

**TOWN OF ACTON  
ACTON CONSERVATION COMMISSION**

**ADMINISTRATIVE CONSENT ORDER**

**I. PARTIES**

1. The Acton Conservation Commission (the “Commission”) is a duly appointed agency of the Town of Acton, Massachusetts under G.L. c. 40, § 8C, having a business and mailing address at 472 Main Street, Acton, Massachusetts 01720.

2. The Department of Environmental Protection (“MassDEP”) is a duly constituted agency of the Commonwealth of Massachusetts established pursuant to M.G.L. c. 21A, § 7. MassDEP maintains its principal office at One Winter Street, Boston, Massachusetts 02108 and its Central Regional Office at 627 Main Street, Worcester, Massachusetts.

3. The United States Army Corps of Engineers (“ACOE”) is an agency of the United States under the Department of Defense. ACOE maintains a regional office for the New England District at 696 Virginia Road, Concord, MA 01742-2751.

4. Esterbrook Farm, LLC (“Esterbrook”) is the owner of 41 Esterbrook Road (Property ID F5-24), Acton, Massachusetts (the “Site”). Esterbrook is a full-service boarding and training facility for show horses. It has 25 box stalls, 9 paddocks, indoor and outdoor rings, and a multi-acre open field. Its riders compete on the A- and AA-rated show circuit.

**II. STATEMENT OF FACTS AND LAW**

5. The Commission is responsible for the implementation of the Wetlands Protection Act, G.L. c. 131, § 40 (“WPA”), the MassDEP Wetlands Protection Regulations, 310 CMR 10.00 (the “MassDEP Wetlands Regulations”), the Town of Acton Wetlands Protection By-law (the “Bylaw”) and the Town of Acton Wetlands Protection By-law Rules and Regulations (the “Bylaw Regulations”). The Commission is authorized to enter into this Administrative Consent Order (“ACO”) under the WPA and the Bylaw.

6. The following facts and circumstances caused the Commission to issue this ACO:

- A. The Site is approximately 10.05 acres and contains a house, office and equipment building, indoor riding ring and a large barn that is utilized for horse boarding. The Site contains freshwater wetland areas, including an intermittent stream channel.
- B. In support of its equestrian operations, in June and July 2012 Esterbrook began creation of a pasture in a forested wetland that is under the jurisdiction of the WPA and the Bylaw without receiving an Order of Conditions, and without obtaining a Section 404 permit under the federal Clean Water Act, 33 U.S.C. § 1344, from the ACOE, and section 401 Water Quality Certification under 314 CMR 9.00 from MassDEP.

- C. Esterbrook also altered an intermittent stream channel within a drainage easement which flows NE to SW through the Site, and several smaller drainage ditches which flow west into the intermittent stream.
- D. An agent for Esterbrook conducted the work, and altered local, state and federal wetlands under the belief that conversion of forest to pasture was an allowed agricultural exemption under the wetland laws.
- E. On September 25, 2012, the Commission issued an Enforcement Order to Esterbrook.
- F. The Enforcement Order from the Commission cited Esterbrook for the following activity: (a) clearing and grading of approximately two acres of forested wetlands; and (b) clearing and silt removal of approximately 400 linear feet of an intermittent stream channel and associated banks. The Commission found that the clearing activity was conducted without a valid Order of Conditions.
- G. The agent for Esterbrook conferred with Thomas Tidman, the Acton Natural Resources Director, on what work might be necessary to address the Enforcement Order. Pursuant to instructions from Mr. Tidman, the agent seeded the stream channel and side slopes, and the western paddock area, and installed a single row of straw wattles along the stream. Mr. Tidman provided a copy of a wetland fill and replacement plan approved by the Commission in 1996, but never completed by the prior owner.
- H. Esterbrook retained LEC Environmental (“LEC”) and Benchmark Survey (“Benchmark”) to prepare a written wetland restoration and replication plan showing freshwater wetland boundaries and details of all work to be completed within jurisdictional areas, including proposed grading and a schedule and methodology for completing the work.
- I. LEC consulted with Mr. Tidman for the Commission, Maryann DiPinto of MassDEP, and Paul Sneeringer of the ACOE throughout the investigation and assessment of this enforcement matter, including a multi-agency site visit on November 7, 2012, and several follow-up consultations with Mr. Tidman and Bettina Abe, the Natural Resources Assistant, on restoration and replication plans.
- J. The Commission consulted with MassDEP and ACOE throughout its investigation and assessment of this matter. Though MassDEP is deferring enforcement under the WPA to the Commission, both MassDEP and ACOE require Esterbrook to demonstrate a return to compliance through a comprehensive wetland restoration plan.

- K. On September 11, 2013, Esterbrook submitted a DRAFT Wetlands Restoration and Replication Plan (the “DRAFT Plan”) to the Commission, MassDEP and ACOE for review and comment. The surveyed plan shows alteration of 77,400 sf of freshwater wetland and of 400 linear feet of bank.
- L. At a duly noticed public meeting on September 18, 2013, the Commission reviewed the DRAFT Plan. Comments were offered by the Commissioners and an abutter. The Commission directed LEC to meet with Director Tidman and Commissioner Green to discuss potential revisions to the DRAFT Plan. The matter was continued to October 16, 2013.
- M. On September 25, 2013, LEC met with Director Tidman and Commissioner Green and discussed changes to the DRAFT Plan. A Revised Plan was provided for their review and input on October 4 and 8, 2013.
- N. On October 9, 2013, LEC submitted to the Commission the Revised Plan with hand sketches of the revisions to be made on the survey plan.
- O. At the continued public meeting on October 16, 2013, the Commission reviewed the Revised Plan and hand sketches and requested additional research into a number of items.
- P. On October 30, 2013, LEC submitted to the Commission the “Final” Plan.
- Q. At the continued public meeting on November 6, 2013, the Commission reviewed and the Final Plan and found the Final Plan will restore and compensate for altered wetlands and contribute to the protection of wetland interests under the WPA and the Bylaw.

### **III. DISPOSITION AND ORDER**

7. The Final Wetlands Restoration and Replication Plan is incorporated herein and shall be considered an enforceable part of this ACO. Any failure on Esterbrook’s part to implement the Plan as approved by the Commission shall constitute a violation of this ACO.

8. Any significant changes made, or intended to be made, to the Final Plan shall require Esterbrook to obtain written approval from the Commission, with input from MassDEP and the ACOE. Minor field adjustments or substitutions in plant material may be authorized at the discretion of the Natural Resources Director.

9. Except for the post wetland mitigation monitoring, the work authorized by this ACO shall be completed by June 1, 2014, unless extended by the Commission in writing.

10. Esterbrook shall file with the ACOE an after-the-fact Appendix C: Category 1 Notification Form for the 1,661 square feet of fill to remain in place. This form shall be submitted prior to the start of the restoration work.

11. Upon completion of grading, planting and seeding in accordance with the Final Plan, Esterbrook shall inform the Commission, MassDEP and the ACOE in writing that it has completed the construction work.

12. Upon completion of construction of the wetland restoration and wetland replacement areas, a wetland scientist approved by the Commission shall monitor the restoration and replacement areas for five (5) years of continuous growing seasons, with bi-annual reports submitted to the Commission by May 31 and October 31 of each monitoring year. If in any monitoring year the wetland scientist finds that 75% coverage has not been achieved, a corrective measures action plan and schedule for achieving compliance must be submitted to the Commission within 60 days of discovering such deficiency. Esterbrook may request in writing that the Commission suspend or waive monitoring in years 4 and 5, provided the Commission determines the restoration and replication has been successfully completed in compliance with the Final Plan.

13. Esterbrook shall inform the Commission, MassDEP and the ACOE in writing that it has completed the Final Plan. Within thirty (30) days after receiving such written notice, the Commission in cooperation with MassDEP and the ACOE shall evaluate the work and, if it determines the work is successfully completed, shall issue a written confirmation that Esterbrook has returned to compliance with the WPA, the Bylaw and this ACO (a "Return to Compliance Letter").

14. Esterbrook shall pay to the Commission the sum of thirty thousand nine hundred dollars (\$30,900.00), as a civil administrative penalty for the violations identified in Section II above. The Commission agrees to suspend payment of the entire penalty amount provided Esterbrook successfully completes the Final Plan. This paragraph shall not be construed or operate to bar, diminish, adjudicate, or in any way affect, any legal or equitable right to assess Esterbrook additional penalties, or to seek other relief, with respect to any future violations of any provision of this ACO or the WPA or the Bylaw.

#### **IV. SPECIAL CONDITIONS**

15. This ACO is binding on Esterbrook, and upon its heirs, successors and assigns, including, but not limited to, any successor in interest or successor in control. Esterbrook shall provide a copy of this ACO and the approved Final Plan to each successor and assignee if the work is not completed at the time that any succession or assignment occurs.

16. Esterbrook shall provide a copy of the ACO and the approved Final Plan to each contractor or consultant who may oversee or perform the approved work. It is Esterbrook's responsibility to see that the Contractor clearly understands all items herein. No work shall be undertaken until the ACO and approved Final Plan has been reviewed and is clearly understood by every contractor, consultant or agent retained by Esterbrook.

17. Accepted engineering and construction standards and procedures shall be followed in the completion of this project.

18. The Commission shall be notified in writing seven (7) days prior to the commencement of any site work.
19. Erosion control measures consisting of staked straw wattles or equivalent, unless otherwise approved by the Commission, shall be installed before the commencement of work and the Commission shall be notified of their placement and no work shall begin before inspection by the Commission.
20. All work shall be completed as quickly as possible to minimize the duration of exposure of disturbed areas. If work is suspended for a significant period of time, then temporary stabilization methods must be employed and maintained during the period of inactivity.
21. Any materials collected by the erosion control measures shall be removed and properly managed. All straw wattles placed for siltation prevention must be removed from the site within 60 days of stabilization of the area of activity.
22. All drainage channels and related structures shall be continually operated and maintained to manage regional flows through the Site. The operation and maintenance of the channel and structures shall be a continuing Order and will survive the Commission's issuance of the Return to Compliance letter.
23. Esterbrook shall provide the Commission, the Natural Resources Director or any representative of the Commission access at all reasonable times for purposes of conducting inspections of the areas covered by this ACO. The Commission and its agents shall also have the right to require the submittal of data deemed necessary by the Commission to evaluate compliance with the ACO.
24. There shall be no underground storage of gasoline, oil or other fuels or hazardous materials within the one-hundred (100) foot buffer zone.
25. Force Majeure
  - A. The Commission agrees to extend the time for performance of any requirement of this ACO if the Commission determines that such failure to perform is caused by a Force Majeure event. The failure to perform a requirement of this ACO shall be considered to have been caused by a Force Majeure event if the following criteria are met: (1) an event delays performance of a requirement of this ACO beyond the deadline established herein; (2) such event is beyond the control and without the fault of Esterbrook, its employees, agents, consultants, and contractors; and (3) such delay could not have been prevented, avoided or minimized by the exercise of due care by Esterbrook or its employees, agents, consultants, and contractors.
  - B. Financial inability and unanticipated or increased costs and expenses associated with the performance of any requirement of this ACO shall not be considered a Force Majeure event.

C. If any event occurs that delays or may delay the performance of any requirement of this ACO, Esterbrook shall immediately, but in no event later than five (5) days after obtaining knowledge of such event, notify the Commission in writing of such event. The notice shall describe in detail: (i) the reason for and the anticipated length of the delay or potential delay; (ii) the measures taken and to be taken to prevent, avoid, or minimize the delay or potential delay; and (iii) the timetable for taking such measures. If Esterbrook intends to attribute such delay or potential delay to a Force Majeure event, then such notice shall also include the rationale for attributing such delay or potential delay to a Force Majeure event and shall include all available documentation supporting a claim of Force Majeure for the event. Failure to comply with the notice requirements set forth herein shall constitute a waiver of Esterbrook's right to request an extension based on the event.

D. If the Commission determines that Esterbrook's failure to perform a requirement of this ACO is caused by a Force Majeure event, and Esterbrook otherwise complies with the notice provisions set forth in paragraph C above, the Commission agrees to extend in writing the time for performance of such requirement. The duration of this extension shall be equal to the period of time the failure to perform is caused by the Force Majeure event. No extension shall be provided for any period of time that Esterbrook's failure to perform could have been prevented, avoided or minimized by the exercise of due care. No penalties shall become due for Esterbrook's failure to perform a requirement of this ACO during the extension of the time for performance resulting from a Force Majeure event.

E. If the Commission determines that Esterbrook's failure to perform a requirement of this ACO is not caused by a Force Majeure event, in its discretion the Commission may still grant an extension of time to perform the work.

F. A delay in the performance of a requirement of this ACO caused by a Force Majeure event or a non-Force Majeure event shall not, of itself, extend the time for performance of any other requirement of this ACO.

26. Violation of any condition of this ACO may result in the issuance of an Enforcement Order. Such Enforcement Order, if issued, may require the immediate cessation of all work until a hearing is held. Such hearing will be held not more than ten (10) days from the issuance of the Enforcement Order.

27. Violation of any condition of the ACO may result in the imposition of fines in accordance with Section F14 of the Bylaw.

28. The Commission and Esterbrook shall use their best efforts to resolve informally any and all disputes under this ACO expeditiously and in good faith. Both parties will consult with MassDEP and the ACOE as necessary to resolve any dispute.

29. Nothing in this ACO shall be construed or operate as barring or affecting any legal or equitable right of the Commission to issue any additional order with respect to the subject

matter covered by this ACO. In complying with this ACO, Esterbrook is not waiving defenses it may raise in any proceeding to enforce this ACO, or to contest any future order.

30. Except as otherwise provided, all notices, submittals and other communications required by this ACO shall be directed to:

Thomas Tidman, Natural Resources  
Director  
Acton Conservation Commission  
472 Main Street  
Acton, MA 01720

Kim Sieurin, Manager  
Esterbrook Farm, LLC  
41 Esterbrook Road  
Acton, MA 01720

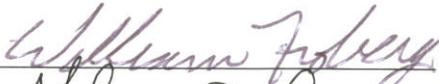
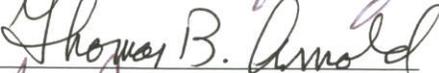
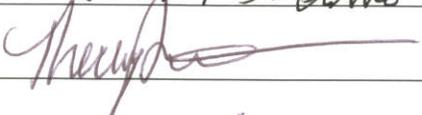
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John F. Shea, Esq.  
Mackie Shea O'Brien, PC  
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Boston, MA 02116  
(For Esterbrook Farm, LLC)

Paul Sneeringer  
United States Army Corps of Engineers  
New England District  
696 Virginia Road  
Concord, MA 01742-2751

31. This ACO shall take effect on the date the second party signs it and shall remain in effect until the Commission issues the Return to Compliance Letter that the work has been completed substantially in compliance with the Final Plan.

By the ACTON CONSERVATION COMMISSION

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Dated: November 6, 2013

Dated: November 8, 2013

  
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Kim Sieurin, Manager  
Esterbrook Farm, LLC