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February 5, 2008

VIA OVERNIGHT MAIL

Mr. Franklin Keel
Regional Director
Bureau of Indian Affairs
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214

RE: Land-In-Trust Application of the Mashpee Wampanoag Tribe of Massachusetts

Dear Mr. Keel:

Pursuant to 25 C.F.R. § 151, the attached comments are submitted on behalf of the Commonwealth of Massachusetts ("Commonwealth") in opposition to the application ("Application") of the Mashpee Wampanoag Tribe ("Tribe") to have approximately 140 acres in Mashpee, Massachusetts and approximately 539 acres in Middleborough, Massachusetts taken into trust by the Department of Interior ("DOI"), Bureau of Indian Affairs ("BIA"). As noted in the attached comments, the Commonwealth opposes the Tribe's Application because it fails to provide the BIA with sufficient information to recommend approval of the Tribe's proposed acquisition at this time.

As an initial matter, the Application fails to provide essential information required under 25 C.F.R. § 151 and the Indian Gaming Regulatory Act ("IGRA"). With respect to 25 C.F.R. § 151, the Tribe fails to provide comprehensive tribal authorization for the trust acquisition request as required under 25 C.F.R. § 151.9, fails to demonstrate tribal need as required under 25 C.F.R. § 151.10(b), fails to provide support for the BIA's ability to discharge additional responsibilities as required under 25 C.F.R. § 151.10(g), fails to provide support for environmental compliance as required under 25 C.F.R. § 151.10(h), and fails to demonstrate anticipated economic benefit as required under 25 C.F.R. § 151.11(c). With respect to the IGRA, the Tribe's Application fails to show that the trust

process is necessary for the Tribe to achieve its goals of economic development and self-sufficiency. The Commonwealth is also unaware of the Tribe's financial arrangement with its investors and therefore unaware of the arrangement's compliance with the IGRA goal of ensuring that the Tribe is the primary beneficiary of the gaming operation.

Moreover, because the placement of lands in trust may exempt certain activities on those lands from state and local laws, there are significant jurisdictional concerns at the state level which, unless resolved, should preclude the BIA from recommending approval of the Tribe's proposed acquisition. Those concerns include environmental issues relating to potential adverse impacts on wildlife and natural resources; zoning and land use concerns; transportation issues relating to increased traffic volume and the feasibility of proposed improvements; labor and employment issues relating to wage and benefit protections and the health and safety of employees; public safety, public health, and consumer protection concerns. Where applicable, the Commonwealth has provided suggestions for addressing or mitigating the Commonwealth's concerns and conditions for approval of the proposed acquisition.

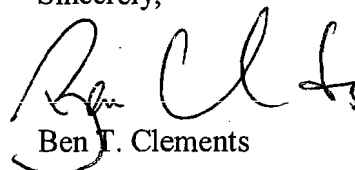
The Commonwealth's concerns illustrate the importance of safeguards for the environment, transportation, labor and employment, public safety, public health, and consumer protection. The Governor's proposed legislation, which would authorize the issuance of up to three licenses for resort casinos in the Commonwealth (H4307, An Act Establishing and Regulating Resort Casinos in the Commonwealth), includes those safeguards and ensures a level of state oversight and involvement that guarantees the protection and preservation of the safety and welfare of the inhabitants of the Commonwealth.

In the event that the BIA decides to move forward with the Tribe's Application, it is imperative that the BIA prepare a comprehensive Environmental Impact Statement ("EIS") during the environmental review process required under 25 C.F.R. § 151.10(h) to fully analyze all potential environmental impacts presented by the Tribe's Application.

In accordance with 25 C.F.R. § 151, the comments submitted by the Commonwealth are preliminary and based on information available at this time. The Commonwealth has been and will continue to be in communication with the Tribe. The Commonwealth reserves the right to supplement and expand on these comments as the process proceeds.

Thank you for your consideration of our comments.

Sincerely,



Ben T. Clements

Enclosure

cc: (with enclosure)
Shawn Hendricks, Chairman of the Mashpee Wampanoag Tribe

cc: (without enclosure)
Fred Fielding, White House Counsel
Dirk Kempthorne, Secretary of the Interior
Carl Artman, Assistant Secretary for Indian Affairs
Paul D. Clement, Solicitor's Office
Philip N. Hogen, Chairman, National Indian Gaming Commission
Michael B. Mukasey, United States Attorney General
Michael J. Sullivan, United States Attorney, District of Massachusetts
Senator Edward M. Kennedy
Senator John F. Kerry
Congressman Michael E. Capuano
Congressman William D. Delahunt
Congressman Barney Frank
Congressman Stephen F. Lynch
Congressman Edward J. Markey
Congressman James P. McGovern
Congressman Richard E. Neal
Congressman John W. Olver
Congressman John F. Tierney
Congresswoman Niki Tsongas
Martha Coakley, Commonwealth of Massachusetts Attorney General
Senate President Therese Murray
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Senator Marc R. Pacheco
Senator Robert O'Leary
Representative Thomas J. Calter
Representative William M. Straus
Representative Stephen R. Canessa
Representative Matthew Patrick
Representative Jeffrey D. Perry
Stephen Lombard, Town Manager, Town of Middleborough
Joyce Mason, Town Manager, Town of Mashpee

**COMMENTS ON THE
MASHPEE WAMPANOAG TRIBE'S
LAND-IN-TRUST APPLICATION
TO THE UNITED STATES
DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS**

COMMONWEALTH OF MASSACHUSETTS

FEBRUARY 5, 2008

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INTRODUCTION

On May 23, 2007, the Mashpee Wampanoag Tribe of Massachusetts (“Tribe”) was acknowledged by the Department of the Interior (“DOI”) as a federally recognized tribe.¹ On August 30, 2007, the Tribe applied to the DOI, Bureau of Indian Affairs (“BIA”) to have approximately 140 acres in Mashpee, Massachusetts (“Mashpee lands”) and approximately 539 acres in Middleborough, Massachusetts (“Middleborough lands”) taken into trust for the benefit of the Tribe, pursuant to Section 5 of the Indian Reorganization Act of 1934 (“IRA”), 25 U.S.C. § 465,² and federal trust land acquisition regulations, 25 C.F.R. § 151. In its Application, the Tribe further requested that the lands be proclaimed the Tribe’s reservation by the Secretary, pursuant to Section 7 of the IRA, 25 U.S.C. § 467, and that the Secretary determine that such lands constitute the Tribe’s initial reservation on which gaming may be conducted pursuant to Section 20(b)(1)(B)(ii) of the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2719(b)(1)(B)(ii).

The following comments are submitted on behalf of the Commonwealth of Massachusetts (“Commonwealth”) in opposition to the Tribe’s application (“Application”) to have the Mashpee lands and the Middleborough lands taken into trust by the BIA. To assist the Secretary of the Interior (“Secretary”) in the exercise of his discretionary authority to determine whether to acquire the lands in trust, and pursuant to 25 C.F.R. § 151, the Commonwealth provides the following comments on (1) the

¹ See 72 Fed. Reg. 35 (Feb. 22, 2007) (determination final and effective 90 days from publication on May 23, 2007).

² Reliance on the IRA in the Commonwealth’s comments presumes that the IRA is constitutional as applied to the Commonwealth. However, if the Supreme Court grants Petitioners’ request for certiorari in *Carcieri v. Kempthorne*, Docket No. 07-526, filed on October 18, 2007, and overturns the First Circuit’s decision regarding the constitutionality of the IRA in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), the Commonwealth reserves the right to argue that the IRA is unconstitutional as applied to the Commonwealth. Absent the IRA, the Secretary would have no other statutory authority for taking lands into trust status on behalf of the Tribe and the Tribe would have no basis for its Application.

Application's failure to meet to criteria required under 25 C.F.R. § 151; (2) the proposed acquisition's potential impacts on regulatory jurisdiction; (3) the proposed acquisition's potential impacts on real property taxes; (4) the proposed acquisition's potential impacts on special assessments; and (5) other considerations.

As an initial matter, the Application fails to provide essential information required under 25 C.F.R. § 151 and IGRA. With respect to 25 C.F.R. § 151, the Tribe fails to provide comprehensive support for the trust acquisition request as required under 25 C.F.R. § 151.9, fails to demonstrate tribal need as required under 25 C.F.R. § 151.10(b), fails to provide support for the BIA's ability to discharge additional responsibilities as required under 25 C.F.R. § 151.10(g), fails to provide support for environmental compliance as required under 25 C.F.R. § 151.10(h), and fails to demonstrate anticipated economic benefit as required under 25 C.F.R. § 151.11(c). With respect to the IGRA, the Tribe's Application fails to show that the trust process is necessary for the Tribe to achieve its goals of economic development and self-sufficiency. The Commonwealth is also unaware of the Tribe's financial arrangement with its investors and therefore unaware of the arrangement's compliance with the goal of the IGRA. Therefore, the Tribe's Application does not provide the BIA with sufficient information to recommend approval of the Tribe's proposed acquisition.

Moreover, because the placement of land in trust could exempt activities on those lands from the application of certain state and local laws,³ there are significant jurisdictional concerns at the state level which, unless resolved, should preclude the BIA from recommending approval of the Tribe's proposed acquisition. Those concerns

³ The Commonwealth in no way concedes the preemption of any particular state or local law or regulation should the Mashpee and Middleborough lands be placed in trust.

include environmental issues relating to potential adverse impacts on wildlife and natural resources, zoning and land use concerns, transportation issues relating to increased traffic volume and the feasibility of proposed improvements, labor and employment issues relating to wage and benefit protections and the health and safety of employees, public safety concerns, public health and consumer protection concerns. The potential lack of regulatory coordination and supervision of the land in trust could make it difficult for the Commonwealth to protect and preserve the safety and welfare of its inhabitants. Where applicable, the Commonwealth has provided suggestions for addressing or mitigating the Commonwealth's concerns and conditions for approval of the proposed acquisition.

Pursuant to the regulations and the BIA's request, the Commonwealth also addresses the potential impacts of the Tribe's proposed acquisition on real property taxes and special assessments.

In accordance with 25 C.F.R. § 151, the comments submitted are preliminary and based on information available at this time. The Commonwealth reserves the right to supplement and expand on these comments as the process proceeds.

THRESHOLD LEGAL CONSIDERATIONS

TITLE 25, CODE OF FEDERAL REGULATIONS, PART 151

Title 25, Part 151 of the Code of Federal Regulations governs the acquisition of land in trust status for the benefit of Indian tribes. A tribe must meet the criteria required under 25 C.F.R. § 151 to allow the BIA to evaluate its proposed acquisition. Specifically, because the Tribe acknowledges that it has no existing reservation or trust lands,⁴ the regulations require that its request be evaluated as an off-reservation acquisition under the

⁴ See Application, Executive Summary, Section II. 8, p. 14 ("As the Tribe has no existing reservation or trust lands, the proposed lands may be considered 'off-reservation.'").

criteria set forth in 25 C.F.R. § 151.11, as opposed to an on-reservation acquisition under the criteria set forth in 25 C.F.R. § 151.10.

On January 4, 2008, the DOI issued letters to 11 tribes⁵ stating that the DOI was “unable to assess the merits of [each tribe’s] request” because the tribes had failed to “provide information required by 25 C.F.R. §§ 151.10 and 151.11.”⁶ Likewise, the Tribe here has failed to provide adequate information to satisfy the criteria required by 25 C.F.R. §§ 151.9, 151.10, and 151.11 to allow the BIA to evaluate its proposed off-reservation acquisition: the Tribe fails to provide comprehensive tribal authorization for the trust acquisition request as required under 25 C.F.R. § 151.9, fails to demonstrate tribal need as required under 25 C.F.R. § 151.10(b), fails to provide support for the BIA’s ability to discharge additional responsibilities as required under 25 C.F.R. § 151.10(g), fails to provide support for NEPA compliance as required under 25 C.F.R. § 151.10(h), and fails to demonstrate anticipated economic benefit as required under 25 C.F.R. § 151.11(c).

Incomplete Authorization to Acquire Lands in Trust

The regulations require that the Tribe demonstrate that the tribal membership has authorized the Tribe’s trust acquisition request. The Tribe has failed to provide a completely executed copy of the tribal resolution authorizing the trust acquisition request as required under 25 C.F.R. § 151.9 and the Office of Indian Gaming’s Checklist for

⁵ Those tribes include the Ysleta del Sur Pueblo, the Turtle Mountain Chippewa Tribe, the Muckleshoot Tribe, the Lower Elwha Tribe, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Kickapoo Tribe and the Sac and Fox Nation, the Ho-Chunk Nation, the Dry Creek Rancheria, the Colorado River Indian Tribes, the Confederated Tribes of the Colville Reservation, and the Burns Paiute Tribe.

⁶ See e.g., Letter from George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, to Arturo Senclair, Governor, Ysleta del Sur Pueblo (Jan. 4, 2008) and similar letters from George T. Skibine to the Turtle Mountain Chippewa Tribe, the Muckleshoot Tribe, the Lower Elwha Tribe, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Kickapoo Tribe and the Sac and Fox Nation, the Ho-Chunk Nation, the Dry Creek Rancheria, the Colorado River Indian Tribes, the Confederated Tribes of the Colville Reservation, and the Burns Paiute Tribe.

Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20

Determinations (“Checklist”), Part 1, Section VII.A.⁷ While the Tribe’s Application includes a signed copy of a tribal resolution, the resolution is undated and fails to include the number of members of the Tribal Council present to form a quorum.⁸ The resolution is also signed by former Tribal Chairman, Glenn Marshall, who resigned as Tribal Chairman in August, 2007, after public allegations were made concerning his military record and his criminal past. Marshall is also the subject of a federal investigation by the Internal Revenue Service and the Justice Department into his handling of the Tribe’s affairs. Therefore, the incomplete resolution warrants further scrutiny into the propriety of the document authorizing the Tribe’s trust acquisition request.

No Demonstration of Tribal Need

The regulations require that the Tribe justify its need for additional land to provide the Secretary with a basis for exercising his discretion under IRA to acquire interests in land for the benefit of the Tribe. The Tribe has failed to provide any documentation to support the Tribe’s need for the acquisition as required under 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10(b)) and Checklist, Part 1, Section VIII.C.⁹ On January 4, 2008, the DOI issued a letter to the United Keetoowah Band of Cherokee Indians stating that the DOI would not approve its proposed acquisition because the

⁷ See Checklist, Office of Indian Gaming, Part 1, Section VII.A, p. 3 and Part 1, Section II.B (Sept. 2007) (requiring a tribal resolution of the appropriate governing body of the tribe authorizing the trust acquisition request); see also Application, Mashpee Wampanoag Tribal Council Resolution, 2007-009, Tab 13.

⁸ See Application, Mashpee Wampanoag Tribal Council Resolution, 2007-009, Tab 13 (The resolution’s certification reads: “I, Glenn Marshall, the undersigned Chairperson of the Mashpee Wampanoag Tribe, a federally recognized tribe, do hereby certify that the Mashpee Wampanoag Tribal Council at its August __, 2007 meeting, with a quorum of __ members of the Tribal Council present, discussed the foregoing Resolution and voted to adopt it by a majority of the members present.”) (emphasis added).

⁹ The relevant portion of the Application states: “no documents at this time.” See Application, Tab 5.

“application does not address a need for land.”¹⁰ Likewise, the Tribe’s Application does not include a detailed analysis on why particular parcels of land need to be held in trust.¹¹

Therefore, the DOI should reject the Tribe’s proposed acquisition.

No Support for the BIA’s Ability to Discharge Additional Responsibilities

The regulations require that the Tribe inform the BIA of additional responsibilities it may be required to take on as a result of the acquisition. The Tribe has failed to provide any documentation regarding additional responsibilities resulting from the acquisition of the land in trust status as required under 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10(g)) and Checklist, Part 1, Section VIII.H.¹² The Tribe’s Application contains no assessment of the extent to which the BIA would be affected by taking the proposed lands into trust and having to oversee the lands. While the BIA is best equipped to determine its ability to discharge its responsibilities, the Tribe has failed to assist the BIA in delineating the additional responsibilities that may result from the proposed acquisition, based on the intended and futures uses of the Mashpee and Middleborough lands.¹³ Therefore, unless the BIA can satisfactorily assess the additional responsibilities resulting from the acquisition, the DOI should reject the Tribe’s proposed acquisition.

¹⁰ Letter from Carl J. Artman, Assistant Secretary for Indian Affairs, to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians (Jan. 4, 2008).

¹¹ See Checklist, Office of Indian Gaming, Part 1, Section VIII.C, p. 3 (“The Regional Director must conclude that the Tribe has *significantly* justified the need for additional land.”) (emphasis added).

¹² The relevant portion of the Application states: “no documents at this time.” See Application, Tab 8.

¹³ See Checklist, Office of Indian Gaming, Part 1, Section VIII.H, p. 4 (“The Regional Director should consider the type of services required for the land, if any; the availability of the staff to carry out the additional responsibilities; and such other considerations which may be relevant in making this assessment. In the assessment of the impact, an analysis is required of the intended and future uses of the property ...”).

No Support for NEPA and Hazardous Substances Determinations Compliance

The regulations require that the Tribe provide the BIA with information that allows the Secretary to comply with federal environmental requirements. The Tribe has failed to provide sufficient documentation to allow the Secretary to comply with 516 DM 6, appendix 4, *National Environmental Policy Act Revised Implementing Procedures*, and 602 DM 2, *Land Acquisitions: Hazardous Substances Determinations*, as required under 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10 (h)) and Checklist, Part 1, Section VIII.I.¹⁴ While the Tribe has proposed that an Environmental Impact Statement (“EIS”) be prepared, the Tribe does not provide any further information at this time, stating only that the Tribe “believes that the proposed action by the BIA of taking the land into trust will not result in any significant environmental impact.”¹⁵ The construction and operation of a gaming facility on the Middleborough lands and plans for the Mashpee lands¹⁶ (which include conservation land) will undoubtedly have significant environmental impacts which will need to be carefully studied and mitigated.¹⁷ Therefore, unless and until the Tribe can provide documentation that allows the Secretary to comply with federal environmental requirements, the DOI should reject the Tribe’s proposed acquisition.

No Demonstration of Anticipated Economic Benefit

The regulations require that the Tribe demonstrate an anticipated economic benefit in order to satisfy the IRA’s purpose of promoting economic advancement and

¹⁴ The relevant portion of the Application states: “no documents at this time.” See Application, Tab 9.

¹⁵ See Application, Executive Summary, Section II.7, p.14.

¹⁶ Although the Tribe states in its Application that it does not intend to use the Mashpee lands for gaming, see Letter from the Mashpee Wampanoag Tribe to BIA Regional Director Franklin Keel (Aug. 30, 2007), the Tribe’s Application still requests a determination by the Secretary that all lands identified in the Application constitute the Tribe’s initial reservation on which gaming may be conducted.

¹⁷ See IMPACTS ON REGULATORY JURISDICTION- ENVIRONMENTAL Section *infra* at p. 13.

self-support for Indian tribes.¹⁸ The DOI recently issued guidance on taking off-reservation land into trust for gaming purposes and determined that “[t]he reviewer should apply greater scrutiny [to the justification of the anticipated benefits] as long as the requested acquisition is off-reservation regardless of the mileage between the tribe’s reservation and the proposed acquisition.”¹⁹ The guidance also provided that “[i]f the initial review reveals that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied.”²⁰ The Tribe has failed to provide any documentation regarding the anticipated economic benefit to the Tribe as required under 25 C.F.R. § 151.11(c) and Checklist, Part 1, Section IX.C.²¹

When the Keetoowah Band of Cherokee Indians provided a “Feasibility Study from Old Fort Entertainment, LLC by the Innovation Group,” the DOI found that the feasibility study satisfied the 25 C.F.R. 151.11(c) criterion.²² However, when the Big Lagoon Rancheria provided general descriptions of the anticipated economic benefit, the DOI found that those “general descriptions do not provide sufficient detail to allow a determination by the Secretary of the specific benefits expected from the use of net gaming revenues” and the DOI rejected the Big Lagoon Rancheria’s proposed acquisition.²³ The Tribe’s Application does not include a comprehensive financial plan²⁴

¹⁸ See Letter from Carl J. Artman, Assistant Secretary for Indian Affairs, to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians (Jan. 4, 2008) (“Where the land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use”).

¹⁹ Memorandum from Assistant Secretary Carl Artman to Regional Directors, BIA and George Skibine, Office of Indian Gaming (Jan. 3, 2008) (emphasis added).

²⁰ *Id.*

²¹ The relevant portion of the Application states: “no documents at this time.” See Application, Tab 11.

²² Letter from Carl J. Artman, Assistant Secretary for Indian Affairs, to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians (Jan. 4, 2008).

²³ Letter from Carl J. Artman, Assistant Secretary for Indian Affairs, to Virgil Moorehead, Chairman, Big Lagoon Rancheria (Jan. 4, 2008) (general descriptions provided included: “support for existing governmental services, including Two Feathers Native American Family Services, which provides various social services to tribal members and other Native Americans living in Humboldt County, and the Tribe’s

that documents the current standing of the Tribe or its future economic objectives, nor does it provide even general descriptions of the anticipated economic benefit. The Preliminary Business Plan included in the Tribe's Application merely states that "it is difficult to predict with precision the exact economic performance of the casino," but that "the project will be successful economically."²⁵ Absent more detailed information on the Tribe's anticipated economic benefit, the DOI should reject the proposed acquisition.

INDIAN GAMING REGULATORY ACT (IGRA)

The IGRA establishes the jurisdictional framework that governs Indian gaming. Because the Tribe seeks to have the Middleborough and Mashpee lands placed in trust for gaming purposes,²⁶ the Tribe's Application must comply with the provisions and goals of the IGRA. However, the Tribe's Application fails to show that the trust process is necessary for the Tribe's goals of economic development and self-sufficiency. The Commonwealth is also unaware of the Tribe's financial arrangement with its investors and therefore unaware of the financial arrangement's compliance with the IGRA goal of ensuring that the Tribe is the primary beneficiary of the gaming operation.

Failure to Show Trust Process Required for Economic Development

The IGRA was passed "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."²⁷ The legislative history of the IGRA shows that tribal gaming was not meant to be an end in itself, but rather an avenue for

education, social services, roads, tribal government, fire, community services, and child welfare programs to its members.").

²⁴ See Checklist, Office of Indian Gaming, Part 1, Section IX.C, p. 5 ("The Regional Director must review the Tribe's *comprehensive* development plan required under 25 CFR 151.11(c), which specifies the anticipated financial benefit associated with the acquisition.") (emphasis added).

²⁵ See Application, Preliminary Business Plan, p. 6, Tab 3.

²⁶ See INTRODUCTION *supra* p.1.

²⁷ 25 U.S.C. § 2702(1).

tribal economic development and self-sufficiency.²⁸ As a threshold matter, the Application fails to show that proceeding through the trust process, rather than in accordance with the regulatory processes required by state and local laws and regulations, is necessary for the Tribe to achieve its goals of economic development and self-sufficiency. Such a showing should be made before any recommendation for approval by the Secretary.

Failure to Show that Tribe is Primary Beneficiary of Gaming Operation

The IGRA also seeks “to ensure that the Indian tribe is the primary beneficiary of the gaming operation.”²⁹ The legislative history of the IGRA illustrates that Congress wanted tribal gaming revenue to benefit Indian tribes to the greatest extent possible to ensure tribal self-sufficiency.³⁰ Therefore, the IGRA places a cap on the term of a management contract between a tribe and its investors³¹ and the percentage of revenues that investors can collect from a tribe under such a management contract.³²

The Tribe has entered into a Development Services Agreement (“DSA”) with its investors for the operation and management of a gaming facility to be constructed on the Middleborough lands. However, the Commonwealth is unaware of the terms of the financial arrangement between the Tribe and its investors because the Tribe has refused to disclose this information to the Commonwealth and, pursuant to the Freedom of

²⁸ See S. REP. No. 100-446 (1988).

²⁹ 25 U.S.C. § 2702(2).

³⁰ See S. REP. No. 100-446, at 2 (1988) (“Indian Tribal elected officials demonstrated to the Committee that [gaming revenues] have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. . . . [T]he income often means the difference between an adequate governmental program and a skeletal program that is totally dependant on Federal funding.”).

³¹ 25 U.S.C. § 2711(b)(5) (up to 5 years or up to 7 years if it is determined that additional time is required and the additional time is requested by the tribe).

³² *Id.* § 2711(c) (up to 30% of gambling profits annually or up to 40% if it is determined that the additional fee is required and the additional fee is requested by the tribe).

Information Act ("FOIA"), the financial terms of the DSA were redacted from the documents the Commonwealth received in response to its FOIA request. Prior to approval of the Tribe's Application by the Secretary, the Tribe's financial arrangement should be disclosed and scrutinized to ensure compliance with the legislative intent of preserving gaming revenues for tribal use.

Due to the Application's deficiencies under both 25 C.F.R. § 151 and the IGRA, the Application fails to satisfy the threshold legal criteria for taking lands into trust. Therefore, even without any analysis of the proposed acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments, the DOI should reject the Tribe's proposed acquisition.

IMPACTS ON REGULATORY JURISDICTION

In determining whether to accept the land into trust, the Secretary is required to consider jurisdictional problems and potential conflicts of land use which may arise from the proposed acquisition. Pursuant to 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10(f)), the following comments address the "jurisdictional problems and potential conflicts of land use that may arise" if the lands sought were placed in trust by the BIA. While the Tribe's Application states that the Tribe does "not foresee any jurisdictional problems, given the detailed Intergovernmental Agreement entered into by [the Tribe and the Town of Middleborough]," the Tribe currently has no such agreement with the Commonwealth.³³

According to the recent guidance issued by the DOI on taking lands into trust for gaming purposes, "[w]ith respect to jurisdictional issues, the application should include

³³ See Application, Executive Summary, Section II.5, p.12; see also *id.*, IGA at Tab 6.

copies of any intergovernmental agreements negotiated between the tribe and the state and local governments, or an explanation as to why no such agreements exist. Failure to achieve such agreements should weigh heavily against the approval of the application.”³⁴ Therefore, the DOI should deny the Tribe’s Application based on the absence of an agreement between the Tribe and the Commonwealth addressing the Commonwealth’s jurisdictional concerns listed below.

Under DOI’s new guidance, the Commonwealth’s opposition is also grounds for rejecting the Tribe’s Application. According to DOI’s guidance on taking lands into trust for gaming purposes, “[t]he reviewer must give a greater weight to the concerns of the state and local governments no matter what the distance is between the tribe’s reservation and the proposed off-reservation acquisition.”³⁵ For example, in evaluating the United Keetoowah Band of Cherokee Indians’ land-in-trust application, the DOI decided against taking the proposed lands into trust because the Governor of the State of Arkansas “responded to the consultation letter expressing *opposition* to the acquisition.”³⁶

The Commonwealth sets forth below specific jurisdictional concerns which lead the Commonwealth to oppose the Tribe’s proposed acquisition. These jurisdictional concerns arise in the following areas: environmental, zoning, transportation, labor, public health and public safety. Reliance on federal law and tribal law alone provides inadequate coverage and protection in these areas. Specifically, in many relevant respects, the laws of the Commonwealth are more stringent than federal law and

³⁴ Memorandum from Assistant Secretary Carl Artman to Regional Directors, BIA and George Skibine, Office of Indian Gaming (Jan. 3, 2008).

³⁵ *Id.*

³⁶ Letter from Carl J. Artman, Assistant Secretary for Indian Affairs, to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians (Jan. 4, 2008) (emphasis added).

proposed tribal law.³⁷ Therefore, the Commonwealth needs to be satisfied that the protections of its laws and regulations are preserved in order to protect the safety and welfare of its inhabitants.

ENVIRONMENTAL

The following section identifies environmental areas of jurisdiction that could be significantly affected by approval of the proposed acquisition, as well as potential adverse impacts upon the wildlife and natural resources of the Mashpee and Middleborough lands and surrounding communities.

Pursuant to 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10(h)), the Secretary is required to undertake a NEPA review process. However, “NEPA itself does not mandate particular results.”³⁸ Rather, “NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.”³⁹ NEPA does not pass judgment on whether a project is environmentally beneficial, or whether a project can or should receive a particular permit, but rather leaves those decisions to the permitting agencies.

The Massachusetts Environmental Policy Act (“MEPA”), on the other hand, requires that state agencies study the environmental consequences of their actions (including permitting and financial assistance decisions) and that they take all feasible measures to avoid or minimize and mitigate damage to the environment.⁴⁰ MEPA further requires that state agencies “use all practicable means and measures to minimize damage

³⁷ See Application, Proposed Tribal Gaming Ordinance, Tab 3.

³⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³⁹ *Dept. of Transportation, et al. v. Public Citizen, et al.*, 541 U.S. 752, 756-57 (2004).

⁴⁰ See M.G.L. ch. 30, §§ 61-62H; see also 301 CMR 11.01 *et seq.*

to the environment,” by studying alternatives to a proposed project, and developing enforceable mitigation commitments which will become permit conditions for the project if and when it is permitted. The MEPA process requires public study, disclosure, and development of feasible mitigation for a proposed project. MEPA review occurs before permitting agencies act to ensure that the agencies know the environmental consequences of their actions.

MEPA applies to projects that exceed certain thresholds and that involve some state agency action, including those that require a permit, financial assistance, or land transfer from state agencies. Because of the size of the proposed major resort and casino facility (“Project”) in Middleborough outlined in the Tribe’s Application and the permits required, in the absence of land-in-trust status, the Project would likely be required to file an Environmental Impact Report (“EIR”). When an EIR is required, the Secretary of the Executive Office of Energy and Environmental Affairs issues a certificate that includes a “scope,” identifying what alternatives the proponent must study, what environmental impacts must be analyzed, and what techniques the proponent’s analysis should follow. Following the issuance of the scope, the proponent prepares both a draft and final EIR.

To the extent that the Tribe is provided the opportunity to address the Commonwealth’s objections to the Application,⁴¹ the Commonwealth strongly urges the Tribe to undergo MEPA review, concurrently with NEPA, so that all environmental concerns can be addressed comprehensively and in a coordinated manner. In the

⁴¹ See Checklist, Part 1, Section VIII.F, p.4. (“The record will also include any objections made by the contacted governmental entities. The Regional Director must consider any and all objections and must provide an analysis of the merits of the specific objections. The Regional Director will include any information on the outcome of any objection *referred to the Tribe.*”) (emphasis added).

NEPA/MEPA process, the Commonwealth would require that the following items be addressed:

(i) the “carbon footprint” of the Project and whether the Project complies with MEPA’s greenhouse gas (“GHG”) policy (which incorporates substantive GHG evaluation requirements and describes GHG project mitigation measures);

(ii) the extent to which the Project will provide onsite renewable energy generation;

(iii) whether the expected heavy energy demand from the casino will undermine the Governor’s enunciated goal of meeting future energy demand through gains in energy efficiency;

(iv) the extent to which the Project will comply with the Governor’s sustainable development principles;⁴² and

(v) the extent to which traffic impact can be avoided, minimized and mitigated.

The following sections address specific environmental areas of concern within the jurisdiction of the Massachusetts Department of Environmental Protection (“MassDEP”), the Department of Fish and Game (“DFG”) and the Department of Conservation and Recreation (“DCR”) should the lands be placed in trust.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

These comments address the potential impacts of the proposed land acquisition on the scope of MassDEP’s jurisdiction to protect the Commonwealth’s natural resources.

⁴² Commonwealth’s Sustainable Development Principles, available at http://www.mass.gov/Agov3/docs/smart_growth/patrick-principles.pdf (attached as Appendix B).

MassDEP's Jurisdiction to Regulate the Environment

Article 97 of the Amendments of the Constitution of the Commonwealth of Massachusetts guarantees the citizens' right to "clean air and water," as well as the "natural, scenic, historic and esthetic qualities of their environment," and it provides the state legislature with the "power to enact legislation necessary or expedient to protect such rights."⁴³ The Massachusetts Legislature has designated MassDEP as the primary state agency responsible for ensuring clean air⁴⁴ and clean water,⁴⁵ managing solid waste⁴⁶ and hazardous waste,⁴⁷ assessing and remediating contaminated sites,⁴⁸ reducing the use of toxic substances,⁴⁹ ensuring abatement and proper disposal of asbestos,⁵⁰ ensuring appropriate use and development of coastal resources, waterways and wetlands,⁵¹ allocating and managing water resources,⁵² and protecting sources and supplies of drinking water.⁵³

If the Mashpee and Middleborough lands were placed in trust, MassDEP's regulation of the property and conduct of the Tribe and its members could be limited.⁵⁴ Specifically, unless the Commonwealth and the Tribe reach agreement regarding the protection of natural resources on lands taken into trust by the BIA, MassDEP's ability to carry out its statutory duties may be diminished.

⁴³ Mass. Const. Amend., art. 97.

⁴⁴ M.G.L. ch. 111, §§ 2B-2C, 142A-142M.

⁴⁵ M.G.L. ch. 21, §§ 26-53.

⁴⁶ M.G.L. ch. 21H; ch. 111, §§ 150A-150A ½.

⁴⁷ M.G.L. ch. 21C.

⁴⁸ M.G.L. ch. 21E.

⁴⁹ M.G.L. ch. 21I, §§ 3, 10-12.

⁵⁰ M.G.L. ch. 111, §§ 142A-142E, 150A-150B; ch. 111F.

⁵¹ M.G.L. ch. 91; ch. 21, §§ 26-35; ch. 131, § 40.

⁵² M.G.L. ch. 21G.

⁵³ M.G.L. ch. 111; ch. 40; ch. 21A; ch. 13 (among others).

⁵⁴ See *Cohen's Handbook of Federal Indian Law*, 2005 ed., § 6.03[1][a]; see also, *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002).

Specific Areas Affected

The Mashpee and Middleborough lands contain significant natural resources that, if not properly protected, could be significantly and adversely affected by the activities proposed by the Tribe — specifically in the areas of water management, wetlands protection, water pollution, drinking water, hazardous waste, solid waste management and air pollution.

Middleborough Lands

Water Management

In Massachusetts, all withdrawals of water above the threshold quantity, other than withdrawals for nonconsumptive use, must either be registered (if existing on January 1, 1986) or permitted (if withdrawn after January 1, 1986) by MassDEP. The Town of Middleborough (“Middleborough”) presently holds a Water Management Act Permit for its municipal water supply. Middleborough was issued a Water Management Act Permit Modification (#9P-4-25-182.01) by MassDEP in October 2006 for water withdrawals within the Taunton River Basin. Through the Water Management Act program, Middleborough may withdraw up to 3.06 million gallons per day (MGD), although presently Middleborough withdraws just a little over half of their total authorized volume.

In the July 28, 2007 Intergovernmental Agreement (“IGA”) entered into between the Tribe and Middleborough (collectively “the Parties”), the Parties addressed the estimated water needs for the Tribe’s proposed Project. In the IGA, Middleborough has agreed to “provide an allotted maximum water volume of up to an average daily volume of 750,000 gallons, with a maximum 24-hour usage of 1.5 million gallons to the

Project.”⁵⁵ Middleborough would likely approach or exceed its permitted volume in order to supply the Tribe with this volume of water. According to engineers who reviewed the Project’s water infrastructure needs, Middleborough’s water system is in need of additional water supply sources to safely and reliably supply all existing customers. In order to address the Project’s water supply needs, an additional supply capacity of at least 1,500,000 gallons per day must be constructed to safely and reliably meet the Project’s maximum daily water supply requirements.⁵⁶ The total water system infrastructure capital improvement costs are estimated to be \$26.1 million, with \$22.5 million being allocated to the proposed Project.

The IGA also notes that the “Tribe may explore the potential for on-site water supply for potable consumption and/or irrigation as a means to reduce the Project’s demands on [Middleborough’s] water supply system.” One of the functions of the Commonwealth’s water management permitting process is to identify the effect of the proposed withdrawal on numerous environmental factors such as water quality, groundwater recharge, navigation, wetlands, fish and wildlife, and agriculture, as well as to identify any alternatives to the proposed withdrawal. If the Tribe does not proceed with the Commonwealth’s permitting process, the Tribe may not address the effects on the various factors or any viable alternatives.

In addition, the Tribe has stated that it intends to construct both a golf course and a water park as part of its proposed Project. These two aspects of the proposal would necessarily require large volumes of water. If the Tribe were to obtain water on-site without taking into account the aquifer’s current withdrawals and its safe yield, there

⁵⁵ See Application, IGA Section 10, p. 7, Tab 6.

⁵⁶ See Application, IGA Exhibit D- Tighe & Bond Report, Tab 6.

could be a resulting significant impact on the regional economy, environment and public health.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring that the Tribe adhere to the Commonwealth's water management permitting process to ensure the safety and health of the inhabitants of the Commonwealth.

Wetlands Protection

The Commonwealth has historically been at the forefront of wetlands protection; it was the first state to enact a wetlands protection permitting law. Generally, the Commonwealth's Wetlands Protection Act requires a permit for any activity that will remove, fill, dredge or alter an area subject to protection under the act. Wetland resource areas are protected due to the important functions they serve, such as flood control, water supplies protection, pollution prevention, fisheries, shellfisheries and wildlife habitat protection, and storm damage protection.

MassDEP has preliminarily reviewed MassGIS (Geographic Information Systems) maps and wetland resource overlays for the Middleborough lands and has estimated that roughly 50% of the site may contain wetland resource areas that would trigger state wetlands permitting, including compliance with state stormwater management standards. In the Middleborough Casino Gambling Study Committee's report entitled "Community Impact Analysis and Mitigation of a Casino-Resort in the Town of Middleborough, Massachusetts" dated July 23, 2007 ("MCGSC Community Impact Report"), the Project site and lands abutting the site are described as containing

mapped estimated habitats for five state-listed species,⁵⁷ several potential vernal pool habitats, Meeting House Swamp (a wooded swamp that is hydraulically connected to Great Cedar Swamp to the west, and is close to the Nemasket River), and an anadromous fish run for alewife herring (which attracts large birds including grey gulls, osprey, and the bald eagle). The MCGSC Community Impact Report also notes that stable populations of raptors such as the Northern barred owl, saw-whet owl, red-tail hawks and harrier hawks are found throughout the area of the Project site.

The United States Environmental Protection Agency (“EPA”) and the Army Corps of Engineers also regulate some activities affecting certain wetlands under the federal Clean Water Act.⁵⁸ The EPA issues National Pollutant Discharge Elimination System (“NPDES”) permits for discharges of pollutants to surface waters only (federal Clean Water Act (“CWA”) jurisdiction does not extend to groundwaters), while the Army Corps of Engineers implements portions of the CWA through issuance of Section 404 permits for discharges of dredged or fill material into waters of the United States.

However, the Massachusetts Wetlands Protection Act program issues permits for all activities that alter jurisdictional resource areas. Alterations, as defined in 310 CMR 10.04, cover many activities beyond the discharge of dredge and fill material, and several wetland resource areas extend beyond the definition of “waters of the United States” under the CWA. If the DOI’s approval of the Tribe’s Application results in the diminishment of state environmental regulatory jurisdiction over tribal trust lands, gaps in the protection of groundwaters and wetland resource areas could develop.

⁵⁷ The five state-listed species are the Eastern Box Turtle, the Four-toed Salamander, the Water-willow Stem Borer, the Northern Red-bellied Cooter, and the Bridle Shiner.

⁵⁸ 33 U.S.C. §1251 *et seq.* (“CWA”).

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that will ensure the protection of the ground waters and wetland resources of the Commonwealth.

Water Pollution

MassDEP implements the Massachusetts Clean Waters Act,⁵⁹ through the adoption of surface and groundwater quality standards contained at 314 CMR 4.00 and 6.00 respectively, and through the issuance of surface and groundwater discharge permits under 314 CMR 3.00 and 5.00 respectively. Adoption of surface water quality standards is also a requirement of the federal CWA,⁶⁰ subject to EPA approval (as noted above, federal CWA jurisdiction does not extend to groundwaters). MassDEP also certifies the issuance of NPDES permits issued by EPA. MassDEP regulates activities that result in an alteration of wetland resource areas (listed at 310 CMR 10.02(1)) pursuant to the Commonwealth's Wetlands Protection Act,⁶¹ and its implementing regulations contained at 310 CMR 10.00.

Middleborough has a municipal wastewater treatment facility ("WWTF") that serves a portion of Middleborough. The Tribe proposes unspecified wastewater improvements in Middleborough. The quantity of flows from the proposed Project and Middleborough WWTF's permitted discharge volume would affect whether the proposed Project or portions thereof could tie into the municipal wastewater system.

In the IGA, the Parties address the estimated sewer and wastewater needs for the Project. The Tribe is to provide for sewage disposal generated at the Project site by

⁵⁹ M.G.L. ch. 21, §§ 26-53.

⁶⁰ 33 U.S.C. § 1313.

⁶¹ M.G.L. ch. 131, § 40.

connection to Middleborough's existing sewer collection system and Middleborough is to provide an allotted maximum wastewater volume of up to an average daily volume of 500,000 gallons, with a maximum 24-hour volume of one million gallons to the Project.

The June 20, 2007 Tighe & Bond report addressing the Project's wastewater infrastructure needs, attached to the IGA as Exhibit E, notes that Middleborough's wastewater system operates under the authorization of a NPDES permit issued jointly by the EPA and MassDEP and that the NPDES permit authorizes a treated effluent daily flow quantity limit of 2,160,000 gallons per day calculated over a 365 day average. The treatment plant discharges to the Nemasket River (adjacent to the plant), which in turn flows into the Taunton River. The NPDES permit lists the Taunton River as the receiving water.

The Tighe & Bond report also notes that not all of the potable water used at the Project will be discharged to the sewer, such as water uses for irrigation, cooling water and the indoor water park. It also states that wastewater treated effluent re-use is likely a necessary outcome of the Water Management Act permitting process to satisfy wastewater management practices requirements under the Act (i.e., keeping water within the basin from which it is withdrawn) and that treatment plant modifications and enhancements would likely be necessary to produce an effluent of a quality that conforms to MassDEP water re-use standards.

The capital improvements identified in the Tighe & Bond report include a sewer connection from the Project site to the treatment plant (including the construction of a wastewater pumping station, the design and operation of which will conform to the sewer discharge permit conditions to be issued to Middleborough under the existing NPDES

permit), a treated effluent re-use transmission pipe from the treatment plant to the Project site (re-uses may include outdoor irrigation, cooling water and toilet flushing water), and the rehabilitation and upgrade of the treatment plant “to reliably produce effluent quality meeting MassDEP [proposed] standards for re-use.” According to the Tighe & Bond report, the total potential wastewater system infrastructure capital improvements costs are estimated to be \$26.3 million dollars, all of which is allocated to the Project.

The Project proposal as presently described by the Tribe includes 8,500 structured parking spaces and 2,000 surface parking spaces. Under proposed revisions to the Commonwealth’s Groundwater Discharge Permit Regulations contained at 314 CMR 5.00, such a Project would require coverage under a stormwater general permit (or possibly an individual permit) for parking lots with high intensity use.

Should the Tribe decide not to connect to the Middleborough’s WWTF but instead treat and discharge wastewater on-site, the discharge would be to groundwater if there is no suitable surface water to receive the discharge on-site. Under normal circumstances, such a groundwater discharge would require MassDEP approval in the form of a state discharge permit under the Massachusetts Clean Waters Act. Groundwater discharge permits are necessary to protect groundwaters for their highest possible use, typically as a source of potable water, and thus would impose limitations on the discharge so as to comply with state groundwater quality standards.

The Commonwealth respectfully requests that the Secretary not approve the Tribe’s Application absent an enforceable agreement between the Tribe and the Commonwealth regarding the level of wastewater treatment to prevent the wastewater

discharged to the ground from contaminating the groundwater, resulting in significant adverse environmental impacts and serious negative human health effects.

Drinking Water

The federal Safe Drinking Water Act (“SDWA”) governs the provision of drinking water.⁶² It directs the EPA to establish drinking water standards and regulations that apply to public water systems and it includes programs designed to protect groundwater supplies from pollution. To supplement the federal regulations, the Massachusetts Legislature authorized MassDEP to establish regulations to protect waters used as sources of water supply and to prevent them from being contaminated. Pursuant to its authority under M.G.L. ch. 111, §160, MassDEP promulgated regulations that govern the siting, construction and operation of public water systems and implement much of the SDWA.

As described above, Middleborough has a municipal public water system (“PWS”) that provides potable water to many of its residents and businesses.⁶³

The Commonwealth respectfully requests that the Secretary not approve the Tribe’s Application absent an enforceable agreement between the Tribe and the Commonwealth that ensures the protection of drinking water.

Hazardous Waste

In the Commonwealth, hazardous waste is managed in accordance with the Massachusetts Hazardous Waste Management Act,⁶⁴ and hazardous waste facilities are

⁶² 42 U.S.C. § 300f *et seq.*

⁶³ See *Water management* section *infra* p. 17, for a discussion of MassDEP’s concerns regarding potential impacts to the Town’s PWS and the effect of the Tribe’s Application on MassDEP’s jurisdiction over sources of water supply.

⁶⁴ M.G.L. ch. 21C.

regulated under the Massachusetts Hazardous Waste Facility Siting Act.⁶⁵ In addition, the Massachusetts Toxics Use Reduction Act (“TURA”) requires Massachusetts companies that use large quantities of specific toxic chemicals to evaluate and plan for pollution prevention opportunities, implement them if practical, and annually measure and report the results.⁶⁶

Due to the preliminary nature of the Tribe’s development proposal, it is unclear whether any hazardous wastes would be generated at the Project site. Notwithstanding this, the Tribe and the BIA will be required to comply with the Hazardous Substances Determination requirements set forth at 25 CFR §151.10(h). In addition, according to the Tribe’s Application, the Tribe will commission a full Environmental Site Assessment to be conducted in accordance with American Society for Testing and Materials (“ASTM”) standard, Document E 1527-00.⁶⁷

In the event this site assessment reveals the presence of contaminants or hazardous substances, the Commonwealth respectfully requests that the Secretary not approve the Tribe’s Application absent an enforceable agreement between the Tribe and the Commonwealth requiring the Tribe to consult with MassDEP on the actions necessary to properly respond to such conditions.

Solid Waste Management

MassDEP regulates the siting and operation of solid waste facilities pursuant to M.G.L. ch. 21H, M.G.L. ch. 111, §§ 150A-150A½ and the regulations promulgated

⁶⁵ M.G.L. ch. 21D.

⁶⁶ M.G.L. ch. 21I.

⁶⁷ See Application, Executive Summary, Section II.7, p. 14; see also, 25 C.F.R. §151.10. (“The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust... (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.”).

pursuant thereto. According to the IGA, the Tribe has agreed to contract with a private waste hauler for the disposal of solid waste and recycled materials generated by the Project, and Middleborough will have no obligation to provide solid waste disposal services for the Project.

It is presumed that the solid waste generated at the Tribe's proposed development will be sent to the nearest permitted solid waste facility, which would be either the Covanta SEMASS facility in Rochester, MA, or Middleborough's landfill. Middleborough's landfill is currently closed as a result of a landfill liner project, but is expected to resume accepting wastes some time in 2008. However, the life expectancy of Middleborough's landfill after its reopening is anticipated to be less than 5-7 years. In the event that solid waste is required to be transported from the development site to the facility in Rochester, MA, the Commonwealth would want to ensure its safe transport and the ability of the Covanta SEMASS facility to handle the waste.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring the Tribe to adopt best management practices for disposing of solid waste to ensure the health and safety of the inhabitants of the Commonwealth.

Air Pollution

Air pollution is regulated in the Commonwealth pursuant to the Massachusetts Clean Air Act,⁶⁸ and the state regulations promulgated thereunder, as well as the federal Clean Air Act ("CAA").⁶⁹ Under the CAA, activities on trust lands are subject to federal jurisdiction. Therefore, the Secretary's approval of the Tribe's Application, absent any

⁶⁸ M.G.L. ch. 111, §142A.

⁶⁹ 42 U.S.C. § 7401 *et seq.*

agreement between the Tribe and the Commonwealth, could exempt the land from state only requirements adopted under the Massachusetts Clean Air Act.

While it is presumed that the primary source of air pollution from the Tribe's proposed development in Middleborough would be associated with the various buildings' power generation and climate control systems, the information contained in the Tribe's Application does not specify the nature of the heating, cooling, or emergency power generation systems for the various buildings that will comprise the Project. However, based on the expected size of and emissions from the generation systems, the installation of such systems may exceed permitting thresholds under the state's Air Pollution Control ("APC") program.

The IGA calls for the upgrading of existing natural gas transmission facilities necessary to provide natural gas to the Project site, so it is presumed that the Project's buildings would be heated primarily by natural gas-fired sources. MassDEP's APC regulations generally apply to boilers and engines that exceed regulatory permitting thresholds. MassDEP APC permitting regulations for boilers, engines and turbines, and emergency engines and turbines may or may not be applicable, depending on the heat input rating and rated power output of the units. If the APC regulations do apply for below-threshold boilers, engines and turbines, and emergency or standby engines, then the owner must certify that the units meet the regulatory requirements, which displaces the need for air permits under MassDEP's APC Plan Approval and Emissions Limitation Regulations, 310 CMR 7.02. MassDEP's APC Plan Approval and Emission Limitations regulations for air permitting would apply should a boiler, engine or turbine, or

emergency engine or turbine not meet the certification requirements of 310 CMR 7.26(30), (42) and (43) respectively.

In addition to the state APC permitting requirements, the Tribe's heating, cooling, or power generation systems may be required to comply with federal CAA requirements such as New Source Performance Standards under section 111 of the CAA (*e.g.*, Emissions Performance Standards for Boilers), New Source Review under 310 CMR 7.00: Appendix A, and the federal Operating Permit Program (pursuant to Title V of the CAA) under 310 CMR 7.00: Appendix C.

In addition to the impacts to air from the Project's heating, cooling, and power generation systems, there may be a significant increase in vehicular traffic in the vicinity of the Tribe's proposed resort casino development, leading to an increase in air pollution in the area. In accordance with the Massachusetts State Implementation Plan,⁷⁰ established pursuant to the federal CAA, if the Project will generate 6,000 vehicle trips per day or more, an air quality mesoscale analysis would be required to determine the project's impact on ozone precursor emissions (volatile organic compounds and oxides of nitrogen). An air quality mesoscale analysis is a requirement of the State Implementation Plan for indirect sources of air pollution.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application without detailed information regarding the anticipated increase in vehicle traffic and the installation of heating, cooling, or emergency power generation systems for the Project and absent an enforceable agreement between the Tribe and the

⁷⁰ The Commonwealth's State Implementation Plans are available at <http://www.mass.gov/dep/air/priorities/sip.htm>.

Commonwealth requiring the Tribe to consult with the MassDEP's APC program regarding the applicability of federal CAA rules.

Mashpee Lands

Water Management

The Mashpee Water District ("District") is registered for 0.14 MGD pursuant to the Commonwealth's Water Management Act. The District's April 5, 2001 permit, in addition to the District's registered volume of 0.14 MGD, authorized up to 1.08 MGD by 2005 and 1.16 MGD by 2010. However, actual water use has increased faster than originally projected. Therefore, in August 2005, the District applied to MassDEP to increase its authorized withdrawal volumes in the Cape Cod Basin and requested that the Water Resources Commission ("WRC") increase the District's water needs forecast from their previous combined registered and permitted authorized limits to a combined maximum of 1.30 MGD in 2005 and 1.54 MGD in 2010. Based on the WRC calculations, MassDEP issued a new permit to the District to reflect these new volumes.

The District's authorized Water Management Act volume would be relevant to whether the development proposals for the various Mashpee parcels could obtain water from the Mashpee Water District. However, the lack of specificity in the Tribe's Application with regard to its plans for the Mashpee lands leaves the Commonwealth unable to comment on whether any aspect of the Tribe's plans might affect the District system, and whether there might be any significant impact on the regional economy, environment and public health if the Tribe were to obtain on-site water without regard to the aquifer's current withdrawals and safe yield.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent greater detail from the Tribe regarding its water management plans for the Mashpee lands.

Wetlands Protection

The Tribe acknowledges in its Application that the Mashpee lands are "environmentally sensitive due to wetlands." However, no detailed information on the various development proposals for the Mashpee lands was provided in the Tribe's Application; therefore the potential impacts to wetlands cannot be determined at this time. The extent and type of jurisdictional resources areas on the nine parcels proposed to be taken into trust can be estimated by MassDEP by a review of MassGIS information if the Tribe provides additional information.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent greater detail from the Tribe regarding its wetlands protection plans for the Mashpee lands.

Drinking Water

The Tribe is proposing that two parcels totaling approximately 57 acres be taken into trust to be used for tribal housing. The type, location and number of proposed housing units are not described in any detail, but would affect drinking water program applicability. The Mashpee Water District is a PWS that serves a portion of Mashpee's residential and commercial properties. Due to the unspecified nature of the Tribe's housing development proposals, it cannot be determined at this time whether these parcels could be connected to the municipal PWS.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent greater detail from the Tribe regarding its plans for drinking water on the Mashpee lands.

Proposed Conditions for Approval of Tribe's Application

The Commonwealth respectfully requests that the BIA require that the Tribe (1) supplement its Application to address the informational deficiencies noted herein, (2) consult with MassDEP on matters of environmental regulation in those areas where state jurisdiction may be impacted, and (3) enter into enforceable agreements with the Commonwealth which, while respecting tribal sovereignty, would address the scope of each entity's regulation and protection of the environment on the Mashpee and Middleborough lands and the surrounding affected communities.

DEPARTMENT OF FISH AND GAME

These comments address potential impacts of the proposed land acquisition on the scope of the Department of Fish and Game's ("DFG") jurisdiction to regulate or to otherwise assure the protection of wildlife, including state-listed rare species, on the Mashpee and Middleborough lands.

DFG's Jurisdiction to Protect and Manage Wildlife

DFG manages and protects the Commonwealth's wildlife and their habitats. DFG's Division of Fisheries and Wildlife ("DFW") is responsible under M.G.L. ch. 131 and 321 CMR for the oversight and protection of all wild amphibians, reptiles, birds, mammals, and freshwater and diadromous fish in the Commonwealth. A key component of DFW's responsibility is the protection of endangered, threatened, and special concern species (including wild plants and invertebrates) pursuant to the Massachusetts

Endangered Species Act (“MESA”) at M.G.L. ch. 131A and 321 CMR 10.00 (“MESA regulations”).

In addition, DFW acquires land for the protection of wildlife habitat and biodiversity and manages a diverse system of wildlife management areas and sanctuaries. Finally, DFW regulates fishing, hunting, trapping, taking and/or possession of wildlife in the state, while DFG’s Division of Marine Fisheries (“DMF”) is responsible under M.G.L. ch. 130 and 322 CMR to regulate both commercial and recreational fishing within the coastal waters of the Commonwealth, including shellfishing and lobstering.

DFG’s divisions ultimately implement their regulatory and management responsibilities based on the best scientific information available. This science-based approach requires an understanding of the dynamic characteristics and often complex needs of wildlife, including their interactions with each other, with human beings and with the environment. Consequently, DFG’s view is that effective wildlife management must be based on a holistic, “big picture” perspective, as habitats and life cycle needs of various species may be highly dependent on other species and cover large geographic areas.

As sovereign, the Commonwealth holds title to wild animals and game within its jurisdiction; the title being held in trust for the public.⁷¹ If the DOI agrees to hold the Tribe’s lands in trust, the Tribe may have the sovereign authority to regulate the wildlife on its trust property, unless otherwise determined by Congress.⁷² The practical reality,

⁷¹ See *Dapson v. Daly*, 257 Mass. 195, 196-197 (1925).

⁷² See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 at 344 (1983) (state could not assert concurrent authority to regulate hunting and fishing on tribal property “given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority”).

however, is that wildlife does not recognize jurisdictional boundaries. Depending on the travels of a given species, both DFG and the Tribe may be regulating the protection and conservation of that same species. This situation creates the potential for jurisdictional conflicts between DFG and the Tribe that may arise out of differing regulatory standards and/or disagreement about harm and use of the shared wildlife species and habitat.

Specific Areas Affected

Hunting, Fishing, Collecting, and Possession of Fish and Wildlife

The proposed acquisition affects the ability of DFW to regulate hunting, fishing, collecting, and possession of fish and wildlife. As discussed above, the DOI's approval of the Tribe's Application could limit DFW's authority to regulate the taking, hunting, fishing, collecting, and possession of fish and wildlife, including state-listed rare species, on both the Middleborough and Mashpee lands. In the absence of adequate regulation by the Tribe, this could lead to taking, fishing, hunting, possession, and collection practices that would not be conducive to the long-term stewardship of these wildlife resources. Given the free movement of wildlife across property boundaries, inadequately regulated activities on Tribal lands could adversely impact fisheries and wildlife resources in surrounding areas. Finally, if not properly regulated, the possession of certain wildlife species (such as deer for farming and other purposes) has the potential to cause the spread of disease to the larger populations of wildlife species in the Commonwealth.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that would protect the wildlife resources of the Commonwealth.

Wildlife Management

The Tribe's Application does not address potential jurisdictional problems and land use conflicts with the Commonwealth related to wildlife management concerns. The Tribe concludes in its Application that it does not foresee any jurisdictional problems with respect to the Mashpee and Middleborough land acquisitions. In the case of the Mashpee lands, the Tribe's conclusion is based on its representation that most of the land's uses will not change and because of the Tribe's long-standing presence in Mashpee. The Tribe's Application fails to provide any analysis of jurisdictional problems that may arise between the Tribe and the Commonwealth with respect to the regulatory jurisdiction of DFG and DFW.

The Tribe's failure to address the above criteria is a clear deficiency in its Application. The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application without the Tribe providing greater detail regarding the impact of its plans for the Middleborough and Mashpee lands on the Commonwealth's wildlife.

Middleborough Lands

Wildlife Habitats

In their current, undeveloped state, the Middleborough lands are primarily forested, with some agricultural fields and shrubland associated with a utility right-of-way. Forested areas are predominantly mixed pine-oak upland forest and deciduous, mixed deciduous wetland forest. A shallow marsh or wet meadow appears to occur in the northern portion of the site, and potential vernal pools may be associated with the utility right of way and other portions of the site.

The site is bounded by and appears to include portions of the extensive Meetinghouse Swamp to the east and the extensive Beaverdam Swamp to the west northwest. To the north, in particular, the site is part of a much broader landscape of largely undeveloped land and habitat, including the Great and Little Cedar Swamps to the northeast and the Winnetuxet and Taunton Rivers to the north and northwest. As explained in more detail below, a number of state-listed rare species, protected by DFW pursuant to MESA and the MESA regulations, have been documented to occur within this landscape. As a result, the entire Project site and adjacent area have been identified as a *BioMap Core Habitat* by DFW.⁷³

“Priority Habitat,” as defined in the MESA regulations at 321 CMR 10.02, is the geographic extent of habitat in the Commonwealth for one or more state-listed rare animal or plant species. If a project is located within a Priority Habitat, it must be reviewed by the Natural Heritage and Endangered Species Program (“NHESP”) pursuant to 310 CMR 10.18 of the MESA regulations to determine whether the project activities will cause a “take” of a state-listed rare species. If the NHESP determines that a take will occur, the project must either be modified to eliminate the take or obtain a Conservation and Management Permit from the NHESP pursuant to 310 CMR 10.23.

A subset of Priority Habitat is “Estimated Habitat.” As that term is used in 310 CMR 10.59 of the Wetlands Protection Act (“WPA”), regulations administered by the MassDEP, Estimated Habitat is the geographic extent of habitat in the Commonwealth for one or more state-listed rare animal species located within a wetland resource area. If

⁷³ The Natural Heritage and Endangered Species Program (“NHESP”) within DFW developed the BioMap program to identify the areas most in need of protection in order to preserve the biological diversity of the Commonwealth. The BioMaps show areas, which if protected, would provide long-term, suitable habitat for the maximum number of plant and animal species and natural communities. See Middleborough BioMap and Living Waters Core Habitats Report (and accompanying map) (attached as Appendix C).

a project is located within an Estimated Habitat, a Notice of Intent (“NOI”) must be filed under the WPA, with a copy sent to the NHESP. Under 310 CMR 10.59 of the WPA regulations, the NHESP responds within 30 days of receiving the NOI with a determination of whether the project will have an “adverse effect” on the wetland resource area habitat.

The NHESP’s *Natural Heritage Atlas* contains maps showing both the Priority Habitat and the Estimated Habitat areas delineated by the NHESP for the Commonwealth. Based on a prior review by the NHESP, there are Priority Habitats/Estimated Habitats for the following five state-listed species located on or in the immediate vicinity of the Middleborough lands:⁷⁴

1. the Eastern Box Turtle, a state species of special concern;⁷⁵
2. the Four-toed Salamander, a state species of special concern;
3. the Bridle Shiner (fish), a state species of special concern;
4. the Water-willow Stem Borer (moth), a state threatened species;⁷⁶ and
5. the Northern Red-bellied Cooter (turtle), a state and federal endangered species.⁷⁷

⁷⁴ On June 18, 2007, the Middleborough Casino Gambling Study Committee (the “Committee”) wrote to the NHESP requesting information on state-listed rare species with respect to the following delineated Priority Habitat (“PH”) or the Estimated Habitat (“EH”) areas shown on the maps contained in the *Natural Heritage Atlas*: PH940/EH306; PH160/EH862; PH302/EH721; PH1219/EH857. These mapped PH/EH areas are either located on or are in the immediate vicinity of the Tribe’s Middleborough lands. On June 21, 2007, the NHESP responded to the Committee’s request by providing the above list of five state-listed rare species.

⁷⁵ “Species of special concern” are defined by DFG as “native species which have been documented by biological research or inventory to have suffered a decline that could threaten the species if allowed to continue unchecked, or which occur in such small numbers or with such restricted distribution or specialized habitat requirements that they could easily become threatened within Massachusetts.” Massachusetts List of Endangered, Threatened and Special Concern Species- Definitions available at http://www.mass.gov/dfwele/dfw/nhesp/species_info/mesa_list/mesa_list.htm.

⁷⁶ “Threatened species” are defined by DFG as “native species which are likely to become endangered in the foreseeable future, or which are declining or rare as determined by biological research and inventory.” *Id.*

Based on the NHESP's review of the maps contained in the Tribe's Application, a portion of the proposed site of the Tribe's Project in Middleborough has been mapped as Priority Habitat for the Eastern Box Turtle (*Terrapene carolina*), a state-listed rare species of Special Concern protected under MESA. As a result, DFW currently has regulatory jurisdiction under 321 CMR 10.18 to review development activities on the site of the proposed Project for impacts to state-listed rare species. If necessary, DFW may require a Conservation and Management Permit for the "take" of state-listed rare species under 321 CMR 10.23.

During the typical MESA review process, DFW works collaboratively with a project proponent to avoid or minimize any impacts to state-listed rare species, and, to the extent practical, to adequately mitigate any unavoidable impacts. Should DOI accept the title to the lands in trust for the Tribe, DFW's jurisdiction under MESA could be limited, unless otherwise determined by Congress or agreed to by the Tribe.

Although the specific scope and configuration of the Project have not been identified, DFW has determined that a portion of the Middleborough lands sought by the Tribe is located within Priority Habitat, and that most of the 539 acre parcel contains highly suitable habitat for the Eastern Box Turtle. Thus, absent adequate regulatory protections by the Tribe and/or DFW, the Project will result in the loss of habitat for the Eastern Box Turtle, will likely cause the direct harming and killing of Eastern Box Turtles during land construction and clearing activities, and will increase the risk of road mortality to the above turtles. The Project has the potential to cause unavoidable impacts to other game and nongame wildlife, as well.

⁷⁷ "Endangered species" are defined by DFG as "native species which are in danger of extinction throughout all or part of their range, or which are in danger of extirpation from Massachusetts, as documented by biological research and inventory." *Id.*

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that would protect the Eastern Box Turtle as well as other game and nongame wildlife in the Commonwealth.

DFW's Abutting Meetinghouse Swamp Wildlife Management Area

The proposed land acquisitions will impact DFW's abutting Meetinghouse Swamp Wildlife Management Area. The construction of the Project has the potential to impact access to, and the recreational use of, DFW's abutting Meetinghouse Swamp Wildlife Management Area in Middleborough (the "Wildlife Area"). For example, the Project has the potential to limit allowed recreational uses such as hunting in the Wildlife Area.⁷⁸ It could also degrade the habitat values of this Wildlife Area, including by eliminating specific areas used by wildlife as corridors between important and essential types of habitat. Finally, the human activities associated with the Project and abutting the WMA, such as increased traffic, increased noise, and additional buildings would likely interfere with the public's quiet enjoyment of this important recreational area.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that would protect the public's quiet enjoyment of the Wildlife Area.

Mashpee Lands

Wildlife Habitats

The description of the Mashpee lands in the Tribe's Application is not specific enough for DFG to definitively determine the geographic boundaries or their wildlife

⁷⁸ M.G.L. ch. 131 § 58 prohibits the discharge of any firearm or release of any arrow across any state or hard surfaced highway or within 150 feet of any such highway or within 500 feet of any dwelling.

habitat characteristics. Based on DFG's review of the relevant maps of Priority Habitat contained in DFW's current *Natural Heritage Atlas* (effective October 1, 2006), there are large areas of Priority Habitat located in Mashpee, some of which appear to extend onto the lands sought by the Tribe. The Priority Habitats in Mashpee provide habitat for a number of state-listed rare species, including but not limited to, various birds, dragonflies, plants, moths, the American Brook Lamprey and the Eastern Box Turtle. It appears that portions of the Tribe's lands in Mashpee are mapped as *BioMap Core Habitat* and *Living Waters Core Habitat*.⁷⁹

According to the Tribe's Application, the Tribe does not have current plans to use the Mashpee lands for gaming or economic development purposes. However, the Commonwealth respectfully requests that the Secretary require the Tribe to consult with DFG and DFW to determine the land's wildlife characteristics and regulatory significance under MESA and not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth regarding the regulation of activities occurring within Priority Habitat on the Mashpee lands.

Proposed Conditions for Approval of Tribe's Application

The Commonwealth respectfully requests that the BIA require the Tribe to work collaboratively with DFG to reach agreement on how the Tribe will manage its wildlife resources, consistent with shared protection goals to avoid or minimize foreseeable jurisdictional or regulatory conflicts. The goal should be to reach a common

⁷⁹ The NHESP, through its Living Waters Project, also maps areas that identify the most critical sites for freshwater biodiversity in the Commonwealth. The related Living Waters conservation plan promotes proactive conservation activities to protect these freshwater habitats. See Mashpee BioMap and Living Waters Core Habitats Report (and accompanying map) (attached as Appendix D).

understanding and consistent regulatory approach to protecting wildlife and their habitat, regardless of their location.

For these reasons, the Commonwealth respectfully requests that the DOI condition any approval of the Tribe's Application on the Tribe entering into enforceable agreements with the Commonwealth regarding the range of the Tribe's regulation and management of wildlife and wildlife habitats and resources on the sought Middleborough and Mashpee lands, including but not limited to state-listed rare species. In particular, an agreement between the Tribe and Commonwealth is needed to assure adequate mitigation for any unavoidable impacts to state-listed rare species arising out of the Project's construction on the Middleborough lands.

DEPARTMENT OF CONSERVATION AND RECREATION

These comments address the potential impacts of the proposed land acquisition in Mashpee on the scope of the Department of Conservation and Recreation's ("DCR") jurisdiction over conservation land – specifically a 0.36 acre parcel that is situated within the Mashpee lands, and which is subject to a certain conservation restriction held by DCR ("Conservation Parcel").⁸⁰

DCR's Jurisdiction Over Conservation Land

One of DCR's statutory mandates is to exercise general care and oversight of the natural resources of the Commonwealth and adjacent waters.⁸¹ In furtherance of this mandate, DCR acquires interests in land, such as conservation restrictions which require the subject land to be held, used and conveyed subject to and in full compliance with Article 97 of the Amendments to the Constitution of the Commonwealth of

⁸⁰ See Conservation Parcel Map (attached as Appendix E).

⁸¹ See M.G.L., c. 21, § 1.

Massachusetts.⁸² DCR acquires land and water areas for conservation purposes within the state parks district under M.G.L. ch. 184, §§ 31-33, and M.G.L. ch. 132A, §§ 2A, 3 and 3A. Similarly, DCR acquires land and rights in land for conservation and recreation purposes within the urban parks district under M.G.L. ch. 184, §§ 31-33, and M.G.L. ch. 92, §§ 33, 79, and 80.

Specific Area Affected

According to the Tribe's Application, the Tribe identified the Conservation Parcel in Mashpee as subject to the conservation restriction held by DCR.⁸³ DCR holds this conservation restriction on behalf of the Commonwealth, consistent with the purposes set forth in Article 97 of the Amendments to the Massachusetts Constitution, and in accordance with M.G.L. c. 184, §§ 31-33, and M.G.L. c. 132A, § 3.⁸⁴ Where, as here, the Tribe is requesting that the DOI hold the Mashpee lands in trust, and the Secretary is considering the approval to acquire such land "from unrestricted fee status" to trust status, 25 C.F.R. § 151.13 requires the Secretary or the Tribe to provide title evidence meeting the *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States*. 25 C.F.R. § 151.13 further provides:

After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.⁸⁵

⁸² See Mass. Const. Amend., art. 97.

⁸³ It does not appear from the Tribe's Application that this conservation restriction is inconsistent with the Tribe's future plan for the parcel, as the Application indicates that the Tribe intends to preserve the current open space condition of this parcel.

⁸⁴ The conservation restriction is memorialized in a Conservation Restriction and Easement obtained by DCR's predecessor, the Department of Environmental Management, from the Trust for Public Land, executed on May 23, 2002, and recorded with the Barnstable Land Court Registry as Doc. No. 873, 208 on May 28, 2002 (attached as Appendix F).

⁸⁵ 25 C.F.R. § 151.13.

The Secretary is further authorized under 25 CFR 151.14 to formally accept the proposed land in trust status “as is appropriate in the circumstances.”

Proposed Conditions for Approval of Tribe’s Application

Based on the foregoing, DCR anticipates that any such title evidence will reveal the Conservation Parcel situated within the Mashpee lands. In considering the environmental benefits of maintaining the Conservation Parcel, and the lack of any need cited by the Tribe to develop this parcel, the Commonwealth respectfully requests that the Secretary exercise his discretionary authority under 25 C.F.R. § 151.14 to maintain the conservation restriction; that is, to require that this encumbrance not be eliminated. In addition, the Commonwealth respectfully requests that the Secretary not approve the Tribe’s application absent an enforceable agreement between the Tribe and the Commonwealth to ensure that the conservation restriction remains fully enforceable by DCR.

ZONING

The following section identifies the current zoning restrictions on the Mashpee and Middleborough lands, as well as the affordable housing requirements on the Middleborough lands.

Mashpee Lands

The Mashpee lands are currently zoned as follows:

Parcel	Zoning	Proposed Use
Mashpee parcel 1 Map 61, Block 58A	R-3 Residential ⁸⁶	Old Indian Meeting House
Mashpee parcel 2 Map 68, Block 13A	R-3 Residential	Town Cemetery
Mashpee parcel 3 Map 27, Block 42	R-5 Residential ⁸⁷	Historical, cultural, religious uses
Mashpee parcel 4 Map 35, Block 30	R-5 Residential	Educational, recreational, cultural services
Mashpee parcel 5 Map 95, Block 7	R-3 Residential	Tribe Council offices
Mashpee parcel 6 Map 45, Block 73A	R-5 Residential	Tribal housing
Mashpee parcel 7 Map 45, Block 75	R-5 Residential	Tribal housing
Mashpee parcel 8 Map 125, Block 238	R-3 Residential	Conservation land
Mashpee parcel 9 Map 99 Block 38	R-3 Residential	Conservation land

Absent any changes, the Tribe's plans to build tribal housing on Mashpee parcels 6 and 7 would need to comply with the R-5 Residential zoning restriction that requires an 80,000 square foot minimum lot size.

Middleborough Lands

The Middleborough lands are currently zoned as follows:

Parcel	Zoning	Proposed Use
Middleborough parcels	Rural Residential ⁸⁸	Casino

⁸⁶ R-3 Residential zoning requires a 40,000 square foot minimum lot size for residential zoning.

⁸⁷ R-5 Residential zoning requires an 80,000 square foot minimum lot size for residential zoning.

Absent any changes, the Tribe would be prohibited from building a casino on the Middleborough parcels, currently zoned for single family houses.

Affordable Housing

Any change to the zoning status of the Middleborough and/or Mashpee land could also raise concerns regarding the exemption of this sizable area of land from affordable housing requirements. M.G.L. ch. 40B, the Massachusetts fair housing statute, was enacted to address exclusionary zoning and regulatory barriers to affordable housing at the local level. A key means of determining a municipality's compliance with its affordable housing requirement under the statute is calculated based upon "available land area." Placing lands in trust could arguably exclude significant land area from the calculation of available land area for each municipality, creating a perverse "safe harbor" and impacting the Commonwealth's ability to achieve the objectives of the statute in the remaining non-trust areas of each municipality.

Therefore, pre-emption of the state fair housing law within trust territory may inhibit or even preclude application of this very important tool in Middleborough and Mashpee, towns already far below the 10% threshold requirement for affordably housing (Middleborough currently at 5%, Mashpee currently at 4%). Further, with the advent of a resort casino and possible resulting population surge, the need for affordable housing may significantly increase. This is especially significant given the anticipated job growth related to the casino proposal and the lack of land zoned suitably for affordable housing in Middleborough.

⁸⁸ Rural residential zoning requires an 80,000 square foot minimum lot size for single family houses.

In addition to an effect on the calculation of available land area under the state fair housing law, the advent of a resort casino in Middleborough and Mashpee may further effect affordable housing commitments due to concerns about the exhaustion of town resources. As addressed above, the development of a resort casino will necessarily draw upon and/or exhaust the capacities of the affected towns in areas such as water management, water pollution, and solid waste management. These effects will likely be raised and relied upon as an objection to the creation of additional affordable housing in each town, per their statutory obligation.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that would require the Tribe to adhere to the Commonwealth's affordable housing requirements.

TRANSPORTATION

The following section identifies specific transportation concerns within the jurisdiction of the Massachusetts Highway Department ("MassHighway") and the Massachusetts Aeronautics Commission ("MAC") that could be significantly affected by approval of the proposed acquisition.

MASSACHUSETTS HIGHWAY DEPARTMENT

These comments address the potential impacts of the proposed land acquisition on the scope of MassHighway's jurisdiction to regulate the Commonwealth's transportation systems.

MassHighway's Jurisdiction to Regulate Roadways

MassHighway is responsible under M.G.L. ch. 81, § 21 and M.G.L. ch. 85, § 2 for the repair, reconstruction, replacement or upgrade of the Commonwealth's roads and bridges. The following comments address areas of concern related to MassHighway's jurisdiction, including the potential for increased traffic volume and the improvements proposed to mitigate such increase, the need for access to the Project site, the environmental process and impact of the proposed improvements, and the projected costs of the necessary improvements.

Specific Areas of Concern

Increased Traffic Volume and Proposed Improvements

The proposed improvements to Route 44 referenced in the Tribe's Application are insufficient because they are based on MassHighway area studies which do not contemplate resort casino traffic. Therefore, any selected infrastructure improvements must be based on a new study which would include updated projected traffic volume data and traffic modeling for the expected land use conditions. Although previous studies might be used as a baseline, a new location/feasibility study must be conducted to determine the preferred alternative, which would then need to undergo the MEPA/NEPA review process.

The area affected by potential traffic increases as a result of the resort casino extends beyond the Route 44 corridor. The area of influence would likely extend from the I-95/93-Route 128 belt to the north and south shore. The actual area affected could be determined by studies of the projected market area. Thus, a comprehensive computer

traffic model should be used over a large area to inform the affected roadways and preferred improvements.

A plausible model is that proposed in the Tribe's Application, an alternative model previously considered but not selected by MassHighway. The Tribe's proposed model includes widening Route 44 from Route 24 to I-495 and double-barreling and grade-separating Route 44 from I-495 to Route 58, with removal of the rotary. This model would significantly improve east-west connectivity in the area. Further, when combined with MassHighway's recently completed Route 44 project, the proposed model would provide east-west connectivity from Route 24 to Route 3. However, as described above, this alternative needs to be re-evaluated with updated traffic volume figures to determine any operational deficiencies. These traffic volume figures would need to be projected 20 years from the build year to provide a complete analysis.

The most significant traffic implication from the development of a resort casino in Middleborough is likely an impact on I-495, which is already processing extremely high traffic volume and must deal with a loss of capacity through the existing lane-drop from three to two lanes. Adding projected traffic volume for the resort casino will force MassHighway to review potential improvements on I-495 to mitigate these increases.

Other alternatives should also be evaluated, including MassHighway's current preferred alternative. This alternative does not include grade separation of Plymouth Street and Route 105. Additional improvements to the public road network including Routes 105, Plymouth Street and Route 28 should also be considered.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the

Commonwealth that is based on an updated area study and would ensure the proper improvements to transportation infrastructure to promote the mobility of people and goods in the region, while protecting the safety of the inhabitants of the Commonwealth.

Access to Site

The Tribe represents that there will be no access to the site from local roads and access will only be via Route 44. Therefore, the Tribe proposes a new interchange on Route 44. There are several issues with this proposal. First, the plan to upgrade Route 44 from its current 2-lane highway to a double-barrel 4-lane grade-separated facility turns the roadway into an expressway. MassHighway and Federal Highway Administration (“FHWA”) policy precludes direct access to developments from an expressway. Access to sites is normally provided only from public roads. The proposed interchange would need to connect with a public road network to the north side of Route 44 or be tied into the adjacent interchanges with some kind of connector road system to comply with this policy.

Second, the proposed designs for the intersections of Route 44 at the Connector Road, for Route 18 and Route 28, for Route 44 at Everett Street and for Route 44 at Route 105, each call for grade separation with diamond ramp junctions. While the diamond ramps require less right-of-way and potentially have less environmental impacts, capacity and levels-of-service need to be evaluated to ensure that the dramatically increased volume can be handled efficiently. It may be necessary to evaluate either cloverleaf or single point urban interchange designs.

Third, bicycle and pedestrian access to the facility must also be considered and included in any proposed improvements. By necessity, bicycle and pedestrian traffic must be provided access through the local road network or dedicated pathways.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that would ensure that all forms of traffic can be provided with safe access to the site.

Environmental Process and Impact

Middleborough has required that the Tribe not allow access to the proposed development until such time as the Route 44 construction project improvements are in place. This presumes that the environmental, design, and construction processes are fully executed in a timely fashion to allow the development to progress. This may be a difficult task to achieve on a limited timeframe.

Proposed transportation improvements should be fully reviewed under NEPA and MEPA, as well as all applicable federal and state environmental laws and regulations as detailed above. Although the proposal describes the Route 44 project as one that has been under development for over 10 years, the preliminary Environmental Assessment/Draft Environmental Impact Report ("EA/DEIR") was never finalized and filed with FHWA or MEPA as required. The MEPA and NEPA documents should therefore include a full discussion of the proposed transportation improvements, including the project purpose and need, alternatives analysis, avoidance and minimization efforts and mitigation.

As proposed in the preliminary EA/DEIR, the Route 44 project will impact approximately 22 acres of wetlands (approximately 20 acres at the Middleborough Rotary). The United States Army Corps of Engineer's Draft Wetlands Mitigation Guidance requires between 2:1 and 3:1 land area for wetlands replacement. If this is not achievable, other methods such as wetlands restoration or land preservation may be acceptable but are less desirable and therefore have higher ratio requirements.

MassHighway's previous preferred alternative, including grade separation of the cross streets between Route 105 and the Middleborough Rotary and a new interchange for the casino, will result in additional impacts to wetlands and may result in more impacts to historical and archaeological resources.

FHWA will need to be consulted regarding the overall scope of the EIS and to determine the extent of their involvement as a Cooperating Agency with the BIA as the lead agency. The Tribe proposes in its Application that an EIS be prepared "in connection with the Project to be located on the Site" to comply with NEPA (with the BIA as the lead agency).⁸⁹ This proposal implies that the Tribe intends to comply with Section 106 of the National Historic Preservation Act of 1966 for the Project. This intention to comply should also apply to all associated transportation improvements as the Tribe's Application clearly states that the Tribe intends to seek reimbursement from federal and state sources. If the federal sources include Department of Transportation ("DOT") funding, Section 4(f) of the DOT Act of 1966⁹⁰ will also apply.⁹¹

⁸⁹ See Application, Executive Summary, Section II.7, p.14.

⁹⁰ Amended and recodified at 49 U.S.C. § 303.

⁹¹ FHWA is the sole agency that can make a final determination as to the applicability of Section 4(f) of the DOT Act of 1966.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that ensures that the necessary transportation improvements comply with NEPA, MEPA and all applicable federal and state laws and regulations.

Projected Costs

The Tribe's estimated cost of \$172 million for its Route 44 improvements is underestimated. Additional infrastructure improvements taking into account the increased traffic and not previously contemplated in the MassHighway study would also add to the cost.

Proposed Conditions for Approval of Tribe's Application

While the IGA between the Tribe and Middleborough references agreements regarding infrastructure improvements to state highways, the Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth regarding the Commonwealth's transportation infrastructure. Moreover, such agreements should rely on current, rather than outdated, information and should be comprehensive. While an EIR/EIS in the affected area was performed in 1999-2000, much has changed since then, particularly the Tribe's proposal for the construction of a casino. Therefore, a new EIR/EIS must be conducted and relied upon.

MASSACHUSETTS AERONAUTICS COMMISSION

These comments address potential impacts of the proposed land acquisition on the scope of MAC's jurisdiction to regulate the Commonwealth's airport system.

MAC Jurisdiction to Regulate the Airport System

The MAC is responsible under M.G.L. ch.90, § 39 for maintaining a safe, efficient airport system to meet the current and future air transportation needs of the Commonwealth.

Specific Areas of Concern

With the approval of lands in trust and the construction of a casino in Middleborough, airports located in neighboring communities such as Plymouth, Taunton, New Bedford, Mansfield, and Norwood could experience a significant increase in aircraft traffic, including jet, multi-engine turbo-prop, and multi-engine piston aircraft. With the presence of a resort casino in the area, if non-residents chose to travel by private plane, neighboring communities could also experience an increase in larger single engine 6+ passenger aircraft and smaller, single engine aircraft. Additional impacts could be experienced as far removed from the Middleborough lands as Hyannis, Worcester, Logan and Hanscom Field. A feasibility study would need to be undertaken to determine the potential impact on air traffic. Any increased traffic could result in additional requests for financial support from the airports for runway extensions, runway improvements, lighting improvements, instrumented approaches, ramp parking expansion and tie downs, additional hanger space, and increased fueling capabilities. The Federal Aviation Administration ("FAA") may not be able to support many of these projects due to funding levels and therefore, these projects may require significant investments on the part of the Commonwealth.

Proposed Conditions for Approval of Tribe's Application

Construction of a casino on the Middleborough lands could significantly increase airport traffic within the Commonwealth. Due to the resultant increase in financial assistance to fund necessary improvements and additions, the Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring the Tribe to address these potential impacts and concerns and ensuring the safety of travelers.

LABOR AND EMPLOYMENT

These comments address potential impacts of the proposed land acquisition on the scope of the Massachusetts Executive Office of Labor and Workforce Development's ("EOLWD") jurisdiction to regulate labor and employment in the Commonwealth.

EOLWD's Jurisdiction to Regulate Labor and Employment

Under numerous provisions of the Massachusetts General Laws, the EOLWD is responsible for regulating labor and employment in the Commonwealth. Massachusetts has and continues to be at the forefront of equality in employment. Since the 1800s, the legislature has enacted a wide array of statutes and regulations that protect the Commonwealth's workers. Many of these statutes are the result of compromises between employer and employee advocates and reflect a consensus among the Commonwealth's citizenry about the basic rights of employees.

Should the Tribe acquire the land in Middleborough in trust, and develop and operate a gaming establishment, the gaming establishment could be exempt from certain federal and state labor and employment laws, eviscerating protections for workers

implemented over the past century. Such a development would be contrary to Massachusetts public policy and could put the Commonwealth's employees at risk.

Specific Areas Affected

Wage and Benefit Protections

Minimum Wage and Overtime. Under Massachusetts law, wages must be paid promptly, usually within six days of the end of any pay period.⁹² The Commonwealth also sets minimum wages and overtime requirements for any non-exempt employees who work over 40 hours per week.⁹³ The Commonwealth also has special protections for child labor.⁹⁴

Health Insurance. Under the 2006 Massachusetts Health Care Reform Law,⁹⁵ employers with 11 or more employees are required to make a fair and reasonable contribution to the cost of their full-time employees' health insurance or pay a "fair share assessment" of \$295.⁹⁶

Unemployment Insurance. Under Massachusetts law, unemployed workers may receive unemployment benefits for up to 30 weeks, including potential eligibility for health insurance under the Medical Security Program.⁹⁷

Time Off. Massachusetts law requires paid employment leave for jury duty, and a variety of provisions allowing employees unpaid time off from work. The Massachusetts Meal Break Law, for example, requires employers to provide a 30-minute, unpaid meal break on any shift that lasts more than six hours.⁹⁸ There are also statutory limitations on

⁹² M.G.L. ch. 149, § 148.

⁹³ M.G.L. ch. 151, §§ 1, 1A.

⁹⁴ M.G.L. ch. 149, §§ 60-96.

⁹⁵ Chapter 58 of the Acts of 2006.

⁹⁶ M.G.L. ch. 149, § 188.

⁹⁷ M.G.L. ch. 151A.

⁹⁸ M.G.L. ch. 149, § 100.

working on holidays and Sundays⁹⁹ and requiring at least one day of rest every seven days.¹⁰⁰ Under the Small Necessities Leave Act, Massachusetts employers of 50 or more employees must provide up to 24 hours of unpaid leave per year to allow employees to participate in their child's school activities or accompany their children or elderly relatives to medical appointments.¹⁰¹ Employers are also required to provide up to eight weeks of unpaid maternity leave¹⁰² and unpaid military leave.¹⁰³

The Commonwealth insists on ensuring these wage and benefit protections for employees of the Commonwealth.

Health and Safety of Employees

Smoking. Since 2004, Massachusetts has prohibited smoking in all workplaces.¹⁰⁴

Occupational Safety. The Massachusetts Division of Occupational Safety (“DOS”) has statutory authority to regulate a variety of employment safety issues, including asbestos,¹⁰⁵ lead,¹⁰⁶ occupational hygiene,¹⁰⁷ and hazardous workplace materials.¹⁰⁸ DOS also regularly collaborates with the Federal Occupational Safety and Health Administration (“OSHA”) on workplace health and safety matters.

Workers' Compensation. The Massachusetts Division of Insurance has statutory authority to regulate workers compensation insurance. Nearly all Massachusetts employers are required to obtain workers' compensation for their employees.¹⁰⁹

⁹⁹ M.G.L. ch. 136.

¹⁰⁰ M.G.L. ch. 149, § 148.

¹⁰¹ M.G.L. ch. 149, § 52D.

¹⁰² M.G.L. ch. 149, § 105D.

¹⁰³ M.G.L. ch. 149, § 52A.

¹⁰⁴ M.G.L. ch. 270, § 22.

¹⁰⁵ M.G.L. ch. 149, §§ 6A-6G.

¹⁰⁶ M.G.L. ch. 149, §§ 11A.

¹⁰⁷ M.G.L. ch. 149, § 6.

¹⁰⁸ M.G.L. ch. 111F, §§ 1-21.

¹⁰⁹ M.G.L. ch. 152.

Licenses. Several boards in the Commonwealth license and regulate numerous professions, including professions that would inevitably be involved in the construction and operation of any gaming establishment.¹¹⁰ Examples include the regulation of engineers and land surveyors,¹¹¹ architects,¹¹² electricians,¹¹³ plumbers and gas fitters,¹¹⁴ drinking water supply facilities operators,¹¹⁵ health officers,¹¹⁶ and sanitarians.¹¹⁷

The Commonwealth insists on ensuring these health and safety protections for inhabitants of the Commonwealth.

Discrimination Statutes

Under Massachusetts law, it is unlawful for an employer to discriminate against any employee on the basis of race, color, religious creed, national origin, sex, sexual orientation, genetic information, ancestry, age, membership in the armed forces, or disability.¹¹⁸ Massachusetts law also requires employers to adopt and distribute a sexual harassment policy to employees.¹¹⁹ The Commonwealth insists on maintaining these protections for employees of the Commonwealth.

Privacy Rights

General Privacy Rights. Under Massachusetts law, all individuals, including employees, have a right against unreasonable, substantial, or serious interference with their privacy.¹²⁰ Indeed, “in the area of private employment there may be inquiries of a

¹¹⁰ See, e.g., M.G.L. ch. 13.

¹¹¹ M.G.L. ch. 13, §§ 45-47.

¹¹² M.G.L. ch. 13, §§ 44A-44D.

¹¹³ M.G.L. ch. 13, §§ 32-32A.

¹¹⁴ M.G.L. ch. 13, §§ 36-38.

¹¹⁵ M.G.L. ch. 13, § 66B.

¹¹⁶ M.G.L. ch. 13, §§ 70-72.

¹¹⁷ M.G.L. ch. 13, §§ 51-53.

¹¹⁸ M.G.L. ch. 151B, § 4.

¹¹⁹ M.G.L. ch. 151B, § 3A.

¹²⁰ M.G.L. ch. 214, § 1B.

personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests.”¹²¹

Employment Inquiries. It is unlawful for an employer, through a written application or an oral inquiry, to ask a job applicant for information regarding certain criminal convictions.¹²² In order to conduct criminal background checks to screen employees for positions of trust or where a criminal record may otherwise be relevant to the qualifications of the position, the Tribe will have to seek and obtain certification from the Criminal History Systems Board and comply with regulations regarding the use and dissemination of such records. It is also unlawful for an employer to require employees and applicants to produce information regarding certain mental illnesses if such individuals can prove that they are mentally competent to perform the job held or sought.¹²³

Lie Detector Tests. It is unlawful for an employer to administer a lie detector test as a condition of employment or continued employment.¹²⁴

Personnel Records. Under Massachusetts law, employees have the right to access their personnel files and, for employers with 20 or more employees, employees have the right to contest material in their personnel files.¹²⁵

The Commonwealth insists on maintaining these privacy rights for employees of the Commonwealth.

¹²¹ *Cort v. Bristol-Myers*, 385 Mass. 300, 307 (1982).

¹²² M.G.L. ch. 151B, § 4(9).

¹²³ *Id.*, § 4(9A).

¹²⁴ M.G.L. ch. 149, § 19B.

¹²⁵ M.G.L. ch. 149, § 52C.

Proposed Conditions for Approval of Tribe's Application

In consideration of the vast protections afforded workers in the Commonwealth and the many compromises that have been reached between employer and employee advocates reflecting a consensus among the Commonwealth's citizenry about the basic rights of employees, some of which have been detailed here, the Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring that the Tribe guarantee at least the same protections provided by the employment laws and regulations of the Commonwealth.

PUBLIC SAFETY

The following section identifies public safety concerns within the jurisdiction of the Massachusetts State Police ("MSP"), the Department of Fire Services ("DFS") and the Department of Public Safety ("DPS") that could be significantly affected by approval of the proposed acquisition.

MASSACHUSETTS STATE POLICE

These comments address potential impacts of the proposed land acquisition on the scope of the MSP's jurisdiction to enforce public safety in the Commonwealth.

MSP's Jurisdiction to Enforce Public Safety

The MSP has jurisdiction throughout the Commonwealth. As the principal statewide law enforcement agency in the Commonwealth, the MSP is responsible for providing policing directed at achieving safer roadways and reducing crime through investigations, education and patrol services. If the Mashpee and Middleborough lands

were placed in trust, the public safety of the Commonwealth could potentially be endangered by a loss of enforcement power.

Specific Areas of Concern

The IGA between the Tribe and Middleborough is limited to supplying Middleborough with a very small number of police officers and firefighters.¹²⁶ Also, the Tribe's commitment in the IGA to fund the police units and emergency medical technicians is scheduled to terminate on the first day of commercial operations at the Project.¹²⁷ These terms are insufficient to provide the Commonwealth with the public safety resources it will need to support the proposed Project on the Middleborough lands, specifically due to concerns regarding traffic and crime control associated with the construction and operation of a casino and the accompanying influx of workers, residents, visitors, and businesses to the area. While studies of the effect of casinos on crime are inconclusive with regard to any increase in crime levels, even if per capita crime remains constant, the increased concentration of people may result in an increase in the absolute numbers of crimes in the region.

Such impacts may result in increased workloads for the neighboring communities, the MSP barracks of jurisdiction, and other facets of the criminal justice system including the local District Attorney's office and the courts. Thus it is imperative that the groundwork for effective strategies be in place before the contemplated Project opens for business.

¹²⁶ See Application, IGA Section 5B, p.3, Tab 6 ("The Tribe agrees to buy two police cruisers and two advanced life support ("ALS") ambulances, and pay for the training, salaries and benefits of eight police officers and 16 firefighters/emergency medical technicians.").

¹²⁷ See Application, IGA Section 5B, p. 3-4, Tab 6.

Proposed Conditions for Approval of Tribe's Application

Jurisdictional Agreement

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth delineating the jurisdiction of the MSP and any tribal police entity. Such an agreement would need to specify:

State criminal jurisdiction- the Commonwealth has the authority to enforce state criminal laws on casino property.

Authority of state law enforcement officers- the MSP has free access to casino premises to enforce the laws of the Commonwealth.

Powers of tribal police- an agreement as to the authority of tribal police.

Procedures for detention and prosecution- an agreement regarding how arrests and prosecutions will be handled, as well as procedures for handling Indian crimes through tribal courts.

Certification/training requirements for tribal police- minimum training and standards for tribal police.

Primary responsibilities of state/tribal police- an agreement regarding the primary duties of the respective officers.

Casino/tribal cooperation agreements for prosecution and evidence issues- agreements covering what will be made readily available to the Commonwealth for prosecution needs and any procedures necessary to obtain evidence from tribal authorities.

Policing Plan

If the Middleborough lands are placed in trust for the operation of a casino, the Commonwealth respectfully requests that the BIA require that the Tribe develop a policing plan based on the following general parameters:

Early MSP involvement in the planning process. Involvement in the planning process will allow the MSP to prepare for the Project's demands, review the plans, and offer strategies to make the resort safer and more secure, and avoid potential problems. Close cooperative planning and review of the venue before construction for public safety issues will address both public and private concerns. It is critically important to obtain detailed agreements from potential casinos before operation. After an initial agreement, casinos, like any other business, try to minimize non-revenue producing expenses.

Early stakeholder participation. Many public agencies may be affected by the opening of a large resort casino. Police, fire, EMS, inspectional agencies, the courts, prosecutors, and many others may be called upon in some way to provide services. Early stakeholder involvement and planning will be critical to avoid problems. Ideally, a major stakeholder working group should be assembled to plan for and coordinate the delivery of government services to the Project.

Adequate law enforcement personnel. The Tribe's proposal will require an appropriate number of sworn police officers to maintain public safety. While casinos usually maintain a heavy security presence, security officers do not have the training or authority to effectively respond to all of the issues that accompany casinos. An adequate number of police officers should be planned for at an early stage. This is especially important when a casino first opens and the initial curiosity can swell the number of

visitors to double the normally expected crowd. Any agreement should also ensure that law enforcement continues to be involved in future growth planning and that sufficient law enforcement resources are available to handle any growth.

Possible statutory changes for gambling related offenses. Casino gaming will require Massachusetts to adopt new statutes to address any possible crimes associated with a higher number of people coming to a casino.

Preventative measures. Close regulation by the Commonwealth, to include background investigations on casino employees, will be a key strategy in preventing problems from emerging. There must also be measures to avoid conflicts of interest by anyone employed by the Project and anyone policing the Project.

Resources. High quality policing requires adequate resources. It is difficult to predict exactly what will be needed for a yet-to-be-built venue. However, a rough approximation can be made based on the experience of other states with analogous resorts (e.g., Connecticut's Foxwoods and Mohegan Sun). Their experience suggests that the resort will require:

- approximately 30 State Police officers for the resort and the surrounding area;
- office space (approximately 100 square feet per officer);
- additional office space for temporary lockup, booking, filing, evidence;
- policing and office equipment;
- improvements to the barracks of jurisdiction;
- other resources for family counseling, foreign language translation and

training.

DEPARTMENT OF FIRE SERVICES

These comments address potential impacts of the proposed land acquisition on the scope of DFS's jurisdiction to assist and support local fire services.

DFS's Jurisdiction to Assist and Support Local Fire Services

DFS is responsible for assisting and supporting the fire service community in protecting the lives and property of the citizens of the Commonwealth. DFS is in a unique position, different from other state agencies, in that DFS is required to provide services to trust lands in order to fulfill its obligation in the event that a fire or other disaster on the trust lands threatens adjacent land which DFS is required to protect.

Specific Areas of Concern

Projected Costs

In the IGA between the Tribe and Middleborough, the Parties agree that the cost of fire services will be primarily borne by Middleborough and reimbursed by the Tribe. It should be noted, however, that Middleborough's resources or the Tribe's resources alone will likely be insufficient in the event of a large-scale fire and when fire departments from neighboring cities and towns may need to be called upon to provide additional services. Accordingly, the Tribe and/or Middleborough should have mutual aid agreements in place with surrounding communities to provide additional fire services when necessary.

Hiring and Training of Paramedics and Firefighters

Section 5B of the IGA contemplates the hiring and training of paramedics and firefighters. If firefighters are to be trained to ensure the safety of the citizens of the

Commonwealth, the firefighters should be certified as Firefighter I/II, as recognized by the Massachusetts Fire Training Council (Massachusetts Firefighting Academy).

Tribal Fire Department and Code

Section 18 of the IGA also envisions establishment of a tribal fire department operating under an adopted fire code no less rigorous than the State Fire Code. The Massachusetts Fire Code is an ongoing maintenance code, requiring buildings to stay current with new and amended fire regulations. If the Tribe intends to adopt “no less stringent” provisions, the same issues identified by DPS below apply concerning who will make, review, and enforce that determination.¹²⁸

Proposed Conditions for Approval of Tribe's Application

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring the Tribe to adopt the Massachusetts Fire Code, specified at 527 CMR, and as amended from time to time, or requiring the Tribe to adopt a code that is no less stringent than the Massachusetts Fire Code, and not just the fire safety provisions found in the Commonwealth's State Building Code (“SBC”). The SBC is an “as built” code; that is, it applies only when buildings are erected. The Commonwealth further requests that the enforceable agreement require the Tribe to agree to adopt three Massachusetts laws that especially implicate fire safety: the possession or sale of explosives,¹²⁹ fireworks,¹³⁰ and fire-safe cigarettes.¹³¹

¹²⁸ See DEPARTMENT OF PUBLIC SAFETY Section *infra* p. 65.

¹²⁹ M.G.L. ch. 148, § 13.

¹³⁰ *Id.*, § 39.

¹³¹ M.G.L. ch. 64C, §§ 2C-2F.

DEPARTMENT OF PUBLIC SAFETY

These comments address potential impacts of the proposed land acquisition on the scope of DPS's jurisdiction as a regulatory, licensing and inspection agency.

DPS's Jurisdiction as a Regulatory, Licensing and Inspection Agency

DPS is the regulatory, licensing and inspection agency, charged with the oversight of numerous activities, businesses and professions. If the Mashpee and Middleborough lands were placed in trust, there could be significant limitations on DPS's ability to enforce the SBC, as well as DPS's ability to ensure elevator, boiler, and refrigeration safety.

Specific Areas of Concern

Building Code

If the Mashpee and Middleborough lands were placed in trust, there could be significant limitations on DPS's ability to enforce the SBC. The Commonwealth is specifically concerned regarding the Tribe's proposal for establishing and enforcing a "Tribal Building Code."

State Building Code. M.G.L. ch. 143, § 3 authorizes the head of a municipality to appoint local building inspectors to enforce the SBC. In addition, M.G.L. ch. 143, § 3 provides minimum standards of certification that local building inspectors and commissioners must meet in order to be qualified for the position.

A series of examinations are required to obtain the necessary certifications. M.G.L. ch. 143, § 93 establishes the Board of Building Regulations and Standards ("BBRS"). A certification committee comprised of members of the BBRS provides oversight of the certification process. Furthermore, the State Building Inspector may

“review any order or decision of a local inspector” and may “supervise the enforcement of the state building code, make periodic reviews of all local building inspection practices and make recommendations for improvements of such practices.”¹³² The BBRS is comprised of a cross-section of experts in various disciplines and promulgates the SBC. If a town wishes to adopt provisions that are more restrictive than the SBC, M.G.L. ch. 143, § 98 outlines the procedure by which the request must be made to the BBRS for review and approval. The adoption of less stringent standards is prohibited.

Finally, M.G.L. ch. 143, § 100 establishes the building code appeals (“BCA”) board, which is authorized to hear appeals from persons “aggrieved by an interpretation, order, requirement, direction or failure to act by... any state or local agency charged with the administration or enforcement of the state building code....”

Tribal Building Code. Section 18 of the IGA states that the Tribe:

shall adopt codes applicable to the Project relating to building construction and fire protection (the “Tribal Building Code”) that are not less rigorous than the Massachusetts Uniform Building [Code]. ... Enforcement of the Tribal Building Code shall be by the Tribal Code Enforcement Officer appointed by the Tribal Council. Additionally, independent consultants shall be engaged by the Tribe to periodically review construction activity on the Project Site and its compliance with the Tribal Building Code.

While Section 18 of the IGA states that the Tribe will adopt a code “not less rigorous” than the SBC, the Tribe has failed to state what entity will be empowered to determine whether the tribal building code meets SBC standards. Normally, municipalities must submit amendments to the BBRS for a thorough review and approval before any provision may be adopted by a municipality. If the Tribe anticipates using the resources of the BBRS for input as to adoption of the Tribal Code, DPS would need

¹³² M.G.L. ch. 143, § 3A.

additional resources to accommodate such a request. If the Tribe does not intend to utilize the expertise of the Board, questions remain as to the qualifications and training of the individuals who would be making these determinations. The Tribe has failed to state whether such individuals will be required to attain certifications similar to what is required by M.G.L. ch. 143, § 3. Further questions remain as to the potential for conflict if the Tribe is simultaneously charged with making these determinations, implementing the Tribal Code, and enforcing it as well.

Section 18 of the IGA provides for a "Tribal Council" to appoint a "Tribal Enforcement Officer" to enforce the code. Again, the Tribe has failed to specify the qualifications and training necessary for both the Tribal Council members as well as the Enforcement Officer. The Tribe has also failed to state whether there will be an appeals process, and if so, whether the Tribe anticipates requesting the resources of the BCA Board. If so, additional resources are necessary.

Additionally, DPS receives numerous complaints each year regarding local building inspectors or their practices that it must investigate. In some instances, DPS has found significant departures from appropriate practices, which may have had serious consequences on the safety of the structures in that community. In those instances, DPS has made recommendations to the head of the municipality for dismissal of the inspector and/or stripped the individual of his certification following a hearing. The Tribe has failed to state whether it anticipates an oversight entity to enforce the Tribal Building Code. If the Tribe does not anticipate an enforcement entity, the Commonwealth has serious concerns regarding one entity's responsibility for both adopting and enforcing the

Tribal Code with no further oversight. Were DPS to provide this type of oversight, however, additional resources would be necessary.

Emergency Response. When emergency situations/disasters occur in a community involving structures, DPS regularly dispatches its Building Inspectors to assist at the scene. It is unclear whether the Tribe anticipates requesting this type of assistance. If so, there are both legal and practical concerns regarding State Building Inspectors assisting at a scene that utilizes a Code other than the SBC.

Specialized Codes. In addition to the SBC, the Commonwealth has adopted other specialized codes. DFS has adopted the Fire Prevention Code also known as the Massachusetts Fire Code at 527 CMR. The Board of Plumbing and Gasfitters, under the Division of Professional Licensure (“DPL”) oversees the Plumbing Code and the Gas Code,¹³³ and the Board of Electrical Examiners, also under DPL, oversees the Electrical Code.¹³⁴ Any departure from these codes adopted in the Commonwealth would also need to be addressed.

The Commonwealth respectfully requests that the Secretary not approve the Tribe’s Application absent an enforceable agreement between the Tribe and the Commonwealth regarding the Tribe’s adoption of the SBC and the Commonwealth’s other specialized codes so that the safety of the Commonwealth’s inhabitants is not jeopardized.

Disability Access

The development and enforcement of regulations established by the Tribe must provide for full access and safe use of tribal facilities for persons with disabilities.

¹³³ See M.G.L. ch. 13, §§ 36-38.

¹³⁴ See M.G.L. ch. 13, §§ 32-32A.

M.G.L. ch. 22, § 13A authorizes the establishment of the Architectural Access Board to write a specialized code known as 521 CMR. This specialized code is specifically referenced in the SBC, which is designed to make public buildings accessible to, functional for, and safe for use by disabled persons. The Commonwealth's regulations are more stringent than the federal Americans with Disabilities Act ("ADA") in some areas, and lack of enforcement of 521 CMR, either by a "Tribal Building Code" that simply does not require enough protections for persons with disabilities, or by the Tribe simply adopting the ADA as its "Tribal Building Code," may result in less access and inadequate safety measures for persons with disabilities.

If, as stated in Section 18 of the IGA, the Tribe adopts codes that are "not less rigorous" than the SBC, the Commonwealth has concerns regarding how disputes relating to the Tribal Building Code will be resolved. The Architectural Access Board is empowered to grant variances to 521 CMR using the Commonwealth's adjudicatory process under M.G.L. ch. 30A. The Board also provides advisory opinions regarding the applicability of 521 CMR. It is unclear whether the Tribe envisions a similar entity for purposes of access issues or use of the Architectural Access Board's resources. If the Tribe envisions use of the Architectural Access Board, additional resources would be required.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth that ensures that persons with disabilities are provided with full access and safe use of any tribal facilities.

Elevator Inspections

Pursuant to M.G.L. ch. 143, § 62, State Elevator Inspectors within DPS have supervisory authority over the installation, alteration, maintenance, inspection, and approval of all elevators in the Commonwealth. State Elevator Inspectors are also charged with enforcing the Elevator Code, promulgated by the Board of Elevator Regulations pursuant to M.G.L. ch. 22, §11. The Board of Elevator Regulations also hears variances from the Elevator Code.¹³⁵ The Board of Elevator Appeals hears appeals from matters before the Board of Elevator Regulations.¹³⁶ And the Board of Elevator Examiners is responsible for examining candidates for licensure for construction, maintenance or repair of elevators.¹³⁷ In order to sit for an examination, candidates must meet certain prerequisites.

The IGA between the Tribe and Middleborough is silent regarding the installation, maintenance, repair and inspection of elevators. It is unclear whether the Tribe will adopt a uniform elevator safety code. If so, the Tribe fails to indicate what entity will be responsible for implementation and enforcement of the Code, and what qualifications will be required for such an entity. It is unclear whether the installers of the elevator units will be required to meet the criteria for a Massachusetts Licensed Elevator Mechanic. It is also unclear whether the elevators will be required to undergo annual inspection, as is required for most elevators in the Commonwealth. If so, the Tribe fails to indicate who will be responsible for the inspections and whether those individuals will be properly trained and experienced. It is also unclear whether there will

¹³⁵ See M.G.L. ch. 143, § 68.

¹³⁶ See M.G.L. ch. 22, § 11A.

¹³⁷ See M.G.L. ch. 143, § 71C.

be an appeals and/or complaint process. If the Tribe anticipates using DPS's inspectors or Boards, additional resources would be required.

In addition, when emergency situations occur on an elevator/escalator, DPS regularly dispatches its Inspectors to perform an investigation. It is unclear whether the Tribe anticipates requesting this type of assistance. If the Tribe anticipates requesting DPS's assistance, there are legal and other concerns regarding State Elevator Inspectors assisting/investigating at a scene that uses a Code other than what has been adopted by the Board of Elevator Regulations.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth regarding the Tribe's adoption of the Commonwealth's Elevator Code so that the safety of the Commonwealth's inhabitants is not jeopardized.

Boilers, Air Tanks and Refrigeration Units

Pursuant to M.G.L. ch. 146, § 2, the Board of Boiler Rules within DPS promulgates regulations for the construction, installation, and inspection of steam boilers. Additionally, DPS is authorized to oversee the licensure of engineers, firemen, and pipefitters who oversee the operation of boilers and install, repair, and maintain the apparatus for piping appliances or accessories for heating systems. DPS employs District Engineering Inspectors who perform boiler inspections and review the licenses of the engineers, firemen and, in the event of a problem, pipefitters.

The Tribe's proposal is silent regarding boiler, air tank, and refrigeration unit safety. The proposed buildings will presumably be heated by boilers. The number and size of the boilers will be dependant on the size and layout of the facility. Further, air

tanks may also be used for service air systems or for control systems and refrigeration units will be needed in any restaurant or kitchen area as well as large chiller units for air conditioning.

The codes currently used and adopted in Massachusetts are the American Society of Mechanical Engineers ("ASME") and American Society of Heating, Refrigerating, and Air Conditioning Engineers ("ASHREA") national standards, as well as the National Board Inspection Code. It is unclear what standard the Tribe will use for construction of the boilers and pressure vessels, what entity will make this determination, and what criteria will be used to determine the qualifications for such an entity. Similarly, it is unclear what standard will be adopted for the construction of the air conditioning and refrigeration units, and what entity will be responsible for installation and repair, and what criteria will be used to determine the qualifications for such an entity. It is also unclear whether there will be any inspection requirements for boilers, air tanks and refrigeration units, and who will be responsible for their inspection. If the Tribe anticipates using DPS's services, additional resources would be required.

Finally, when emergency situations occur involving a boiler, air tank, or refrigeration unit, DPS has jurisdiction and regularly dispatches its Inspectors to perform an investigation. It is unclear whether the Tribe anticipates requesting this type of assistance. If so, there are legal and other concerns regarding DPS Inspectors investigating a scene that uses Codes other than those that have been adopted by the Commonwealth.

The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the

Commonwealth regarding the Tribe's adoption of boiler, air tank, or refrigeration safety standards so that the safety of the Commonwealth's inhabitants is not jeopardized.

Proposed Condition for Approval of Tribe's Application

The Commonwealth respectfully requests that the Tribe be required to address the deficiencies outlined above, including the building code requirements, emergency response assistance from building inspectors, disability access to facilities, elevator inspections and the regulation of boiler, air tank and refrigeration units and enter into enforceable agreements with the Commonwealth to ensure the safety and security of the its inhabitants.

PUBLIC HEATH

The Commonwealth, through the Department of Public Health ("DPH"), is dedicated to promoting healthy people, healthy families, healthy communities and healthy environments through compassionate care, education and prevention. The Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth requiring the Tribe to address the possible increased demand for social service and public health programs, such as gambling prevention and addiction services, likely to increase with the increased presence of gaming. The Commonwealth also respectfully requests that the Secretary require the Tribe to enter into an enforceable agreement to ensure that any casino is operated with the highest levels of oversight and regulation in order to diminish potential negative impacts.

Specifically, the Commonwealth requests that any casino operating on trust lands be required to:

1. refrain from targeting minors or other vulnerable populations;
 2. provide free space for independent on-site intervention and counseling services;
 3. train its workforce to identify and intervene with customers exhibiting problematic gambling behavior, much like alcohol behavior training;
 4. prominently display signs of problem gambling and ways to access help;
 5. establish a plan whereby anyone can remove themselves from receiving any promotional material of the casino, much like the "do not call" list;
 6. provide the Commonwealth with the aggregate demographic information of its customers, so as to allow the Commonwealth to more precisely
 7. target its prevention and intervention efforts; and
- provide smoke-free facilities

CONSUMER PROTECTION

The Tribe's proposed acquisition could seriously limit the jurisdiction of agencies within the Massachusetts Office of Consumer Affairs and Business Regulation ("OCABR"). OCABR agencies are empowered to regulate individuals and industries for the protection of consumers.¹³⁸ Were land to be placed in trust, the Commonwealth's power to protect consumers could be severely restricted and Massachusetts consumers could lose substantial benefits provided by Massachusetts law.

For example, consumers engaging in gaming activities on trust lands may not be entitled to the protections under M.G.L. ch. 93A, which regulates business practices within the Commonwealth, specifically for the protection of consumers. Similarly, consumers may not be entitled to protection under warranty or innkeeper laws on trust

¹³⁸ M.G.L. ch. 24A, § 1.

land.¹³⁹ The Commonwealth may also not be permitted to perform any weights and measures functions or device testing/certification in the absence of consent by the Tribe.¹⁴⁰ Finally, consumers could lose the jurisdiction of Massachusetts courts in resolving disputes arising from certain events or transactions occurring on trust land.

Therefore, the Commonwealth respectfully requests that the Secretary not approve the Tribe's Application absent an enforceable agreement between the Tribe and the Commonwealth ensuring that the Commonwealth is able to protect its consumers and provide avenues for consumers to seek redress for alleged consumer violations.

IMPACTS ON REAL PROPERTY TAXES

Pursuant to 25 C.F.R. § 151.11(a) (specifically 25 C.F.R. § 151.10(e)), the following comments address "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."

Mashpee Lands

The Tribe's Application states that the Mashpee lands do not generate tax revenue, as they are owned by Mashpee, non-profit entities, or used for governmental/tax exempt purposes. Mashpee assessors have indicated that all parcels except Parcel 9 (Map 99-Block 38) were coded exempt in FY07 and thus assessed no taxes. The assessors also indicated an expectation that Parcel 9 would be removed from the tax rolls for FY08. However, Mashpee's records show that Parcel 9 has been assessed taxes for FY08.¹⁴¹ The records show that the remaining 8 parcels have been coded exempt and thus have not been assessed taxes for FY08.

¹³⁹ See M.G.L. ch. 140 § 2-21.

¹⁴⁰ See M.G.L. ch. 98.

¹⁴¹ The Tax Rate for FY08 is \$6.96. See Town of Mashpee Massachusetts, Assessor's Online Database, available at <http://www.assessedvalues.com/index.zhtml?jurcode=172>.

Middleborough Lands

The property taxes levied on the Middleborough lands in FY07 (the most recent fiscal year available) are as follows:

MAP & LOT	2007 TAXES	2007 FULL VALUE TAXES ¹⁴²	5-YEAR TAX SAVINGS ¹⁴³
024-4153	\$ 0.29	\$ 32.44	\$ 162.20
023-3285 ¹⁴⁴	\$ 2.57	\$ 1,436.16	\$ 7,167.95
024-3313 ¹⁴⁵	\$ 5.45	\$ 1,638.66	\$ 8,166.05
023-4055	\$ 22.11	\$ 2,230.43	\$ 11,041.60
023-6471	\$ 28.58	\$ 910.26	\$ 4,423.40
023-6052	\$ 31.50	\$ 3,035.50	\$ 15,020.00
023-3838	\$ 37.30	\$ 3,967.39	\$ 19,650.45
032-1483	\$ 71.70	\$ 2,348.39	\$ 11,383.45
032-2745	\$ 206.02	\$ 206.02	N/A
042-2035	\$ 2,475.00	\$ 2,475.00	N/A
032-5816	\$ 2,552.00	\$ 2,552.00	N/A
042-2134	\$ 293.92	\$ 293.92	N/A
032-1769	\$ 4,821.62	\$ 4,821.62	N/A
032-2057	\$ 4,821.62	\$ 4,821.62	N/A
032-1769	\$ 784.16	\$ 784.16	N/A
031-5635	\$ 428.74	\$ 428.74	N/A
TOTAL¹⁴⁶	\$15,369.68¹⁴⁷	\$31,982.31¹⁴⁸	\$ 77,015.10¹⁴⁹

Lands subject to preferential tax treatment under M.G.L. ch. 61A

¹⁴² The 2007 full value taxes are based on fair cash value of the property without the special tax status afforded to the property by M.G.L. ch. 61A due to the prior agricultural use of the land.

¹⁴³ The 5-year tax savings represent the new owner's roll-back tax liability based on the tax benefits otherwise afforded to the property for FY03-FY07 under M.G.L. ch. 61A, § 13.

¹⁴⁴ This lot is not included in the Tribe's Application. See Application, Annual Taxes on Middleborough Properties, Tab 6.

¹⁴⁵ This lot is not included in the Tribe's Application. See *id.*

¹⁴⁶ The Tribe's Application also includes lot 032-1769 (representing \$784.16 in taxes) and lot 031-5635 (representing \$428.74 in taxes). However, this information was not provided by the Town of Middleborough. See Application, Annual Taxes on Middleborough Properties, Tab 6.

¹⁴⁷ The figures in the Tribe's Application differ. In the Tribe's Application, this amount is listed as \$23,305.00. See *id.*

¹⁴⁸ The figures in the Tribe's Application differ. In the Tribe's Application, this amount is listed as \$34,974.46. See *id.*

¹⁴⁹ The 5-year tax penalty is not addressed in the Tribe's application. See *id.*

Based on the information provided by Middleborough, the removal of the Middleborough lands from the tax rolls would result in an estimated annual reduction of \$15,369.68 in taxes, as indicated in the chart above. Certain Middleborough parcels have received preferential tax treatment under M.G.L. ch. 61A based on the land's active agricultural use. If the Chapter 61A parcels had been taxed at the regular rate, the tax in FY07 would have been \$31,982.31 as indicated in the chart above.

However, as a general rule, the town has a right to payment of penalty taxes on the parcels that have received preferential tax treatment under M.G.L. ch. 61A whenever the owner changes the use of the land. The Tribe states in its Application that "the tax status will not be renewed, and beginning on July 1, 2008, the higher (non-Chapter 61A) tax rate will take effect for properties."¹⁵⁰ As the new owner does not intend to apply for Chapter 61A status and intends to immediately begin developing the land, pursuant to M.G.L. ch. 61A, the new owner will be liable for repayment of the tax benefits received for each of the prior five fiscal year's tax savings (plus 5% interest). When land is purchased for development (outside of the trust process), the "roll-back tax" liability is usually paid off so the land can be acquired free and clear of the lien. The 5-year roll-back tax liability (excluding 5% annual interest) is \$77,015.10.

In the IGA between the Tribe and Middleborough, the Tribe has agreed to make voluntary payments to Middleborough in lieu of taxes. The Tribe's system of voluntary payments is no substitute for mandatory tax payments and the IGA does not recognize the 5-year roll-back tax liability. The numbers listed above also don't necessarily take into consideration increases in the taxes on the properties resulting from future development and improvement of the property. The loss in property tax revenues must also be

¹⁵⁰ See Application, Annual Taxes on Middleborough Properties, n. 1, Tab 6.

evaluated in light of the Tribe's plan to undertake considerable commercial development on the Middleborough lands. Therefore, the result of removing the Mashpee and Middleborough lands from the tax rolls could be significant and beyond what was envisioned by the IGA.

IMPACTS ON SPECIAL ASSESSMENTS

The Commonwealth is unaware of any special assessments currently assessed by the Commonwealth against the Mashpee and Middleborough lands.

OTHER CONSIDERATIONS

This section provides additional considerations beyond the jurisdictional, tax and special assessment issues described above.

Concerns of Neighboring Communities

While the Tribe and Middleborough may have entered into the IGA, the neighboring communities do not benefit from such an arrangement, but are still positioned to bear some of the cost of the construction and operation of a casino in Middleborough. Neighboring communities also have significant jurisdictional concerns that, unless resolved, should preclude the DOI from approving the proposed acquisition.

Claims to the Lands by Other Tribes

The Pocasset Wampanoag Tribe of Fall River, the Pokanoket Wampanoag Tribe of Rhode Island and the Federation of Old Plimoth Indian Tribes all claim ownership to the Middleborough lands. The Pocasset Wampanoag claim legitimate ties to Middleborough. Michael Weeden, President of the Pokanoket Wampanoag Tribe of Rhode Island, asserts that southeastern Massachusetts is the historic territory of the Pokanoket Wampanoag. Sachem Rodney Randy Joseph of the Federation of Old Plimoth

Indian Tribes asserts that the use of ancient Middleborough reservation lands falls within the purview of the Federation of Old Plimoth. Other tribes' claims to the proposed acquisition lands should be resolved prior to any BIA recommendation for approval of the Tribe's Application.

CONCLUSION

For the reasons stated herein, the Commonwealth opposes the Tribe's Application to have the Mashpee and Middleborough lands taken into trust for its failure to provide the BIA with sufficient information to recommend approval and significant jurisdictional concerns which, unless resolved, could jeopardize the safety and welfare of the Commonwealth's inhabitants.

APPENDIX A

LIST OF ACRONYMS

ADA – Americans with Disabilities Act

ASHREA – American Society of Heating, Refrigerating, and Air Conditioning Engineers

ASME – American Society of Mechanical Engineers

APC – Air Pollution Control Program

ASTM – American Society for Testing and Materials

BBRS – Board of Building Regulations and Standards

BCA – Building Code Appeals Board

BIA – Bureau of Indian Affairs

CAA – Clean Air Act

CWA – Clean Water Act

DCR – Department of Conservation and Recreation

DFG – Department of Fish and Game

DFS – Department of Fire Service

DFW – Department of Fisheries and Wildlife

DMF – Division of Marine Fisheries

DOI – Department of Interior

DOL – Department of Labor

DOS – Division of Occupational Safety

DOT – Department of Transportation

DPL – Division of Professional Licensure

DPS – Department of Public Safety

DSA – Development Services Agreement

EA/DEIR – Environmental Assessment/Draft Environmental Impact Report

EH – Estimated Habitat

EIR – Environmental Impact Report

EIS – Environmental Impact Statement

EOLWD – Executive Office of Labor and Workforce Development

EPA – Environmental Protection Agency (U.S.)

FAA – Federal Aviation Administration

FHWA – Federal Highway Administration

FOIA – Freedom of Information Act

GHG – Green House Gas

IRA – Indian Reorganization Act of 1934

IGA – Intergovernmental Agreement

IGRA – Indian Gaming Regulatory Act

MAC – Massachusetts Aeronautics Commission

MassDEP – Massachusetts Department of Environmental Protection

MassGIS – Massachusetts Geographic Information Systems

MassHighway – Massachusetts Highway Department

MCGSC – Middleborough Casino Gambling Study Committee (Community Impact Report)

MEPA – Massachusetts Environmental Protection Act

MESA – Massachusetts Endangered Species Act

MGD – Million of Gallons Per Day

MHC – Massachusetts Historical Commission

MSP – Massachusetts State Police

NEPA – National Environmental Protection Act

NHESP – Natural Heritage and Endangered Species Program

NOI – Notice of Intent

NPDES – National Pollutant Discharge Elimination System

OCABR – Office of Consumer Affairs and Business Regulation

OSHA – Occupational Safety and Health Administration

PH – Priority Habitat

PWS – Public Water System

SDWA – Safe Drinking Water Act

SBC – Massachusetts State Building Code

TURA – Massachusetts Toxics Use Reduction Act

WMA – Wildlife Management Area

WPA – Wetlands Protection Act

WRC – Water Resources Commission

WWTF – Wastewater Treatment Facility

APPENDIX B

Sustainable Development Principles

The Commonwealth of Massachusetts shall care for the built and natural environment by promoting sustainable development through integrated energy and environment, housing and economic development, transportation and other policies, programs, investments, and regulations. The Commonwealth will encourage the coordination and cooperation of all agencies, invest public funds wisely in smart growth and equitable development, give priority to investments that will deliver good jobs and good wages, transit access, housing, and open space, in accordance with the following sustainable development principles. Furthermore, the Commonwealth shall seek to advance these principles in partnership with regional and municipal governments, non-profit organizations, business, and other stakeholders.



1. Concentrate Development and Mix Uses

Support the revitalization of city and town centers and neighborhoods by promoting development that is compact, conserves land, protects historic resources, and integrates uses. Encourage remediation and reuse of existing sites, structures, and infrastructure rather than new construction in undeveloped areas. Create pedestrian friendly districts and neighborhoods that mix commercial, civic, cultural, educational, and recreational activities with open spaces and homes.

2. Advance Equity

Promote equitable sharing of the benefits and burdens of development. Provide technical and strategic support for inclusive community planning and decision making to ensure social, economic, and environmental justice. Ensure that the interests of future generations are not compromised by today's decisions.



3. Make Efficient Decisions

Make regulatory and permitting processes for development clear, predictable, coordinated, and timely in accordance with smart growth and environmental stewardship.



4. Protect Land and Ecosystems

Protect and restore environmentally sensitive lands, natural resources, agricultural lands, critical habitats, wetlands and water resources, and cultural and historic landscapes. Increase the quantity, quality and accessibility of open spaces and recreational opportunities.



5. Use Natural Resources Wisely

Construct and promote developments, buildings, and infrastructure that conserve natural resources by reducing waste and pollution through efficient use of land, energy, water, and materials.



6. Expand Housing Opportunities

Support the construction and rehabilitation of homes to meet the needs of people of all abilities, income levels, and household types. Build homes near jobs, transit, and where services are available. Foster the development of housing, particularly multifamily and smaller single-family homes, in a way that is compatible with a community's character and vision and with providing new housing choices for people of all means.



7. Provide Transportation Choice

Maintain and expand transportation options that maximize mobility, reduce congestion, conserve fuel and improve air quality. Prioritize rail, bus, boat, rapid and surface transit, shared-vehicle and shared-ride services, bicycling, and walking. Invest strategically in existing and new passenger and freight transportation infrastructure that supports sound economic development consistent with smart growth objectives.



8. Increase Job and Business Opportunities

Attract businesses and jobs to locations near housing, infrastructure, and transportation options. Promote economic development in industry clusters. Expand access to education, training, and entrepreneurial opportunities. Support the growth of local businesses, including sustainable natural resource-based businesses, such as agriculture, forestry, clean energy technology, and fisheries.



9. Promote Clean Energy

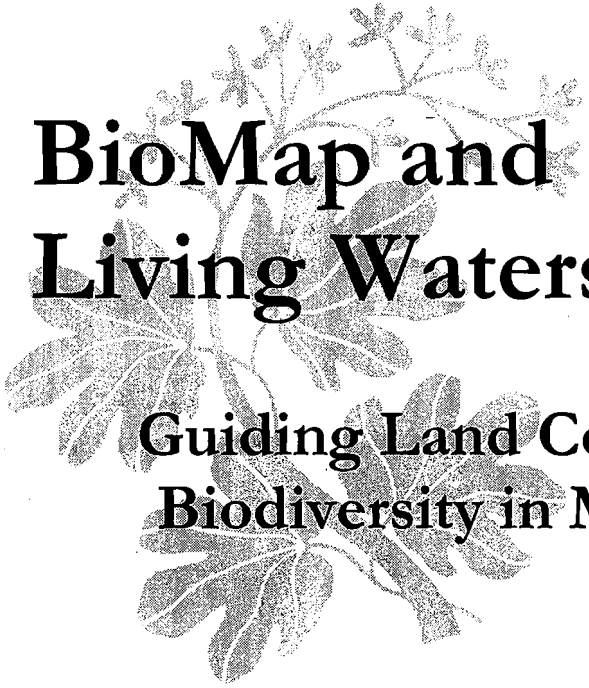
Maximize energy efficiency and renewable energy opportunities. Support energy conservation strategies, local clean power generation, distributed generation technologies, and innovative industries. Reduce greenhouse gas emissions and consumption of fossil fuels.

10. Plan Regionally

Support the development and implementation of local and regional, state and interstate plans that have broad public support and are consistent with these principles. Foster development projects, land and water conservation, transportation and housing that have a regional or multi-community benefit. Consider the long-term costs and benefits to the Commonwealth.



APPENDIX C



BioMap and Living Waters

Guiding Land Conservation for Biodiversity in Massachusetts

Core Habitats of Middleborough

This report and associated map provide information about important sites for biodiversity conservation in your area.

This information is intended for conservation planning, and is not intended for use in state regulations.

Produced by:

Natural Heritage & Endangered Species Program
Massachusetts Division of Fisheries and Wildlife
Executive Office of Environmental Affairs
Commonwealth of Massachusetts

Produced in 2004



BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

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- In Support of Core Habitats

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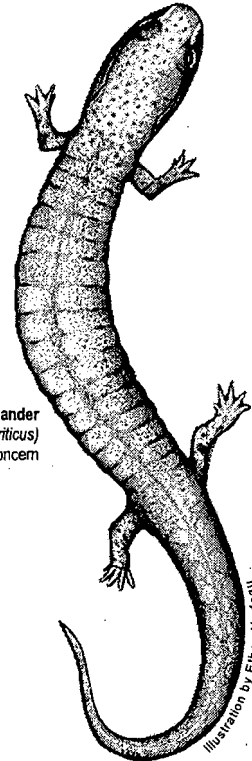
- Protecting Larger Core Habitats
- Additional Information

Local Core Habitat Information*

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- BioMap: Core Habitat Summaries
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Spring Salamander
(*Gyrinophilus porphyriticus*)
Species of Special Concern



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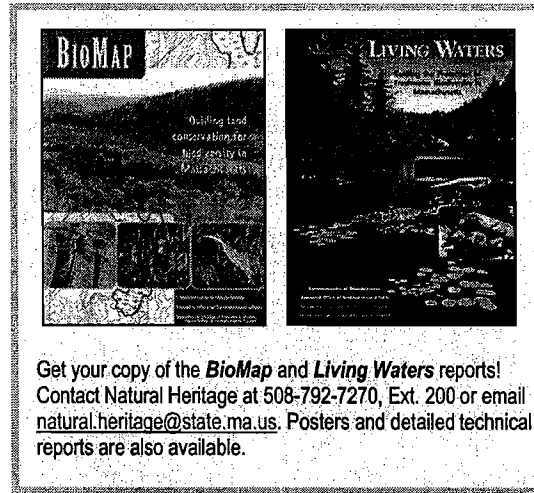
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In this report, the Natural Heritage & Endangered Species Program provides you with site-specific biodiversity information for your area. Protecting our biodiversity today will help ensure the full variety of species and natural communities that comprise our native flora and fauna will persist for generations to come.

The information in this report is the result of two statewide biodiversity conservation planning projects, *BioMap* and *Living Waters*. The goal of the BioMap project, completed in 2001, was to identify and delineate the most important areas for the long-term viability of terrestrial, wetland, and estuarine elements of biodiversity in Massachusetts. The goal of the Living Waters project, completed in 2003, was to identify and delineate the rivers, streams, lakes, and ponds that are important for freshwater biodiversity in the Commonwealth. These two conservation plans are based on documented observations of rare species, natural communities, and exemplary habitats.

What is a Core Habitat?

Both BioMap and Living Waters delineate *Core Habitats* that identify the most critical sites for biodiversity conservation across the state. Core Habitats represent habitat for the state's most viable rare plant and animal populations and include exemplary natural communities and aquatic habitats. Core Habitats represent a wide diversity of rare species and natural communities (see Table 1), and these areas are also thought to contain virtually all of the other described species in Massachusetts. Statewide, BioMap Core Habitats encompass 1,380,000 acres of uplands and wetlands, and Living Waters identifies 429 Core Habitats in rivers, streams, lakes, and ponds.



Get your copy of the *BioMap* and *Living Waters* reports! Contact Natural Heritage at 508-792-7270, Ext. 200 or email natural.heritage@state.ma.us. Posters and detailed technical reports are also available.

Core Habitats and Land Conservation

One of the most effective ways to protect biodiversity for future generations is to protect Core Habitats from adverse human impacts through land conservation. For Living Waters Core Habitats, protection efforts should focus on the *riparian areas*, the areas of land adjacent to water bodies. A naturally vegetated buffer that extends 330 feet (100 meters) from the water's edge helps to maintain cooler water temperature and to maintain the nutrients, energy, and natural flow of water needed by freshwater species.

In Support of Core Habitats

To further ensure the protection of Core Habitats and Massachusetts' biodiversity in the long-term, the BioMap and Living Waters projects identify two additional areas that help support Core Habitats.

In BioMap, areas shown as *Supporting Natural Landscape* provide buffers around the Core Habitats, connectivity between Core Habitats, sufficient space for ecosystems to function, and contiguous undeveloped habitat for common species. Supporting Natural Landscape was



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BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

generated using a Geographic Information Systems (GIS) model, and its exact boundaries are less important than the general areas that it identifies. Supporting Natural Landscape represents potential land protection priorities once Core Habitat protection has been addressed.

In Living Waters, *Critical Supporting Watersheds* highlight the immediate portion of the watershed that sustains, or possibly degrades, each freshwater Core Habitat. These areas were also identified using a GIS model. Critical Supporting Watersheds represent developed and undeveloped lands, and can be quite large. Critical Supporting Watersheds can be helpful in land-use planning, and while they are not shown on these maps, they can be viewed in the Living Waters report or downloaded from www.mass.gov/mgis.

Understanding Core Habitat Species, Community, and Habitat Lists

What's in the List?

Included in this report is a list of the species, natural communities, and/or aquatic habitats for each Core Habitat in your city or town. The lists are organized by Core Habitat number.

For the larger Core Habitats that span more than one town, the species and community lists refer to the entire Core Habitat, not just the portion that falls within your city or town. For a list of all the state-listed rare species within your city or town's boundary, whether or not they are in Core Habitat, please see the town rare species lists available at www.nhesp.org.

The list of species and communities within a Core Habitat contains only the species and

Table 1. The number of rare species and types of natural communities explicitly included in the BioMap and Living Waters conservation plans, relative to the total number of native species statewide.

Biodiversity Group	Species and Verified Natural Community Types	
	Included in BioMap	Total Statewide
Vascular Plants	246	1,538
Birds	21	221 breeding species
Reptiles	11	25
Amphibians	6	21
Mammals	4	85
Moths and Butterflies	52	An estimated 2,500 to 3,000
Damselflies and Dragonflies	25	An estimated 165
Beetles	10	An estimated 2,500 to 4,000
Natural Communities	92	> 105 community types

Biodiversity Group	Species	
	Included in Living Waters	Total Statewide
Aquatic Vascular Plants	23	114
Fishes	11	57
Mussels	7	12
Aquatic Invertebrates	23	An estimated > 2500

natural communities that were explicitly included in a given BioMap or Living Waters Core Habitat. Other rare species or examples of other natural communities may fall within the Core Habitat, but for various reasons are not included in the list. For instance, there are a few rare species that are omitted from the list or summary because of their particular sensitivity to the threat of collection. Likewise, the content of many very small Core Habitats are not described in this report or list, often because they contain a single location of a rare plant



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BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

species. Some Core Habitats were created for suites of common species, such as forest birds, which are particularly threatened by habitat fragmentation. In these cases, the individual common species are not listed.

What does 'Status' mean?

The Division of Fisheries and Wildlife determines a status category for each rare species listed under the Massachusetts Endangered Species Act, M.G.L. c.131A, and its implementing regulations, 321 CMR 10.00. Rare species are categorized as Endangered, Threatened, or of Special Concern according to the following:

- **Endangered** species are in danger of extinction throughout all or a significant portion of their range or are in danger of extirpation from Massachusetts.
- **Threatened** species are likely to become Endangered in Massachusetts in the foreseeable future throughout all or a significant portion of their range.
- **Special Concern** species have suffered a decline that could threaten the species if allowed to continue unchecked or occur in such small numbers or with such restricted distribution or specialized habitat requirements that they could easily become Threatened in Massachusetts.

In addition, the Natural Heritage & Endangered Species Program maintains an unofficial *watch list* of plants that are tracked due to potential conservation interest or concern, but are not regulated under the Massachusetts Endangered Species Act or other laws or regulations. Likewise, described natural communities are not regulated any laws or regulations, but they can help to identify ecologically important areas that are worthy of protection. The status of natural

Legal Protection of Biodiversity

BioMap and Living Waters present a powerful vision of what Massachusetts would look like with full protection of the land that supports most of our biodiversity. To create this vision, some populations of state-listed rare species were deemed more likely to survive over the long-term than others.

Regardless of their potential viability, all sites of state-listed species have full legal protection under the Massachusetts Endangered Species Act (M.G.L. c.131A) and its implementing regulations (321 CMR 10.00). Habitat of state-listed wildlife is also protected under the Wetlands Protection Act Regulations (310 CMR 10.37 and 10.59). The **Massachusetts Natural Heritage Atlas** shows **Priority Habitats**, which are used for regulation under the Massachusetts Endangered Species Act and Massachusetts Environmental Policy Act (M.G.L. c.30) and **Estimated Habitats**, which are used for regulation of rare wildlife habitat under the Wetlands Protection Act. For more information on rare species regulations, see the *Massachusetts Natural Heritage Atlas*, available from the Natural Heritage & Endangered Species Program in book and CD formats.

BioMap and Living Waters are conservation planning tools and do not, in any way, supplant the Estimated and Priority Habitat Maps which have regulatory significance. Unless and until the combined BioMap and Living Waters vision is fully realized, we must continue to protect all populations of our state-listed species and their habitats through environmental regulation.

communities reflects the documented number and acreages of each community type in the state:

- **Critically Imperiled** communities typically have 5 or fewer documented sites or have very few remaining acres in the state.
- **Imperiled** communities typically have 6-20 sites or few remaining acres in the state.
- **Vulnerable** communities typically have 21-100 sites or limited acreage across the state.
- **Secure** communities typically have over 100 sites or abundant acreage across the state; however excellent examples are identified as Core Habitat to ensure continued protection.



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BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

Understanding Core Habitat Summaries

Following the BioMap and Living Waters Core Habitat species and community lists, there is a descriptive summary of each Core Habitat that occurs in your city or town. This summary highlights some of the outstanding characteristics of each Core Habitat, and will help you learn more about your city or town's biodiversity. You can find out more information about many of these species and natural communities by looking at specific *fact sheets* at www.nhesp.org.

Next Steps

BioMap and Living Waters were created in part to help cities and towns prioritize their land protection efforts. While there are many reasons to conserve land – drinking water protection, recreation, agriculture, aesthetics, and others – BioMap and Living Waters Core Habitats are especially helpful to municipalities seeking to protect the rare species, natural communities, and overall biodiversity within their boundaries. Please use this report and map along with the rare species and community fact sheets to appreciate and understand the biological treasures in your city or town.

Protecting Larger Core Habitats

Core Habitats vary considerably in size. For example, the average BioMap Core Habitat is 800 acres, but Core Habitats can range from less than 10 acres to greater than 100,000 acres. These larger areas reflect the amount of land needed by some animal species for breeding, feeding, nesting, overwintering, and long-term survival. Protecting areas of this size can be

very challenging, and requires developing partnerships with neighboring towns.

Prioritizing the protection of certain areas within larger Core Habitats can be accomplished through further consultation with Natural Heritage Program biologists, and through additional field research to identify the most important areas of the Core Habitat.

Additional Information

If you have any questions about this report, or if you need help protecting land for biodiversity in your community, the Natural Heritage & Endangered Species Program staff looks forward to working with you.

Contact the Natural Heritage & Endangered Species Program:

by Phone 508-792-7270, Ext. 200

by Fax: 508-792-7821

by Email: natural.heritage@state.ma.us.

by Mail: North Drive
Westborough, MA 01581

The GIS datalayers of BioMap and Living Waters Core Habitats are available for download from MassGIS: www.mass.gov/mgis

Check out www.nhesp.org for information on:

- Rare species in your town
- Rare species fact sheets
- BioMap and Living Waters projects
- Natural Heritage publications, including:
 - * Field guides
 - * Natural Heritage Atlas, and more!



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BioMap: Species and Natural Communities

Middleborough

Core Habitat BM1176

Natural Communities

<u>Common Name</u>	<u>Scientific Name</u>	<u>Status</u>
Alluvial Atlantic White Cedar Swamp		Imperiled
Alluvial Red Maple Swamp		Vulnerable
Red Maple Swamp		Secure

Plants

<u>Common Name</u>	<u>Scientific Name</u>	<u>Status</u>
Long-Leaved Panic-Grass	<i>Panicum rigidulum ssp pubescens</i>	Threatened
Pale Green Orchis	<i>Platanthera flava var herbiola</i>	Threatened

Vertebrates

<u>Common Name</u>	<u>Scientific Name</u>	<u>Status</u>
American Bittern	<i>Botaurus lentiginosus</i>	Endangered
Blanding's Turtle	<i>Emydoidea blandingii</i>	Threatened
Common Moorhen	<i>Gallinula chloropus</i>	Special Concern
Eastern Box Turtle	<i>Terrapene carolina</i>	Special Concern
Eastern Spadefoot	<i>Scaphiopus holbrookii</i>	Threatened
Four-toed Salamander	<i>Hemidactylium scutatum</i>	Special Concern
Grasshopper Sparrow	<i>Ammodramus savannarum</i>	Threatened
King Rail	<i>Rallus elegans</i>	Threatened
Long-eared Owl	<i>Asio otus</i>	Special Concern
Northern Red-bellied Cooter	<i>Pseudemys rubriventris</i>	Endangered
Pied-Billed Grebe	<i>Podilymbus podiceps</i>	Endangered
Spotted Turtle	<i>Clemmys guttata</i>	Special Concern
Upland Sandpiper	<i>Bartramia longicauda</i>	Endangered
Wood Turtle	<i>Clemmys insculpta</i>	Special Concern



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BioMap: Core Habitat Summaries

Middleborough

Core Habitat BM1176

This large and diverse Core Habitat encompasses habitat for state-listed rare plants, amphibians, reptiles, marsh birds, and grassland birds. It includes over 10 miles of the Taunton River and substantial reaches of several of its tributaries. Also included are a variety of forested wetlands, including several large Alluvial Red Maple Swamps. Much of this key Core Habitat remains unprotected.

Natural Communities

This Core Habitat contains a variety of forested swamps. It includes several large Alluvial Red Maple Swamps with intact hydrology and minimal disturbances. Alluvial Red Maple Swamps are a type of Red Maple Swamp that occurs in low areas along rivers and streams. Regular flooding enriches the soil with nutrients, resulting in an unusual set of associated trees and plants. One of the swamps in this complex is influenced by seepage and described as the only known one of its kind in the state.

Plants

A population of the Threatened Pale Green Orchis is found along a vernal pool near the Taunton River.

Vertebrates

This Core Habitat encompasses significant riverine, wetland, and upland habitats for Red-bellied, Blanding's, Wood, Spotted, and Eastern Box Turtles. Significant habitat for Four-toed Salamanders is also present. Two important areas of freshwater marsh provide habitat for rare birds, including Pied-billed Grebes, American Bitterns, and King Rails. Significant breeding habitat for Upland Sandpipers and Grasshopper Sparrows is also present. Relatively large areas of habitat exist in this Core Habitat for birds of forested wetlands. Over 90% of this large and diverse area is unprotected, and management may be needed to mitigate the fragmentation effects of several paved roads that impair wetland and riparian connectivity. Further, grasslands in the area need annual mowing and, ideally, occasional burning.

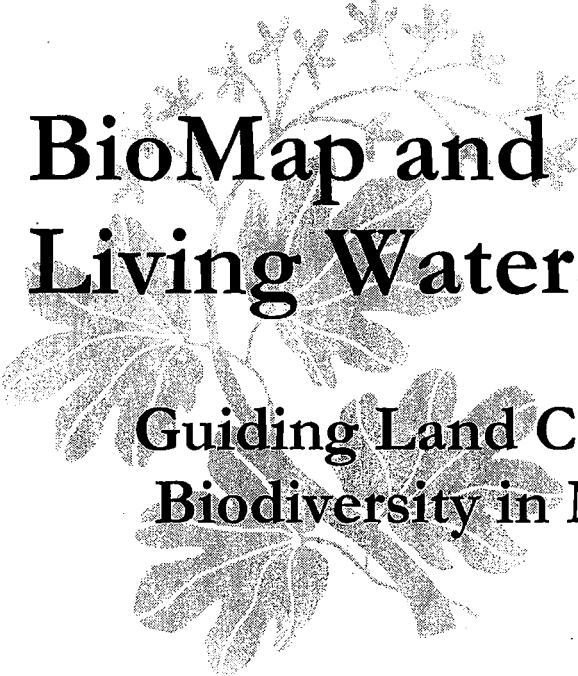


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APPENDIX D



BioMap and Living Waters

Guiding Land Conservation for Biodiversity in Massachusetts

Core Habitats of Mashpee

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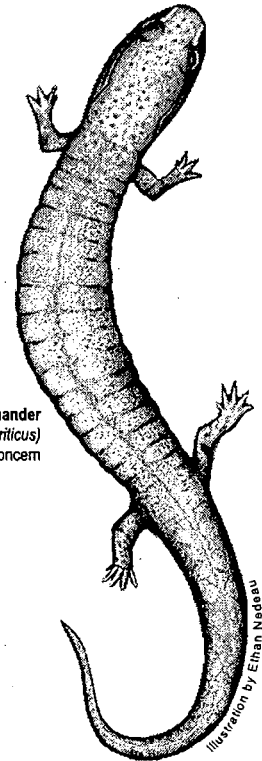
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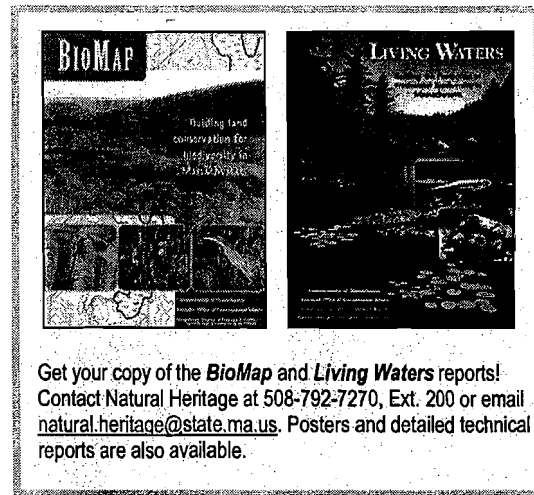
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Tel: (508) 792-7270, Ext. 200 Fax: (508) 792-7821
<http://www.nhesp.org>

For more information on rare species and natural communities, please see our fact sheets online at www.nhesp.org



BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

generated using a Geographic Information Systems (GIS) model, and its exact boundaries are less important than the general areas that it identifies. Supporting Natural Landscape represents potential land protection priorities once Core Habitat protection has been addressed.

In Living Waters, *Critical Supporting Watersheds* highlight the immediate portion of the watershed that sustains, or possibly degrades, each freshwater Core Habitat. These areas were also identified using a GIS model. Critical Supporting Watersheds represent developed and undeveloped lands, and can be quite large. Critical Supporting Watersheds can be helpful in land-use planning, and while they are not shown on these maps, they can be viewed in the Living Waters report or downloaded from www.mass.gov/mgis.

Understanding Core Habitat Species, Community, and Habitat Lists

What's in the List?

Included in this report is a list of the species, natural communities, and/or aquatic habitats for each Core Habitat in your city or town. The lists are organized by Core Habitat number.

For the larger Core Habitats that span more than one town, the species and community lists refer to the entire Core Habitat, not just the portion that falls within your city or town. For a list of all the state-listed rare species within your city or town's boundary, whether or not they are in Core Habitat, please see the town rare species lists available at www.nhosp.org.

The list of species and communities within a Core Habitat contains only the species and

Table 1. The number of rare species and types of natural communities explicitly included in the BioMap and Living Waters conservation plans, relative to the total number of native species statewide.

BioMap		
Biodiversity Group	Species and Verified Natural Community Types	
	Included in BioMap	Total Statewide
Vascular Plants	246	1,538
Birds	21	221 breeding species
Reptiles	11	25
Amphibians	6	21
Mammals	4	85
Moths and Butterflies	52	An estimated 2,500 to 3,000
Damselflies and Dragonflies	25	An estimated 165
Beetles	10	An estimated 2,500 to 4,000
Natural Communities	92	> 105 community types
Living Waters		
Biodiversity Group	Species	
	Included in Living Waters	Total Statewide
Aquatic Vascular Plants	23	114
Fishes	11	57
Mussels	7	12
Aquatic Invertebrates	23	An estimated > 2500

natural communities that were explicitly included in a given BioMap or Living Waters Core Habitat. Other rare species or examples of other natural communities may fall within the Core Habitat, but for various reasons are not included in the list. For instance, there are a few rare species that are omitted from the list or summary because of their particular sensitivity to the threat of collection. Likewise, the content of many very small Core Habitats are not described in this report or list, often because they contain a single location of a rare plant



**Natural Heritage
& Endangered Species
Program**

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species. Some Core Habitats were created for suites of common species, such as forest birds, which are particularly threatened by habitat fragmentation. In these cases, the individual common species are not listed.

What does 'Status' mean?

The Division of Fisheries and Wildlife determines a status category for each rare species listed under the Massachusetts Endangered Species Act, M.G.L. c.131A, and its implementing regulations, 321 CMR 10.00. Rare species are categorized as Endangered, Threatened, or of Special Concern according to the following:

- **Endangered** species are in danger of extinction throughout all or a significant portion of their range or are in danger of extirpation from Massachusetts.
- **Threatened** species are likely to become Endangered in Massachusetts in the foreseeable future throughout all or a significant portion of their range.
- **Special Concern** species have suffered a decline that could threaten the species if allowed to continue unchecked or occur in such small numbers or with such restricted distribution or specialized habitat requirements that they could easily become Threatened in Massachusetts.

In addition, the Natural Heritage & Endangered Species Program maintains an unofficial *watch list* of plants that are tracked due to potential conservation interest or concern, but are not regulated under the Massachusetts Endangered Species Act or other laws or regulations. Likewise, described natural communities are not regulated any laws or regulations, but they can help to identify ecologically important areas that are worthy of protection. The status of natural

Legal Protection of Biodiversity

BioMap and Living Waters present a powerful vision of what Massachusetts would look like with full protection of the land that supports most of our biodiversity. To create this vision, some populations of state-listed rare species were deemed more likely to survive over the long-term than others.

Regardless of their potential viability, all sites of state-listed species have full legal protection under the Massachusetts Endangered Species Act (M.G.L. c.131A) and its implementing regulations (321 CMR 10.00). Habitat of state-listed wildlife is also protected under the Wetlands Protection Act Regulations (310 CMR 10.37 and 10.59). The **Massachusetts Natural Heritage Atlas** shows **Priority Habitats**, which are used for regulation under the Massachusetts Endangered Species Act and Massachusetts Environmental Policy Act (M.G.L. c.30) and **Estimated Habitats**, which are used for regulation of rare wildlife habitat under the Wetlands Protection Act. For more information on rare species regulations, see the *Massachusetts Natural Heritage Atlas*, available from the Natural Heritage & Endangered Species Program in book and CD formats.

BioMap and Living Waters are conservation planning tools and do not, in any way, supplant the Estimated and Priority Habitat Maps which have regulatory significance. Unless and until the combined BioMap and Living Waters vision is fully realized, we must continue to protect all populations of our state-listed species and their habitats through environmental regulation.

communities reflects the documented number and acreages of each community type in the state:

- **Critically Imperiled** communities typically have 5 or fewer documented sites or have very few remaining acres in the state.
- **Imperiled** communities typically have 6-20 sites or few remaining acres in the state.
- **Vulnerable** communities typically have 21-100 sites or limited acreage across the state.
- **Secure** communities typically have over 100 sites or abundant acreage across the state; however excellent examples are identified as Core Habitat to ensure continued protection.



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BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

Understanding Core Habitat Summaries

Following the BioMap and Living Waters Core Habitat species and community lists, there is a descriptive summary of each Core Habitat that occurs in your city or town. This summary highlights some of the outstanding characteristics of each Core Habitat, and will help you learn more about your city or town's biodiversity. You can find out more information about many of these species and natural communities by looking at specific *fact sheets* at www.nhesp.org.

Next Steps

BioMap and Living Waters were created in part to help cities and towns prioritize their land protection efforts. While there are many reasons to conserve land – drinking water protection, recreation, agriculture, aesthetics, and others – BioMap and Living Waters Core Habitats are especially helpful to municipalities seeking to protect the rare species, natural communities, and overall biodiversity within their boundaries. Please use this report and map along with the rare species and community fact sheets to appreciate and understand the biological treasures in your city or town.

Protecting Larger Core Habitats

Core Habitats vary considerably in size. For example, the average BioMap Core Habitat is 800 acres, but Core Habitats can range from less than 10 acres to greater than 100,000 acres. These larger areas reflect the amount of land needed by some animal species for breeding, feeding, nesting, overwintering, and long-term survival. Protecting areas of this size can be

very challenging, and requires developing partnerships with neighboring towns.

Prioritizing the protection of certain areas within larger Core Habitats can be accomplished through further consultation with Natural Heritage Program biologists, and through additional field research to identify the most important areas of the Core Habitat.

Additional Information

If you have any questions about this report, or if you need help protecting land for biodiversity in your community, the Natural Heritage & Endangered Species Program staff looks forward to working with you.

Contact the Natural Heritage & Endangered Species Program:

by Phone 508-792-7270, Ext. 200

by Fax: 508-792-7821

by Email: natural.heritage@state.ma.us.

by Mail: North Drive
Westborough, MA 01581

The GIS datalayers of BioMap and Living Waters Core Habitats are available for download from MassGIS: www.mass.gov/mgis

Check out www.nhesp.org for information on:

- Rare species in your town
- Rare species fact sheets
- BioMap and Living Waters projects
- Natural Heritage publications, including:
 - * Field guides
 - * Natural Heritage Atlas, and more!



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BioMap: Species and Natural Communities

Mashpee

Core Habitat BM1391

Vertebrates

Common Name	Scientific Name	Status
Bird Migration Habitat		-----
Northern Parula	<i>Parula americana</i>	Threatened

Core Habitat BM1391

This Core Habitat encompasses riparian and adjacent upland forests along the Mashpee River that provide breeding habitat for the Northern Parula, a species of warbler that rarely breeds in Massachusetts and is believed to be declining here. This stretch of riparian forest, located only 1.5 miles north of Popponeset Bay on Nantucket Sound, also provides valuable migration habitat near the coast for many species of landbirds.



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Living Waters: Core Habitat Mashpee

Core Habitat LW081

Fishes

Common Name

American Brook Lamprey

Scientific Name

Lampetra appendix

Status

Threatened

Core Habitat LW081

This Core Habitat supports a population of the Threatened American Brook Lamprey. There are only 12 known populations within the state; this population is the only known population on Cape Cod. This primitive, eel-like fish species has a skeleton made of cartilage. It is generally an indicator of clean, silt-free water, as it needs clean gravel in riffle habitats to spawn (breed). Completing the network of permanently protected riparian lands adjacent to the Core Habitat and controlling sediment runoff from nearby development will help maintain the quality of this habitat. This Core Habitat is also known for its populations of sea-running Brook Trout, of which there are few remaining populations in the state.



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For more information on rare species and natural communities, please see our fact sheets online at www.nhesp.org 6



Natural Heritage & Endangered Species Program
 Massachusetts Division of Fisheries & Wildlife
 Route 135, Westborough, MA 01581
 tel: (508) 792-7370, ext. 200; fax: (508) 792-7824
 www.mass.gov/dfw/eh/ehsp

Data Sources:
 Living Waters Core Habitats and Riparian Areas: created by NHEERP in 2001.
 Biology Core Habitats and OES: created by NHEERP in 2001.
 Protected Open Space: 2002 protected areas from Massachusetts Department of Environmental Protection, 2003.
 Wetlands: 2002 Wetlands from Massachusetts Department of Environmental Protection, 2003.
 Town Boundaries: 1999 data from Massachusetts Department of Transportation, 2003.
 Roads: 1999 data from Massachusetts Department of Transportation, 2003.
 Elevation Contours: 1:25,000 topographic data obtained from MassGIS, updated October, 2003.
 Riparian Areas: 1:25,000 topographic data obtained from MassGIS, updated October, 2003.
 Developed Lands: 1:25,000 topographic data obtained from MassGIS, updated October, 2003.
 Roads: State Highway Department 1:100,000 road data obtained from MassGIS, updated in October, 2003.

Printed in 2004

MASHPEE BioMap and Living Waters: Guiding Land Conservation for Biodiversity in Massachusetts

- BioMap Core Habitats**
 - Habitat for rare species
 - Exemplary natural communities
- Living Waters Core Habitats**
 - Habitat for rare freshwater species
 - Exemplary freshwater habitats
- Riparian Areas for Living Waters Core Habitats**
 - 330 foot (100 meter) buffer from water's edge
 - Areas critical to the integrity of the freshwater habitats
- Undeveloped Riparian Areas**
- Developed Riparian Areas**

- Protected Open Space**
 - This Protected Open Space includes federal, state and local conservation lands and holdings of non-profit conservation organizations, which are considered to have relatively long-term legal protection and management for biodiversity. Due to a lack of comprehensive data, the areas protected by Conservation Restrictions are not shown.
- Developed Lands**
 - Includes residential, commercial and industrial lands, as well as croplands.

- Wetlands**
- Water**
- Town Boundary**
- Elevation Contours (30 ft)**
- Roads**
 - Toll Highway
 - Multi-lane Highway
 - Single-lane Highway
 - Major Road
 - Railroad

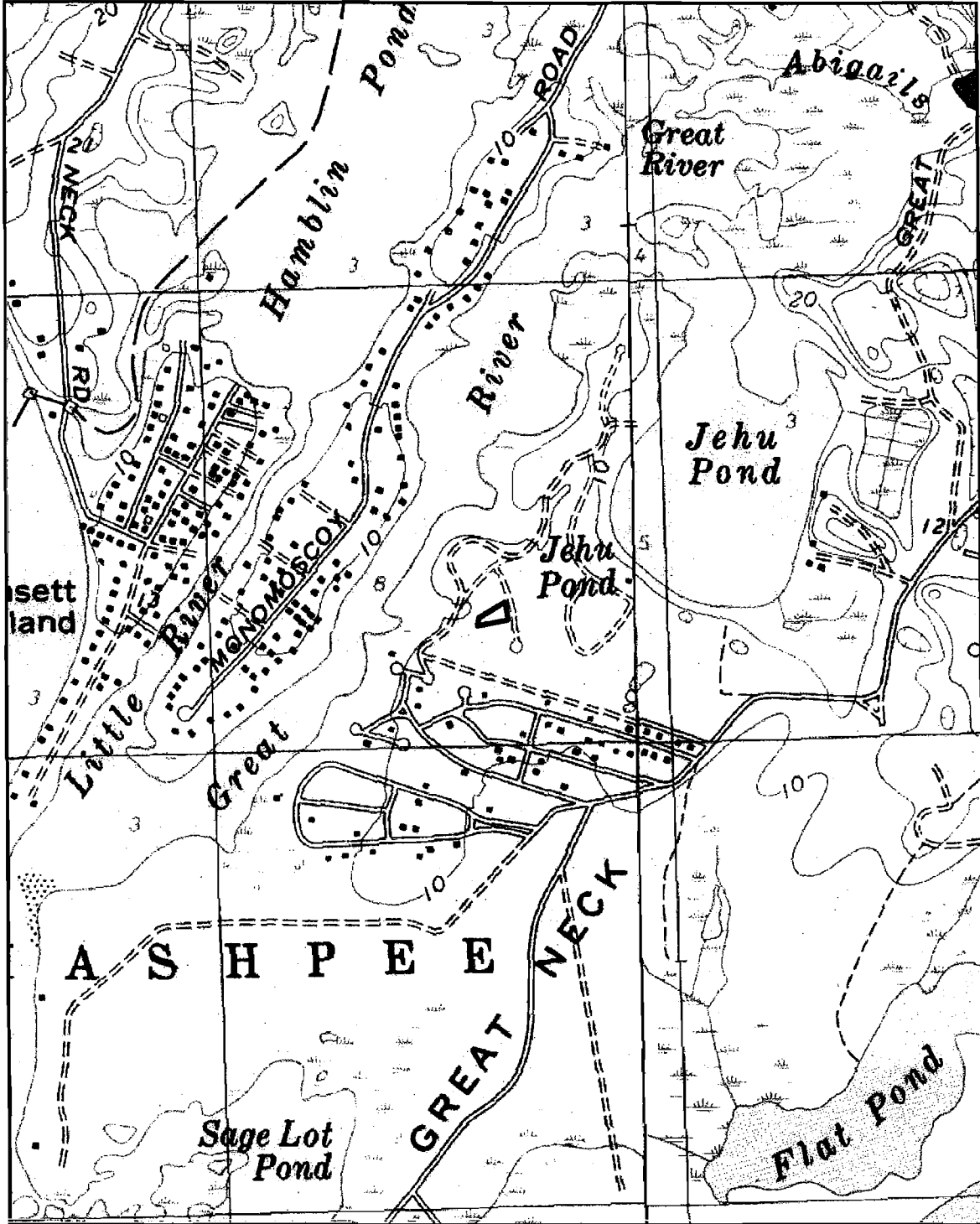


Commonwealth of Massachusetts, MA Recovery Committee
 Executive Office of Environmental Affairs, 25th Story, Hartwell Building, Boston

APPENDIX E



DCR 0.36 acre Conservation Restriction and Easement in Mashpee, MA



Parcel Lines from Mashpee Assessor



APPENDIX F

CONSERVATION RESTRICTION AND EASEMENT

KNOW ALL PERSONS BY THESE PRESENTS that the Trust for Public Land with an address of 33 Union Street, Boston, MA 02109 (hereinafter "Grantor"), which term includes the Grantor's successors and assigns, in consideration paid of One Hundred Fifty Thousand Dollars (\$150,000.00), the receipt and sufficiency of which is hereby acknowledged, hereby grants with QUITCLAIM COVENANTS, in perpetuity and for the purposes set forth in Article 97 of the Amendments to the Massachusetts Constitution, a Conservation Restriction (hereinafter "CR") in accordance with Chapter 184, Sections 31-33 and Chapter 132A, Section 3 of the General Laws, to the Commonwealth of Massachusetts, acting by and through its Department of Environmental Management (DEM), with a usual place of business at 251 Causeway Street, Boston, Massachusetts, its successors and assigns, (hereinafter "Grantee"), upon land in the Town of Mashpee, Barnstable County, Massachusetts (hereinafter "Premises"), and further described in Exhibit A attached hereto and incorporated herein by reference.

I. PURPOSE: The purpose of this CR is to retain the Premises predominantly in its natural, scenic and open condition; to protect and promote the conservation of biological diversity, forests, wetlands, soils, natural watercourses, and wildlife thereon, and to protect and preserve sensitive archeological and cultural resources and to allow public access for passive recreational use and enjoyment of the open space resources of the Premises as specifically provided for herein.

II. PROHIBITED ACTIVITIES: In order to carry out the purposes set forth in Article I above, the Grantor shall refrain from and will not permit any activity which shall be inconsistent with the aforestated purposes of this CR or which is detrimental to water quality, soil conservation, wildlife conservation and/or archeological and cultural resources or which is otherwise wasteful of the natural resources of the Premises and the Grantor covenants for itself and its legal representatives, mortgagees, successors and assigns that the Premises will at all times be held, used and conveyed subject to and not in violation of the following prohibitions:

M&M

80 35464-B

A. Construction or placing of any building, residential dwelling, tennis court, ball field, swimming pool, dock, artificial water impoundment, billboard, sign or other advertising display, parking area, roadway, asphalt or concrete pavement, antenna, utility pole, tower, conduit or line, or any other temporary or permanent structure or facility on or above the Premises.

B. Dumping, placing or storing of equipment, mobile home, trailer, automotive vehicle or parts, soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, radioactive waste, hazardous waste, or the installation of aboveground or underground storage tanks on or in the Premises.

C. Removal, destruction or cutting of trees, shrubs, or other vegetation on the Premises; except in connection with a site restoration and landscape plan approved by the Grantee, in consultation with the Massachusetts Historical Commission.

D. Excavation, dredging, mining or removal of any loam peat, gravel, soil, sand, rock or other mineral substance, or natural deposit from the Premises, or alteration of any natural contours or features whatsoever; except in connection with a site restoration and landscape plan approved by the Grantee, in consultation with the Massachusetts Historical Commission.

E. Use of motorized or power-driven vehicles of any kind, including without limitation, all-terrain vehicles; except as allowed by the regulations of the Division of Forests & Parks of the Grantee.

~~any other uses inconsistent with the purposes of this CR, including but not limited to~~
commercial camping, commercial boating and commercial fishing, hunting or trapping.

G. The storage, mixing, preparation for use, or application or use of pesticides, herbicides, insecticides, fungicides, or other chemicals or materials; except in connection with a site restoration and landscape plan approved by the Grantee, in consultation with the Massachusetts Historical Commission.

H. Grantor shall not plant or broadcast on the Premises any genetically modified or replicated organisms, or any exotic species, defined as species which are not native to the Northeastern Region of the United States without the prior written approval of the Grantee in accordance with Article IV hereof.

I. Use of the premises or any portion thereof to satisfy zoning requirements, or to calculate permissible building density, for purposes of subdivision or development of adjacent unrestricted land, whether or not such land is owned by the Grantor, its successors or assigns; subdivision of the Premises under Chapter 41, section 81K et seq. of the General Laws. It is the intent of this paragraph that the Premises shall be conveyed as a unit, whether or not said Premises are comprised, as of the date of this CR, of more than one separate legal parcel.

J. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or other acts or uses detrimental to retention of land and water resources.

K. ~~The installation and maintenance of groundwater extraction wells and associated equipment and pipelines and similar equipment for use in extracting groundwater, collecting surface water, and transporting said water for sale or use off the Premises.~~

L. Other uses of the Premises or activities which would significantly impair the conservation interests protected by this CR or which are prohibited by federal, state or local law or regulation, or which are inconsistent with the intent that the Premises remain predominantly in its natural condition.

III. PERMITTED ACTIVITIES: Notwithstanding the provisions of Article II hereof and subject to an in accordance with applicable laws, regulations and ordinances, Grantor reserves to itself and to its heirs, devisees, legal representatives, successors and assigns the following rights, uses and activities on the Premises:

A. The maintenance and use of existing trails, fences, benches, bridges, culverts, gates and stone walls on the Premises, substantially in their present condition, and the construction, relocation or installation of new such

improvements reasonably necessary in conducting permitted activities on the Premises, so long as such activities, improvements and uses are conducted in a reasonable manner in order to minimize the impact on the water quality, soil conservation, wildlife conservation and cultural resources protected by this CR and shall not disturb the archeological resources protected by this CR. Any trails constructed on the Premises shall not exceed ten (10) feet in width, and shall be located, designed, and constructed in a reasonable manner which minimizes the negative impact on the resources protected this CR. Construction of any such new trails, fences, benches, bridges, culverts, gates or stone walls, shall be subject to the approval of Grantee as provided in Article IV, below. The installation and maintenance of such improvements; including, but not limited to benches, shall be constructed primarily of natural materials and placed on the surface of the property without any excavation or permanent affixation. The Grantor's activities pursuant to this Section shall not impair or prohibit access by the public, except for any temporary periods necessary for public safety reasons.

B. The erection of sign of a reasonable and appropriate size, regarding ownership and use of the Premises, in a location which shall not disturb the archeological resources below the surface of the Premises, the design and location to be approved by the Grantee, in conjunction with Massachusetts Historical Commission and Massachusetts Commission on Indian Affairs, or their successors, in accordance with Article IV below.

C. The planting, loaming, seeding, cutting, mowing, pruning and removal of trees, shrubs, grasses and other vegetation for normal improvement and maintenance of the Premises, and/or to prevent threat of injury or damage to persons or property, to remove hazards, diseased trees, or insect damage, to control invasive and exotic species; provided that such maintenance shall be performed in accordance with the site restoration and maintenance plan approved by Grantee as provided in Article IV below.

D. The non-commercial use of the Premises by Grantor and the public for passive recreational and educational activities such as hiking, bird watching, interpretive study, and other like recreational and educational activities, provided that such activities are carried out in a reasonable manner which does not impair the

conservation, recreational, archeological and cultural values (including recreational value and access to the general public) protected by this CR.

E. Conducting initial site stabilization and restoration, including the use of motorized vehicles in connection therewith, in accordance with the site restoration and landscape plan approved by Grantee in accordance with Article IV below.

F. Access to the property as necessary by Grantor, Grantee, police, firemen or other emergency personnel, in responding to emergencies, or other governmental agents when engaged in their legitimate duties.

The exercise of any right retained by the Grantor under this Section III shall be in compliance with the then-current Zoning Bylaw applicable to the Premises, the Wetlands Protection Act (General Laws Chapter 131, Section 40), and all other applicable federal, state, and local environmental protection and other laws and regulations. The inclusion of any reserved right in this Section III requiring a permit from a public agency does not imply that the Commonwealth takes any position on whether such permit should be issued.

Any right or use not reserved herein is prohibited without the express written approval of the Commonwealth stating that such right or use is not inconsistent with the conservation purposes of this Conservation Restriction. Any request by Grantor for approval of such a right or use shall contain a detailed description of such right or use and explanation of why such right or use is not inconsistent with the overall conservation purposes of this Conservation Restriction. In the event the Commonwealth disapproves of such right or use, the Commonwealth shall provide a detailed explanation of why such right or use is inconsistent with the overall conservation purposes of this Conservation Restriction.

IV. NOTICE AND APPROVAL PROCEDURE: Unless otherwise provided herein or by law, Grantor and Grantee shall notify each other in writing, sent certified mail, return receipt requested sixty (60) days before allowing or undertaking any uses or activities on the Premises which require the approval of the other party under the terms of this CR. Grantor and Grantee shall also in the same manner notify

the other party before allowing or undertaking any uses or activities which may significantly impair the conservation interests found within the Premises or which may be contrary to the purposes of this CR. Notices shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit the party receiving such notice to make an informed judgment as to its consistency with the purposes of the CR, and party sending the notice shall submit to the party receiving the notice such plans and other information as the party receiving the notice shall otherwise reasonably require. All communications in this regard should be mailed to:

GRANTEE: Commissioner
 Department of Environmental Management
 251 Causeway Street
 Boston, MA 02114

GRANTOR: Regional Director
 The Trust for Public Land
 33 Union Street
 Boston, MA 02109

With respect to those activities or uses which require approval, Grantor or Grantee, as the case may be, shall grant or withhold its approval in writing within sixty (60) days of receipt of written request therefor. Such approval may be withheld only upon a reasonable determination by Grantor or Grantee, as the case may be, that the action as proposed would be inconsistent with the purposes or provisions of this CR, would materially impair the conservation interests to be protected by this CR, or would be violative of any statute, ordinance, bylaw, rule or regulation. Failure of a party to respond within ninety (90) days of receipt of written request from the other party shall be deemed to constitute approval of the matters described in the notice, so long as the notice references the provisions of this Article relating to deemed approval after the passage of time.

V. ACCESS FOR MONITORING AND COMPLIANCE; LEGAL REMEDIES OF GRANTEE: The Grantee, its successors and assigns, shall have the right to enter upon the Premises in a reasonable manner and at reasonable times for the purpose of inspecting the Premises to determine compliance with the

terms of this CR. In the event of any violation, Grantee must notify Grantor thereof request Grantor to remedy such violation, and provide Grantor with a reasonable period of time to remedy any such violations. If the violation is not remedied within a reasonable time, Grantee may enter upon the Premises, with or without Order of Court, to remedy or abate such violation, and may enforce this CR by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation relief requiring restoration of the Premises to its condition prior to the time of the injury complained of (it being agreed that Grantee may have no adequate remedy at law), and this remedy shall be in addition to and not in limitation of any other rights and remedies available to Grantee at law or in equity.

This CR shall be enforced by Grantee in its sole discretion. Nothing herein shall impose upon the Grantee any affirmative obligation or liability relating to the condition of the Premises. Failure by the Grantee to enforce any provision or condition set forth herein, or to exercise any rights hereby conveyed, shall not constitute a release or waiver of any such right or condition.

~~VI. ACCESS FOR GRANTEE AND GENERAL PUBLIC:~~ The CR hereby conveyed includes the grant of the right to the Grantee, its successors and assigns, to enter upon and use, and to permit the public to enter upon and use, the Premises for recreational and educational purposes such as hiking, bird watching, interpretive study, and other like recreational and educational activities, subject however, to conditions specified in this CR, and provided that such activities shall be in accordance with the rules and regulations of the Grantee and the restrictions imposed herein to preserve and promote wildlife habitat, archeological, cultural and natural resource values of the Premises.

The CR also includes the grant and the right, but not the obligation, to erect a sign of a reasonable and appropriate size, in conjunction with the Grantor, Massachusetts Historical Commission and Massachusetts Commission on Indian Affairs, or their successors, relating to the use and ownership interests of the Premises.

The right of access and use provided for herein shall not interfere with implementation by Grantor of the permitted activities described in Article III hereof.

VII. COSTS AND TAXES; LIABILITY: Grantor agrees to pay and discharge when and if due any and all real property taxes and other assessments levied by competent authority on the Premises.

VIII. BINDING EFFECT; RELEASE; RECORDATION: The burden of this CR shall run with the Premises in perpetuity, and shall be enforceable against the Grantor and the Grantor's successors and assigns holding any interest in the Premises. This CR may only be released, in whole or in part, by the Grantee pursuant to and in accordance with Article 97 of the Amendments to the Massachusetts Constitution.

The Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this CR. The Grantor, for itself and its successors and assigns, appoints the Grantee its attorney-in-fact, coupled with an interest, to execute, acknowledge and deliver any such instruments on its behalf. Without limiting the foregoing, the Grantor, its successor and assigns, agrees to execute any such instrument upon request.

IX. ASSIGNMENT: The benefits of this CR shall be in gross and shall not be assignable by the Grantee, its successors and assigns, unless the assignee is a "qualified organization" as defined in Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, including, without limitation, a government entity, provided that, as a condition of such assignment, the assignee is required to hold this CR and enforce its terms for conservation purposes. The Grantee shall notify the Grantor in writing at least thirty (30) days before it assigns this CR.

X. SUBSEQUENT TRANSFERS: The Grantor agrees to incorporate the terms of this CR, in full or by reference, in any deed or other legal instrument by which Grantor conveys or transfers any interest in all or a portion of the Premises, including without limitation, a leasehold interest. The Grantor shall notify the Grantee in writing at least thirty (30) days before conveying or transferring the Premises, or any part thereof or interest therein (including a lease).

XI. EXTINGUISHMENT; EMINENT DOMAIN: The Grantor and Grantee agree that the grant of this CR gives rise to a

property right that vests immediately in the Grantee and which has a fair market value that is equal to the value by which the CR reduces, at the time of the grant, the value of the property as a whole. Such proportionate value of the Grantee's property right at the time of the grant shall remain constant.

Should this CR be extinguished over all or any portion of the Premises by judicial decree or by act of public authority, the Grantee shall be entitled to a portion of the proceeds equal to the proportionate value of the CR, subject, however, to any applicable law which expressly provides for a different disposition of proceeds. If the conservation interests protected hereby are unaffected by the taking, and the only interest taken by public authority is the Grantor's interest, and recovered proceeds are awarded on the basis of the value of the Premises as restricted by this CR, then the proceeds from such taking shall be payable in their entirety to Grantor.

Whenever all or any part of the Premises or any interest therein is taken by a public authority (other than The Commonwealth) under power of eminent domain, or if all or any part of this CR is extinguished by act of public authority (other than The Commonwealth), then the Grantor and Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. If the public authority is The Commonwealth, the Grantor and Grantee shall pursue their remedies separately.

XII. AMENDMENT: If circumstances arise under which amendment to or modification of this CR would be appropriate, Grantor and Grantee may by mutual written agreement jointly amend this CR; provided that no amendment may be made that will be inconsistent with the purposes of this CR, affect its perpetual duration, nor adversely affect any of the significant conservation values of the Premises. Any such amendment shall be recorded with the Barnstable Registry of Deeds in Barnstable, Massachusetts.

XIII. SEVERABILITY: If any section or provision of this CR shall be held to be unenforceable by any court of competent jurisdiction, the CR shall be construed as though such section had not been included in it. If any section or provision of the CR shall be susceptible of two constructions, one of which would render such section or provision invalid, then such section or provision shall be

given the construction that would render it valid. If any section or provision of this instrument is ambiguous, it shall be interpreted in accordance with the policies and provisions expressed in Chapter 184, Sections 31 - 33 and Chapter 132A of the General Laws.

XIV. MISCELLANEOUS:

- A. This instrument does not, and shall not be interpreted to, transfer a fee interest in the Premises.
- B. This CR is conveyed subject to matters of record at the Barnstable Registry of Deeds.
- C. Grantor and Grantee hereby expressly acknowledge that no building or structure exists on the Premises as of the date of execution of this CR.

IN WITNESS WHEREOF, the said Francis W. Hatch III, duly authorized, has caused these presents to be signed, acknowledged and delivered on on behalf of the Trust for Public Land, this 23rd day of May, 2002.

THE TRUST FOR PUBLIC LAND

By:

Francis W. Hatch III
Regional Director and Vice President
COMMONWEALTH OF MASSACHUSETTS

Suffolk

, SS

May 23, 2002

Then personally appeared the above Francis W. Hatch III, duly authorized, and acknowledged the foregoing instrument to be the free act and deed of the Trust for Public Land, before me.

Brenda M. Ferris
Notary Public
Commission Expires: *July 26, 2007*

EXHIBIT A

The land situated in Mashpee in the county of Barnstable and Commonwealth of Massachusetts bounded and described as follows:

Northeasterly by Mizzenmast, one hundred eighteen (118) feet;

Southeasterly by Lot 81, one hundred ninety-two and 76/100 (192.76) feet;

Westerly by a portion of Lot 171, fifty-seven (57) feet; and

Northwesterly by Lot 79, one hundred eighty-eight and 65/100 (188.65) feet.

All of said boundaries are determined by the court to be located as shown on subdivision plan 35464-B (Sheet 7) dated January 23, 1974, drawn by Hayes Engineering, Inc., George B. Hayes, Surveyor, and filed in the Land Registration Office at Boston, a copy of which is filed in the Barnstable County Registry of Deeds in Land Registration Book 415, Page 64 with Certificate of Title No. 51944 and said land is shown thereon as LOT 80.

Together with the benefit of and subject to matters set forth in a Declaration dated August 26, 1974 being Document No. 189760, as amended by Document No. 196542.

For our title, see deed of Stephen Berish and Daniel B. Abrams, Trustees, M & M Nominee Trust udt dated August 26, 1998, Document No. 743317, to The Trust for Public Land, filed herewith as Document No. 873206, with Certificate of Title No. ~~152531~~ 165380

ADDRESS OF PREMISES: 17 Mizzenmast, Little Neck Bay, New Seabury, MA.

BARNSTABLE REGISTRY OF DEEDS

BARNSTABLE COUNTY
REGISTRY OF DEEDS
A TRUE COPY, ATTEST

John F. Meade

JOHN F. MEADE, REGISTER