

# McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 660  
BOSTON, MASSACHUSETTS 02108  
(617) 338-6464  
FAX (617) 338-0737

LUKE H. LEGERE, ESQ.  
E-mail: llegere@mcgregorlaw.com  
(617) 338-6464 ext. 126

## VIA E-MAIL

September 15, 2021

Environmental Management Commission  
Building 3468  
Beaman Street  
Camp Edwards, MA 02542-5003

### **RE: Camp Edwards, Joint Base Cape Cod, Massachusetts Proposed Multi-Purpose Machine Gun Range**

Dear Commissioners Amidon, Suuberg and Montgomery:

This Firm represents the Barnstable County Commissioners with respect to the Massachusetts Army National Guard's ("MAARNG") proposed construction of an eight lane Multi-Purpose Machine Gun ("MPMG") Range with associated buildings, roadways, firebreaks and appurtenances (the "Project") within the Upper Cape Water Supply Reserve at Camp Edwards on the Joint Base Cape Cod ("JBCC") in Sandwich and Bourne, Massachusetts.

The Environmental Management Commission (the "Commission") should deny the proposed Project, which fails to satisfy numerous requirements under state law and the applicable Environmental Performance Standards. If constructed, the MPMG Range would threaten drinking water and destroy valuable wildlife habitat, contrary to both the fundamental mandate of the Commission and the purpose and intent of the governing legislation that created it.

Furthermore, the MAARNG has failed to demonstrate compliance with a host of other legal and permitting requirements. The Project requires, but has not received, a two-thirds vote of the state Legislature under Article 97 of the Amendments to the Massachusetts Constitution ("Article 97").<sup>1</sup> In our opinion, the Project must also undergo further review under the Massachusetts Environmental Policy Act ("MEPA") due to the wholly inadequate nature of the MAARNG's filings.

## BACKGROUND

The JBCC (formerly known as the Massachusetts Military Reservation ("MMR")) consists of approximately 20,554 acres, of which roughly 18,000 acres is owned by the

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<sup>1</sup> Consequently, the Project must comply with the Executive Office of Energy and Environmental Affairs' ("EEA") Article 97 Land Disposition Policy ("Land Disposition Policy") as well.



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Commonwealth of Massachusetts.<sup>2</sup> The JBCC has suffered significant environmental harm as the result of historic military use. There are no fewer than sixty-seven (67) hazardous waste sites reported under M.G.L. c. 21E on the JBCC in Bourne, Falmouth, Mashpee and Sandwich. Roughly \$1.2 billion has been spent remediating contamination at the JBCC under federal Superfund law over the course of the past two decades.

In order to ensure protection of the JBCC's environmental resources, stakeholders prepared the 1998 MMR "Master Plan Final Report", which divides the JBCC into two sections: the Cantonment Area and Camp Edwards Northern Training Area. The 5,000-acre Cantonment Area was intended for new military and civilian development projects (e.g., administrative buildings, barracks, vehicle and equipment maintenance shops, housing); the approximately 15,000-acre Camp Edwards was set aside for permanent protection of water supplies, wildlife habitat, and open space, with compatible military training, including a small arms range.<sup>3</sup>

The majority of Camp Edwards includes the Upper Cape Water Supply Reserve (the "Reserve"), which was created by the state Legislature under Chapter 47 of the Acts of 2002 (also known as "An Act Relative to the Environmental Protection of the Massachusetts Military Reservation") (the "Act"). The Legislature established the Reserve as:

public conservation land ... dedicated to: (a) the natural resource purposes of water supply and wildlife habitat protection and the development and construction of public water supply systems, and (b) the use and training of the military forces of the Commonwealth; provided that, such military use and training are compatible with the natural resource purpose of water supply and wildlife habitat protection.

*Chapter 47 of the Acts of 2002, § 2 (emphasis added).*

The MAARNG has acknowledged Camp Edwards' extraordinarily high natural resource value and significance to public health. The Environmental Assessment ("EA") filed by the MAARNG under the National Environmental Policy Act ("NEPA") states that:

- Camp Edwards' "predominant source of groundwater is the Sagamore Lens of the Cape Cod Aquifer, designated as a sole-source aquifer under the Safe Water Drinking Act."

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<sup>2</sup> Most of the land is licensed to the Massachusetts Air National Guard (approx. 3,830 acres) and MAARNG (approx. 14,500 acres is leased by Commonwealth to the United States of America through its Department of the Army for military uses – the U.S. Army then licensed that land back to the Commonwealth, through the Massachusetts Army and Air National Guard), while some is leased to the U.S. Air Force, Army and Coast Guard (approx. 1,407 acres). The National Cemetery (approx. 750 acres) and a portion of the Otis Air National Guard Base (approx. 1,100 acres) are owned in fee by the United States of America.

<sup>3</sup> Camp Edwards is owned by the Commonwealth of Massachusetts and is in the care, custody and control of the Massachusetts Division of Fish and Game's ("DFG") Division of Fisheries and Wildlife ("DFW"), which has leased it to the U.S. Army until 2051. The Army, in turn, licensed the land to the MAARNG for training.



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- “The groundwater beneath Camp Edwards provides up to three million gallons of clean drinking water daily to Camp Edwards and the towns of Sandwich, Bourne, Falmouth, and Mashpee.”<sup>4</sup>
- “Camp Edwards is the largest intact area of relatively unfragmented forest remaining on Cape Cod and serves as an important refuge for wildlife which require large ranges of interior forest habitat.”
- “One Federally listed and 34 state-listed wildlife species have been documented at Camp Edwards.”

Federal, state, regional and local government have all recognized the significance of the Sagamore Lens, a critical source of drinking water for Cape Cod communities, and taken significant action to ensure protection of the Reserve. In 1982, the United States Environmental Protection Agency (“EPA”) designated the Cape Cod Aquifer as a sole-source aquifer under the Safe Water Drinking Act.<sup>5</sup> In 2015, the four military agencies at JBCC signed a Memorandum of Agreement to implement the JBCC Groundwater Protection Policy to enforce protections for the existing and future water supplies at the JBCC. In a letter dated August 23, 2021, EPA announced its decision to conduct a Sole Source Aquifer review “to evaluate whether the proposed MPMGR project has a potential to contaminate the aquifer creating a significant hazard to public health and to provide recommendations to protect the aquifer.”

Former Governor Celluci took numerous actions designed to protect the Reserve, including executing two Executive Orders (Nos. 412 and 433), a 1999 Directive, and filing legislation to designate the Reserve as public conservation land under Article 97. The Cape Cod Commission prepared an October 2015 Joint Land Use Study intended to provide guidance for future use and development of the JBCC.

The Project is proposed for construction within the Reserve. The Project site is located within Priority and/or Estimated Habitat as mapped by the state Department of Fisheries and Wildlife’s Natural Heritage and Endangered Species Program (“NHESP”), as is approximately 98% of Camp Edwards.

The Project consists of the following:

- An eight-lane MPMG Range;
- A range control tower;
- A range operations and storage facility;

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<sup>4</sup> According to Citizens United for MMR Watershed & Wildlife Refuge, the Sagamore Lens: is the largest of Cape Cod’s six underground water reservoirs; is the source of drinking water for 90 public wells and 10,000 private wells; and lies upgradient of polluted groundwater flowing south and west from the southern portion of the base (approximately 66 billion gallons of water contaminated, estimated clean-up cost of \$800 million or more).

<sup>5</sup> An October 4, 2001 Supplemental Lease Agreement #1 between the Commonwealth and U.S. Army recognizes that Camp Edwards is environmentally sensitive and addresses need for a cooperative partnership to ensure permanent protection of the drinking water supply and wildlife habitat, and to ensure that military and other activities are compatible with protection of the drinking water supply and wildlife habitat. That lease requires compliance with October 4, 2001 Memorandum of Agreement between the parties.



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- An ammunition breakdown building;
- Enclosed bleachers;
- A range classroom building;
- A covered mess shelter;
- A new 4.5-mile gravel road;
- Firebreaks; and
- Maintenance (mowing) of 77 acres along the edge of the firebreaks.

The Project would directly alter 209 total acres of land (of which approximately 38.5 acres has been previously altered), and will result in a “Take” of several state-listed rare species under the Massachusetts Endangered Species Program (“MESA”). According to the MAARNG’s EA, the Project would require clearing up to 170.5 acres of trees.<sup>6</sup>

Crucially, in addition to these direct impacts, approximately 5,197 acres – more than one-third of the Upper Cape Water Supply Reserve – would be required for the MPMG Range to accommodate the Surface Danger Zones associated with the Project’s proposed weapons and ammunition.

### **THE PROJECT FAILS TO SATISFY THE ENVIRONMENTAL PERFORMANCE STANDARDS AND IS CONTRARY TO THE ACT’S INTENT AND PURPOSE**

The Project proposes a banned activity within Camp Edwards and the Reserve, and should be denied by the Commission. As noted above, the Act, Section 5, created the Commission and established that:

The purpose of the commission shall be to ensure the permanent protection of the drinking water supply and wildlife habitat of the reserve. The commission shall ensure, by oversight, monitoring and evaluation, that all military and other activities on the reserve are consistent with this purpose. The commission shall oversee compliance with and enforcement of the environmental performance standards, coordinate the actions of the environmental agencies of the commonwealth in the enforcement of environmental laws and regulations at the reserve, as appropriate and facilitate an open and public review of all activities on the reserve.

The April 6, 2017 Environmental Performance Standards for MAARNG’s operations at Camp Edwards list “[a]rtillery live fire” as a “banned military training activit[y]”. The Environmental Performance Standards further provide that “[l]ive weapon fire is prohibited outside of established small arms ranges. Live weapon fire is not allowed on established small arms ranges except in accordance with Environmental Performance Standard 19, other applicable

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<sup>6</sup> Cape Cod and the Islands make up the EPA Ecoregion known as the “North Atlantic Coastal Plain Pitch Pine Barrens”. According to Citizens United for MMR Watershed & Wildlife Refuge: Pine Barrens cover more than 5,000 acres on the northern portion of the JBCC; this is the largest intact area of Pine Barrens habitat on Cape Cod and one of the largest in New England; NHESP ranks MMR as one of the most important sites of remaining barrens.



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Performance Standards, and a range-specific plan approved through the Environmental Management Commission.”<sup>7</sup>

Environmental Performance Standard 19 addresses “Range Performance Standards” for “operational ranges”. The MPMG Range is not an operational range – rather, it proposes the expansion of an existing range. In our opinion, this means that the Project proposes a banned activity within Camp Edwards and the Reserve.

Even assuming, for the sake of argument, that the Project were not a banned activity under the Environmental Performance Standards, the Commission is still empowered to deny it. This is because the Project is contrary to the Commission’s fundamental mandate of ensuring permanent protection of the Reserve’s drinking water supply and wildlife habitat. The Act endows the Commission with discretion to order the MAARNG to halt any use or activity which threatens these interests. Specifically:

The Act, Section 10(a), provides that:

The commission shall evaluate all information and data regarding the activities and uses of the reserve and the environmental impact upon the drinking water supply and wildlife habitat of the reserve and may take action, as described in subsection (b) and (c). The commission may consult with the science advisory council, the community advisory council, or other entities in evaluating such information and in taking such action.

The Act, Section 10(c), in turn, provides that:

If the commission determines, based upon sound and accepted scientific analysis and evidence, that an activity that is otherwise compliant with law, regulation or environmental performance standards, is causing or threatens to cause imminent and substantial damage to the drinking water supply or wildlife habitat of the reserve, the commission may: (1) order such activity to cease immediately; or (2) require adjustments in the activity to eliminate the imminent and substantial damage or threat of damage.

In our opinion, these provisions of the Act logically allow the Commission to deny a proposed use that would cause or threaten “imminent and substantial damage” to the Reserve’s drinking water supply or wildlife habitat, regardless whether that proposed use technically meets the Environmental Performance Standards. That is particularly true where the MAARNG has not established that the Project “is compliant with law”, as discussed in detail below.

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<sup>7</sup> In an October 22, 1999 Certificate, EEA stated that it would require “as a condition of this MEPA Certificate ... [t]he EPS shall forbid all training activities that are permanently banned in the Reserve, as committed to in the DEIR... ” This suggests that MAARNG had previously committed to prohibit live fire outside of established small arms ranges, contrary to the proposed Project.



## GROUNDWATER AND DRINKING WATER

As discussed above, the Act created the Commission and charged it with ensuring the permanent protection of the Reserve's drinking water supply. The critical importance of that drinking water supply has long been recognized by federal, state, regional and local government and organizations. For example, EEA noted in an October 22, 1999 Certificate that the northern 15,000 acres of JBCC comprises Cape Cod's largest potential water supply. In its EA filed under NEPA, MAARNG acknowledged that:

- Camp Edwards' "predominant source of groundwater is the Sagamore Lens of the Cape Cod Aquifer"; and
- "The groundwater beneath Camp Edwards provides up to three million gallons of clean drinking water daily to Camp Edwards and the towns of Sandwich, Bourne, Falmouth, and Mashpee."

The EA also noted the July 13, 1982 EPA "Cape Cod Aquifer Determination", in which the agency "determined that the Cape Cod aquifer is the sole or principal source of drinking water for Cape Cod, Massachusetts" and therefore "federal financially assisted projects constructed anywhere on Cape Cod will be subject to EPA review."

The 1998 MMR Master Plan, at page 36, provides that "[i]n order to ensure the water quality of existing and future supply wells of the Upper Cape, the protection of the upper 15,000 acres of the base is critical. The level of protection should be at least equal to that required by the state DEP for municipal public water supplies under the New Source Approval Program. Water Quality should not be placed at risk due to any current military activities, or any military or nonmilitary proposed uses." (emphasis added).

According to Citizens United for MMR Watershed & Wildlife Refuge, the Sagamore Lens is the largest of Cape Cod's six underground water reservoirs, and lies upgradient of polluted groundwater flowing south and west from the southern portion of the base. Indeed, the March 2001 "Zone II Delineation for Proposed Upper Cape Water Supply Wells Report" concluded "that the Zone IIs for the three proposed supply wells [at JBCC] do not intercept identified groundwater contamination and are outside the footprint of known source areas."

These federal, state and local findings underscore the particular importance of the Reserve's drinking water supply in light of contamination to groundwater and other natural resources caused by historic military operations at the JBCC. Citizens United for MMR Watershed & Wildlife Refuge has reported that the Sagamore Lens is the source of drinking water for 90 public wells and 10,000 private wells serving Cape Cod residents, and estimates that approximately 66 billion gallons of water were contaminated by military activities at the JBCC. Clean up costs under the federal Superfund program have exceeded \$1.2 billion.

The Sagamore Lens is fragile. A 2018 Consumer Confidence Report for Otis Air National Guard Base on the JBCC, which detailed the quality of drinking water drawn from the



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Sagamore Lens, confirmed that “[a] susceptibility ranking of HIGH was assigned to this system due to the absence of hydrogeological barriers (i.e., clay) that can prevent contamination migration.” In addition to typical sources of contamination, that 2018 Report confirmed that the JBCC “being a military facility ... has the potential of having fuel, chemicals, and other material(s) as possible sources of contamination.”

The July 10, 2019 “JBCC Groundwater Protection Policy Memorandum of Agreement” between Massachusetts Air National Guard, MAARNG, United States Air Force and United States Coast Guard (and additional proponents) was executed for the stated purpose of outlining the parties’ agreement to implement the JBCC “Groundwater Protection Policy”.

By its terms, the “Groundwater Protection Policy shall apply to all operations, new construction, reconstruction or expansion of existing facilities and new or expanded uses or operations by all of the agencies and their current and future tenants of JBCC located in the groundwater protection area identified on the map entitled JBCC Groundwater Protection Area dated August 2018 and updated as needed”. It defines “Groundwater Protection Area” as including “Interim Wellhead Protection Areas and Zone II as defined in 310 CMR 22.00 to existing and potential public water supply wells as shown on the map entitled JBCC Groundwater Protection Area ...” It also requires compliance with NEPA and MEPA.

The Project is proposed for construction within designated Zone II areas approved by MassDEP and, thus, within the Groundwater Protection Area. Therefore, the MAARNG must demonstrate compliance with the Groundwater Protection Policy, which has not been done.

The MEPA process (which had an artificially limited scope, as discussed below) revealed that the Project may negatively impact water quality within the Reserve. The EEA Secretary’s July 17, 2020 Certificate on Single Supplemental Environmental Impact Report acknowledges that “[t]he Single Supplemental EIR also addressed how groundwater will be monitored to determine whether operation of the MPMG Range will impact the aquifer.”

The July 17, 2020 Certificate further provides that:

The Operations, Maintenance, and Monitoring Plan (OMMP) for the range, required by the EPS, will include requirements for baseline and postconstruction sampling to monitor soil and groundwater. If the monitoring identifies changes to groundwater quality beneath the MPMG Range, the MAARNG will work with the EMC to identify the source/cause of the impact and appropriate measures and/or changes in practices to mitigate or address the impact.

In other words, the July 17, 2020 MEPA Certificate implicitly recognizes the potential for this Project to contaminate or otherwise degrade groundwater within the Reserve, including potential harm to the Sagamore Lens. Monitoring for contamination, and seeking to identify the source are intended to mitigate the harm after the fact, and are insufficient to ensure the permanent protection of the Reserve’s drinking water supply.



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EPA has likewise recognized the potential for this Project to contaminate groundwater within the Reserve, including the Sagamore Lens, and thus create a significant public health hazard. Therefore, EPA is conducting a Sole Source Aquifer review under the federal Safe Drinking Water Act in order to evaluate Project's impacts on the Cape Cod Aquifer.

For the foregoing reasons, the Commission should deny Project, which threatens "imminent and substantial damage" to the Reserve's drinking water supply.

### WILDLIFE HABITAT

The Act also charges the Commission with ensuring the permanent protection of the Reserve's wildlife habitat. In an October 22, 1999 Certificate EEA recognized that the JBCC constitutes "the largest unprotected open space area on the Cape. The regionally significant pitch pine / scrub oak forests and grasslands are home to" many species protected under MESA.

The Project site is located within Priority and/or Estimated Habitat as mapped by NHESP. MAARNG's EA filed under NEPA states that:

- "Camp Edwards is the largest intact area of relatively unfragmented forest remaining on Cape Cod and serves as an important refuge for wildlife which require large ranges of interior forest habitat."
- "One Federally listed and 34 state-listed wildlife species have been documented at Camp Edwards."

The 1998 MMR Master Plan Final Report included the following among its guiding principles:

- "[t]he Plan will propose uses that minimize adverse impacts on rare species habitat and enhance management of these and other important habitats;
- "[t]he Plan will minimize fragmentation of forest habitat and other natural areas";
- "[t]he Plan will foster the creation of permanent open space areas, linking existing forests and refuges within and adjacent to the MMR"; and
- "[p]roposed uses will demonstrate that adequate infrastructure exists or can be provided to serve the proposed use while minimizing impacts to natural resources or community character".<sup>8</sup>

In a July 6, 2020 letter, NHESP stated that it "anticipates that the [P]roject will result in a 'take' of multiple state-listed species." Consequently, MAARNG must obtain a Conservation and Management Permit ("CMP") pursuant to 321 CMR 10.23.<sup>9</sup> In its July 6, 2020 letter, NHESP clarifies that:

<sup>8</sup> The 1998 MMR Master Plan (p.49) proposed: a Modified Record Fire Range (MRFR), which was to be a live-fire training and qualification range consisting of 24 total acres (9.5 acres for the range itself, support area with amenities approx.. 1 acre, and protective buffer of 962 acres extending into the Impact Area; and a Multi-Purpose Machine Gun Transition Range (range approx.. 54 acres, 1 acre amenities, and 1,460 acre safety buffer zone).

<sup>9</sup> The Single Supplemental EIR indicated that the MAARNG submitted a CMP application to NHESP in April 2020.



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In order for a project to qualify for a CMP, the applicant must demonstrate that the project has avoided, minimized and mitigated impacts to state-listed species consistent with the following performance standards: (a) adequately assess alternatives to both temporary and permanent impacts to the state-listed species, (b) demonstrate that an insignificant portion of the local population will be impacted, and (c) develop and agree to carry out a conservation and management plan that provides a long-term net benefit to the conservation of the state-listed rare species.

As part of its Single Supplemental EIR, MAARNG “acknowledged that long-term habitat management and monitoring of the Pine Barrens Focal Area (551 acres) and Grassland mitigation Area (36 acres) will be a condition of the CMP and is required in perpetuity.”

The EEA Secretary determined that the Single Supplemental EIR the Project’s proposed “extension of the two 1,500-m lanes and adjacent firebreaks into this habitat will allow for management and enhancement of the scrub oak shrubland habitat” and that “[p]rescribed burns will be planned and implemented to improve open Pine Barrens conditions for dependent species, including improvement of frost bottom.”

In other words, EEA determined that although the Project will result in a “take” of multiple state-listed species, habitat management and monitoring will provide sufficient mitigation.

In our opinion, the fact that the Project will result in a “take” of numerous state-listed species is clear evidence that it threatens “imminent and substantial damage” to the Reserve’s wildlife habitat. Thus, the Commission should deny the Project.

### **THE PROJECT REQUIRES ARTICLE 97 LEGISLATIVE APPROVAL AND RELATED REVIEWS**

#### ARTICLE 97

The Reserve is protected under Article 97, and thus the Project cannot be built without first obtaining legislative approval, satisfying EEA’s Land Disposition Policy, and refile for review under MEPA.<sup>10</sup>

Article 97 was enacted by Massachusetts voters in 1972 to explicitly establish the citizenry’s right to use and enjoy the natural environment. Article 97 codifies the public interest in conserving natural areas and open space by providing that:

[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their

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<sup>10</sup> The Notice of Project Change (“NPC”) filed by MAARNG with MEPA on or about January 31, 2020 incorrectly answered “no” to the question of whether the Project involves “conversion of public parkland or other Article 97 public natural resources to any purpose not in accordance with Article 97.”



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environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

*Art. 97 of the Amendments to the Massachusetts Constitution.*

Thus, Article 97 creates a procedural protection for public lands taken, acquired, or designated for natural resource or outdoor recreation purposes by requiring a super-majority, two-thirds vote of each chamber of the Legislature to transfer, or change the use of, open space or parkland taken, acquired or designated for its purposes.

The Reserve has been dedicated to Article 97 purposes for decades by virtue of the Act. Specifically, the Act designates the Reserve as “public conservation land ... dedicated to the natural resource purposes of water supply and wildlife habitat protection and the development and construction of public water supply systems” and compatible military use and training.

Consistent with this designation, the Reserve is under the care and control of the DFW.

The Reserve’s status as Article 97 land has been confirmed repeatedly in legal and planning documents. Indeed, the Reserve’s status as protected Article 97 land has recently been acknowledged by the Massachusetts Attorney General.

In the July 1998 “Report on Legal Control Over Land Use” of the MMR<sup>11</sup>, at page 11, the Attorney General identified the predecessor to Article 97 – Article 49 of the Massachusetts Constitution – as applying to land under the jurisdiction of the state Department of Environmental Management (“DEM”) or other EEA agencies, and concluded that “[a]ny part of the MMR that has been returned to DEM for management as state forest, then, could not be transferred away from DEM, or put to a different use, without a two-thirds vote of the Legislature.” On pages 12-13 of that 1998 Report, the Attorney General discussed the Land Disposition Policy (and the DEM Policy and Procedure for the Disposition of Land, Water or

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<sup>11</sup> This July 1998 report was prepared as part of a larger investigation by the Attorney General’s Office into the 10-year extension of the Air Force’s lease, granted by Governor Weld in 1995. In June 1998, the Attorney General produced a “Special Report on the MMR Lease Extension”, which confirmed that the lease extension was executed behind closed doors and that although “state military officials know that the public and our office would be interested in the extension of the Air Force lease and the Massachusetts National Guard License ... these officials nonetheless failed to inform the public and our office of their renewed request for a lease extension” and “there is no evidence that the Commonwealth sought or received anything in exchange for the extension”. The June 1998 Report concludes that “by granting the extension without obtaining environmental *quid pro quos* or other concessions, the Administration lost a significant opportunity to assert the Commonwealth’s interests.” The June 1998 Report also recognized “the fundamental unfairness of the process used to grant the extension”, and details how the Air Force and National Guard originally requested a 25-year extension in 1991, but reduced the request to 10 years upon being informed that lease extension of more than 10 years would require MEPA review.



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Interests Therein), noting that “lands under the jurisdiction of other EOEAs agencies, including Fish and Wildlife and DEP, would be subject to the EOEAs disposition policy.”<sup>12</sup>

This 1998 Report, written before passage of the Act, clearly establishes the applicability of Article 97 to state-owned land within the JBCC which has been designated for Article 97 purposes, like the Legislature did with the Reserve several years later.

Thus, it was no surprise that the Attorney General more recently pointed to the Reserve as the first example of Commonwealth-owned land dedicated to Article 97 purposes. In an amicus brief filed with the Massachusetts Supreme Judicial Court in *Smith v. City of Westfield*, 478 Mass. 49 (2017), the Attorney General, citing the Act, successfully argued at pages 40-41 of her brief that:

[i]n some instances, the Legislature has dedicated land to Article 97 purposes and directed the Massachusetts Division of Capital Asset Management and Maintenance (DCAMM) ... to transfer the care and control of land to DCR or DFG so that they may manage the land for Article 97 purposes. For example, in 2003, DCAMM transferred care and control of 15,000 acres of the Massachusetts Military Reservation to DFG for management as “public conservation land[,] ... dedicated to ... water supply and wildlife habitat protection.”

The Supreme Judicial Court ultimately accepted the Attorney General’s arguments and ruled that Article 97 protection extends to land that has clearly and unequivocally been dedicated for Article 97 purposes, and that one should consider the “totality of the circumstances” in making this determination, and not look solely at the chain of title in the Registry of Deeds. *Smith*, 478 Mass. at 62-64.

The Reserve’s status as protected Article 97 land is further reflected in an October 4, 2001 Memorandum of Agreement between the Commonwealth (and state agencies including EEA, DFW, DEP and DEM), Department of the Army and National Guard. That Agreement’s stated purpose is “to establish a long-term management structure for the northern 15,000 acres of the [MMR] in order to ensure the permanent protection of the drinking water supply and the wildlife habitat, and to ensure that military and other activities are compatible with protection of the drinking water supply and the wildlife habitat.”

Similarly, a December 2014 “Joint Base Cape Cod Water and Wastewater System Evaluation” prepared for the Massachusetts Development Finance Agency, Section 2.7.1.2 “State – Article 97” acknowledges that “[t]he Reserve is considered ‘Article 97 land’, conservation land established under Article 97 of the state constitution. Any attempt to put that

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<sup>12</sup> The Attorney General also presciently noted, at page 13 of the 1998 Report, that “[t]he Cape’s need for additional future water supplies, coupled with the limited number of potential water sources in the area, may present a compelling case for legislative action. The unique combination of factors present on the Upper Cape – the potential availability of undeveloped land, the undivided nature of Cape Cod’s aquifer, the contamination that has affected much of that aquifer, and the rapid population growth in the region – may justify a unique legislative solution that can balance preservation of open space for recreation and ecological preservation with water supply needs.”



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land to use for other than conversation (sic) purposes requires a two-thirds vote of the state legislature, a very high hurdle. This would make expansion of the [Rapid Infiltration Basins] beyond the existing fence line difficult.”

Thus, Article 97 requires a two-thirds, roll call vote of the Legislature authorizing construction of the Project within the Reserve.

### EEA LAND DISPOSITION POLICY

EEA has developed its Land Disposition Policy establishing additional requirements prior to disposition of Article 97 land, with the goal of ensuring “no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions.” That Policy applies to the Property, for the reasons set forth above and below.

Specifically, the Policy requires that “all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist”. Thus, it requires (among other things) exploration of alternatives, and that “the scope of alternatives under consideration shall be commensurate with the type and size of the proposed disposition of Article 97 land, and must be performed by the proponent of the disposition to the satisfaction of [EEA] and its agencies. The scope of alternatives extends to any sites (*sic*) that were available at the time the proponent of the Article 97 disposition first notified the controlling agency of the Article 97 land, and which can be reasonably obtained ... .”

It also requires that replacement “real estate of equal or greater fair market value or value in use of proposed use, whichever is greater, and significantly greater resource value as determined by EOE and its agencies, are granted to the disposing agency or its designee so that the mission and legal mandate of [EEA] and its agencies and the constitutional rights of the citizens of Massachusetts are protected and enhanced.”

This means that, if the MAARNG insists on proceeding with the Project within the Reserve, it would need to:

- demonstrate to the satisfaction of EEA that there are no reasonable options available to achieve its purposes other than constructing the Project within the Reserve; and
- provide replacement land of comparable size with equal or greater value – and of significantly greater resource value<sup>13</sup> – than the portions of the Reserve to be developed.

Although the MAARNG has ostensibly performed an alternatives analysis which concluded that the Project must proceed as planned, to our knowledge the MAARNG has not

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<sup>13</sup> As noted above, the MAARNG acknowledges in its EA that “Camp Edwards is the largest intact area of relatively unfragmented forest remaining on Cape Cod and serves as an important refuge for wildlife which require large ranges of interior forest habitat. The proposed MPMG Range footprint is primarily comprised of disturbed land, immature pitch pine, pitch pine oak forest, and pitch pine scrub oak. One Federally listed and 34 state-listed wildlife species have been documented at Camp Edwards.”



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explored or identified viable replacement land.<sup>14</sup> In our opinion, this includes all acreage associated with the MPMG Range, including the 5,197-acre Surface Danger Zone. These issues must be addressed, and resolved, to the satisfaction of EEA before the Project can proceed.

### MEPA

In addition, conversion of Article 97 land would require further review under the MEPA. 301 CMR 11.03(1)(b)(3). The NPC and Single Supplemental Environmental Impact Report filed with MEPA for the Project failed to disclose the applicability of Article 97, among other things.

The JBCC has a long history with MEPA, spanning more than two decades. In an October 22, 1999 Certificate, EEA encouraged restriction on future military use within the Reserve, stating that “[i]n light of the Governor’s actions, the nature of MEPA review will necessarily differ from the Reserve area, as opposed to the Cantonment area” and “[w]ith respect to the Reserve, the focus ... should be to refine the analysis of on-site and off-site training alternatives, and the feasibility and impacts of each.” That 1999 Certificate also referenced the 1998 Master Plan Final Report, which divided the JBCC into “the northern 15,000 acres of the Reservation, within which permanent protection for water supply, wildlife, and open space would be paramount” and “[t]he Cantonment Zone ... identified as the appropriate location for new military and civilian development projects.”

For the Project, MEPA review was triggered by the mandatory EIR threshold at 301 CMR 11.03(1)(a) because it would directly alter 50 or more acres of land (specifically, 209 total acres). The Project also exceeds thresholds for land and state-listed rare species at 301 CMR 11.03(1)(b)(1) and 11.03(2)(b)(2). The Project as proposed also exceeds the “lowered thresholds” related to the clearing of two or more acres of vegetation and construction of new buildings and structures of more than 500 square feet, which apply within the Reserve.

In our view, MAARNG’s Single Supplemental EIR was deficient. The July 17, 2020 Certificate recognized that the scope of the Single Supplemental EIR “was narrow and limited to providing clarifications on land preservation, noise and groundwater monitoring, and construction period mitigation measures.”

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<sup>14</sup> As part of the NEPA process, MAARNG was required to perform an Alternatives Analysis, which amounted to the bald rejection of anything other than the Project. Specifically: “MAARNG considered but dismissed from further analysis the following alternatives: 1) use a training site at another installation; 2) use an undisturbed area at Camp Edwards; 3) use a different existing range at Camp Edwards; 4) implement a standard-size MPMG range; and 5) use an alternate location 100 meters south of the Proposed Action.” The “EA examines three alternatives in-depth, the Preferred Action Alternative, which would carry out the Proposed Action; the Reduced-Scale Alternative, which would carry out a modified, smaller version of the Proposed Action; and the No Action Alternative, which would not carry out the Proposed Action.” Not surprisingly, “[t]he Preferred Alternative was determined by the MAARNG to provide the best combination of land and resources to sustain quality military training and to maintain and improve the units’ readiness postures” despite that fact that “the Reduced-Scale Alternative would carry out a modified version of the Proposed Action, it would still meet the purpose of and need for the Proposed Action.” (emphasis added).



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The NPC incorrectly answered “no” to the question of whether the Project involves “conversion of public parkland or other Article 97 public natural resources to any purpose not in accordance with Article 97.”

The NPC also failed to acknowledge all necessary state permits – for one example, the Project will require a Consistency Certificate from the Massachusetts Office of Coastal Zone Management.

Consequently, EEA’s review under MEPA lacked a fundamental understanding of the Project’s impacts and need for review and approval under various state laws.

Furthermore, it appears that the MAARNG has run afoul of MEPA’s anti-segmentation provision, 301 CMR 11.01(2)(c), which provides, in relevant part, that:

In determining whether a Project is subject to MEPA jurisdiction or meets or exceeds any review thresholds, and during MEPA review, the Proponent, any Participating Agency, and the Secretary shall consider the entirety of the Project, including any likely future Expansion, and not separate phases or segments thereof. The Proponent may not phase or segment a Project to evade, defer or curtail MEPA review. The Proponent, any Participating Agency, and the Secretary shall consider all circumstances as to whether various work or activities constitute one Project, including but not limited to: whether the work or activities, taken together, comprise a common plan or independent undertakings, regardless of whether there is more than one Proponent; any time interval between the work or activities; and whether the environmental impacts caused by the work or activities are separable or cumulative.

A steady stream of NPCs have been filed, and Certificates issued, for projects at the Reserve and/or JBCC over the years. Specifically: proposed upgrades at Bravo, Echo and Sierra Ranges (March 24, 2006); a return to the use of lead-bullet ammunition at MMR (November 9, 2006); changes in the Small Arms Range Improvement Project (SAR-IP) (August 10, 2007); installation of an eXportable Combat Training Capability (XCTC) system (January 22, 2010); Soldier Validation Lane (SVL) training activities (May 6, 2011), and construction of a Unit Training Equipment Site (UTES) facility (February 22, 2013).

Indeed, supporting materials submitted with the Single Supplemental EIR for the Project “identified potential future projects that may draw upon the bank, including: gym expansion, transient troop headquarters, tango range expansion, sierra range expansion, and infantry squad battle course.” The Secretary “note[d that] these projects will require MEPA review if they meet/exceed a review threshold identified at 301 CMR 11.03 or one of the ‘lowered thresholds’ as detailed in the Informational Supplement to the FEIR, dated August 15, 2001.”

The MAARNG has established a pattern of proposing projects at the Reserve, and JBCC generally, one at a time in order to minimize their apparent impact. In our opinion, this is contrary to MEPA’s anti-segmentation policy, which is intended to allow MEPA and other state



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agencies to understand and review “the entirety of the Project, including any likely future Expansion, and not separate phases or segments thereof.”

**CONCLUSION**

The Commission should deny the Project. The proposed the MPMG Range fails to satisfy the applicable Environmental Performance Standards and, if constructed, would threaten drinking water and destroy valuable wildlife habitat. MAARNG has not received the mandatory two-thirds vote of the state Legislature required by Article 97, has not sought a Consistency Certificate from the Massachusetts Office of Coastal Zone Management, and has failed to demonstrate compliance with MEPA and EEA’s Land Disposition Policy.

Thank you for your attention to this matter. Please do not hesitate to contact us should you have any questions.

Very truly yours,

*Luke H. Legere*

Luke H. Legere

*Gregor I. McGregor*

Gregor I. McGregor

cc: Mathew N. Porter, COL, IN, Garrison Commander, Massachusetts Army National Guard  
Kathleen Theoharides, Secretary, Executive Office of Energy and Environmental Affairs  
Maura Healey, Massachusetts Attorney General

