

TOWN OF ORLEANS

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Telephone (508) 240-3700 — Fax (508) 240-3703
<http://www.town.orleans.ma.us>

BOARD OF
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TOWN
ADMINISTRATOR

May 17, 2007

Thomas W. French, Ph.D.
Assistant Director, Division of Fisheries & Wildlife
Field Headquarters, 1 Rabbit Hill Road
Westborough, MA 01581

RE: Nauset Beach

Dear Mr. French,

Thank you for your letter dated May 1, 2007 with respect to the above referenced matter. Please be advised that Orleans is keenly aware of the species of threatened and special concern that populate, in season, Nauset Beach. Orleans has a long history of managing its beaches in accordance with the Guidelines for Managing Recreational Use of Beaches, To Protecting Piping Plovers, Terns and Their Habitats in Massachusetts (1993) issued by Massachusetts Division of Fisheries and Wildlife..

By way of background, in 1990 The Town proceeded with filings before the Conservation Commission and DEP which resulted in the issuance of an Order of Conditions for the management by the Town for the north portion of Nauset Beach the so called Nauset Spit (see SE 54-723). The Order came about as a result of third parties filing a request with DEP that the Town make such a filing and obtain an Order in order to conduct its management program for Nauset Spit including off-road vehicle use that the Town had been historically conducting on the entirety of Nauset Beach.

No request by a third party, the DEP or any other regulatory agency, to my knowledge, has ever requested that the Town obtain an Order of Conditions in order to conduct its recreational program on the southerly portion of Nauset Beach that extends from the Nauset Beach parking lot to the town of Chatham (this area includes the Pochet area referenced in your letter). Notwithstanding this request the Town has voluntarily applied the Order of Conditions obtained for the Nauset Spit portion of the beach to its recreational program on the south end of the beach including application of the Guidelines for management of the ORV use so as provide protection for the species of threatened and special concern. Applying that Order of Conditions to the south beach has resulted in annual closures to the beach to off-road vehicles in accordance with the Guidelines. Further the Town has annually undertaken a comprehensive management plan on the South Beach to protect these species of threatened and special concern by carrying out the Piping Plover and Least Tern Management Plan required by the Order of Conditions.

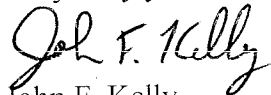
The Order of Conditions also provides for an annual review by the Conservation Commission in order to approve annual maintenance work on the beach necessitated by the changing dynamics of the beach from the previous year. During the course of the review for this year the Pochet area was identified as an area in which the existing ORV road needed some maintenance work because of wash overs. Annually the Town, after approval by the Conservation Commission, performs maintenance including adding sand, on its ORV roadway trails on both the Spit and the South Beach in accordance with this provision of the Order of Conditions. After conducting a review with the Conservation Commission for this year, the Conservation Commission on February 13, 2007 voted to approve road maintenance in the Pochet area together with fencing in order to maintain the existing ORV trail in this area. Pursuant to that approval the work to which you now refer in your May 1, 2007 letter was undertaken along with other maintenance work in other areas of the Spit and the South Beach.

Mr. Scott Melvin of your office has been aware of the Town's management of the south portion (including Pochet) of Nauset Beach in accordance with the Order issued for Nauset Spit for the past 15 years. As a result it came as a surprise that your department would now be raising this annual maintenance work as not being in compliance with the MESA regulations and State Wetlands Protection Act. Given the Town's long history of strictly applying the management guidelines contained in the Order of Conditions, the Town continues to believe that it is in full compliance with all regulations for its historical use of the land. No maintenance was performed outside an existing historical ORV trail which provides access to over 30 beach camp dwellings. It remains a question to the Town, that even though Mr. Melvin has been aware of other work which has been carried out including the erection of snow fencing, placement of Christmas trees and other debris, and other forms of beach nourishment conducted in many areas in the Town of Chatham on the same barrier beach that, to the best of the Town's knowledge no notice such as the one received by Orleans on May 1, 2007, has ever been issued to Chatham or any of the property owners in Chatham.

Notwithstanding the above, be advised that the Town, in accordance with the directive contained in your May 1, 2007 letter, will undertake no further work in the Pochet area until this issue has been resolved.

I look forward to discussing this matter directly with you at your convenience.

Very truly yours,



John F. Kelly
Town Administrator

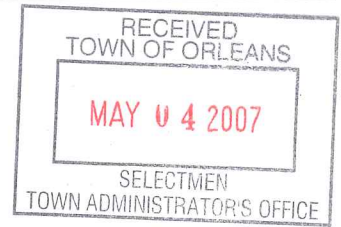
Cc: Mass DEP Southeast Regional Office
Susi von Oettingen, U.S. Fish and Wildlife Service
Orleans Board of Selectmen and Park Commissioners
Orleans Park Superintendent Paul Fulcher
Orleans Town Counsel Michael D. Ford



MassWildlife

Commonwealth of Massachusetts

Division of Fisheries & Wildlife



Wayne F. MacCallum, Director

May 1, 2007

Mr. John F. Kelly
Town Administrator
Town of Orleans
19 School St.
Orleans, MA 02653

T.A.	A.T.A.	O.M.	T.A.S.		
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Re: Work in Pochet Overwash, Nauset Beach
NHESP Tracking No. 07-22163

Dear Mr. Kelly:

It has come to our attention that a sand berm was built recently across the large overwash area in the Pochet section of Nauset Beach, Orleans, where Piping Plovers and Least Terns nested in 2006. This overwash area, which extends from the ocean-side beach westward to the shore of Little Pleasant Bay, provides nesting, feeding, and chick-rearing habitat for Piping Plovers and Least Terns, species that are listed as *Threatened* and *Special Concern*, respectively, pursuant to the Massachusetts Endangered Species Act (MGL c. 131A) and its implementing regulations (321 CMR 10.00) (MESA).

This work has occurred within designated *Priority Habitat of Rare Species*, and therefore requires review through a direct filing with the NHESP for compliance with the MESA (321 CMR 10.18). The MESA is administered by the NHESP of the Massachusetts Division of Fisheries and Wildlife, and prohibits the "take" of state-protected rare species, which includes actions that "...harass, harm, kill... disrupt the nesting, breeding, feeding, or migratory activity... Disruption of nesting, breeding, feeding, or migratory activity may result from, but is not limited to, the modification, degradation, or destruction of Habitat " of state-listed species (321 CMR 10.02). For a MESA filing checklist and additional information about the MESA review process, please visit our website: www.nhesp.org ("Regulatory Review" tab).

No additional work, including building of dunes or berms, beach nourishment, disturbance of soil or vegetation, grading, or installation of sand fencing, shall be conducted anywhere on this site prior to filing pursuant to MESA, or while the NHESP review of the required filing is ongoing.

It also appears that this activity should have been reviewed pursuant to the rare species provisions of the Wetlands Protection Act regulations that apply to rare species habitat (310

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Division of Fisheries and Wildlife

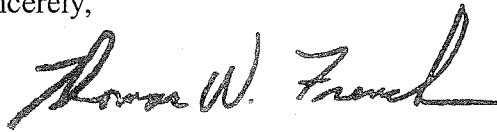
Field Headquarters, One Rabbit Hill Road, Westborough, MA 01581 (508) 389-6300 Fax (508) 389-7891

An Agency of the Department of Fisheries, Wildlife & Environmental Law Enforcement

CMR 10.37), given that this work was done within actual Resource Area Habitat of state-protected rare wildlife species. Please clarify for us whether an Order of Conditions was issued for this work, and if so, please provide this office with a copy of said Order.

If you have any questions regarding this review, please contact Scott Melvin, Ph.D at (508) 389-6345.

Sincerely,

A handwritten signature in cursive script that reads "Thomas W. French". The signature is written in dark ink and is positioned below the word "Sincerely,".

Thomas W. French, Ph. D.
Assistant Director

cc: Mass. DEP, Southeast Regional Office
Susi von Oettingen, U.S. Fish and Wildlife Service