



Town of Chatham

Office of the Selectmen
Town Manager
549 Main Street
Chatham, MA 02633



Jill R. Goldsmith
TOWN MANAGER

Tel: (508) 945-5105
Fax: (508) 945-3550
www.chatham-ma.gov

December 2, 2015

Matthew D. Hillman
Refuge Manager
Monomoy National Wildlife Refuge
30 Wikis Way
Chatham, Massachusetts 02633

RE: COMMENTS ON FINAL CCP MONOMOY NATIONAL WILDLIFE REFUGE

Dear Mr. Hillman,

Thank you and your colleagues for briefing members of the Board of Selectmen, Town staff, and local legislators on the USFWS Final Comprehensive Conservation Plan and Environmental Impact Statement for the Monomoy National Wildlife Refuge (CCP). We greatly appreciate changes made in the Final CCP in response to concerns expressed by the Town and many other commenters. While many of the Town's concerns have been addressed in a satisfactory manner, there remains one major area of disagreement; the FWS claim of jurisdiction over open waters and submerged lands on the western side of the Refuge.

In our October 7, 2014 comments on the Draft CCP, the Town provided extensive documentation as to why the FWS claim of jurisdiction and management of the open waters and submerged lands within the Declaration of Taking (referred to by FWS as the "inclusive western boundary") is erroneous. If this claim is allowed to stand, it would forever cede jurisdiction and management authority over the submerged lands and open waters to the FWS, abrogating the Town's and the Commonwealth's authority. We feel particularly strongly about this point, not only because of fisheries restrictions proposed in the Final CCP, but also because of what could happen in the future under a different administration and refuge manager. This latter point is emphasized by FWS in its explanation of changes to the Service's preferred Alternative B in the Final CCP. FWS uses the phrase, "*at this time*" to explain why it is not regulating certain activities (e.g. fin fishing, fish weirs, shellfishing below MLW, scallop harvesting), clearly indicating that FWS could regulate those activities in the future if the agency so decided.

As Chatham's elected officials, we have a fiduciary responsibility to the Town to protect public safety, public assets, and the special quality of life in Chatham for this and future generations. The Town and Commonwealth have, for generations, effectively managed the open waters and submerged lands, and the resources contained within, to the benefit of the environment and the public. Regulations governing these areas and resources have been implemented, or revised, as needed to ensure the long-term viability of these resources for use by the public and in support of the Refuge's goals.

In responding to the Town's (and many others) comments rejecting the FWS claim of an "inclusive western boundary", the FWS made its determination based on historical documents describing the pre- and circa 1944 actions establishing the refuge including: (1) the 1938 Chief's Approval Package, (2) 1941 Development Plan for Monomoy NWR, and (3) the 1944 Declaration of Taking. From these documents FWS contends that they have determined that in 1944, "the essential intent of the Service" was an inclusive western boundary.¹

The Town has closely reviewed each of the cited documents, examined the most recent FWS 1988 management plan for the refuge, and researched Congressional intent during the 1970 wilderness designation legislative process; the result is the Town holds even more firmly to its position of opposition to FWS'S claim of jurisdiction. None of the historical or legal documents cited by FWS support an inclusive western boundary. Regrettably, FWS appears to have determined "intent" more than half a century after the facts by selectively quoting words and portions of sentences from the cited documents. The Town is compelled to respond to the Service because it is wrong and we cannot let stand an erroneous, unsupported conclusion about an inclusive western boundary. The brief comments below are in addition to the lengthy comments submitted on October 7, 2015 and they summarize why the FWS position is incorrect.

1938 Chief's Approval Package

FWS cites no language in the Chief's Approval Package to support its position, because no such language exists. FWS merely draws the unsupported conclusion that "the Chief's Approval package gives us clear information about the intended boundary."² To the contrary, these historic documents, which contain no coordinates of the land, show that FWS could not determine the limits of land at that time so they simply drew a rectangular line around all the land to the west, submerged and above water. In fact, in multiple places within the Chief's Approval package, the recommendation is that the land within the drawn box be set aside as a refuge.³ In his memorandum to Dr. Gabrielson proposing the Monomoy Island Migratory Waterfowl Refuge included in this package, Chief Salyer II concludes with the following:

"It is recommended, therefore, that the Bureau acquire title to the land area [emphasis added] enclosed within the red line on the attached Coast Guard chart."⁴

¹ The Service discusses their rationale for claiming an inclusive western boundary on pages K-7 & K-8, Monomoy National Wildlife Refuge Final Comprehensive Conservation Plan and Environmental Impact Statement. Appendix K. Summary of Public Comments and Service Responses (2015).

² Ibid.

³ Both Salyer II and Griffith make reference throughout the Chief's Approval Package to the intended land takings of the refuge. Chief's Approval Package, August 12, 1938.

⁴ Chief's Approval Package, August 12, 1938, J. Clark Salyer II, pg 2.

The attached 1938 chart was labeled the Monomoy Island Migratory Waterfowl Refuge and it included a red line of a proposed western boundary, almost identical to the refuge chart used today by the Service. Obviously if the intent was to purchase the submerged lands and open waters, Chief Salyer II would have stated such.

Furthermore, the Chief's Approval Package shows that the intention was to purchase the land that FWS did not already own. For example, the Griffith's attachment to Chief's Approval Package regarding ownership states:

*"Most of the land area on Monomoy Island is owned by the town of Chatham. Three small parcels of land are owned by the Coast Guard Service. The squatters having shacks or cottages on the beach have no title to the land upon which their buildings are located."*⁵

The Griffith's attachment, when discussing cost, further states:

*"... acres of beach and marshland [emphasis added] recommended for inclusion the refuge boundaries."*⁶

It is clear from the Chief's Approval Package that the intent of FWS was to acquire the land within the drawn boundary line, not lay claim to any of the waters within this box.

1941 Development Plan

The Service contends that because the 1941 FWS Development Plan for the refuge includes a statement about a desire of the Service to attempt to replant eelgrass, there is evidence of its intent for an inclusive western boundary. However, this desire never materialized and simply because a pre-refuge plan references a desire to replant eel grass, it does not change the facts. In the 1930s, a disease caused by *Labyrinthula sp.* threatened eelgrass beds along the East Coast. FWS was clearly concerned about these vital nursery grounds, but as far as we know, there was never an effort to replant eel grass lost to this disease, likely because the submerged lands were not part of the original taking.⁷

More revealing is the section of the Development Plan addressing the controversy over continued public use of the area (Sec. IV). The Service asserts: "under our regulations sports and commercial fishing can be carried on as in the past."⁸ Clearly had FWS claimed an inclusive western boundary that would not be the case, just as FWS is now claiming the authority to manage fisheries on the submerged lands and open waters in the west.

1944 Declaration of Taking (DOT)

⁵ Chief's Approval Package August 12, 1938, Richard E. Griffith, pg 2.

⁶ Ibid.

⁷ Email message, November 28, 2015, Seth Taylor.

⁸ Development Plan for the Monomoy National Wildlife Refuge, Chatham, Mass, 1941, pg 4.

In our previous comments, we provided an extensive legal basis as to why the DOT did not include submerged lands and western open waters. The Town's position is that the DOT unambiguously described the lands that the United States was taking as only those lying above mean low water, and therefore, there is no support for FWS's position that it included lands below mean low water.

In responding to the Town's position in appendix K, FWS quotes portions of the DOT to reach an erroneous conclusion. The cited paragraph provides in full:

*"The above-described area (referring to the first full paragraph on page 2 of the DOT) [editorial comment added] contains in the aggregate 3,000 acres, more or less, and is delineated on a map tracing, bearing date, February, 1944, and designated Monomoy National Wildlife Refuge, United States VS. 3,000 Acres, Miscellaneous Civil Action No. 6340 in the U.S. District Court for Massachusetts, and a print from that tracing is attached hereto and made part hereof, and said area is to be acquired together with **all accretioned land** [emphasis added] and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining."*⁹

However, the first paragraph on page 2 of the DOT to which the above paragraph refers provides in pertinent part:

*"All of that part of Cape Cod in the Town of Chatham, Barnstable County, Massachusetts, more particularly described as being **all those tracts or parcels of land lying above mean low water**, including a portion of Morris Island; all of Monomoy Beach, Monomoy Island, and Monomoy Point; Sheeters Island; together with **all land covered by the waters of land locked ponds**; and all islands, islets, **sand bars and tidal flats lying in Nantucket Sound, Chatham Bay, and Stage Harbor**; all lying within the following described exterior limits: (description of metes and bounds)." ¹⁰ [Emphasis added]*

This area is described in longitudinal and latitudinal terms and is also depicted in various images in the CCP/EIS. While the 1944 Declaration clearly describes a taking of the land-mass that is Monomoy, it does not cede to FWS absolute ownership of the open water and submerged lands contained within the above-described rectangular box to the west of Monomoy Island. Where the DOT, in describing the other exterior limits, did not include any lands below mean low water, the U.S. did not intend to take those lands.

The Town relies on the exact language of the 1944 Declaration describing the taking. This language limits the taking to "all those tracts or parcels of land lying above mean low water [emphasis added]." ¹¹ In other words, while the scope of the taking encompasses all area within the rectangular box, the Declaration only vested the United States with ownership of lands within the box that lie above "mean low water." This language is unambiguous.

⁹ U.S. District Court, Declaration of Taking, 1944.

¹⁰ Ibid.

¹¹ Ibid.

Furthermore, even if the intent of the original Declaration of Taking was relevant, the intent did not definitively include an intent or desire to take title to the open water. While historical documents both preceding and post-dating the 1944 DOT certainly reference activities within the open water to the West of Monomoy, a substantial amount of historical documentation references intent to only manage the migratory bird population on the island of Monomoy itself. Indeed, the introductory sentence of the Development Plan states: “Monomoy Island was selected for the major Cape Cod waterfowl refuge area primarily because it gives so much promise for great future utility to migratory birds and waterfowl.”¹² The DOT expressly arose “under the authority of an Act of Congress entitled the Migratory Bird Conservation Act”.¹³ Furthermore, the sole elucidated purpose of the Declaration was for the protection of bird species “during the nesting season or while on their way to and from their breeding grounds”.¹⁴ Moreover, the DOT itself is devoid of any language that may evidence a purpose of managing open water or the fisheries occurring within or on them. Rather, as reflected in the available reports, the taking was solely to be of the land itself.¹⁵ Indeed, the 1944 plans that FWS prepared expressly reference the “mean low water” as the determinative boundary (See Appendix B to the Town’s October 10, 2014 comments).

1945 FWS Statement Concerning the Monomoy NWR Controversy

A further historic document supporting the Town’s position is the 1945 FWS Statement Concerning the Monomoy NWR Controversy:

“In connection with the first item the Service has stated that there will be no interference with fishing. The Act under which the refuge was acquired provides that “nothing in this Act or in any regulations thereunder shall be construed to prevent a person from entering upon any area acquired under this Act for the purpose of fishing in accordance with the law of the State in which such area is located, provided that such person complies with the regulations of the Secretary of the Interior covering such area.” Any regulations formulated for the refuge will give full consideration to the commercial fisheries so as to avoid so far as possible any interference with this industry.”¹⁶

The clear intent was that the state in which the submerged lands lies is responsible for regulating fishing, and that there will be no federal interference with fishing and use of these lands continued beyond the 1944 DOT. FWS provides no persuasive support for any other interpretation.

Finally, had the United States desired to take the open water and submerged lands to the west of Monomoy, the DOT could have simply stated that fact; but it did not. A more realistic explanation is that the inclusion of the rectangular box was intended to take into account the fact

¹² Development Plan, 1941, pg 1.

¹³ U.S. District Court, Declaration of Taking 1944.

¹⁴ Ibid.

¹⁵ For example, on August 12, 1938, a report by J. Clark Salyer II, the Chief of the Division of Wildlife Refuges, only expressed an interest in “ownership of the land area” of Monomoy.

¹⁶ Statement of the U.S. Fish & Wildlife Service, May 3, 1945, Ira N. Gabrielson, pg 12.

that, even in 1944, the FWS was aware of the dynamic nature of Monomoy's coastline and the slow westerly movement of the island. Numerous reports and memoranda reflect knowledge of the ever-changing nature of the western boundary.¹⁷ Contrary to the Eastern boundary, which generally exhibits a smooth and consistent shoreline, the Western boundary is typified by constant changes, the result of which has been the appearance and disappearance of new and often temporal land masses above mean low water. By drawing the rectangular box, the FWS was able to capture such land masses under the Declaration, so long as such land was within the defined area of the rectangular box. Supporting this premise is a map of Monomoy prepared in 1933 and presented in 1938 in conjunction with the exploration of the taking that depicts low lying flats to the west of Monomoy. This map shows a more modest rectangular box that closely corresponds with the temporal land masses and shallow water immediately to the West of Monomoy (See Appendix B to the Town's October 10, 2014 comments).

1988 Master Plan

FWS did not cite the most recent February 1988 Environmental Assessment, Master Plan, Monomoy National Wildlife Refuge (1988 Master Plan) perhaps because as recently as 1988 the Service position was that the western submerged lands and open waters were not part of the Refuge. In describing the affected environment the 1988 Plan states:

*"The Declaration of Taking which created the refuge in 1944 established a boundary line to the west of Monomoy (shown in Figure 2 on page 3) and provided for inclusion in the refuge of **all land which may accrete** [emphasis added] within the boundary (U.S. District Court 1944). The Morris Island portion of the refuge includes the refuge headquarters site, an undeveloped area called Point, and a 0.2 acre tract on the north side of adjoining Stage Island."*¹⁸

This statement makes explicitly clear that the FWS knew that the western boundary was set so that any **land accreting** within that boundary would automatically become part of the refuge.

1970 Wilderness Designation

Lastly, FWS contends that , "the inclusive western boundary line is consistent with the official 1970 Wilderness Area map, which was provided to Congress and incorporated into that legislation, and represents the only congressionally approved map of the refuge."¹⁹

As FWS is aware, Congress has no role in creating wildlife refuges and Congress never approved a map of the refuge when it was established. What Congress did do is hold hearings on legislation to designate Monomoy as a wilderness area in 1968 and 1969 and in so doing, described the wilderness proposal boundary as coinciding with the boundary of the refuge. In the 1968 Senate report from the Committee on Interior and Insular Affairs accompanying S. 3425, a bill designating Monomoy Wilderness Area, the Committee described the boundary this way: "The exterior boundaries of the wilderness proposal are **all lands on Monomoy Island** to the **line of mean low tide** which **coincides** with the national wildlife refuge boundary around the

¹⁷ For example, in a report dated July 10, 1938, Richard E. Griffith, a biologist with the Division of Wildlife Refuges, wrote "the tip of Monomoy is continually building around to the west."

¹⁸ Environmental Assessment Master Plan for Monomoy National Wildlife Refuge, 1988, pg 39.

¹⁹ Monomoy National Wildlife Refuge Final CCP and EIS. Appendix K, pg K-7 – K-8.

island”²⁰ [Emphasis added]. S. 3425 passed the Senate in 1968 but no further action was taken during the 90th Congress. The bill was re-introduced in the 91st Congress and the same Committee held hearings and favorably reported the new bill S. 1652. Massachusetts Senators Brooke and Kennedy co-sponsored the legislation. Again, the Committee described the proposed wilderness area in the Committee Report exactly as they had the previous year: “The exterior boundaries of the wilderness proposal are all lands on Monomoy Island to the line of mean low tide **which coincides with the national wildlife refuge boundary around the island**”²¹ [Emphasis added].

In both 1968 and 1969, the Senate approved the wilderness legislation accompanied by the Committee report. It is instructive that the description of the boundary of the refuge was not changed in the committee reports from 1968 to 1969. Moreover, the Committee on Interior and Insular Affairs was the same Senate Committee with jurisdiction over the national wildlife refuge system, which means they would have been knowledgeable about the Monomoy refuge and its boundary; if the 1968 description of the refuge boundary been in error, the Committee would have changed it.

In 1969 the Committee on Interior and Insular Affairs of the U.S. House of Representatives held a hearing on H.R. 486 and H.R. 987, bills designating Monomoy as wilderness. Full Committee Chairman Wayne Aspinall chaired the hearings and received testimony on the Monomoy wilderness proposal from Dr. Leslie Glasgow, Assistant Secretary of Interior for Fish, Wildlife, Parks and Marine Resources. In describing the Monomoy Island refuge, Dr. Glasgow testified that it consisted of a 9 mile long **island** covering about 2600 acres and that the island “is bound on the West by Nantucket Sound.”²² Dr. Glasgow went on to add “that the island is separated from the mainland by a channel about ½ mile wide.”²³

The House and the Senate passed the legislation in October 1970 and it became Public Law 91-504. The Service contends that the mere fact that a map depicting (incorrectly) the refuge inclusive western boundary line is evidence that the Congress approved the map. To the contrary, Congress approved a wilderness map which depicted the wilderness, not the refuge. Sec. (1)(g) of PL 91-504 described the areas to be designated as wilderness areas and states, “certain lands in the Monomoy National Wildlife Refuge, Massachusetts, which comprises about two thousand six hundred acres but excepting and excluding therefrom two tracts of land containing approximately ninety and one hundred and seventy acres respectively and which are depicted on a map entitled “Monomoy Wilderness-Proposed” and dated August 1970, which shall be known as the “Monomoy Wilderness”.”²⁴ In other words, Congress specifically identified the map as designating the new wilderness and referred to it as such. To suggest the map was used by Congress to identify the refuge boundary is not supported by fact and is contrary to the description of the refuge as approved by the U.S. Senate.

²⁰ Committee on Interior and Insular Affairs, U.S. Senate Report No. 1368, July 8, 1968, pg 5.

²¹ Committee on Interior and Insular Affairs, U.S. Senate Report 91-198, May 22, 1969, pg 2.

²² Hearings Before the Subcommittees on Public Lands and National Parks and Recreation of the Committee on Interior and Insular Affairs U.S. House of Representatives, Serial No. 91-25, May 27, 1969, pg 11.

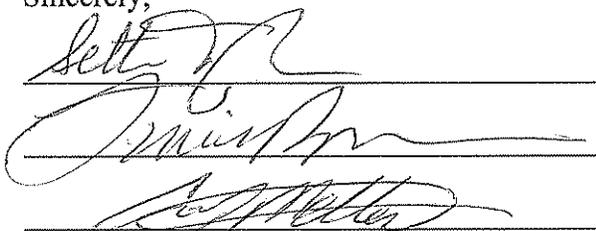
²³ Public Law 91-504-Oct. 23, 1970.

²⁴ Public Law 91-504-Oct. 23, 1970.

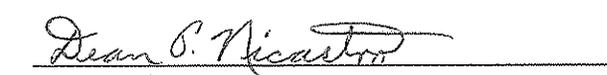
In conclusion, we continue to profoundly disagree with the FWS assertion of ownership and authority over the submerged lands and open waters within the Declaration of Taking and do not believe that the Service's response to our comments on this issue establishes any legal or historical foundation for the FWS's position. In fact, we believe a close review of the referenced historical documents preceding the establishment of the refuge actually reinforces the Town's position.

We earnestly hope the Service will review these additional comments in the context of the entire record, and reconsider its position. The Town is prepared to provide whatever additional documentation may be necessary and we would be pleased to authorize Town Counsel to consult with FWS legal counsel.

Sincerely,



Chatham Board of Selectmen

cc:

Sen. Edward Markey
Sen. Elizabeth Warren
Rep. William Keating
Rep. Niki Tsongas

State Rep. Sarah Peake
State Sen. Daniel Wolf
Dan Ashe, Director, FWS
Scott Kahan, Northeast Regional Chief, FWS
Elizabeth Herland, Project Leader, FWS