. Compliance with Law. The obligations of the Wellfleet and CCNS under this MOU IV are subject to all current and future laws, regulations, and policies governing each governmental entity.
- g. Federal Congressional Provisions.
 - i. Pursuant to 41 U.S.C. § 22, no Member of, Delegate to, or Resident Commissioner in, Congress shall be admitted to any share or part of any contract or agreement made, entered into, or adopted by or on behalf of the United States, or to any benefit to arise therefrom, unless the share or part or benefit is for the general benefit of a corporation or company.
 - ii. In carrying out, supporting, or pursuing actions under this Agreement, Wellfleet will not undertake activities, including lobbying for proposed Town or NPS projects or programs, that seek to either (1) alter the appropriation of funds included in the President's budget request to Congress for the Department of the Interior or another federal agency that holds funds for the sole benefit of the NPS under Congressionally authorized programs, including the Federal Lands Highway Program; or (2) alter the allocation of such appropriated funds by NPS or another Federal agency. Nothing in this paragraph is intended to preclude Wellfleet or another Project Partner from applying for and obtaining a competitive or non-competitive grant of Federal financial assistance from a Federal agency, or from undertaking otherwise lawful activities with respect to any Town or NPS activity, project or program included in the President's budget request to Congress. Nothing in this paragraph should be construed as NPS requesting, authorizing or supporting advocacy by nonfederal entities before Congress or any other government official. Except as provided herein and in applicable laws, nothing in this paragraph shall be construed to curtail Wellfleet's ability to interact with elected officials.
- 10. Dispute Resolution. If Wellfleet and CCNS do not agree regarding any aspect of the Project, Wellfleet and CCNS shall work cooperatively to resolve any disagreement, including but not limited to use of alternative dispute resolution ("ADR"), should they so agree.
- 11. Termination. Either party may terminate this Agreement at any time by providing ninety (90) days written notification consistent with the Notice provisions of Section 12.d. below.
- 12. Miscellaneous Provisions.
 - a. Amendments. This Agreement may be amended only by written agreement signed by authorized representatives of both Parties. It shall remain in effect until superseded by a further MOU or inter-governmental agreement(s) to implement its purposes or terminated by either party as described above.

- b. Merger. This Agreement constitutes the Parties' entire agreement and understanding with respect to its subject matter, except as otherwise noted in Section 1.
- c. No Third-Party Beneficiaries. The Parties are the sole and exclusive beneficiaries of the Agreement, subject to its terms and to all applicable law.
- d. Notices. All notices to be given pursuant to this Agreement shall be provided by email or U.S. mail. Notice shall be deemed to have been received at the time of actual receipt of any email or three (3) business days after the date of any properly addressed notice sent by mail as set forth below:

If to Wellfleet: Daniel R. Hoort
Town Administrator
Town of Wellfleet
300 Main Street
Wellfleet, MA 02667
Dan.Hoort@wellfleet-ma.gov

Wellfleet Selectboard
300 Main Street
Wellfleet, MA 02667

With a copy to: Gregor I. McGregor, Esq.
Olympia Bowker, Esq.
McGregor & Legere, P.C.
15 Court Square, Suite 500
Boston, MA 02108
gimcg@mcgregorlaw.com

If to CCNS: Brian Carlstrom
Superintendent, Cape Cod National Seashore
99 Marconi Site Road
South Wellfleet, MA 02667
brian_carlstrom@nps.gov

With a copy to: Melissa Boness, Esq.
Attorney Advisory, Boston Office
Office of the Solicitor
U.S. Department of the Interior
15 State Street, 8th Floor
Boston, MA 02109
Melissa.boness@sol.doi.gov

- e. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

- f. Severability. If any provision of this Agreement or its application to any circumstances is declared invalid or unenforceable by the final ruling of a court of competent jurisdiction, the remaining provisions and their application to other circumstances shall not be affected. In place of such invalid or unenforceable provision, there shall be substituted a valid and enforceable provision that most nearly accomplishes the Parties' original intention.
- g. Authority. The signatories below represent that they are duly authorized to sign on behalf of and bind their respective parties.

IN WITNESS WHEREOF, the Parties have caused this MOU IV to be executed by their respective duly authorized representatives on the day and year indicated.

[Signature page to follow]

