



February 17, 2023

CERTIFIED MAIL [7022 0410 0002 0978 7317]

Mark S. Tisa, Director
Massachusetts Division of Fisheries and Wildlife
Field Headquarters
One Rabbit Hill Road
Westborough, MA 01581

Re: Notice of Claim for Adjudicatory Hearing:
Appeal of the Massachusetts Division of Fisheries and Wildlife
Surfside Crossing, Nantucket, Massachusetts
NHESP File No. 12-31035

Dear Mark S. Tisa:

On behalf of Petitioner Nantucket Land Council, Inc., please find enclosed a Notice of Claim for Adjudicatory Hearing to the Massachusetts Division of Fisheries and Wildlife and a check for the filing fee in the above-reference matter.

Thank you for your attention to this matter.

Very truly yours,

/s/ Dennis A. Murphy

Dennis A. Murphy

Enclosures

cc: Surfside Crossing, LLC

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFIARS
DEPARTMENT OF FISH AND GAME
DIVISION OF FISHERIES AND WILDLIFE

_____)
In the Matter of Take Determination for)
Surfside Crossing)
NHESP File No. 12-31035)
_____)

Docket No. 2018-02-RL

And

_____)
In the Matter of Conservation and)
Management Permit for Surfside Crossing)
NHESP File No. 12-31035)
Conservation Permit No. 022-402.DFW)
_____)

NOTICE OF CLAIM FOR ADJUDICATORY HEARING

Petitioner Nantucket Land Council, Inc. (“Land Council”) submits this Notice of Claim for an Adjudicatory Hearing, in accordance with G.L. c. 30A, § 11 and 321 CMR 10.25, to appeal the Conservation and Management Permit (“CMP”) issued by the Division of Fisheries and Wildlife (“Division”) for the Surfside Crossing project on Nantucket, MA. In further support of Petitioner’s Notice of Claim enclosed is the Affidavit of Emily Molden, Executive Director of the Land Council. Also enclosed is a check for the filing fee. The file number of the project is NHESP File No. 12-31035. The CMP is permit number 022-402.DFW, a copy of which is enclosed. Petitioner requests an adjudicatory hearing on the CMP in accordance with 321 CMR 10.23 & 10.25.

I. Petitioner Nantucket Land Council, Inc., 6 Ash Lane, Nantucket, MA, is the party filing this Notice of Claim through its Counsel, whose contact information is below.

2. Petitioner satisfies the requirements of an “aggrieved person” to file this appeal. As attested in the Molden Affidavit, the Land Council has a definite interest in the matters in contention, has suffered an actual injury that is special and different from the public, which has resulted from the violation of a duty owed to Petitioner by the Division.
3. The Land Council’s longstanding interest in this matter dates back five years to 2018 when it appealed the NHESP Take Determination. The Presiding Officer ruled that Land Council satisfies the requirements of an “aggrieved person”, finding that:
 - Land Council “has presented sufficient evidence of the nexus between the NLC’s core mission and activities and interest that fall squarely within the MESA Zone of Interests.” (Molden Aff. ¶ 7 & Ex. B at p. 38)
 - Land Council “makes 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.” (Id. at 39)
 - “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.” (Id. at 43)
4. The Land Council’s status as an aggrieved party has already been adjudicated, and the Presiding Officer ruled that the Land Council has standing and is a property party in this matter. (Molden Aff. ¶ 8) For that reason, the Land Council should have received notice of the CMP, but was not included on the distribution list. (Id. ¶ 9; CMP p. 10)
5. Under the NHESP regulations, “any person aggrieved” by a conservation and management permit issued under 321 CMR 10.23 has the right to an adjudicatory hearing

at the Division. 321 CMR 10.25(1). As a “person aggrieved” in this matter, the Land Council was entitled to notice of the CMP. The failure to provide notice was in “violation of a duty owed to [the Land Council] by the Division.” 312 CMR 10.25(3)(b).

6. Had the Land Council been given notice of the CMP, it would have appealed within 21 days of its issuance. (Molden Aff. ¶ 11) This Notice of Claim has been filed within 21 days of the Land Council having actual notice of the CMP. The failure to provide notice of the CMP tolled the time to appeal it.

7. The CMP does not protect the interests identified in the Massachusetts Endangered Species Act, G.L c.131A (“MESA”) and its regulations, 321 CMR 10.00. Specifically, it does not meet the performance standards to mitigate the Take, in violation of 321 CMR 10.23(2) because:

- Alternatives were not adequately assessed, including the permanent protection of 20.34 acres of land off-site, as stated in the MEPA comment letters. (Molden Aff. ¶ 10)
- The permanent loss of 11.5 acres of habitat on a small island like Nantucket impacts a significant portion of the local population.
- The CMP does not provide a long-term Net Benefit because the harm from losing 11.5 acres of priority habitat exceeds the conservation contribution under the permit, and the CMP does not contribute significantly to the long term conservation of the species. 321 CMR 10.02.
- The CMP does not satisfy the 1:1.5 ratio for a species of special concern. 321 CMR 10.23(7)(a)(3).

WHEREFORE, Petitioner respectfully requests the following relief:

- A. That the Presiding Officer conduct an adjudicatory hearing to hear this appeal;
- B. That after such hearing the Presiding Officer annul the CMP as issued because it was arbitrary and capricious, in contravention of the facts and evidence, and in violation of MESA and its Regulations;
- C. That the Presiding Officer order the Division to reconsider the CMP – with input from the Land Council – to correct the errors set forth herein and to ensure the permit complies with prior rulings in this matter, as well as MESA and its Regulations;
- D. That the Presiding Officer stay the CMP pending the outcome of this Appeal; and
- E. That the presiding officer grant any and all such relief as is just and appropriate.

Respectfully submitted for Petitioner
By their attorney,

/s/ Dennis A. Murphy

Daniel C. Hill (BBO #644885)
Dennis A. Murphy (BBO #645168)
HILL LAW
6 Beacon Street
Boston, MA 02108
(617) 494.8300
dhill@danhilllaw.com
dgusmurphy@gmail.com

CERTIFICATE OF SERVICE

In accordance with 321 CMR 10.25(2) & (3)(d), undersigned counsel for Petitioner hereby certifies that this Notice of Adjudicatory Hearing was served on all parties, including the Division of Fisheries and Wildlife and Applicant Surfside Crossing, LLC, by certified mail, return receipt requested.

/s/ Dennis A. Murphy

Dennis A. Murphy (BBO #645168)

February 17, 2023



2022 00003244
 Bk: 1922 Pg: 1 Page: 1 of 38
 Doc: PERMIT 11/30/2022 11:56 .

DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581
 p: (508) 389-6300 | f: (508) 389-7890
 MASS.GOV/MASSWILDLIFE

MA ENDANGERED SPECIES ACT (G.L. c.131A) CONSERVATION AND MANAGEMENT PERMIT

DATE	August 31, 2022
CONSERVATION PERMIT NO.:	022-402.DFW
NHESP FILE No.	12-31035
PERMIT HOLDER	Surfside Crossing, LLC 37 Old South Road, Unit #6 Nantucket, MA 02554
PROJECT	"Surfside Crossing" Residential Development 3, 5, 7 and 9 South Shore Road Nantucket, MA 02554

A. Permit Authority

Pursuant to the authority granted in the Massachusetts Endangered Species Act ("MESA") (G.L. c. 131A) and its implementing regulations (321 CMR 10.23), the Director of the Massachusetts Division of Fisheries & Wildlife (the "Division") hereby issues a Conservation and Management Permit (the "Permit") to Surfside Crossing, LLC (the "Permit Holder"). This Permit authorizes the Take of the Coastal Heathland Cutworm (*Abagrotis benjamini*), which is State-listed as "Special Concern," pursuant to the MESA, arising out of the construction of ±11.50-acre residential development project (the "Project") on a ±13.56 acre site consisting of four (4) parcels (Map 67, Parcels 336, 336.7, 336.8 and 336.9) located west of South Shore Road in the Town of Nantucket, Massachusetts (Book 1612, Page 62, Nantucket County Registry of Deeds; the "Property").

B. Description of Take

The Property currently contains ±13.56 acres of pitch pine scrub oak barren habitat. The Division has determined (letter dated October 19, 2018) that the Project, as proposed, will result in a Take of the Coastal Heathland Cutworm through the permanent loss of suitable habitat and interference with the feeding, breeding, overwintering and migratory behaviors of this species.

C. Permit Performance Standards

MASSWILDLIFE

Under the authority granted by and in accordance with MGL c131A§3 and 321 CMR 10.23, the Director may permit the Take of a State-listed species for conservation and management purposes provided that there is a long-term Net Benefit to the conservation of the impacted species. If the Director determines that the applicant for a permit has avoided, minimized and mitigated impacts to the State-listed Species consistent with the following performance standards, then the Director may issue a conservation and management permit, provided:

- (a) the applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
- (b) an insignificant portion of the local population would be impacted by the Project or Activity, and;
- (c) the applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species that has been approved by the Director, as provided in 321 CMR 10.23(5), and shall be carried out by the applicant.

The Director has determined that the applicant for this Permit has met the above noted performance standards and that the conservation and management plan described herein provides a long-term Net Benefit to the conservation of the Coastal Heathland Cutworm.

D. Conservation and Management Plan

In order to provide a long-term Net Benefit to the conservation of the Coastal Heathland Cutworm, the Permit Holder has proposed, by way of the Permit Application, to: (i) permanently protect ±2.08 acres of the Property as open space and State-listed Species habitat through a Division-approved Declaration of Restriction; (ii) implement a Division-approved plan to restore several areas of pre-existing disturbance, and several areas of temporary disturbance associated with the Project, to high quality habitat for state-listed species within the open space; and (iii) provide mitigation funds for off-site land protection, conservation research, habitat management, and/or conservation planning in order to provide a long-term Net Benefit to the Coastal Heathland Cutworm in Massachusetts.

Therefore, the Project can be permitted pursuant to the MESA. This Permit is issued to condition the Project and to provide a long-term Net Benefit to the Coastal Heathland Cutworm.

E. Related Project Authorizations

- i. MA Environmental Policy Act (EEA 16173) Certificate: Issued June 5, 2020.

F. Documents and Plans of Records

In accordance with the documents and plans of record submitted to the Division entitled:

- "Conservation and Management Permit Application" (dated May 31, 2022; prepared LEC Environmental Consultants, Inc.) and "Surfside Crossing CMP Supplemental Letter (dated June 28, 2022; prepared by LEC Environmental Consultants, Inc.) (collectively, the "Permit Application");
- "Layout Plan" (dated February 15, 2018; revised through February 10, 2022; prepared by Bracken Engineering, Inc.; the "Project Plan"; [Attachment 1](#));
- "Open Space Plan" (dated July 25, 2022; prepared by Bracken Engineering, Inc.; the "Open Space Plan"; [Attachment 2](#));
- Draft Declaration of Restriction ([Attachment 3](#));
- Draft Escrow Agreement ([Attachment 4](#));

MASSWILDLIFE

- "Revegetation Planting Plan" (dated August 9, 2022) and "Revegetation Planting Plan Narrative" (dated August 16, 2022) (collectively, prepared by LEC Environmental Consultants, Inc.; the "Restoration Plan"; Attachment 5);

and any other plans and documents referenced herein (collectively, the "Plans of Record"), this Permit is issued with the following General and Special Conditions:

G. General Conditions

GC 1.	The Permit Holder shall comply with all General and Special Conditions of this Permit and complete the Project consistent with all Division-approved plans and supporting documents referenced herein, except as otherwise approved by the Division in writing.
GC 2.	A violation of any General or Special Condition of this Permit will result in an unauthorized Take and may be subject to civil and or criminal penalties pursuant to M.G.L. c. 131A. The Division reserves the right to require an immediate cessation of Work (as defined in Special Condition #1), in whole or in part and at its sole discretion, should the Permit Holder violate any General or Special Condition of this Permit.
GC 3.	The Permit Holder shall submit in writing any documents, plans, reports, or other items required for submission in accordance with this Permit, for review and written approval by the Division, except as otherwise approved by the Division in writing.
GC 4.	Division representatives shall have the right to enter and inspect the Property subject to this Permit at reasonable hours to evaluate Permit compliance and require the submittal of additional, reasonable information not otherwise required by this Permit but deemed necessary by the Division to complete its evaluation.
GC 5.	Any land protected to achieve a long-term Net Benefit associated with this Permit shall remain undeveloped and protected as habitat for State-listed Species in perpetuity.
GC 6.	This Permit shall not preclude the review of future projects on the Property that are subject to the Wetlands Protection Act Regulations (310 CMR 10.37, 10.58(4)(b), 10.59), as applicable, by the Division.
GC 7.	This Permit does not relieve the Permit Holder of the necessity of complying with all applicable federal, state or local statutes, ordinances, bylaws or regulations, including but not limited to those administered by the Town of Nantucket Conservation Commission and the Massachusetts Department of Environmental Protection.
GC 8.	All Work shall be in conformance with the Plans of Record. Any changes, updates, or revisions to the Project, or any additional work beyond that shown on the Plans of Record, shall require additional review and approval by the Division prior to implementation, pursuant to General Condition #9. This Permit prohibits any work not specifically authorized by this Permit, unless otherwise approved by the Division in writing prior to performing the additional work.
GC 9.	Any proposed change to any plan identified in this Permit, or to the State-listed species conservation and management plan required by way of this Permit, shall require the Permit Holder to inquire of the Division, in writing, whether the change is significant enough to require the filing of a new Conservation and Management Permit Application, and or require additional long-term Net Benefit for affected State-

	<p>listed Species. The Division retains the right to require the submittal of additional, reasonable information to evaluate the proposed plan change.</p>
GC 10.	<p>This Permit shall apply to, and inure to the benefit of, the Permit Holder and any successor-in-interest of the Permit Holder, or to a subsequent successor-in-control of the Property or portion thereof subject to this Permit should the Permit Holder convey its record ownership of the Property to said successor-in-control, as well as to any contractor or other person performing Work conditioned by this Permit. Within three (3) days of the transfer of an interest in the Property or a portion thereof, any successor-in-interest or subsequent successor-in-control [i.e., subsequent owners or operators] of the Property or a portion thereof shall provide the Division with a letter indicating (1) that the successor is the successor-in-interest of the Permit Holder or the successor-in-control [i.e., current owner or operator] of the Property or a portion thereof, and (2) that said successor will perform the obligations of the Permit Holder as set forth in this Permit.</p> <p>If the Permit Holder determines that the successor-in-control of the Property or portion thereof should be a Homeowners Association, Condominium Association, or the like whose members are the owners of all or a portion of the constructed units, the Permit Holder shall submit to the Division for review of compliance with the terms and provisions of this Permit all proposed documents creating said Homeowners Association, Condominium Association, or the like and defining the rights, powers, and responsibilities of said Association and its members. No such Association's documents shall be signed, recorded, or be deemed legally effective in any manner without the express written approval of the Division. The Division's review and approval of such documents are limited to ensuring compliance with this Permit.</p>
GC 11.	<p>Prior to the initiation of Work, the Permit Holder shall notify the Division in writing of the name, address, email, business and home telephone numbers of the project supervisor(s) and/or contractor(s) responsible for compliance with this Permit. The Permit Holder shall provide updated information in writing to the Division should new or additional project supervisors and/or contractors be hired after Work has commenced. Prior to the initiation of Work, said project supervisor(s) and/or contractor(s) shall be provided a copy of this Permit. Said project supervisor(s) and/or contractor(s) may be held responsible for violations of this Permit performed by said project supervisor(s) and/or contractor(s).</p>
GC 12.	<p>Prior to the initiation of Work, the text of this Permit shall be recorded by the Permit Holder in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Property. In the case of recorded land, the Permit shall be noted in the Registry's Grantor Index under the name of the owner of the Property upon which the proposed Work is to be done. In the case of registered land, the Permit shall be noted on the Land Court Certificate of Title of the owner of the Property upon which the proposed Work is done. The Permit Holder shall submit to the Division a date-stamped and signed copy of said recorded Permit showing the date and book and page of recording within five (5) business days after recording and/or filing, as applicable. No Work shall be initiated on the Property until the Permit is recorded and said recorded copy is submitted to the Division, except as otherwise approved by the Division in writing.</p>
GC 13.	<p>Prior to the initiation of Work, the Permit Holder shall send a summary report to the Division which: (a) demonstrates compliance with all pre-Work General and Special Conditions of the Permit; and (b) requests permission to initiate the Work authorized by the Permit. Unless otherwise authorized by the Division in writing, no Work may be initiated on the Property until the Permit Holder has received written confirmation from the Division confirming compliance with all pre-Work General and Special Conditions and authorizing the initiation of Work. Within three (3) days of the initiation of Work, the Permit Holder shall send a letter to the Division confirming the date upon which Work commenced.</p>

GC 14.	<p>The Project authorized by this Permit shall be completed within five (5) years from the date of issuance. If needed, the Permit Holder shall submit a written request to the Division for an extension of time to complete said Project, and the Division will review the Project pursuant to MESA for any continuing impacts as described herein and for any new impacts to any State-listed species found subsequent to the issuance date of this Permit. Said request shall be submitted to the Division at least sixty (60) days prior to expiration of this Permit, and shall include a summary report demonstrating compliance with all General and Special Conditions of this Permit.</p>
GC 15.	<p>Within (3) months of the completion of Work the Permit Holder shall submit to the Division a written request for a Certificate of Permit Compliance (the "Certificate"), including as-built plans and other supporting materials demonstrating the completion of Work and compliance with all General and Special Conditions of the Permit.</p> <p>The text of the Division-issued Certificate shall be recorded by the Permit Holder in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Property. Unless an extension is granted in writing by the Division pursuant to General Condition #14, the Permit Holder shall record the Division-issued Certificate prior to expiration of the Permit. The Permit Holder shall submit to the Division a date-stamped and signed copy of said recorded Certificate showing the date and book and page of recording within five (5) business days after recording and or filing, as applicable.</p>

H. Special Conditions:

SC 1.	<p><u>Work Authorized by the Permit:</u> This Permit authorizes the construction of a ±11.50-acre residential development project ("Surfside Crossing") on the Property, as shown on the Project Plan (the "Work"; Attachment 1). All Work shall be confined to the area of the Property within the limits of Work shown on the Project Plan (Attachment 1). The Permit Holder has proposed to perform all tree clearing activities on the Property between August 1 and May 31 of any year, unless otherwise approved by the Division. The Work also includes any other on-site activity required by the Division as a condition of this Permit.</p>
SC 2.	<p><u>Integration of Dark Sky Design Principles:</u> Unless otherwise approved by the Division, all outdoor lighting associated with the Project shall comply with dark sky lighting design principles as outlined by the International Dark-Sky Association (https://www.darksky.org/our-work/lighting/lighting-principles/) or substantially similar.</p>
SC 3.	<p><u>Declaration of Restriction:</u> The Permit Holder has proposed to permanently protect ±2.08 acres of land on the Property – labeled "Protected Open Space" (the "Open Space") on the Open Space Plan (Attachment 2) - as open space and habitat for state-listed species through a Division-approved Declaration of Restriction (Attachment 3). The Declaration of Restriction shall run in perpetuity.</p> <p>Prior to the initiation of Work, the Permit Holder shall provide proof to the Division of appropriate recordation of the approved Declaration of Restriction in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Open Space. Any proposed changes to the text of the Declaration of Restriction shall be submitted to the Division for review and approval prior to recordation. Any violation of the Declaration of Restriction, as approved by the Division recorded, is a violation of this Permit pursuant to General Condition #2.</p>

	<p>The Permit Holder has proposed that a Condominium Association or similar shall have the right, responsibility and obligation to protect and manage the Open Space as native habitat for state-listed species pursuant to the terms and conditions of this Permit and the Declaration of Restriction.</p>
SC 4.	<p>Re-Recording Declaration of Restriction: The Permit Holder shall re-record the Declaration of Restriction no later than thirty (30) years from the date of initial recording and every twenty (20) years thereafter in perpetuity, in accordance with the requirements of G.L. c. 184 §§ 23-30.</p> <p>The Permit Holder and the Division are authorized, jointly and severally, to re-record and file any notices and/or instruments to protect the Open Space in accordance with the provisions of G.L. c. 184 §§ 23-30. Without limiting the foregoing, the Grantor agrees to execute any such notices and or instruments at the request of the Division within thirty (30) days of said request.</p>
SC 5.	<p>Temporary Demarcation of Limits of Work: Prior to the initiation of Work, the limits of Work shown on the Project Plan (Attachment 1) shall be monumented and marked with temporary flagging, silt fencing, and or other similar visual marker sufficient to clearly delineate the area of the Property within which all Work will occur.</p>
SC 6.	<p>Permanent Demarcation of Open Space: Prior to the initiation of Work, or as otherwise approved by the Division in writing, the boundaries of the Open Space shall be permanently monumented and marked with signage as shown on the Open Space Plan (Attachment 2). Said permanent bounds and signage shall be maintained in good condition by the Permit Holder and repaired or replaced, as necessary.</p>
SC 7.	<p>State-listed Species Conservation: In order to provide a Net Benefit to the conservation of the State-listed species impacted by this Project, the Permit Holder has proposed to provide restricted funding in the amount of \$641,796 (the "Funds") for land protection, conservation research, habitat management and or conservation planning to benefit Coastal Heathland Cutworm in Massachusetts. The Permit Holder has chosen to fulfill this obligation by providing restricted funding to an escrow account, subject to an escrow agreement in substantially the same form shown in Attachment 4 (which has been approved by the Division), or through another Division-approved mechanism. Any changes to said agreement, other than typographical or grammatical changes, must be approved in writing by the Division before the escrow is established. Therefore, the Permit Holder shall send written confirmation to the Division of depositing the Funds into an escrow account subject to and according to the terms of the escrow agreement (Attachment 4), including written confirmation of deposit receipts and an electronic copy of the executed escrow agreement.</p> <p>Unless otherwise approved by the Division, the Permit Holder shall have a period of one (1) year from the date of final deposit to use all or a portion of the Funds for the purpose of permanently protecting and or enhancing habitat for Coastal Heathland Cutworm within the Town of Nantucket (the "Habitat Conservation Project"). Said Habitat Conservation Project shall be subject to prior review, approval and any requirements of the Division as a condition of its approval, including but not limited to those specified within the escrow agreement (Attachment 4). Any land or interest in land purchased using the Funds shall be protected in perpetuity as open space and State-listed Species habitat through either (i) an Executive Office of Energy & Environmental Affairs-Division of Conservation Services approved conservation restriction, or (ii) conveyance in fee to a qualified land trust or government entity approved by the Division. Said conservation restriction or deed of conveyance shall be submitted to the Division for review and written approval prior to recordation.</p> <p>If any portion of the Funds remain in the escrow account at the end of said one (1) year period, the Division, and not the Permit Holder, shall have sole responsibility for ensuring that remaining Funds are</p>

	used for land protection, conservation research, habitat management and/or conservation planning to benefit Coastal Heathland Cutworm in Massachusetts.
SC 8.	<p>Habitat Restoration Plan: The Permit Holder has proposed to restore ± 0.10 acres of the Open Space as described in the Restoration Plan (Attachment 5). Any changes to the Restoration Plan shall require prior review and written approval from the Division. Initial restoration activities shall occur prior to and or in conjunction with Work and shall be completed prior to the completion of Work associated with the Project.</p> <p>By the end of the first and second full growing seasons following implementation of habitat restoration activities, a qualified, Division-approved biologist shall prepare and deliver a site evaluation report to the Division and the Permit Holder. Said report shall describe: (i) current habitat conditions (including photographs and detailed descriptions of habitat conditions) within the restoration areas; (ii) an assessment of the success or failure of restoration activities in achieving the desired habitat conditions; and (iii) additional actions recommended to achieve the desired habitat conditions, if necessary.</p> <p>The Permit Holder shall take all reasonable measures necessary to implement the recommendations of the biologist to restore high quality habitats for Coastal Heathland Cutworm, provided that said recommendations are approved in writing by the Division.</p>
SC 9.	<p>Construction Staff Education: All construction, landscaping, and other sub-contractors associated with the Project shall be informed in writing of the likely presence of State-listed species on the Property and what measures should be implemented to minimize direct harm to State-listed Species. Further, no wildlife shall be removed from the Property without approval of a qualified, Division-approved wildlife biologist or the Division except as necessary to receive veterinary treatment in the case of harm during construction.</p>
SC 10.	<p>Observations of State-listed Species: The Division shall be notified, in the form of an NHESP Rare Animal or Plant Observation Form, within ten (10) days of the observation of any State-listed species within or outside the limits of Work. Visit https://www.mass.gov/how-to/report-rare-species-vernial-pool-observations for access to observation reporting forms.</p>

I. Notice of Appeal of Rights:

This Permit is a final decision of the Division of Fisheries and Wildlife pursuant to 321 CMR 10.23. Any person aggrieved by this decision shall have the right to an adjudicatory hearing at the Division pursuant to M.G.L. c. 30A, s.11 in accordance with the procedures for informal hearings set forth in 801 CMR 1.02 and 1.03.

Any notice of claim for an adjudicatory hearing shall be made in writing and be accompanied by a filing fee in the amount of \$500.00. The notice of claim shall be sent to the Division by certified mail, hand delivered or postmarked within twenty-one (21) days of the date of issuance of this Permit to:

Mark S. Tisa, Director
 Massachusetts Division of Fisheries and Wildlife
 Field Headquarters
 One Rabbit Hill Road
 Westborough, MA 01581

Any notice of claim for an adjudicatory hearing shall include the following information:

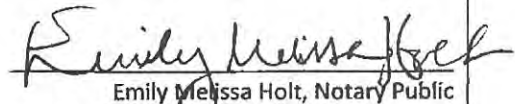
MASSWILDLIFE

1. The file number for the project;
2. The complete name, address and telephone number of the person filing the request, and the name, address and telephone number of any authorized representative;
3. 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 (a) how they have a definite interest in the matters in contention within the scope of interests or area of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00 and (b) 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;
4. A clear statement that an adjudicatory hearing is being requested;
5. A clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of the Division and the basis for those objections; and the relief sought through the adjudicatory hearing; and a statement that a copy of the request has been sent by certified mail or hand delivered to the applicant and the record owner, if different from the applicant.



Everose Schlüter, Ph.D., Assistant Director
Massachusetts Division of Fisheries & Wildlife

On this 31st day of August, 2022 before me, the undersigned notary public, personally appeared Everose Schlüter, Ph.D., Assistant Director, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.



Emily Melissa Holt, Notary Public
My Commission Expires: July 12, 2024

Conservation and Management Permit 022-402.DFW
Issued: August 31, 2022
Expires: August 31, 2027



MASSWILDLIFE

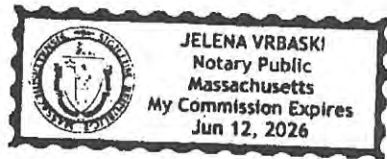
Acknowledgement and Acceptance of all Terms of this Permit

The undersigned below agrees that commencement of any work authorized by and described in this Permit constitutes acknowledgement and acceptance of all terms of this Permit.

<i>Surfside Crossing LLC</i>	
Signatory 1	<i>[Signature]</i>
Organization	<i>Manager</i>

COMMONWEALTH OF MASSACHUSETTS

On this 01 day of 09, 2022 before me, the undersigned notary public, personally appeared JAMES D FEELEY proved to me through satisfactory evidence of identification which was MASS DRIVERS LICENSE to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.



SEAL

Notary Public:

Jelena Vrbaski

My Commission Expires: 06/12/2026

Distribution List

Nantucket Board of Selectmen
Nantucket Conservation Commission
Nantucket Planning Board
Alex Strysky, MA Environmental Policy Act Office
Brian Madden, LEC Environmental Consultants, Inc.

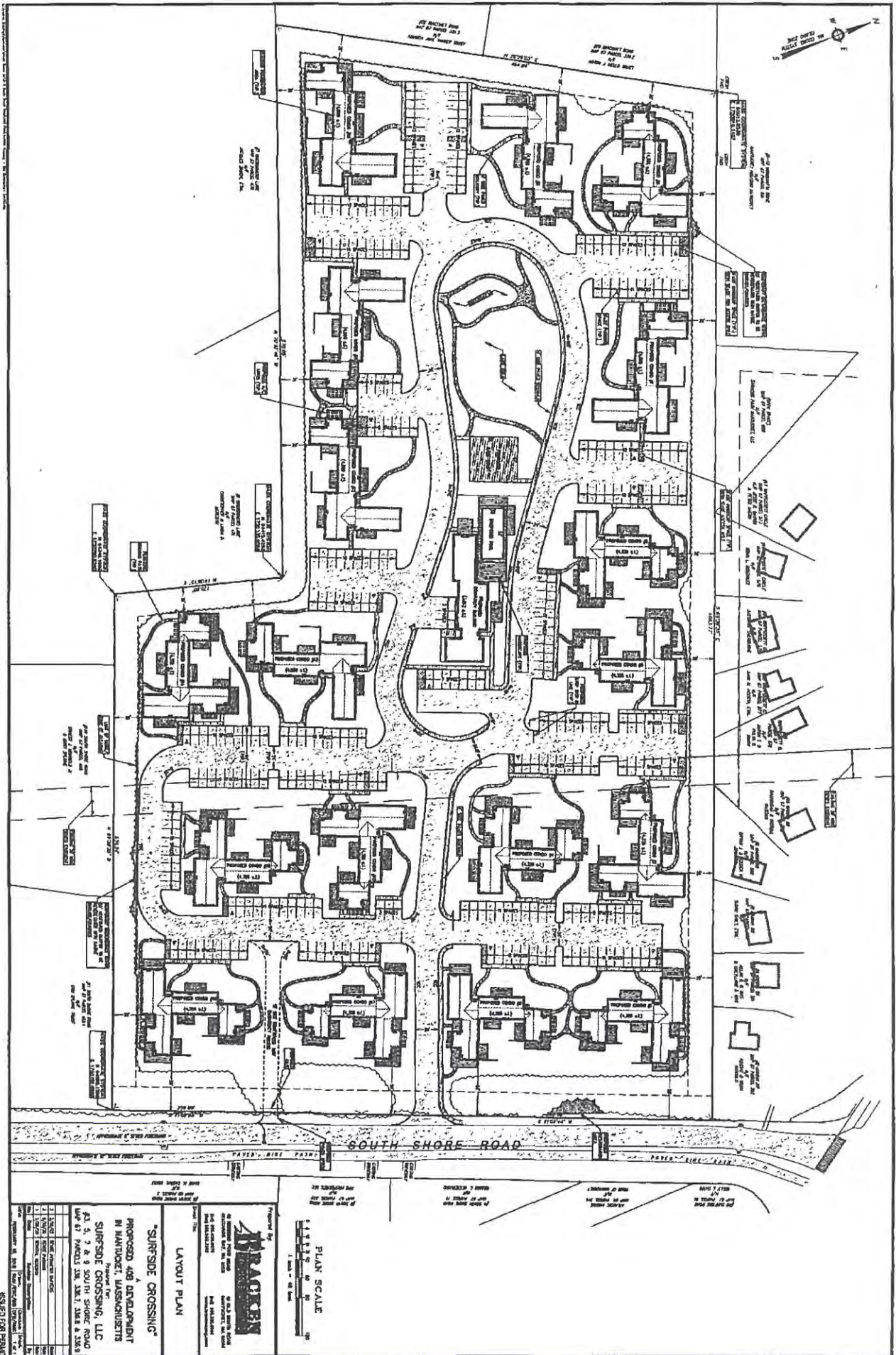
MASSWILDLIFE

Attachment 1

"Layout Plan" (dated February 15, 2018; revised through February 10, 2022; prepared by Bracken Engineering, Inc.; the "Project Plan"

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**



BRACKEN
 ARCHITECTS
 100 SOUTH SHORE ROAD
 MANLYPORT, MASSACHUSETTS 01904
 TEL: 508-833-1111
 FAX: 508-833-1112
 WWW.BRACKENARCHITECTS.COM

Prepared by:
 BRACKEN ARCHITECTS
 DATE: 08/15/2011
 PROJECT NO.: 11-001

LAYOUT PLAN
 "SURFSIDE CROSSING"
 PROPOSED 408 DEVELOPMENT
 IN MANLYPORT, MASSACHUSETTS
 Prepared for:
 SURFSIDE CROSSING, LLC
 43, 5, 7 & 9 SOUTH SHORE ROAD
 MANLYPORT, MASSACHUSETTS 01904

NO.	DATE	DESCRIPTION
1	08/15/2011	ISSUED FOR PERMIT
2	08/15/2011	ISSUED FOR PERMIT
3	08/15/2011	ISSUED FOR PERMIT
4	08/15/2011	ISSUED FOR PERMIT
5	08/15/2011	ISSUED FOR PERMIT
6	08/15/2011	ISSUED FOR PERMIT
7	08/15/2011	ISSUED FOR PERMIT
8	08/15/2011	ISSUED FOR PERMIT
9	08/15/2011	ISSUED FOR PERMIT
10	08/15/2011	ISSUED FOR PERMIT

PLAN SCALE
 1" = 40'

Attachment 2

"Open Space Plan" (dated July 25, 2022; prepared by Bracken Engineering, Inc.; the
"Open Space Plan"

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**



I CERTIFY THAT THE PROPERTY LINES SHOWN ON THIS MAP WERE OBTAINED BY MEASUREMENTS MADE BY ME OR BY A LICENSED SURVEYOR AND THAT THE SAME ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.



MASSACHUSETTS REG. NO. 37713

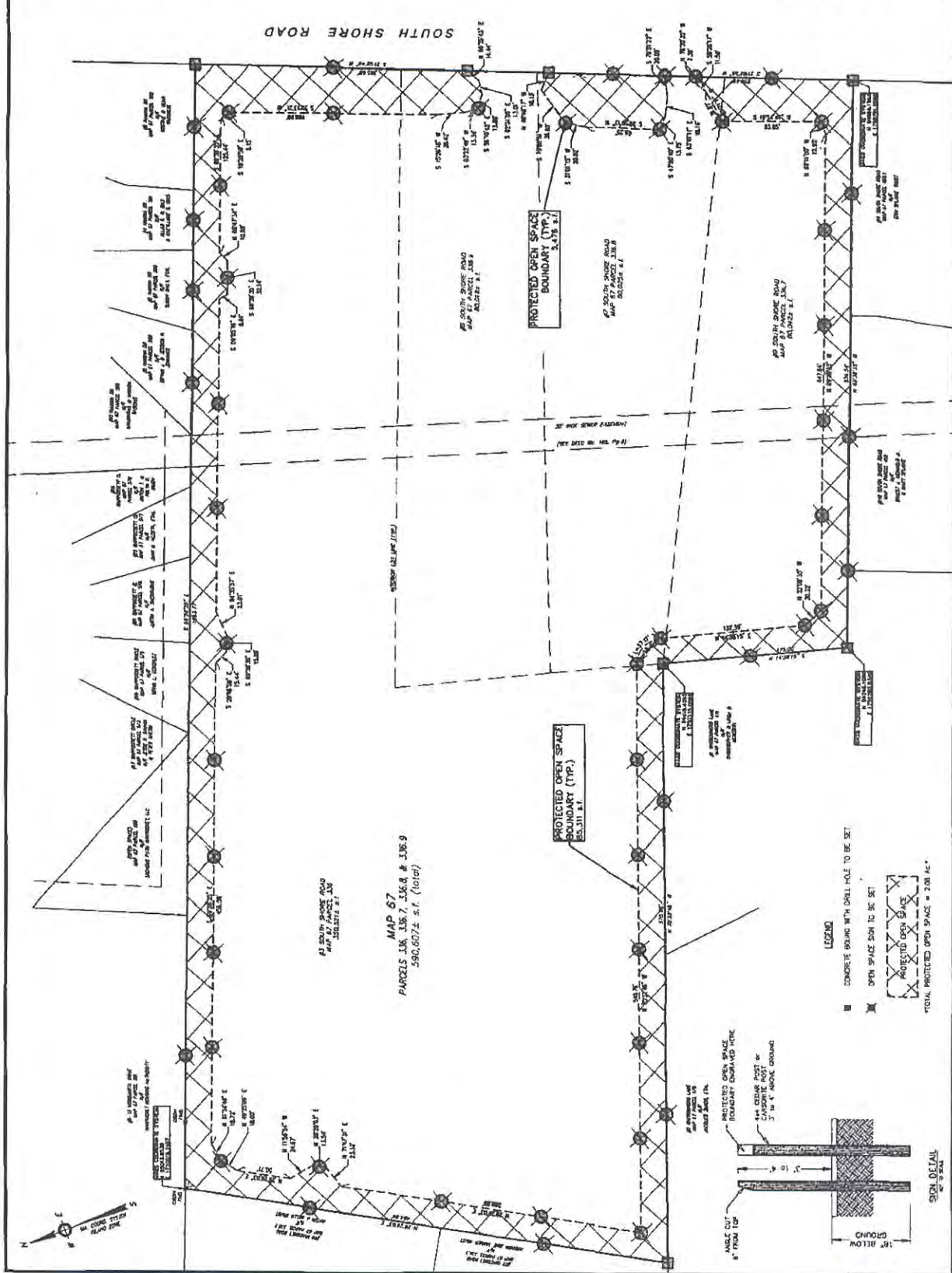
NOTICE

1. LOCUS: MAP 67, PARCELS 136.7, 136.8 & 136.9
2. OWNER: SURFSIDE CROSSING LLC, 19 OLD SOUTH ROAD, NANTUCKET, MA 02554
3. 2020 REV. No. 1013, Pg. 02
4. PLAN REF: No. 25 (Pg.20) (LUTS 1-4)

OPEN SPACE PLAN
NANTUCKET, MASS.

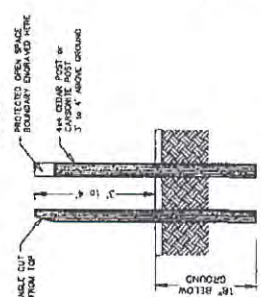
PREPARED FOR
SURFSIDE CROSSING, LLC
BRACKEN ENGINEERING, INC.
19 OLD SOUTH ROAD
NANTUCKET, MA 02554
TEL: (508) 325-0044
FAX: (508) 633-2282

SCALE: 1" = 30' JULY 25, 2022



MAP 67
PARCELS 136.7, 136.8 & 136.9
590,607± s.f. (total)

LEGEND
 ■ CONCRETE BOUNDARY WITH DRILL HOLE TO BE SET
 ✕ OPEN SPACE SIGN TO BE SET
 □ PROTECTED OPEN SPACE
 TOTAL PROTECTED OPEN SPACE = 2.08 AC.



Attachment 3

Draft Declaration of Restriction

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**

Declaration of Restriction
MAKE ALL CHANGES USING THE TRACK CHANGES FUNCTION OF MS WORD

Copy of draft, Division-approved document; for reference as an attachment to an Authorization issued pursuant to the MA Endangered Species Act. This Declaration of Restriction must be recorded as its own, separate instrument in the Registry of Deeds.

Draft: August 19, 2022; 11 pages
 Grantor: Surfside Crossing, LLC
 Property Address: 3, 5, 7, & 9 South Shore Road, Nantucket
 Grantor's Title: Book 1612 Page 62, Nantucket County Registry of Deeds

DECLARATION OF RESTRICTION

THIS DECLARATION OF RESTRICTION (hereinafter the "Declaration") is made this _____ day of _____, 2022, by Surfside Crossing, LLC, 37 Old South Road, Unit #6, Nantucket, MA 02554 (hereinafter the "Grantor").

WITNESSETH

WHEREAS, collectively, Grantor is the owner of that certain parcels of land known as 3, 5, 7, & 9 South Shore Road (Map 67, Parcels 336, 336.9, 336.8, & 336.7) located in the Town of Nantucket, Nantucket County, Massachusetts (hereinafter the "Premises"), shown on the Open Space Plan, prepared by Bracken Engineering, Inc., dated _____, and recorded in the _____ County Registry of Deeds at Plan Book _____ as Plan _____ (the "Plan"); and

WHEREAS, the Premises are subject to the terms and provisions of the Massachusetts Endangered Species Act (MESA) (MGL. c. 131A) and its implementing regulations (321 CMR 10.00); and

WHEREAS, the Premises contains important habitat for wildlife including but not limited to the Coastal Heathland Cutworm (*Abagrostis benjamini*), which at the time of this recording is listed as a Special Concern species pursuant to the MESA; and

WHEREAS, the Grantor sought authorization from the Natural Heritage and Endangered Species Program within the Division of Fisheries and Wildlife ("Division"), in accordance with the requirements of MESA, to develop the Premises. The Division determined that the development would result in a Take of the Coastal Heathland Cutworm pursuant to the MESA on October 19, 2018 relative to the Premises and the Plan; and

WHEREAS, the Grantor desires and agrees as a condition of Conservation and Management Permit 022-____.DFW, dated _____, recorded in the Nantucket County Registry of Deeds at Plan Book _____, Page _____, and as amended (the "Authorization"; incorporated by reference herein), issued

by the Division pursuant to MESA for the project described in the Authorization, to protect *in perpetuity* a total of +/-2.08 acres of the Premises as state-listed rare species habitat as shown on the Plan (the "Open Space"); and

WHEREAS, the Open Space provides actual and substantial benefit to the Grantor as an integral part of the development of the Premises for other conservation purposes. Consequently, the Grantor desires to protect the Open Space by restricting development for the benefit of itself, successors and assigns, including individual successors in ownership of Surfside Crossing, LLC, respectively (collectively, the "Grantor"); and

WHEREAS, Grantor desires and agrees that this Declaration shall run in perpetuity, as implemented in accordance with the requirements of G.L. c. 184 §§ 23-30; and

WHEREAS, Grantor desires and agrees that the Open Space, which in total contains approximately +/- 2.08 acres as shown on the Plan, shall be maintained as habitat and open space, subject to the Prohibited Uses and Reserved Rights set forth below; and

NOW, THEREFORE, Grantor hereby voluntarily declares and imposes in perpetuity upon the Open Space, as implemented in accordance with the requirements of MGL. c. 184 §§ 23-30, the following covenants, conditions and restrictions for the benefit of the Grantor and the Division, and said Open Space shall be held, transferred, sold, conveyed, occupied and used subject to the covenants, terms, conditions, and restrictions contained herein.

1. **Definitions.**

- a. **Hazardous Material:** shall mean any material or substance that, whether by its nature or use, is now or hereafter defined as a pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material, hazardous substance or contaminant under any environmental law, or which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic or otherwise hazardous and which is now or hereafter regulated under any environmental law.
- b. **Pervious:** shall mean built of materials consisting of unconsolidated minerals such as sand, dirt or gravel, or natural materials such as wood chips or grass.
- c. **Structure:** (whether or not said term is capitalized) shall mean anything constructed or erected which requires permanent or temporary location on, in, over or under the ground or permanent or temporary attachment to something which is erected or placed on the ground and designed, intended or arranged for the housing, shelter, enclosure and/or structural support of persons or animals of any kind, including but not limited to houses, mobile homes, tents, barns, sheds, greenhouses, treehouses, and other buildings of any kind; silos and cribs; swimming pools; playing courts; outdoor riding rings; fences; pads; patios and decks; docks; bridges; roads; driveways and parking areas (whether surfaced with macadam, brick, paving stones, gravel, clay or other material); artificially surfaced walkways; solar panels; satellite dishes and antennae; signs and billboards; storage tanks; windmills and wind turbines; and water, sewer, power, fuel, gas and communication lines, other utility systems and related facilities.
- d. **Passive Recreation:** activities that are non-consumptive uses of resources and do not require prepared facilities like sports fields and pavilions. Passive recreation activities place minimal

stress on the site's resources and are compatible with the conservation values. Examples include hunting, hiking, wildlife viewing, observing and photographic nature, picnicking, walking, bird watching, running/jogging, stargazing, and fishing. Passive recreation excludes mountain bikes, use of motorized vehicles, and horseback riding, unless specified herein.

2. **Prohibited Uses.** Except as to reserved rights set forth in Section 3 below, the Grantor shall not perform or permit others to perform the following acts or uses, which are prohibited, in, on, above or below the Open Space:
- a. **Structures.** Constructing, placing, or allowing to remain any Structure;
 - b. **Extractive Activities and Uses.** Mining, excavating, dredging or removing soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit, or changing existing topography;
 - c. **Disposal and Storage.** Placing, filling, storing or dumping of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, tree and other vegetation cuttings, waste or Hazardous Material or other substance or material whatsoever, whether or not generated on the Open Space, or the installation of underground storage tanks;
 - d. **Impacts to Vegetation.** Removing, cutting, pruning or destroying vegetation (native or non-native), including, but not limited to trees, shrubs, grasses and ground covers, except as allowed in writing by the Division to remove hazards to users;
 - e. **Pesticides.** Applying or using fertilizers, fungicides, herbicides or pesticides in any quantity;
 - f. **Introduction of Non-Native Species.** Planting, releasing, cultivating, maintaining, or engaging in any other activity that introduces plant or animal species that pose a substantial risk of being invasive or are otherwise detrimental to the native plant and animal community, as determined by the Division. A list of plant species deemed to be invasive is provided in the Massachusetts Prohibited Plant List, which is updated and maintained by the Massachusetts Department of Agricultural Resources;
 - g. **Impacts to Water, Soil and Other Natural Features.** Activities detrimental to drainage, flood control, erosion control, water or soil conservation, archaeological resources or the quality of ground water and wetlands;
 - h. **Domestic Animals and Livestock.** Animal penning or grazing; holding horses, pets, livestock, or domestic animals within a paddock; horseback riding, causing or permitting any domestic or livestock to be unattended or to roam or be at large; and storing or dumping of manure or other animal wastes; any agricultural use;
 - i. **Motor Vehicles.** The use, parking or storage of motorized vehicles, including, but not limited to, trucks, trail bikes, motorized or non-motorized, all-terrain vehicles, dune buggies, boats, trailers, and snowmobiles and parts of these vehicles, except as necessary by the police, fire fighters, ambulance services, or other governmental agents in carrying out their lawful duties; and except for motorized wheelchairs or scooters used by physically challenged parties;

- j. Stone Walls or Markers. Disrupting, removing, or destroying of any stone walls, historical stone monuments, granite fences, granite posts, or boundary markers;
 - k. Docks and Similar Structures. Installing any dock, pier, ramp, jetty or other such structures;
 - l. Subdivision. Subdivision or conveyance of a part or portion of the Open Space (as compared to conveyance of the Open Space in its entirety, which shall be permitted) except as allowed by the Plan and the Authorization;
 - m. Damage or Disturbance. Damaging, disturbing, removing or harming any part or portion of the Open Space or any resource, real, natural, personal, cultural or historic, except through hunting, fishing, or trapping where permitted and carried out in accordance with regulations issued by the Division pursuant to MGL. c. 130, 101 and 321 CMR, or other written authorization from the Division; and
 - n. Inconsistent Uses. The use of the Open Space for business, residential or industrial purposes, or for more than de minimis commercial passive recreation, or any other use or activity which is inconsistent with or which would otherwise shall not impair the conservation values of the Open Space and the purposes of this Declaration.
3. **Reserved Rights:** The Grantor reserves the right to conduct or permit the following activities in the Open Space, provided they do not materially impair the conservation values or purposes of this Declaration or other significant interests:
- a. Fences. With prior written permission of the Division and after consultation with and consistent with the advice of a professional biologist to ensure such use will not be detrimental to any state-listed species or other wildlife, to erect and maintain sight-pervious, non-enclosing, wildlife friendly fences, such as wooden split rail or other open-faced fences, or low hedges of native species;
 - b. Passive Recreational Uses. To conduct non-commercial, Passive Recreational uses of the Open Space, such as nature study, birding, wildlife observation, walking on existing trails, and similar passive recreation activities, provided such uses do not alter the topography, including, but not limited to the landscape or environmental qualities of the Open Space;
 - c. Monuments and Signs. With prior written permission of the Division, the right to install temporary or permanent boundary monuments and the right to erect and maintain small signs that provide information, including identifying the Grantor, provided that such signage is consistent with the purposes of this Declaration and does not identify the location or existence of any specific state-listed species on the Open Space;
 - d. Vegetation Management. With prior written permission of the Division, the right to remove or control hazardous trees, poison ivy, oriental bittersweet, other invasive or exotic species, insect infestations, diseases, and other types of pests by methods, including but not limited to, the use of spot-applied herbicides, fungicides and pesticides in a manner that minimizes damage to surrounding, non-target species and preserves water quality;

- e. **Habitat Management and Restoration.** With prior written permission of the Division, the right to monitor, restore, maintain, enhance or otherwise manage biotic communities or habitats for the benefit of native or rare species that include, but are not limited to, application of herbicide, selective planting of native species, removing of brush, selective de minimis pruning and cutting of trees, brush, and grass, prescribed burning or removal of native vegetation, forestry, and modification of soils. All habitat restoration, maintenance or enhancement of rare species habitat shall be done in accordance with the written permission of the Division and applicable Authorization requirements;
- f. **Trails.** With prior written permission of the Division, the construction of new trails or the relocation of existing trails for Passive Recreation, provided that any trail construction or relocation results in trails that are no wider than four (4) feet. Maintenance of existing trails and construction of new trails may include the installation and maintenance of trail features to protect the conservation values of the Open Space, such as boardwalks, footbridges, railings, steps, or other such features as approved by the Division;
- g. **Actions Required by the Division.** All actions and activities required or authorized by the Authorization issued by the Division, as it may be subsequently amended and duly recorded within the Nantucket County Registry of Deeds with reference to the Authorization;
- h. **Archaeological Investigations and Activities.** Archaeological investigations and activities, including without limitation surveys, excavation, and artifact retrieval conducted under the direction of a qualified organization or person, following submission of an archaeological field investigation plan and written approval thereof by (a) the Commonwealth and (b) the State Archaeologist of the Massachusetts Historical Commission, and in accordance with Massachusetts 950 CMR 70.00 with approval of the Town in consultation with the Division; and (c) the Division in accordance with the requirements of MESA; and
- i. **Site Restoration.** Any work undertaken in conjunction with the reserved rights under Section 3 shall seek to minimize disturbance to the Open Space. Upon completion of any site work performed in conjunction with Section 3, any disturbed areas shall be restored substantially to match the conditions with respect to soil material, grade, and vegetated ground cover that existed prior to said work.

The exercise of any right reserved by the Grantor under Section 3 shall be in compliance with the then-current Zoning By-Laws of the Town of Nantucket and all other applicable federal, state, county and local laws, bylaws, rules and regulations, including, but not limited to Massachusetts Historic Commission regulations and local wetland conservation commission bylaws and regulations. The inclusion of any reserved right in Section 3 requiring a permit from a public agency does not imply that the Division takes any position on whether such permit should be issued.

- 4. **Monuments and Signage.** The Grantor shall have the right and obligation to maintain in good condition any, bounds, monuments, markers and signs shown on the Plan and demarcating the boundaries of the Open Space, and shall repair and or replace said monuments and signage on an as needed basis.
- 5. **Benefited Parties.** This Declaration and the protection of the Open Space is hereby intended and declared to benefit the Grantor and the Division. The protection of the Open Space is intended to

benefit the Grantor as a condition of the Authorization and as open space for other conservation purposes that benefit one or more of the parties.

6. **Term.** The intent of this Declaration and its provisions are to restrict the Open Space in perpetuity, as implemented in accordance with MGL. c. 184 §§ 23-30. This Declaration shall run with the Open Space, as shown on the Plan, from the date of recordation in the Nantucket County Registry of Deeds for thirty (30) years and in subsequent increments of twenty (20) years upon re-recording in accordance with the requirements of MGL. c. 184 §§ 23-30.

This Declaration of Restriction shall be binding upon the Grantor and any other party having an ownership interest in the Open Space or claiming to have an interest with respect to the Open Space as tenants, invitees, licensees or otherwise, and all of the respective heirs, successors, grantees, mortgages, assigns, agents, contractors, subcontractors and employees of the foregoing.

In the event that any ownership interest in the Premises, or portion thereof is sold, transferred or conveyed to another party or parties, the Grantor reserves the right to record this Declaration as well as an EEA-DCS approved conservation restriction on the Open Space even after said sale, transfer or conveyance occurs.

Grantor hereby waives all their legal right to and shall forego any action in law or equity of any kind whatsoever attempting to contest the validity of any provision of this Declaration and shall not, in any enforcement action, raise the invalidity of any provision of this Declaration.

7. **Right to Re-Record.** The Grantor and the Division are hereby authorized, jointly and severally, to continually re-record and file any notices and/or instruments in accordance with the provisions of MGL. c. 184 §§ 23-30. Without limiting the foregoing, the Grantor agrees to execute any such notices and instruments upon request of the Division within thirty (30) days of said request.
8. **Enforceability.** The Grantor and the Division, jointly and severally, shall have the authority and right to enforce this Declaration. The Division shall have the right to bring proceedings at law or equity, as may be necessary or appropriate, against any party or parties violating or attempting to violate the terms of this Declaration to enjoin them from so doing and to cause any such violation to be remedied, including but not limited to restoration of the portion of the Open Space adversely affected, after providing written notice to such party or parties and all mortgagees of record if the names and addresses of such parties and mortgagees have been provided in writing to the Division.
9. **Severability.** If any court or other tribunal of competent jurisdiction determines that any provision of this Declaration is invalid or unenforceable, such provision shall be deemed to have been modified automatically to conform to the requirements for validity and enforceability as determined by such court or tribunal. In the event the provision invalidated is of such a nature that it cannot be so modified, the provision shall be deemed deleted from this instrument as though it had never been included herein. In either case, the remaining provisions of this instrument shall remain in full force and effect.
10. **Non-Waiver.** Any election by the Division as to the manner and timing of its right to enforce this Declaration or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.

11. **Access.** The Division, or its duly authorized agents or representatives, shall have the right to enter the Open Space, in a reasonable manner and at reasonable times, and after providing the Grantor with reasonable notice, for the purposes of (a) inspecting the Open Space to determine compliance with this Declaration; (b) enforcing this Declaration; and (c) taking any other action which may be necessary or appropriate, in the Divisions' sole judgment, to remedy or abate any violation hereof, including the right to perform a survey of boundary lines. Notwithstanding this access provision, nothing in this Declaration shall be construed to limit the Division's authority pursuant to MGL. c. 131 §§ 4 and 11 to access the Open Space.

Excluding residents of Surfside Crossing, permitted guests, and/or authorized personnel, this Declaration does not grant to the Town of Nantucket, the general public or any other person or entity any right to enter upon the Open Space except as otherwise provided for herein.

12. **Notice and Approval.** Whenever notice to or approval by the Division is required, Grantor shall notify Division in writing not less than 60 days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, MESA File Number and/or CMP Number, if applicable, and any other material aspect of the proposed activity in sufficient detail to permit the Division to make an informed judgment as to its consistency with the purposes of this Declaration and the Authorization. The Division may, at its sole discretion, require the submittal of additional information necessary to evaluate the proposed activity. Within 60-days of receiving Grantor's request and any additional information requested by the Division, as applicable, the Division shall grant or withhold approval in writing. The Division's approval shall not be unreasonably withheld, but shall only be granted upon a showing that the proposed activity shall not materially impair the conservation values of the Open Space and the purposes of this Declaration.

Failure of the Division to respond in writing within 60 days shall be deemed to constitute approval by the Division of the request as submitted, so long as the request sets forth the provisions of this section relating to deemed approval after 60 days in the notice, the requested activity is not prohibited herein, is not in violation of any local, state or federal law, including but not limited to MESA and the Authorization, and the activity will not materially impair the conservation values of the Open Space or the purposes of this Declaration.

Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other shall be in writing and either be served personally or sent by first class mail, postage pre-paid, addressed as follows:

To Grantor: Surfside Crossing, LLC
 37 Old South Road, Unit #6
 Nantucket, MA 02554

To the Division: Massachusetts Division of Fisheries & Wildlife
 Natural Heritage & Endangered Species Program
 1 Rabbit Hill Road
 Westborough, MA 01581
 Attention: Regulatory Review, CMP No. 022-____.DFW

or to such other address as any of the above parties shall designate from time to time by written notice to the other or, if notice is returned to sender, to an address that is reasonably ascertainable by the parties.

13. **Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer.** Grantor's successors and assigns shall incorporate this Declaration, in full or by reference, into all deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest in and/or a right to use the Open Space or any portion thereof is conveyed. Any such deed, mortgage or other interest purporting to convey any portion of the Open Space without including this Declaration in full or by reference shall be deemed and taken to include said Declaration in full even though said Declaration is not expressly described or referenced therein.
14. **Recordation/Registration.** Grantor shall record and/or register this Declaration with the appropriate Registry of Deeds and/or Land Registration Office upon the later of (a) thirty (30) days of its date of execution, or (b) prior to the initiation of any work on the Premises by the Grantor.
15. **Amendment and Release.** No amendment or release of this Declaration shall be effective unless it has been approved in writing by the Division (hereinafter the "Division Approval") and said amendment or release and the requisite Division Approval has been recorded within the appropriate Registry of Deeds and/or Land Registration Office.

Notwithstanding the foregoing, the release of this Declaration shall be effective at such time as the Grantor has recorded a Division-approved conservation restriction signed by EEA-DCS in the chain of title of the Open Space.

16. **Attachments.**

Exhibit A: Easement Plan of Land showing the Open Space
Exhibit B: Description of Land

*Remainder of Page Intentionally Left Blank
Signature Pages to Follow*

GRANTOR

IN WITNESS WHEREOF, Jamie Feeley, Surfside Crossing, LLC, has caused these presents to be signed, acknowledged and delivered in its name and behalf this ____ day of _____, 20__.

[Name of Grantor and Title if Grantor is corporate entity or Trust – make sure to attach corporate authority or trustee certificate if applicable]

{County} _____, ss. _____, 20__

On this day before me, the undersigned notary public, personally appeared _____ (name), proved to me through satisfactory evidence of identification, which was photographic identification with signature issued by a federal or state governmental agency, oath or affirmation of a credible witness, personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

SEAL

Notary Public
Commission Expires: _____

ACKNOWLEDGEMENT BY THE MASSACHUSETTS DIVISION OF FISHERIES AND WILDLIFE

This Declaration set forth above by Surfside Crossing, LLC is acknowledged and accepted this _____ day of _____, 20___. The Division acknowledges the reserved rights and obligations of the Division set forth herein.

By: _____
Its: _____

COMMONWEALTH OF MASSACHUSETTS

On this _____ day of _____, 20___, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was one of the following (check applicable box): a driver's license; a valid passport; personally known to be the person whose name is signed on the preceding or attached document; or other _____, and acknowledged to me that he/she signed it voluntarily for its stated purpose as _____ of the Commonwealth of Massachusetts Division of Fisheries and Wildlife.

SEAL

Notary Public
Commission Expires: _____

Attachment 4

Draft Escrow Agreement

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**

ESCROW AGREEMENT

This ESCROW AGREEMENT (this "Agreement") is entered into as of this ____ day of _____, _____ by and between the Massachusetts Division of Fisheries and Wildlife, by and through the Natural Heritage and Endangered Species Program, having a principal place of business at 1 Rabbit Hill Road, Westborough, Massachusetts, 01581 ("Division"); Surfside Crossing, LLC having a principal place of business at 37 Old South Road, Unit #6; and _____ {*escrow agent name*}, having a principal place of business at _____ {*escrow agent address*} ("Escrow Agent"). The Division, Surfside Crossing, LLC and Escrow Agent are referred to herein collectively as the "Parties".

1. Recitals

a. The Conservation and Management Permit No. _____ DFW ("Permit") issued by the Division to Surfside Crossing, LLC contains financial assurance provisions in paragraph #8 of the Special Conditions section requiring that Surfside Crossing, LLC ensure that funds are available in the total sum of \$641,796.00 (the "Funds") for habitat protection, habitat restoration and/or management, and/or conservation planning and research to provide a net benefit to Coastal Heathland Cutworm (*Abagrotis benjamini*) populations in Massachusetts (hereinafter referred to as "Division-approved mitigation activities").

b. The Parties agree the Funds shall be paid by Surfside Crossing, LLC to the Escrow Agent and held in an interest bearing escrow account ("Escrow Account") (further defined in 2 below) and expended pursuant to the terms and conditions described below to mitigate for the "take" of State-listed species and their habitat, as described in the Permit in connection with the Surfside Crossing residential development (the "Project"), located in Nantucket, Massachusetts.

c. Unless otherwise approved by the Division, Surfside Crossing, LLC shall have a period of one (1) year from the date of depositing the final installment of the Funds to permanently protect and or enhance habitat for the Coastal Heathland Cutworm within the Town of Nantucket (the "Habitat Conservation Project"), subject to prior review, approval and any conditions, restrictions, and or approvals required by the Division.

d. Surfside Crossing, LLC shall work with the Division to identify a potential Habitat Conservation Project(s) toward which all or a portion of the Funds may be applied, and must submit a proposal to the Division for prior review and approval. The release of Funds shall be solely under the control and discretion of the Division.

e. If applicable, the Division shall notify the Escrow Agent in writing of any agreements reached with Surfside Crossing, LLC pertaining to release of the Funds for a Division-approved Habitat Conservation Project. The Division shall specifically instruct the Escrow Agent as to where Funds are to be dispersed if any such agreement is reached.

The Parties enter into this Agreement for the purpose of defining the terms and conditions under which the Funds shall be held and disbursed.

NOW THEREFORE, after consideration of the above recitals, Surfside Crossing, LLC, the Division and the Escrow Agent hereby covenant and agree as follows:

2. Escrow Account

a. Prior to the start of Work under the Permit, which is defined as the start of any soil or vegetation disturbance, Surfside Crossing, LLC shall deliver to Escrow Agent fifty (50) percent of the Funds, in the amount of \$ \$320,898.00. Additional funding to the escrow account via the Escrow Agent shall occur on the following schedule: (i) twenty-five (25) percent of the Funds, in the amount of \$160,449.00, shall be deposited within six (6) months of the initiation of Work under the Permit; (ii) the final twenty-five (25) percent of the Funds, in the amount of \$160,449.00, shall be deposited within twelve (12) months of the initiation of Work under the Permit.

b. All funds delivered by Surfside Crossing, LLC to the Escrow Agent shall be deposited by the Escrow Agent in a high yield, interest bearing savings account or held in obligations by the US Government at one or more banks ("Depository Bank"), said account(s) to be at all times insured by the Federal Deposit Insurance Corporation and which shall pay interest on the Funds at a reasonable rate. The Escrow Agent shall ensure that all such account(s) are in the name of the Surfside Crossing, LLC only. In addition, the taxpayer information, including tax identification number, provided by the Escrow Agent to the Depository Bank shall be for the Surfside Crossing, LLC only. The Depository Bank shall be entitled to charge the Escrow Account for services related to maintenance of the Escrow Account at a rate not exceeding the Bank's standard charges to other customers for similar services, notwithstanding the minimum balance requirement of Paragraph 2(a).

c. The Escrow Account shall be opened by the Escrow Agent and funds may be withdrawn only by the Escrow Agent and no other person. Disbursements shall be made from the Escrow Account only in accordance with the terms of this Agreement.

d. The Escrow Agent shall maintain a record of all deposits, income, disbursements, and other transactions of the Escrow Account. By January 15th of each year and upon request, the Escrow Agent shall provide to the Parties a written accounting of all transactions. The Parties shall have the right to inspect all books and records of the Escrow Agent relating to the Escrow Account at reasonable times upon request. Escrow Agent's computation of the Funds is correct in the absence of manifest error.

e. The Escrow Agent shall keep possession of the book(s) and bank statements of the Escrow Account until such time as it is terminated in accordance with the terms of this Agreement, or until a successor Escrow Agent is appointed as provided herein.

3. Disbursements

a. From time to time, the Division may, on or before the date which is 10 years from the date of this Agreement, request in writing that the Escrow Agent to deliver all or portions of the Funds, plus any interest thereon, to be used for Division-approved mitigation activities. Upon receipt of such written request, the Escrow Agent shall deliver the requested portion of the Funds to the Division or any party designated in writing by the Division within ten (10) business days of receiving said written request. Delivery of the Funds in accordance with the terms of this Agreement shall be made by cashier's check, or by federal funds wire transfer, at the option of the payee.

b. If, at the end of 10 years from the date of this Agreement any portion of the Funds is

still held in escrow, then the Division shall, within six (6) months after such 10 year date, develop a plan for the use of any remaining Funds by the Division or any party designated in writing by the Division for the implementation of Division-approved mitigation activities in accordance with such plan. The Escrow Agent shall release any remaining Funds to the Division or any party designated in writing by the Division in accordance with such plan.

4. Termination of Agreement

This Escrow Agreement shall terminate, and the Escrow Agent shall be relieved of all liability, after all funds in the Escrow Account have been properly disbursed in accordance with the terms and conditions of this Agreement. When the Escrow Account is terminated, the Escrow Agent shall provide a final accounting of all transactions hereunder to the Parties.

5. Duties and Liabilities of Escrow Agent

a. The sole duty of the Escrow Agent under this Agreement is to receive funds from Surfside Crossing, LLC and to hold the funds for disbursement according to Section 3 above. The Escrow Agent shall be under no duty to pass upon the adequacy of any documents, to determine whether any of the Parties are complying with the terms and provisions of this Escrow Agreement, or to determine the identity or authority of any person purporting to be a signatory authorized by Surfside Crossing, LLC or the Division.

b. The Escrow Agent may conclusively rely upon, and shall be protected in acting on, a statement, certificate, notice, requisition, order, approval, or other document believed by the Escrow Agent to be genuine and to have been given, signed and presented by a duly authorized agent of Surfside Crossing, LLC or the Division. The Escrow Agent shall have no duty or liability to verify any statement, certificate, notice, request, requisition, consent, order, approval or other document, and its sole responsibility shall be to act only as expressly set forth in this Agreement. The Escrow Agent shall not incur liability for following the instructions contemplated by this Agreement or expressly provided for in this Agreement or other written instructions given to the Escrow Agent by the Parties. The Escrow Agent shall be under no obligation to institute or defend any action, suit or proceeding in connection with this Escrow Agreement, unless first indemnified to its satisfaction. The Escrow Agent may consult with counsel of its choice including shareholders, directors, and employees of the Escrow Agent, with respect to any question arising under or in connection with this Agreement, and shall not be liable for any action taken, suffered or omitted in good faith. The Escrow Agent shall be liable solely for its own willful misconduct.

c. The Escrow Agent may refrain from taking any action, other than keeping all property held by it in escrow if the Escrow Agent: (i) is uncertain about its duties or rights under this Escrow Agreement; (ii) receives instructions that, in its opinion, are in conflict with any of the terms and provisions of this Agreement, until it has resolved the conflict to its satisfaction, received a final judgment by a court of competent jurisdiction (if it deems such action necessary or advisable), or it has received instructions executed by both Surfside Crossing, LLC and the Division.

d. Escrow Agent is acting, and may continue to act, as legal counsel to Surfside

Crossing, LLC in connection with the subject transaction, whether or not the Funds are being held by Escrow Agent or have been delivered to a substitute impartial party or a court of competent jurisdiction. *{If the preceding sentence is not applicable, then use the following sentence}* Escrow Agent is not acting as counsel to Surfside Crossing, LLC in Escrow Agent's capacity as escrow agent.

e. Each of the Parties admits, acknowledges and represents to each of the other Parties that it has had the opportunity to consult with and be represented by independent counsel of such party's choice in connection with the negotiation and execution of this Agreement. Each of the Parties further admits, acknowledges and represents to the other Parties that it has not relied on any representation or statement made by the other Parties or by any of their attorneys or representatives with regard to the subject matter, basis or effect of this Agreement.

6. Escrow Agent's Fee

a. Payments for services provided by Escrow Agent shall not be made from Escrow Funds.

7. Investment Risk

a. In no event shall the Escrow Agent have any liability as a result of any loss occasioned by the financial difficulty or failure of any institution, including Depository Bank, or which holds United States Treasury Bills, or other securities, or for failure of any banking institution, including Depository Bank, to follow the instructions of the Escrow Agent. Without limiting the generality of the foregoing, in no event shall the Escrow Agent incur any liability as the result of any claim or allegation that the Escrow Agent should have invested the escrow funds in United States Treasury Bills rather than hold same on deposit at the Depository Bank, or vice versa.

8. Notices

a. All notices permitted or required by this Agreement shall be in writing and shall be deemed duly provided when deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, to the other Parties at the addresses set forth in the first paragraph of this Agreement. The Party providing notice may choose alternate methods, including hand delivery, Federal Express, or other recognized overnight courier. Notices provided by hand delivery; Federal Express or other recognized overnight courier shall be deemed duly provided when received at the addresses set forth in the first paragraph of this Agreement.

b. All notices, certification, authorizations, requests or other communications required, or permitted to be made under this Escrow Agreement shall be delivered as follows:

To the DIVISION:

Division of Fisheries and Wildlife
Natural Heritage and Endangered Species Program
ATTN: Regulatory Review, CMP 022-____.DFW

1 Rabbit Hill Road
Westborough, MA 01581

To the Responsible Party:

Surfside Crossing, LLC
37 Old South Road, Unit #6
Nantucket, MA 02554

To the Escrow Agent:

Company, Address, & Contact numbers

or to such other place or to the attention of such other individual as a Party from time to time may designate by written notice to all other Parties.

9. Resignation, Removal, or Successor Escrow Agent

a. If, for any reason, the Escrow Agent is unable or unwilling to continue to act as Escrow Agent, he/she shall give written notice to the other Parties of his/her inability or unwillingness to continue as Escrow Agent. The parties shall agree upon a successor agent, formally appoint the successor agent, and provide written notification to the Escrow Agent of the subsequent appointment within ten (10) business days. The Escrow Agent shall then, within three (3) business days after receiving notice of subsequent appointment, deliver to the successor escrow agent all cash and other property held by the Escrow Agent under this Escrow Agreement. Upon such delivery, all obligations of the Escrow Agent under this Escrow Agreement shall automatically cease and terminate. If no successor escrow agent is designated within the prescribed ten (10) day period, or if notice of subsequent appointment is not received within such period, then the Escrow Agent may, at its option at any time thereafter, deposit the funds and any documents then being held by it in escrow into any court having appropriate jurisdiction, and upon making such deposit, shall thereupon be relieved of and discharged and released from any and all liability hereunder, including without limitation any liability arising from the Funds, or any portion thereof so deposited.

b. The Escrow Agent may be removed at any time by a written instrument or concurrent instruments signed by the Division and Surfside Crossing, LLC and delivered to the Escrow Agent.

c. If at any time hereafter, the Escrow Agent shall resign, be removed, be dissolved, or otherwise become incapable of acting, or the position of the Escrow Agent shall become vacant for any of the foregoing reasons or for any other reason, the Parties hereto shall promptly appoint a successor Escrow Agent. Upon appointment, such successor Escrow Agent shall execute and deliver to his/her predecessor and to the Parties hereto an instrument in writing accepting such appointment hereunder. Thereupon, without further act, such successor Escrow Agent shall be fully vested with all the rights, immunities, and powers, and shall be subject to all the duties and obligations of his/her predecessor, and the predecessor Escrow Agent shall promptly deliver all books, records, and, other property and monies held by him/her hereunder to such successor Escrow Agent.

10. Interest

a. All interest income accrued on funds in the Escrow Account shall become part of the Escrow Account and shall remain in the Escrow Account. The Surfside Crossing, LLC has the responsibility to pay federal and state taxes on the accrued interest on its funds in the Escrow Account, and the Escrow Agent may disburse funds from the Escrow Account for such purpose. Said disbursement may be made by the Escrow Agent only after receiving a written confirmation from Surfside Crossing, LLC, with a copy sent to the Division, of all itemized federal and state tax liabilities incurred by interest accrued on the Escrow Account.

11. Miscellaneous

a. This Escrow Agreement shall be binding upon, and shall inure to the benefit of the respective Parties hereto and their successors and assigns.

b. This Agreement shall be governed by and be construed in accordance with the laws of the Commonwealth of Massachusetts.

c. This Agreement shall be interpreted as an instrument under seal.

d. This Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all counterparts shall constitute one Agreement.

e. This Escrow Agreement may not be amended, altered, or modified except by written instrument duly executed by all of the Parties hereto.

f. If the term, condition or provision of this Agreement, or the application thereof to any circumstances or party hereto, ever shall be held to be invalid or unenforceable, then in each such event the remainder of this Agreement or the application of such term, condition, or provision to any other circumstance or party hereto (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected, and each term, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by law.

g. Each individual and entity executing this Agreement hereby represents and warrants that he, she or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he, she or it is executing this Agreement to the terms hereof.

12. Effective Date

a. This Agreement shall take effect on the latest date of execution by the Division, Surfside Crossing, LLC, or Escrow Agent.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the parties have caused this Escrow Agreement to be duly executed as of the day and year first written above.

FOR THE MASSACHUSETTS DIVISION
OF FISHERIES AND WILDLIFE:

Name:
Title:

COMMONWEALTH OF MASSACHUSETTS

_____, ss _____, 20__

On this __ day of __, 20__, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public
My commission expires:

FOR Surfside Crossing, LLC:

By: _____.

By: _____

Name: _____

Its: _____

COMMONWEALTH OF MASSACHUSETTS

_____, ss

_____, 20__

On this __ day of __, 20__, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public
My commission expires:

FOR THE ESCROW AGENT:

Company Name

By: _____

Name:

Title:

COMMONWEALTH OF MASSACHUSETTS

_____ ss. _____, 20__

On this __ day of __, 20 __, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public
My commission expires:

Attachment 5

“Revegetation Planting Plan” (dated August 9, 2022) and “Revegetation Planting Plan Narrative” (dated August 16, 2022) (collectively, prepared by LEC Environmental Consultants, Inc.; the “Restoration Plan”

**STAMPED FOR
IMAGE CAPTURE**



LEC Environmental Consultants, Inc.
www.lecenvironmental.com

NHESP File No. 12-31035
Surfside Crossing
Nantucket, MA
8/16/22

Revegetation Planting Plan Narrative

Purpose

Habitat revegetation and enhancement is proposed on-site within four (4) specific areas to benefit the Coastal Heathland Cutworm (*Abagrotis benjamini*) as depicted on the *Revegetation Planting Plan*, prepared by LEC, dated August 9, 2022.

Two revegetation/enhancement areas (740± sf) will be temporarily disturbed for regrading needs associated with the project. Furthermore, revegetation/enhancement is proposed within two existing encroachment (non-habitat) areas; 1) a gravel turnout area adjacent to South Shore Road (615± sf) and 2) a former paddock area along the southerly property boundary (3,100± sf). The revegetation/enhancement areas will be planted with a combination of Beach Plum (*Prunus maritima*), Black Cherry (*Prunus serotina*), and Shadbush (*Amelanchier canadensis*) and a native seed mix containing Pennsylvania sedge (*Carex pennsylvanica*), little bluestem (*Schizachyrium scoparium*), and/or switchgrass (*Panicum virgatum*).

Beach Plum has been identified as the larval host plant for Coastal Heathland Cutworm and is lacking on-site. Coastal Heathland Cutworm are suspected to feed on Black Cherry and Shadbush. The planting of Beach Plum, Black Cherry, and Shadbush within these restoration areas will therefore enhance on-site potential habitat for Coastal Heathland Cutworm.

Monitoring

The revegetation/enhancement areas will be monitored for a period of at least two (2) years. A NHESP-approved botanist shall conduct monitoring site inspections during the first two growing seasons. Monitoring shall focus on evaluating survivorship of the plantings. The plantings shall be appropriately irrigated as necessary and as recommended by the botanist. A summary report shall be submitted to NHESP at the end of the first and second growing seasons documenting the health and vigor of the revegetation/enhancement areas and any recommendations.

Invasive Species Management

Invasive species will be managed as site conditions dictate utilizing Best Management Practices recommended by the NHESP-approved botanist. Small concentrations of invasive species shall be dug up, bagged, and brought to an approved facility (e.g., Madaket Landfill solid waste digester) for proper disposal. Larger concentrations may require herbicide treatment following recommendations from the NHESP-approved biologist and written approval from NHESP.

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFIARS
DEPARTMENT OF FISH AND GAME
DIVISION OF FISHERIES AND WILDLIFE

NANTUCKET, ss.

_____)
In the Matter of Take Determination for)
Surfside Crossing)
NHESP File No. 12-31035)
_____)

Docket No. 2018-02-RL

And

_____)
In the Matter of Conservation and)
Management Permit for Surfside Crossing)
NHESP File No. 12-31035)
Conservation Permit No. 022-402.DFW)
_____)

Affidavit of Emily Molden

I, Emily Molden, state under oath as follows in support of Plaintiff Nantucket Land Council's notice of claim for adjudicatory hearing on Conservation and Management Permit No. 022-402.DFW:

1. I am the Executive Director of Petitioner Nantucket Land Council, 6 Ash Lane, Nantucket MA ("Land Council"), where I have been employed since 2004. Before becoming Executive Director four years ago in 2019, I was employed by the Land Council for fifteen years as a Resource Ecologist. My academic training was in ecology and wildlife biology, and I have been personally involved with research on Nantucket for the past nineteen years to preserve habitat for rare and endangered species.
2. Founded in 1974, the Land Council is a Massachusetts non-profit land conservation organization that holds over 90 conservation restrictions on some 1500 acres on Nantucket for land preservation purposes. Our mission statement reads: "The NLC is a 501(c)(3) non-profit dedicated to protecting Nantucket's natural world and rural character by holding and enforcing conservation restrictions, commissioning scientific research, monitoring development proposals, engaging in legal proceedings to protect natural resources, and educating the public on local environmental issues." More information on the history and mission of the Land Council can be found on our website at www.nantucketlandcouncil.org.
3. Since its founding nearly five decades ago, the Land Council's conservation efforts have protected the environment on Nantucket through acquisitions, advocacy, education, research and,

when necessary, litigation. Most of the Land Council's land acquisitions have been specifically designed to protect rare or endangered species habitats. Its conservation efforts have led to the protection of over 5000 additional acres on Nantucket by other environmental organizations and agencies. I have devoted the past two decades to protect Nantucket's unique natural environment in the face of immense development pressures.

4. In my capacity as an ecologist with the Land Council, I have assisted the Massachusetts Natural Heritage Endangered Species Program ("NHESP") in numerous ways based on my expertise about the flora and fauna of Nantucket: performing Element Occurrence surveys for the NHESP plant and animal protection database, funding studies for protected species such as Lepidoptera (moths), and preserving endangered species habitat throughout Nantucket.

5. The Land Council has invested substantial resources to preserve and protect Nantucket's rare and endangered species habitat, including land adjacent the project site located on South Shore Road ("Project Site"). I personally have spent hundreds of hours over the past five years working to try to preserve species and habitat on the Project Site. The reason the Land Council has expended vast resources to research and preserve the Project Site is because it has made a decades long investment in nearby mid-Island properties that share the same pitch pine habitat unique to Nantucket. In fact, we hold the CR for Sachem's Path, an abutting project that like Surfside was developed under Chapter 40B. The Sachem's Path CR protects the same Lepidoptera moth, as well as state listed vascular plants: New England Blazing Star (*Liatris novae-angliae*) and Sandplain Blue-eyed Grass (*Sisyrinchium fuscatum*).

6. The attached aerial photograph (Ex. A) depicts the Project Site and nearby areas that have been protected by Land Council and other conservation groups. Specifically, the photo shows the project site (yellow); open space owned by the Nantucket Islands Land Bank (green); Nantucket Conservation Foundation Land (Blue); Nantucket State Forest Land (purple); the Camp Richards owned by Nantucket Boy Scouts (red); and the Sachems Path CR parcel (dark blue). Together these areas form an almost continuous swath of largely undeveloped pitch pine habitat. The Project Site itself is a critical section of this contiguous area that provides habitat for protected species.

7. On November 8, 2018, the Land Council filed a timely appeal from the October 19, 2018 Take Determination issued by the Division. The Project Proponent moved to dismiss our appeal for lack of standing, but in a 47 page decision, the Presiding Officer denied that motion, ruling that the Land Council is a "person aggrieved" with standing to appeal because it proved particularized injury: "NLC has also identified a harm distinct to it as an organization that would result from a Take". (4/24/19 Ruling on motion to dismiss, p. 42, Ex. B) Among other statements, the hearing officer specifically referenced the Conservation and Management Permit and the long-term Net Benefit mitigation standard: "were the Division to determine that the Project will cause a Take . . . 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." (*Id.*)

8. After the Land Council successfully prevailed on standing, I testified during the administrative proceedings before NHESP. In the Final Decision after the hearing, the Presiding

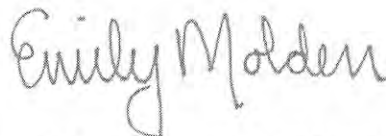
Officer once again referenced the Conservation Management Permit: “Surfside Crossing will need to apply for a Conservation and Management Permit (“CMP”) from the Division pursuant to 321 CMR 10.23 (to authorize the take of the Coastal Heathland Cutworm) in order to move forward with its Project.”). (10/4/19 Final Decision, p. 43, Ex. C)

9. The Land Council sought judicial review of the agency’s final decision in Superior Court. There was no cross appeal of the Presiding Officer’s Ruling on standing, which along with the Final Decision was affirmed by the Superior Court. As a result, I was advised and had every expectation that as a party with standing, the Land Council would receive written notice of further filings regarding the Surfside Project on Nantucket in NHESP File No. 31035. I check the Environmental Monitor faithfully twice a month, but notice of the Conservation Management Permit was never announced in the Environmental Monitor. No notice of the Conservation and Management Permit was ever sent to the Land Council, despite our status as an aggrieved party.

10. In addition to participating in the administrative proceedings at NHESP, the Land Council also filed extensive written comments during the MEPA review process, as did NHESP. Like the two agency rulings, NHESP’s MEPA comment letter also references the Conservation and Management Permit, including the representation that the Project would “meet the long-term net benefit performance standard of a CMP by permanently protecting +/-20.34 acres of land off-site as open space and state listed species habitat”. (5/12/20 Ltr. to Sec’y Theoharides, p. 2, Ex. D) My own MEPA comment letter argued any off-site mitigation must be on the Island of Nantucket. In my nearly twenty years of experience, there has never been a conservation and management permit for Nantucket where the mitigation was off-island. On the mainland that may make sense, but Nantucket is a unique Town, County and Island 35 miles away off shore so off-Island mitigation provides no Net Benefit to species endemic to this unique habitat. (4/13/20 Ltr. to Sec’y Theoharides, pp. 3-4, Ex. E)

11. Over the past five years I have devoted hundreds of hours of my life, and hundreds of thousands of dollars of Land Council funds, in our efforts to preserve the Project Site that contains critical species habitat. As a trained ecologist and wildlife biologist who has studied rare and endangered species on Nantucket for the past nineteen years, I can attest that the Conservation Management Permit does not provide a long term Net Benefit, as required. I also attest with absolute certainty that had the Land Council been notified of the Conservation Management Permit – as we should have been since we were adjudicated an aggrieved party – then I unequivocally would have filed this appeal within the 21 day time period of its issuance. But notice was not provided to the Land Council until January 28, 2023, when the Sheriff on Nantucket halted work on the site until Applicant furnished a copy of the Conservation and Management Permit. Accordingly, I am providing this notice of appeal within 21 days of the date on which the Land Council first had actual notice of the Conservation Management Permit.

Signed under the pains and penalties of perjury this 16th day of February, 2023.



Emily Molden, Nantucket Land Council, Inc.

Exhibit A

Conservation Land in the Vicinity of Surfside Crossing

Surfside Crossing

Legend:

- Red - Camp Richards Boy Scouts Land
- Light Blue - Conservation Foundation Land
- Purple - State Forest Land
- Green - Land Bank Land
- Dark Blue - Sachem's Path Lot
- Yellow - Surfside Crossing Lot

Exhibit B

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

In the Matter of)	
)	
Take Determination for)	Docket No. 2018-02-RL
Surfside Crossing)	
NHESP File No. 12-31035)	
)	
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 Take¹ 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 residents² 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 "vitiating 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 at 5-6 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. 7⁵; 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 Regulations⁶ 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 Env’tl. 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 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 “vitalize” 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:

<u>Action</u>	<u>Filing Deadline</u>
<i>1. Prefiled Written Direct Testimony</i>	
<i>2. Prefiled Written Rebuttal Testimony</i>	

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
251 Causeway Street, Suite 400
Boston, MA 02114

SERVICE LIST

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

PETITIONERS

Nantucket Select Board

George X. Pucci, Esquire
Andrew Weisheit, Esquire
KP Law, P.C.
101 Arch Street, Boston, MA 02110

Nantucket Land Council and 13 residents of Nantucket

Peter R. Fenn, Esquire
53 Milk Street
Westwood, MA 02090

Jonathan D. Witten, Esquire
Barbara Huggins Carboni, Esquire
Huggins and Witten, LLC
156 Duck Hill Road
Duxbury, MA 02332

DIVISION OF FISHERIES AND WILDLIFE

Beverly Vucson, Esquire
Division of Fisheries and Wildlife
251 Causeway Street, Suite 400
Boston, MA 02114

Jessie Leddick
Division of Fisheries and Wildlife
1 Rabbit Hill Road
Westborough, MA 01581

PROJECT PROPONENT

Richard A. Nylén, Jr., Esquire
Lynch, DeSimone & Nylén, LLP
10 Post Office Square, Suite 970N
Boston, MA 02109

Exhibit C



MASSWILDLIFE

**DIVISION OF
FISHERIES & WILDLIFE**

1 Rabbit Hill Road, Westborough, MA 01581
p: (508) 389-6300 | f: (508) 389-7890
MASS.GOV/MASSWILDLIFE

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DIVISION OF FISHERIES AND WILDLIFE

In the Matter of

Take Determination for
Surfside Crossing
NHESP File No. 12-31035

Nantucket, MA

Docket No. 2018-02-RL

**FINAL DECISION
IN THE ADJUDICATION OF THE APPEAL
BY PETITIONER NANTUCKET LAND COUNCIL**

I adopt the attached Recommended Final Decision of the Presiding Officer.

A person who has the right to seek judicial review may appeal this Final Decision of the Division to Superior Court pursuant to M.G.L. c30A, s.14 (1). The complaint must be filed in Court within thirty (30) days of receipt of this Final Decision.

Handwritten signature of Mark S. Tisa in black ink.

Mark S. Tisa
Director

12/5/19
Date

MASSWILDLIFE

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

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

Docket No. 2018-02-RL

**RECOMMENDED FINAL DECISION
IN THE ADJUDICATION OF THE APPEAL
BY PETITIONER NANTUCKET LAND COUNCIL**

I. SUMMARY

This appeal originally arose out of 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 (the “Project”) on a 13.5 acre property owned by the Proponent in Nantucket, MA (the “Property”) 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” or “Take Determination”).

The appeals filed by the above Petitioners on November 8, 2018 claimed 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 (“NLEB”) 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.

On April 24, 2019, I issued a Recommended Final Decision granting the Division and Surfside Crossing’s respective Motions to Dismiss the Petitioners’ claim that the Division erred by not determining whether the Project will result in a Take of the New England Blazing Star, and the appeals of the Select Board and the 13 residents for lack of standing. On June 17, 2019, the Division Director adopted my Recommended Final Decision as to these rulings as the Final Decision of the Division.

My April 24, 2019 Recommended Final Decision also denied the Division and Surfside Crossing’s respective Motions to Dismiss the NLC’s appeal for lack of standing, as well as Surfside Crossing’s Motion to Dismiss the NLC’s appeal with respect to the NLEB for reasons of justiciability. The Decision therefore included an order establishing as the issue for adjudication in the remaining appeal by the NLC whether the Division properly applied its MESA regulatory criteria at 321 CMR 10.13 and 10.18 when it made its October 19, 2018 determination that the project will only result in a take of the Coastal

Heathland Cutworm. The parties' witnesses thereafter filed prefiled written direct and/or rebuttal testimony, which was followed by the live cross examination of certain of the witnesses.

Based on my evaluation of the evidence in the administrative record for this adjudicatory appeal by the NLC and for the reasons set forth in this Recommended Decision, I have determined that the NLC has not met its burden of showing that the Division erred in issuing its October 19, 2018 Take Determination on the Surfside Crossing Project when the Division concluded that the Project site did not meet the MESA regulatory criteria at 321 CMR 10.13 and 10.18 for mapping it as Priority Habitat for the Northern Long-eared Bat ("NLEB"), an endangered state-listed species, and therefore did not necessitate a review of the Project to determine whether it will cause a take of the NLEB.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The MESA Regulations relevant to this Appeal

Under M.G.L. c. 131A, § 4 and 321 CMR 10.03, 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. M.G.L. c. 131A, § 2 prohibits the "Take" of a state-listed species, which is broadly defined in 321 CMR 10.02 to include the killing or harming of animals as well as the disruption of their nesting, breeding, feeding or migratory activity that may result from the modification, degradation, or destruction of "Habitat"¹ of state-listed species. "Priority Habitat" is

¹ "Habitat" is defined in 321 CMR 10.02 to mean an area which, due to its physical or biological features, protects or provides important elements for the growth and survival of plants or animals such as food, shelter, or living space, and includes without limitation, breeding, feeding, resting, migratory, or overwintering areas.

defined in 321 CMR 10.02 to mean the geographic extent of Habitat for state-listed species delineated by the Division within the Commonwealth pursuant to 321 CMR 10.12. As also provided in 321 CMR 10.02, Priority Habitat is delineated by the Division based on records of state-listed species observed within the twenty-five (25) years prior to delineation and contained in its Natural Heritage and Endangered Species Program (“NHESP”) database. However, 321 CMR 10.12(2) further requires the Division to delineate Priority Habitat based on the Best Scientific Evidence Available,² which includes an examination of individual occurrence records but also involves evaluating the nature and/or significance of such occurrence as it relates to the conservation and protection of the species.

As stated in 321 CMR 10.12(1), Priority Habitats are used by the Division for two purposes: (1) to screen proposed projects and activities that may result in a Take of state-listed species; and (2) to provide guidance to property owners regarding such projects and activities through consultation with the Division. The MESA Regulations at 321 CMR 10.18 require that, except as provided in 321 CMR 10.13 (“Sites or Projects not in Priority Habitat”) and 321 CMR 10.14 (“Exemptions”), any project or activity proposed to occur in Priority Habitat must be reviewed by the Division to determine if it will cause a Take of a state-listed species. 321 CMR 10.18 further requires that prior to the commencement of any physical work in Priority Habitat, the record owner of the land where such project or activity will occur shall submit the information listed in 321 CMR 10.20 to the Division. Under the latter regulation, the Division has the discretion to

² “Best Scientific Evidence Available” is defined in 321 CMR 10.02 to mean species occurrence records, population estimates, habitat descriptions, assessments, peer reviewed scientific literature, documented consultation with experts and information contained in the NHESP records or other credible scientific reports or species sighting information readily available to the Director.

require additional information beyond that described in the lists set forth therein, including survey(s) for particular state-listed species.

Projects or activities proposed to take place on sites that are not delineated as Priority Habitat are not subject to review by the Division pursuant to 321 CMR 10.18, except as provided in 321 CMR 10.13(1). Relevant to this appeal, 321 CMR 10.13(1)(a)1, provides that if the Division receives new information on the occurrence of an endangered or threatened state-listed species (only) relating to a site that is not located in Priority Habitat, the Division may determine, within thirty (30) days of its receipt of such occurrence information, whether the new state-listed species occurrence meets the criteria for delineation of a Priority Habitat under 321 CMR 10.12, and whether any proposed project or activity at the site shall be reviewed under 321 CMR 10.18. Under 321 CMR 10.13(1)(b)1., the Division may request in its comments to the Massachusetts Environmental Policy Act (“MEPA”) Office on an Environmental Notification Form (“ENF”), draft or final Environmental Impact Report (“EIR”) or Notice of Project Change (“NPC”) filed with the MEPA Office by a proponent of a project or activity that will not be located in Priority Habitat that a survey be done where the Division has credible information indicating the occurrence of a particular endangered or threatened state-listed species or its habitat within the area to be disturbed by the project or activity.

B. Procedural History

On September 20, 2018, the Division received a MESA Project Review Checklist and the required documentation associated with Surfside Crossing’s Project, which proposes the construction of sixty (60) single-family homes, ninety-six (96) condominium units, roadways and related site work on a 13.5 acre property in Nantucket,

MA. At the time of the Division's review of Surfside Crossing's proposed Project pursuant to 321 CMR 10.18, the Property was mapped as Priority Habitat by the Division for seven (7) state-listed Lepidoptera (moths and butterflies) species, including the Coastal Heathland Cutworm, a state-listed species of special concern.

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 NLEB and that "the deer trails and open spots within these habitat types could host populations" of the New England Blazing Star. 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. In an email dated October 2, 2019, the Division explained to the Select Board why the above information did not meet the criteria for delineating the Property as Priority Habitat for the additional state-listed species identified by the Select Board. The NLC separately sent a letter to the Division on October 4, 2018 reiterating that the information provided by the Select Board necessitates a review by the Division to determine the Project's impacts to the NLEB and other state-listed species.

The appeals filed by the Select Board, the NLC and the 13 residents on November 8, 2018, asserted 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.

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 Petitioners confirmed that their position is that the information provided to the Division prior to making its Take Determination warranted additional surveys and shows that the Project will cause a Take of the NLEB and the New England Blazing Star. 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 had filed a Motion to Dismiss the appeals of all three Petitioners due to their lack of standing. At the PHC, I 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. The Select Board and the NLC filed their respective Oppositions to the Motions on March 4, 2019.

On April 24, 2019, I issued a Recommended Final Decision granting the Division and Surfside Crossing’s respective Motions to Dismiss the Petitioners’ claim that the Division erred by not determining whether the Project will result in a Take of the New England Blazing Star, and the appeals of the Select Board and the 13 residents for lack of standing. On June 17, 2019, the Division Director adopted my Recommended Final Decision as to these rulings as the Final Decision of the Division.³

My April 24, 2019 Recommended Final Decision also denied the Division and Surfside Crossing’s respective Motions to Dismiss the NLC’s appeal for lack of standing, as well as Surfside Crossing’s Motion to Dismiss the NLC’s appeal with respect to the

³ The underlying administrative record provided to the Division Director for his review of my April 24, 2019 Recommended Final Decision included all of the parties’ filings related to the issue of the petitioners’ respective standing to appeal and the justiciability of certain of their claims.

NLEB for reasons of justiciability. The Decision therefore included an order establishing as the issue for adjudication whether the Division properly applied its regulatory criteria at 321 CMR 10.13 and 10.18 when it made its October 19, 2018 determination that the project will only result in a take of the Coastal Heathland Cutworm, and not any other state-listed species, including the Northern Long-eared Bat (“NLEB”). The schedule for adjudication that I thereafter established on May 10, 2019 provided for the submission of prefiled written direct and rebuttal testimony⁴ by the parties’ witnesses, followed by the live hearing portion of the adjudication that is limited to the cross examination of the parties’ witnesses based on their prefiled testimony.

On May 17, 2019 the NLC filed a Motion for Access to the Project Site, requesting that I order Surfside Crossing to allow the NLC’s experts to access the Project Site for the purpose of surveying the property for evidence of the NLEB. The Division and Surfside Crossing both filed written Oppositions to the Motion. In a ruling dated May 24, 2019, I denied the NLC’s Motion for Access for the reason that any such new NLEB occurrence information would not be determinative of the issue for adjudication, which centers on whether the Division properly applied its regulatory criteria at 321 CMR 10.13 with respect to the NLEB information before it at the time of its October 19, 2018 Take Determination.

Consistent with the Schedule for Adjudication I established on May 10, 2019, the Division and the NLC filed the PDT of their witnesses on June 18, 2018. Specifically, the NLC filed PDT from two witnesses: (1) Danielle O’Dell, an Ecologist for the Nantucket Conservation Foundation and NLEB researcher; and (2) Emily Molden, the

⁴ In this Recommended Decision, I hereinafter refer to a witness’ prefiled direct testimony as “PDT” and their prefiled rebuttal testimony as “PRT”.

Executive Director of the NLC. The Division filed PDT from two witnesses: (1) Thomas W. French, Ph.D, who at the time of the Division's Take Determination was the Assistant Director of the Division responsible for the management of the Natural Heritage and Endangered Species Program ("NHESP") that administers the MESA regulatory program; and (2) Jessie E. Leddick, Chief of Regulatory Review in the NHESP. The June 18, 2019 filing by Surfside Crossing stated that it would not be submitting PDT, but instead had retained Meghan Lout, a Certified Wildlife Biologist, to review the PDT of the witnesses of the NLC and the Division and to file prefiled written rebuttal testimony ("PRT") in accordance with the July 18, 2019 deadline in the schedule for adjudication. Surfside Crossing also confirmed that its witness, Ms. Lout, will be available for cross-examination at the hearing on August 6, 2019.

The parties filed the PRT of their respective witnesses on July 18, 2019.

On July 22, 2019, the NLC filed a "Motion to Strike Portions of So-Called Pre-Filed 'Rebuttal' Testimony of Megan [sic] Lout." As grounds for its Motion to Strike, the NLC stated that Ms. Lout's pre-filed testimony is not "rebuttal" testimony, but rather is direct testimony that was due to be submitted on or before June 18, 2019. The NLC points out that the pre-filed testimony of all witnesses has been subject to rebuttal testimony except Ms. Lout's. The NLC further contended that by failing to submit Ms. Lout's testimony when it was due and labeling it as "rebuttal" testimony, Surfside Crossing has deprived the NLC of the opportunity of filing testimony rebutting Ms. Lout's testimony and been put at a "decided and unfair advantage" in this adjudication. Accordingly, the NLC moved to strike most of the substantive content of Ms. Lout's PRT, i.e., the entire or portions of following numbered paragraphs (including any

corresponding exhibits referenced therein) - 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, and 38 – and requested that such testimony not be considered by the Presiding Officer or included within the record of these proceedings.

On July 29, 2019, Surfside Crossing filed an Opposition to the NLC's Motion to Strike. As grounds for its Opposition, Surfside Crossing stated that the testimony of Ms. Lout is rebuttal to the PDT of the NLC and its witnesses; is intended to respond to the actual testimony of the NLC; is consistent with the rules for adjudicatory proceedings and the Administrative Procedures Act; and will assist the Presiding Officer in his role as the trier of fact. Concluding that Ms. Lout's PRT neither violates the rules for adjudicatory hearings nor causes prejudice to the NLC, Surfside Crossing requested that I deny the NLC's Motion to Strike.

In a Ruling dated July 31, 2019, I granted, in part, the NLC's Motion to Strike ¶¶ 17 – 20 and the sixth sentence in ¶ 31 of Ms. Lout's PRT. Consistent with my May 24, 2019 Ruling denying the NLC's Motion for Access to the Project site, I determined that Ms. Lout's observations and related opinions derived from her July 2019 visit to the Project site discussed in the above portions of her PRT are not relevant evidence that would assist in my adjudication of the specific issue in this appeal. As to the other entire or portions of paragraphs in Ms. Lout's PRT identified in the NLC's Motion to Strike, I determined they are reasonably within the scope of PRT for the purposes of this appeal and would not prejudice the NLC in light of its ability to cross examine Ms. Lout on her testimony. Consequently, I denied the NLC's Motion to Strike these portions of Ms. Lout's PRT.

The cross examination of selected witnesses of the parties occurred at the hearing on August 6, 2019.⁵ With the agreement of the parties, I allowed three (3) additional exhibits associated with the NLC's cross examination of the Division's witness, Jessie Leddick, to be entered into evidence.

III. ISSUE FOR ADJUDICATION

The single issue for adjudication in this appeal is as follows:

“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.”

IV. FINDINGS OF FACT

Based on all of the evidence presented, reasonable inferences drawn from the evidence, and my assessment of the credibility of the witnesses, the relevance of their qualifications and the specificity of their testimony and supporting evidence, I make the following findings of fact under the topic headings below. Additional findings of fact are included in Section V. (Legal Analysis and Conclusions) of this Recommended Decision, as necessary.

A. Summary of the NLEB Natural History

1. Five (5) bat species, including the NLEB, have been listed by the Division for protection under MESA. *French PDT*, ¶ 20. In Massachusetts, all five species generally hibernate in caves, abandoned mines, and other cave-like structures such as aqueducts

⁵ The NLC cross examined one of the Division's witnesses, Mr. Leddick, and Surfside Crossing's witness, Ms. Lout. The Division cross examined both of the NLC's witnesses, Ms. O'Dell and Ms. Molden, and Surfside Crossing's witness, Ms. Lout. Surfside Crossing cross examined both of the NLC's witnesses, Ms. O'Dell and Ms. Molden. In this Recommended Decision, I refer to a witness' testimony on cross examination as "Cross."

and roost in the summer on trees, rock crevices, buildings and other human-made structures. *Id.*

2. The NLEB is one of the small insect eating bats in the genus *Myotis* that has historically occurred in Massachusetts. *French PDT*, ¶ 26. A medium sized bat with long ears, the NLEB has a body length of 3 to 3.7 inches and a wing span of 9 to 10 inches, with pale-brown fur on its underside and darker brown fur on its back. *French PDT*, ¶ 25.
3. The NLEB has an extensive geographic range extending from northern Florida to the southern Northwest Territories in Canada, and across this range occupies a wide diversity of forested habitat types for summer foraging and roosting, including Pitch Pine oak-hickory, northern hardwoods, pine-dominated forests, and boreal forest. *French PDT*, ¶ 98. Thus, the NLEB is considered to be a habitat generalist because of the wide range of habitat types it is capable of using; its plasticity is an essential trait that allows NLEB to successfully occupy such a large and varied geographic range. *French PDT*, ¶¶ 32, 76 and Exhibit 4 (*Federal Register Notice of 4(d) Rule for the Northern Long-eared Bat*, Vol. 81, No. 9, Thursday, January 14, 2016) at 1903. Moreover, because the NLEB is highly plastic in their use of habitats, they will use human-made structures for day-roosts, maternity roosts, and hibernacula. *French PDT*, ¶ 96; see also ¶ 29.
4. The NLEB hibernate singly or in small groups of up to about 10-15 but tend to be generally solitary while foraging and roosting during the summer, except when females are caring for their young. *French PDT*, ¶ 27.
5. The availability of winter hibernation sites, known as hibernacula, is considered the primary driver of NLEB distribution across a wide geographic area. *French PDT*, ¶

28. Nearly all NLEBs across their range hibernate in caves and cave-like structures, and individual bats show a high level of faithfulness to a hibernation site consistently returning in successive years to the same location. *French PDT*, ¶¶ 28-29. In addition to these caves and cave-like structures, NLEBs have been documented over-wintering in human-made structures. *French PDT*, ¶ 29.

6. The NLEB also use human-made structures for day roosting, as documented in studies showing that on Martha's Vineyard, 36% of NLEB roost sites were on buildings; on Cape Cod, NLEB primarily used human structures for roosting. *French PDT*, ¶ 33 and Exhibit 2 (*Bat Use of an Island Off the Coast of Massachusetts*, Dowling and O'Dell (2018, *Northeastern Naturalist*, Vol. 25, No.3) at 376; see also Exhibit 2 to O'Dell PDT.

7. While the NLEB is generally solitary, aggregations of females (with their single young) come together during the breeding season in groups of typically 10-30 individuals. *French PDT*, ¶ 36. Individual female NLEBs carry their young to and from different changing groups of females, interspersed with periods of roosting singly in what has been termed a fission-fusion pattern. *Id.* This constant dynamic of group reorganization continues throughout the period in which the young are raised. *Id.* As a result, each individual adult female will use multiple maternity roost sites each year, and if followed, will be responsible for the documentation of multiple known active maternity roost trees as well as other maternity roosts on multiple human-made structures. *Id.*

8. Female NLEBs generally give birth in late May and early June, and their young are not able to fly for approximately 21 days after birth. *French PDT*, ¶ 37.

Consequently, the most vulnerable time for NLEB pups is during the months of June and

July, which the Division factors in when reviewing proposed projects or activities in Priority Habitat. *Id.*; *see also* ¶ 77.

B. The Impact of White-Nose Syndrome on the NLEB

9. White-nose Syndrome (“WNS”) is a fungal disease affecting bats that was first detected in 2006 in east central New York and has since resulted in the first sustained epizootic illness in North America affecting bats in recorded history. *French PDT*, ¶ 46. The fungus responsible for this disease is a pathogen in the genus *Pseudogymnoascus destructans* (*Pd*). *French PDT*, ¶ 47; *O’Dell PRT*, ¶ 13. The WNS fungus is known to spread in natural hibernacula consisting of caves and cave-like structures. *O’Dell PDT*, ¶ 23. It grows on and into the deeper layers of the bat’s skin, causing enough irritation that the bat is continually aroused from winter hibernation, thereby dehydrating the bat and depleting its fat stores. *French PDT*, ¶ 48. The initial mortality of NLEB at natural hibernacula surveyed in central and western Massachusetts was nearly 100%. *French PDT*, ¶ 51.
10. Because of the impact of WNS on the NLEB population, most but not all of the individual NLEB occurrence records in Massachusetts over the past 10 years have come from the coast, from Newburyport south through the Blue Hills to Cape Cod and the islands of Martha’s Vineyard and Nantucket. *French PDT*, ¶ 51. While logically NLEB using small coastal hibernation sites might be somewhat isolated from infected bats using large caves and mines farther west and therefore not exposed to the fungus, WNS has been subsequently documented on Cape Cod in 2013 and on Martha’s Vineyard in 2017 where a previously tagged NLEB found dead tested positive for WNS. *French PDT*, ¶¶ 51, 53.

11. On Nantucket, out of 41 swabs collected directly from captured NLEB between 2016 and the fall 2018 only one bat returned positive for the presence of *Pd*. *O'Dell PRT*, ¶ 13. There is no evidence of progression to WNS on NLEB on Nantucket at this time. *Id.* Additionally, the one known hibernacula in a crawl space on Nantucket has been swabbed annually to test for *Pd* and all these samples have returned negative. *O'Dell PRT*, ¶ 14. The presence of a single bat with *Pd* indicates that bats on Nantucket are clearly exposed to the fungus but so far are not progressing to WNS. *O'Dell PRT*, ¶ 15. However, the fact that widespread mortalities from WNS have not yet been documented on Nantucket does not mean that Nantucket is a refuge from the disease, given that an NLEB mortality from WNS was documented on Martha's Vineyard in 2017 and, as noted above, *Pd* has already been documented on a bat on Nantucket. *French PRT*, ¶¶ 94, 53-54.

12. In response to the sudden and significant population decline experienced by the cave bats in Massachusetts from WNS, the Division listed the NLEB, Little Brown Bat, Small-footed Bat, and Tri-colored Bat as endangered state-listed species under MESA on February 12, 2012. *French PDT*, ¶ 59.

C. The Presence of NLEB on Nantucket

13. Most of what is known of the presence of NLEBs on Nantucket arises out of the research conducted from 2015-2018 by Dr. Zara Dowling and the NLC's expert witness, Danielle O'Dell. *French PDT*, ¶ 39. The Division issued the necessary scientific collection permits to allow these researchers to conduct their 2015-2016 field work in accordance with MESA, which included acoustic surveys, mist net captures, radio tracking and visual observations. *French PDT*, ¶ 40. Dowling and O'Dell published a

summary of their work from 2015-2016 in 2018. *Bat Use of an Island Off the Coast of Massachusetts, Dowling and O'Dell (2018, Northeastern Naturalist, Vol. 25, No.3), Exhibit 2 to O'Dell PDT, referenced in ¶ 13; Exhibit 2 to French PDT.*

14. As the first systematic inventory of bats on Nantucket, the work undertaken by Dowling and O'Dell from 2015-2016 resulted in the capture of thirteen (13) NLEBs, nine (9) by mist net and four (4) by hand. *French PDT, ¶ 41 and Exhibit 2 at 375.* The four (4) NLEBs captured by hand were among five NLEBs found hibernating in a crawl space. *Id.* Emergence counts at two known active maternity roost trees in large pitch pines documented eleven (11) and nine (9) NLEBs respectively. *French PDT, ¶ 42; see also Exhibit 2 at 375-376.* Additionally, when conducting spring and fall mist-netting to capture and band NLEB, swabs were collected to detect the presence of *Pd*, the fungus that causes WNS. *O'Dell PDT, ¶ 14.*

15. As a condition of their scientific collection permit, Dowling and O'Dell were required to submit reports to the Division detailing how many bats of each species were captured, handled, banded, and/or tracked with attached radio transmitters. *French PDT, ¶ 40 and Exhibit 3.* Ms. Dowling submitted two such supplemental reports to the Division on September 26, 2018. *Leddick PDT, ¶ 35 and Exhibit 4 (containing both reports: "An Exploratory Study of Northern Long-eared Bats on Nantucket," and "Roosting Habits of Northern Long-eared Bats on Nantucket.")* These reports summarized the NLEB survey work conducted by Ms. Dowling in 2016 and 2017 respectively. *Leddick Cross, p. 31, lines 16-18.*

16. Between 2015-2016, acoustic detectors were deployed by Dowling and O'Dell at 15 locations on Nantucket to listen for and record bat calls to inventory bat species and

identify seasonal activity patterns. *French PDT*, ¶ 42 and *Exhibit 2 at 363 and Figure 1 at 364*. The acoustic surveys detected the widespread occurrence of NLEB in 8 of 15 locations. *Exhibit 2 to both O'Dell PDT and French PDT, at 377*. Two of these locations, Ram Pasture and Lost Farm, had consistently high detection rates of NLEB and were located adjacent to mature Pitch Pine stands, but NLEB were also detected in areas of Scrub Oak (approximately 20 feet tall). *Id.* However, because the acoustic sampling was somewhat opportunistic and focused on areas deemed potential bat habitat, the study did not include acoustic surveying for the presence in more urban areas. *Id.*

17. At least some NLEBs are able to survive the winter in crawl spaces under houses, though it is not known if all of the NLEBs remain on Nantucket or if some portion leaves the island every fall. *French PDT*, ¶ 45.

18. In addition, acoustic detectors were placed by O'Dell at properties adjacent to the Surfside Crossing Project site in 2017 and 2018 in habitat and vegetation communities types that are similar to those present on the Project site. *O'Dell PDT*, ¶ 17 and *Exhibit 3 (showing these acoustic detector locations)*. NLEB were detected at every one of these locations, and the ones surrounded by yellow circles displayed on Exhibit 3 to Ms. O'Dell's PDT detected significantly higher levels of activity by NLEB ranging from 50 to 100 calls per night, on nights with suitable weather conditions. *Id.*

D. The Division's Delineation of Priority Habitat for the NLEB

19. As a general matter, Priority Habitat is delineated by the Division through a two-step process: (1) the Division needs to have an occurrence record, which is a verified observation of an individual state-listed species that is less than twenty-five (25) years old; and (2) the Division performs a subsequent evaluation of the context and

significance of the occurrence record based the Best Scientific Evidence Available, which also involves evaluating the nature and/or significance of such occurrence as it relates to the conservation and protection of the species. *See 321 CMR 10.02 and 10.12(2); French PDT, ¶ 66; Leddick PDT, ¶¶ 19 and 20.* In short, in order for the Division to delineate Priority Habitat for a state-listed species, the Division must have an occurrence record and then determine that the occurrence meets the criteria for delineating Priority Habitat consistent with the Division's mapping guidelines (discussed in ¶ 20 below). *Leddick PRT, ¶ 13.*

20. Pursuant to its authority under 321 CMR 10.12(5), the Division has established criteria for its acceptance of state-listed species occurrence records, the purpose of which is to ensure that the NHESP database meets the highest standards of data integrity and that only verified occurrence records may be used to delineate Priority Habitats. *Leddick PDT, ¶ 22.* As required by 321 CMR 10.12(3), the Division has also established habitat mapping guidelines for each state-listed species that identify important habitat features, describe the methodology by which such Priority Habitats are delineated, and set forth the rationale, references and citations for the Best Scientific Evidence Available that support the mapping guidelines for a particular state-listed species. *Leddick PDT, ¶ 23.*

21. Projects or activities proposed to take place on sites that are not delineated as Priority Habitat are not subject to review by the Division pursuant to 321 CMR 10.18, except as provided in 321 CMR 10.13(1). Relevant to this appeal, 321 CMR 10.13(1)(a)1, provides that if the Division receives new information on the occurrence of an endangered or threatened state-listed species (only) relating to a site that is not located in Priority Habitat, the Division may determine, within thirty (30) days of its receipt of

such occurrence information, whether the new state-listed species occurrence meets the criteria for delineation of a Priority Habitat under 321 CMR 10.12, and whether any proposed project or activity at the site shall be reviewed under 321 CMR 10.18. *French PDT*, ¶ 68; *Leddick PDT*, ¶¶ 27 and 28; *Leddick PRT*, ¶¶ 10 and 11.

22. Relevant as background for the Division's mapping of Priority Habitat for the NLEB, the Division's 2012 listing of the NLEB as an endangered species under MESA preceded the NLEB's listing under the federal Endangered Species Act ("ESA") as a threatened species by almost three years. *French PDT*, ¶ 70. Taking into consideration the Best Scientific Evidence Available and the habitat features critical to the survival of the NLEB, the Division initially mapped Priority Habitat for the NLEB based on known use of a cave or cave-like structures for hibernation by ten (10) or more NLEBs within the preceding twenty-five (25) years. *French PDT*, ¶ 72. The Division also began to develop working habitat mapping guidelines that contemplated a 100 foot buffer zone around these known hibernacula. *Id.*

23. The United States Fish and Wildlife Service ("USFWS") thereafter promulgated what is known as a "4(d) Rule,"⁶ on February 16, 2016. *French PDT*, ¶ 74. The federal 4(d) Rule established requirements for the protection of the NLEB that were more stringent than those envisioned by the Division in 2012 when it listed and mapped Priority Habitat for the NLEB pursuant to MESA. *Id.*

24. In developing its 4(d) Rule, the USFWS determined that in areas impacted by WNS, the most important conservation actions for the NLEB are to protect bats in

⁶ Under section 4(d) of the ESA, the USFWS may issue regulations for any threatened species that set forth measures that are necessary and advisable to provide for the conservation of such species. *French PDT*, ¶ 75 and *Exhibit 4 at 1900*.

hibernacula and maternity roost trees. *French PDT*, ¶ 76, *Exhibit 4 at 1902*. The USFWS further noted that because of the NLEB's demonstrated plasticity in its environment, the availability of forested habitat does not now, nor will it likely in the future, limit the conservation of the NLEB. *French PDT*, ¶ 76, *Exhibit 4 at 1903-1904, 1909*. Accordingly, the USFWS' final 4(d) Rule for the NLEB at 50 CFR 17.40(o) prohibits the cutting of trees within .25 miles of a known hibernaculum, cutting or destroying an occupied (or unoccupied) maternity roost tree, including any other trees within a 150 foot radius from the maternity roost tree, during the NLEB pup season (June 1 through July 31). *French PDT*, ¶ 76; *50 CFR § 17.40(o)*, *Exhibit 4 at 1921*.

25. A known occupied maternity roost tree is defined in the 4(d) Rule as a tree that has had at least one female NLEB or juvenile bat tracked to it, or the presence of a female or juvenile bat that is known as a result of other methods. *French PDT*, ¶ 77, *Exhibit 4 at 1911*. Once documented, a tree will continue to be considered a known occupied maternity roost tree if the tree and surrounding habitat remain suitable for NLEBs. *Id.* Preserving known maternity roost trees is only necessary to protect the pups from the risk of direct mortality during the period when they are not yet able to fly, which is from June through July. *Id.* Consequently, the 4(d) Rule does not prohibit the removal of these trees outside of the pupping season. *Id.*

26. Known hibernacula are defined in the 4(d) Rule as locations where NLEBs have been detected during hibernation or at the entrance during fall swarming or spring emergence. *French PDT*, ¶ 78; *Exhibit 4 at 1902, 1909*. However, the 4(d) Rule separately exempts from the take prohibition the removal of NLEBs from "human structures" which are defined as houses, garages, barns, sheds, and other buildings

designed for human entry. *French PDT*, ¶ 78; *Exhibit 4 at 1901, 1921*. In mapping Priority Habitat for bat hibernacula, the Division has always mapped any natural geological feature and any cave-like human-made structure, such as a mine, aqueduct or tunnel, but not buildings or bridges used as maternity roosts. *French PDT*, ¶ 78. The Division does not map Priority Habitat for the occurrence of NLEB roosting on or hibernating within human-made structures (houses, buildings, bridges or towers) because the Division has no control over the maintenance, management, or future availability of these structures. *French PDT*, ¶ 84. For these reasons, the Division has determined that human-made structures such as building, bridges or towers are not the types of locations that provide quality habitat features necessary for the long-term conservation and protection of the species as required by 321 CMR 10.12. *Id.*

27. Because the 4(d) Rule established more stringent requirements for the protection of NLEB habitat than those envisioned by the Division when it listed the NLEB under MESA in 2012, the Division subsequently modified its Priority Habitat mapping guidelines to ensure compliance with the federal requirements. *French PDT*, ¶ 79 and *Exhibit 5 (the Division's Priority Habitat Mapping Guidelines for the NLEB)*. The Division also determined that the 4(d) Rule protections adequately guard against the disruption of NLEB habitat that would rise to a Take of the NLEB under MESA. *Id.*

28. As set forth in the Division's Priority Habitat Mapping Guidelines, the Division maps Priority Habitat for the NLEB within .25 miles of known winter hibernacula (caves or cave-like structures such as abandoned mines) and within 150 feet of known maternity roost trees. *Exhibit 5 to French PDT; Leddick PRT*, ¶ 14.

29. The Division's criteria for acceptance of NLEB hibernacula or maternity roost tree occurrence records requires submittal of photographs, in-hand identification by an expert (e.g., by capturing the bat in a mist net), or radio-telemetry of identified individual bats showing the actual use of a hibernacula or maternity roost tree at a specific location. *Leddick PRT*, ¶ 15; see also *Leddick Cross*, p. 71, lines 5-10; p. 73, lines 21-24; p. 74, lines 1-6.

30. In comparison, verifying the presence of bat species in a particular area by acoustic data is difficult and has a significant level of error. *Leddick PDT*, ¶ 51; *Leddick PRT* at ¶16; see also *O'Dell PRT*, ¶10. Acoustic bat surveys use microphones to listen for the high frequency foraging calls of bats. *French PDT*, ¶ 89. Some species of bats can be identified with a reasonable level of certainty from their foraging calls while others, including the species of *Myotis*, can be fairly reliably identified to the group but distinguishing among different species is more difficult. *Id.* As bat species travel great distances to forage within a single active season, acoustic data does not provide definitive identification of the location and actual use of a hibernaculum or maternity roost tree by NLEB. *Leddick PDT*, ¶ 52; *French PDT*, ¶ 88; see also *Leddick Cross*, p. 71, lines 5-10. Instead, acoustic data shows the potential presence of a bat or group of bats in an area at a particular time of year. *Leddick PDT*, ¶ 52; *French PDT*, ¶ 88. For these reasons, while the Division will archive acoustic survey data in the NHESP database as a future lead, it is not used to map Priority Habitat because it does not rise to being a verified observation of an individual bat. *Id.*

E. The Division's October 19, 2018 Take Determination

Surfside Crossing's Project Filing with the Division pursuant to 321 CMR 10.18

31. On September 20, 2018, the Division received a MESA Project Review Checklist and the required documentation associated with Surfside Crossing's Project, which proposes the construction of sixty (60) single-family homes, ninety-six (96) condominium units, roadways and related site work on a 13.5 acre property in Nantucket, MA (the "Property"). *Leddick PDT, ¶ 29 and Exhibit 2.*

32. At the time of the Division's review of Surfside Crossing's proposed Project pursuant to 321 CMR 10.18, the Property was mapped as Priority Habitat by the Division for seven (7) state-listed Lepidoptera (moths and butterflies) species, including the Coastal Heathland Cutworm, a state-listed species of special concern. *Leddick PDT, ¶ 31.* The Property's status as Priority Habitat for seven state-listed Lepidoptera species is shown in the current 14th Edition of the Massachusetts Natural Heritage Atlas (the "Atlas") (effective August 1, 2017), which was also the case in the prior 13th Edition of the Atlas (effective October 1, 2008). *Leddick PDT, ¶ 32.* The Atlas serves as the Division's authoritative delineation of the boundaries of Priority Habitats in the Commonwealth. *Leddick PDT, ¶ 24 and 321 CMR 10.17.*

Submission of Information by or on behalf of the Select Board or the NLC in advance of the Division's Take Determination

33. In a letter dated September 27, 2018, the Select Board submitted information documenting observations of the New England Blazing Star, a state-listed plant species of special concern, on another parcel located in the vicinity of the Property. *Leddick PDT, ¶ 33 and Exhibit 3 (the Select Board's letter submitting the September 21, 2017 letter from Avalon Consulting and attachments thereto).* The Select Board indicated that

the Property may provide suitable habitat for the New England Blazing Star as well as another state-listed plant species of special concern, Sandplain Blue-eyed Grass. *Id.*

34. The Select Board further indicated that the Property may also provide suitable habitat for the NLEB based on the 2015-2016 research conducted by Dowling and O'Dell and published in *Northeastern Naturalist* in 2018 (also referred to in the Division's testimony and herein as the "Dowling and O'Dell study"). *Leddick PDT*, ¶ 34 and *Exhibit 3*. The Select Board's letter also stated that in the week preceding its letter, Ms. O'Dell had placed acoustic bat detectors on Town property and Nantucket Land Bank property "very close" to the Surfside Crossing Project site, and preliminary results from two evenings of observation indicated that NLEB were active at these two nearby locations. *Exhibit 3 to Leddick PDT*. A plan showing the two locations where the acoustic detectors were placed by Ms. O'Dell is Figure 1 attached to the September 21, 2018 Avalon Consulting letter. *Id.* Ms. O'Dell separately testified that these two acoustic detectors were deployed from September 19, 2018 through October 2, 2018, documenting high levels of activity of NLEB over most nights with suitable weather conditions. *O'Dell PDT*, ¶ 16 and *Exhibit 1*; ¶ 17 and *Exhibit 3 (displayed thereon as yellow and green dots)*; see also *O'Dell PRT*, ¶ 9. Ms. O'Dell testified on cross examination that she did not thereafter submit the acoustic data collected by the two detectors from September 19, 2018 through October 2, 2018 to the Division. *O'Dell Cross*, p. 254, lines 5-14.

35. Other acoustic detectors deployed as part of a larger island-wide survey in the summer of 2017 and 2018 documented the presence of NLEB at each of those locations as well. *O'Dell PDT*, ¶ 17 and *Exhibit 3 (displayed thereon as red and pink dots)*. The

locations surrounded by yellow circles displayed on Exhibit 3 to Ms. O'Dell's PDT detected significantly higher levels of activity by NLEB ranging from 50 to 100 calls per night, on nights with suitable weather conditions. *Id.*

36. In an email dated September 24, 2018, a Nantucket resident named Meghan Perry reported to the Division that she had assisted with acoustic studies conducted from an abutter's property within 300 feet of the Project site that documented the presence of NLEB. *Leddick PDT, ¶ 57 and Exhibit 9; French PDT, ¶ 87 and Exhibit 9.* As discussed in Finding of Fact No. 55, Ms. Perry thereafter submitted an observation report for the above referenced acoustic monitoring of NLEB to the Division through its Vernal Pool and Rare Species Information System ("VPRS") on October 26, 2018, after the Division's issuance of its Take Determination. *Id.*

37. On September 26, 2018, Zara Dowling separately provided the Division with a copy of the Dowling and O'Dell study as well as the two supplemental reports summarizing her NLEB research on Nantucket in 2016 and 2017. *Leddick PDT, ¶ 35 and Exhibits 3 and 4.*

38. Consistent with Ms. O'Dell's testimony, the record also shows that Zara Dowling previously submitted observations of NLEB in 2016 and 2017 to the Division through VPRS. *O'Dell PRT, ¶ 3.* A summary of the full scope of Ms. Dowling's submittals through VPRS is set forth in a December 3, 2018 email from Tara Huguenin, a Conservation Data Specialist in the NHESP, to Danielle O'Dell. *Leddick Cross Examination Exhibit #2; see also Leddick PRT, ¶ 33 and Exhibit 1 regarding the 5 NLEB observations submitted by Ms. Dowling through VPRS on January 29, 2018.*

39. In response to the information submitted to the Division regarding the potential presence of other state-listed species on the Project site, the Select Board requested the Division to reevaluate its determination that the Property only provided habitat for state-listed Lepidoptera species, and that the Division review Surfside Crossing's Project for its impacts to NLEB and the New England Blazing Star. *Leddick PDT*, ¶ 36.

The Division's October 2, 2018 Response to the Select Board

40. Jessie Leddick, Chief of Regulatory Review in the Division's NHESP, reviewed the above summarized information and consulted with Dr. Thomas French, the Assistant Director of the Division in charge of the NHESP, and responded to the Select Board in an email dated October 2, 2018. *Leddick PDT*, ¶ 40 and *Exhibit 5*; *French PDT*, ¶ 86 and *Exhibit 8*.

41. In summary, Mr. Leddick's October 2, 2018 response confirmed for the Select Board that because Surfside Crossing's Property did not meet the MESA regulatory criteria for mapping new Priority Habitat for the New England Blazing Star, Sandplain Blue-eyed Grass or the NLEB, the Division would not review the proposed Project relative to these state-listed species. *Exhibit 5 to Leddick PDT*. Noting that WNS is the reason that the NLEB was listed under the ESA and MESA, Mr. Leddick explained that the Division reviews projects or activities for their impacts to NLEB consistent with the USFWS' 4(d) Rule – i.e., when they are within .25 miles of known winter hibernacula (caves and mines) and within 150 feet of known roost trees. *Id.* He further noted that the 4(d) Rule does not apply to hibernacula or roosts that occur in structures, where NLEB overwinter on Nantucket. *Id.* His email stated that the Division had not received “any verified observations” of the NLEB within 150 feet of the Surfside Crossing Property and

that there were no known winter hibernacula within .25 miles of the Property, or elsewhere on Nantucket. *Id.* The Division therefore determined that the Property does not meet the criteria for mapping as Priority Habitat for the NLEB, and that the Division cannot review the Project or require Surfside Crossing to conduct a survey for this species. *Id.*

42. Mr. Leddick's October 2, 2018 response to the Select Board further stated that "based on recent verbal consultations with the proponent's representatives, it is our understanding that the proponent is willing to proactively include this time of year restriction [no tree removal between June 1st through July 31st] as part of any future, permitted projects or actions that may occur on the property." *Exhibit 5 to Leddick PDT.* However, neither the prefiled testimony of the Division's witnesses nor the testimony of Mr. Leddick on cross examination documented or confirmed that Surfside Crossing had thereafter memorialized in writing its commitment to abide by the above TOY restriction. *See, e.g., Leddick Cross, pp. 106-108; pp. 118-120, 123.* Consequently, the record only supports a finding that, consistent with the Division's October 2, 2018 email response to the Select Board, Surfside Crossing's commitment not to remove any trees on the Property during the NLEB pup season was verbal in nature only. *Leddick Cross, pp. 121, 123.*

43. Mr. Leddick testified on cross examination, however, that in his experience verbal commitments are fulfilled by project proponents and "end up being captured in the review of project...[and] then incorporated into project permitting." *Leddick Cross, p. 134, lines 20-21, p. 135, lines 15-18.*

44. Regarding the Division's October 2, 2018 response that it cannot require Surfside Crossing to conduct a survey for NLEB, the MESA regulations provide one situation where the Division may *require* a survey, and one situation where it may *request* a survey. *Leddick PRT*, ¶ 23. Where a property is mapped as Priority Habitat for a particular state-listed species, the Division has authority under 321 CMR 10.20 to require a project proponent who has filed for MESA review pursuant to 321 CMR 10.18 to conduct a survey for that state-listed species. *Leddick PRT*, ¶ 24. When the property is not already delineated as Priority Habitat for the species in question, the Division has authority under 321 CMR 10.13(1)(b)1 to request in its comments on an ENF, draft or final EIR or NPC filed with the MEPA Office that the project proponent conduct a survey be done where the Division has credible information indicating the occurrence of a particular endangered or threatened state-listed species. *Leddick PRT*, ¶ 25.

45. In the instant case, because Surfside Crossing's Project site is not mapped as Priority Habitat for the NLEB, the Division did not have the authority under 321 CMR 10.18 and 10.20 to require Surfside Crossing to conduct a survey for the NLEB. *Leddick PRT*, ¶ 24. Because at the time of the Division's review of Surfside Crossing's MESA filing there was no ongoing review of the Project under MEPA, the Division's authority to request the MEPA Office to require a survey for NLEB was not applicable. *Leddick PRT*, ¶ 26.

46. At the August 6, 2019 hearing, I allowed into evidence a July 29, 2019 letter from Surfside Crossing notifying the Housing Appeals Committee that Surfside Crossing intends to file an ENF under MEPA for the Project by September 1, 2019. *Leddick Cross Examination Exhibit #3*. The Division testified that even if there had or will be a MEPA

filing for the Surfside Crossing Project, the Division would not request that a survey for NLEB be done because the NLEB acoustic survey data provided to it by Dowling and O'Dell does not constitute credible information of an occurrence record within the meaning of 321 CMR 10.13(1)(b)1. *Leddick PRT*, ¶ 28. To be considered such credible information, the Division would require evidence of NLEB using a hibernaculum or maternity roost tree at a specific location on or within .25 miles or 150 feet, respectively, of the Surfside Crossing Property. *Leddick PRT*, ¶ 28.

47. During his cross examination, Mr. Leddick reiterated and elaborated on the several reasons why the Division did not and would not request the MEPA Office to have Surfside Crossing do an NLEB survey of its Property. First, he testified that there is no data indicating the presence of maternity roost trees or hibernaculum in the vicinity of the Property that would result in the Division mapping it as Priority Habitat. *Leddick Cross*, p. 88, lines 2-8. Second, he pointed to the fact that over several years the island-wide surveys by Dowling and O'Dell found only eight (8) maternity roost trees in two specific locations means that the chances of maternity roost trees being found on the Project site are "small." *Leddick Cross*, p. 90, line 16 (as corrected by *Leddick errata sheet*); see also p.88, lines 10-16. Finally, he testified that as a matter of practice, the Division has requested surveys to be done through the MEPA process in situations where it anticipated significant harm to or a resulting take of the species. *Leddick Cross*, p.88, lines 19-24; p.89, line 1. Even if maternity roost trees were identified on or in the immediate vicinity of Surfside Crossing's Property that lead to the Division's mapping the Property as Priority Habitat for the NLEB and review of the Project, the Division would condition the Project to avoid a take of the NLEB through the TOY restriction prohibiting the removal

of trees during the June through July NLEB pup season. *See Leddick Cross, p.89, lines 3-7.* Thus, as testified by Mr. Leddick on cross examination, for the Division to request NLEB surveys through the MEPA process “would at most result in the finding of maternity roost trees, and, at most, result in a timing restriction, which is already...going to be implemented as part of any future work.” *Id. at p.89, lines 8-12.*

48. The Division therefore determined that based on its review of all information relative to NLEB on Nantucket submitted to Division prior to or since its October 19, 2018 Take Determination, the Division would not request that Surfside Crossing conduct a survey for NLEB pursuant to 321 CMR 10.13(1)(b)1. *Leddick PRT, ¶ 28.*

49. On October 4, 2018, the NLC separately sent a letter to the Division referencing the information submitted by the Select Board and reiterating that such information necessitates a review by the Division to determine the Project’s impacts to the NLEB and other state-listed species. *Leddick PDT, ¶ 41 and Exhibit 6.*

Information reviewed by the Division prior to making its October 19, 2018 Take Determination

50. Mr. Leddick testified that prior to issuing its Take Determination, the Division conducted a thorough review of the information submitted to the Division by the Select Board, which included the Dowling and O’Dell study, the two supplemental reports by Dowling and the five (5) NLEB observations (four mist-net and one roost site in a building) submitted by Dowling on January 29, 2018 through VPRS as identified in Exhibit 1 to his PRT. *Leddick PRT, ¶¶ 33 and 34; see also Leddick PDT, ¶ 54 and Exhibits 4, 8 and 9.*

51. Mr. Leddick confirmed on cross examination that the information reviewed by him and Dr. French, the Division’s taxonomic expert, were the Dowling and O’Dell study

and the two supplemental reports by Dowling (both of which included information on acoustic surveys), documenting the “general locations” of mist net and maternity roost tree occurrence records, and other “unverified records” in NHESP’s database. *See Leddick Cross, p. 47, lines 1-7, 23-24 and p. 48, lines 1-2.* Mr. Leddick’s reference to the latter “unverified” information, when read together with his ¶ 33 of his PRT, supports a finding that he was referring to the five (5) NLEB observations submitted by Dowling on January 29, 2018. *See also Exhibit 1 to Leddick PRT.*

52. The Dowling and O’Dell study and the two supplemental reports by Dowling documented the general locations of eight (8) known occupied maternity roost trees on Nantucket. *French PDT, ¶ 83 and Exhibit 7; see also Leddick Cross, p. 47, lines 4-7.* In reviewing this information prior to making its Take Determination, the Division determined that the general locations of these roost trees indicated that they are almost two (2) miles away from the Property. *Leddick PDT, ¶ 54 and Exhibit 8.* Furthermore, although maternity roosts and hibernacula on man-made structures do not meet the Division’s guidelines for mapping Priority Habitat (see the Finding of Fact No. 26), all maternity roosts and hibernacula documented by Dowling and O’Dell on man-made structures were also located over one (1) mile away. *Id. and Exhibit 9.* Finally, for the reasons summarized in Finding of Fact No. 30, the acoustic survey data provided by Dowling and O’Dell is not considered by the Division to be an occurrence record because it is not a confirmed observation of an individual bat and does not document a maternity roost tree or hibernacula. *See also O’Dell Cross, p. 257, lines 12-16 (O’Dell agreeing with the Division that acoustic data is not used to map Priority Habitat).*

53. The Division therefore determined that none of the information that it reviewed prior to the October 19, 2018 Take Determination met the Division's guidelines for mapping Surfside Crossing's Property as new Priority Habitat for the NLEB. *Leddick PRT*, ¶¶ 17-23; *French PDT*, ¶ 101; see *Leddick Cross*, p. 48, lines 16-24, p. 49, lines 1-4, and p. 73, lines 3-7.

54. On October 19, 2018, the Division issued its Take Determination, which concluded that the proposed Surfside Crossing Project would only result in a Take of the Coastal Heathland Cutworm, state-listed Species of Special Concern. *Leddick PDT*, ¶ 42 and *Exhibit 7*.

55. On November 8, 2018, the Select Board, and the NLC and 13 residents of Nantucket, filed separate Notices of Claim challenging the Division's October 19, 2018 Take Determination, which resulted in this remaining appeal by the NLC.

Information submitted to and Actions taken by the Division subsequent to its October 19, 2018 Take Determination

56. On October 26, 2018, about a week after the Division's issuance of its Take Determination for the Surfside Crossing Project, Meghan Perry followed up on her September 24, 2018 email to the Division by submitting a report through VPRS that referenced acoustic records of NLEB within 300 ft. of the Property but did not indicate if the acoustic records had been vetted by a qualified biologist. *Leddick PDT*, ¶ 57 and *Exhibit 9*; *French PDT*, ¶ 87 and *Exhibit 9*. In Ms. Perry's VPRS report, she provided no documented experience with the NLEB, nor did she make it clear who the actual observer was or if the acoustic data had been vetted by an experienced bat biologist. *French PDT*, ¶ 87 and *Exhibit 9*. As a result, the Division accepted these records into the NHESP

database as a future lead but they were not used to delineate a new Priority Habitat. *Id.*, *Leddick PDT*, ¶ 57.

57. Ms. O'Dell testified that following the issuance of the Division's Take Determination, she requested clarification from the Division as to why none of the Nantucket NLEB observations had been updated by NHESP. *O'Dell PRT*, ¶ 4; *see also O'Dell Cross*, p. 241, lines 19-24, p.242, lines 1-14. In a November 13, 2018 email from Jennifer Longsdorf, a NHESP Program Coordinator, to Ms. O'Dell and Ms. Dowling, Ms. Longsdorf stated that she had recently took over responsibility for bat record acceptance and mapping and was slowly going through data submitted via VPRS, acknowledging that prior to this, NHESP did not have anyone accepting bat data since 2016. *Leddick Cross Examination Exhibit #2*. Ms. Longsdorf then requested further information from Dowling and O'Dell regarding NLEB observations on July 21st and October 20th, 2017. *Id.*

58. At the conclusion of an exchange of emails on November 14, 2018 regarding the above and other NLEB observations previously submitted by Dowling and O'Dell through VPRS, Ms. Longsdorf asked Ms. O'Dell in an email on that date to send a "shapefile" of the maternity roost locations (i.e., to allow the Division to determine their precise locations), explaining that:

"As of right now, the VPRS reports only indicated mist-net locations, which don't have mapping associated with them. Therefore, we'd need locations of any maternity colony trees, maternity roost trees, and hibernacula."

Leddick Cross Examination Exhibit #2.

59. In a November 16, 2018 email to Ms. Longsdorf, Ms. O'Dell transmitted the shapefiles for Nantucket's 2016 and 2017 maternity roost tree and hibernaculum

locations to the Division. *Leddick Cross Examination Exhibit #2*; see also *O'Dell PRT*, ¶ 5. There followed an exchange of emails between Ms. Longsdorf and Ms. O'Dell on November 26th and November 30th, 2018 respectively responding to the Division's questions on the shapefile data. *Leddick Cross Examination Exhibit #2*.

60. In a December 3, 2018 email from Tara Huguenin, a Conservation Data Specialist in the NHESP, to Danielle O'Dell, Ms. Huguenin summarized the full scope of Ms. Dowling's submittals through VPRS and the extent to which they matched the shapefile data, noting, however, that the Division "could not find matches to most of the shapefile points." *Leddick Cross Examination Exhibit #2*. Ms. Huguenin also asked Ms. O'Dell to submit a single VPRS record for all of the shapefiles provided by Ms. O'Dell, which she sent by email on the same day (December 3, 2018). *Id.*

61. Following the receipt and review of the shapefiles from Ms. O'Dell on November 16, 2018, the Division confirmed that the precise locations of eight (8) known occupied maternity roost trees are all well beyond the boundaries of the Project site, the nearest tree being located approximately 9,900 feet away from the Property. *Leddick PDT*, ¶ 56 and *Exhibit 9*; see also *O'Dell Cross*, p.200, lines 15-23 (*agreeing that of the eight known maternity roost trees, the one closest to the Project site is almost two miles away*). The Division subsequently mapped new NLEB Priority Habitat for these eight (8) known maternity trees on Nantucket west of the Property. *Leddick PDT*, ¶ 56; see also *O'Dell Cross*, p.257, lines 2-5 (*agreeing that nothing in addition to those eight maternity roost trees has been found by O'Dell*). Finally, while the occurrence of NLEB roosting on or hibernating in a human-made structure does not meet the criteria for mapping Priority Habitat, the Division determined from the shapefiles that the nearest known roost

documented on a structure was 7,825 feet from the Property and the only documented location where bats were hibernating was in a house crawl space 8,100 away from the Property. *French PDT*, ¶ 83.

62. At the request of the NLC, Ms. O'Dell set an acoustic detector on private property directly abutting the Surfside Crossing site from May 15th to May 28th 2019 and NLEB calls were detected at all sites. *O'Dell PRT*, ¶ 9. Ms. O'Dell testified on cross examination that no follow-up actions, such as mist-netting, were conducted with respect to the above May, 2019 acoustic survey data due to an assumption that the NLC would not be allowed to introduce it as relevant evidence in this appeal as well as the lack of funding for such activities. *See O'Dell Cross*, p. 255, lines 9-16, p.256, lines 1-6.

V. LEGAL ANALYSIS AND CONCLUSIONS

A. Standard of Legal Review Governing this Adjudicatory Appeal

As provided in the MESA regulations⁷ and affirmed in final MESA adjudicatory decisions, the standard of legal review governing this appeal clearly place the burden of proof on the party aggrieved by the Division's final determination. *In the Matter of 16 Medouie Creek Road*, Docket No. 11-30084-2012-01-RL, NHESP File No. 11-30084, Recommended Decision at 25-26 (March 14, 2013), adopted as the Division's Final Decision (April 4, 2013); *In the Matter of Plymouth Long Beach Management Plan*, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, Recommended Decision II, at 30 (December, 2010), adopted as the Division's Final Decision (June, 2011); see also *In the Matter of South Road, Lots 11 and 12*, NHESP File No. 07-21460, Recommended Decision,

⁷ Under 321 CMR 10.25(3)(b), a notice of claim for an adjudicatory hearing must include a "clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of the Division and the basis for those objections."

p. 15 (July, 2009), adopted as the Division's Final Decision (August, 2009). The burden of proof in an adjudicatory proceeding does not shift but rather remains with the same party throughout. *In the Matter of 16 Medouie Creek Road*, at 26.

A petitioner in an MESA adjudicatory proceeding is required to establish by a preponderance of the evidence that the petitioner is entitled to a favorable decision. *In the Matter of 16 Medouie Creek Road*, at 26; *In the Matter of Plymouth Long Beach Management Plan*, at 31-32. “The burden of persuasion through the introduction of evidence is upon the petitioner...to show by a preponderance of the evidence entitlement to the favorable administrative determination sought from the agency,” *Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 227 (2014), citing *A.J. Cella, Administrative Law and Practice § 243 (1986)*. While a petitioner has the burden of proving a particular fact by a preponderance of the evidence, the petitioner does not have to establish that fact as an absolute certainty; it is sufficient to show the fact has the greater likelihood, the greater probability. See *In the Matter of FTO Realty Trust*, 2018 MA LEXIS 33, 11; *In the Matter of Paul J. Armstrong*, 2012 MA LEXIS 65, 21-22.

The party initiating the adjudicatory appeal must produce competent evidence from a credible source sufficient to meet their burden of proof. *In the Matter of 16 Medouie Creek Road*, at 27. Credible evidence must come from a competent source in support of each claim of factual error, including any relevant expert reports, plans or photographs. See *In the Matter of Christopher N. Colby*, 2018 MA LEXIS 63, 25. “A competent source is a witness who has sufficient expertise through education, training, or experience to render testimony on the factual issues on appeal.” *In Matter of Margaret Reichenbach*, 2014 MA ENV LEXIS 52 at 23.

Proof by substantial evidence is the standard generally applicable to administrative proceedings. *In the Matter of 16 Medouie Creek Road*, at 27; *In the Matter of South Road, Lots 11 and 12*, at 15. As provided in M.G.L. c. 30A, §11(2), substantial evidence requires that agency findings rest on such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

When challenging an agency action, a petitioner must do more than simply speculate, make unsupported allegations, and rely on unsubstantiated arguments; “speculation, even by an expert witness, is not proof from a competent source” to support an allegation. *In the Matter of 16 Medouie Creek Road*, at 27; *In the Matter of Plymouth Long Beach Management Plan*, at 32.

A regulation is interpreted in the same manner as a statute, according to the words of a regulation in their usual and ordinary meaning. *In the Matter of City of Pittsfield Airport Commission*, 2010 MA ENV LEXIS 89 at 16, footnote 6, citing *Ten Local Citizen Group v. New Eng. Wind, LLC*, 457 Mass. 222, 229 (2010). “Normally, the application of a regulation to the particular facts of a case is within the agency’s discretion and we accord an agency’s interpretation of its own regulations substantial deference,” and “apply all rational presumptions in favor of the validity of the administrative action.” *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 184, 187 (2009), citing *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782 (1980), *Consolidated Cigar Corp. v. Department of Pub. Health*, 372 Mass. 844, 855 (1977). “An agency’s interpretation of its own regulation is ordinarily accorded considerable deference unless it is arbitrary, unreasonable, or inconsistent with the plain terms of the regulations themselves.” *In the Matter of City of Pittsfield Airport Commission* at 16, footnote 6,

citing Rasheed v. Commissioner of Correction, 446 Mass. 463, 476 (2006). “The party challenging an agency’s interpretation of its own rules has a ‘formidable burden’ of showing that the interpretation is not rational.” *Ten Local Citizen Group at 228.* “A construction...that would lead to an...unreasonable conclusion should not be adopted, where the language is fairly susceptible to a construction that would lead to a logical and sensible result.” *In the Matter of Blackinton Common LLC, 2009 MA ENV LEXIS 5 at 53, citing Bell v. Treasurer of Cambridge, 310 Mass. 484, 489 (1941).*

B. Legal Analysis and Conclusions

The issue for adjudication in this appeal by the NLC is 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 Surfside Crossing’s Project will only result in a take of the Coastal Heathland Cutworm. Stated more specifically, this appeal is about whether the Division erred when it determined that the information on the occurrence or general presence of NLEB on Nantucket and in the vicinity of the Surfside Crossing’s Property does not meet the MESA regulatory criteria for mapping the Property as Priority Habitat for the NLEB and therefore does not necessitate a review of the Project to determine whether it will cause a take of the NLEB.

As discussed in Section V. A. above, the burden is on the NLC to show by a preponderance of the evidence that it is entitled to a favorable decision on its appeal of the Division’s October 19, 2018 Take Determination. In addition, to the extent that the NLC’s appeal is predicated on challenging the Division’s interpretation of its own regulations, the NLC has a formidable burden of showing that the Division’s interpretation is not rational.

I begin my legal analysis by recapping the MESA regulatory framework particularly relevant to the issue for adjudication, which comes into play when the Division receives new state-listed species information relating to a site that is not mapped as Priority Habitat for that species.

In order for the Division to map property as Priority Habitat for a state-listed species, it must first have an occurrence record, and then determine that the occurrence meets the Division's regulatory criteria and guidelines for mapping Priority Habitat for that species. *Findings of Fact No. 19 and 20.* As a general rule, a project proposed to take place on property that is not mapped as Priority Habitat for a particular state-listed species is not reviewed by the Division to determine whether the project will result in a take of that state-listed species. *Finding of Fact No. 21.* The relevant regulatory exception at 321 CMR 10.13(1)(a)1. provides that if the Division receives new information on the occurrence of an endangered or threatened state-listed species relating to such an unmapped site, it "may" determine, within thirty (30) days of its receipt of such occurrence information, determine whether the new state-listed species occurrence meets the criteria for delineation of a Priority Habitat under 321 CMR 10.12.⁸ *Id.* If the Division determines that the new state-listed species occurrence meets the criteria for mapping the site as Priority Habitat, the Division has the authority to review the project to determine whether the project will result in a take of that state-listed species. *Finding of Fact No. 21.*

⁸ 321 CMR 10.13(1)(a)1. does not expressly address a situation where the Division fails to make such a determination within 30 days. However, Mr. Leddick's testified on cross examination that the Division does not interpret this regulation as requiring it to respond to the person submitting the information within 30 days. *See Leddick Cross, p.40, lines 4-14.* While the Division's interpretation of its own regulation is reasonable and entitled to deference, whether the Division responded to Ms. Dowling and/or Ms. O'Dell within 30 days of when NLEB information was first submitted by them through VPRS or otherwise is not determinative of the merits of the NLC's appeal for the reasons discussed in this Section V.B.

Thus, the determinative, two-part factual inquiry for this appeal is whether the Division, in making its October 19, 2018 Take Determination: (1) had information in its possession that constitutes an NLEB “occurrence” on or affecting the Property, and if so, (2) did that NLEB occurrence meet the Division’s criteria for mapping the Property as NLEB Priority Habitat.

Danielle O’Dell, the NLC’s expert witness on the NLEB,⁹ acknowledged on cross examination that she is familiar with the issue for adjudication, but agreed that nowhere in her prefiled testimony did she specifically describe her familiarity with the provisions of 321 CMR 10.13(1)(a)1. or how they are applied by the Division under the MESA regulations. *O’Dell Cross, p.188, lines 8-24, p.189, line 1.* Ms. O’Dell also agreed on cross examination that her prefiled testimony does not specifically explain why the Division misapplied the provisions of 321 CMR 10.13(1)(a)1. when it determined that acoustic data does not rise to the level of being an occurrence record for the purposes of mapping Priority Habitat. *O’Dell Cross, p.189, lines 2-11.* Instead, a core argument of the NLC’s direct case is that the Division erred by not requiring Surfside Crossing to conduct an NLEB survey of its Property to definitively determine the presence of NLEB thereon, particularly in response to the high number of bat calls recorded in close proximity of the Project site. *See, e.g., O’Dell PDT, ¶¶ 15-18* (discussing her advice to the Select Board that such a survey is warranted based on the acoustic survey data of nearby properties and the 2018 Dowling and O’Dell study).

However, the testimony of Jessie Leddick, who serves as the Chief of Regulatory Review in the NHESP, sets forth substantial evidence supporting the Division’s

⁹ Emily Molden, the NLC’s other witness, serves as its Executive Director. Ms. Molden agreed on cross examination that she is not an expert on the NLEB. *Molden Cross, p. 208, lines 4-13.*

determination that requiring Surfside Crossing to survey its Property for NLEB was neither contemplated by the MESA regulations nor warranted by the information provided by Dowling and O'Dell.

First, Mr. Leddick testified that because Surfside Crossing's Project site is not mapped as Priority Habitat for the NLEB, the Division did not have the authority under 321 CMR 10.18 and 10.20 to require Surfside Crossing to conduct a survey for the NLEB. *Findings of Fact No. 45*. In addition, because at the time of the Division's review of Surfside Crossing's MESA filing there was no ongoing review of the Project under MEPA, the Division's authority under 321 CMR 10.13(1)(b) 1. to request the MEPA Office to require a survey for NLEB was not applicable. *Id.* Moreover, even if there had or will be a MEPA filing for the Surfside Crossing Project, the Division would not request that a survey for NLEB be done because the NLEB acoustic survey data provided to it by Dowling and O'Dell does not constitute credible information of an occurrence record within the meaning of 321 CMR 10.13(1)(b)1. *Findings of Fact No. 46 and 47*.

As both Dr. French and Mr. Leddick testified, verifying the presence of a specific bat species (e.g., the NLEB as distinguished from other *Myotis* bats) in a particular area by acoustic data is difficult and has a significant level of error. *Finding of Fact No. 30; see also O'Dell, PRT, ¶ 10* (O'Dell also acknowledging that "analysis of bat acoustic calls is a difficult and imprecise science.") Furthermore, because bat species travel great distances to forage, acoustic data does not provide definitive identification of the location and actual use of a hibernaculum or maternity roost tree by NLEB. *Finding of Fact No. 30*. Instead, acoustic data only shows the potential presence of a bat or group of bats in

an area at a particular time of year. *Id.* Thus, Mr. Leddick testified, “credible information” for the purpose of 321 CMR 10.13(1)(b) 1. would require evidence of NLEB using a hibernaculum or maternity roost tree at a specific location on or within .25 miles or 150 feet, respectively, of the Surfside Crossing Property - which the Division did and does not have in its possession. *Findings of Fact No. 47 and 48; see also Finding of Fact No. 28.*

Mr. Leddick further opined that the chances of maternity roost trees being found on the Project site are small due to the fact that the island-wide surveys conducted by Dowling and O’Dell over several years found only eight (8) maternity roost trees in two locations that are almost two miles away from the Project site. *See Finding of Fact No. 47; see also Finding of Fact No. 52.*

Finally, Mr. Leddick testified that as a matter of practice, the Division has requested surveys to be done through the MEPA process in situations where it anticipated significant harm to or a resulting take of the species. *Finding of Fact No. 47.* Even if maternity roost trees were identified on or in the immediate vicinity of Surfside Crossing’s Property that lead to the Division’s mapping the Property as Priority Habitat for the NLEB and review of the Project, the Division would condition the Project to avoid a take of the NLEB through the TOY restriction prohibiting the removal of trees during the June – July NLEB pup season.¹⁰ *Id.* As Mr. Leddick testified on cross examination, for the Division to request NLEB surveys through the MEPA process “would at most result in the finding of maternity roost trees, and, at most, result in a

¹⁰ On cross examination, Mr. Leddick emphasized that the Division’s ability to impose the TOY restriction was not the sole reason for determining that an NLEB survey of Surfside Crossing’s Property was and is not warranted. *See, e.g., Leddick Cross, p. 74, lines 7-18.*

timing restriction, which is already...going to be implemented as part of any future work.” *Id.*, citing *Leddick Cross*, p.89, lines 8-12.

As to Mr. Leddick’s latter point, I find that the record only supports a finding that Surfside Crossing’s commitment not to remove any trees on the Property during the NLEB pup season was verbal in nature. *See Finding of Fact No. 42.* Mr. Leddick testified on cross examination, however, that in his experience verbal commitments are fulfilled by project proponents and “end up being captured in the review of project...[and] then incorporated into project permitting.” *Finding of Fact No. 43.* In the instant case, the effect of the Division’s October 19, 2018 Take Determination is that Surfside Crossing will need to apply for a Conservation and Management Permit (“CMP”) from the Division pursuant to 321 CMR 10.23 (to authorize the take of the Coastal Heathland Cutworm) in order to move forward with its Project. Consequently, the Division has a reasonable expectation that Surfside Crossing’s verbal commitment will thereafter be embodied as a written condition in any future CMP issued by the Division for the Project.

In any event, the record is clear that Surfside Crossing’s verbal commitment to abide by the TOY restriction was not the sole reason for the Division’s position that an NLEB survey of the Project Site is unwarranted. Independent of any verbal commitment, I find that the Division’s other reasons at the time of the Take Determination constitute substantial evidence supporting its position regarding the need for a survey. In a nutshell, the MESA regulations did not provide an avenue for the Division to require or request that an NLEB survey of the Property be done, and the acoustic data documenting the general presence of bats in the vicinity of the Property does not rise to adequate evidence

of a potential NLEB occurrence justifying such a survey. For all of the above reasons, I conclude that the NLC has not met its burden of showing that the Division erred by not requiring an NLEB survey of the Property.

The NLC's focus on the need for a NLEB survey of Surfside Crossing's Property is directed at confirming whether there is any evidence of an actual NLEB occurrence on the Property, not whether the NLEB information before the Division at the time of its October 19, 2018 Take Determination met the MESA regulatory criteria for mapping the Property as Priority Habitat for the NLEB. To address this latter issue for adjudication, I turn next to the question of whether the record shows there was NLEB information before the Division at the time of its October 19, 2018 Take Determination that met the criteria in 321 CMR 10.13(1)(a) 1. for mapping Surfside Crossing's Property as new Priority Habitat for the NLEB.

Prior to the Division issuing its October 19, 2018 Take Determination, the following NLEB information was reviewed by Mr. Leddick and Dr. French: (1) the Dowling and O'Dell study; (2) the two supplemental reports on the NLEB survey work conducted by Dowling in 2016 and 2017; and (3) the five (5) NLEB observations (four mist-net and one roost site in a building) submitted by Dowling on January 29, 2018 through VPRS, as identified in Exhibit 1 to Mr. Leddick's PRT.¹¹ See *Findings of Fact No. 50 and 51*. The Dowling and O'Dell study and the two supplemental reports by Dowling documented the general locations of eight (8) known occupied maternity roost trees on Nantucket. *Finding of Fact No. 52*. The Division determined from this

¹¹ I determined that Mr. Leddick's reference on cross examination to reviewing other "unverified records" in NHESP's database, when read together with his ¶ 33 of his PRT, supports a finding that he was referring to the five (5) NLEB observations submitted by Dowling on January 29, 2018. See *Finding of Fact No. 51*.

information that these maternity roost trees are almost two (2) miles away from Surfside Crossing's Property. *Id.* Given that considerable distance, it was reasonable for the Division to rely on this more general location information in determining that there was no basis for mapping Surfside Crossing's Property as Priority Habitat for the NLEB.¹² The Division also determined that all of the maternity roosts and hibernacula documented by Dowling and O'Dell on man-made structures are located over one (1) mile away from the Property.¹³ *Finding of Fact No. 52.* Finally, the Division determined - consistent with its Priority Habitat mapping guidelines - that the acoustic survey data reviewed by the Division prior to the Take Determination is not evidence of an NLEB "occurrence" within the meaning of the MESA regulations because it is not a confirmed observation of an individual bat and does not document a maternity roost tree or hibernacula. *Findings of Fact No. 52 and 30.* Ms. O'Dell herself agreed on cross examination that the Division's Priority Habitat Guidelines do not consider acoustic data to be an occurrence record. *See O'Dell Cross, p. 257, lines 12-16.* I therefore conclude that none of the above NLEB information reviewed by the Division at the time of its October 19, 2018 Take Determination meets the MESA regulatory criteria for mapping the Property as Priority Habitat for the NLEB. Furthermore, substantial evidence in the record supports my determination that the NLC failed to show that the Division's interpretation of the relevant provisions of its MESA regulations and Priority Habitat mapping guidelines is not entitled to deference.

¹² Under the Division's Priority Habitat mapping guidelines, Priority Habitat for the NLEB is mapped within 150 feet of known maternity roost trees. *See Finding of Fact No. 28.*

¹³ For the reasons stated in Finding of Fact No. 26, NLEB maternity roosts and hibernacula on man-made structures do not meet the Division's guidelines for mapping Priority Habitat. *See also O'Dell Cross, p. 189, lines 16-23* (O'Dell agreeing that the only two NLEB habitats mapped by the Division as Priority Habitat are maternity roost trees and natural caves or abandoned mines similar to natural caves.)

The parties' PRT, the cross examination of Mr. Leddick, and the related Cross Examination Exhibits No. 1 and 2 highlight the other main argument of the NLC – i.e., the Division's October 19, 2018 Take Determination is deficient because it was not based on a review of the full scope of the NLEB information previously submitted to the Division by Ms. Dowling and/or Ms. O'Dell. This issue was first surfaced for the NLC when following the issuance of the Take Determination Ms. O'Dell requested clarification from the Division as to why none of the Nantucket NLEB observations had been updated by NHESP. *Finding of Fact No. 57.* It is reasonable to infer from Ms. O'Dell request that she was seeking to determine why the Division had not yet mapped Priority Habitat for the eight (8) maternity roost tree locations identified in the Dowling and O'Dell study and the two supplemental reports by Dowling, which were reviewed by the Division at the time of its October 19, 2018 Take Determination.

In a November 13, 2018 email to Ms. O'Dell (and Ms. Dowling), Jennifer Longsdorf informed them that she had recently took over responsibility for bat record acceptance and mapping for the NHESP and was slowly going through data submitted via VPRS. *Finding of Fact No. 57.* Prior to this, Ms. Longsdorf acknowledged, NHESP did not have anyone accepting bat data since 2016. *Id.* As a follow-up to her review, Ms. Longsdorf stated in a November 14, 2018 email to Ms. O'Dell that the reports submitted through VPRS “only indicated mist-net locations, which don't have mapping associated with them.” *Finding of Fact No. 58.* Ms. Longsdorf therefore requested Ms. O'Dell to send a shapefile of the maternity roost locations (i.e., to allow the Division to determine their precise locations), explaining that for the purposes of mapping Priority Habitat the Division would “need the locations of any maternity colony trees, maternity

roost trees, and hibernacula.” *Id.* In short, for the purpose of mapping new Priority Habitat, it was efficient and reasonable for the Division to respond to Ms. O’Dell’s concern by asking her to submit shapefile(s) documenting the precise locations of NLEB occurrences previously identified by her and/or Ms. Dowling.

On November 16, 2018, Ms. O’Dell transmitted the shapefiles for Nantucket’s 2016 and 2017 maternity roost tree and hibernaculum locations to the Division. *Finding of Fact No. 59.* Tara Huguenin, a Conservation Data Specialist in the NHESP, responded to Ms. O’Dell in a December 3, 2018 email that included a summary of the full scope of Ms. Dowling’s submittals through VPRS. *Finding of Fact No. 60.* As outlined in Ms. Huguenin’s email, Ms. Dowling provided information through VPRS on mist-net or house roost locations, neither of which is used by the Division to map Priority Habitat. *Leddick Cross Examination Exhibit No. 2.* Furthermore, Ms. Huguenin noted that the Division could not find matches between Ms. Dowling’s VPRS submittals and most of the shapefile points submitted by Ms. O’Dell at the request of the Division. *Finding of Fact No. 60.*

The Division thereafter mapped new NLEB Priority Habitat for the eight (8) known occupied maternity trees on Nantucket west of the Property. *Finding of Fact No. 62.* In doing so, Division confirmed that the precise locations of these maternity roost trees are all well beyond the boundaries of the Project site, the nearest tree being located approximately 9,900 feet away from the Property. *Id.* Ms. O’Dell, in turn, agreed on cross examination that of the eight (8) known maternity roost trees, the one closest to the Project site is almost two miles away and that, to her knowledge, there are no other known maternity roost trees within 150 feet of the Surfside Crossing Project site. *O’Dell*

Cross, p.200, lines 15-23. Finally, while the occurrence of NLEB roosting on or hibernating in a human-made structure does not meet the MESA regulatory criteria and guidelines for mapping Priority Habitat,¹⁴ the Division determined from the shapefiles that the nearest known roost documented on a structure was 7,825 feet from the Property and the only documented location where bats were hibernating was in a house crawl space 8,100 away from the Property. *Finding of Fact No. 61.*

Thus, the Division's determination of the precise locations of the NLEB occurrences on Nantucket based on its review of the shapefiles thereafter submitted by Ms. O'Dell confirm the basis for the Division's position that there is no NLEB information that was before the Division at the time of or subsequent to its October 19, 2018 Take Determination that met the criteria for mapping the Surfside Crossing Property as Priority Habitat for the NLEB.

VI. CONCLUSION

Based on my Findings of Fact in Section IV and for the reasons discussed in Section V and elsewhere in this Recommended Decision, I conclude that the NLC has not met its burden of showing that the Division's October 19, 2018 Take Determination is based on an improper application of the regulatory criteria at 321 CMR 10.13 and 10.18 when the Division found that the Surfside Crossing Project will only result in a take of the Coastal Heathland Cutworm.

¹⁴ For the reasons summarized in Finding of Fact No. 26, I find the NLC has not met its burden of showing that Division's interpretation of its MESA regulations on this point is unreasonable.

Accordingly, I hereby recommend that the Director issue a Final Decision affirming the validity of the Division's October 19, 2018 Take Determination.

Dated: 10/7/19

By: Richard Lehan
Richard Lehan, Esquire
Presiding Officer
Division of Fisheries and Wildlife
Department of Fish and Game
251 Causeway Street, Suite 400
Boston, MA 02114

Notice

This decision is the Recommended Final Decision of the Presiding Officer. It 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 agency, 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 this matter 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.

SERVICE LIST

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

PETITIONER

Nantucket Land Council

Peter R. Fenn, Esquire
53 Milk Street
Westwood, MA 02090

Jonathan D. Witten, Esquire
Barbara Huggins Carboni, Esquire
KP LAW
101 Arch Street, 12th Floor
Boston, MA 02110

DIVISION OF FISHERIES AND WILDLIFE

Beverly Vucson, Esquire
Division of Fisheries and Wildlife
251 Causeway Street, Suite 400
Boston, MA 02114

Jessie Leddick
Division of Fisheries and Wildlife
1 Rabbit Hill Road
Westborough, MA 01581

PROJECT PROPONENT

Richard A. Nylén, Jr., Esquire
Lynch, DeSimone & Nylén, LLP
10 Post Office Square, Suite 970N
Boston, MA 02109

Exhibit D



MASSWILDLIFE

DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581

p: (508) 389-6300 | f: (508) 389-7890

MASS.GOV/MASSWILDLIFE

May 12, 2020

Kathleen A. Theoharides, Secretary
Executive Office of Energy and Environmental Affairs
Attention: MEPA Office
Alex Strycky, EEA No. 16173
100 Cambridge St.
Boston, Massachusetts 02114

Project Name: Surfside Crossing
Proponent: Surfside Crossing, LLC
Location: 3, 5, 7 and 9 South Shore Road, Town of Nantucket
Document Reviewed: Environmental Notification Form
EEA No.: 16173
NHESP No.: 12-31035

Dear Secretary Theoharides:

The Natural Heritage & Endangered Species Program of the Massachusetts Division of Fisheries & Wildlife (the "Division") has reviewed the Environmental Notification Form (the "ENF") for the proposed Surfside Crossing Residential Subdivision Project (the "Project") and would like to offer the following comments regarding state-listed species and their habitats.

According to the Massachusetts Natural Heritage Atlas (14th Edition), the Project site is mapped as Priority Habitat for several state-listed Lepidoptera (moth and butterfly) species. These species and their habitats are protected pursuant to the Massachusetts Endangered Species Act (MGL c.131A) and its implementing regulations (MESA; 321 CMR 10.00). Fact Sheets for state-listed species can be found on our website, www.mass.gov/nhesp. All projects or activities proposed within Priority Habitat, which are not otherwise exempt pursuant to 321 CMR 10.14, require review through a direct filing with the Division for compliance with the MESA Regulations (321 CMR 10.18).

The MESA is administered by the Division and prohibits the Take of state-listed species, which is defined as "in reference to animals...harm...kill...disrupt the nesting, breeding, feeding or migratory activity...and in reference to plants...collect, pick, kill, transplant, cut or process...Disruption of nesting, breeding, feeding, or migratory activity may result from, but is not limited to, the modification, degradation, or destruction of Habitat" of state-listed species (321 CMR 10.02).

The Division previously received and reviewed site plans entitled "*Surfside Crossing*" A Proposed 40B Development in Nantucket, Massachusetts (dated February 15, 2018; Attachment H of the ENF) for a 156-unit residential subdivision resulting in ±12.84 acres of disturbance on the ±13.56 acre property. Based on a review of the information that was provided and the information contained in our database, the Division determined (letter dated October 19, 2018; Attachment F of the ENF; the "Determination")

MASSWILDLIFE

that the Project, as proposed, would result in a Take (321 CMR 10.18 (2)(b)) of the Coastal Heathland Cutworm (*Abagrotis nefascia*), a moth species state-listed as Special Concern, due to the harming or killing of individuals, interference with feeding, breeding, over-wintering and migratory activities, and the permanent loss of suitable habitat.

The Division's Determination was subsequently appealed by the Nantucket Select Board and the Nantucket Land Council. The appeals claimed that the Division's Determination was issued in error because the Division did not review the Project for potential impacts to the Northern Long-eared Bat (*Myotis septentrionalis*), state-listed as Endangered, or the New England Blazing Star (*Liatris scariosa* var. *novae-angliae*), state-listed as Special Concern. The Project site was and is not mapped as Priority Habitat for either the Northern Long-eared Bat or New England Blazing Star. In a Final Decision issued on December 5, 2019, the Determination was affirmed by the Director of the Division; the Director's Final Decision can be found on our website, www.mass.gov/doc/surfside-final-decision/download. On December 26, 2019, the Nantucket Land Council appealed the Director's Final Decision to Massachusetts Superior Court. This appeal remains ongoing.

The Project, as currently proposed and described in the ENF, includes the construction of a 156-unit residential subdivision resulting in ± 12.27 acres of disturbance as shown on the updated site plans (dated February 28, 2020; Attachment K of the ENF; the "Preferred Alternative"). The Project, as currently proposed, will result in a Take (321 CMR 10.18 (2)(b)) of the Coastal Heathland Cutworm.

Projects resulting in a Take of state-listed species may only be permitted if they meet the performance standards for a Conservation and Management Permit (CMP; 321 CMR 10.23). 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 species.

Based on information provided in the ENF, the Proponent has evaluated several project alternatives for the property that have varying levels of impact to state-listed species and their habitats. In particular, the 100-unit and 92-unit alternatives – with ± 11.92 and ± 11.41 acres of disturbance, respectively – would reduce impacts to state-listed species relative to the Preferred Alternative by preserving wider (25') buffers of natural, undisturbed vegetation around the perimeter of the property. The Division recommends that the Proponent assess alternatives that maximize the width of natural, undisturbed vegetated buffers around the perimeter of the property. In addition, the Division also recommends that the Proponent assess alternatives to minimize use of artificial exterior lighting associated with the Project, with an emphasis on maximizing integration of "Dark Sky" principles into Project design.

Based on information provided in the ENF and previous consultations with the Proponent, it is our understanding that the Proponent intends to propose to meet the long-term net benefit performance standard of a CMP by permanently protecting ± 20.34 acres of land off-site as open space and state-listed species habitat, and or providing funding for habitat protection, habitat management, conservation research or planning to benefit Coastal Heathland Cutworm in Massachusetts. The Division anticipates that a suitable long-term net benefit for this species can be achieved through the permanent protection of habitat off-site and or through appropriate conservation funding.

The Division will not render a final decision until the MEPA review process and its associated public comment period is complete, and until all required CMP application materials have been submitted to the Division. As the MESA review process remains ongoing, no alteration to the soil, surface, or vegetation associated with the proposed Project shall occur until the Division has made a final decision relative to the CMP.

If you have any questions about this letter, please contact Jesse Leddick, Chief of Regulatory Review, at jesse.leddick@mass.gov or 508-389-6386. We appreciate the opportunity to comment on the Project.

Sincerely,



Everose Schlüter, Ph.D.
Assistant Director

cc: Town of Nantucket Select Board
Town of Nantucket Zoning Board of Appeals
Town of Nantucket Planning Board
Town of Nantucket Conservation Commission
Brian Madden, LEC Environmental Consultants

Exhibit E



Nantucket Land Council

Six Ash Lane
Post Office Box 502
Nantucket, Massachusetts 02554
508 228-2818
Fax 508 228-6456
nlc@nantucketlandcouncil.org
www.nantucketlandcouncil.org

Board of Directors

Lucy S. Dillon
President

Paul A. Bennett
Vice President

William Willet
Vice President

Neil Marttila
Treasurer

Susan E. Robinson
Clerk

Matt Anderson
Susan Baer
Mary-Randolph Ballinger
Larry Breakiron
William S. Brenizer
Karen K. Clark
Christine Donelan
Josh Eldridge
Thomas V. Farrell
Robert Friedman
Nancy Gillespie
Nathanael Greene
Charles A. Kilvert III
Laurel Ried Langworthy
Lucy Leske
Matthew B. Liddle
Keltie Donelan McDonald
Peter McCausland
Eileen P. McGrath
Carl H. Sjolund
H. Brooks Smith
Lars Soderberg
David Troast
Peter Watrous

Honorary Directors

Howard N. Blitman
William M. Crozier, Jr.

Scientific Advisor

James W. Sutherland, Ph.D.

Staff

Emily Molden
Executive Director

RJ Turcotte
Resource Ecologist

Meg McNeely Browers

Development **EEA # 16173 Surfside Crossing Comments: Nantucket Land Council**

April 13, 2020

Secretary Kathleen Theoharides
Executive Office of Energy and Environmental Affairs
MEPA Office
100 Cambridge St., Suite 900
Boston, MA 02114

Re: **EEA #16173 Environmental Notification Form**
Surfside Crossing - Nantucket Massachusetts

Dear Secretary Theoharides,

The mission of the Nantucket Land Council (NLC), a non-profit organization established in 1974, is to protect and preserve the fragile natural resources of Nantucket for the sustainability of the environment and the health of our community. On behalf of its thousands of members, donors and volunteers who reside on Nantucket, NLC submits the following comments regarding the Environmental Notification Form (ENF) filing by Surfside Crossing dated March 13, 2020 and appearing in the Environmental Monitor on March 25, 2020. According to MEPA Analyst Alex Strysky the public comment period for this application has been extended to May 12, 2020. Protecting the natural and human environment of Nantucket from the type of impacts anticipated from the project is squarely within the core mission of the NLC.



BACKGROUND

The NLC participated throughout the Nantucket Zoning Board of Appeals' (ZBA) public hearing process reviewing the Comprehensive Permit for Surfside Crossing's development, proposed under Chapter 40B. The NLC submitted extensive written and verbal testimony expressing many concerns over the impacts of this project. We also submitted scientific data from our consultants to show project impacts to rare and endangered species habitat, water resources, waste disposal, and the environment.

The Surfside Crossing project was initially submitted to the ZBA, as the Island's comprehensive permit granting authority under c. 40B, in February 2018 as a 156 unit development on the 13.5 acre property located at 3, 5, 7, and 9 South Shore Road. This area is locally zoned as Limited Use General 2 (LUG 2) with a minimum lot size of 80,000 square feet. As a result of the concerns raised throughout the public hearings by the Town, numerous abutters and members of the community at large, as well as the ZBA and its peer review consultants, the developers modified their plans to include 100 dwelling units, and then later a 92 unit plan was submitted. While small steps were taken by Surfside Crossing to explore options with reduced density, they did little to address the concerns raised regarding the environmental impacts which MEPA, per 301 CMR 11.00, is charged to review.

It should be noted that the community of Nantucket recognizes the importance and need for a variety of housing options and especially for the creation of more below-market housing stock, both owner occupied and rental. The NLC has played an important role in housing development policy on Nantucket, including the development of specific projects. The NLC holds the conservation restriction for the c. 40B development adjacent to the site called Sachem's Path. Great effort has been and continues to be made by the Town of Nantucket and other stakeholders to meet ambitious affordable housing development goals, and immediately subsequent to the issuance of the Surfside Crossing Comprehensive Permit, due to these efforts, the Town successfully entered a two year period of "safe harbor".

Affordable housing is important to Nantucket; however, the impacts associated with the proposal before you are too substantial and are not commensurate with the limited benefits. The impacts have not been addressed by the applicant. The scale of this development is completely inappropriate for the site. The proposal provides wholly inadequate buffer zones, open space, or protections for important habitat and water resources which are further outlined below. Per the MEPA regulations, 301 CMR 11.01 1.b, "*the Secretary's decision that a review document is adequate or that there has been other due compliance with MEPA and 301 CMR 11.00 means that the Proponent has adequately described and analyzed the Project and its alternatives, and assessed its potential environmental impacts and mitigation measures.*" The clear adverse impacts to environmental resources both on and off site, and the insufficient information provided to address those concerns, render this Environmental Notification Form wholly inadequate. We respectfully request that the Secretary require an Environmental Impact Report.

RARE AND ENDANGERED SPECIES

Throughout the review process for the Comprehensive Permit both the NLC and the Town petitioned the developers to allow access to the site for necessary surveys of rare and endangered species. The Town's expert consultants provided testimony that in addition to listed Lepidoptera species already mapped on the site, the site was very likely to contain state-listed plants, including the New England Blazing Star, and provide important habitat for the state endangered Northern Long Eared Bat (NLEB). The Division of Fish and Wildlife's NHESP did not recognize any plant species or the NLEB in their Determination letter, dated October 19, 2018 as the property is not currently mapped as habitat for these species. This was a "Catch 22"; as no access or survey was allowed by the developer, these species have not been mapped on the site. It is imperative that a survey take place in order to determine if listed species are present, specifically the endangered NLEB. The MESA regulations speak specifically to this scenario under 321 CMR 10.13 1.b: when a property not currently mapped as Priority Habitat is subject to MEPA review, the Division can request "...the project proponent be required to assess the area to be disturbed by the Project or Activity to determine if such State-listed Species are present". We are requesting that, through the MEPA process, site surveys for the presence of state listed NLEB and plant species be required, which after two years in the regulatory and/or appellate process and after multiple requests to the property owner, have never been required or completed.

The original Determination made by NHESP stated that the development of the 13.5 acre site will result in a "take" of the Coastal Heathland Cutworm, a Massachusetts state listed species of special-concern. We understand that NHESP is considering working with the project proponent to develop a plan for offsite mitigation to compensate for onsite impacts to this state protected Lepidoptera species. The ENF filing indicated that the mitigation may come in the form of offsite habitat protection or even a monetary contribution to a management project that is deemed suitable by the State. The Nantucket Land Council urges NHESP to follow its own clear and concise policy steps to "Avoid, Minimize, and Mitigate". First, the state should require the developer to "Avoid" direct impacts to host plant species then secondly, "Minimize" the impacts by requiring a smaller development footprint. This can easily be achieved by requiring a conservation restriction, which the NLC has previously and successfully worked with the State and land owners to accomplish on other sites. The proposal before you will completely clear cut the entire thirteen acre property. The Land Council is very concerned that the State Agency we depend on to protect our endangered species would not first mandate reasonable on site alternatives that would protect significant and sensitive habitat before determining that offsite mitigation is acceptable. Offsite mitigation should be the last and least attractive alternative, not the first and only option considered. We are extremely familiar with NHESP's work on the island; indeed we have often been their local partner in endangered species and habitat protection. On site mitigation has been required for many projects in the past and should be required here.

In addition to several endangered Lepidoptera species, the site also supports the Northern Long Eared Bat (NLEB). After investigating the population of NLEB on Nantucket, Wildlife Biologist Danielle O'Dell has concluded this property is very likely to provide important habitat for NLEB. After a federal court ruling in January overturned listing this species as "threatened" rather than the more protective "endangered" under the Federal Endangered Species Act, the US

Fish and Wildlife Service will be revisiting the protections that should be afforded to NLEB given its recent decimation by White Nose Syndrome. Given the science and threats to the species, NLEB's status is likely to be upgraded to a Federal "endangered" listing in the near future. This anticipated change should motivate our state agencies to provide more protection for this species, which is already listed as "endangered" in Massachusetts. This property is not currently mapped as Priority Habitat for NLEB because the project proponent has forbidden any surveys to be conducted on the site to look for them, but with access to the site to conduct a survey, this property would almost certainly qualify as mapped Priority Habitat.

The NHESP has the authority to require a site survey to determine whether it should, in fact, be mapped. Nantucket Island is one of the very few locations in the northeast where White Nose Syndrome has not been detected, and where the population seems to be taking refuge. We request the State, through the MEPA process, to finally require proper site surveys for the presence of NLEB, before the entire 13 acres is irrevocably clear cut, to document the importance of this habitat type to the Nantucket population and to map it as Priority Habitat if appropriate. If NLEB habitat is confirmed on the site, any additional protections that can be provided should be required. Finally, we request a prohibition on tree cutting across the site during the NLEB pupping season, in June and July, be written into any Conservation and Management Permit granted to the applicants.

The Land Council is well versed with the variety of habitat throughout the island and we trust you will respect our opinions on how important the habitat of this particular site is to protected species. This site provides important habitat within the overall vicinity, as it is surrounded by other protected land. The project, if developed as currently proposed, will cause significant habitat fragmentation. Attached below is an aerial view of the project site and nearby areas that shows protected property in the local vicinity. As you can see, there are several significant protected areas nearby, owned by diverse agencies, including the Nantucket Land Bank, Nantucket Conservation Foundation and the Commonwealth of Massachusetts (State Forest). The Land Council holds and enforces a conservation restriction to the north for the Sachems Path affordable housing development project, which was specifically required by NHESP to mitigate the abutting development. The aerial photo clearly shows how important the Surfside Crossing parcel is in connecting significant Lepidoptera habitat to the east and west. As you well know, connectivity is vital for providing ecological corridors, enhancing species resilience to development, and promoting the movement of species throughout an ecological landscape. It is critical that on-site protection and mitigation be required on the project site.

WATER RESOURCES PROTECTION

Nantucket Island has a single "sole" source aquifer, as designated by the US EPA in 1984. This public water supply serves a majority of the mid-island area, and the proposed development is located entirely within Nantucket's Wellhead Protection District, and MassDEP's Zone II Wellhead Protection Area. The implications of a development of this size and intensity on water quality must be carefully reviewed, and the project must be conditioned so as to avoid all adverse impacts. Just beyond the development site, to the south and west, are a number of properties outside of this public water district which are serviced by private wells. The extent of site disturbance and the nature of land use also threatens the groundwater serving these wells. While

the Town's public water supply usage has been calculated as it relates to wastewater generation, the on-site irrigation well proposed to serve the entire development's landscaping needs has not been taken into account. The water draw and usage from this well must be considered as it relates to abutting properties and resources.

In addition to impacting the quality of the surrounding groundwater and abutters' drinking water, Surfside Crossing also falls within the watershed to Miacomet Pond, one of Nantucket's "Great Ponds", and as noted in the ENF application, an impaired water body. Miacomet Pond has a relatively small surface area for the extent of its watershed. This watershed includes a large portion of the developed mid-island area, including significant impervious surface, and has become degraded from excess nitrogen and phosphorus loading. The Town of Nantucket's 2014 Miacomet Pond Watershed Study, by Woodard and Curran, demonstrated not only that the Surfside Crossing property falls within the Miacomet Pond watershed, but that the western half of the site also falls within the area of Direct Runoff Contribution for Miacomet Pond. This makes it critical to minimize any form of runoff pollution and to require best possible practices for stormwater management across the site. As proposed, the amount of vegetation clearing, impervious surface creation, and new landscaped areas will undoubtedly lead to negative impacts on the surrounding water resources such as Miacomet Pond, which is already an impaired waterbody. These potential impacts must be reviewed and significantly minimized or appropriately mitigated.

TOWN INFRASTRUCTURE CONCERNS

Throughout the ZBA's review and deliberations, several concerns were raised regarding the impact of the proposed development on Town Sewer and Town Water.

The ENF filing materials indicate the proponent's intention to tie all proposed units into Town Sewer via a pump station and one of the existing force mains that run along South Shore Road. It was made abundantly clear by the Director of the Town Sewer Department, as well as the Town's consulting engineers, that this is inadvisable and would not only have a negative impact on existing flow and capacity of either force main, but might also compromise the integrity of the infrastructure itself. The Town provided the proponent with a perfectly clear alternative of constructing a gravity sewer line to transport wastewater from the site to the Wastewater Treatment Facility. The Town Sewer Department also expressed concerns about construction related impacts to the two force mains running directly across the eastern portion of the site. Should either of these lines rupture from impacts surrounding construction they could release 30,000-60,000 gallons of wastewater before being shut down. Such a catastrophic failure would not only cause a public health crisis, it would also destroy fragile habitat and further impair the species that rely on it. The wastewater infrastructure design presented with this ENF filing is not possible, per direct communication by the Town during the ZBA hearings, rendering the project as proposed unbuildable. It is imperative that these designs undergo local review in order to ensure that local infrastructure requirements are properly considered.

The Wannacomet Water Company (WWC) provides Nantucket's public water throughout the mid-island area. The increasing rate and intensity of growth on the island has threatened to

overwhelm the Water Company's infrastructure and state permitted pumping rates. The Surfside Crossing development will add an unanticipated increase to Town water needs. The calculated draw on the public water supply from the 156 unit plan presented here is 31,330 gallons per day. This is significantly more water than the 60 units permitted by the ZBA would have required. Upon issuance of the Comprehensive Permit for those 60 units, WWC's application for additional pumping capacity in the Town's Water Withdrawal Permit was still pending. This is another example of an issue that must be addressed through consultation with local authorities.

SITE DESIGN

Impervious Surface

As proposed this development exceeds MEPA's threshold for creation of greater than 5.0 acres of impervious surface. The new "modified" plan increases impervious areas by almost a half acre from what had been originally proposed. The original 156 unit proposal presented by the applicants in February, 2018 included 6.05 acres of impervious surface. After multiple conceptual redesigns which incrementally decreased both the cleared land area and the impervious area, the currently presented 156 unit plan now proposes 6.46 acres of impervious surface. The massing of the structures coupled with the parking necessary to accommodate such an inappropriate number of units for this site will render nearly half of the entire 13.5 acre property impervious. This will have clear impacts on all habitat values, and is also likely to negatively impact water quality for the downgradient wells and already impaired water body Miacomet Pond.

Stormwater Infrastructure

The management of stormwater across the site during and after construction is of the utmost importance. The designs presented in this ENF filing look to consist of deep hooded catch basins, oil-water separators and underground infiltration units. It is unclear from the plans provided with this filing whether soil data has been documented for the location of these infiltration units and whether the proposed stormwater management design meets Mass DEP's Stormwater Handbook requirements. No Operations and Maintenance Plan for the infrastructure was submitted. The developers should be required to incorporate vegetated swales and bioretention basins as much as possible across the site. Improperly maintained catch basins and infiltration units supporting this much impervious area can easily result in on site flooding and runoff of pollutants that may impact downgradient wells and/or Miacomet Pond.

Transportation (Traffic)

The 156 unit design presented in this ENF filing exceeds MEPA's transportation threshold: generating greater than 1,000 daily vehicle trips with the creation of more than 150 new parking spaces. The proposed development is shown to generate 1,142 vehicle trips per day on roadways to access a single location and proposes 299 new parking spaces, just one less than the separate MEPA threshold of 300 new parking spaces at one single location. The NLC's consultant reviewed the transportation and traffic data presented with the original 156 unit proposal before the ZBA, and the Town's consultant also peer-reviewed the proposed transportation and traffic impacts. There was significant concern from the Town, the NLC and the community that the

generation of this many new vehicle trips directed at one single already burdened intersection of South Shore Rd, Fairgrounds Rd, and Surfside Rd would adversely impact the use of these roadways. The number of vehicles proposed for travel and parking at this site also increases the risk for contamination of the surrounding water resources.

Town of Nantucket Master Plan – Open Space

The applicant identifies the Town of Nantucket's 2009 Master Plan in its ENF filing as the current municipal land use plan. However, when asked to describe the project's consistency with the plan in regard to "open space impacts" the applicant simply indicates "N/A". In fact, the open space impacts from Surfside Crossing's development are very applicable to the Master Plan. The proposed project will clear cut all but 1.29 acres of perimeter strips so small they will be more or less useless as habitat or as the buffers they claim to be. While the Nantucket Master Plan recognizes the importance and need for the development of affordable housing opportunities, it also emphasizes in Chapter 6, *Open Space and Recreation*, the need to "...protect Nantucket's native ecosystems and biodiversity" as well as "to maintain the quality of its water bodies" and resources (Nantucket Master Plan Goal 6.1 and 6.2). It also clearly outlines the basis of its land use and development ethic in Goal 2.3 "To define and develop standards for growth appropriate for the patterns set by the existing built environment". The proposed Surfside Crossing development is contrary to the South Shore Road neighborhood as well as to the Nantucket Master Plan. The impacts to open space and the island's fragile water resources have not been avoided, minimized or mitigated.

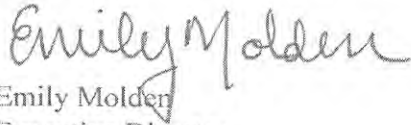
CONCLUSION

The project as proposed will clear cut 13.5 acres of state listed priority habitat and proposes to turn half of it into impervious surfaces. The proponent should be required to allow on-site surveys of the state-listed Northern Long Eared Bat so that its habitat can be appropriately mapped and mitigation for impacts can be appropriately addressed by DFW. Additional information must be provided to address stormwater impacts from the impervious surfaces not only to ensure that state standards are being met, but to mitigate for impacts to important water resources using Best Management Practices. Additional information is required to determine whether water and sewer infrastructure has been designed in a way that is compatible with the Town and more information should be provided on how the proponent will mitigate for traffic and transportation impacts.

The regulatory process for reviewing such a project should not begin with MEPA. We recognize the role that MEPA is intended to play for all applicable state agencies and state permitting authorities. However, the MEPA review process is not designed or intended to circumvent the peer review process that takes place before local regulatory boards. The materials submitted with the Environmental Notification Form do not address the wide range of environmental concerns and impacts that will result from this project. An Environmental Impact Report should be required in order to address the issues raised above.

Thank you for your time.

Sincerely,



Emily Molden
Executive Director

Enc.

cc: Nantucket Town Manager

Ms. C. Elizabeth Gibson
Town Manager
Nantucket Town Hall
16 Broad Street
Nantucket, MA 02554