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June 8, 2021

*Via E-Mail: schilcott@townofpembroke.mass.org  
and First Class Mail*

Frederick Casavant IV, Chairman  
c/o Sabrina Chilcott  
Pembroke Zoning Board of Appeals  
100 Center Street  
Pembroke, MA 02359

**Re: River Marsh – Comprehensive Permit Application  
Water Street, Pembroke, MA  
North River Corridor**

Dear Ms. Chilcott, Chair Casavant, and Members of the Board:

Reference is made to the letter from Scott W. Horsley that we received May 18, 2021, and the letter Dennis A. Murphy, Esq. that we received June 7, 2021, with respect to delineation of the North River Corridor.

The North River Corridor is properly delineated on the project plans in accordance with the language of the Scenic and Recreational River Protective Order for the North River (the "Protective Order"). The 300-foot North River Corridor, over which the North River Commission has jurisdiction under the Protective Order was established in 1978 according to the North River Corridor map and Protective Order recorded in the Plymouth County registry in 1979. Although wetland flagging and on-the-ground conditions apply to setbacks and analysis inside the Corridor, they do not extend the 300 feet beyond what was set in 1978. Furthermore, River Marsh did flag the freshwater marsh on which the definition of natural bank is defined, and River Marsh included an even larger corridor of protection than required by the North River Corridor map. The argument made by Mr. Horsley and Attorney Murphy conflicts with the language of the Protective Order. The bordering

vegetative wetland on the site must be protected under the Wetland Protection Act and associated regulations, but it does not extend the North River Corridor beyond what is delineated on the River Marsh project plans. The River Marsh project plans comply with state law under the Protective Order and the Wetland Protection Act.

The Protective Order requires determination of the natural bank for work inside the 300-foot corridor, but it does not require flagging to determine the extent of the Corridor. The Protective Order specifically defines the Corridor as “the river, marsh and land up to 300 horizontal feet from the natural bank of the river as delineated on the plan entitled “Commonwealth of Massachusetts, Department of Environmental Management, Scenic and Recreational River Corridor, North River” (emphasis added). See Section 1 and subsection (F). The Corridor was delineated in 1978, and there is no expiration period for that delineation. The Corridor is set by the plans entitled, “Scenic River Corridor, North River” and recorded in the Plymouth County Registry of Deeds at Book 20, Page 869 (the “North River Corridor map”). A hearing was held on the delineation, and the areas were approved March 22, 1979. The Protective Order was akin to a taking, and the list of assessed owners of land so affected were recorded with the Protective Order in the Plymouth Registry at Book 4639, Page 278. The Corridor over which the North River Commission has jurisdiction is a definite and certain line set forth in the Protective Order and shown on the recorded plans. The definition of “natural bank” is used to determine setbacks within the 300 feet Corridor, but the definition of “natural bank” does not extend the land over which the North River Commission has jurisdiction. The jurisdiction of the North River Commission stops at the 300 feet delineated on the North River Corridor map and affecting the 300 feet or less of property owned by owners identified in the Protective Order recorded on April 11, 1979.

Although River Marsh could have delineated the 300-foot North River Corridor based only on the 1978 North River Corridor map, River Marsh took great care to ensure they were also furthering the purposes of the Protective Order by delineating the natural bank of the North River through flagging the freshwater marsh on the ground. Based on that flagging, River Marsh moved the project even farther away from the North River than the 300 feet established in 1978 that was set in the Protective Order. The natural bank was delineated by Environmental Consulting & Restoration, LLC on December 20, 2017. This notation has been on plans, but the most recent plan set, last revised June 7, 2021, was submitted yesterday (the “Project Plans”). As noted on the enclosed memorandum from Brad Holmes, Manager of Environmental Consulting & Restoration, LLC, dated December 30, 2017, the delineation shown on the Project Plans is more conservative than the line shown on the 1978 North River Corridor map, and thus the project is further away from the river than would have been required by the Protective Order.

Although it does not apply to River Marsh because the entire project is outside of the 300-foot Corridor, the definition of “natural bank” is discussed in the enclosed memorandum from Brad Holmes. The definition set forth by Mr. Horsley and Attorney Hill does not apply. The Protective Order does define natural bank according to the marsh, and Mr. Holmes placed the delineation used on the Project Plans based on the marsh. The marsh is not equivalent to the bordering vegetated wetland. Furthermore, the Wetland Protection Regulations, 310 C.M.R. 10.00 et seq., govern riverfront areas but expressly exclude the North River Corridor. Specifically, Section 10.58(6) lists the areas exempted from Riverfront Area jurisdiction and subsection (j) states as an exemption “Activities within riverfront areas subject to a protective order under M.G.L. c. 21, § 17B, the Scenic



Town of Pembroke  
Zoning Board of Appeals  
June 8, 2021  
Page 3

Rivers Act.” In any event, the definition of natural bank in the Protective Order only applies to setback determinations inside the Corridor, it does not extend the Corridor over which the North River Commission has jurisdiction.

The Protective Order was adopted under Ch. 367, § 62 of the Acts of 1978 and under the statute repealed in 2003 that was at G.L. c. 21, § 17B. Although G.L. c. 21, § 17B, was intended to cover other rivers in the state, the North River is the only river for which such a protective order was issued before the statute was repealed. The Protective Order is a matter of state law, and of course River Marsh is not requesting a waiver of any portion of the Protective Order, nor would the Board have any jurisdiction to grant such waivers if requested. See Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 85 n.9 (2007).

As a point of further correction, Attorney Murphy’s letter references the Superseding Order of Resource Area Delineation issued February 22, 2018, claiming it expired. As you may recall, the Extension Order was issued February 17, 2021, and it extends the Superseding Order to February 22, 2024. We provided the Board with the Extension Order on February 22, 2021. Furthermore, the Superseding Order was extended along with other permits under the COVID-19 State of Emergency and would not be expired even if we had not received the extension.

Respectfully yours,

RIVER MARSH LLC  
By its Attorney,

WARREN E. BAKER

WFB:amg  
enclosure

Cc: Amy Kwesell, Esq.



Environmental Consulting & Restoration, LLC



## **NATURAL BANK DELINEATION MEMO**

**TO:** McKenzie Engineering Group, Inc.

**FROM:** Brad Holmes @ ECR, LLC

**DATE:** December 30, 2017

**RE:** Water Street, Pembroke

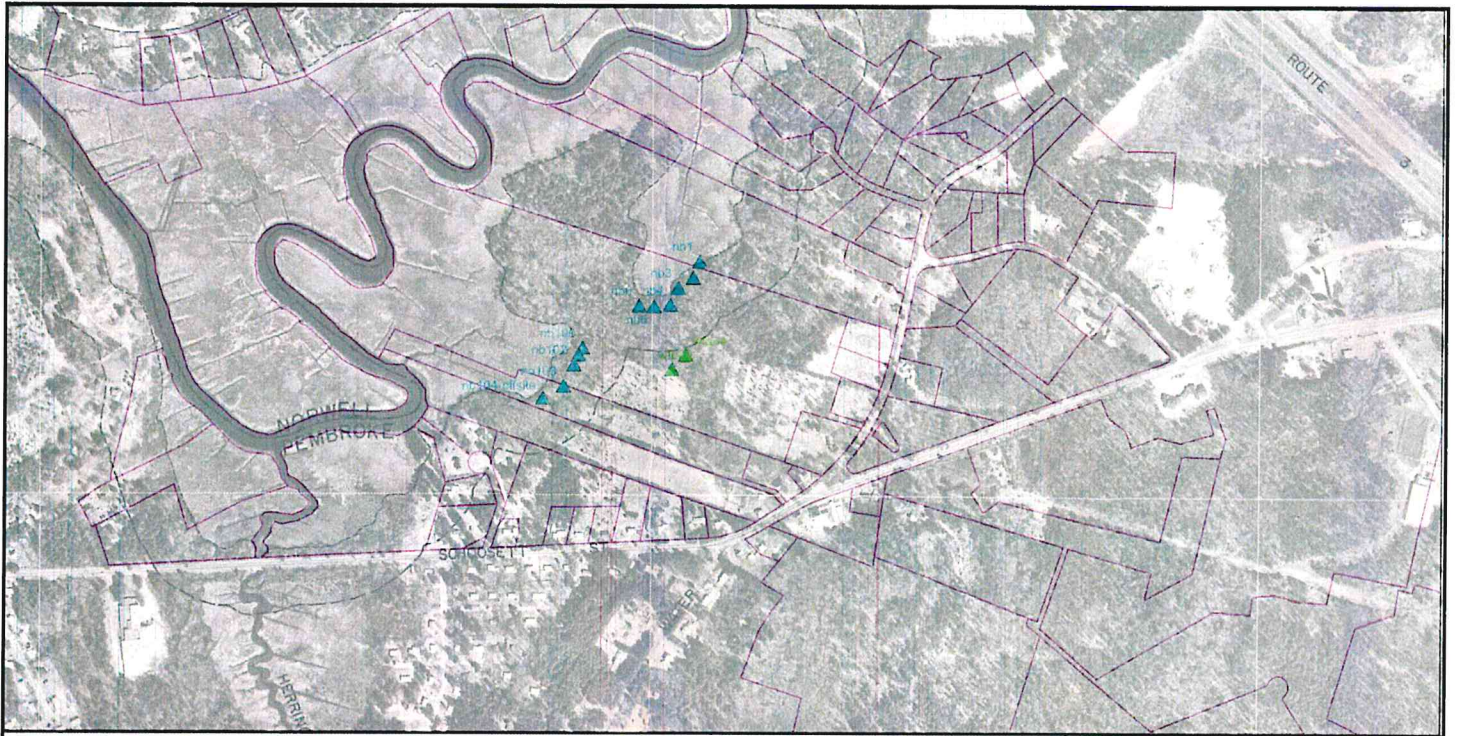
Environmental Consulting & Restoration, LLC (ECR) delineated the limit of the freshwater marsh leading to the salt marsh associated with the North River at the property on and near Lots 17 & 17A Water Street in Pembroke (the Site) on December 20, 2017. The purpose of ECR's field delineation was to delineate the landward limit of the Natural Bank of the North River in accordance with the requirements of the North River Protective Order so that the 300 foot North River Corridor could be established on and near the site. Due to the swampish conditions within the freshwater marsh preventing access to the edge of salt tolerant vegetation located further into the marsh system, ECR hung blue ribbons at the limit of the freshwater marsh located downgradient of the Bordering Vegetated Wetland system. These flags represent a very conservative delineation of the Natural Bank of the North River, which is defined in the Protective Order as follows:

Natural Bank shall mean:

- a) In wetland areas, it means the landward edge of the salt or freshwater marsh, as defined in G.L. c. 131, s. 40;
- b) In tidal rivers or streams, it means the landward edge of the mean annual high tide. Where emergent wetland vegetation is present, this boundary shall be identified as the landward edge of specific vegetative species which require periodic flushing and input of salt, brackish or fresh water to survive;
- c) Where there is a natural or man-made structure containing the river or stream, it means the aquatic side of the structure which contains the river or stream at the mean annual high tide. Where there are beaches, rock shores or mud Banks, the natural bank shall be the point at which the Water's edge meets the land during the mean annual high tide; d) In freshwater rivers, it means the landward edge of the mean annual high water which usually occurs in the early spring. Where emergent wetland vegetation is present, this boundary shall be as defined in G.L. c. 131 s. 40.

ECR also GPS surveyed each Natural Bank flag placed in the field and has overlaid these flags onto the 1978 North River Corridor map. As you can see on the following overlay map, ECR's Natural Bank flags are landward of the Natural Bank of the river line, which again allows for a very conservative approach to delineating the Natural Bank of the North River at the site. As a result of ECR's delineation, the proposed project at the site is landward of the 300 foot North River Corridor and outside the jurisdiction of the North River Commission. Upon review of this delineation memo, please contact me at (617) 529 – 3792 or [brad@ecrholmes.com](mailto:brad@ecrholmes.com) with any questions or requests for additional information.

Thank you,  
Brad Holmes, Professional Wetland Scientist #1464  
Manager



# Natural Bank Historical Overlay Plan

*Off Water Street  
Pembroke, Massachusetts*

December 22, 2017

