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

OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of	)	May 16, 2008
Cape Wind Associates, LLC	)	NHESP Tracking No. 01-9604

RECOMMENDED FINAL DECISION
ON MOTIONS TO DISMISS

This matter involves a request for an adjudicatory hearing by the Alliance to Protect Nantucket Sound, Inc. and several concerned citizens ("Petitioners") on the terms of a July 17, 2007 decision by the Division of Fisheries and Wildlife, a Division within the Department of Fish & Game (the "Division"), under the Massachusetts Endangered Species Act, M.G.L. c. 131A ("MESA") and its regulations at 321 CMR 10.00 et seq. ("MESA Regulations") that no "Take" of Massachusetts protected species would occur. This finding was made in response to an application under the MESA regulations to the Natural Heritage and Endangered Species Program of the Division by the Cape Wind Associates, LLC (the "Applicant") with respect to installation of cables and other infrastructure on land and land under water within the borders of the Commonwealth of Massachusetts in and near Cape Cod (the "Cable Project"). This utility infrastructure will be transmitting electricity from a proposed wind energy turbine farm to be

constructed on Horseshoe Shoals entirely within federal territorial waters in Nantucket Sound (the "Wind Turbine Farm").[1]

Petitioners are a group of citizens and a nonprofit organization whose members are concerned about impacts to two endangered bird species, the roseate tern and piping plover, and one species of concern, the common tern, from the construction and operation of the Wind Turbine Farm. The Division also expressed concern about the welfare of these bird species and about impacts to the birds that might result from the construction of the Wind Turbine Farm in filings that have become part of the federally supervised National Environmental Policy Act review pursuant to standards in the federal Endangered Species Act. All parties agree that such impacts will occur solely within the federal territorial waters in Nantucket Sound. The Division also concluded, and Petitioner does not contest, that no impacts would occur as a result of the Cable Project. The Division concluded that it could not attempt to regulate the Wind Turbine Farm impacts indirectly through regulation of the Cable Project because it was pre-empted by federal laws. In this Recommended Final Decision, I affirm the decision by the Division not to regulate the bird species impacts from the Wind Turbine Farm because the Division lacks jurisdiction to do so.

I. Procedural History

The Applicant applied for a determination under MESA and the MESA Regulations as to whether a "Take"[2] of Massachusetts protected species would occur as a result of the installation

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[1] These proceedings are governed by the rules for adjudicatory proceedings contained in the MESA regulations at 321 CMR 10.25 and the informal rules contained within 801 CMR 1.00 et seq., which were enacted pursuant to authority contained in M.G.L. c. 30A.

[2] A "Take" is a defined term that means: "...in reference to animals, means to harass, harm, pursue, hunt, shoot hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of

of the utility infrastructure within Massachusetts' land territory and territorial waters, that is, the Cable Project. The Division found that no Take would occur. The Petitioners appealed the Division's decision on the grounds that the Division should have also considered impacts to Massachusetts protected species that would occur within federal territorial waters as a result of the Wind Turbine Farm that was to be connected to the Cable Project infrastructure. Petitioners do not contest the Division's conclusion that the Cable Project would not cause any Take of Massachusetts protected species.

The Applicant and the Division filed Motions to Dismiss Petitioners' claims. Both parties asserted a lack of standing on the part of Petitioners in their briefs, although the Division has chosen not to pursue arguments on this ground for dismissal. The Applicant and the Division also move to dismiss on the grounds that the Division cannot deny the Cable Project based upon impacts to Massachusetts protected species that might occur outside the borders of the Commonwealth as a result of the construction or operation of the Wind Turbine Farm. I conclude that I do not have to reach the standing issue. I recommend that the Division issue a Final Decision dismissing the Petitioners' claim on the basis that the Division would not have jurisdiction over the Wind Turbine Farm impacts to Massachusetts protected species, either directly or indirectly.

II. Summary of Facts

There is a great deal of agreement on the relevant facts. There is no dispute that the Cable Project will occur completely within the territorial boundaries of the Commonwealth of

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nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat." 321 CMR 10.02.

Massachusetts and that at least a portion of the project lies within Priority Habitat[3] for Massachusetts protected species. The Division conceded that it does have jurisdiction over the Cable Project as defined in the application (but not the Wind Turbine Farm or its impacts). The Division also does not dispute that the Cable Project is a portion of a larger project that includes the Wind Turbine Farm. However, there is no part of the Wind Turbine Farm project that will occur inside of Priority Habitat.

The Division describes the Cable Project's overlap with Priority Habitat and its connection to the Wind Turbine Farm as follows in its Motion to Dismiss, and this description is undisputed by the Petitioners:

> This appeal arises out of a proposal by Cape Wind Associates, LLC ("Cape Wind") to construct and operate a wind farm consisting of 130 wind turbine generators (the "WTGs"), an electric service platform (the "ESP") and two associated transmission lines. The WTGs and the ESP are to be located entirely within federal waters of Nantucket Sound on Horseshoe Shoal and both will be anchored to the seabed. Electricity generated by the WTGs will be delivered to the NSTAR electric grid by two 115 volt transmission lines (the "Transmission Cable System"). The submarine portion of the Transmission Cable System will run from the ESP in federal waters under six feet of seabed through the Commonwealth waters of Lewis Bay for approximately 7.6 miles, making landfall at New Hampshire Avenue in Yarmouth, MA. The upland portion of the Transmission Cable System will run in an underground conduit for approximately four miles to the intersection of the NSTAR Electric Company right of way on Willow Street in Yarmouth. From there, the underground conduit of transmission lines will proceed west for approximately 1.9 miles along the existing NSTAR Electric right of way to their endpoint at the Switching Station in Barnstable, MA.

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[3] "Priority Habitat" is a defined term in the MESA regulations as: "the geographic extent of Habitat for State-listed Species as delineated by the Division pursuant to 321 CMR 10.12. Priority Habitats are delineated based on records of State-listed Species observed within the 25 years prior to delineation and contained in the Division's NHESP database." 321 CMR 10.02. Priority Habitats are delineated, updated and published by the Division on a regular basis. Project proponents are required to make a filing with the Division setting forth the details of any project that will occur partly or wholly within Priority Habitat and obtain a finding from the Division that no "Take" of Massachusetts protect species will occur. Project proponents are not required to apply to the Division for proposed activity outside of Priority Habitat, and the Division confirmed at the oral argument that the Division believes it does not have jurisdiction to regulate activities that occur entirely outside of Priority Habitat.

The Division further identifies the basis for jurisdiction over the Cable Project as follows, and, again, this characterization of the location and nature of Priority Habitat is uncontested by Petitioners:

> The portion of the Transmission Cable System to be located within the Commonwealth intersects with four different Priority Habitats of State-listed Species. [FN 1] [Text of FN 1: Under 321 CMR 10.14(6), two of the four Priority Habitats are exempt from review by the Division because the portions of the transmission lines that cross these two Priority Habitats are utility lines to be installed within ten feet of an existing paved road.]

Petitioners do not contest this description, nor do they provide any allegation or evidence with respect to the location of these areas of Priority Habitat or what species of concern inhabit them.

There is also no dispute that the Wind Turbine Farm will be constructed on the seabed located in the area of Horseshoe Shoals. Horseshoe Shoals is in the central portion of Nantucket Sound more than three miles from the coastline of the Massachusetts mainland and islands that surround that body of water. There is no dispute that this places the Wind Turbine Farm entirely within federal territorial waters. These federal territorial waters are a bit peculiar in their location and dimensions in that they are almost entirely, but not completely, cut off from the surrounding federal waters along the eastern seaboard.[4] There is also no dispute that the Wind Turbine Farm would be located entirely outside of any MESA Priority Habitat.

Petitioners also concede that no "Take" of Massachusetts protected species would occur as a result of the proposed Cable Project and that any impacts to such species would occur only as a result of the Wind Turbine Farm. Petitioners claim that the Wind Turbine Farm will cause impacts upon two MESA endangered species, the roseate term and piping plover, and a third species of concern, the common term. Petitioners support these factual allegations by the introduction of documents that contain official comments by the Division during the coordinated

[4] Those peculiarities have been, unfortunately for the Petitioners, comprehensively and conclusively dealt with in statutory and case law. I will discuss that law comprehensively later in this recommended decision.

state and federal environmental review processes for the Wind Farm finding that these three species would experience losses as a result of the Wind Farm.[5]

III. Legal Conclusions

For the purposes of the Motions to Dismiss, I would recommend that the Division adopt the same standards that are applied in the Massachusetts courts under Mass. R. Civ. P. 12(b)(1). Under those principles, the decision-maker in this matter must accept as true the facts alleged by the Petitioners to support their notice of claim seeking an adjudicatory hearing for the purposes of the pending Motions to Dismiss. The Petitioners' factual allegations are taken as true, and the Petitioners should be given the benefit of all inferences. *Ginther v. Commissioner of Insurance*, 427 Mass. 319, 322, n. 6 (1998). A Motion to Dismiss, unsupported by affidavits, is an attack on the sufficiency of the Petitioners' allegations and those allegations must be taken as true for the purposes of resolving such a motion. *Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 709-710 (2004). Parties defending against Motions to Dismiss are free to introduce supplemental evidence to bolster their claims. In this case, therefore, I accept as true all material factual allegations made by the Petitioners in their initial appeal papers and in their supplemental filings.[6]

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[5] It is important to note that the Division has expressed detailed concerns about Massachusetts protected species, including the roseate tern [sterna dougallii dougallii] and piping plover [charadrious melodus], in the documents submitted by Petitioners, which were submitted as part of the state and federally coordinated environmental review process that governs the Wind Turbine Farm's environmental impacts under the National Environmental Policy Act ("NEPA") which was coordinated with Massachusetts Environmental Policy Act ("MEPA") review. The Division is not seeking to abandon its responsibilities to these species. It is also worthy to note that both the roseate tern and piping plover are listed as Endangered and Threatened Species on the United States Endangered Species List. See, public listing at the U.S. Fish and Wildlife Service website at http://www.fws.gov/endangered. NEPA review will include review of impacts to these species under the auspices of the federal Endangered Species Act ("ESA" discussed in more detail herein), which does have standards and requirements for protection of species listed as endangered and/or threatened. While the common tern is not a federally protected species, the Division' comments about impacts to the common tern do have a forum in the NEPA review process.

[6] The Division urges me to disregard as irrelevant the supplementary evidence introduced by the Petitioners, but I decline to do so. Whether Petitioners' evidence is relevant is part of the exercise that the Applicant and Division have asked me to conduct by filing their motions to dismiss. If Petitioners' position were found to be correct that

Petitioners put forward arguments in defense of their claim of jurisdiction on three bases: (1) that the Division's jurisdiction is not entirely pre-empted by the federal government; (2) that the language of the MESA regulations both allow and compel the Division to assert jurisdiction in this situation; and (3) that several Massachusetts cases support the legality of the Division's assertion of extra-territorial jurisdiction in this matter. Petitioners made clear in their brief and at oral argument that they are relying primarily on their argument as to the proper construction of the statutory and regulatory language of MESA and the MESA regulations. Petitioners' counsel asserted that this was their strongest argument. They argue that I need not address the Division's or the Applicant's concerns about federal pre-emption or supremacy because the plain language of MESA and MESA regulations requires the Division to take the deaths of the piping plovers, roseate terns and common terns in federal waters into account in its determination about the Cable Project. After a comprehensive examination of the law applicable to this case, I conclude that the federal law on point is overwhelming in its support of the Division's decision that it was pre-empted from regulation of bird species impacts caused by the Wind Turbine Farm. I also conclude that Petitioners' other two sets of arguments are not persuasive.

Federal Preemption and Applicable Authority over Nantucket Sound

I disagree with the Petitioners position that federal supremacy and pre-emption principles do not apply to this case. The dividing line between federal and state jurisdiction is a basic principle articulated in the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2, as repeatedly held by the United States Supreme Court and recognized by the Supreme Judicial Court of Massachusetts. See, *Supreme Judicial Court of Massachusetts In re Opinion of the Justices*, 297 Mass. 567, 574 (1937). Whether a state would have the authority to regulate

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the impacts from the Wind Turbine Farm as well as the Cable Project must be considered, then the information about the Division's statements about species impacts caused by the Wind Turbine Farm would be highly relevant.

outside its borders and in federal territorial waters necessarily implicates this supremacy question.[7] In this situation, there is a set of statutes that expressly exert comprehensive regulation of Nantucket Sound, including environmental regulation and review. There is also federal case law directly on point as to the extent of the jurisdiction of the Commonwealth of Massachusetts in the federal waters of Nantucket Sound.

In *Ten Taxpayers Citizens Group v. Cape Wind Associates, LLC.*, 373 F.3d 183, 190 (1st. Cir. 2004), the United States Court of Appeal for the First Circuit rejected claims by another group of citizens that the Commonwealth of Massachusetts could insist on regulating the construction of a 197-foot data collection tower on the seabed of Horseshoe Shoals in the federal territorial portion of Nantucket Sound. The plaintiffs in *Ten Taxpayers* also sought to obtain a ruling that the project proponents, Cape Wind Associates, LLC, could not commence the construction of the tower until it obtained permission from Massachusetts. The *Ten Taxpayers* decision contains a succinct yet comprehensive review of the body of law that "divides regulatory authority over Nantucket Sound between the state and federal governments." *Ten Taxpayers* at 186. Because this body of law is critical to the resolution of the jurisdictional question before this forum, and because the summary is so comprehensive, I repeat it here:

> A. **Regulation of the Seabed and Attached Structures**
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> As a general rule, "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." *United States v.* Maine (Maine I) 420 U.S. 515, 524, 43 L.Ed.2d 363, 95 S.Ct. 1155 (1975). In a series of cases beginning in 1947, the Supreme Court established that the United States enjoys exclusive title in the lands underlying the sea, regardless of a state's historical claims to the waters off its coast. *See, United States v. Texas, 339 U.S. 707, 719-20, 94 L.Ed. 1221, 70 S.Ct. 918 (1950); United States v. Louisiana, 339 U.S. 699, 705-06, 94 L.Ed. 1216, 70 S.Ct. 914 (1950); United States v. California, 332 U.S. 19, 29-39, 91 L.Ed. 1889, 67 S.Ct. 1658*

[7] There may also be conflict with the mandates of the Commerce Clause of the United States Constitution since this is an energy project that would be seeking to transmit power through the Cable Project utility lines from a source outside the Commonwealth; however, I am not grounding my decision in this body of law as it was not briefed and there is ample authority from other sources of law.

(1947). Together, those cases established that the "control and disposition" of the seabed is "the business of the Federal Government rather than the States." *Maine I, 420 U.S. at 522.*

That background rule, however, has been modified by Congress in several significant respects. Most importantly, Congress in 1953 passed the Submerged Lands Act (SLA), *43 U.S.C. §1301 et seq.*, which grants to the states full title to the seabed within three geographical miles of their shores.[FN 3] *See, U.S.C. §§1301, 1311.* Moreover, Congress expressly recognized that three-mile line as the official seaward boundary of the coastal states. *Id. §1312.*

[FN 3: The three-mile boundary is subject to certain exceptions not relevant here. E.g., *43 U.S.C. §1301(b)*]

Shortly thereafter, however, Congress enacted the Outer Continental Shelf Lands Act of 1953 (OCSLA), *43 U.S.C. §1331 et seq.* A major purpose of the OCSLA was to specify that federal law governs on the "outer Continental Shelf" – defined as all submerged lands under U.S. sovereign control lying seaward of the three-mile boundary, *see 43 U.S.C. §1331(a)* – and on any fixed structures attached to the outer Continental Shelf. *Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 355, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969); see also 43 U.S.C. §1332* (declaring it to be "the policy of the United States that ... the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition"). The OCSLA makes the Constitution, laws, and civil and political jurisdiction of the United States fully applicable to the outer Continental Shelf. *43 U.S.C. §1333(a)(1).* It also establishes nationwide rules for the leasing and development of natural resources in the seabed outside of state territory. *Id. §1337.* Further, the OCSLA provides a federal cause of action for any person aggrieved by a violation of those rules, *id. §1349(a)(1),* and grants the federal courts jurisdiction to hear such cases, *id. §1349(b).* It is, in short, a sweeping assertion of federal supremacy over the submerged lands outside of the three-mile SLA boundary. *See id. §1332* (declaring it to be "the policy of the United States that ... the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public" (emphasis added [in original *Ten Taxpayers* text]).

In 1975, the Supreme Court confirmed this broad understanding of the OCSLA in *Maine I.* The United States had brought an original complaint in the Supreme Court against thirteen states bordering the Atlantic Ocean, alleging that each state had claimed some right or title in the outer Continental Shelf that was inconsistent with federal interests. *420 U.S. at 516-17.* In reply, the defendant states (including Massachusetts) had denied the United States's title in the outer Continental Shelf, asserted a variety of historical claims to the seabed beyond the SLA's three-mile boundary, and urged the Court to overrule its decisions in *California, Louisiana* and *Texas. Id. at 517-19.* The Supreme Court ruled for the United States, reaffirming that "paramount rights" in the seabed belong to the federal government as national sovereign. *Id. at 524.* The SLA, the Court acknowledged, had transferred title to the states in a narrow band of the seabed. But that statute did not alter the federal government's rights outside of that narrow band. *Id. at*

526. On the contrary, the Court explained, Congress in the OCSLA had "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit."

B. Regulation of Fishing and Marine Fisheries

With the framework for regulating the seabed thus settled, Congress in 1976 enacted the Magnuson (now Magnuson-Stevens) Fishery Conservation and Management Act, *16 U.S.C. §1801 et seq*.

Like the OCSLA, the Magnuson-Stevens Act asserts federal control over the waters outside of the three-mile limit of state jurisdiction. The Act creates a "national framework for conserving and managing marine fisheries." S. Rep. Co. 104-276, at 2 (1996) (describing the history and purposes of the Act). It claims for the federal government "exclusive fishery management authority" in outer Continental Shelf waters within and beyond the United States's "exclusive economic zone," which extends approximately 197 nautical miles seaward from the three-mile boundary of state jurisdiction. [FN4] *See 16 U.S.C. §1811*. Within that exclusive economic zone, the Act further claims for the United States "sovereign rights ... over all fish, and all Continental Shelf Fishery resources." [FN5] *Id. §1811(a); see also id. §1801(c)(1)* (declaring Congress's intent "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources"). [Text of FN4 and FN5 omitted as not relevant]

At the same time, the Magnuson-Stevens Act establishes that the states enjoy the power to regulate fishing activities within their borders, including *within* their borders, including within the three-mile SLA boundary: "Nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." [FN6] *16 U.S.C. §1856(a)(1)*. By so providing, Congress "confirmed state jurisdiction over fisheries within a State's internal waters and, for coastal states, out to the three-mile limit." *Davrod Corp. v. Coates, 971 F.2d 778, 786 (1st Cir. 1992); see also Massachusetts ex rel Div. of Marine Fisheries v. Daley, 170 F.3d 23, 25 (1st Cir. 1999)* (Magnuson-Stevens Act, with limited exceptions, does not apply within state territorial waters). [Text of FN6 omitted as not relevant to this case]

C. Federal vs. State Jurisdiction in Nantucket Sound

Nantucket Sound, where the disputed tower has been built, presents special difficulties in distinguishing the respective spheres of state and federal jurisdiction. Nantucket Sound is almost completely enclosed by Massachusetts's territorial sea; only at the extreme eastern end of the Sound does a channel of federal water approximately one mile wide connect it to the open ocean. But the sound is a large body of water, and its center portion – including the site of Cape Wind's data tower on Horseshoe Shoals – is more than three miles from any coast.

> Despite that fact, Massachusetts in the early 1970s took the position that *all* of Nantucket Sound, including Horseshoe Shoals, is within the Massachusetts's territorial jurisdiction under the doctrine of "ancient title." The Supreme Court rejected that claim in *United States v. Maine (Maine II), 475 U.S. 89, 89 L.Ed.2d 68, 106 S.Ct. 951 (1986),* holding that the Commonwealth did not inherit title to the Sound from the British Crown. *Id. at 103.* After *Maine II,* it is incontrovertible that Cape Wind's data tower is located on the outer Continental Shelf, outside of Massachusetts's territorial jurisdiction. *43 U.S.C. §1331(a).*
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> But there is a complication. In 1984 – while the *Maine II* litigation was pending – Congress passed a bill defining all of Nantucket Sound to be within the "jurisdiction and authority" of Massachusetts "for the purposes of" the Magnuson-Stevens Act. *See,* Pub.L.No. 98-623, §404(4), 98 Stat. 3394, 3408 (Nov. 8, 1984) (codified at *16 U.S.C. §1856(a)(2)(b)*). In *Davrod Corp. v. Coates, supra,* this court held that *§1856(a)(2)(B)* "expressly confirms" Massachusetts *power to regulate the length of fishing vessels in Nantucket Sound. See* 971 F.2d at 786. In this case, Ten Taxpayer contends that the same provision authorizes Massachusetts to regulate the construction of Cape Wind's data tower, which Ten Taxpayer claims has the potential to affect fishing and fish habitats.

Ten Taxpayers at 188-190.

Despite the language of the amended Magnuson-Stevens Act at 16 U.S.C. §1856(a)(2)(B), the First Circuit held in *Ten Taxpayers* that the Commonwealth of Massachusetts did not have any power to regulate the construction of a structure on the seabed of the federal territorial area of Nantucket Sound, which was instead comprehensively and exclusively regulated by the federal government under OCSLA. *Ten Taxpayers* at 198. The First Circuit held:

> ... [T]he two statutes can readily coexist: the Magnuson-Stevens Act authorizes Massachusetts to regulate fishing-related conduct throughout Nantucket Sound, but "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon," *43 U.S.C. §1333(a)(2)(A),* remain the exclusive province of the federal government. Congress was perfectly clear in the Magnuson-Stevens Act that it did not intend to alter the rights of the United States in the outer Continental Shelf. *See 16 U.S.C. §1801(c)(1)* (declaring it to be the policy of Congress in the Magnuson-Stevens Act "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources.").

> We conclude that any Massachusetts permit requirement that might apply to the [the data tower] project is inconsistent with federal law and thus inapplicable on Horseshoe Shoals under the OCSLA.

Ten Taxpayers at 198 (emphasis added). This holding appears directly applicable to the case at hand. Petitioners in the case at hand have also argued that Massachusetts has jurisdiction to regulate impacts from "fixed structures," that is, the structures to be erected on the seabed of the federal territorial waters of Nantucket Sound as part of the Wind Turbine Farm.

The plaintiffs in *Ten Taxpayers* had a stronger argument than the Petitioners have in this case for extension of Massachusetts's jurisdiction into the federal territorial waters of Horseshoe Shoals. The plaintiffs in *Ten Taxpayers* could argue that Massachusetts had jurisdiction to regulate the erection of the data tower because the tower might impair the fisheries fleet or fish habitat in Nantucket Sound. The amended Magnuson-Stevens Act specifically granted regulatory authority to the Commonwealth of Massachusetts over the federal portion of Nantucket Sound with respect to fisheries interests. However, the First Circuit in *Ten Taxpayers* did not accept that argument. Instead, the First Circuit concluded that Massachusetts' regulatory authority over fisheries interests under the Magnuson-Stevens Act was not sufficient to trump the federal government's comprehensive authority over "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." See, *Ten Taxpayers* at 190. In the case at hand, Petitioners have not cited any federal law that grants authority to Massachusetts to regulate bird species impacts that occur in the federal territorial waters of Nantucket Sound.

Under the ruling of *Ten Taxpayers*, therefore, this leaves only the argument that MESA and the MESA regulations might apply as "surrogate federal law" to the species impacts from the proposed erection of the Wind Turbine Farm structures on the seabed of federal territorial

waters in Nantucket Sound. See, *Ten Taxpayers* at 186-87. In *Ten Taxpayers*, the First Circuit recognized that OCSLA allows for the application of state law of neighboring coastal states by its own terms. See, 43 U.S.C. §1333(2)(A). Federal statutory and common law has gaps and is not as comprehensive as state law; this necessitates application of state law where these gaps exist, as OCSLA expressly recognizes. See, *Ten Taxpayers* at 186-87. However, state law cannot apply and is pre-empted where there is a comprehensive scheme for regulation, such as a scheme for protection of endangered, threatened or rare species. *Id.*

Petitioners never attempted to make this argument in their briefs. Even if they had, this argument must fail. The combination of the Submerged Lands Act, OCSLA, NEPA and ESA constitute a comprehensive scheme for establishment of jurisdiction for environmental reviews and regulation of species impacts caused by construction projects on the seabed of federal territorial waters, including Nantucket Sound. See, 43 U.S.C. §1332(5)[8]. State law can only apply as a "surrogate federal law" if it is consistent with federal law and not pre-empted by other federal law or regulation.[9] See, 43 U.S.C. §1333(2)(A); *Ten Taxpayers* at 186-87.

From an examination of the applicable federal statutes and case law, MESA would be pre-empted by federal law that establishes a comprehensive federal scheme for the regulation of rare, endangered and threatened species impacts from activities approved under the authority in OCSLA in Nantucket Sound. The United States Court of Appeals for the First Circuit expressly

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[8] As part of the federal regulatory scheme set up by OCSLA, "the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized." 43 U.S.C. §1332(5).

[9] "To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf,..." 43 U.S.C. §1333(2)(A).

held that the requirements of the federal Endangered Species Act, 16 U.S.C.§1531 et seq. ("ESA") apply to activities conducted in federal territorial waters under OCSLA. See, *Conservation Law Foundation, Inc. v. Andrus,* 623 F.2d 712, 715 (1st Cir. 1979). In *Andrus*, the Commonwealth had sued the Secretary of the Interior for failing to include a provision that future actions pertaining to an approved lease in Georges Bank would have to satisfy the requirements of the federal ESA. The First Circuit held that (1) the Secretary of the Interior was required to follow ESA; (2) that ESA and OCSLA are not "mutually exclusive" and (3) "the standards of these two acts are complementary." *Id.* The *Andrus* decision also makes clear that the procedural and substantive review requirements of the National Environmental Policy Act, 42 U.S.C. §4331 et seq. ("NEPA") also apply to projects under OCSLA and state comments on state endangered species concerns would have to be accepted and addressed under this process. *Id.*[10] This comprehensive federal legal scheme for the review and regulation of endangered species impacts under NEPA, ESA and OCSLA would trump any state legal authority over endangered species impacts resulting from construction of structures on the seabed in federal territorial waters, such as the Wind Turbine Farm project.

The NEPA review process for endangered species impacts under standards of the federal ESA has been going forward for the Wind Turbine Farm. The Division would be prohibited under this federally supreme and comprehensive legal and regulatory scheme from attempting to regulate Massachusetts protected species impacts through its jurisdiction over the Cable Project

[10] United States Supreme Court decisions confirm this principle in other Outer Continental Shelf locations (OCS). See, e.g., *Sec'y of Interior v. California*, 464 U.S. 312, 338 (1984) ["The second stage of OCS planning -- the stage in dispute here -- involves the solicitation of bids and the issuance of offshore leases. 43 U. S. C. § 1337(a) (1976 ed., Supp. V). Requirements of the National Environmental Policy Act and the Endangered Species Act must be met first."]; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 538 fn 6 (1987) ["The Coastal Zone Management Act, 16 U. S. C. § 1451 et seq. (1982 ed. and Supp. III), Marine Protection, Research, and Sanctuaries Act, 16 U. S. C. § 1431 et seq. (1982 ed. and Supp. III), Marine Mammal Protection Act, 16 U. S. C. § 1361 et seq. (1982 ed. and Supp. III), Fishery Conservation and Management Act, 16 U. S. C. § 1801 et seq. (1982 ed. and Supp. III), Endangered Species Act, 16 U. S. C. § 1531 et seq. (1982 ed. and Supp. III), and National Environmental Policy Act, 42 U. S. C. § 4331 et seq. (1982 ed. and Supp. III), all apply to activities on the OCS."]

utilities. See, e.g., *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 174 (1st Cir. 1989) (Massport, a Massachusetts state agency, was prohibited, in the context of comprehensive federal regulation of aviation, from setting airport fees that would indirectly regulate the size of aircraft allowed at the airport.) The First Circuit specifically held in that case, which involved another conflict between federal and Massachusetts regulatory authority, that "Massport cannot do indirectly what it is forbidden to do directly." *Id.* In the case at hand, the Division could not assert regulatory authority indirectly over the Wind Turbine Farm by reviewing species impacts from the Farm in evaluating the Cable Project, because there already exists a comprehensive federal environmental review process under NEPA, ESA and OCSLA. On the other hand, it is important to note that the bird species of concern will not be without protection, because there is a federal regulatory process through NEPA comments and through enforcement of the standards and requirements of the federal ESA.[11]

Finally, the United States government's supreme powers to regulate wildlife impacts in federal territory are also bolstered by federal property law. The federal government has total authority over the regulation of federal lands pursuant to the Property Clause of the United States Constitution. See, U.S. Const. Art. IV, § 3, cl. 2. The United States Supreme Court has specifically held in *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976), that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." State law can remain valid on federal land that is located within a state's territory to the extent that it does not contradict or frustrate federal law. See, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). In *Utah Power & Light Co.*, the United States Supreme Court held that "for many purposes, a State has civil and criminal jurisdiction

[11] Petitioners can participate, and apparently, are fully participating, in that federal process, and, therefore, have an administrative forum for articulation of their concerns. The Division has also submitted detailed comments.

over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands...." This is similar to the statutory scheme in OCSLA for application of state law to the federal territorial waters of Nantucket Sound. State law can apply and govern activities there, but not if it is in conflict with federal law. Since there is a comprehensive federal regulatory scheme for the protection of wildlife from OCSLA-permitted activities, then, it follows that Massachusetts regulation of wildlife would be pre-empted under these federal property law precedents.[12]

Construction of the Language of MESA and the MESA regulations

Petitioners argue that the language of MESA compels the Division to regulate species impacts from the Wind Turbine Farm. Petitioners rely upon two portions of the MESA regulations in particular: 321 CMR 10.05(1) and 10.16. Petitioners made clear in their brief and oral arguments that they place great reliance on this argument, and that we must set aside federal pre-emption law and concentrate on the language of the MESA regulations. I do not find Petitioners' construction of the regulatory language persuasive, and I disagree that MESA and its regulations can be read outside the context of the federal statutory and regulatory schemes that apply to the federal territorial waters of Nantucket Sound.

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[12] Petitioners argued for the first time at oral argument that the Commonwealth of Massachusetts has an inherent police power to regulate the welfare of Massachusetts's endangered species. While that may be true within the Commonwealth's territorial boundaries, it is impossible to see how the Commonwealth could assert authority to regulate species impacts that occur entirely within federal territory that is not within the Commonwealth's borders. If Massachusetts tried to regulate species impacts on federal property within the borders of the Commonwealth based on a theory that its inherent police powers trumped federal authority, it is unlikely that Massachusetts could succeed. See, *Wyoming v. United States, 279 F.3d 1214, 1230 (10th Cir. 2002)* [State may retain some inherent police powers to regulate welfare of wildlife on federal property within its borders unless federal government has expressly and totally assumed all such management authority. In the face of an express and comprehensive federal legal and regulatory scheme, the state of Wyoming's claims that it had the inherent power to vaccinate elk on federal land was dismissed; but, the state was allowed to challenge federal refusal to vaccinate as arbitrary and capricious under the administrative procedures for such objections under the federal government's comprehensive regulatory scheme.] Petitioners' argument here seems even more tenuous, i.e., that the Commonwealth's inherent police powers would trump an express and comprehensive regulatory scheme such as that embodied in ESA and OCSLA for impacts in federal territory wholly outside of the borders of the Commonwealth of Massachusetts.

Petitioners argue that the Cable Project is part of a larger project that includes the Wind Turbine Farm. The Division does not dispute this. Assuming that the Cable Project and the Wind Turbine Farm are parts of the same larger project, Petitioners argues that the anti-segmentation requirements of Section 10.16 of the MESA regulations require the Division to consider species impacts from the Wind Turbine Farm as part of its review of the Cable Project.[13] Petitioners argue that Section 10.16 does not prohibit the Division from considering species impacts from segments of the same project that may occur outside the territory of the Commonwealth of Massachusetts, and, therefore, the Division should exercise its regulatory authority to find that "Takes" of protected species have occurred in cases where the Division has clear jurisdiction over a portion of the project.

It is quite clear that Section 10.16 does require the Division to consider Massachusetts protected species impacts outside of Priority Habitat areas where a single larger project would be partially located within Priority Habitat. The Division concedes this point in its papers, as pointed out by Petitioners. Therefore, the anti-segmentation provision does provide a basis for the Division to extend its geographic jurisdiction over a project within the borders of the Commonwealth of Massachusetts. However, it is quite another matter to assert that Section

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[13] Section 10.16 of the MESA regulations states as follows in relevant part:

> Projects shall not be segmented or phased to evade or defer the review requirements of 321 CMR 10.18 through 10.23. For the purposes of 321 CMR 10.18 through 10.23, the entirety of a proposed Project subject to review, including likely future expansions, shall be considered, and not separate phases or segments thereof. In determining whether two or more segments or components are in fact parts of one project, all circumstances shall be considered, including but not limited to time interval between phases, whether the segments or components, taken together, constitute a part of a common plan or scheme, and whether environmental impacts are separable. Ownership by different entities does not necessarily indicate that two segments or components are separate.

321 CMR 10.18 through 10.23 provide for the process and standards under which the Division would review a project for species impacts.

10.16 would provide not only a basis, but also a mandate, upon the Division to exercise jurisdiction outside the territorial borders of the Commonwealth of Massachusetts.

In an attempt to bolster their argument, Petitioners argue that the language of Section 10.05(1) of the MESA regulations, taken together with the anti-segmentation requirements of Section 10.16, creates a mandate upon the Division to exercise extra-territorial jurisdiction. Section 10.05(1) states that "[a]ll state agencies shall utilize their authorities in furtherance of the purposes of MESA and 321 CMR 10.00: review, evaluate and determine the impact on Endangered, Threatened and Special Concern species or their habitats of all works, projects or activities conducted by them," and asks all state agencies to "use all practicable means and measures to avoid or minimize damage to such species or their habitats." Section 10.05(1) goes on to define "state action" as "any work, project or activity either directly undertaken by a state agency, or if undertaken by a person, which seeks the provision of financial assistance by an agency or requires the issuance of permits by an agency ... to a person or a third party on behalf of a person." Petitioners argue that this language means that the Division must broadly interpret its authority under MESA to include species impacts that occur outside Massachusetts's territory so long as the Division has some authority over a portion of a project. Petitioners argue that the Division would be indirectly abetting a "Take" of protected species if the Division did not take the Wind Turbine Farm species impacts into account during their review of the Cable Project.[14]

I accept Petitioners factual allegations about the species impacts of the Wind Turbine Farm as true. Finally, I also accept the Petitioners' assertion that the Wind Turbine Project and the Cable Project are part of the same larger project for the purposes of the anti-segmentation provisions of Section 10.16 of the MESA regulations since the Division concedes this.

[14] Petitioners attempt to support this construction of the MESA statute and its regulations by citing to a handful of cases that they say allow a state to assert extra-territorial jurisdiction. I will discuss and distinguish those cases later.

Furthermore, although it is a legal conclusion, I can also accept, solely for the purposes of this Motion to Dismiss, their assertion that the exercise of permitting authority by the Division over the Cable Project would meet the definition of "state action" for the purposes of Section 10.05(1). However, I am still not persuaded by Petitioners' other legal arguments. Instead, I find that the Division made a reasonable interpretation of MESA and its regulations in finding no jurisdiction over Massachusetts protected species impacts from the portion of the project in federal territorial waters. In addition to the legal authorities cited by the parties, I have also examined the language of MESA and the MESA regulations using basic legal principles for statutory and regulatory construction. This analysis also supports the Division's decision.[15]

The Supreme Judicial Court has held, in the context of environmental as well as other areas of law, that the language of regulations and statutes will be interpreted in accordance with traditional rules of construction. See, *Hellman v. Board of Registration in Medicine,* 404 Mass. 800, 803 (1989); *Warcewicz v. Dep't. of Environmental Protection,* 410 Mass. 548; 574 N.E.2d 364, 365-66 (1991). The Supreme Judicial Court has also held that the undefined words of regulations and statutes should be accorded their usual and ordinary meaning. See, *Warcewicz, supra*, *Nantucket Conservation Found., Inc. v. Russell Management, Inc.,* 380 Mass. 212, 214 (1980); *Department of Envtl. Quality Eng'g v. Hingham,* 15 Mass. App. Ct. 409, 411 (1983).

It is also a basic rule of construction that words or concepts should not be "read into" statutes or regulations, particularly where they would expand the scope of authority or regulation. For example, in the *Warcewicz* decision, the Supreme Judicial Court refused to adopt the Department of Environmental Protection's reading of its wetlands regulations to include

[15] In making this determination, I disregard the argument by the Division that I must defer to the Division's legal interpretation of its regulations in this matter. This proceeding under M.G.L. c. 30A and 801 CMR 1.00 et seq. is a de novo review by a neutral presiding officer appointed by the Division. The presiding officer in such a proceeding is not bound by the Division's prior determination of legal or factual issues.

man-made ponds that were created "by excavation" when the regulation only sought to regulate man-made ponds made "by impoundment." See, *Warcewicz supra* at 214. The Supreme Judicial Court interpreted the word "impoundment" to have its ordinary meaning from the Webster's Dictionary as a water body formed by the installation of a dam. *Id.* The Court refused to agree with the Department's desire to expand the definition, to include ponds created by excavation, holding that words "should not be imported to the regulations at issue." *Id.;* Cf. *Massachusetts Medical Soc'y v. Commissioner of Ins.*, 402 Mass. 44, 63 (1988); *Beeler v. Downey,* 387 Mass. 609, 616 (1982) (where specific language is used in one paragraph of a statute but not in another, the language should not be implied where it is not present).

In the case at hand, the Petitioners are correct in their position that neither MESA nor the MESA regulations explicitly prohibits consideration of extra-territorial species impacts in Division reviews of projects presented under 321 CMR 10.18 through 10.23. However, Petitioners are wrong in stating the MESA and the MESA regulations compel the Division to exercise jurisdiction outside the borders of the Commonwealth. Both MESA and the MESA regulations are entirely silent on this topic. There is no language that would authorize the Division to regulate, directly or indirectly, activity occurring outside the borders of the Commonwealth. It is a basic principle of administrative law that the Division could not enact regulations that went beyond the power given to it by the legislature. For Petitioners' argument to be successful, I must "read into" MESA an intent by the legislature not only to allow but to mandate that the Division exercise jurisdiction outside the borders of the Commonwealth. This goes against the basic rules of statutory construction in Massachusetts as cited above.

At least one respected legal treatise states a rule of construction contrary to that advocated by Petitioners. The encyclopedia of American law, *American Jurisprudence,* states

that there is a common law presumption against extraterritorial jurisdiction in the absence of explicit statutory language to the contrary:

> [U]nless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state of country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication.

See, 73 Am.Jur.2d, Statutes §250 (West 2007). This rule of statutory construction has been applied in the federal courts for many decades based upon a 1949 holding of the United States Supreme Court. See, *Foley Bros. v. Filardo,* 336 U.S. 281, 285 (1949) ("...legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."). In addition, although I was unable to find any Massachusetts court case addressing this particular rule of statutory construction or any case construing the specific terms of MESA or the MESA regulations, many of the other highest courts of other states have adopted this rule of construction as to the extraterritorial effect of statutes, as stated by *American Jurisprudence* and the *Foley Bros.* decision.[16]

Given the significant body of law in the federal and state courts of this country and the prior rulings by the Supreme Judicial Court refusing to imply language not present in statutes, it

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[16] See, e.g. *Tattis v. Karthans*, 215 So. 2d 685, 689 (Miss. S. Ct. 1968); *Carlson Auction Servs. v. Lopez*, 31 Kan. App. 2d 117, 121 (Kan. Ct. App. 2003); *Ex parte Old Republic Sur. Co.*, 733 So. 2d 881, 884 (Ala. S. Ct. 1999); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006); *State Surety Co. v. Lensing*, 249 N.W.2d 608, 611 (Iowa S. Ct. 1977). *Marmon, et al. v. Mustang Aviation, Inc.*, 430 S.W.2d 182; 11 Tex. Sup. J. 416 (Tex. S. Ct. 1968); *State of Nebraska v. Karsten*, 194 Neb. 227; 231 N.W.2d 335; (Neb. 1975); *People v. Buffum*, 40 Cal. 2d 709; 256 P.2d 317; (Cal. S. Ct. 1953); *Burns v. Rozen*, 201 So. 2d 629, 630 (Fla. 1st DCA 1967); *Cf, Arizona v. Willoughby*, 181 Ariz. 530; 892 P.2d 1319; 186 Ariz. Adv. Rep. 45 (Ariz. S. Ct. 1995) (Willoughby involved construction of a criminal conspiracy law that the court interpreted to allow the regulation of extra-territorial conduct, common in that field of criminal conspiracy law. However, the Supreme Court of Arizona recognized the general rule of construction as summarized by legal treatises and the *Foley Bros.* decision: "When interpreting nonjurisdictional, substantive statutes like those in *Foley Bros.* and *Bowman*, we ordinarily assume the substantive reach of a law is contained within the territorial borders of the enacting jurisdiction to avoid conflicts with other jurisdictions. But when jurisdiction is the very substance of a statute, we must look carefully at its language to determine its intended reach").

seems reasonable to assume that the courts of the Commonwealth of Massachusetts would adopt a similar approach in construing the terms of MESA and the MESA regulations to presume no extraterritorial effect in the absence of explicit language authorizing such jurisdiction. In addition, I do not think it is reasonable to construe the terms of MESA and its regulations in a vacuum, without considering the federal law applicable to Nantucket Sound. Looking at all of this legal authority together, the Division might well choose to adopt a cautious interpretation of its extra-territorial jurisdiction as a matter of policy. This would also be a reasonable and sound approach to the problem, given the absence of any extra-territorial language in MESA and given the lack of a published Massachusetts decision expressing a rule of construction with respect to extra-territorial intent.[17]

Inapplicability of Case Law Relied Upon by Petitioners

Petitioners also cite a handful of cases that they say support their argument that the Division has an obligation to exercise its jurisdiction outside of the territory of the Commonwealth of Massachusetts. First, Petitioners cite to *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), cert. denied, 525 U.S. 830 (1998), and they argue that it holds that a state agency would violate MESA by issuing a permit to a person who would use it in aid of a project that takes protected species. I conclude that Petitioners' reliance on *Strahan* is misplaced. The First Circuit in *Strahan* held that the state agency charged with protection of fisheries could not issue state fishing permits that allowed fisherman to place fishing gear in Massachusetts waters that would injure or kill federally protected Right Whales. *Id.* at 163. The First Circuit held that this

[17] The Division has limited resources with which to pursue its mission to protect Massachusetts's wildlife. Even if it shared Petitioners' view that it could assert jurisdiction over impacts in federal waters, the Division might choose not to adopt such an expansive view of its jurisdiction as a matter of policy in the face of the federal statutory, regulatory and case law applicable to Nantucket Sound. The Division could reasonably conclude that it would be likely to end up in a conflict with the federal government if it adopted a more expansive interpretation of its jurisdiction. Such a conflict would drain its resources and perhaps impair its ability to be effective in securing a federal commitment to address its concerns about bird species impacts from the Wind Turbine Farm through the federal NEPA process.

would violate the federal ESA. Therefore, *Strahan* stands for the principle that federal environmental law is supreme over state action, not that states can regulate species impacts outside their territory. Petitioners cite *Strahan* for the proposition that the Division's issuance of approval for the Cable Project without considering impacts of the Wind Turbine Farm is a violation of Section 10.05(1) of the MESA regulations prohibiting even indirect action by a state agency that results in a Take of protected species. However, Petitioners argument ignores the jurisdictional problem. If the Division does not have the authority to regulate species impacts outside of Massachusetts's territory, then it cannot be in violation of MESA for failing to regulate that conduct. *Strahan* does not lend any support to Petitioners' arguments.

Next, Petitioners cite to a series of cases that, in their view, confirm that the Commonwealth of Massachusetts can exercise extra-territorial jurisdiction. While I agree that the Commonwealth can regulate some conduct and persons outside of its territorial jurisdiction, I find no case in which a court recognized this extra-territorial jurisdiction unless expressly authorized by a state statute. In addition, the cases cited by Petitioners also make clear that the extra-territorial jurisdiction was exercised in a manner allowed by and not inconsistent with federal law.

First, Petitioners cite to *Darcy v. Hankle*, 54 Mass.App.Ct. 846 (1996) in which the Massachusetts Appeals Court allowed exercise of personal jurisdiction by Massachusetts courts over a New York resident for an action for tortuous injury arising from conduct that occurred in New York. While it is true that the court allowed the action to proceed, the court grounded its analysis in the language of the Massachusetts long-arm statute, which expressly authorizes Massachusetts courts to exercise jurisdiction over persons outside the territory of the Commonwealth according to specified standards. See, M.G.L. c. 223A, §3D. There is no such

express language in MESA or the MESA regulations. In addition, *Darcy v. Hinkle* involved a question of the exercise of personal jurisdiction by a court of law in the context of a very long-standing area of the law, long-arm jurisdiction. The Massachusetts Supreme Judicial Court has called this statute "an assertion of jurisdiction [by the courts] over the person to the limits allowed by the Constitution of the United States." *Automatic Sprinkler Corp. v. Seneca Foods Corp.*, 361 Mass. 441, 443 (1972). The decision of the Massachusetts Supreme Judicial Court in *Automatic Sprinkler* makes clear that this exercise of extra-territorial personal jurisdiction by the courts of the Commonwealth is only possible because it is sanctioned by the United States Constitution as interpreted by the United States Supreme Court, most notably in *International Shoe Co. v. Washington*, 326 U.S. 310; 66 S. Ct. 154; 90 L. Ed. 95 (1945) ("Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") The case at hand involves the exercise of regulatory authority by a state executive agency outside Commonwealth borders and inside federal territory -- an entirely different inquiry.

Petitioners also seek to rely on two additional personal jurisdiction cases, *Commonwealth v. McLoon*, 101 Mass. 1 (1869) and *Commonwealth v. Lent*, 420 Mass. 764 (1995). In both of these cases, the courts of the Commonwealth were authorized to exercise personal jurisdiction over criminal defendants that were citizens of other states or countries for charges of murder by a specific Massachusetts statute, Gen. Sts. c. 171, §19 and M.G.L. c. 277, §62, respectively. These statutes were grounded in long-standing principles of common law that went back even to the English common law. These cases deal with principles of personal jurisdiction of the courts of the Commonwealth for conduct that occurred outside of the state's boundaries, not with the

exercise of jurisdiction by a Massachusetts state regulatory agency. In addition, these cases involve exercise of extra-territorial jurisdiction specifically authorized by Massachusetts statutes, whereas MESA and the MESA regulations are silent on this question.

Petitioners next attempt to rely upon *Dupont v. Dracut*, 41 Mass. App.Ct. 293, 295-96 (1996) and *Leisure Time Cruise Corp. v. Town of Barnstable*, 62 F.Supp.2d 202 (D.Mass. 1999) for the principle that Massachusetts agencies have regulated conduct outside their territorial borders through a permitting process. I conclude that the case of *Dupont v. Dracut* is entirely inapposite. First, *Dupont* involves the exercise of authority by a local permitting authority in a municipality. It is unclear how the extent of the authority of a municipality could ever be relevant to the extent of the Commonwealth of Massachusetts's scope of regulatory authority outside of its borders and in federal territorial waters. Second, the holding in *Dupont* allowed the municipality to regulate conduct only within its own territorial borders, and, therefore, I see no substantive support for Petitioners' position by analogy from this ruling.

The Petitioners' reliance on the *Leisure Time* case is also misplaced. *Leisure Time* involved the attempt by a company to establish a "cruise to nowhere" business out of Hyannis harbor for the purposes of allowing passengers to gamble in international waters. Local permitting authorities sought to require additional work on a local pier and other portions of the harbor before issuing a permit to the company for operation of their cruise line. The cruise company filed an action in federal court seeking an injunction on the grounds that these local authorities were unlawfully seeking to shut down their gambling business, which was allowed by federal statute in international waters. The Massachusetts Federal District Court rejected the cruise company's request for an injunction on two grounds: (1) the express language of the applicable federal statute, the Johnson Act, 15 U.S.C. 1175, did not provide for comprehensive

federal regulation but instead reserved authority to state and local authorities to regulate gambling cruises to a certain extent, see, *Leisure Time* at 205; and (2) the facts did not support the cruise company's claim that the local authorities were attempting to regulate the gambling operation, but instead reflected legitimate local authorities over "land, wetland, and pier uses ancillary to Leisure Time's operation of its gambling cruise." *Leisure Time* at 208. Therefore, there is no support in *Leisure Time* for Petitioners arguments that the Division can and should regulate species impacts in the federal waters of Nantucket Sound. The Division in the case at hand has no federal or state statutory authority to regulate in federal waters, and it faces a comprehensive and expressly pre-emptive federal statutory and regulatory scheme under the Submerged Lands Act, OCSLA, NEPA and ESA in those waters.

IV. Conclusion

In an adjudicatory hearing matter such as this one, subject matter jurisdiction is limited to the resolution of claims arising under MESA and the MESA regulations over which the Division has jurisdiction. Essentially, the Division, and by extension, this forum, would not have jurisdiction to grant relief outside the scope of MESA and MESA regulatory jurisdiction. In this case, I conclude that the Division does not have jurisdiction to regulate directly or indirectly harms to Massachusetts protected species under MESA or the MESA regulations that occur in the federal territory of the United States in Nantucket Sound outside of Massachusetts's territorial boundaries. The Division's position, as represented by its General Counsel in the Division's Motion to Dismiss, is a reasonable and logical interpretation of its jurisdiction under the applicable federal and state statutory, regulatory and case law. Petitioners failed to put forward any persuasive legal authority to the contrary. A Motion to Dismiss should be granted where there is no subject matter jurisdiction granted by law to the forum asked to decide the

matter. *Jones v. Jones*, 297 Mass. 198 (1937). Therefore, I recommend that the Petitioners claims be dismissed and that the Division issue a Final Decision supporting such a dismissal.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It is being transmitted along with the complete file of proceedings in this matter to the Wayne MacCullum, Director of the Division of Fish and Wildlife, 1 Rabbit Hill Road, Westborough, MA, 01581 for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Director's Final Decision is subject to further rights of either reconsideration and/or court appeal and will contain a notice to that effect. Any questions about the nature of these rights should be directed to the General Counsel for the Department of Fish and Game.

Because this matter has now been transmitted to the Director, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Director's office regarding this decision unless the Director, in his sole discretion, directs otherwise.

Laurel A. Mackay
Presiding Officer

SERVICE LIST

In The Matter Of:	Cape Wind Associates, LLC
Docket No.	NHESP Tracking No. 01-9604

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Date: May 16, 2008