**COMMONWEALTH OF MASSACHUSETTS**
**EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS**
**DEPARTMENT OF FISH AND GAME**

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| In the Matter of | ) | |
| Take Determination for Surfside Crossing NHESP File No. 12-31035 | ) | Docket No. 2018-02-RL |
| Nantucket, MA | ) | |

# RECOMMENDED FINAL DECISION

# DISMISSING PETITIONERS' CLAIM THAT DIVISION ERRED BY NOT DETERMINING WHETHER THE PROJECT WILL RESULT IN A TAKE OF THE NEW ENGLAND BLAZING STAR AND DISMISSING NANTUCKET SELECT BOARD AND THIRTEEN RESIDENTS FOR LACK OF STANDING

# AND

# RULINGS DENYING MOTIONS TO DISMISS NANTUCKET LAND COUNCIL FOR LACK OF STANDING OR FOR REASONS OF JUSTICIABILITY AND RELATED ORDER FOR ADJUDICATION OF NANTUCKET LAND COUNCIL'S APPEAL

## I. Summary

This appeal involves challenges by the Nantucket Select Board ("Select Board"), the Nantucket Land Council, Inc. ("NLC") and thirteen (13) individual petitioners who are residents of Nantucket ("Individual Petitioners" or "13 residents") to a October 19, 2018 determination by the Division of Fisheries and Wildlife (the "Division") that a project proposed by the Proponent, Surfside Crossing LLC ("Surfside Crossing") of sixty

(60) single-family homes, ninety-six (96) condominium units, roadways and associated site work on a 13.5 acre property in Nantucket, MA (the "Project") will result in a prohibited Take of the Coastal Heathland Cutworm, a moth that is listed as a species of special concern for protection by the Division under M.G.L. c. 131A, the Massachusetts Endangered Species Act ("MESA"), and 321 CMR 10.00 (the "MESA Regulations") (the "Division's Take Determination").

The appeals filed by the above Petitioners on November 8, 2018 claim that the Division's Take Determination was issued in error because the Division ignored credible evidence proffered by the Select Board and the NLC that Surfside Crossing's Project will also impact at least two other state-listed species, the endangered Northern Long-eared Bat and the New England Blazing Star, a species of special concern. The Division and Surfside Crossing subsequently filed separate Motions to Dismiss the appeals for lack of standing, and with respect to certain claims, for reasons of justiciability. The Petitioners filed written Oppositions to the Motions to Dismiss.

For the reasons stated herein, I am issuing a Recommended Final Decision that grants the Division and Surfside Crossing's respective Motions to Dismiss (1) the Petitioners' claim that the Division erred by not determining whether the Project will result in a Take of the New England Blazing Star (Section III); and (2) the appeals of the Select Board and the 13 residents for lack of standing (Section IV.C. and D respectively). However, I deny (1) the Division and Surfside Crossing's respective Motions to Dismiss the NLC's appeal for lack of standing; and (2) Surfside Crossing's Motion to Dismiss the NLC's appeal with respect to the NLEB for reasons of justiciability (both addressed in Section IV.E.).

Finally, Section V. sets forth the single issue for adjudication in the NLC's appeal and orders the remaining parties (Surfside Crossing, the Division and the NLC) to jointly propose a schedule for adjudication of that issue.

## II. Factual Background and Procedural History

Under MESA and the MESA Regulations, the Division has the authority and duty to identify and list those animals and plants in Massachusetts that the Division determines to be endangered, threatened or species of special concern, and to protect and conserve such state-listed species. Pursuant to 321 CMR 10.12, the Division has delineated the geographic extent of habitat for state-listed species ("Priority Habitat") within the Commonwealth, as shown in the Division's *Natural Heritage Atlas*, effective August 1, 2017. 321 CMR 10.18 requires any project or activity proposed to take place in Priority Habitat to be reviewed by the Division to determine if it will cause a Take[1] of a state-listed species.

In September 2018, Surfside Crossing submitted a MESA Project Review Application to the Division for the Project proposed to occur on property that is mapped as Priority Habitat for seven (7) state-listed moth and butterfly species (Lepidoptera). *See Division Motion to Dismiss at 1 and Attachment 1; Surfside Crossing Motion to Dismiss at 2.* The MESA Regulations at 321 CMR 10.13(3) allow a property owner to undertake a voluntary assessment to determine if state-listed threatened species or state-listed species of special concern are present on their property, provided that the protocols for such assessment are pre-approved in writing by the Division. Surveys for the presence of

[1] "Take" is broadly defined in 321 CMR 10.02 to include, but is not limited to, the killing or harming of animals as well as the disruption of their nesting, breeding, feeding or migratory activity, and the killing, collection, picking of plants.

state-listed Lepidopeta species were conducted by a Division-approved biologist on the Project site in 2016 and 2018 and documented the presence of two state-listed species of special concern, the Coastal Heathland Cutworm and the Northern Brocade Moth respectively. *Division Prehearing Statement at 1-2.* By letter to the Division dated September 27, 2018, the Select Board submitted a report by Avalon Consulting Group ("Avalon") that concluded that the Project site also "likely provides high quality habitat" for the Northern Long-eared Bat ("NLEB"), an endangered state-listed species, and that "the deer trails and open spots within these habitat types could host populations" of the New England Blazing Star, a state-listed plant species of special concern. *Consolidated Opposition of Select Board, Town Counsel Affidavit ¶ 19 and referenced Exhibits.* The Select Board's September 27, 2018 letter requested the Division to review the information provided by Avalon and reevaluate its initial determination regarding the state-listed species present on the Project site. *Id.*

By email dated October 2, 2019, the Division responded to the Select Board that the above information did not meet the criteria for delineating the Project site as Priority Habitat for the additional state-listed species identified by the Select Board. *Attachment 2 to the Division Prehearing Statement.* Regarding the NLEB, the Division noted that consistent with the rule promulgated by the U.S. Fish and Wildlife Service ("USFWS") pursuant to section 4(d) of the federal Endangered Species Act ("ESA"), the Division reviews projects within .25 mi. of the NLEB's known winter hibernacula (i.e., caves or mines) and within 150 ft. of known roost trees. Because the Division has no record of verified observations of NLEB roosting within 150 ft. or no known caves or mines within .25 mi of the Project site, the Division determined that the property does not meet the

criteria under 322 CMR 10.13 for delineating it as Priority Habitat for the NLEB. Therefore, the Division stated, it cannot review the Project to determine whether it will cause a take of the NLEB or require Surfside Crossing to conduct a study for the presence of the NLEB. Regarding the New England Blazing Star, the Division noted that the plant was recently observed immediately north of the Project site within existing sandplain grassland/heathland habitat and also observed during the surveys performed at the request of the Division - but only in this type of habitat. The Division determined that based on habitat mapping of Nantucket by The Nature Conservancy and current aerial photos, the Project site does not appear to provide suitable habitat for the New England Blazing Star. The Division concluded that because the Project site does not meet the criteria for mapping it as Priority Habitat for the New England Blazing Star, the Division will not review the Project to determine whether it would cause a Take of this state-listed species of special concern. *Id.*

The Petitioners' appeals, both filed on November 8, 2018, assert that the Division's Take Determination was issued in error because the Division ignored credible evidence proffered by the Select Board and the NLC that Surfside Crossing's Project will also impact the NLEB and the New England Blazing Star, but did not require the Proponent to conduct additional surveys to determine their presence on the Project site. *Select Board Notice of Claim at 4; NLC and Individual Petitioners Notice of Claim at 10.* Accordingly, the Petitioners argue that the Division's Take Determination fails to protect the interests of MESA and the MESA Regulations.

As the Presiding Officer for this appeal, I conducted a Prehearing Conference ("PHC") on January 24, 2019 with counsel for the Petitioners, the Division and Surfside

Crossing. The Division and Surfside Crossing both identified the standing of the Petitioners as a threshold issue for adjudication. Prior to the PHC, on January 16, 2019, the Division filed a Motion to Dismiss the appeals of the Select Board and the NLC and the 13 residents due to their lack of standing. I also granted a request by counsel for Surfside Crossing to file its own motion to dismiss the appeals of these Petitioners for lack of standing, which it did on January 28, 2019. At the PHC, I asked counsel for the Division, Surfside Crossing and the Petitioners to each explain how they framed the issue(s) in their respective Prehearing Statements.

The Division argued that the only issue for adjudication is whether it properly applied its regulatory criteria under 321 CMR 10.13 with respect to the NLEB when it made its Take Determination pursuant to 321 CMR 10.18 that the Project will only result in a take of the Coastal Heathland Cutworm. The Division contended that because the Project site is not mapped as Priority Habitat by Division for either the NLEB, a state-listed endangered species, or the New England Blazing Star, a state-listed species of special concern, the provisions of 321 CMR 10.13 govern whether and how the Division may conduct a review of the impacts of the Project on these species. The Division further stated that 321 CMR 10.13 provides that only projects in mapped Priority Habitat are subject to review under 321 CMR 10.18, unless the Division (1) receives new information on an occurrence of a state-listed *endangered* or *threatened* species; and (2) determines that it meets the criteria for delineating Priority Habitat under 321 CMR 10.12. (Emphasis added.) The Division therefore argued that because the New England Blazing Star is a special concern species, the MESA Regulations preclude the Division from conducting a take review for this species on the project site - even if there is new

information of an occurrence of the New England Blazing Star that meets the criteria for delineating Priority Habitat under 321 CMR 10.12 (which the Division disputes). Consequently, in the Division's view, the only issue for adjudication is whether the Division properly applied the criteria under 321 CMR 10.13 with respect to the NLEB when it made its Take Determination.

Surfside Crossing essentially concurred with the Division but framed its description of the issue(s) differently. Specifically, Surfside Crossing asserted that the request by the Petitioners that the Division determine whether the Project will cause a take of the New England Blazing Star asks the Division to, in effect, extend Priority Habitat to that special concern species, which is prohibited by 321 CMR 10.13. Thus, Surfside Crossing framed this issue as whether that component of the Petitioners appeal is "justiciable" (i.e., a matter that the Presiding Officer may adjudicate), and argued that the Petitioners are seeking remedies contrary to the MESA regulations. Surfside Crossing's subsequent Motion to Dismiss argues more broadly that the MESA Regulations do not afford the Petitioners the right to appeal the Division's Take Determination for its failure to delineate the project site as Priority Habitat for the New England Blazing Star or the NLEB under 321 CMR 10.13. *Surfside Crossing Motion to Dismiss at 10-14.*

Regarding the NLEB, Surfside Crossing noted that even if the Project site were mapped as Priority Habitat, it has voluntarily committed not to cut trees in June or July in compliance with the federal 4(d) rule for the NLEB. The other issue identified by Surfside Crossing in its Prehearing Statement is stated generally as whether the Division's Take Determination was issued in accordance the MESA Regulations.

As described more specifically in the Prehearing Statement of the NLC and the 13 residents, Petitioners identified the same issue: whether the Division's Take Determination, which concluded that the Project will cause a take of the Coastal Heathland Cutworm but did not determine it will also cause a take of the NLEB and New England Blazing Star, was in "derogation of the Division's legal obligation" under MESA. *See NLC Prehearing Statement at 1.* I noted to counsel for both Petitioners that I read the claims in their appeals more narrowly – i.e., that the Division's failure to require the additional surveys to determine whether the Project will also cause a Take of the NLEB and the New England Blazing Star meant that the Division's Take Determination was inadequately supported and did not meet the requirements of a Take review under 321 CMR 10.18. The Petitioners responded that their position is that the information they provided to the Division warranted additional surveys and shows that the Project will cause a Take of these two state-listed species. Neither of the Petitioners addressed the applicability of 321 CMR 10.13 in their respective statement of the issue for adjudication or at the PHC.

I thereafter issued the Prehearing Conference Report and Order on January 30, 2019, which established an agreed upon deadline of March 1, 2019 for the Petitioners to file their Oppositions to the Motions to Dismiss filed by the Division and Surfside Crossing. The Prehearing Conference Report and Order also provided that within 14 days of my issuance of a ruling on the Motions to Dismiss by the Division and Surfside Crossing that determines that all or some of the Petitioners have standing to appeal, the parties shall submit a proposed joint schedule for adjudication, or separate proposed schedules if the parties are unable to agreed. I subsequently granted separate requests by

the Select Board and the NLC for a short extension of time to file their Oppositions, which they did on March 4, 2019. The 13 residents did not, however, file a separate opposition.

On the question of the Petitioners' standing to appeal, the Division and Surfside Crossing both assert in their Motions to Dismiss that the Select Board's sole contention to support its claim to be an aggrieved person is that it "presented clear and compelling information that [Surfside Crossing] failed to provide properly updated field survey and data" to the Division. *Division Motion to Dismiss at 12-13; Surfside Crossing Motion to Dismiss at 7-8.* Surfside Crossing also argues that the Select Board has very limited powers and does not own any of the Project site in fee or any abutting properties. *Surfside Motion to Dismiss at 7.* The Division states that the Select Board "seems to argue aggrieved status because it was trying to protect interests guaranteed to its residents and visitors under [MESA]." *Division Motion to Dismiss at 12.* The Division and Surfside Crossing both emphasize that the Select Board's Notice of Claim fails to demonstrate that it has suffered an injury that is different from the general public and results from a duty owed to the Select Board by the Division. *Division Motion to Dismiss at 7; Surfside Crossing Motion to Dismiss at 8.*

Similarly, the Division's Motion to Dismiss contends that no credible evidence has been presented by the 13 residents[2] to show that they are aggrieved. If being an abutter does not automatically confer standing under the MESA Regulations, the Division argues, then neither does being a resident of a town in which a project will occur. *Division's Motion to Dismiss* at 8. Surfside Crossing states that the 13 residents should

[2] The Notice of Claim (at 8) identifies them only as "year-round residents on the Island."

be dismissed because they failed to provide evidence of an injury that is different from the general public. *Surfside Crossing Motion to Dismiss* at 8.

The Division and Surfside Crossing contend that NLC's core purpose and activities as an organization are not to protect MESA state-listed species, but to more generally preserve and protect the environment by limiting development on Nantucket. *See Division's Motion to Dismiss at 8-11; Surfside Crossing Motion to Dismiss at 8-10.* The Division and Surfside Crossing therefore argue that the NLC's appeal fails to show that it has a definite interest in the matters that fall within the scope of interests or areas of concern of MESA, or that the NLC has suffered an injury that is different from the public. Surfside Crossing instead characterizes the NLC's interest in this matter as seeking to ensure that MESA is properly applied and enforced with respect to the Project, which Surfside Crossing argues does not, however, establish NLC's standing. *Surfside Crossing Motion to Dismiss at 10.*

In response to the Motions to Dismiss filed by the Division and Surfside, the Oppositions of the Select Board and the NLC introduced supplemental evidence to bolster their claims of standing, including through supporting affidavits.

The Select Board's Opposition argues that it has demonstrated a "unique and substantial commitment" to the preservation of open space and wildlife habitat, including state-listed species habitat, which are within the interests protected by MESA. *Select Board Opposition at 8-12 and Pucci Affidavit.* Highlighting its efforts to provide timely input to the Division by retaining at its own expense a consulting firm (Avalon) with expertise in the MESA-related habitat and species particular to the Project site, the Select Board argues that it will be "injured in its shared goals of MESA" if the deficiencies in

the Division's Take Determination are not remedied. *Select Board Opposition at 9-12 and the Cardoza and O'Dell Affidavits cited therein.* Dismissing its appeal for lack of standing, the Select Board contends, would "eviscerate the goals of MESA" and be "contrary to sound public policy" which should seek to encourage local participation in these type of MESA determinations. *Select Board Opposition at 13-14.*

The NLC's Opposition explains that it owns and manages critical conservation land, primarily by acquiring and holding non-fee interests, to protect open space and indigenous and endangered species and habitats. *Collier Affidavit* ¶¶ *1, 4*; *NLC Opposition at 6-8.* The NLC attests more specifically that a large portion of the NLC's acquisition of thousands of acres of critical habitat on Nantucket "have been specifically designed to protect rare or endangered species and habitats, including globally rare and endangered habitats." *Collier Affidavit* ¶ *7.* The NLC cites its work in certifying the majority of vernal pools on Nantucket, to allow them to be added to the Division's Natural Heritage and Endangered Species Program ("NHESP") database; expending $15,000 on Lepidoptera studies specifically to improve the NHESP database; performing Element Occurrence ("EO") surveys for NHESP for plants and animals; and working with NHESP to protect significant endangered species habitat on Nantucket, including west of the Project site. *Collier Affidavit* ¶ *7.* The NLC therefore argues that its core interests as an organization are preservation of habitat and protection of endangered species on Nantucket, which are interests "indisputably grounded in an area of concern of the statutory or regulatory authority governing the Division's action." *NLC Opposition at 8.*

Moreover, the NLC's Opposition asserts that its interests will be directly impacted and injured by the Division's Take Determination based on its investment of substantial resources in projects that contribute to the protection of Nantucket's state-listed species and habitats, particularly those found on the Project site. *NLC Opposition at 9.* Such projects include working with NHESP and several conservation groups to protect vital habitat in the areas surrounding the Project site. *Collier Affidavit ¶¶ 13-14, 16-17 and the referenced Exhibits.* The NLC identifies itself as the holder of a conservation restriction ("CR") on a nearby property, Sachem's Path, which is mapped in its entirety as Priority Habitat for a number of state-listed species that include the New England Blazing Star and four moths. *Collier Affidavit ¶ 16 and Exhibit D.* In addition, the NLC has been appointed by NHESP to serve on a scientific advisory committee to monitor land management activities as part of a MESA Conservation and Management Permit that the Division issued for the property of the Nantucket Island Land Bank in the same area. *Id.* The NLC is also in the process of acquiring a CR on a large parcel of land containing state-listed species habitat approximately 100 yards from the Project site. *Collier Affidavit ¶¶ 18-20 and Exhibit B.*

The NLC argues that the areas protected through its efforts form a "habitat continuum for protected species" in the area of the Project, which itself is a critical section of this habitat continuum.[3] *Collier Affidavit ¶¶ 19-20 and Exhibit B.* Moreover, through the supporting affidavit of Danielle O'Dell of Avalon, the NLC alleges that the Project site is "very likely to support" the NLEB. For this reason, the NLC argues that it has thereby presented credible evidence that the Division's Take Determination, which

[3] In the NLC's Opposition's only reference to the 13 residents who are individual Petitioners, it states that the abutting properties of several of these residents also function as part of this "continuous ecosystem." *Collier Affidavit at ¶ 19 and Exhibit E.*

was not based on a review of the Project's impacts on the NLEB, may result in harm to this state-listed endangered species. *NLC Opposition at 13-14; O'Dell Affidavit at ¶ 13; Collier Affidavit ¶¶ 11-12, 15.* Thus, the NLC contends, development of the Project site and the associated Take of state-listed species will have a direct and deleterious impact to the areas and species already protected by the NLC. *Id. at 21.* The alleged resulting Take will "vitiate NLC's investment"[4] in the immediate area of the Project site, and this harm is peculiar to the NLC due to its unique role in protecting the habitat continuum within this area. *Collier Affidavit ¶¶ 13-20.* For these reasons, the NLC argues that the Division's Take Determination has a disproportionate impact on the NLC's core public mission that constitutes a harm that is distinctly greater in kind and magnitude from the harm to the interests of the general public. *NLC Opposition at 12-13.* Accordingly, the NLC's Opposition concludes, it has demonstrated standing to appeal the Division's Take Determination. *Id. at 14.*

Finally, the Oppositions of both Petitioners continue to argue that the presence of the New England Blazing Star on nearby property and the existence of similar habitat on the Project site required the Division to determine whether the Project will also cause a Take of this state-listed species of special concern. *See NLC Opposition at 10; Select Board Opposition at 10.* However, neither the Notices of Claim nor the Oppositions of the Select Board or the NLC offers a response to the shared position of the Division and Surfside Crossing that the MESA Regulations at 321 CMR 10.13(1)(a) expressly limits the authority of the Division to consider new occurrence information on an endangered

[4] The NLC describes its investment in these land protection efforts, through litigation, advocacy, and acquisition of CRs, as totaling hundreds of thousands of dollars, and states further that the NLC and its partners are poised to expend almost $1 million more to acquire a CR on neighboring property. *Collier Affidavit at ¶ 21.*

and threatened species, not a species of special concern. Consequently, I will begin my adjudication of the Petitioners' appeals by addressing and ruling on this threshold issue of justiciability in Section III below.

## III. Dismissal of the Petitioners' claim that Division erred by not determining whether the Project will result in a Take of the New England Blazing Star, a Species of Special Concern

The Select Board and the NLC both claim that the Division's Take Determination is deficient and violates MESA because it did not also determine that the Project will result in a Take of the New England Blazing Star, a state-listed species of special concern. However, there is no factual dispute that at the time of the Division's Take Determination and presently, the Project site is not mapped as Priority Habitat for the New England Blazing Star. The MESA Regulation applicable to such situations, 321 CMR 10.13(1), provides that projects that are not located in Priority Habitat for a state-listed species shall not be subject to review by the Division pursuant to 321 CMR 10.18 to determine whether the project will cause a Take of that state-listed species, except in the circumstances described in 321 CMR 10.13(1)(a) and (b). 321 CMR 10.13(1)(a), in turn, provides in pertinent part that if the Division receives new information on a "State-listed *Endangered* or *Threatened* species occurrence" relating to a site that is not located in Priority Habitat, the Division may determine whether this new state-listed species occurrence meets the criteria in 321 CMR 10.12 for delineating the site as Priority Habitat and whether any proposed project at the site shall be reviewed under 321 CMR 10.18 to determine whether it will cause a Take. (Emphasis Added.) The Division and Surfside Crossing therefore argue that the Division is precluded by 321 CMR 10.13(1)(a) from providing the Petitioners with the remedy they seek – i.e., to delineate the Project

site as Priority Habitat for the New England Blazing Star and then determine whether the Project will cause a take of this species of special concern. *See the Prehearing Statements of Division and Surfside Crossing at5-6 and 3 respectively.*

In effect, the Select Board and the NLC are claiming that any provision of the MESA Regulation that prevents the Division from taking such action is invalid because it is in "derogation of the Division's legal obligation" under the MESA statute. *See NLC Prehearing Statement at 1.* In this way, the Petitioners' claim constitutes a facial challenge to the substantive validity of 321 CMR 10.13(1)(a). However, as the Presiding Officer for this appeal, I lack the subject matter jurisdiction to adjudicate the Petitioners' claim. As affirmed in a previous MESA adjudicatory decision, it is well settled that the substantive validity of a regulation may not be challenged in an adjudicatory proceeding. *See In the Matter of South Road, Lots 11 and 12, Hampden, MA, Decision on Motion of Division of Fisheries and Wildlife to Dismiss Petitioner's Second Claim (May 19, 2009), at 3-5, citing M.G.L. c. 30A, s.7*[5]; *Ryan v. Kehoe, 408 Mass. 636 (1990); Salisbury Nursing & Rehabilitation Center, Inc. v. Division of Administrative Law Appeals, 448 Mass. 365 (2007)*; *Rate Setting Commission v. Division of Hearings Officers, 401 Mass. 542 (1988);* and *Beth Israel Hospital Association v. Rate Setting Commission, 24 Mass.App.Ct. 495 (1987).* Moreover, the SJC's ultimate decision in *Pepin v. Division of Fisheries and Wildlife, 467 Mass. 210 (2014)* – which arose out of the same above referenced MESA adjudicatory appeal – noted that a claim by Pepin in that proceeding

[5] M.G.L. c. 30A, s.7 makes clear that, unless otherwise provided by law, judicial review of any regulation is through an action for declaratory relief under M.G.L.c. 231A. Because MESA does not specify an exclusive mode for judicial review of the MESA Regulations, any challenge to these regulations is by seeking declaratory relief from a court, not through an adjudication by the Division.

directly challenging the validity of the Priority Habitat provisions in the Division's MESA Regulations was properly dismissed by the administrative magistrate. *Id. at 214.*

Accordingly, I hereby dismiss the Petitioners' claim that Division erred by not determining whether the Project will result in a Take of the New England Blazing Star because I do not have the jurisdiction to adjudicate their de facto challenge to the validity of 321 CMR 10.13(1)(a).

## IV. Determination of the Petitioners' Standing

### A. *The Standard of Review for a Motion to Dismiss for Lack of Standing*

The threshold question of whether a person has standing to appeal is "one of critical significance," and an issue of subject matter jurisdiction for the reviewing court. *Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998)*, citing *Tax Equity Alliance v. Commissioner of Revenue, 423 Mass. 708, 715 (1996)*. Because of the jurisdictional nature of standing, a petitioner's status as an "aggrieved person" is an essential prerequisite to obtaining review by a court or by an administrative agency in an adjudicatory proceeding. *Nickerson v. Zoning Board of Raynham, 53 Mass.App.Ct. 680, 681 (2002); Matter of Town of Hanson, 2005 WL 4124572, p.2* (standing "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim," and "impacts the effective adjudication of administrative appeals"). Thus, a motion to dismiss for lack of subject matter jurisdiction should be granted where the specific matter raised is not within the jurisdiction granted by law to the court deciding the matter. *Jones v. Jones*, 297 Mass. 198 (1937).

In reviewing a motion to dismiss, the Division has adopted the same standards that are applied in Massachusetts courts under Mass. R. Civ. P. 12(b)(1). *In the Matter of*

*Cape Wind Associates, LLC, NHESP Tracking No. 01-9604, Final Decision dated July 2, 2008,* adopting the Recommended Final Decision of the Presiding Officer dated May 16, 2008, at 6). Since 2008 the Massachusetts Supreme Judicial Court (the "SJC") has adopted the United States Supreme Court's refinement of the standard of review for evaluating the sufficiency of a plaintiff's complaint on a motion to dismiss. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As discussed by the SJC in *Iannacchino*, the Supreme Court determined in *Bell Atl. Corp. v. Twombly* that the previous, long-standing articulation of the standard in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957) – a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief – had "earned its retirement." *Iannacchino* at 635-636. The Supreme Court explained that under *Conley's* "no set of facts" standard, a wholly conclusory statement of claim would survive a motion to dismiss whenever pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery. *Id.* Under the refined standard adopted by the SJC in *Iannacchino*, the decision-maker generally accepts a petitioner's factual allegations and reasonable inferences drawn from them, but a petitioner's obligation to provide the grounds for its entitlement to relief requires more than "mere labels and conclusions," and factual allegations "must be enough to raise a right to relief above the speculative level…plausibly suggesting (not merely consistent with) an entitlement to relief." *Id.* The SJC noted that it quoted the language of *Conley* "no set of facts" standard in a previous decision of its own, *Nader v. Citron*, 372 Mass.

96, 98 (1977), and affirmed that "we follow the [Supreme Court's] lead in retiring its use." *Id.*

A party defending against a motion to dismiss is free to introduce supplemental evidence to bolster a claim set forth in their Notice of Claim, but may not add a new claim as part of their opposition to such motion to dismiss. *In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL, Final Decision dated April 12, 2019, adopting the Recommended Final Decision of the Presiding Officer dated March 15, 2019, at 22, footnote 8*; *In the Matter of Cape Wind Associates, LLC* at 6, citing *Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 709-710 (2004).

### *B. Summary of the Law regarding Standing to Appeal under MESA*

The Standing Requirements under the MESA Regulations

The scope of the Division's interests and areas of concern under MESA and the MESA Regulations[6] encompass its authority and responsibilities to list species for protection thereunder; to delineate the Priority Habitats where state-listed species occur; to review proposed projects and activities within Priority Habitat to determine whether they will result in a prohibited Take of state-listed species; and to conduct research, data collection and other management activities related to the conservation and protection of state-listed species.

In *Pepin v. Division of Fisheries and Wildlife, 467 Mass. 210, 221-225 (2014)*, the SJC's discussion and affirmation of the Division's MESA regulatory provisions requiring the review of project and activities in Priority Habitat make clear that the Division's

[6] Also referred to in this decision as the "MESA Zone of Interests."

interest thereunder is not to categorically prohibit any or certain types of development in such areas. Instead, the Division seeks to determine whether the proposed development will avoid, with or without conditions, a Take of state-listed species, and if not, whether the Take can be permitted by the Division in accordance with the performance and mitigation standards in the MESA Regulations.

The requirements and process associated with appealing a final decision made by the Division pursuant to the MESA Regulations is set forth in 321 CMR 10.25 ("Appeal Process"). Under 321 CMR 10.25(1), any person aggrieved by a final decision of the Division made pursuant to 321 CMR 10.12, 10.18 or 10.23 shall have the right to an adjudicatory hearing. Under 321 CMR 10.25(2), any notice of claim for an adjudicatory hearing must be sent to the Division within 21 days of the date of the Division's final decision. 321 CMR 10.25(3)(b) provides, in pertinent part, that any such request for an adjudicatory hearing shall include the specific facts that demonstrate that a party filing a notice of claim satisfies the requirements of an aggrieved person, including but not limited to:

1. how they have a definite interest in the matters in contention within the scope of interests or areas of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00; and

2. have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division.

In addition, several previous MESA adjudicatory decisions have affirmed that 321 CMR 10.25(3)(b) does not automatically confer standing on property abutters by regulation, or allow abutters to make a more limited or less stringent showing to demonstrate their standing. *In the Matter of Conditional No-Take Determination,*

*NHESP File No. 15-34327, Docket No. 2018-01-RL, at 15-16; In the Matter of Marion Drive, Kingston, MA, Docket No. 07-22182-2010-02-RL, Final Decision dated October 20, 2010; In the Matter of 16 Medouie Creek Road, Nantucket, MA, Docket No. 11-30084-2012-01-RL, Ruling on Joint Motion to Dismiss for Lack of Standing dated July 16, 2012.* As discussed in these decisions, the MESA regulations differ from, e.g., the state Zoning Act, pursuant to which "parties in interest" (which includes abutters) enjoy a rebuttable presumption that they are "persons aggrieved." *Marion Drive at 9; 16 Medouie Creek at 4; see also M.G.L. c. 40A, §11 and §17, and Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass. 106, 107, 653 N.E.2d 589 (1995).* Consequently, it is well established that an abutting property owner is still required to demonstrate their compliance with all of the standing requirements in 321 CMR 10.25(3)(b) in the same manner as any other aggrieved person.

Summary of Key Case Law on the Standards for Demonstrating Standing

In summarizing the relevant case law for demonstrating standing under the MESA Regulations, I begin with the three-part, "irreducible constitutional minimum of standing" established by United States Supreme Court case law as set forth in *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*:

1. First, the plaintiff must have suffered an "an injury in fact," meaning, an invasion of a legally protected interest which is (a) concrete and particularized,[7] and (b) actual or imminent, not conjectural or hypothetical;

2. Second, there must be a causal connection between the injury and the conduct complained of – the injury has be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

[7] By "particularized," the Court said, "we mean that the injury must affect the plaintiff in a personal and individual way." *Id., n.1 at 561.*

3. Third, it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan* at *560-561*.

The party invoking the jurisdiction of the reviewing court or agency bears the burden of establishing the above elements of standing. *Lujan at 562*. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation." *Id. at 561-562*.

Moreover, the Supreme Court has described injury in fact as "first and foremost of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Court emphasized that "[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Id. at 548* (Emphasis in original). As stated above in *Lujan*, for an injury to be "particularized", it must affect the plaintiff in a personal and individual way. A "concrete" injury, the Court said, "must be *'de facto;'* that is, it must actually exist." *Spokeo, Inc.* at 548 (Emphasis in original).

Massachusetts case law similarly requires a showing that a plaintiff has suffered a non-speculative, concrete injury that is different from that of the public. See *Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 27 (2006); quoting Havard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass.App.Ct. 491, 493 (1989)* ("A person aggrieved...must assert a plausible claim of a definite violation of a private right, a private property interest, or private legal interest."); see also *Fraser v. Zoning Bd. of Appeals of Marshfield, 2009 WL 1975388 (Mass. Land Ct) (2009)*. An aggrieved person must also "establish – by direct facts and not speculative personal opinion – that his

injury is special and different from the concerns of the rest of the community." *Barvenik v. Alderman of Newton, 33 Mass.App.Ct. 129, 132 (1992); see also Standerwick, supra, at 208; Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass. 551, 554 (1999); Nickerson v. Zoning Bd. of Appeals of Raynham, 53 Mass.App.Ct. 680, 761 N.E.2d. 544, 547 (2002); Butler v. City of Waltham, 63 Mass.App.Ct. 435, 440 (2005); Fraser, supra.* "Injuries that are speculative, remote, and indirect are insufficient to confer standing." *Ginther, at p. 323.* "[T]he aggrieved party must show that the injury suffered is one that is non-speculative and a substantial injury to him personally, as distinct from a speculative injury or an injury to the public generally." *Lopez v. Board of Health of Topfield, 76 Mass.App. Ct. 1118 (2010).* While it is not necessary to prove a claim of particularized injury by a preponderance of evidence, "the possibility of injury must be more than an 'allegation of abstract, conjectural, or hypothetical injury.'" *In the Matter of Three Bays Preservation, Inc. and Massachusetts Audubon Society, 2018 MA Env. Lexis 40, 44.*

The Supreme Court in *Lujan* acknowledged that the desire to use or observe an threatened or endangered animal species is a "cognizable interest" for the purpose of showing standing under the federal Endangered Species Act, but also emphasized that the injury in fact test "requires more than an injury to a cognizable interest…[i]t requires that the party seeking review be himself among the injured." *Lujan at 563.* This necessitates "evidence showing, through specific facts, not only that such federally listed species were in fact being threatened…but also that one or more of the respondents' members would thereby be 'directly' affected apart from their 'special interest' in the subject." *Id.*

The Court has also made clear that persons do not acquire standing based on a contention that they seek to enforce an environmental law, stating "[w]e have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and the laws and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan at 574-575*. In short, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464, 486 (1982); Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 135 (2000).*

Furthermore, 321 CMR 10.25(3)(b) expressly requires a petitioner to demonstrate how they have a definite interest in the matters in contention that fall within the scope of interests or areas of concern of MESA or the MESA Regulations. "A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred. *Enos at 135, citing Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977).* Determining the proper scope of the interests and area of concerns of a particular statutory and regulatory scheme is a necessary means of assessing a petitioner's compliance with the above standing requirement. By way of example, the SJC held in *Enos* that nothing in the Massachusetts Environmental Policy Act ("MEPA") language, purpose or administrative scheme suggested a legislative intent to allow judicial review of a determination thereunder of what constituted a proper environmental impact report. The SJC found the Appeals Court's characterization of MEPA's area of concern as the

"protection of the environment from damage caused by projects" to be "far too broad for our purposes." *Id. at 138*. "To grant standing based on MEPA's ultimate goal of the protection of the environment," the SJC stated, "would allow suit in almost every project within MEPA jurisdiction, based on generalized claims by plaintiffs of injury such as loss of use and enjoyment of property." *Id.* Similarly, the scope of interests and concerns under MESA does not extend to prohibiting any or certain types of development in Priority Habitat or to preventing or regulating broadly defined environmental impacts that do not have a direct enough nexus to protecting state-listed species and their habitats.

Finally, as is also expressly required by 321 CMR 10.25(3)(b), "[i]t is not enough that the plaintiffs be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the defendants." *Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction, 382 Mass. 527, 532 (1981), quoting L.H. Tribe, American Constitutional Law § 3-22, at 97-98 (1978)*. In the same *Enos* decision, the SJC emphasized that "we pay special attention to the requirement that standing is not present unless a governmental official or agency can be found to owe a duty directly to the plaintiffs." *Enos at 136*.

"Under the theory of organizational standing, the organization is just another person – albeit a legal person – seeking to vindicate a right." *Knight First Amendment Inst. At Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 562 (2018), quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F. 3d 286. 294 (2d Cir. 2012). For an incorporated organization to have aggrieved status and standing, it must establish some harm to a corporate legal right that is traceable to the Division determination being appealed. *Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27*

*Mass. App. Ct. 491, 496 (1989).* Whether the organization has suffered such an injury is determined, in part, by an examination of its corporate purpose, or stated another way, of its core public mission. *In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL,* at 26. This inquiry is, in turn, relevant to the required showing under 321 CMR 10.25(3)(b) that a petitioner has a definite interest in the matters in contention within the scope of interests and areas of concern of MESA and the MESA Regulations. *Id.*

"A mere statement of corporate purpose which expresses a general civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources], is not enough to confer standing upon the corporate entity." *In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., 2016 MA ENV LEXIS 3, 24, citing Harvard Square Defense Fund, Inc. at 496.* In determining whether an organization suing on its own behalf has standing to sue, the court conducts the same inquiry as in the case of an individual: "Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of [the court's] jurisdiction." *Havens Realty Corp. v. Coleman, 102 S. Ct. 1114 (1982).* Thus, when an organization sues on its own behalf, it "bears the burden of showing: (i) an imminent injury in fact to itself as an organization (rather than to its members) that is 'distinct and palpable;' (ii) that its injury is 'fairly traceable' to the complained-of act; and (iii) that a favorable decision would redress its injuries." *Knight First Amendment Inst. At Columbia Univ.* at 563.

Taking these MESA regulatory requirements and relevant case law standards for demonstrating standing into consideration, I have analyzed and ruled on the standing of

the Select Board, the 13 residents and the NLC respectively in Sections IV.C., D. and E. below.

### *C. Dismissal of Nantucket Select Board For Lack of Standing*

Like any other legal person, the Select Board has the burden of showing that it is aggrieved within the meaning of 321 CMR 10.25(3)(b). As is the case for abutters, the MESA Regulations do not automatically confer standing on a municipality or allow a different or less stringent showing of standing for a municipality. Consequently, the Select Board must show that it has a definite interest in the matters in contention within the MESA Zone of Interests and has suffered an actual injury that is special and different from that of the public and due to a violation of a duty owed to it by the Division.

The Select Board's Opposition states that it is seeking to prosecute its appeal on behalf of the Town of Nantucket, and argues that the Town has demonstrated a "unique and substantial commitment" to the preservation of open space and wildlife habitat, including state-listed species habitat. *Select Board Opposition at 8-12 and Pucci Affidavit.* More specifically, the Select Board highlights the actions of the Town, through its Natural Resources Department, Conservation Commission and/or Land Bank, to protect and preserve the environmental resources of the Island, some of which fall within the MESA Zone of Interests. *Select Board Opposition at 3-5.* However, relying on the fact that various Town entities engage in a range of respective regulatory, permitting and land protection and management activities is a too broadly stated basis for showing that the Select Board specifically or the Town as a whole has a special interest in the Division's review of Surfside Crossing's Project under MESA. *See Enos at 135-138.* Similarly, the fact that the Select Board submitted information on the Project to the

Division does not, by itself, satisfy this particular standing requirement. To grant standing on that basis alone would allow appeals by parties who have no private or special interest at stake beyond a personal or civic desire to see MESA properly applied and enforced. And that is how I view the Select Board's interest in this matter - acting on behalf of the Town as an advocate for the community as a whole to ensure that the Division's Take Determination is based on an adequate assessment of the Project's impact on all the state-listed species that are or may be present on-site. Furthermore, the relief sought by the Select Board – that the Division modify its Take Determination consistent with Avalon's assessment – no more directly or tangibly benefits the Town than it does the public at large. *See Lujan at 574-575.* In short, by seeking to ensure that MESA is properly applied and enforced with respect to this Project, the Town has not established its right to an adjudicatory appeal to challenge the Division's Take Determination. *Id. at 575.*

As noted Section IV.B, *supra*, at 20, the U.S. Supreme Court has described injury in fact as "first and foremost of standing's three elements." *Spokeo, Inc. v. Robins, at 547.* Neither the Select Board's Notice of Claim nor Opposition sets forth a plausible showing that the Division's Take Determination has resulted in an actual injury to either the Select Board or to the Town as a whole that is different from the public. In its Notice of Claim, the Select Board contends that it is an aggrieved person simply because it "presented clear and compelling information that [Surfside Crossing] failed to provide properly updated field survey and data" to the Division. *Select Board Notice of Claim at 1.* In its Opposition, the Select Board explains further that it was injured "in its shared goals of MESA" by the Division's failure to modify its Take Determination consistent

with Avalon's assessment. *Select Board Opposition at 9.* But stated either way, the Select Board has not alleged with the requisite specificity why any resulting alleged Take of the NLEB or the New England Blazing Star injured the Town differently than the public at large or violated any duty owed to the Town by the Division. As discussed above, the record supports a finding that the Select Board's involvement this matter is to vindicate the public's interest in seeing MESA properly applied to this Project. Thus, the Division's decision not to modify its Take Determination as requested by the Select Board did not impact the Town as a municipality any more directly or disproportionately than it did the community as a whole. Simply put, the Select Board failed to show that the Town suffered a concrete injury in fact particular to it.

Finally, the Select Board's inability to clearly identify the injury to itself or the Town, as distinct from the public, is reflected in the conclusion to its Opposition, which broadly claims that denying it standing under the circumstances of this case would "eviscerate the goals of MESA" and be contrary to "sound public policy" of encouraging local input on MESA determinations. *See Select Board Opposition at 14.* But an alleged conflict with these generally stated objectives does not equate to a plausible showing of an injury within the scope of interests of MESA. For all of the above reasons, I find that the Select Board has not met its burden of demonstrating standing within the meaning of 321 CMR 10.25(3)(b) and therefore dismiss its appeal.

### *D. Dismissal of Thirteen Residents of Nantucket for Lack of Standing*

The Notice of Claim filed by the NLC and the 13 Individual Petitioners identifies the latter as year-round residents of Nantucket who allege that they are aggrieved by the Division's Take Determination because it fails to protect and preserve state-listed species

found on the Project site. *Notice of Claim at 3*. These residents claim that they are aggrieved persons with a definite interest in this matter that is within the scope of interests or areas of concern under MESA and the MESA Regulations, and that they have suffered actual injuries which are special and different from the public resulting from violation of a duty owed to them by the Division. *Id. at 4, 8*.

The 13 residents did not file a separate opposition to the Motions to Dismiss by the Division and Surfside Crossing. While the NLC's Opposition states that the abutting properties of several of these residents are part of a "continuous ecosystem" in the area of the Project, it does not claim that any of them are NLC members or otherwise address the arguments made by the Division and Surfside Crossing challenging their standing. *See Collier Affidavit at ¶ 19 and Exhibit E.*

The 13 residents have the burden of individually demonstrating that they satisfy each of the requirements of an aggrieved person in 321 CMR 10.25(3)(b). Simply put, their allegations of standing as described in the Notice of Claim are conclusory and unsupported by any specific facts. For those residents who own property abutting the Project Site, previous MESA adjudicatory decisions make clear that the MESA Regulations do not automatically confer standing on abutters or allow them to make a more limited or less stringent showing to demonstrate their standing. Moreover, even assuming that the properties of these abutters function as part of a "continuous ecosystem" or "habitat continuum" in the area of the Project, that fact would not, by itself, establish a plausible claim of a concrete injury to that property owner, as distinct from the general public. *See Marion Drive at 19*. The abutters themselves have not alleged any additional facts, by affidavit or otherwise, to support a claim of having a

special interest in the outcome of the Division's Take Determination or having suffered an actual injury to their private interests. At best, these 13 residents' conclusory allegations of aggrievement are evidence of their interest in seeing that MESA is properly applied to the Project proposed on a neighboring property, but such an interest is not sufficient to confer standing on them.

For these reasons, I hereby dismiss the 13 residents for lack of standing.

### *E. Denial of Motions to Dismiss the Nantucket Land Council For Lack of Standing*

The Motions to Dismiss of the Division and Surfside Crossing

The Motions to Dismiss of the Division and Surfside Crossing both contend that NLC's core purpose and activities as an organization are not to protect MESA state-listed species, but to more generally preserve and protect the environment by limiting development on Nantucket. *See Division's Motion to Dismiss at 8-11; Surfside Crossing Motion to Dismiss at 9-10.* Surfside Crossing's Motion more specifically highlights information on the NLC's website, including pointing to its Mission statement, to argue that the NLC's core purpose is merely to curtail development on Nantucket by holding and enforcing conservation restrictions on open space parcels and by commissioning scientific research, monitoring development proposals, engaging in legal proceedings to protect natural resources, and educating the public on local environmental issues. *See Id. at 9 and Exhibit 4.* Consequently, Surfside Crossing states, the NLC's mission to reduce development on Nantucket differs from the purpose of the MESA statute which is to to protect state-listed species. *Id.* Surfside Crossing instead regards the NLC's interest in this matter as seeking to ensure that MESA is properly applied and enforced with respect

to the Project, which Surfside Crossing argues does not establish NLC's standing. *Surfside Crossing Motion to Dismiss at 10.*

The Division, in turn, contends that the NLC's recitation in its Notice of Claim of its expenditure of the funds, land protection and related activities (such as certifying vernal pools) do not demonstrate that the NLC has suffered an injury that is special and different from the public and traceable to the Division's Take Determination. *Division Motion to Dismiss at 9-11.* Similarly, Surfside Crossing argues that the NLC failed to show how the Division's Take Determination causes specific harm to the NLC or how the Determination violated a duty owed to the NLC by the Division. *Surfside Crossing Motion to Dismiss at 10.* For these reasons, the Division and Surfside Crossing each request that I dismiss the NLC's appeal for lack of standing.

Finally, Surfside Crossing characterizes the NLC's appeal as seeking to challenge the Division's determination under 321 CMR 10.13(a)(2) that the criteria for mapping the Project site as Priority Habitat for the NLEB had not been met because the NLC did not provide with the Division with any new occurrence information on the NLEB. *Surfside Crossing Motion to Dismiss at 12-14.* Surfside Crossing contends, however, that the MESA Regulations do not provide an avenue for the NLC to appeal the above Division determination because under 321 CMR 10.25 appeals are limited to determinations made by the Division pursuant to 321 CMR 10.12, 10.18 and 10.23 only. *Id. at 13.* Surfside Crossing therefore asserts that even if I were to find that the NLC has standing to appeal, its Notice of Claim should be dismissed because it challenges a Division determination for which no appeal is allowed under the MESA Regulations.

The NLC's Opposition to the Motions to Dismiss

In response to the Motions to Dismiss filed by the Division and Surfside, the NLC's Opposition provides supplemental evidence to bolster its claims of standing, including through supporting affidavits from Cormac Collier, the NLC's Executive Director, and Danielle O'Dell, an Ecologist/Field Supervisor with the Nantucket Conservation Foundation ("NCF") who is serving as a subcontractor to Avalon.

At the outset, the NLC's Opposition states that "[i]n adjudicatory appeals across the Commonwealth's regulatory agencies under a variety of statutory schemes, the term 'person aggrieved' has been interpreted as requiring the claimant to assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest…of particular importance, the right or interest asserted must be one that the statute…intends to protect." *NLC Opposition at 3, citing Matter of Corey, 2018 MA ENV LEXIS 10, 30.* The NLC acknowledges that a mere statement of corporate purpose to enforce environmental laws or preserve natural resources is not sufficient to confer standing upon a corporate entity. *Id. at 4, citing Harvard Square Defense Fund at 496.* The NLC argues, however, that an organization may establish aggrievement through evidence that its core mission serves interests protected under the applicable statutes and regulations. *Id. at 4.* Among the DEP adjudicatory decisions cited by the NLC as support for its argument is the above referenced *Matter of Corey*, which ruled that the Buzzards Bay Coalition ("Coalition") had standing to appeal under the Wetlands Protection Act ("WPA") because the protection of interests impacted by the regulation of activities in Buzzards Bay wetlands and watershed was "integral to the Coalition's mission." *Matter of Corey at 38.* The presiding officer explained that where the core

public mission of the Coalition is to protect, preserve and advocate on behalf of one or more interests enumerated in the Wetlands Protection Act and Regulations, decisions made by the local conservation commission and/or DEP "can have a disproportionate impact upon that entity's core public mission and may or does constitute a harm that is distinctly greater in kind and magnitude from the harm to the interests to the general public." *Id. at 39.*

To that end, Mr. Collier's Affidavit attests that while the NLC was founded in 1974 "with the sole purpose to protect the environment of the Island of Nantucket and environs," since then the NLC has worked by itself and in conjunction with other public and private groups to own and manage "critical conservation land, primarily by acquiring and holding non-fee interests, to protect open space and indigenous and endangered species and habitats." *Collier Affidavit ¶ 4.* At present, the NLC holds over 85 conservation restrictions ("CRs") on over 1,400 acres on Nantucket. *Id.* Furthermore, a large portion of the NLC's acquisition of thousands of acres of critical habitat on Nantucket has been "specifically designed to protect rare or endangered species and habitats, including globally rare and endangered habitats." *Collier Affidavit ¶ ¶ 7, 8.* The NLC cites to its work in certifying the majority of vernal pools on Nantucket for the purpose of getting them added to the Division's Natural Heritage and Endangered Species Program ("NHESP") database; expending $15,000 on Lepidoptera studies specifically to improve the NHESP database; performing Element Occurrence ("EO") surveys for NHESP for plants and animals; and working with NHESP to protect significant endangered species habitat on Nantucket, including west of the Project site. *Collier Affidavit ¶ 6.*

In summary, the NLC argues that its core interests as an organization are preservation of habitat and protection of endangered species on Nantucket, which are interests "indisputably grounded in an area of concern of the statutory or regulatory authority governing the Division's action." *NLC Opposition at 8*. Furthermore, like the Coalition in *Matter of Corey*, the NLC and its members have a significant interest in protecting Nantucket's natural resources and its habitat for a variety of threatened and endangered species. *Id.* The NLC asserts that by demonstrating the nexus between its mission and actions and interests protected under MESA, it has shown the legal interest that is the predicate for its standing to appeal the Division's Take Determination. *Id., and the adjudicatory decisions cited as support.*

The NLC agrees that to establish standing it must additionally establish – by direct facts and not by speculative personal opinion – that it has suffered an injury is special and different from the concerns of the rest of the community. *NLC Opposition at 5; see also Standerwick at 28.* The NLC argues, however, standing does not require the NLC to prove the merits of its case or that it is entitled to the relief sought on appeal. *Id. at 5.* Instead, the NLC must only put forth a "minimum quantum of credible evidence" to substantiate its allegations of an injury related to an interest protected by MESA. *Id. at 6, citing Matter of Corey at 39.*

The NLC asserts that its interests will be directly impacted and injured by the Division's Take Determination based on the NLC's investment of substantial resources in projects that contribute to the protection of Nantucket's state-listed species and habitats, particularly those found on the Project site. *NLC Opposition at 9*. Such projects include working with NHESP and several conservation groups to protect vital habitat in the areas

surrounding the Project site. *Collier Affidavit ¶¶ 13-14, 16-17 and the referenced Exhibits*. To that end, the NLC is the holder of a CR on a nearby parcel of land called Sachem's Path that is mapped in its entirety as Priority Habitat for a number of state-listed species, including the New England Blazing Star and four moths. *Collier Affidavit ¶ 14 and Exhibits B and D.* In addition, the NLC has worked with the NHESP to protect significant endangered species habitat to the west of the Project site. *Collier Affidavit ¶ 16 and Exhibits B.* More specifically, when the Nantucket Island Land Bank ("NILB") expanded their golf course from 9 holes to 18 holes in 2003, the NLC advocated for a CR to protect this area with a CR and was appointed by NHESP to serve on a scientific advisory committee to monitor land management activities as part of the MESA Conservation and Management Permit that the Division issued for this property. *Id.* The NLC recently participated in lengthy litigation and expended in excess of $250,000 to protect the Camp Richards Boy Scouts Land, a parcel of undeveloped land of over 100 acres containing state-listed species habitat that is located approximately 100 yards from the Project site. *Collier Affidavit ¶ 18 and Exhibit B.* The NLC states that it and the NILB are currently in the final stages of negotiating the acquisition of a CR on the Camp Richards Boy Scouts Land at the cost of just under $1 million, and asserts that the value of the NLC's activities and holdings with respect to on this site will be specifically diminished by the Take that will allegedly result from the Surfside Crossing Project. *Id. at ¶ 21.* As depicted in the aerial photo in Exhibit B to the Collier Affidavit, the NLC argues that the Project site and the nearby highlighted parcels form an "almost continuous swath of largely undeveloped and protected pitch pine habitat" and a "habitat continuum for protected species" in the area of the Project. *Collier Affidavit ¶ 19 and Exhibit B.* In

addition, while the area immediately to the south of the Project site, between it and the NILB land, is not formally protected, it is developed at a very low density (and owned in part by several of the 13/Individual Petitioners/residents) and essentially functions as part of this same "continuous ecosystem." *Collier Affidavit ¶ 20 and Exhibit B.* In conclusion, Mr. Collier's Affidavit attests that protecting intact ecosystems and their associated state-listed species "is at the core of the NLC's mission," and that the development of the Project site and the alleged associated Take caused by the Project will have a "deleterious and direct impact to the areas already protected by the NLC" and result in harm "peculiar to the NLC and entirely different and distinct from the impact that will accrue to the general public." *Collier Affidavit ¶ 20.*

The supporting Affidavit of Danielle O'Dell, the NLC's expert on the NLEB, states that the Project site is identified on The Nature Conservancy's island-wide habitat mapping of Nantucket as primarily pitch pine/scrub oak with a smaller portion of coastal shrubland. *O'Dell Affidavit ¶ 5 and Exhibit 1.* Ms. O'Dell cites to a 2018 publication entitled "Bat Use of an Island off the Coast of Massachusetts" that she co-authored with Zara R. Dowling, which reported consistently high detection rates of NLEB adjacent to mature pitch pine stands and the presence of breeding populations and maternity roosts in pitch pine scrub oak in other locations on Nantucket.[8] *O'Dell Affidavit ¶ 8 and Exhibit 3.* Her Affidavit further states that multiple calls of NLEBs were recorded by acoustic detectors placed within .25 miles of the Project site during peak maternity roost season from early May to August of 2017, and May through September of 2018. *O'Dell*

[8] Her Affidavit explains that high quality habitat and the presence of a large breeding population and at least one known hibernacula of NLEB on Nantucket are of particular importance for this state-listed endangered species because White-nose Syndrome, which has decimated New England mainland populations by 90-99%, is not present on Nantucket. *O'Dell Affidavit at ¶ 7.*

*Affidavit ¶ 9.* Two additional acoustic detectors deployed on September 19 through October 2, 2018 on nearby sites in the immediate vicinity of the Project site also documented high levels of NLEB activity. *O'Dell Affidavit ¶ 9 and Figures in Exhibit 1.* Ms. O'Dell's Affidavit ends by opining that the Project site includes high quality habitat for the NLEB that is very similar to other known maternity roost habitat on Nantucket and that it is "highly likely" to contain potential roost trees. *O'Dell Affidavit ¶ 13.*

In conclusion, the NLC argues that the affidavits of Mr. Collier and Ms. O'Dell presented facts showing the possibility of injury related to an interest protected by MESA - namely the preservation of crucial habitat for a breeding population of the endangered NLEB. *NLC Opposition at 14.* Through such expert testimony, the NLC contends, it has set forth credible evidence to substantiate its allegations of harm to interests protected by MESA and central to the NLC's mission. *Id., citing Matter of Three Bays Preservation, Inc. at 14.* Therefore, the NLC has met "minimal evidentiary threshold" required for its appeal to proceed. *Id., citing Matter of Corey at 34.*

Determination of the NLC's Standing

The NLC, a 501(c)(3) non-profit corporation, bears the burden of establishing that it meets each of the required elements of standing under the MESA regulations at 321 CMR 10.25(3)(b), consistent with the three-part, "irreducible constitutional minimum of standing" described by United States Supreme Court in *Lujan* and with the specific standing test applicable to corporate organizations set forth in *Knight First Amendment Inst. at Columbia Univ., and Harvard Square Defense Fund, Inc.* As discussed in Section IV.A., *supra*, at 15-17, I accept as true the facts alleged by the NLC in its Notice

of Claim and Opposition and supporting affidavits in accordance with the standard of review adopted by the SJC in *Iannacchino*.

The Motions to Dismiss for lack of standing by the Division and Surfside Crossing are based on their review of the NLC's Notice of Claim only. In response, the NLC's Opposition to these Motions bolstered its claim of standing through the supporting affidavits of the NLC's Executive Director, Cormac Collier, and the NLC's state-listed species expert, Danielle O'Dell, and the amplified legal arguments made therein.

For the purposes of determining standing, the first question to address is whether the NLC as a corporate "person" has a definite interest in the matters in contention within the MESA Zone of Interests. The Division and Surfside Crossing argue that NLC's core purpose and activities as an organization are not to protect MESA state-listed species, but to more generally preserve and protect the environment by limiting development on Nantucket. However, I find that Mr. Collier's detailed Affidavit, as summarized, *supra*, at 32-35, has presented sufficient evidence of the nexus between the NLC's core mission and activities and interests that fall squarely within the MESA Zone of Interests. Mr. Collier's showing includes attesting that: (1) a large portion of the 85 CRs acquired by the NLC since 1974 has been specifically for the purpose of protecting state-listed species and habitats; (2) the NLC has made a substantial monetary investment and incurred other significant litigation and transactional expenditures to acquire (or advocate for) CRs on properties that comprise a larger habitat continuum for state-listed species (e.g. the Sachem Path and Boy Scout Land parcels), some of which are alleged to be present on the nearby Project site; and (3) the NLC has engaged in MESA-specific work certifying vernal pools, performing EO surveys, funding Lepidoptera studies, and serving

on an NHESP scientific advisory committee associated with a CMP issued for NILB land located near the Project site. Most of these long-standing activities of the NLC preceded the Division's review of the Surfside Crossing Project and encompassed the purpose of protecting interests within the scope of MESA, rather than merely constituting a discrete effort to oppose the Project during the MESA review process. In short, the description and related recitation of the history and focus of activities of the NLC in the Collier Affidavit make the requisite showing that MESA-relevant interests are sufficiently integral to the public mission of the NLC, thereby supporting a conclusion that the effect of the Division's Take Determination has a disproportionate impact upon that mission as compared to the general public.

Furthermore, the NLC's demonstration in this regard is consistent with one of the reasons I found that the petitioners in *Matter of 16 Medouie Creek Road* had standing. *See Matter of 16 Medouie Creek Road at 21* (detailed affidavits by the petitioners and others showed that the petitioners' long standing professional and/or personal commitment to bird conservation predated and went beyond seeking to enforce MESA against the project at issue.) In comparison, in the instant appeals neither the Select Board's specific powers and actions nor the Town's overall environmental or land protection responsibilities, constitute an adequate showing that their core purpose and activities are substantially and consistently directed at matters within the MESA Zone of Interests. *See the discussion, supra, at 25-26*. Instead, the record supports a finding that the interest of the Select Board specifically and the Town as a whole is to advocate for the proper application of MESA to this particular Project. *Id., supra, at 26*. Finally, the NLC's above showing as a corporate entity is distinguishable from my recent MESA

adjudicatory decision, *In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL,* where I determined that the petitioner, Protect Sudbury, did not demonstrate that its core mission and activities fall within the MESA Zone of Interests. *See In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL, at 26-28* (finding that the core corporate purpose of this self-described "501(c)(4) non-profit organization formed in opposition to the [electric transmission line project proposed by Eversource]" was, as evidenced by Protect Sudbury's mission statement and the affidavit of a founding member, to oppose that project for primarily energy facility siting reasons and to also seek changes to DPU's regulation of such facilities.)

The next question to address is whether the NLC has made a plausible showing it has suffered an actual injury in fact traceable to the Division's Take Determination that is special and different from the public. As an organization, the NLC bears the burden of showing an injury to itself as an organization (rather than to its members) that is distinct and palpable. *Knight First Amendment Inst. At Columbia Univ.* at 563. For the purposes of standing, it is not necessary for the NLC to prove an alleged injury by a preponderance of evidence or to otherwise prove the merits of its case. However, the NLC's showing must be (1) more than an allegation of abstract, conjectural, or hypothetical injury; (2) supported by credible factual evidence that substantiate its allegations of an injury related to an interest protected by MESA; and (3) identify a harm to it as an organization that is distinctly greater in kind and magnitude from the harm to the interests to the general public. *See the discussion and case law cited in Section IV.B., supra, at 20-22, 25; NLC Opposition at 5.*

To recap, the NLC's expert on the NLEB, Danielle O'Dell, attests in her Affidavit that:

- A 2018 publication entitled "Bat Use of an Island off the Coast of Massachusetts" that she co-authored reported consistently high detection rates of NLEB adjacent to mature pitch pine stands and the presence of breeding populations and maternity roosts in pitch pine scrub oak in other locations on Nantucket.

- The Surfside Project site is primarily pitch pine/scrub oak with a smaller portion of coastal shrubland.

- During peak maternity roost season for NLEBs, from early May to August of 2017, and May through September of 2018, multiple calls of NLEBs were recorded by acoustic detectors placed within .25 miles of the Project site.

- Two additional acoustic detectors deployed on September 19 through October 2, 2018 on nearby sites in the immediate vicinity of the Project site also documented high levels of NLEB activity.

- In her expert opinion, the Project site includes high quality habitat for the NLEB that is very similar to other known maternity roost habitat on Nantucket and that it is "highly likely" to contain potential roost trees.

*See O'Dell Affidavit* ¶¶ *5, 6, 8, 9-13.*

The NLC's Opposition, in reliance on the Collier and O'Dell Affidavits, further alleges that:

- Given the proximity and consistency of NLEB habitat to the Project site, it is "very likely" to be used by the NLEB and to be supporting their population for feeding and/or breeding.

- The areas protected through the NLC's work form a habitat continuum for state-listed species in the area of the Project site, and the Project site itself is a critical section of this habitat continuum.

- Habitat fragmentation resulting from the Project will result in a Take of state-listed species under MESA, both on the Project site and beyond.

- Development of the Project site and the associated Take of state-listed species will have a "direct and deleterious impact" to the areas and state-listed species already protected through the NLC's own efforts.

- The NLC's investment in its protection of state-listed species – through litigation, advocacy and the acquisition of CRs – totals hundreds of thousands of dollars, and the NLC and its partners are poised to expend almost $1 million to acquire a CR on property approximately 100 yards from the Project site.

- Consequently, the Take of state-listed species on the Project site will "vitiate" the NLC's investment in the immediate area of the Project site, resulting in harm that is peculiar to the NLC due to its unique role in protecting the habitat continuum through its long-term efforts and at considerable expense.

*See NLC Opposition at 9-11 and the references to the Collier and O'Dell Affidavits cited therein.*

I find that through the cited studies and expert opinion of its state-listed species expert, the NLC has set forth plausible factual allegations that the NLEB are likely present on the Project site and that the Project will result in a Take of the NLEB. Again, for the purpose of showing standing, the NLC is not required to prove that a Take of the NLEB will occur. Furthermore, the fact that Surfside Crossing has voluntarily agreed not to cut not to cut trees on the Project site during June or July in compliance with the federal 4(d) rule for the NLEB does not moot out the issue of whether a Take review by the Division is necessary. Among other reasons, were the Division to determine that the Project will cause a Take of the NLEB that cannot be avoided, Surfside Crossing would be required to meet the long-term Net Benefit mitigation standard in 321 CMR 10.23 in order for the Division to authorize the Take through a Conservation and Management Permit.

I further find that through the representations of its Executive Director in particular, the NLC has also identified a harm distinct to it as an organization that would result from a Take of the NLEB on the Project site and beyond – i.e., the adverse impact to its substantial investment in state-listed species protection within the habitat continuum

in the immediate area of the Project site. The proximity to and nexus between the NLC mission-related, MESA-relevant investments/efforts and the Take that will allegedly occur on the Project site and extend into the NLC-supported habitat continuum are key factors supporting my finding that the NLC as an organization will suffer an injury that is greater in kind and magnitude from the harm to the general public.

My determination that the NLC has adequately alleged an injury in fact is also consistent with the showing made by the petitioners in *16 Medouie Creek*, which included an affidavit from the petitioners' state-listed species expert that attested with specificity that the proposed project work would reduce the area of habitat and directly disturb a local pair of the state-listed species in question (the threatened northern harrier) on adjacent property and likely cause that pair to abandon their nesting area. *See 16 Medouie Creek at 22*. In contrast to the NLC, the Select Board failed to plausibly show how it would be injured by the Division's Take Determination in a manner that is special and different than the public. *See the discussion, supra, at 27-28*. Similarly, those among the 13 Individual Petitioners/residents who own property within the alleged habitat continuum in the area of the Project site made no showing (beyond being abutters) as to how they individually have a special interest in protecting state-listed species on their properties such that they will be harmed personally if the Project results in a Take of such species. Compare also with *In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL at 23-26; 31-35,* where I determined that neither Protect Sudbury as an organization nor its members demonstrated an injury in fact different from the public (finding that, particularly when considered in light of the scope of the grounds for its appeal, their allegations of injury were insufficiently

supported by credible evidence or attributed to the Division's failure to actively consult with the organization or certain members/supporters during the review of the project under MESA).

For all of the above reasons, I hereby deny the Division and Surfside Crossing's respective Motions to Dismiss the NLC's appeal for lack of standing.

Finally, I disagree with Surfside Crossing's argument that the NLC's appeal constitutes a challenge of a determination made by the Division pursuant to 321 CMR 10.13(a)(2) and is therefore is not justiciable because the MESA Regulations do not provide an avenue to appeal such Division determinations. *See Surfside Crossing Motion to Dismiss at 12-14.* The NLC appealed the Take Determination made by the Division for the Project pursuant to 321 CMR 10.18. In the circumstances of this case, determining whether the Project will cause a Take of state-listed species pursuant to 321 CMR 10.18 necessarily included the Division's consideration of new occurrence information on the NLEB and the related determination of whether the Project site meets the criteria under 321 CMR 10.12 for delineating it as Priority Habitat for the NLEB. If so, the MESA Regulations then envision the Division reviewing the Project to determine whether it will cause a Take of the NLEB. Consequently, it is reasonable and appropriate to regard the NLC's appeal as challenging the adequacy of Division's Take Determination made pursuant to 321 CMR 10.18, with a focus on whether it properly applied the criteria under 321 CMR 10.13. The Division's conclusion that the Project site should not be delineated as Priority Habitat for the NLEB meant that no review of whether the Project will cause a Take of the NLEB was required under 321 CMR 10.18. The absence of such a review of the Project's impact on the NLEB in the resulting

Division Take Determination is the subject of the NLC's appeal and falls within the appeal provision in 321 CMR 10.18. Moreover, this reading of the appeal provisions of the MESA Regulations is consistent with the Division's own position. In its Prehearing Statement, the Division stated that the only remaining issue for adjudication is whether the Division properly applied under 321 CMR 10.18 with respect to the NLEB when it made its Take Determination pursuant to 321 CMR 10.18. *See Division Prehearing Statement at 6.* I therefore deny Surfside Crossing's Motion to Dismiss the NLC's appeal for the above reasons, and have identified the Division's identification of single issue for adjudication in the NLC's appeal in Section V below.

## V. Order Establishing Issue for Adjudication and Directing Parties to Propose Schedule for Adjudication

### A. Issue for Adjudication

The single issue for adjudication is as follows:

1. ***Whether the Division properly applied its regulatory criteria at 321 CMR 10.13 and 10.18 when it made its October 19, 2018 Take Determination that the project will only result in a take of the Coastal Heathland Cutworm.***

### B. Order requiring the Parties' Proposed Joint Schedule for Adjudication

By no later than **Wednesday, May 8, 2019**, the remaining parties (Surfside Crossing, the Division and the NLC) shall submit a proposed joint schedule for adjudication, or separate proposed schedules if the parties are unable to agreed. Such schedule(s) shall propose dates for each of the following adjudicatory actions:

| Action | Filing Deadline |
|---|---|
| 1. *Prefiled Written Direct Testimony* | |
| 2. *Prefiled Written Rebuttal Testimony* | |

3. *Hearing*
*(limited to cross examination of the parties' witnesses)*

I am further requesting that the parties propose a schedule for adjudication that has the hearing completed in advance of Labor Day, 2019. Finally, as agreed upon at the Prehearing Conference, the NLC and/or Surfside Crossing shall arrange for a stenographer to be present at the hearing to transcribe the proceeding and thereafter provide copies of the hearing transcript to the Presiding Officer and the Division free of charge.

## VI. Notice Related to those Rulings that constitute the Final Recommended Decision of the Presiding Officer

The Rulings (1) dismissing the Petitioners' claim that the Division erred by not determining whether the Project will result in a Take of the New England Blazing Star (Section III); and (2) dismissing the Select Board and the 13 residents for lack of standing (Section IV.C. and D respectively) constitute the Recommended Final Decision of the Presiding Officer.

The above described Recommended Final Decision has been transmitted to the Director of the Division of Fisheries of Wildlife, Department of Fish and Game, for his final decision in this matter. This decision is therefore not a final decision of the Division, and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A. The Division Director's final decision is subject to court appeal and will contain a notice to that effect.

Because the above described Recommended Decision has now been transmitted to the Division Director, no party shall file a motion to renew or reargue this Recommended Final Decision or any portion of it, and no party shall communicate with the Director regarding this Decision, unless the Division Director, in his sole discretion, directs otherwise.

Dated: 4/24/19

By: Richard Lehan

Richard Lehan, Esquire
Presiding Officer
Division of Fisheries and Wildlife
Department of Fish and Game
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## SERVICE LIST

*Take Determination for Surfside Crossing, NHESP File No. 12-31035*
*Docket No. 2018-02-RL*

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