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September 28, 2010

Wayne F. MacCallum
Director
Division of Fisheries and Wildlife
Field Headquarters
One Rabbit Hill Road
Westborough MA 01581

Re: In the Matter of Marion Drive, Kingston, MA
Docket No. 07-22182-2010-02-RL
NHESP File No. 07-22182
RECOMMENDED FINAL DECISION

Dear Director MacCallum:

Enclosed for your review and issuance of a Final Decision is my Recommended Final Decision on the Division's Motion to Dismiss the Petitioner's Appeal for Lack of Standing and the Town of Kingston's related Motion to Intervene in the above entitled MESA appeal. I have also enclosed a copy of the administrative record for the appeal ending with my Recommended Final Decision.

My Recommended Final Decision is being sent to the parties concurrently with this submittal to you.

Sincerely,

Richard Lehan

Richard Lehan
Presiding Officer

Enclosures

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

In the matter of

Marion Drive
Kingston, MA

Docket No. 07-22182-2010-02-RL
NHESP File No. 07-22182

**RECOMMENDED FINAL DECISION ON
MOTION TO DISMISS AND MOTION TO INTERVENE**

I. Introduction

This appeal arises out of a November 20, 2009 determination by the Division of Fisheries and Wildlife (the "Division") pursuant to 321 CMR 10.18 of the MA Endangered Species Act ("MESA") regulations that the earth removal activities proposed by Thorndike Development Corporation (the "Applicant") on property located on Marion Drive in Kingston, MA would not result in a "Take" of a state-listed rare species protected under MESA (the "Division's No Take Determination"). Jennifer DiRico (the "Petitioner") is an abutting property owner to the project site who filed an appeal challenging the MESA regulatory basis for the Division's No Take Determination. The Town of Kingston thereafter filed a motion to intervene in the Petitioner's appeal in support of the Applicant's project and the Division's No Take Determination. Following the Prehearing Conference that I conducted with the parties on May 11, 2010, the Division filed a motion to dismiss the Petitioner's appeal due to a lack of standing, arguing that the Petitioner has not demonstrated that she is an "aggrieved person" as

required by 321 CMR 10.25(1) and (3)(b) of the MESA regulations. The Petitioner filed a response opposing the Division's Motion to Dismiss.

For the reasons set forth below, I grant the Division's Motion to Dismiss the Petitioner's Appeal for Lack of Standing. Because my decision means that the Petitioner's appeal should be dismissed, the Town's Motion to Intervene in the appeal is moot. In addition, I note for the record that had the Petitioner's appeal gone forward, I would not have allowed the Town to intervene because its Motion to Intervene did not demonstrate that the Town is an aggrieved person as required by 321 CMR 10.25(3)(b) and 10.25(4).

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 MA that the Division determines to be Endangered, Threatened or Species of Special Concern, and to protect such state-listed species against "takes" caused by projects and activities. *M.G.L.c. 131A and 321 CMR 10.00*. To that end, the Division has, by regulation, delineated the geographic extent of habitat for state-listed species in MA ("Priority Habitat"), and requires any Project or Activity proposed to take place in Priority Habitat to be reviewed by the Division to determine if it will cause a "take" of a state-listed species. *See 321 CMR 10.02, 10.12 and 10.18*. The Division also conducts research, data collection and other conservation management activities in connection with implementing its responsibilities under MESA and the MESA regulations. *Id.*

In a November 20, 2009 letter to the Applicant, the Division determined, pursuant to 321 CMR 10.18 of the MESA regulations, that the Applicant's proposed "Phase I

earthwork” on property located on Marion Drive in Kingston, MA would not result in a “Take” of a state-listed rare species protected under MESA. The Division stated that its No-Take Determination was based on a review of the Applicant’s submittal, which consisted of a MESA review form, together with site plans and other required materials, dated October 6, 2009, and on the information contained in the Division’s Natural Heritage and Endangered Species Program (“NHESP”) database. Finally, the Division’s No-Take Determination states that any changes to the Applicant’s project (i.e., the Phase I earthwork) or any additional work beyond that shown on the site plans may require an additional filing with the NHESP pursuant to MESA.

In response to the Division’s No-Take Determination, the Petitioner filed a Notice of Claim for an Adjudicatory Hearing with the Division pursuant to 321 CMR 10.25(1) on December 10, 2009. The Notice of Claim indicates that the Applicant’s Phase I earth removal is associated with a larger, mixed-use development called “Kingston Place,” to be built on land owned by the O’Donnell Family Trust, and sets forth several claims, summarized below.

The Petitioner alleges that the Applicant improperly segmented the project, contrary to a January 16, 2008 Certificate issued by the Secretary of the Executive Office of Energy and Environmental Affairs pursuant to the Massachusetts Environmental Policy Act (“MEPA”), and that soil removal activity was occurring on the O’Donnell property without the required review under MESA. *Section II of the Notice of Claim, pp. 4-7.* In addition, the Petitioner claims that the Division’s No-Take determination lacks a sufficient factual basis and is based on inadequate information. *Section III of the Notice*

of Claim, pp. 7-8. The Petitioner's requested remedy is a determination that the Division's No-Take Determination is invalid for the reasons stated in her appeal.

An affidavit included as part of the Petitioner's Notice of Claim addresses the issue of her "aggrieved party" status under 321 CMR 10.25(3)(b) of the MESA regulations. The Petitioner's affidavit states that she is a resident of Kingston and that she owns or co-owns with her husband approximately three acres of land adjacent to the O'Donnell property, which is the location of Applicant's proposed Phase I earth removal activities. *Paragraph 2 of the Petitioner's Affidavit, p. 1.* One of her lots directly abuts the O'Donnell property, and all of the lots are within Priority Habitat delineated by the Division pursuant to the MESA regulations. *Id.* The Petitioner's affidavit claims that she is aggrieved person with standing to appeal the Division's No-Take Determination because allowing development of the project site "without compliance with environmental factors will have a negative impact on my property values." *Id.* The Petitioner further states that one of the attributes of her property that increases its value is "the rich natural life, " and that the effect of the Division's No-Take Determination diminishes her property values and "undermines the efforts I have made to protect the natural qualities of this area." *Paragraph 5 of the Petitioner's Affidavit, p. 2.*

The Petitioner states that the Applicant "has also expressed a desire to build a road from this development into critical habitat along Smelt Brook and Raboth Road," and expresses a concern that this potential road "would act as a short cut for many people leaving the train station and his development." *Paragraph 4 of the Petitioner's Affidavit, p. 2.* The Petitioner's affidavit further notes her efforts to challenge local and state approvals of the Applicant's project, including contesting the local rezoning of the

O'Donnell property and the adequacy of the MEPA and MESA reviews. *Paragraph 6 of the Petitioner's Affidavit, p.2.* She also highlights her and her family's history of civic involvement in the Town of Kingston, and her belief in the importance of environmentally protecting the area of Kingston where her property and the Applicant's project are located. *Paragraph 8 of the Petitioner's Affidavit, p.3.*

Finally, the Notice of Claim makes the related claims that the matters in contention are within the scope of interests or areas of concern of M.G.L. c.131A and 321 CMR 10.00, and that the Petitioner has suffered an actual injury. *Paragraph 3 of the Notice of Claim, p.1.*

On February 4, 2010 the Town of Kingston (the "Town") filed a Motion to Intervene in the above appeal pursuant to 321 CMR 10.25(4)¹. The Town asserts that it has a "particular interest" in the Division's No-Take Determination with respect to Phase I of the project and in any subsequent Division determination under the MESA regulations affecting the project. *Town's Motion to Intervene, pp.1-2.* The Town argues more specifically that its interest in the Division's No-Take Determination being upheld on appeal is that the "Town as a whole will benefit from the Project because it will not only broaden the business base and create jobs, but will also provide much needed affordable housing in accordance with G.L. c. 40R." *Id.*

As the Presiding Officer for this appeal, I conducted a Prehearing Conference on May 11, 2010 with the respective counsel for the Petitioner, the Division, the Applicant

¹ 321 CMR 10.25(4) provides that "the presiding officer in an adjudicatory proceeding at the Division may allow a person who demonstrates, as required by 321 CMR 10.25(3)(b), that they are aggrieved to join or intervene in the adjudicatory proceeding."

and the O'Donnell Family Realty Trust², and the Town. At the Prehearing Conference, counsel for the Division identified as a threshold issue for adjudication whether the Petitioner is an "aggrieved party" within the meaning of 321 CMR 10.25(3), and stated an intent to file a motion to dismiss the Petitioner's appeal due to a lack of standing. Counsel for the Petitioner requested, depending upon the outcome of my resolution of the standing issue, an opportunity to file a dispositive motion prior to the filing of any prefiled testimony.

Following the Prehearing Conference, I issued a Prehearing Conference Report and Order dated May 12, 2010 that established the issue for adjudication³ and the tentative schedule for adjudication. The schedule called for, at the outset, the Division filing its Motion to Dismiss the Petitioner's Appeal for Lack of Standing, followed by the Petitioner's Response to the Division's Motion. As discussed in more detail in Section III of my Recommended Final Decision below, the Division and the Petitioner made their respective filings on May 27, 2010 and June 15, 2010. Because of the potentially dispositive nature of the Division's Motion to Dismiss for Lack of Standing, I set forth the remainder of the schedule for adjudication but expressly noted that it is dependent on the outcome and timing of my ruling on the Division's Motion.

Under that tentative schedule, the date for filing any opposition to the Town's Motion to Intervene was August 10, 2010. On August 9, 2010 the Petitioner filed its Response to the Town's Motion to Intervene as well as a Motion to Stay the Scheduling

² Harold Guggenheim, Esquire, confirmed that he represents both Thorndike Development Corporation and the O'Donnell Family Realty Trust in this appeal.

³ The issue that I established for adjudication in this appeal was as follows:

Whether there are sufficient supporting facts for and a proper regulatory basis under 321 CMR 10.16 and 10.20 for the Division's November 20, 2009 determination that Thorndike Development Corporation's proposed earth removal project at Marion Drive in Kingston, MA would not result in a prohibited "take" of a state-listed species protected under MESA.

Order until I have made my ruling on the Division's challenge to the Petitioner's standing. On August 10, 2010 the Division filed a Motion to Amend the Schedule for Adjudication, making essentially the same request as the Petitioner.

In a Ruling on the Motions to Stay or Amend the Schedule for Adjudication dated August 13, 2010, I granted the motions by the Petitioner and the Division to stay the schedule for adjudication pending my ruling on the Division's Motion to Dismiss. My ruling stated that if the outcome of my decision on the Division's Motion to Dismiss necessitated a further schedule for adjudication, I would establish that schedule at the time of my ruling, including providing time for the Division to file its response to the Town's Motion to Intervene.

III. Discussion

1. 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").

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 (see p.6)*. Under those principles, the decision-maker must accept as true the facts alleged by a petitioner to support their notice of claim seeking an adjudicatory hearing for the purposes of the pending motion to dismiss. *Id.* See also *Curran v. Boston Police Patrolmen's Ass'n, Inc.*, 4 Mass.App.Ct. 40 (1976) (when determining whether to grant a motion to dismiss a claim, the moving party admits all facts well plead by the non-moving party).

2. The Standing Requirements under the MESA Regulations

A. The Standing Requirements in 321 CMR 10.25(3)(b)

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(3)(b), any notice of claim 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 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 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, the plain language of 321 CMR 10.25(3)(b) does not confer standing on property abutters by regulation, or allow abutters to make a more limited or less stringent showing to demonstrate their standing. In that regard, 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.” See *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). Thus, notwithstanding the fact that the Petitioner in the instant appeal is an abutter to property that is the subject of the Division’s No-Take Determination, she is required to demonstrate her compliance with all of the standing requirements in 321 CMR 10.25(3)(b) in the same manner as any other aggrieved person.

B. Relevant Case Law on the Standards for Demonstrating Standing

Relevant case law affirms and provides more specific guidance on the factual showing required to demonstrate “aggrieved person” status under the MESA regulations. First, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the United States Supreme Court reiterated the three part, “irreducible constitutional minimum of standing” as follows:

1. the plaintiff must have suffered an “an injury in fact,” meaning, an invasion of a legally protected interest which is (a) concrete and particularized⁴, and (b) actual or imminent, not conjectural or hypothetical;
2. 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

⁴ 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. it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan*, at 561.

Moreover, while the Court 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, it made clear 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. Consistent with *Lujan*, a federal district court opinion cited in the Petitioner’s Response to the Division’s Motion to Dismiss (“Petitioner’s Response”), *Southwest Center for Biological Diversity v. Clark*, 90 F. Supp. 1300, 1305 (D. New Mexico, 1999), stated that when determining whether an organization or association has standing:

“the Supreme Court has recognized aesthetic, environmental and economic injuries as injuries in fact, so long as the challenged agency action can be shown to cause the injuries alleged and the plaintiff asserts a ‘specific and perceptible harm’ which distinguishes the interests of the organizational plaintiff and its members from the generalized interests of the public as a whole.”

Similarly, Massachusetts courts have affirmed that “a person aggrieved...must assert a plausible claim of a definite violation of a private right, a private property interest, or private legal interest.” *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); 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 nonspeculative 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).

Furthermore, private petitioners do not acquire standing based on a contention that they seek to enforce an environmental law. *Matter of Town of Ipswich*, 2005 WL 4124572, at p.6. To do so “would permit almost anyone to claim standing to appeal...[o]ne ‘zealous in the enforcement of law but without private interest’ is not an aggrieved person.”, *Id.* quoting *Ginther*, at 322. “We have consistently held,” said the U.S. Supreme Court in *Lujan*, “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.

Finally, a petitioner must show how they have a definite interest in the matters in contention that fall within the scope of interests or areas of concern in the statute and regulations at issue. “Of particular importance, the right or interest asserted must be one that the statute under which a plaintiff claims aggrievement intends to protect.” *Standerwick*, at 204. (diminution of real estate values are not a concern that M.G.L. c. 40B, the affordable housing statute, is intended to protect.); *Jepson v. Zoning Board of*

Appeals of Ipswich, 450 Mass. 81 (2007) (same holding); *Circle Lounge & Grille, Inc. v. Board of Appeals of Boston*, 324 Mass 427 (1947) (zoning act does not protect against business competition). “Alleging injury is not enough, a plaintiff must allege a breach of duty owed to it by the public defendant.” *Ginther*, at 323. “The injury alleged must fall within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.” *Id.*

Three Department of Environmental Protection (“DEP”) adjudicatory decisions cited in the Petitioner’s Response illustrate how the above standing requirements are addressed in an environmental context. First, in *Matter of Town of Ipswich*, *supra*, the DEP administrative magistrate (“magistrate”) granted the Town of Ipswich’s motion to dismiss two watershed associations for lack of standing.⁵ The magistrate determined that the associations’ claims that water withdrawals allowed by the appealed Water Management Act (“WMA”) permit would lead to a loss of fisheries, water quality degradation and other environmental injuries, and would diminish its members’ ability to use and enjoy the river, were matters of general public concern. Such matters, the magistrate found, are not concrete injuries to the associations’ own rights, property or legal interests, even though the associations’ stated purpose was to protect the river.

Consistent with MA case law addressing standing in a zoning context, the magistrate stated that “[c]oncerns about water degradation, loss of habitat and other environmental damages are not ‘concrete injuries’ to the petitioner...[r]ather, these are

⁵ In a subsequent ruling, the magistrate denied the associations’ motion to reconsider the question of their standing, rejecting their argument since DEP had found watershed associations had standing in analogous situations, the two associations must have standing in this case. *Matter of Town of Ipswich*, 2006 WL 1681036, p. 2. The magistrate noted that standing “must be determined case by case, based on the specific facts presented, the particular permit or project in dispute, the claims at issue, the controlling regulations, and the relief requested.” *Id.*

‘matters of general public concern which...do not establish a plausible claim of a definite violation of a private right, property interest, or legal interest sufficient to bring [the association] within the zone of standing.’ *Id.*, at p.4, quoting *Havard Sq. Defense Fund, Inc.*, at 493. “Valuing or ‘caring about’ the subject environment is insufficient to establish standing.” *Id.*, quoting *Matter of NNB Associates*, 5 MELR 1067, 1094 (1987). Moreover, the fact that one of the associations had recently relocated its headquarters in the same watershed basin as the permitted withdrawal does not automatically endow the association with standing or mean that it is likely to suffer an injury in fact as a result of the permit. *Id.*, at p.7, citing, e.g., *Matter of Northland Residential Corp*, 11 DEPR 74, 76, n.5 (2004) (property ownership by itself, is not enough to make a petitioner aggrieved).

The magistrate distinguished *Matter of Town of Ipswich* from a second DEP adjudicatory decision, *Matter of Town of Hanson*, 2005 WL 4124572, “because the association in that case owned property on the banks of the Jones River and had submitted a detailed affidavit outlining the damage that the permit would cause to the river and, thus, to the association.” *Id.*, at p.6. Like the *Town of Ipswich* appeal, *Matter of Town of Hanson* involved a ruling on petitioners’ standing in response to a motion to dismiss. The magistrate affirmed the standing of the Town of Kingston and the Jones River Watershed Association because they jointly filed a detailed affidavit from a civil engineer showing that diminished river water levels would harm the Town’s ability to provide water to its residents and that this result would also injure the property that the association owned along the river and would interfere with its corporate purposes, which included maintaining and improving the water quality of the Jones River watershed. The

magistrate also determined that the interests of protection of water supplies and the viability of rivers and watersheds are within the zone of interests of the WMA. *Id.*

In the third DEP decision, *Matter of Crumpin-Fox Club, Inc.*, 2006 WL 1681029, the owner of a campground that abutted a golf course appealed a DEP WMA permit issued to the owner of the golf course, Crumpin-Fox. In support of her appeal, the petitioner provided a report by a hydrogeologist that examined Crumpin-Fox's pumping test data and information to evaluate the possibility of adverse impacts to the campground well due to the pumping of an irrigation well at the golf course. The hydrogeologist concluded that pumping at the golf course well would result in no significant short term impacts to the campground well, but that long-term impacts have the potential to be significant during an extended drought period. *Id.*, at p. 2.

The question of the petitioner's standing was decided by the magistrate in response to cross motions for summary decision. The magistrate determined that the petitioner had no reasonable expectation of proving that the golf course well will cause her an injury in fact because her motion for summary decision was not supported by an affidavit from her hydrogeologist (whom she discharged after he completed the above referenced report), and did not contain proof of the existence of a hydraulic connection between the campground and golf course wells. As a consequence, the magistrate ruled that the petitioner lacked standing and granted summary decision in favor of Crumpin-Fox. The magistrate included a statement in the decision that if the petitioner's standing had been challenged by a motion to dismiss, "her claim of personal aggrievement based on a potential hydrogeologic connection between the two wells *might* have sufficed to save her appeal from dismissal." *Crumpin-Fox*, at p.6. (Emphasis added).

Relevant to the question of the Petitioner's standing in the instant appeal, the two DEP decisions where the magistrate found (or might have found) standing in response to a motion to dismiss involved petitioners who provided sufficient facts in their notice of claim to show that their injury was more than speculative personal opinion and conjecture – a detailed affidavit from a civil engineer supporting the claims of injury in *Matter of Town of Hanson*, and a report from a hydrogeologist supporting the possibility of a hydraulic connection between the campground and golf course wells in *Matter of Crumpin-Fox, Inc.*

3. Determination of the Petitioner's Standing to Appeal

As stated in Section III.1., *supra* at pp.7-8, in ruling on the Division's Motion to Dismiss I accept as true the facts alleged by the Petitioner to support her notice of claim. The Petitioner's factual demonstration of her status as an "aggrieved person" within the meaning of 321 CMR 10.25(3)(b) is contained solely in her affidavit included with her notice of claim.

There is some ambiguity in the record as to whether the Petitioner is arguing that her status as an abutter confers standing on her or otherwise lessens the showing required under 321 CMR 10.25 (3)(b). On one hand, citing *Matter of Crumpin-Fox, Inc.*, the Petitioner acknowledges that "[l]ike any individual petitioner, an abutter or other land owner challenging must do so based upon personal aggrievement, not upon an asserted injury to the public interest." *Petitioner's Response*, p.14. At the same time, the Petitioner appears to argue that she has standing because she is "an abutting landowner who has and maintains an interest in species survival and diversity upon contiguous habitat." *Id.*, at p. 11. Regardless, as I highlighted in Section II.2, *supra* at pp. 8-9, the

MESA regulations accord no special status to the Petitioner as an abutter and she is therefore required to demonstrate her compliance with all of the standing requirements in 321 CMR 10.25(3)(b).

The Petitioner's affidavit more clearly alleges that allowing development of the Applicant's project site without compliance with MESA will negatively impact and diminish her property values. *Paragraphs 2 and 5 of the Petitioner's Affidavit*. The Petitioner also argues that one of the attributes of her property that increases its value is the "rich natural life." *Id., at Paragraph 5*.

Under 321 CMR 10.25(3)(b), the Petitioner is required to show how her claims fall within the scope of interests or areas of concern of the MESA statute and regulations. As described more specifically in Section II., *supra*, at p.2, the zone of interests under MESA concerns the listing and protection of state-listed species and related conservation management activities. MESA, like affordable housing statute, M.G.L. c. 40B, is not intended to protect against diminution of real estate values. *See Standerwick, Jepson*. More specifically, when the Division exercises its authority and responsibility under MESA to review an activity proposed to take place in Priority Habitat, it is for the purpose of determining whether it will cause a "take" of a state-listed species. MESA does not also require the Division to ensure that the outcome of its screening of activities in Priority Habitat does not negatively impact or diminish the real estate value of property, whether it be the property where the proposed activity will take place, abutting property or other property located within mapped Priority Habitat. Even assuming the value of the Petitioner's property is enhanced because of its wildlife attributes, that fact would not bring a diminution-of-value claim within an area of concern of MESA. The

Division owes no duty to Petitioner under MESA to protect the real estate value of her property when reviewing projects and activities under 321 CMR 10.18 to protect against “takes” of state-listed species. Simply put, the Petitioner’s alleged harm is not the type of injury that confers standing under MESA.

The Petitioner’s affidavit further alleges that the Applicant has “expressed a desire” to build a road from the project site into critical habitat along Smelt Brook and Raboth Road, and that this potential road “would act as a short cut for many people leaving the train station and his development.” *Paragraph 4 of the Petitioner’s Affidavit*. This claim of the Petitioner is clearly speculative in nature. She alleges the possible construction of a road that was not the subject of the Division’s No-Take Determination, and which would therefore need to be separately reviewed under MESA if it is proposed in the future. *Division’s Motion to Dismiss, p. 7; see also the Division’s No-Take Determination*. Moreover, even assuming the road had been the subject of the Division’s No-Take Determination, the Petitioner has not presented any facts to plausibly show how the use of the road as a “shortcut” would injure her in a manner that is special and different from the general public. *See Bringham v. Planning Board of the Town of Walpole, 1993 WL 13156085 (1993)* (MA land court rejected the standing of plaintiffs, ruling that their interest regarding traffic impacts from a proposed subdivision “is no different from that of their neighbors, as well as the general public, but their distress at the situation does not make them parties aggrieved within the meaning of [the zoning] statute.”); *see also Matter of Town of Ipswich*.

Finally, the Petitioner’s apparent claim that traffic resulting from a possible, future phase of the project will harm her personally does not fall within an area of

concern of MESA. Once the Division determines that a project will protect state-listed species as required by MESA, it has no additional duty to ensure that there will be no traffic impacts attributable to the project.

The Petitioner's remaining representations in her affidavit note her efforts to challenge local and state approvals of the Applicant's project, highlight her and her family's history of civic involvement in the Town of Kingston, and express her belief in the importance of environmentally protecting the area of Kingston where her property and the Applicant's project are located. *Paragraphs 6 and 8 of the Petitioner's Affidavit, pp. 2-3.* Even accepting these facts as true, they do not support a legal conclusion that the Petitioner has "suffered an actual injury that is special and different from the public" resulting from the Division's issuance of its No-Take Determination to the Applicant. *See 321 CMR 10.25(3)(b).*

The Petitioner's Response sets forth several related arguments to support her position that she is an "aggrieved person" within the meaning of 321 CMR 10.25(3)(b), in essence because of her interest in ensuring that MESA is complied with on the Applicant's property and on contiguous land within the same Priority Habitat. More specifically, the Petitioner argues that she has standing because:

- (1) she is "an abutting landowner who has and maintains an interest in species survival and diversity on contiguous habitat" (*Petitioner's Response, p. 11*);
- (2) she is "an individual who has demonstrated a protracted effort and intent to protect endangered species and habitat on the [Applicant's] project parcel, in addition to other environmental laws"⁶ (*Petitioner's Response, p. 14*); and
- (3) her "interest in environmental property rights and environmental values on land within the same mapped priority habitat clearly constitutes personal aggrievement and not a generic public interest alone" (*Petitioner's Response, pp. 14-15*).

⁶ Consistent with this argument, the Petitioner's Response (p.3) refers to her right to challenge the Applicant's project as a "private attorney general."

First, consistent with the language in 321 CMR 10.25(3)(b) and relevant case law cited in the Petitioner's Response, being an abutter does not automatically give the Petitioner standing or mean that she is likely to suffer an injury in fact because of the Division's No-Take Determination. *See Matter of the Town of Ipswich*. Moreover, the fact that the Petitioner has a personal interest in protecting state-listed species on the Applicant's property and on contiguous land in mapped Priority Habitat (including her own property) does not, by itself, establish a plausible claim of a concrete injury to her personally, as distinct from the general public. *Id.* Even in the context of a motion to dismiss, when a petitioner claims injuries that are based on environmental protection concerns there must still be sufficient facts contained in a notice of claim to make out an actual (not speculative) injury in fact to a private right that is different from the general public and traceable to agency action being appealed. *See, in particular, the discussion in Section II.2., supra, pp.12-15, which distinguished three DEP decisions cited by the Petitioner.* The Petitioner's affidavit does not draw the requisite nexus between the effect of the Division's No-Take Determination on the Applicant's property and any resulting harm to her personally.

The Petitioner's reliance on a federal district court opinion from New Mexico, *Southwest Center for Biological Diversity v. Clark*, is misplaced. First, as noted in Section III.2.B, *supra*, p.10, the court stated that in order to acquire standing based on aesthetic or environmental injuries, a plaintiff must still show that these concerns rise to injuries in fact that were caused by the challenged agency action and result in a "specific and perceptible harm" that is distinguishable from the generalized interests of the public. In finding standing, the court determined that the plaintiff had a stake in the

outcome of the challenged agency matter as well as a direct benefit and potential loss personal to the plaintiff.

I find that the Petitioner does not meet the test for standing articulated by the court in *Southwest Center for Biological Diversity v. Clark*, without holding, however, that the fact-specific standing analysis in this federal district court opinion is determinative of or the most appropriate for MESA appeals. Because the Petitioner's broadly stated interest and concern in this matter is to ensure the proper application and enforcement of MESA to Applicant's project, her stake in the outcome of the Division's No-Take Determination is no different than that of the general public, nor does the Petitioner's alleged facts plausibly show how the Division's action harms her personally.

Finally, if, as referenced in the Petitioner's Response (p.3), her standing is predicated on acting as a "private attorney general" to vindicate the interests of MESA on behalf of herself and the public, the requirements of 321 CMR 10.25(3)(b) and the relevant case law are clear that, absent a private interest, this purpose does not make her an "aggrieved person" within the meaning of MESA and the MESA regulations. See *Lujan, Ginther, Matter of Town of Ipswich*.

IV. Conclusion

For the reasons stated in this Recommended Final Decision, I grant the Division's Motion to Dismiss the Petitioner's Appeal for Lack of Standing. Because my decision means the Petitioner's appeal should be dismissed, the Town's Motion to Intervene is moot. For the record, even assuming that the Petitioner's appeal had gone forward, I would not have allowed the Town to intervene because its Motion to Intervene does not

demonstrate that the Town is an "aggrieved person," as required by 321 CMR 10.25(3)(b) and 10.25(4). The Town's stated interest in the Division's No-Take Determination being upheld due to the larger project's alleged benefits to the Town's business base and toward the creation of jobs and affordable housing do not fall within the scope of interests or areas of concern of MESA.

V. Notice

This decision is a 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.

Dated: September 28, 2010

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

In the Matter of Marion Drive, Kingston
Docket No. 07-22182-2010-02-RL
NHESP File No. 07-22182

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