

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

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. 721460-09-DH

)
IN THE MATTER OF:)
)
SOUTH ROAD, LOTS 11 and)
12, HAMPDEN, MA, NHESP)
FILE NO. 07-21460)
_____)

RECOMMENDED FINAL DECISION

I. INTRODUCTION

This is an adjudicatory hearing of an appeal taken pursuant to the Massachusetts Endangered Species Act, G.L. c.131A (“MESA”). In accordance with 321 CMR 10.25(1) William and Marlene Pepin (“Petitioners”) appealed a Final Decision of the Division of Fisheries and Wildlife (“Division”) which reconsidered an earlier decision and concluded that the Division had properly delineated and mapped an area of Hampden, MA, which includes land owned by the Petitioners identified as lots 11 and 12 on South Road, as Priority Habitat for the Eastern Box Turtle (“EBT”).¹ The Petitioner’s appeal alleges that the Division’s reconsidered delineation of their land as Priority Habitat for EBT did not apply the required criteria of 321 CMR 10.12, and that 321 CMR 10.12 is otherwise invalid and beyond the scope of the Division’s authority as set forth in MESA.

¹ 321 CMR 10.25(1) provides in part: “[A]ny person aggrieved by a final agency decision made pursuant to 321 CMR 10.12 ... shall have the right to an adjudicatory hearing at the Division ...” A notice to this effect is contained in the Division’s November 6, 2008 reconsideration. Pursuant to §10.25(1) the Petitioners constitute a person aggrieved by the Division’s Priority Habitat delineation and mapping; such delineation and mapping made by the Division pursuant to §10.12. The Petitioners September 17, 2008 request for reconsideration was made pursuant to §10.12(8).

II. BACKGROUND

A. Timeline.

The following timeline setting forth the actions of the parties up to this point is helpful in understanding the background leading up to this appeal.

- July 2005-Division adopts revised MESA regulations.
- October 2006-Division's Natural Heritage and Endangered Species program (NHESP) releases the first Natural Heritage Atlas containing Priority Habitats for listed species in Massachusetts, included species of Special Concern.²
- Atlas contains delineation and mapping of an area in Hampden, MA, which includes Petitioners land, South Road lots 11 and 12, as EBT Priority Habitat.
- January 2007-Division receives a MESA completed Project Review Checklist and supporting materials from Petitioners which proposes to develop two single family houses on lots 11 and 12.
- February 2007-Division responds indicating proposed project has potential to result in a "take" of EBT and requests additional information.
- May 2007-Division, following consultations with Petitioners representatives and review of additional submissions, issues its MESA determination enabling the proposed two lot subdivision to proceed, subject to certain conditions.
- May 2008-Division receives Petitioners request for NHESP files on listing of EBT and delineating of EBT Priority Habitat in an area that includes Petitioners lots 11 and 12.
- May 2008-Division provides Petitioner with files including all related EBT and

² Pursuant to 310 CMR 10.03 the EBT is listed as a species of Special Concern.

Priority Habitat information and data.

- September 2008-Division receives Petitioners Request for Reconsideration of the delineation and mapping of EBT Priority Habitat in an area that includes Petitioners lots 11 and 12.
- October 2008-NHESP Project Review Manager Dr. Regosin and Turtle Conservation Biologist Lori Erb conduct site visit on Petitioners property, review Petitioners request for reconsideration including the six attachments, and review the application of the regulatory criteria and guidelines to the delineation of EBT Priority Habitat.
- November 2008-Division responds to Petitioners Request for Reconsideration in the form of a Final Decision confirming that the delineation and mapping of EBT Priority Habitat on Petitioners land was made in compliance with MESA regulations and the MESA regulatory guidelines.

B. Request for Reconsideration.

The Petitioners requested reconsideration of the EBT Priority Habitat alleges: (1) the original data is flawed and without scientific merit; (2) the delineation is based on the alleged sighting of a single turtle in 1991, with no photographs or other tangible evidence; (3) the timing and methodology used to delineate the property is suspect; (4) there is no scientific basis for how the area was delineated, and it appears to have been done so randomly, subjectively and without scientific support; (5) use of 1600 meters (1 mile) to define the range of an EBT is extreme or excessive when compared to the range estimates used by most other scientific authorities which is limited to a few hundred yards or acres; (6) the Division does not know the location of the alleged turtle sighting

as it relates to the proximity of the subject property; and (7) the delineation of EBT Priority Habitat is erroneously based on distance, and ignores scientific data that the EBT is common from sea level to 490 feet in elevation, and rare to 705 feet which is the elevation of the Petitioners property.³

C. Reconsideration.

The Division's response to the request for reconsideration (1) reviewed the Petitioner's September 17, 2008 request including the six attached exhibits; (2) conducted a habitat evaluation of the Petitioner's property in the presence of William Murray, Esq., attorney for the Petitioners; and (3) reviewed their EBT Priority Habitat delineation and mapping of the subject area, in particular the application of the criteria set forth in 321 CMR 10.12(2), the mapping guidelines required by 321 CMR 10.02(3), and guidelines for the selection of occurrence records for inclusion in the NHESP database required by 321 CMR 10.02(5). Based on these three actions, the Final Decision concluded that the Petitioner's project site, lots 11 and 12 on South Road in Hampden, MA was properly delineated and mapped as Priority Habitat for the Eastern Box Turtle (*Terrapene Carolina*), in accordance with the criteria set forth in 321 CMR 10.12.⁴

³ The written request includes the following six exhibits: Ex.A - Natural Heritage and Endangered Species Atlas, 12th Edition, copy of page showing Priority Habitat for EBT in the Town of Hampden; Ex.A1 - site locus of lots 11 and 12 as drawn by land surveyor on 2 USGS charts; Ex.B - 5/18/08 Division letter providing information on the sighting of an Eastern Box Turtle on or in proximity to the petitioner's property; Ex. C - unidentified data from various sources on the range of the Eastern Box Turtle; Ex. D - USDA report by Dr. C. Kenneth Dodd, "North American Box Turtles, A Natural History" containing Eastern Box Turtle sightings at particular elevations; Ex. E - professional resume of Dr. C. Kenneth Dodd.

⁴ 321 CMR 10.12(8) provides: "Within 45 days of its receipt of such information ... the Division shall, applying the criteria in 321 CMR 10.12(2), issue a written decision either confirming the original delineation or modifying that delineation as the Division determines is warranted by the additional information submitted to the Division. The decision shall state the grounds for the Division's determination, and shall be mailed by certified mail to the Record Owner. This decision shall be considered the final agency action for the purposes of M.G.L. c. 30A. No Record Owner may appeal the delineation in the Priority Habitat Map pursuant to c. 30A without first requesting reconsideration as provided above. However, the failure to request reconsideration shall not preclude a Record Owner from challenging the

D. Appeal.

The Petitioners appeal of the Final Decision is based on two grounds. First, the Petitioners allege that the criteria set forth in 321 CMR 10.21 [sic] were not applied by the Division when it reconsidered its delineation of EBT Priority Habitat on their property.⁵ Second, the Petitioners claim that 321 CMR 10.12 is otherwise invalid because it conflicts with the statutory authority granted to the Division by MESA, the enabling statute.

An adjudicatory hearing was noticed and docketed. On April 14, 2009 a pre-hearing conference was held at which time the parties agreed to an expedited schedule for this appeal.⁶ Neither party engaged in discovery. The Division filed a motion to dismiss the Petitioner's second claim for lack of subject matter jurisdiction, which motion was granted. See *In the Matter of: South Road Lots 11 and 12, Hampden, MA*, NHESP File No. 07-21460, Docket No. 721460-09-DCH, Decision on Motion of Division of Fisheries and Wildlife to Dismiss Petitioners Second Claim, May 19, 2009.⁷ As agreed, each party filed written pre-hearing direct testimony, as well as written pre-hearing rebuttal testimony. The Division then filed a motion seeking a directed decision in its favor. The Petitioners filed a motion in opposition.

Priority Habitat delineation in connection with the review of a Project or Activity pursuant to 321 CMR 10.18 or in any subsequent appeal relating to that review.”

⁵ Neither party nor the ALM noticed this typographical and harmless error which incorrectly cites the criteria as 321 CMR 10.21, rather than the correct cite 321 CMR 10.12.

⁶ The first amended expedited schedule establishes the following deadlines: discovery-April 27 to 31; pre-hearing motions-May 1; motion responses-May 7; Division's pre-filed testimony-May 15; petitioner's pre-filed testimony-May 22; rebuttal testimony-June 1; dispositive motions-June 15; ALM decision on dispositive motions-July 1; hearing-July 15.

⁷The Decision incorrectly cites to the Division's regulations for delineating Priority Habitat as 321 CMR 10.21 rather than the correct citation, 321 CMR 10.12. To the extent the Decision makes reference to regulations for the delineation of Priority Habitat, such reference shall be to 321 CMR 10.12, and not 321 CMR 10.21.

III. DISCUSSION AND ANALYSIS

A. Issue to be Adjudicated.

Only the Petitioners first claim as set forth in their appeal remains and is subject to adjudication. The Division contends that the parties and the Administrative Law Magistrate (ALM) agreed at the pre-hearing conference to the Division's "Statement of the Issue for Adjudication."⁸ However, while the Petitioners acknowledged at the pre-hearing conference that the "Statement of the Issue for Adjudication" was the Division's understanding and view of the Petitioners first claim, they did not stipulate or otherwise agree that the Division's statement as written was to be adopted as the remaining issue for adjudication. Nor did the ALM determine or otherwise rule at the pre-hearing conference that the Division's statement as written was to be accepted as the remaining issue for adjudication.

The issue to be decided is determined by Petitioner's remaining claim, Petitioner's Request for Reconsideration with attachments, and the Division's Final Decision with attachments. Relevant portions of these filings follow:

The Agency Final Decision is based upon the reported sighting of one Eastern Box Turtle in the roadway at least a few hundred feet away from the project site more than 17 years ago. There has never been a report of a sighting of an Eastern Box Turtle on the Project Site [lots 11 and 12]. No sighting of an Eastern Box Turtle in the vicinity of the Project Site has been reported since June 1991. There has never been a report of a sighting of a second Eastern Box Turtle on or in the vicinity of the Project Site. There is no evidence of breeding of the Eastern Box Turtle on the Project Site. There is

⁸ Both the Division's Statement of the Issue for Adjudication which was filed and made part of the record at the pre-hearing conference, and the Division's statement of the sole issue for adjudication as contained in their motion for directed decision frames the issue as follows: "In response to the Petitioner's September 17, 2008 request for reconsideration pursuant to 321 CMR 10.12(8), whether the Division's Natural Heritage and Endangered Species Program, in applying its regulatory criteria at 321 CMR 10.12(2), properly confirmed its original 2006 delineation of Petitioner's project site (Lots 11 and 12 on South Road in Hampden, MA) as Priority Habitat for the Eastern Box Turtle (EBT)."

no evidence of persistence of the Eastern Box Turtle on the Project Site. There is no evidence of any variety of life stages of the Eastern Box Turtle on the Project Site. There is no evidence of more than one Eastern Box Turtle ever having been in the vicinity of the Project Site and that one Turtle was reported seen on only one occasion more than seventeen years ago. (Petitioners Appeal at p.2.)

* * * *

I am writing to request reconsideration for an area delineated as a Priority Habitat for the Eastern Box Turtle in which my property is located...I believe the original data used is flawed and without scientific merit...321 CRM [sic] 10.12(2) sets forth criteria upon which decisions to delineate Priority Habitat are made...Was this criteria applied in this instance...There doesn't seem to be any scientific basis for how the area in question was delineated, rather it appears that delineation was done randomly, subjectively and without scientific support. (Letter of William Pepin to Wayne MacCallum requesting reconsideration of delineated EBT Priority Habitat, September 17, 2008).

* * * *

Pursuant to 310 CMR 10.12(8), the Natural Heritage and Endangered Species Program (NHESP) of the Massachusetts Division of Fisheries and Wildlife has reviewed your request for a reconsideration of the Priority Habitat mapping for the above-listed project site in Hampden, MA. We have reviewed your letter dated September 17, 2008, and associated attachments. In addition our turtle Conservation Biologist and regulatory Review Manager visited your property with attorney William Murray on October 30, 2008 and conducted a habitat evaluation. Finally we have reviewed the Eastern Box Turtle Priority habitat mapping affecting your property to assure that our habitat mapping procedures for this species were properly implemented... Based on this review, the Division has determined that the above-listed project site has been properly mapped as Priority habitat for the Eastern Box Turtle...The grounds for this determination are outlined below. (Letter of Division's Assistant Director Thomas W. French, Ph.D. in response to Mr. Pepins letter, November 6, 2008).

Having reviewed and considered the entirety of these three documents, including their exhibits and attachments, the following issue remains for adjudication in this appeal:

Did the Division properly apply the criteria set forth in 321 CMR 10.12 when it reconsidered its delineation and mapping of an area in Hampden, MA that includes land owned by the Petitioners, specifically South Road lots 11 and 12, as EBT Priority Habitat?

B. Regulatory Scheme.

The Division's regulations implementing MESA are contained at 321 CMR 10.00. The stated purpose of 321 CMR 10.00 is to define and clarify the procedures and rules necessary for the Division and NHESP to carry out their responsibilities under MESA, and to establish a comprehensive approach to the protection of the Commonwealth's Endangered, Threatened, and Special Concern species including their habitats. 321 CMR 10.01(2). The regulations consist of five parts: Part I: General Provisions: Definitions, Listing, Taking Permits, and Responsibilities of State Agencies includes sections 10.01 to 10.07; Part II: Delineation of Priority Habitat and Review of Projects or Activities within Priority Habitat includes sections 10.11 to 10.25; Part III: Designation of Significant Habitat includes sections 10.30 to 10.40; Part IV: Alteration of Significant Habitat includes sections 10.60 to 10.22; and Part V: Species List, Designated Significant Habitat includes sections 10.90 to 10.99. Clearly, then both MESA as well as the MESA regulations establish a complex statutory and regulatory framework for the conservation and management of endangered, threatened and special concern species of animals, plants and their habitats in the Commonwealth.

Deciding the remaining claim in this appeal involves a review and application of the MESA regulations at 321 CMR 10.00. In particular, 321 CMR 10.12 which contains the criteria pursuant to which the Division delineates and maps Priority Habitats. This section provides in pertinent part:

- Priority Habitats shall be delineated based on the Best Scientific Evidence Available. §10.12(1).
- The delineation of Priority Habitat ... shall include examination of individual occurrence records in the context of species listing status, and shall apply the following criteria: the nature and/or significance of the occurrence as it relates to the conservation and protection of the species, including but not limited to, evidence of breeding, persistence, life stages present, number of individuals, extent of necessary supporting habitat, and proximity to other occurrences. §10.12(2).
- For each species, habitat mapping guidelines will be prepared that identify the important habitat features, and that describe the methodology by which Priority Habitats are delineated. §10.12(3).
- In the delineation of Priority Habitat and the selection of occurrence records to be included in Priority Habitat mapping, the Division shall take into consideration the listing status of individual species and use a methodology that draws clear distinctions between State-listed Species based on the relative threat of extinction or extirpation for each of those classifications. The Division will develop guidelines and criteria for the acceptance and inclusion of occurrence records into the NHESP data base. §10.12(5).
- Promptly after completion, the Division shall provide town-based Priority Habitat map [sic] to planning boards and conservation commissions in cities and towns where Priority Habitats exists. The Priority Habitat maps shall also be made available electronically as a GIS data layer. §10.12(6).

The above MESA regulations establish a specific, comprehensive regulatory scheme for the delineation and mapping of Priority Habitats. 321 CMR §10.12 contains the criteria to be applied by the Division when it delineates and maps Priority Habitat. More specifically, §10.12 contains three principle subdivisions: 10.12(2), which sets forth individually enumerated criteria to be applied to the delineation of a Priority Habitat; 10.12(3), which sets forth the requirement that for each species the Division will prepare habitat mapping guidelines that identify important habitat features, and describe the methodology by which Priority Habitats are delineated; and 10.12(5) which requires that both the delineation of Priority Habitats and the selection of occurrence records to be

included in Priority Habitat mapping shall take into account the listing status of the individual species and a methodology that draws clear distinctions between State-listed Species based on the relative threat of extinction or extirpation for each classification; in addition, the Division will develop guidelines and criteria for the acceptance and inclusion of occurrence records into the NHESP data base.

First and foremost is that the delineation of Priority Habitats shall be based upon the best scientific evidence available.⁹ Second, Priority Habitats are delineated based on records of State-listed Species observed within twenty-five years prior to delineation and are contained in the Division's NHESP database. Third, the Division has prepared Box Turtle Species Habitat Mapping guidelines ("mapping guidelines) which identify important EBT habitat features, and describe the methodology by which EBT Priority Habitats are delineated; and has also developed Guidelines for the Acceptance and Inclusion of Occurrence Records into the Natural Heritage and Endangered Species Program Database which includes criteria for the acceptance and inclusion of occurrence records into the NHESP data base ("acceptance and inclusion guidelines").¹⁰

C. Directed Decision.

At the pre-hearing conference the parties agreed to an expedited schedule for discovery, pre-filed written testimony, pre-filed written rebuttal testimony and dispositive

⁹ 321 CMR 10.02 defines best scientific evidence available as "species occurrence records, population estimates, habitat descriptions, assessments, peer reviewed scientific literature, documented consultation with experts and information contained in the records of the Natural Heritage and Endangered Species Program or other credible scientific reports or species sighting information reasonably available to the Director." Unfortunately the parties did not adequately brief what constitutes BSEA within the meaning of the regulatory definition.

¹⁰ The acceptance and inclusion guidelines are used to determine whether observation records in Massachusetts of MESA listed rare species should be accepted and included in the NHESP database. The guidelines include eight criteria that are used by the Division in evaluating observation records and reports including qualifications and credibility of observer; ease of species identification; corroboration; thoroughness and accuracy of the field observation report; documentation; appropriateness of the habitat; known range; and phenology. The June 3, 1991 EBT sighting and occurrence record is included in the NHESP database.

motions, in that order. See n.6, *Supra*. All pre-hearing written testimony and rebuttal testimony from both parties was filed on June 1, 2009. The Division then filed a dispositive motion seeking a directed decision. The Petitioners filed an opposition motion. The final issue to be decided in this appeal, therefore, is before me in the form of a motion for directed decision.

This adjudicatory hearing is governed by the Informal Hearing Rules as contained in Adjudicatory Rules of Practice and Procedure at 801 CMR 1.02. 321 CMR 10.25(1). The adjudicatory rules also contain a set of Formal Hearing Rules at 801 CMR 1.01 and 1.02 respectively. The preamble to the adjudicatory rules provides that issues not addressed in the rules or for which any party seeks clarity are to be considered in light of the entire G.L. c.30A. 801 CMR 1.00. Thus, if a specific issue is not addressed by the informal rules the ALM may look to all provisions of G.L. c.30A, including the formal rules and adjudicatory hearing rules used by other agencies. For example, while the informal rules permit voluntary discovery, they are silent as to the techniques available for such discovery. “In the absence of any express prohibition against the use of the full panoply of discovery techniques ... and given the silence of M.G.L.A. c.30A on the entire issue of discovery in adjudicatory proceedings, it would appear that the full panoply of discovery techniques ... available under the Formal Rules may be made available to a party under the Informal/Fair Hearing Rules as a matter of discretion under appropriate circumstances.” Cella, Administrative Law and Practice (39 Mass. Prac.), §548, note 8. “As allowed under the Informal Hearing Rules, the Presiding Officer may recommend that an appeal be dismissed or that judgment be granted in favor of a party as a matter of law, obviating the need for an adjudicatory hearing.” Guidance on the Process

for Adjudicatory Appeals under the MESA Regulations, Division of Fisheries and Wildlife, Part II.(4)(B).

In this adjudicatory hearing the ALM, consistent with his duties and powers set forth in 801 CMR 1.02(10(f), is not constrained by the informal rules, but rather may look to the formal rules and the hearing rules used by other Massachusetts agencies for guidance in deciding the proper procedure and process available to the parties.

The informal rules provide that any party may request at any time written rulings or relief from the ALM. 801 CMR 1.02(7)(c). The formal rules provide that an agency or party may by motion request the ALM to issue any order or take any action not inconsistent with law or the provisions of §1.01. 801 CMR 1.01(7)(a)(1). The formal rules provide that at the conclusion of the Petitioners direct case, the opposing party may file a motion to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his case. 801 CMR 1.01(7)(g)(1). The Department of Environmental Protection (DEP) Adjudicatory Hearing Rules provide that upon the Petitioners submission of pre-filed written testimony, or at the close of his live direct testimony if not pre-filed, the opposing party may move for the dismissal of any or all of the Petitioner's claims, on the ground that upon the facts or the law the Petitioner has failed to sustain his case. 310 CMR 1.01(11)(1). Similar to 1.02(7)(c) of the informal rules, DEP's formal rules also provide a broad provision which allows any party to file a motion seeking "any order or action consistent with law and with 310 CMR 1.01 that will assist in resolving issues expeditiously," 310 CMR 1.01(11)(a)1.

It is permissible, therefore, at this stage of the hearing for the Division as the opposing party to file a motion for directed decision requesting a written ruling from the

ALM. 801 CMR 1.02(7)(c); 801 CMR 1.01(7)(g)(1); 310 CMR 1.01(11)(1). To be sure the parties and ALM envisioned as much when the expedited schedule was agreed upon and approved at the pre-hearing conference. See note 6, *Infra*.

D. Examples of Agency Directed Decisions.

In the *Matter of Anderson*, Docket No. 05-085, Final Decision- Order of Dismissal, 4 DEPR 56 (April 8, 1997), Petitioners appealed a wetlands superseding order of conditions allowing the construction of a single family dwelling and septic system in land subject to coastal storm flowage. They claimed that the installation of the septic system would be located too close to a well they used as a private water supply. After the Petitioners filed their written and rebuttal testimony and exhibits, DEP moved to dismiss for failure to sustain a direct case. The motion was granted based on the lack of any testimony contained in the pre-filed written testimony on why or how the proposed septic system would adversely affect the wells private water supply.

In the *Matter of Central Water District Associates Limited Partnership*, Docket No. 92-037, Final Decision, 2 DEPR 228 (November 7, 1995), motion for directed decision granted in an appeal of a wetlands superseding order of conditions denying the applicant's proposal to lower a pond impounded by a dam. The applicant's direct case lacked any evidence that the pond was created by excavation rather than by impoundment, or that there was no bank, bordering vegetated wetland or other wetland resource area associated with the pond.

In the *Matter of Crowley*, Docket No. 89-152, Final Decision and Order of Dismissal (July 19, 1995), motion for directed decision granted in a wetlands permit appeal where the Petitioner alleged that the proposed work would occur within a wetland

resource area rather than outside wetland boundaries, as DEP had found. Petitioner's direct case failed to provide any evidence that the proposed drainage outfall was within the boundary of a bordering vegetated wetland, contrary to what the project plan approved by DEP showed.

In the *Matter of Hobson*, Docket No. 94-068, Final Decision, 2 DEPR 151 (July 12, 1995), motion for directed decision granted in an appeal of a negative wetlands superseding determination of applicability where the Petitioner failed to produce any credible evidence in support of its claim that the landowner had altered an area subject to protection under M.G.L. c. 131, 40, and thus failed to meet its burden of going forward; having failed to meet that burden, Petitioner could not sustain his case.

In the *Matter of Pride Convenience Stores, Inc.*, Docket No. 94-099, Final Decision, 2 DEPR 106 (May 16, 1995), motion for directed decision granted in a wetlands permit appeal following an order to show cause why such relief should not be granted because Petitioner's pre-filed written testimony failed to address any of the issues identified for adjudication by the pre-hearing conference report, and therefore failed to sustain its direct case.

See also, *Matter of Oxford Housing Authority*, Docket Nos. 92-026, 93-008, Final Decision, 1 DEPR 5 (January 21, 1994), reconsideration denied, 1 DEPR 55 (February 22, 1994), in which a directed decision was granted for failure of the Petitioner's pre-filed written testimony to contain any evidence, data or surveys to refute the applicant's findings. On appeal to the Superior Court, the granting of a motion for directed decision in the adjudicatory hearing was upheld. The Court noted: "like entry of a directed verdict in the trial courts, in a state administrative agency proceeding the judge may, upon

motion, dismiss a case at the close of the plaintiff's direct case for failure to sustain his case." *Widen v. Oxford Housing Authority*, Worcester Superior Court, Civil Action No. WOCV-94-004130, (October 20, 1994).

E. Standard and Burden of Proof.

An Administrative Law Magistrate presiding at an adjudicatory hearing need not follow the rules of evidence observed by courts, unless otherwise provided by law. G.L. c.30A, §11(2); 801 CMR 1.02(10)(h)(1). Agencies generally have wide discretion in ruling on evidence. *Rate Setting Commission v. Baystate Medical Center*, 422 Mass. 744 (1996). Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. A petitioner challenging an agencies' Final Decision has the burden of going forward with evidence sufficient to support a reversal of that decision. *Matter of Cormier Construction Co.*, Final Decision, 1 DEPR 159, 160 (1994). The party initiating the adjudicatory hearing must produce "competent evidence from a credible source" sufficient to meet his burden of proof. *Matter of Nelson*, 6 DEPR 120, 123 (1999).

In this adjudicatory hearing the relevant evidentiary burden is the initial burden of going forward, which is with the Petitioners who initiated this appeal. The burden of proof is also with the Petitioners who have filed their direct case in the form of pre-filed written direct and rebuttal testimony, while the opposing party has filed its case also in the form of pre-filed written direct and rebuttal testimony. The standard for admission of expert testimony has been held to be an extremely lenient one. *Heyman v. Knirk*, 35 Mass.App.Ct. 946 (1993). Qualification of an expert is a question of fact for the ALM to determine. *Foxboro Associates v. Board of Assessors of Foxborough*, 385 Mass. 679

(1982). Proof by substantial evidence is the standard generally applicable to administrative proceedings. *Craven v. State Ethics Commission*, 390 Mass. 191 (1983). Substantial evidence requires that agency findings rest on such evidence as a reasonable mind might accept as adequate to support a conclusion. *Boston Edison Co., v. Boston Redevelopment Authority*, 374 Mass 37 (1977). Evidence sufficient to withstand a motion for directed verdict must rest on something more than surmise or conjecture. *Knox v. Lamoureaux*, 338 Mass.167 (1958); citing *Helie v. Goldstein*, 338 Mass. 22 (1958).

The Division's motion for directed decision, supported by their pre-filed written direct and rebuttal testimony must show that the Petitioners direct case lacks sufficient evidence from a credible source to support their remaining claim in this appeal.

The Petitioners direct case must present sufficient evidentiary support for its position on the remaining issue in this appeal. Thus, the Petitioners direct case must contain evidence from a credible source to show that when the Division reconsidered its delineating and mapping of EBT Priority Habitat on Petitioners land they *did not*: apply the best scientific evidence available; examine individual EBT occurrence records in the context of the EBT listing status and the acceptance and inclusion guidelines; apply criteria which include the nature and/or significance of the EBT occurrence as it relates to the conservation and protection of the EBT; apply evidence of EBT breeding, persistence, life stages present, number of individuals, extent of necessary supporting habitat, and proximity to other EBT occurrences; apply the mapping and the acceptance and inclusion guidelines.

The following findings of fact and conclusions of law are based on both the burden of going forward when opposing a directed decision, as well as the evidentiary

requirements for sustaining the Petitioners direct case and their remaining claim.

F. Findings of Fact.

1. Division: the Division's November 6, 2008 Final Decision contains the reconsideration of the EBT Priority Habitat delineation and mapping. I find that the criteria set forth in 321 CMR 10.12 were used to delineate and map the EBT Priority Habitat on Petitioners property. I also find that the procedures and guidelines contained in the Division's "Box Turtle Species Habitat Mapping" guidelines were properly implemented when the EBT Priority Habitat delineation was mapped.

The Division's pre-filed written direct testimony and rebuttal testimony are from the Division's Regulatory Review Manager, Jonathan V. Regosin, Ph.D., and the Division's Turtle Conservation Biologist, Lori A. Erb. Their written testimony is signed under the penalties of perjury. Having reviewed their written testimony, including the attachments with their curriculum vitae, I conclude that their education and experience qualify them as experts in their field and competent to provide expert testimony concerning the scientific and biological aspects of EBT in Massachusetts, as well as the delineation and mapping of the EBT Priority Habitat.¹¹

I find that on June 3, 1991, during the EBT nesting season, one reproductive age adult female EBT was observed on South Road immediately adjacent to and within a few hundred feet of the Petitioners land in Hampden at about 5:00 pm.¹² The EBT was sighted and observed by a Hampden resident, and its identification as an EBT was verified by a professional herpetologist at Massachusetts Audubon's Laughing Brook

¹¹ The pre-filed written direct testimony of both Dr. Regosin and Ms. Erb contain their curriculum vitae.

¹² The Division cites numerous studies contained in the mapping guidelines attached to the Final Decision which show the average distances traveled by EBT in a year, their habitat preferences and population biology used by the Division to delineate EBT Priority Habitat.

Wildlife Sanctuary located near the Petitioner's property. A NHESP Rare Animal Observation Form (RAOF) documenting the sighting, observation and verification was filed with the Division on June 7, 1991, four days after the initial observation and identification.¹³ The professional herpetologist has an advanced degree in herpetology, has conducted research on turtles in Massachusetts, was a co-organizer of the Massachusetts Reptile and Amphibian Atlas project, and is now the Director of the Natural Resources and Environmental Conservation Program at the University of Massachusetts in Amherst.

The June 3, 1991 occurrence falls within the known range of the EBT in Massachusetts, and the habitat type and landscape context based on GIS mapping including aerial photographs is appropriate habitat conducive to EBT. The Petitioners project site is located well within EBT range in Massachusetts, which is sporadically distributed from southeastern Berkshire County to Cape Cod, from the Connecticut border north to Vermont in the Connecticut River Valley to New Hampshire along the north shore. EBT is found in both dry and moist woodlands.

In Massachusetts, EBT are most abundant in the southeast and the southern Connecticut River Valley, with a moderate number of sightings in the intervening portions of southern Worcester County. In addition to the South Road area (Priority Habitat "PH" 311) of Hampden, there have been multiple EBT sightings east-northeast (PH 1362) and one EBT sighting west (PH 1362) of Petitioner's property.¹⁴ EBT use a variety of habitats throughout the year, overwintering in forests, spending time in early

¹³ Also attached to the Final Decision was a copy of a USGS map of the subject area containing the Division's documentation of the exact location of this EBT sighting.

¹⁴ The Division acknowledges that EBT are *near* the northern limit of their range with a limited distribution in Massachusetts, and that while the EBT sightings east-northeast and west of the Petitioners property do not directly affect the priority habitat mapping on Petitioners property, they do lend support to the credibility of the South Road turtle sighting.

successional habitats in spring and early summer, tending to move back into the forests in late summer, early fall. Individual EBT's in a given population vary in the extent to which they migrate to early successional habitats, as opposed to remaining in the forests. EBT's are particularly vulnerable to even modest increases in adult mortality due to the considerable distances they can travel and their long life spans which is measured in decades.

Not only does the Petitioners land contain extensive supporting EBT habitat, but other land in the immediate vicinity of Petitioners property does as well. For example, there have been multiple sightings east, northeast, and one sighting west of the Petitioners property. In 1993 a nesting of female EBT's and hatchlings were observed near Carmody Road. From 1980 through 2005, multiple male and female EBT's have been observed in the vicinity of the Laughing Brook Sanctuary, including at least two sightings on Scantic Road immediately east of Hampden center. During the mid-1900's multiple EBT's were observed immediately east of Scantic Road, north of the gas pipeline and south of South Monson Road. Multiple additional EBT's have been observed in the same vicinity, including a 2006 EBT radio-tracking study of eight females and five males with direct evidence of nesting immediately east of Bennet Road.

The Division's expert testimony concludes, and I find, that a local population of EBT's in Hampden extends across Carmody Road, South Road, Petitioners lots 11 and 12 and areas of Scantic Road. If anything, in areas where there are large blocks of contiguous EBT habitat, the Division has constrained, rather than expanded, their mapping of EBT Priority Habitats based on documented movement distances of individual EBT's, rather than mapping the entire extent of habitat which is likely to be

occupied by given local populations of EBT's.

The Division's sight visit on Petitioners property was undertaken as part of the Division's reconsideration process.¹⁵ The sight visit confirmed that the Petitioners property contained largely deciduous with some mixed deciduous upland forest, best characterized as transitional mixed oak-northern hardwood on fairly steep terrain. In addition to the mostly forested condition of the area, there are few major roads. Some portions of the site showed recent timber harvest providing open canopy areas. The site is steeply sloping, similar to other steeply sloping sites in parts of Massachusetts and elsewhere where EBT have been documented. These habitat conditions and terrain appear generally similar to other Massachusetts sites with well document EBT population in Hampden, Belchertown, Montague, and Agawam. The interspersions of intact forest and open canopy early successional areas on the site creates ideal habitat conditions for EBT.

EBT's move considerable distances overland as they migrate during the annual active season between early successional, forested, upland and wetland habitats for feeding, breeding, nesting, basking, sheltering, estivating (passing the summer in a dormant state) and overwintering. Based on a Division multi-site, multi-year radio-tracking study in central Massachusetts conducted in 2005-2007, the median straight-line distance traveled by individual turtles was 1,509 feet, and the 95th percentile of straight-line movement distances was 4,347 feet. Such movements, as well as their longevity make EBT especially vulnerable to road mortality and incidental collection by people.

¹⁵ The Division's Regulatory Review Manager, Jonathan V. Regosin, Ph.D, and Turtle Conservation Biologist, Lori A. Erb accompanied by the Petitioner's attorney William Murray on a site visit at the Petitioner's property explaining the basis for delineating and mapping the property as an EBT Priority Habitat.

A new spring 2009 observation record recently submitted by an expert botanist and naturalist tends to support the June 3, 1991 observation. On April 16, 2009 while performing a survey, an expert botanist working for the United States Department of Agriculture's Forest Service observed two EBT's that had recently emerged from their overwintering holes. His observation of the two EBT's was along the Wilbraham mountain range on the north side of Main Street, adjacent to the Minnechoag Mountain on the south side of Main Street in Hampden. The new observation location is on the same ridge line as the Petitioners land and at a slightly higher elevation, approximately 797 feet.

The Massachusetts Geographic Information Systems ("GIS") database listed twenty EBT sightings in areas with an elevation at or above 750 feet.¹⁶ The twenty EBT sightings involved sixteen towns with actual elevations ranging from 750 to 1239 feet above sea level. Dr. Regosin makes specific reference to this data in his testimony, and notes that the Dodd report on Eastern Box Turtles cited by the Petitioners involves research done in the southeastern United States. EBT's in central Massachusetts regularly occupy elevations higher than those listed in the Dodd report. In addition, while Dr. Dodd is a noted EBT expert, his published works, studies and reports have not included Massachusetts.

2. Petitioners: the Petitioners September 17, 2008 request for reconsideration contains six exhibits. See n.3, *Infra*. Exhibit A is a very poor black and white copy of the 2006 NHESP Atlas map delineating EBT Priority Habitat in an area of Hampden, MA.

¹⁶ The Division works with the GIS program of its parent agency Department of Fish and Game. The Department's GIS program coordinates with MassGIS, the Commonwealth's Office of Geographic and Environmental Information, within the Massachusetts Executive Office of Energy and Environmental Affairs (EOEEA). Through MassGIS, the Commonwealth has created a comprehensive, statewide database of spatial information for environmental planning and management.

Petitioners allege that more than half of the Town of Hampden is delineated as an EBT Priority Habitat. Both the exhibit and the allegation are irrelevant as evidence to support their remaining claim in this appeal. Exhibit A-1 is another poor black and white copy of the 2006 NHESP Atlas map which includes the location of Petitioners site locus as prepared by a land surveyor. The Petitioners included this map to show that they were intending “to build our home on the larger lot and sell the smaller parcel.” This exhibit is also irrelevant as evidence to support their remaining claim in this appeal.

Exhibit C is a list of collected quotations from unidentified sources purporting to come from the Connecticut Department of Environmental Protection, the Rhode Island Department of Environmental Management, the Virginia Department of Game and Inland Fisheries, the Universities of Michigan and Tennessee, Davidson College, Smithsonian and Audubon. The list is not authenticated, and does not identify who made the quoted statements, what their education, experience and expertise is, when these statements were made, under what conditions or part of what scientific studies.¹⁷

Exhibit D contains selective portions of a document entitled, Biological Data and Habitat Requirements, Species: Terrapene Carolina. The Petitioner identifies it as a report issued by the Forest Service of the United States Department of Agriculture (“USDA”). The two-page document contains research on the eastern box turtle with an additional 3 pages of citations to scientific studies that were done in Florida, Mississippi, Maryland, Missouri, Oklahoma, Kansas, Arkansas, New York, Tennessee and Virginia. The report contains no research studies done in Massachusetts. The report does cite to a review

¹⁷ The quotation from an unidentified source in the University of Tennessee’s College of Veterinary Medicine states that it is from a research study that was conducted at the Jug Bay Wetlands Sanctuary, of Maryland’s Chesapeake Bay National Estuarine Research Reserve. It is enough to say that EBT Priority Habitat in Massachusetts is found in dry and moist woodlands, brushy fields, thickets, marsh edges and well drained bottomland. For purpose of this appeal, characteristics of EBT found in wetlands areas of the Chesapeake Bay have little to no relevance.

authored by Dr. C. Kenneth Dodd, Jr. entitled, Species accounts: Box turtle, genus Terrapene Merrem cited in, North American box turtles: A natural history, vol. 6. p.173, University of Oklahoma Press, 2001. The species review by Dr. Dodd “notes that eastern box turtles in New England being common from sea level up to 490 feet (150m) in elevation, and rare to 705 feet (215m).”¹⁸ Dr. Dodd is a well known expert herpetologist employed at the Florida Integrated Science Center in Gainesville, Florida. His curriculum vitae attached as Petitioners exhibit E is by all standards very impressive, and he is extremely accomplished in his field. He lists 28 published works, only 1 of which contains his book, North American Box Turtles. A Natural History. All of the remaining publications concern other amphibians and reptiles. It is worth noting, however, that Dr. Dodd’s book is an authoritative natural history of all twelve species and subspecies of the North American box turtle. It is not, however, a work on the eastern box turtle found in Massachusetts. Dr. Dodd’s list of professional affiliations, prior experience and publications are focused primarily in the southeast and, in particular, Florida.

The Petitioners pre-filed written direct and rebuttal testimony is from the Petitioner William Pepin, and is signed under the penalties of perjury. I have reviewed his written testimony and based on this review conclude that he possesses neither the education, expertise or experience to qualify him as an expert witness, nor is he competent to testify as an expert witness regarding EBT scientific and biological conclusions surrounding the Petitioners remaining claim in this appeal.

I find that the Petitioner’s pre-filed written direct and rebuttal testimony contains factually unsupported or inadequately supported conclusions, expert-type opinion

¹⁸ In his book Dr. Dodd also makes specific reference to eastern box turtles that have been reported in Penobscot County, Maine to be 150 km (93.2056 miles) east of their “normal” range. Dodd, C. Kenneth, North American Box Turtles: A Natural History, vol. 6. p.175, University of Oklahoma Press, 2001.

testimony, lay opinion unsupported by first hand observations, and legal opinion and argument. The Petitioners testimony does not sufficiently describe which specific criteria were not applied by the Division or, if it does, it does not explain how or in what way the particular criteria were not applied. Criteria that are not specifically included in the regulations or the guidelines were not required to be applied by the Division when it delineated and mapped EBT Priority Habitat on the Petitioners land. For example, Petitioners exhibit B of a handwritten note provides no description, explanation or other reason why that exhibit is relevant to his testimony that the criteria was not applied, or if it was applied, it was done so improperly.¹⁹

The Division does not pretend that multiple sightings of multiple EBT's have been made by multiple EBT experts directly in the middle of Petitioners property all within the last few years. The Division is well aware of the fact that it has the sighting occurrence it has. By their very nature as rare species, an EBT sighting is not an everyday occurrence. The Petitioners testimony that both Dr. Regosin's and Ms. Erb's testimony and opinions "hide the fact that during their October 2008 careful and extensive examination of the Project Site, they found not one turtle ..." does little to advance evidence of their remaining claim in this appeal. If anything, Petitioners testimony confirms that the Division's reconsideration involved a site visit by not one but both of the Division's experts; that the site visit was carefully undertaken; and that the site visit was extensive in its coverage. Neither MESA nor the regulations require that more than one sighting is the necessary standard of sighting credibility before the Commonwealth can act to prevent further takes of a special concern species such as the EBT through

¹⁹ Petitioners exhibit B attached to his rebuttal testimony is a handwritten note dated 11/3/08 which states: "AV spoke with Scott Jackson working at laughing Brook sanctuary (in Hampden) at that time (1991). So, he believes this woman brought the turtle in and he signed off on RAOF."

further, continuous disruption, damage or alteration of EBT habitat. The Division received a completed Rare Animal Observation Form reporting the sighting on June 3, 1991 of an adult female EBT on South Road in Hampden immediately adjacent to Petitioners property, including an attached map showing the exact sighting location. The turtle that was sighted was identified as an EBT by a professional herpetologist.

However, when taken in conjunction with specifically identified scientific studies documenting EBT movement distances in that particular part of Massachusetts, an EBT sighted on South Road in June of 1991 was well within the typical seasonal movement distances of an individual EBT. Add to that the fact that Petitioners property is highly suitable EBT habitat; the fact that other numerous sightings of multiple females, males, hatchlings and evidence of breeding in the area surrounding Petitioners property have been received and included in the NHESP database; the fact that there is a relative abundance in that area of other locations which are highly suitable EBT habitat adds additional support to the Divisions reconsideration of the delineation of EBT Priority Habitat on Petitioners property.

Petitioners pre-filed testimony present no evidence tending to show that the Division was prohibited or prevented as a matter of fact or law from accepting and including this sighting in the NHESP database; or that the Division improperly included this sighting in the NHESP database, or that the Division included this sighting in the NHESP database without first evaluating it to determine its validity through the application of the BSEA in the form of criteria contained in the acceptance and inclusion guidelines.

Instead, the pre-filed testimony belittles, trivializes and mocks this single sighting

by repeatedly making multiple references to it in an emotional, humorous, angry, frustrated or incredulous fashion. The Petitioner's feelings regarding this occurrence, while understandable, are irrelevant to establishing the Petitioners claim, or casting any doubt on the accuracy of the Division's reconsideration contained in its Final Decision as a matter of fact or law.

At no point in their pre-filed testimony do the Petitioners show that either the particular criteria set forth in of 321 CMR 10.12(2), the mapping guidelines or the acceptance and inclusion guidelines were violated by the Division or that the Division did not apply or improperly applied them when it reconsidered its delineation and mapping of EBT Priority Habitat on Petitioners property. Rather, Petitioners complain about criteria that are not found in §10.12 as well as criteria that is, and insists that the criteria which is required to be applied is both inadequate and unreliable. All of which is again, irrelevant and immaterial to the Petitioner's claim. For example, Petitioners argue that the delineation and mapping of EBT Priority Habitat must be based upon multiple sightings of multiple animals by multiple sources. This is simply not true as a matter of fact or law. There are no such criteria required to be applied by the Division to the delineation of Priority Habitat. Thus, alleging that there is and that it wasn't applied does nothing to advance the Petitioners case.

I am unable to find any competent or credible evidence in the direct case put forth by the Petitioners that would support their claim that the Division did not properly apply the criteria set forth in 321 CMR 10.12 when it reconsidered its delineation and mapping of an area in Hampden, MA that includes land owned by the Petitioners, specifically South Road lots 11 and 12, as Priority Habitat for EBT.

G. Conclusions of Law.

I find that the Petitioner's pre-filed written direct and rebuttal testimony contains factually unsupported or inadequately supported conclusions, expert-type opinion testimony, lay opinion unsupported by first hand observations, and legal opinion and argument. The Petitioners testimony does not identify or explain which specific criteria were not applied by the Division, or if they do identify such criteria the reason they offer as to why it should have been applied is incorrect or misplaced. In addition, Petitioners fail to identify or explain how or in what way the particular criteria were not applied.

For example, Petitioners provide no clear explanation, description or reason why their presentation of exhibit B attached to Petitioners pre-filed written rebuttal testimony supports their claim that the Division did not apply the criteria of 321 CMR 10.12, including the mapping guidelines and the acceptance and inclusion guidelines when they reconsidered their delineation of EBT Priority Habitat. Petitioners seem to imply that exhibit B, which is not authenticated, shows that the Division attempted to corroborate the June 3, 1991 sighting, but did so after the delineation of EBT Priority Habitat in violation of 321 CMR 10.12. However, 321 CMR 10.12 does not require corroboration of a sighting prior to the delineation of Priority Habitat. The acceptance and inclusion guidelines, however, do state that the Division determines the validity of observation records and whether they should be included in the NHESP database by applying criteria which includes "[C]orroboration of the observation by additional or multiple observers." BSEA, means that criteria may only be applied to the extent that it is available. Furthermore, the June 3, 1991 sighting was already included in the NHESP database prior to the delineation of the EBT Priority Habitat. Had it not been so, the delineation of

EBT Priority Habitat would have no basis.²⁰

Petitioner argues that the MESA regulations define BSEA to mean the best “credible” evidence available. That is not what the definition says. 321 CMR 10.02 defines BSEA to mean “species occurrence records, population estimates, habitat descriptions, assessments, peer reviewed scientific literature, documented consultation with experts and information contained in the records of the Natural Heritage and Endangered Species Program, *or* other credible scientific reports or species sighting information reasonably available to the Director.” (Emphasis Supplied). Nowhere in this definition does it state that specific evidence in the form of species occurrence records, population estimates, habitat descriptions, assessments, peer reviewed scientific literature or documented consultation with experts and information contained in the records of the Natural Heritage and Endangered Species Program must be credible. This type of specific evidence, in and of itself, contains the trappings of credibility because of its source.

The MESA regulations provide that BSEA such as peer reviewed scientific literature, documented consultations with experts and records contained in NHESP’s data base are already imprinted with the indicia of credibility. After defining BSEA to include such evidence without specifically stating that it must be credible, the definition goes on to include “or evidence” by stating that BSEA also includes other scientific reports or species sighting information reasonably available to the Director provided it is credible. The definition requires the later category of information to be credible because scientific reports which are not peer reviewed, or species sighting information which does not come from the NHESP database can be by its very nature unreliable, and thus not credible.

²⁰ Petitioners exhibit B attached to his rebuttal testimony is a handwritten note dated 11/3/08 which states: “AV spoke with Scott Jackson working at laughing Brook sanctuary (in Hampden) at that time (1991). So, he believes this woman brought the turtle in and he signed off on RAOF.”

Petitioners testimony does identify that 4 of the criteria set forth in 321 CMR 10.12(2), specifically evidence of breeding, persistence, life stages present, and number of individuals was not applied by the Division when it reconsidered its delineation of EBT Priority Habitat on Petitioners land. The reason why these 4 criteria were not applied, however, is because there was no such evidence available at the time the Division reconsidered its delineation. Again, BSEA means that criteria which are not available cannot be applied. The MESA regulations do not require the Division to apply non-existent criteria.

Petitioners also argue that the criteria require that delineation of an EBT Priority Habitat may be made only if the area delineated is actually populated by EBT's. No such requirement is contained in 321 CMR 10.12.

I find that as a matter of law and fact, Petitioners have presented no credible evidence sufficient to support their final claim in this appeal. Nor have Petitioners presented any credible evidence to withstand the Division's motion for directed decision.

As a final matter, in their opposition motion Petitioners point to the case *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass.App.Ct. 775 (1980), suggesting that they have a right to cross examine the Division's expert witnesses whose pre-filed direct and rebuttal testimony has already been presented and addressed by the Petitioner in their pre-filed written direct and rebuttal testimony. The holding of the Court in that case appears to be more in line with this Recommended Final Decision than with the Petitioner's argument that he is denied due process, and the ability to put forth his entire case when he is unable to cross-examine the Division's expert witnesses. If a permit applicant is unable to get past the

threshold of providing sufficient evidence of a credible nature to support his claim, there is no justification in conducting the adversarial, confrontational, quasi-judicial process of calling witnesses to cross examine them on issues that will have no impact on the final outcome of the adjudicatory hearing. Any due process rights that the Petitioners may have to cross-examination exist as to witnesses who have been called, sworn in and provided live, oral testimony. In this appeal, the Petitioner agreed to pre-filed written direct and rebuttal testimony. The Petitioners have already exercised their due process rights when both parties presented their case in the form of their pre-filed testimony from their own witnesses. No one has been subpoenaed to testify, and there is no one whose live testimony has otherwise been requested. Nothing more is due the Petitioners.

Massachusetts Outdoor Advertising Council concerns a process similar to an agencies' decision in an adjudicatory hearing based on cross motions for summary judgment where the parties have either agreed to the facts, or there are no facts in dispute, and the matter turns on a question of law to be decided by the ALM based on the parties' memoranda and affidavits. Not surprisingly then, the Appeals Court noted that "[C]onfrontation and cross-examination are not always part of the due process right." *Id.*, 9 Mass.App.Ct. 775, 789-790 (1980); citing *Lotto v. Commonwealth*, 369 Mass. 775 (1976).

IV. CONCLUSION AND DISPOSITION

Based upon the law and the facts as set forth above, I conclude that the Petitioners have failed to present any credible evidence sufficient to support their claim that the Division did not properly apply the criteria set forth in 321 CMR 10.12 when it reconsidered its delineation and mapping of an area in Hampden, MA that includes land

owned by the Petitioners, specifically South Road lots 11 and 12, as EBT Priority Habitat.

Because the Petitioners have failed to sustain their case the Division's motion for directed decision is granted, and the remainder of Petitioner's appeal is dismissed.

Dated: July 10, 2009

Original Signed by David C. Hoover

David C. Hoover, Esq
Administrative Law Magistrate

NOTICE

This decision is a recommended final decision of the Administrative Law Magistrate. It has been transmitted to the Director of the Division of Fisheries and Wildlife 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 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 Division Director regarding this decision, unless the Division Director, in his sole discretion, directs otherwise.