

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**June 26, 2018**

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In the Matters of  
Jean T. Ricupero and  
Karen and Thomas Doyle

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OADR Docket No. WET-2017-015, 016  
DEP File Nos. SE 66-1744, 1745

Sandwich, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

These consolidated appeals involve challenges to two Reviewable Decisions<sup>1</sup> issued by the Department of Environmental Protection's Southeast Regional Office to Jean Ricupero (WET-2017-015) and Thomas and Karen Doyle (WET-2017-016) on June 22, 2017 pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. ("the Wetlands Regulations"). The Reviewable Decisions are two Superseding Orders of Conditions (SOCs) for two separate projects at property now owned by the Doyles located at 18 Salt Marsh Road in Sandwich ("the Property").<sup>2</sup> The appeals are brought by Chris and Marcia Warrington, abutters who assert that they are aggrieved by the SOCs.

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<sup>1</sup> "Reviewable Decision" means a MassDEP decision that is a superseding order of condition or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance. 310 CMR 10.04.

<sup>2</sup> The Notice of Intent ("NOI") for File No. SE 066-1744 was filed on behalf of Jean T. Ricupero, who died in 2013. At the time the NOI was filed, the property was owned by her estate and is now owned by Thomas and Karen Doyle. They succeeded Ricupero as the Applicant in WET-2017-015. The Doyles' property is also known as Lot 7A.

The first project proposes to abandon and remove an existing below grade septic system and construct a new below grade septic system in a coastal dune/barrier beach and Riverfront Area. The second project proposes to raze the existing at-grade single family house and replace it with a house elevated on timber piles, decks, stairs, a shed and a fence, in a coastal dune/barrier beach, coastal beach, and Riverfront Area. The SOC for each project affirms an Order of Conditions issued by the Town of Sandwich Conservation Commission (“SCC”) authorizing the proposed work pursuant to the MWPA and the Wetlands Regulations.

I conducted an evidentiary Adjudicatory Hearing (“Hearing”) on November 21, 2017 at which witnesses who had filed testimony in advance of the Hearing were available to be cross-examined. None of the parties opted to cross-examine witnesses. I also viewed the site with the parties and their representatives directly after the Hearing pursuant to 310 CMR 1.01(13)(j).<sup>3</sup> After reviewing the administrative record, and considering and evaluating the testimonial and documentary evidence presented by the parties at the Hearing, as well as my observations at the site view, I recommend that the Department’s Commissioner issue a Final Decision dismissing the appeals (1) because the Petitioners lack standing, or alternatively, (2) because the Petitioners

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<sup>3</sup> 310 CMR 1.02(13)(j) provides that:

“The parties may request and the Presiding Officer may order that a view be taken of a site, property or other places and things that are relevant to an appeal to promote understanding of the evidence that has been or will be presented. Notice and a reasonable opportunity to be present shall be given to all parties. Parties shall not present evidence during the view, but may point out objects or features that may assist the Presiding Officer in understanding evidence. The Presiding Officer may rely on the Presiding Officer’s observations during a view as evidence to the same extent permissible as if observed in the hearing room.”

Several times in their Closing Brief the Petitioners reference statements apparently made to me by Applicant Thomas Doyle during the site view. I do not specifically recall these statements but will note for the record that in rendering this Recommended Final Decision I have not relied on any statements made by Mr. Doyle, but only on the materials filed by the parties throughout these appeals and the sworn testimony of their witnesses.

failed to prove that the Department erred in issuing the SOC's at issue. Additionally, as discussed below, I have determined that each of the proposed projects nonetheless complies with the applicable regulations and protects and enhances the interests of the MWPA. The result would be for the projects to proceed as approved by MassDEP.

#### **WITNESSES<sup>4</sup>**

The following witnesses submitted pre-filed testimony on behalf of the Petitioners:

1. Paul J. Shea, Professional Wetlands Scientist. Mr. Shea is the President and Principal Environmental Scientist and Wetlands Scientist of Independent Environmental Consultants, Inc. of Plymouth, Massachusetts, with 31 years of relevant experience in wetlands assessment and evaluations, including coastal wetlands in Massachusetts. He has a Master's Degree from Brown University in Environmental Studies (Wetlands/Hydrology) and a Bachelor's Degree from Northeastern University in Environmental Science. Mr. Shea holds a Certification from the Society of Wetland Scientists and has served as the Conservation Agent for several towns on the Massachusetts coast. He has been qualified as a wetlands science expert by courts and administrative agencies in Massachusetts, Rhode Island and Connecticut. Shea PFT at ¶¶ 2-3 and Exhibit A.

2. Marcia Warrington, Petitioner. Ms. Warrington owns the home located at 20 Salt Marsh Road in Sandwich, Massachusetts.

3. Chris Warrington, Petitioner. Mr. Warrington owns the home located at 20 Salt Marsh Road in Sandwich, Massachusetts

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<sup>4</sup> Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT at ¶ "; Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR at ¶ ". References to the Transcript will be cited as "Tr. at [time]."

The following witnesses submitted pre-filed testimony on behalf of the Applicants:

1. Robert M. Gray, Professional Wetlands Scientist. Mr. Gray holds a Certification from the Society of Wetland Scientists. He is the owner of SABATIA, Inc., a wetlands consulting firm, and has over 30 years of professional experience. He holds a Bachelor of Science degree in Biological Sciences and a M. Ed. Degree in Education. He has served on the Bourne Conservation Commission since 1978 and served on the Board of Directors of the Massachusetts Association of Conservation Commissions from 1984 to 1997, three years as its President. Mr. Gray is also a Registered Sanitarian and a DEP Certified Soil Evaluator. He has been qualified as an expert in wetlands and septic system issues in adjudicatory appeals before MassDEP. Gray PFT at ¶¶ 1-2 and Exhibit A.

2. James O'Connell, Coastal Geologist & Coastal Processes Specialist. Mr. O'Connell is the owner of Coastal Advisory Services, with over 30 years of experience as a coastal geologist and coastal processes specialist, including 13 years with the Massachusetts Coastal Zone Management Program. He has a Bachelor of Arts degree in Physical Studies from Boston State College (Geology concentration, Coastal Studies minor) and a Master's Degree from the University of Texas at Austin in Physical Geography, with coastal geomorphology and coastal management concentrations. He has been qualified as an expert in coastal geology in adjudicatory appeals under the MWPA. O'Connell PFT at ¶¶ 2-3 and Appendix A.

The following witness submitted pre-filed testimony on behalf of the Department:

Maissoun E. Reda, Environmental Analyst. Ms. Reda has been employed by the Department's Wetlands and Waterways program in the Southeast Regional Office since April 2016. Her work involves administering and enforcing the MWPA and the Wetlands Regulations;

reviewing Notices of Intent, site plans, and resource area delineations; writing Superseding Orders in response to appealed decisions of local conservation commissions; and reviewing projects needing water quality certifications. These duties require that Ms. Reda conduct site inspections to assess the potential impact of proposed projects on the statutory interests of the MWPA. She has prior experience in the private sector as an Ecological Scientist. She holds a Bachelor of Science Degree in Biology from the Lebanese American University and a Master of Science Degree in Soil Science from the University of Massachusetts at Amherst.

### **RULINGS ON MOTIONS TO STRIKE**

The Applicants and the Department move to strike<sup>5</sup> certain materials filed by the Petitioners as part of their rebuttal filings. These include the following seven documents:

1. Conclusion
2. Petitioners (Appellants) response to Department's Memorandum of Law
3. Petitioners (Appellants) response to Pre-Filed Testimony of Maissoun E. Reda
4. Petitioners (Appellants) response to Robert Gray Pre-Filed Testimony
5. Petitioners (Appellants) response to Memorandum of Law of Tom and Karen Doyle
6. Petitioners (Appellants) response to Pre-Filed Testimony of James O'Connell
7. Paul Shea's Response to Pre-Filed Testimony of Elizabeth Kimball, DEP

The Applicants move strike items 1 through 6. The Department moves to strike item 7. The Applicants' basis for striking items 1, 2 and 5 is that these filings are not rebuttal testimony, but are memoranda of law not specifically allowed by the PHC Report and Order. The

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<sup>5</sup> The Applicants' motions were filed one day before the hearing; the Department's motion is contained within its Closing Brief.

Petitioners object to the motions. They argue that they believed they were required to submit rebuttal testimony on all documents submitted by the Department, the Applicants and their experts. Petitioners' Closing Brief at p. 7. The Applicants are correct that the PHC Report and Order did not specifically state that the Petitioners rebuttal testimony could be accompanied by a reply memorandum. That was an oversight on my part, and as I stated at the hearing, a supplemental memorandum of law limited to the issues raised in the PFT of the Applicants and the Department was acceptable. Tr. at 20:2-10. At the hearing, I granted the motion as to the "Conclusion", but I am reversing that ruling because the "Conclusion" can also be read as a reply memorandum, and taken together, these three documents are appropriately a part of the administrative record as the Petitioners hearing memoranda. The motions to strike are denied as to items 1, 2 and 5. However, I have disregarded and given no weight to the portions of these documents that consist of unsworn factual assertions or information outside the scope of these wetlands appeals.<sup>6</sup>

I reserved ruling on the motions to strike items 3, 4, 6 and 7 so that I would have time to consider them in depth. This also afforded the Petitioners an opportunity to respond to the motions, which they did in their closing brief. The Applicants argue (regarding items 3, 4 and 6) that the Petitioners' responses to the PFT filed by the other parties' experts is "not formatted as rebuttal testimony...but instead consists largely of argument and legal conclusions...The entire Reponse[s] submitted by the Petitioners is a Memorandum of Law masquerading as rebuttal

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<sup>6</sup> For example, in their closing brief at pp. 12-13 the Petitioners offered criticism of Mr. O'Connell that might have been useful as cross-examination (which they opted not to conduct), but that is inappropriate after the evidence has been presented.

testimony....” Applicants’ Motions to Strike Petitioners’ Responses to the Pre-Filed Testimony of Maissoun E. Reda, Robert Gray and James O’Connell, at 1.<sup>7</sup> The Applicants also argue that this testimony “consists very, very heavily of lay opinion testimony” and “are also argumentative, conclusionary and in some cases speculative....” Tr. at 21:13-20. The Department supports these motions, arguing that the Petitioners present no credentials that would allow them to offer expert opinions to rebut the testimony of Mr. Gray, a credentialed wetlands expert, and Mr. O’Connell, a coastal geologist with more than 30 years of experience in that role in Massachusetts. Department’s Closing Brief at 2-3.

The Petitioners argue that their experience of living “on the beach for almost 14 years and having experienced several storm events” gives them first-hand knowledge of the effects of weather and storms on the project site, thereby making their observations credible. They assert that expert testimony should not be required where the subject matter is within the realm of general human experience, citing Pitts v. Wingate at Brighton, Inc., 82 Mass. App. Ct 285, 289-90 (2012) for that proposition.

I agree with the Applicants and the Department that items 3, 4 and 6 should be struck from the record. The Petitioners present their testimony purportedly to rebut the testimony of three expert witnesses, yet neither Petitioners presented any information from which I could determine that she or he is competent to rebut expert testimony addressing the substantive issues in these appeals. See Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision, 2003 MA EN LEXIS 133 (April 30, 2003), adopted as Final Decision (May 9, 2003).

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<sup>7</sup> The three motions are essentially identical.

I also agree with the Applicants that this testimony is argumentative and in many instances amounts to no more than disagreements with the experts' testimony without factual support. See, e.g., Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc., 416 Mass. 684, 696 (1993) (affidavit conclusory where it consisted of unsupported conclusions of law or fact) and Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library, & Pub. Employees Union, 407 Mass. 601, 610 n.4 (1990) (affidavit conclusory where it consisted largely of denials of movant's account and statements of "belief" rather than knowledge), both cited in Regis College v. Town of Weston, 462 Mass. 280, 293 (2011); see also 310 CMR 10.05(7)(j)6 (rebuttal evidence shall be limited to countering evidence submitted in the [Applicants' and Department's]...Direct Case in support of the Reviewable Decision). Argument is not evidence. The motions to strike are allowed as to items 3, 4 and 6. The motion is also allowed as to item 7. Attorney Kimball did not file testimony, and it was improper for Mr. Shea to file a response to the Department's Memorandum of Law, as the memorandum was not evidence and Attorney Kimball was not a witness.

## **BACKGROUND**

### **I. The Project Site**

The Applicants' property is an already developed 14,295 square foot residential lot in Sandwich located between Cape Cod Bay and Salt Marsh Road in a densely developed residential area. The lot contains a single-family house, constructed in or about 1926. The house is 818 square feet in size, and sits at grade with a concrete foundation embedded in the coastal dune (primary frontal dune). MEPA Certificate, April 7, 2017, Applicants' Exhibit 6 ; O'Connell PFT at ¶ 29. The foundation and parts of the house were severely damaged during Superstorm Sandy in 2012 and Winter Storm June in 2015. MEPA Certificate, supra; see also Petitioners'

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Exhibit F, Photographs 1 and 2 (showing damage to lower level of existing house). There is an existing sub-surface septic system serving the house. Wetlands Resource Areas at the project site include Coastal Beach, Barrier Beach, Coastal Dune, Land Subject to Coastal Storm Flowage, Riverfront Area, and Buffer Zone to Salt Marsh. There is also Priority Habitat (for Least Terns and Piping Plovers) as mapped by the Massachusetts Natural Heritage and Endangered Species Program (“NHESP”). Applicants’ Exhibit 1, NOI for SE 66-1744; O’Connell PFT at ¶ 26. The Property lies within flood zones VE (EI-15) and AE (EI-15) on a FEMA flood map dated July 16, 2014.<sup>8</sup> NOI at 1; O’Connell PFT at ¶ 32. The entire project site is within these resource areas, except for RFA and Buffer Zone to Salt Marsh (the Inner and Outer Riparian Zones), which account for only a portion of the site on the landward side. See Post-Development Plan, Revised to March 23, 2017, Applicants’ Exhibit 9.

## **II. The Projects as Proposed and Conditioned**

### **A. Process**

On October 3, 2016, Robert Gray filed a NOI on behalf of Jean T. Ricupero for an upgrade/repair to an existing septic system prior to a transfer of title in the Property. See Applicants’ Exhibit 1, NOI for SE 66-1744; Gray PFT at ¶ 3. Just prior to this filing, the Town of Sandwich Board of Health had determined that the septic system as proposed complied with

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<sup>8</sup> Flood zone VE means “[a]reas subject to inundation by the 1-percent annual-chance flood event with additional hazards due to storm-induced velocity wave action.” <https://www.fema.gov/zone-ve-and-v1-30>. Flood Zone AE means “[a]reas subject to inundation by the 1-percent-annual-chance flood event determined by detailed methods.” <https://www.fema.gov/zone-ae-and-a1-30>. The V-Zone is also known as a Coastal High Hazard Area, considered an “area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. The coastal high hazard area is identified as Zone V on Flood Insurance Rate Maps (FIRMs). Special floodplain management requirements apply in V Zones including the requirement that all buildings be elevated on piles or columns.” <https://www.fema.gov/coastal-high-hazard-area>

local and state regulations for a repair/upgrade to replace an existing system at an existing dwelling. Applicants' Exhibit 3, Correspondence from Town of Sandwich Board of Health ("BOH"), October 2, 2016; Applicants' Exhibit 13, Plan for Septic System submitted to BOH. The Plan of Record ("POR") for the septic system, included with the NOI, is dated August 20, 2016, revised to September 30, 2016 to show the riparian zones at the Property. After a public hearing the Sandwich Conservation Commission issued an Order of Conditions ("OOC") approving the septic upgrade, subject to 23 special conditions under the MWPA and 25 special conditions under the Town of Sandwich wetlands by-law. See Order of Conditions for SE 66-1744, Applicant's Exhibit 2. The SCC found that the project as conditioned met the performance standards of the MWPA and the Sandwich wetlands by-law. Id. The Petitioners attended the public hearing and commented on the proposed project.

Meanwhile, on October 18, 2016, Mr. Gray filed a separate NOI on behalf of Karen and Thomas Doyle, the prospective buyers of 18 Salt Marsh Road. The NOI proposed to raze and rebuild the existing structure on the property. See Applicants' Exhibit 4, NOI for SE 66-1745; Gray PFT at ¶ 10. The Plan of Record ("POR") for the house project filed with the NOI contained two sheets, a Pre-Development Plan and a Post-Development Plan, both dated September 16, 2016.<sup>9</sup> The NOI also included architectural plans for the house. Because portions of the project site are located within mapped rare species habitat for piping plover and least tern, the proposed work on the coastal dune and coastal beach is subject to the provisions of 321 CMR 10.00, the regulations implementing the Massachusetts Endangered Species Act, M.G.L. c.

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<sup>9</sup> The Post-development Plan was subsequently revised three times to include the structure elevation and dune note (10/19/16 revision), the addition of the spring tide line (3/16/17 revision) and the dune construction cross-section (3/23/17 revision).

131A. Mr. Gray submitted the NOI and POR to the Massachusetts Natural Heritage and Endangered Species Program (“NHESP”) for review and comment. After a public hearing, the Sandwich Conservation Commission issued an OOC on December 28, 2016 approving the proposed project subject to 37 special conditions under the MWPA and 38 special conditions under the Sandwich wetlands bylaw. See OOC for SE 66-1745, Applicant’s Exhibit 5.<sup>10</sup> The Petitioners attended the public hearing and commented on the proposed project.

**B. The Projects**

**1. File No. SE 066-1744, the Septic System**

The existing septic system consists of a 1,000-gallon septic tank and two flow diffusers. Portions of the system appear to be located on the Petitioners’ property, according to the Plan of Record for the Septic System.<sup>11</sup> See Septic System Plan prepared for #18 Salt Marsh Road, Sandwich, Massachusetts by Stephen Doyle and Associates, August 20, 2016, revised to 09-30-16, Applicants’ Exhibit 13. The areas in which the work is proposed are significant to the statutory interests of Public Water Supply, Private Water Supply, Groundwater Supply, Fisheries, Storm Damage Prevention, Prevention of Pollution, Flood Control and Protection of Wildlife Habitat. OOC at 2.

The Applicants propose to upgrade/repair the existing septic system at the Property, as follows: (1) abandon the existing 1000-gallon septic tank and two existing flow diffusers and

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<sup>10</sup> The Petitioners did not appeal either decision made under the local wetlands by-law to Superior Court pursuant to M.G. L. c. 249, § 4, the Certiorari statute.

<sup>11</sup> MassDEP is only concerned that a person has a colorable claim of title to land. The parties are engaged in litigation in the Massachusetts Land Court in a dispute concerning their property boundaries. See Land Court Docket Misc. Case No. 000743. OADR does not have jurisdiction to review the boundary dispute, Tindley v. Department of Environmental Quality Engineering, 10 Mass. App. 623 (1980), and I do not address in this RFD the potential impact of the outcome of the Land Court case on the permits under appeal here.

remove them from the property; (2) install a new 1500-gallon septic tank with pump chamber, distribution box and leaching field, entirely on the Applicants' property; (3) reinstall any utilities, as required; and (4) re-landscape disturbed areas. Applicants' Exhibit 1. The septic system will be located within the barrier beach and coastal dune, Land Subject to Coastal Storm Flowage ("LSCSF") and Riverfront Area (outer riparian zone). Id.; Gray PFT at ¶ 3. It will also be within a FEMA-mapped Velocity Zone. O'Connell PFT at PFT at ¶ 32. The septic project as planned will alter less than 500 square feet of the outer riparian zone, coastal dune, barrier beach and LSCSF. NOI at 3-4; OOC at 4.

The OOC permits the installation of the septic system upgrade subject to numerous conditions. The SCC found that the project was exempt from the Riverfront Area regulations.<sup>12</sup> OOC at 3. Among the 23 Special Conditions imposed by the SCC and incorporated by MassDEP pursuant to the MWPA, the following are pertinent to the issues raised by the Petitioners:

- Work demarcation lines must be maintained until all phases of construction are complete (Special Condition 7).
- Site disturbances must be confined to the project limits shown on the approved plan, and marked with high visibility fencing (Special Condition 15).
- The components of the old septic system and other "unsuitable material" must be removed from the site "immediately following excavation"; no stockpiling is allowed. (Special Condition 16).

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<sup>12</sup>The septic project is exempt from the Riverfront Area regulations at 310 CMR 10.58(6)(c) because it is an upgrade/repair of a system that existed as of August 7, 1996 and complies with the Title 5 regulations at 310 CMR 15.00. The Sandwich Board of Health approved the septic system plan on October 2, 2016, determining that the system as proposed complies with the Sandwich Board of Health Regulations and the Massachusetts Title 5 regulations for an upgrade/repair to replace an existing system for an existing dwelling. See Correspondence from Sandwich Director of Public Health to Tom and Karen Doyle, Applicants' Exhibit 3.

- All non-driveway areas disturbed must be re-vegetated during the next immediate planting period. No loam may be added to existing soils; only clean washed sand of a similar grain size may be brought onto the site. “Beach grass shall be planted using 3 culms per hole, a minimum of twelve (12) inches on center.” The Applicants must notify the SCC in writing immediately after completion of the re-vegetation, and the planting will be reviewed in the field no sooner than 18 months after it is completed. A 90% survival rate must be realized, and the SCC may require additional plantings. (Special Condition 19).
- The existing driveway cannot be expanded. Any asphalt disturbed or damaged during construction cannot be repaired or replaced. (Special Condition 20).
- After the old septic system is removed and the new system is installed, all stone, concrete, brick or other impervious materials damaged during construction must be removed from the Property. (Special Condition 21).

See Applicants’ Exhibits 2 and 7. (OOC and SOC for File No. SE 66-1744).

## 2. File No. SE 066-1745, Raze/ Rebuild the House

The house project proposes to raze the existing structure on the property, rebuild a new single-family home with decks and stairs, construct an 80 square foot shed, and install a split-rail fence. As noted above, the existing house encloses approximately 818 square feet of coastal dune. The proposed new house will be elevated on 27 timber piles; an 8’ x 10’ shed and the front stairs will also be on piles, on the landward side of the property. These features reduce the enclosure of the dune to approximately 21 square feet. Gray PFT at ¶ 52. The split rail fence will be located near the roadway, with approximately 15 linear feet to be located within the 100-foot Inner Riparian Zone of RFA and the remainder of the fence, the shed, and the front stairs in the 100’ Outer Riparian Zone. O’Connell PFT at ¶ 50; see also Applicants’ Exhibit 9, Post-Development Plan. The proposed house itself is outside the 200’ Riverfront area. Gray PFT at ¶ 60; see also Post-Development Plan, Exhibit 9. A new 14’ x 24’ pile-supported deck on the bay

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side will require placement of four 10” timber piles into the coastal beach. Four additional piles will be placed into the coastal beach to support a stairway for a detachable aluminum ramp to the beach. The disturbance of the coastal beach from these piles will be 3.18 square feet. Gray PFT at ¶ 48. The project was designed to comply with FEMA’s National Flood Insurance Program (“NFIP”) and the State Building Code for projects in a Velocity Zone. Gray PFT at ¶¶ 31-32.<sup>13</sup> The lowest horizontal structural element of the house will be at elevation 20; the 100-year flood elevation (Base Flood Elevation) is elevation 15. O’Connell PFT at ¶ 49.

The project includes reconstruction of the coastal dune displaced by the existing house. The dune will be rebuilt by placing 215 cubic yards of clean, compatible dune sand under the elevated house, matching the contours of the abutting dunes as closely as possible, and connecting the dunes east and west of the new house. The dune will be re-constructed to elevation 18, two feet below the lowest structural element of the new house, and three feet above the Base Flood Elevation of 15. The dune slope on the ocean side of the property will be planted with American Beach Grass. O’Connell PFT at ¶¶ 39, 68; Gray PFT at ¶¶ 40, 42; see also Post-Development Plan, Exhibit 9 to Applicants’ PFT. The beach grass will be planted as plugs, 12” on center, as required by the SCC’s OCC.<sup>14</sup> Utilities will be reinstalled as required, and disturbed areas will be re-landscaped. *Id.* The house will be no further seaward than the existing house,

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<sup>13</sup> The FEMA NFIP mandates that for a project such as this, the structure be on open piles or columns with the lowest horizontal structure at or above the 100-year flood elevation. Gray PFT at ¶ 31. The State Building Code requires a 2-foot separation between the 100-year flood elevation and the lowest horizontal structure. Id.

<sup>14</sup> I observed this type of planting on the face of a dune on a property to the west of the Applicants’ property during the site view.

except for decks and stairs but will be closer to Salt Marsh Road and reoriented on the Property. NOI for File No. SE 066-1745, Applicants' Exhibit 4.

Three alternatives for the proposed project were considered by the Applicants and presented to the SCC. These included making minor repairs to the existing structure; making major repairs to the existing structure; and razing the existing structure and rebuilding a new house. The first two alternatives were rejected, the first because the existing structure is not usable with only minor repairs, the second because the repairs needed to bring the house up to code "are numerous and full compliance cannot be achieved." NOI at 2.

The OOC permits the "raze/rebuild of an existing single family dwelling with appurtenances and the rebuilding of the dune..." subject to numerous conditions. The SCC found that the project would alter less than 350 square feet of RFA, 2 square feet of Coastal Beach, less than 900 square feet of Coastal Dune, and the same area of LSCSF. OOC at 3-4. The SCC made the following additional findings in the OOC pursuant to the MWPA: (1) the resource delineation is correct; (2) the solid foundation of the existing house reduces dune volume and prevents the movement of sand, contrary to 310 CMR 10.28; (3) the proposed design reduces direct dune displacement from 818 square feet to 94.5 square feet; (4) the shed is approvable as accessory to an existing building pursuant to 310 CMR 10.28(4); (5) the work is not prohibited by "Coastal Wetland Protection Act"; and (6) the project complies with 310 CMR 10.28(1), sub-sections (a), (b), (c) and (e), and will better comply with sub-section(d) by allowing re-vegetation of some areas, with sub-section (f) by increasing available habitat through dune restoration, and with 310 CMR 10.28(3) sub-sections (a) and (c) by replacing dune materials currently not available to the drift/overwash system.

Among the 37 Special Conditions imposed by the SCC and incorporated by MassDEP pursuant to the MWPA, the following are pertinent to the issues raised by the Petitioners:

- Work demarcation lines must be maintained until all phases of construction are complete (Special Condition 7).
- Construction material storage will be confined within work limits; waste, demolition material and construction debris must be containerized and removed from the Property twice a week. Light materials and debris must be prevented from blowing around the Property and onto neighboring properties and resource areas. (Special Condition 16).
- Site disturbances must be confined to the project limits shown on the approved plan, and marked with high visibility fencing (Special Condition 17).
- All non-driveway areas disturbed must be re-vegetated during the next immediate planting period. No loam may be added to existing soils; only clean washed sand of a similar grain size may be brought onto the site. “Beach grass shall be planted using 3 culms per hole, a minimum of twelve (12) inches on center.” The Applicants must notify the SCC in writing immediately after completion of the re-vegetation, and the planting will be reviewed in the field no sooner than 18 months after it is completed. A 90% survival rate must be realized, and the SCC may require additional plantings. Planting multiple native species of plants is highly recommended, and no fertilizers, pesticides or herbicides can be used within the resource areas. (Special Condition 18).
- The driveway shall be stabilized with washed stone. The existing driveway cannot be expanded. (Special Condition 24).
- Dune renourishment requires the Applicants to restore the dune profile to match the abutting properties horizontally and vertically where the existing structures will be removed. (Special Condition 33).

See Applicants’ Exhibits 5 and 8. (OOC and SOC for File No. SE 66-1745). MassDEP added additional Special Conditions based on its review of the project. These include requirements to: (1) comply with the revised plans; (2) avoid existing dune vegetation; (3) not use timbers treated with creosote as construction material; and (4) make sure wood preservative is dry before any



treated wood is used in construction. Applicants' Exhibit 8, SOC for File No. SE 66-1745 at g. Other.

Both the SCC's and MassDEP's Orders incorporated requirements to address habitat concerns, contained in a November 21, 2016 letter from the NHESP, included with the MEPA Certificate, Applicants' Exhibit 6. In its letter, NHESP advised that the project as proposed "must be conditioned to avoid adverse effects to the Resource Area Habitats of state-listed wildlife species (310 CMR 10.37) and must be conditioned in order to avoid a prohibited Take of state-listed species (321 CMR 10.18(2)(a))." The conditions include:

- time of year ("TOY") restrictions on work, construction materials and equipment from April 1 to August 31;
- a requirement that Dune Restoration must match the existing contours of the abutting dune as closely as possible, as proposed;
- no sand/snow fence on the beach from April 1 to August 31, and no permanent fencing at all, only temporary winter sand/snow fencing from September 1 to March 31;
- a requirement that the Applicants allow regular monitoring for the presence of Piping Plovers and terns and allow any "nests, scrapes, or unfledged chicks to be protected with symbolic fencing (warning signs and twine fencing)";
- a directive that the Applicant contact the Division of Fisheries and Wildlife for a written response regarding impacts to Resource Area Habitats of state-listed wildlife "upon filing for renewal, extension, or amendment" of the OOC.

See Applicants' Exhibit 6, NHESP Letter, November 21, 2016; see also OOC Special Conditions 33 and 34 and SOC Condition g. Other. It was NHESP's opinion that with these conditions included in any order approving the project, the project would not result in an adverse impact to the Resource Areas and will not result in a prohibited Take of state-listed species.

By approving both projects, both the SCC and MassDEP determined that the Applicants' had met their burden of proof pursuant to 310 CMR 10.03(1)(a)2 that the "proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § by complying with the general performance standards established by [the wetlands regulations] for that area."

During the course of MassDEP's review of the projects, triggered by the Petitioners' requests for SOC's,<sup>15</sup> a review was also conducted by the Secretary of Energy and Environmental Affairs ("EEA") pursuant to the Massachusetts Environmental Policy Act ("MEPA"), M.G.L. c. 30, § 61.<sup>16</sup> Comments were received from several state agencies, as well as from the Petitioners and another abutter. See Applicants' Exhibit 6. During the MEPA review, the alternative of moving the house closer to Salt Marsh Road was considered, as suggested by the Petitioners in a March 27, 2017 letter to the EEA Secretary. Id. The EEA Secretary noted in the MEPA Certificate that this alternative increased impacts to the RFA and was hindered by the shape of the lot. Specifically, "[l]ocating a new structure closer to Salt Marsh Road will not reduce impacts to the aforementioned resource areas, but will increase impacts within the Riverfront

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<sup>15</sup> The Petitioners filed their request for the SOC for the septic project by letter dated December 7, 2016 and for the house project by letter dated January 9, 2017. The requests are included among the Department's Basic Documents.

<sup>16</sup> The proposed Project was subject to MEPA (M.G.L. c 30 § 61) because it requires state agency action (by MassDEP) and would result in alteration of a coastal dune. See 301 CMR 11.03(3)(b)(1)(a), part of the MEPA regulations. Relative to the Doyles' projects, the EEA Secretary determined that an EIR was not required. The MEPA Certificate issued for this project is included in the Applicants' Exhibits as Exhibit 6. The Certification "[also] does not mean that a proposed project meets applicable permitting standards." In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. "Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation" as required by MEPA. Id. The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review . . . ." 301 CMR 11.01(1)(b).

Area associated with Old Harbor Creek.” MEPA Certificate at 3, Exhibit 6 to Applicants’ PFT; see also O’Connell PFT at ¶ 54 (“The alternative of relocating the proposed house farther landward towards Salt Marsh Road...would place more of the project farther into the Riverfront Area, as well as would adversely impact existing vegetated Coastal Dune areas that presently are not proposed to be affected.”) The irregular shape of the lot “creates a narrower section closer to Salt Marsh Road, limiting placement of the house and septic system due to setback requirements and other zoning restrictions.” Exhibit 6, MEPA Certificate. The Office of Coastal Zone Management (“CZM”) commented that “[t]he very narrow shape of this lot and the location of the two adjacent neighboring houses severely limit the redevelopment options for this project. Given these existing constraints, CZM believes the reconstruction of this structure on an elevated pile foundation, and the reconstruction of the dune under and in front of the new structure results in an improvement over existing conditions.” See Applicants’ Exhibit 10, MA CZM Comments to MEPA Office, March 27, 2017.

### **III. The Petitioners’ Appeals**

After MassDEP issued the SOCs, the Petitioners timely appealed each permit to the Office of Appeals and Dispute Resolution (“OADR”) pursuant to 310 CMR 1.00 and 310 CMR 10.05(7)(j) by filing a Notice of Claim (“NOC”) for each appeal. In both appeals they claim to be aggrieved. They assert generally that neither project adequately protects the environment, their property, and the interests of the MWPA “as outlined in 310 CMR 10:27-10:29 and 10.03(3).” Petitioners’ More Definite Statement at 1. They make the following specific claims of error and arguments.

A. The Septic System

The Petitioners frame their complaint regarding approval of the septic system as a violation of 310 CMR 15.213(1) and (2) of the Title 5 regulations.<sup>17</sup> They allege that it should be presumed to be feasible to elevate the septic tank above the velocity zone, relying on 310 CMR 213(1) and (2). In their Closing Brief (“Petitioners Brief”) they argue that NOI for the septic system should have been denied “on the basis that a second application was submitted (within two weeks of the septic upgrade application) to raze the existing 1926 with a proposal to build a new home.” Petitioners’ Brief at 3. Therefore, the proposal should not have been approved by the SCC or the MassDEP as an upgrade to the existing system because the new system will be serving a new structure, not a structure in existence as of March 31, 1995.<sup>18</sup> They claim their property rights are adversely affected because the location of the septic system “does not adequately protect [their] property from long term danger due to the sensitivity of the location in a coastal and barrier beach. The potential for flooding as a result of the dune being breached is of real concern and will have a direct long term impact on [their property] if this should happen.” *Id.* at 2.

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<sup>17</sup> 310 CMR 15.00, known as the “Title 5” regulations, govern the siting, construction, upgrade and maintenance of on-site sewage disposal systems such septic systems. These regulations are implemented and enforced at the local level by boards of health/approving authorities, and by the Department under certain circumstances. See 310 CMR 15.003(2); “Local Boards of Health are the primary regulatory authorities. However, MassDEP is involved in certain approvals, including many innovative/alternative technology approvals, shared systems, large systems and many variance requests. In addition, MassDEP is responsible for overseeing local implementation of Title 5 and provides local governments with training and technical assistance.”

<http://www.mass.gov/eea/agencies/massdep/water/wastewater/title-5-general-information-frequently-asked-questions.html>

310 CMR 15.213 governs construction of septic systems in Velocity Zones and Floodways.

<sup>18</sup> I will note that the Title 5 regulations specifically state that “[n]ew construction shall not include replacement or repair of a building in existence as of March 31, 1995 that has been totally or partially destroyed or demolished....” 310 CMR 15.002. As stated above at pp. 8-9, the existing house was severely damaged by storms in 2012 and 2015. As well, photographs of the existing house among the Department’s Basic Documents depict a structure that is partially destroyed, and my own observations confirm this.

The NOC did not specifically state how the septic project as approved and conditioned fails to comply with the wetlands regulations nor did it clearly and concisely identify the alleged errors in the SOC and “how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40.” See 310 CMR 10.01(7)(j)2.b.iii. In their More Definite Statement, the Petitioners did not specifically indicate how the project as conditioned fails to contribute to the protection of the interests of flood control and storm damage prevention identified in the Wetlands Protection Act and the wetlands regulations. They assert in their More Definite Statement, and argue in their pre-hearing and post-hearing memoranda, that placement of the septic system in the proposed location “will cause damage to the environment and [their] property”, basing this argument on Mr. Shea’s opinion that a “new pathway” for ocean waters under the house will result from removal of the existing house from the dune and elevating the new house on piles. Shea PFT at ¶¶ 12-14 (“...new septic is located within the new pathway for the coastal waters from Cape Cod Bay during storm events.”) The Petitioners seek to have the SOC modified so that the septic system is elevated or hung underneath the new house and not placed in the ground, More Definite Statement at p. 4, and have the project remanded to the Department’s Southeast Regional Office for review and modification. Petitioners’ Closing Brief at 4.

B. The House Project

In their appeal of the SOC approving the house project, the Petitioners allege that the SOC does not adequately protect the environment or their property. NOC at 1. They claim that the location of the proposed house “does not adequately protect the dune and poses imminent and long term danger to [their] property and surrounding properties.” Id. They allege that as

proposed, the house project will increase and accelerate erosion of the coastal beach and barrier beach, resulting in an adverse impact to the environment and their property. Id at 2. They seek a Final Order of Conditions that requires relocation of the new house away from the dune. Id. at 3.

They allege that allowing the house to be built in a coastal dune on a coastal beach is inconsistent with 310 CMR 10.27, which states that interrupting the natural processes of the resource area by “human-made structures reduce the ability of the coastal beach to perform” the functions of storm damage prevention and flood control by dissipating wave energy. NOC at 1, quoting 310 CMR 10.27. They claim that the proposed location of the house is within a dune that has been breached in the past and the SOC fails to protect the dune from a breach in the future. They further contend that the SOC fails to provide for adequate vegetative cover for the dune directly beneath the house, exposing their property as well as other properties to excessive erosion and scouring of the coastal beach. Additionally, they allege that the proposed pilings seaward of the dune’s edge “subject the area to scouring thus weakening the dune and setting up further erosion and a possible breach....” NOC at 2. The Petitioners complain, as well, that the project should have considered the alternative of moving the house back from the dune because the current project does not guarantee dune stability.

In their More Definite Statement, the Petitioners, supported by a statement from their expert, Mr. Shea, claim that the project will create a “new pathway” for the coastal waters from Cape Cod Bay through the Applicants’ lot, subjecting the Petitioners’ property to the negative effects of erosion and undermining the vegetation on the lot. In sum, the Petitioners allege that the proposed project will negatively impact the functions of the coastal dune and the ability of the dune to provide storm damage protection, flood control and wildlife habitat, and result in a

permanent loss of established native coastal dune vegetation. They argue that the alternative of relocating the house farther from the ocean should have been required. Mr. Shea testified that all of the alleged harm from the project can be mitigated by moving the house landwards toward Salt Marsh Road. See, e.g. Shea PFR to Mr. Gray, at ¶ 11. Petitioners seek to have the SOC modified to require repositioning of the house back from the coastal dune.

### **ISSUES FOR ADJUDICATION**<sup>19</sup>

The issues to be decided in these appeals were determined at the pre-hearing conference conducted on August 17, 2017 based on the parties pleadings, including the Appeal Notices and the Pre-Hearing Conference Statements, and discussions at the conference, as follows:

1. Whether Petitioners have standing to bring these appeals as “persons aggrieved” as defined at 310 CMR 10.04?
2. If the Petitioners are aggrieved:
  - (a) Whether the proposed septic system project meets the performance standards for construction on coastal dune and barrier beach at 310 CMR 10.28 and 310 CMR 10.29?
  - (b) Whether the proposed house project meets the performance standards for construction on coastal beach, coastal dune, and barrier beach at 310 CMR 10.27 , 310 CMR 10.28, and 310 CMR 10.29?

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<sup>19</sup> Compliance with the performance standards for RFA was not included as an issue for adjudication because neither the Petitioners’ Notice of Claim nor their Amended Appeal Notice/More Definite Statement alleged sufficient facts to state a claim that the proposed projects do not comply with these regulations, 310 CMR 10.58. The SCC found that the septic project was exempt from the regulations. Testimony submitted by the Applicants supports a finding that the activities within the RFA are either exempt from the RFA regulations or constitute “minor activities” with negligible impacts (due to the square footage of alteration). See Gray PFT at ¶¶ 59-64; see also 310 CMR 10.02(2)(a)1 (exempting certain activities within the RFA from regulation).

## **STATUTORY & REGULATORY FRAMEWORK**

### **A. Purpose and Process**

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

M.G.L. c. 131, § 40; 310 CMR 10.01(2).

The Wetlands Protection Act and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter<sup>20</sup> any [wetlands] area subject to protection under [the MWPA

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<sup>20</sup> The Wetlands Regulations at 310 CMR 10.04 define “alter” as “to change the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;



and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity . . . .” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a). “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)”. 310 CMR 10.02(2)(a). A person must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the issuing authority, will alter [any protected wetlands]”, unless the activity is exempt. 310 CMR 10.02(2)(b). The “issuing authority” for wetlands permits is either the local Conservation Commission, in the first instance, or MassDEP when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission’s decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or prohibiting proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id. Similarly, when MassDEP is requested to review a Conservation Commission’s decision and issue a Superseding Order of Conditions, it “shall

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(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

impose such conditions as are necessary to meet the performance standards set forth in [the Wetlands Regulations]...for the protection of [the statutory interests]” 310 CMR 10.05((7)(i).

## **B. Resource Areas**

The wetland resource areas at the project site include coastal dune, coastal beach, barrier beach, LSCSF, Riverfront Area,<sup>21</sup> Buffer Zone to Salt Marsh and Priority Habitat for state-listed species. The regulations pertaining to coastal wetlands are at 310 CMR 10.21 through 10.37. These regulations are “intended to ensure that development along the coastline is located, designed, built and maintained in a manner that protects the public interests in the coastal resources listed in M.G.L. c. 131, § 40.” 310 CMR 10.21. With respect to each affected resource area, the Wetlands Regulations provide the following:

Coastal Dune.<sup>22</sup> A Coastal Dune is “any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash...[and/or] sediment

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<sup>21</sup> As noted above, compliance with the performance standards for RFA was not identified as an issue for adjudication because the Petitioners did not allege noncompliance with these performance standards. Rather, through their expert’s submissions and their memoranda they argue that the alternative of moving the house away from the dune and toward the RFA should have been considered. This ignores the fact that this alternative was considered during the MEPA process, would put more of the project into the RFA, and would impact areas of the site not proposed to be impacted.

<sup>22</sup> The Performance Standards for Coastal Dune at 310 CMR 10.28(3)-(6) provide:

Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

- (a) affecting the ability of waves to remove sand from the dune;
- (b) disturbing the vegetative cover so as to destabilize the dune;
- (c) causing any modification of the dune form that would increase the potential for storm or flood damage;
- (d) interfering with the landward or lateral movement of the dune;
- (e) causing removal of sand from the dune artificially; or
- (f) interfering with mapped or otherwise identified bird nesting habitat.

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such

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deposited by artificial means and serving the purpose of storm damage prevention or flood control.” 310 CMR 10.28(2).

All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach, also known as the Primary Frontal Dune as defined in 310 CMR 10.04, in any area are per se significant to storm damage prevention and flood control. The Coastal High Hazard Area or Velocity Zone extends at a minimum to the inland limit of the Primary Frontal Dune along the open coast. Coastal dunes are also often significant to the protection of wildlife habitat. 310 CMR 10.28(1).

Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be

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work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28(3)(b) through (e). Such an accessory project may include, but is not limited to, a small shed or a small parking area for residences. It shall not include coastal engineering structures.

(5): The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

- (a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;
- (b) fencing and other devices designed to increase dune development; and
- (c) plantings compatible with the natural vegetative cover.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37.

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maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns. Id.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition. Id.

On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding. Id.

A number of birds, most commonly terns and gulls, nest at the base or sides of dunes. In some dune systems other birds also nest in the interdunal area, the species being determined by the plant community structure, topography, and hydrologic regime of the area. In a few dune systems, wet meadows or vernal pool habitats occur, which serve as important feeding areas for a wide variety of bird species. Id.

Coastal Beach.<sup>23</sup> The Coastal Beach consists of “unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bank line, or the seaward edge of existing human-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.” 310 CMR 10.27(2).

Coastal beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions.

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<sup>23</sup> The relevant Performance Standard for Coastal Beach at 310 CMR 10.27(3) provides “[a]ny project on a coastal beach, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.”

Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves. 310 CMR 10.27(1).

A coastal beach at any point serves as a sediment source for coastal areas down drift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore. Id.

Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by human-made structures reduce the ability of the coastal beach to perform these functions. Id.

When coastal beaches are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:

- (a) volume (quantity of sediments) and form; and
- (b) the ability to respond to wave action.

Id.

Barrier Beach.<sup>24</sup> A Barrier Beach is a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is

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<sup>24</sup> The Performance Standards applicable to Coastal Beach and Coastal Dune apply to Barrier Beach. 310 CMR 10.29(3). As well, 310 CMR 10.29(4) provides that “no project may be permitted which will have any adverse effect

separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system. A barrier beach may be joined to the mainland at one or both ends. 310 CMR 10.29(2).

Barrier beaches are significant to storm damage prevention and flood control and are likely to be significant to the protection of marine fisheries and wildlife habitat and, where there are shellfish, the protection of land containing shellfish. 310 CMR 10.29(1).

Barrier beaches protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds and fresh water marshes and ponds, which are in turn important to marine fisheries and protection of wildlife habitat. Barrier beaches and the dunes thereon are also important to the protection of wildlife habitat in the ways described in 310 CMR 10.27(1) (Coastal Beaches) and 10.28(1) (Coastal Dunes). Id.

Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action. The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash and tidal inlet deposition. Barrier beaches in Massachusetts undergo a landward migration caused by the landward movement of sediment by wind, storm wave overwash and tidal current processes. The continuation of these processes maintains the volume of the landform which is necessary to carry out the storm and flood buffer function. Id.

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on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.”

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LSCSF. LSCSF is “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” 310 CMR 10.04.<sup>25</sup>

Wildlife Habitat is an “Area Subject to Protection under the [MWPA], which, due to its plant community, composition and structure, hydrologic regime or other characteristics provides important food, shelter, migratory or overwintering areas or breeding areas for wildlife.” 310 CMR 10.04.

### **THE PETITIONERS’ EVIDENCE**

The Petitioners’ testimony consisted of the testimony of their expert witness, Paul Shea, and identical submissions by the Petitioners concerning the impacts of recent storms on the Petitioners’ property and nearby properties. The Petitioners’ testimony was accompanied by numerous photographs taken at or near the project site, showing the effects of recent severe coastal storms on structures and resource areas at or near the Property. The Petitioners testify that they have witnessed storm damage to their property, abutting properties and other properties along Spring Hill Beach after the North American Blizzard of 2005, and seen their dune erode and their winter beach fence and stairs destroyed in this storm. They have seen the water from the salt marsh come into the street and into other abutting properties’ driveway. Warrington PFT at ¶ 5. They also witnessed storm damage to their property, abutting properties and several

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<sup>25</sup> The wetlands regulations do not contain specific performance standards for LSCSF. Projects in LSCSF are subject to the Coastal Wetlands regulations generally; the wetlands interests to be protected are flood control and storm damage prevention. Matter of Edward Longo, Docket No. 91-001, Final Decision, 1996 MA ENV LEXIS 52 (February 7, 1996), citing Matter of Stephen Whorisky, Docket No. 85-1, Final Decision, 6 MELR 1143, 1157 (March 4, 1988); In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 17, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79.

homes along Spring Hill Beach after Hurricane Sandy in 2012 and the March 2013 Nor'easter. Warrington PFT at ¶ 7, 8. They saw their dune, abutters' dunes and several other properties' dunes severely eroded or lost after the storm. Photographs, Petitioners' Exhibit E; Warrington PFT at ¶ 8

In his testimony, the Petitioners' expert witness, Mr. Shea, described the materials he reviewed to familiarize himself with the projects at issue in the SOC's. These are: (1) the NOI's for both projects; (2) the SOC's; (3) a "proposed project site plan for 18 Salt Marsh Road, Sandwich, MA, Map 77, Parcel 28, prepared by Stephen Doyle and Associates, 42 Canterbury Lane, East Falmouth, MA 02536, and stamped by Stephen J. Doyle, Professional Land Surveyor, on 9-20-16"; (4) the FEMA map dated July 16, 2014; (5) site photographs taken by others; (5) aerial photographs from Google Earth; and (6) the map of record for the subject property located at 18 Salt Marsh Road, Sandwich, MA, dated 1965. Shea PFT at ¶ 6-7.

Mr. Shea testified that the Petitioners' property "will be subject to new erosion impacts from the downgradient flow of coastal storm waters within Lot 7A during storm events" resulting from the loss of mature established vegetation and the creation of a "new pathway" on the Property, under the elevated structure. Shea PFT at ¶¶ 12, 14, 15.d. He testified that the Petitioners' property will be damaged by scouring resulting from the placement of the new house and deck. Shea PFT at ¶ 15.a. He testified that "Lot 7A will be the only residential property along Salt Marsh Road to create the opportunity for the ocean waters of Cape Cod Bay to flow under the house, and then over the Primary Coastal Dune & Barrier Beach." Shea PFT at ¶12.

The crux of Mr. Shea's testimony was that a "new pathway" for ocean waters will be created as a result of a loss of mature, established vegetation from the dune, elevating the new



house on timber piles, and reconstructing an unvegetated dune beneath and adjacent to the house to elevation 15, the Base Flood Elevation. See Shea PFT at 12 (“Existing established mature vegetation currently growing within the primary coastal dune of Lot 7A will be permanently altered and removed, during the construction phase of this new house and septic system”); Shea PFR to PFT of O’Connell at ¶ 8 (“The proposed site plans show the crest elevation of the proposed unvegetated dune under and adjacent to the chosen house location is at the FEMA-mapped Base Flood Elevation of 15 feet NAVD.”)<sup>26</sup>

Mr. Shea testified that:

(“[Elevating the house on piles] will allow the significant flows of coastal waters from Cape Cod Bay to then flow under the proposed house in a southerly direction during storm events, allowing the coastal waters to flow over the new septic system, down the sand & gravel driveway (which encompasses Lot 8A, which is owned by the Warringtons’), down to Salt Marsh Road (seashell & sand & gravel roadway), across Salt Marsh Road (seashell & sand & gravel roadway), to the salt marsh wetland system and Old Harbor Creek, located just to the south of Salt Marsh Road.”

Shea PFT at ¶12; see also Shea PFT at ¶¶ 13, 14, 15, 22, 27, 29 (making reference to the “new pathway” for concentrated flows of ocean waters as the basis for non-compliance with applicable performance standards). Mr. Shea opined that the projects will destabilize the dune, not protect

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<sup>26</sup> Mr. Shea stated that “[t]he bare sand areas under the house and sunroom will NOT be planted with typically required coastal dune plant species, which would anchor the new loose sand deposits down, and to protect the loose unvegetated sand against erosion. With no protective coastal vegetation being planted under the proposed house & sunroom areas located on top of the reshaped and unvegetated dune crest area, the unvegetated dune area will be subject to the forces of erosion. The significant shading impacts from the proposed house & sunroom structures being located on the top of the reshaped unvegetated dune will not allow for the growth of vegetation.” Shea PFR to O’Connell PFT at ¶ 25.

the interests of wetlands protection provided by the resource areas, and damage the Petitioners' property.

He also opined that the projects do not meet the performance standards for any of the resource areas. As to Coastal beach, he testified that this is the case because the house project results in permanent alterations from the timber piles. Shea PFT at ¶ 21. As to Coastal Dune, he opined that this is the case because of the permanent loss of established mature vegetation and permanent physical alteration from the construction activities and use of heavy machinery. Shea PFT at ¶ 21. Mr. Shea's opinions also apply to the impacts of the proposed projects on LSCSF and Barrier Beach. Shea PFT at ¶¶ 23, 24. Although RFA is not among the issues for adjudication, Mr. Shea opined that the projects do not meet the performance standards for RFA because of damage resulting from the "new pathway" for ocean waters. Shea PFT at ¶ 26.

### **PETITIONERS' BURDEN OF PROOF**

#### **A. Burden of Proof on Standing**

The provisions of 310 CMR 10.05(7)(j)2(a) state, in pertinent part, that "[a]ny . . . aggrieved person, if previously a participant in the permit proceedings . . . may request [OADR] review of a[n] [SOC] by filing an Appeal Notice . . . ." There is no dispute that the Warringtons participated in the proceedings before both the SCC and MassDEP. The issue for adjudication is whether they have standing to challenge the SOC's as "aggrieved persons," within the meaning of 310 CMR 10.04 and 10.05(7)(j)(2)(a).

The Wetlands Regulations at 310 CMR 10.04, define a "person aggrieved" as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that

suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.’” In the Matter of Webster Ventures, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, 15, adopted by Final Decision (March 26, 2015); In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B). As the persons challenging the Department’s decision, Petitioners bear the burden of producing credible evidence to support their claim of standing. 310 CMR 10.03(2). An allegation of abstract, conjectural, or hypothetical injury is not sufficient. See Matter of Martin and Kathleen Crane, Docket No. 2008-100, Recommended Final Decision (March 30, 2009), adopted by Final Decision (March 30, 2009); Matter of Charles Doe, Docket No. 97-097, Final Decision (April 15, 1998).

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” In the Matter of Webster Ventures, *supra*, at 16; In the Matter of Thomas Vacirca, Jr., (Recommended Final Decision, 2017 MA ENV LEXIS 22, at 29-30,

(April 11, 2017), adopted by Final Decision (April 18, 2017); In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; Webster Ventures, supra, at 16-17; Vacirca, supra, at 30-31; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); compare Standerwick, 447 Mass. at 37 (plaintiffs’ case appealing zoning decision cannot consist of “unfounded speculation to support their claims of injury”).

All told, in order to demonstrate that they had standing to challenge the Department’s SOC as “persons aggrieved,” the Petitioners were required to put forth a minimum quantum of credible evidence supporting their claim that the SOC’s would or might cause them to suffer an injury in fact which would be different either in kind or magnitude from an injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. See 310 CMR 10.04 and the cases cited above. If the

Petitioners met that minimal evidentiary threshold, their appeals of the SOC's would then proceed "to [the] inquiry on the merits" regarding whether the Department properly issued the SOC's in accordance with by the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441.

### **B. Burden of Proof on the Merits**

In these *de novo* appeals challenging MassDEP's determinations in the SOC's, the Petitioners had the burden of going forward by presenting credible evidence from a competent source in support of their positions. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. . "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source),

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adopted as Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003).

If the Petitioners' initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006). "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d). In sum, if the Warringtons met their burden of production, then they would have the burden of proving by a preponderance of the evidence that the projects do not meet the applicable performance standards in the wetlands regulations at sections 310 CMR 10.28 and 10.29 for the septic system, and 310 CMR 10.27, 10.28 and 10.29 for the house project.

The relevancy, admissibility, and weight of evidence that the Parties introduced in the Hearing is governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. 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. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

### **EVALUATION OF THE PETITIONERS’ EVIDENCE**

In evaluating the evidence presented, my obligation is to determine whether the source of the evidence is competent, whether the evidence itself is credible, and then to weigh the probative value of the evidence in the context of the entire administrative record.

As discussed more fully below, I have determined that the Petitioners have not presented credible evidence from a competent source in support of their claims. The key evidence supporting their claims – that elevating the house will create a “new pathway” for ocean waters to flow –is unsupported by credible evidence. This “new pathway” is the keystone on which the structure of the Petitioners’ case depends.

The Petitioners’ pre-filed testimony is not probative of the issues relating to the wetlands performance standards. Neither Mrs. nor Mr. Warrington presented testimony in support of their claim that the proposed projects do not comply with the applicable performance standards under the wetlands protection regulations. The testimony of their expert, Mr. Shea, suffered from an incomplete understanding, misunderstanding, or intentional disregard of the projects as conditioned and a fatal error of fact. Notably absent from the list of the materials he reviewed in preparing his PFT are the March, 2017 Post-Construction Development Plan and the MEPA

Certificate issued by the Secretary on April 7, 2017. Because of this, Mr. Shea's understanding of the projects was incomplete, his conclusions were based on incomplete or incorrect information, and I do not find his testimony competent or credible. The fatal mistake of fact concerns the elevation of the crest of the reconstructed dune. The explanation for this error became plain after the Hearing.

One week after the Hearing, on November 28, 2017, the Petitioners requested an opportunity for Mr. Shea to submit revised testimony based on "new information." The information they claimed was new was the Post-Development Site Plan dated October 19, 2016, revised through March 23, 2017. Mr. Shea claimed that he had not seen this plan prior to the site visit. I denied the request because this plan was provided by email to the Warringtons on July 24, 2017 as part of the "Basic Documents" sent by Leslie-Ann DeFilippis, Paralegal for the Department's counsel, Elizabeth Kimball. The Plan was also included as Exhibit 9 to the Applicants' Pre-Filed Testimony, which was filed with the OADR on November 1, 2017, and sent to the other parties that same day. It is among the exhibits listed on the Applicants' List of Exhibits included with their testimony. The plan had also been provided to the Petitioners by the Applicants' wetlands expert, Mr. Gray, on March 26, 2017. The plan is referenced at least four times in Mr. Gray's pre-filed testimony, and at least four times in Mr. O'Connell's pre-testimony. Mr. Shea testified in his pre-filed rebuttal testimony that he reviewed both Mr. Gray's and Mr. O'Connell's pre-filed testimony.

On November 29, 2017, the Warringtons renewed their request for Mr. Shea to submit revised testimony based on the Post-Development Site Plan dated October 19, 2016, revised to March 23, 2017. They admitted that the plan was part of the Applicants' pre-filed testimony



submitted on November 1, 2017. They claimed, nonetheless, that in preparing his testimony Mr. Shea reviewed materials in the files of the SCC and the plan was not among those files. The Petitioners asserted “[w]hile this may seem like an unimportant detail we believe it has had an effect on what information our expert has been able to attain [sic] and review in preparation for our appeal.” See Email from the Petitioners, Wednesday, November 29, 2017, 9:38 AM.<sup>27</sup> They stated their belief that the alleged absence of the Plan from the SCC’s files is a “procedural failure that has affected [their] expert’s ability to properly defend [their] appeal....” Id. I denied their request again, on December 1, 2017. Several days later, the Petitioners submitted an electronic mail message to OADR stating that contrary to what they had previously maintained, and based on further review of Mr. Shea’s pre-filed rebuttal testimony, they were mistaken regarding their assertions that Ms. Shea had not reviewed the plan as revised to March 23, 2017. Apparently, he had seen this plan when he reviewed Mr. O’Connell’s PFT, filed on November 1, 2017. See E-Mail message to Ms. Munster from Marcia Warrington, Subject: March Plan, Saturday, December 09, 2017, 5:34 PM.

Mr. Shea did reference the plan in his rebuttal testimony. See Shea PFR to Gray PFT at ¶ 19. If he did, in fact, review it, he nevertheless missed the crucial fact about the crest elevation of the reconstructed dune. The cross-section clearly shows reconstruction to Elevation 18. Throughout his PFR Mr. Shea disputed the Applicants’ witnesses on this crucial fact. In light of the Petitioners post-hearing request, I find the statements in Mr. Shea’s PFT describing what he reviewed to prepare his testimony, and the statement in the Petitioners’ November 28, 2017, 2:11

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<sup>27</sup> The record in this appeal reflects the fact that the SCC was a recipient of the Doyles’ pre-filed testimony, sent by email on November 1, 2017.

PM email message that Mr. Shea was “surprised” to see a plan during the site view that “he was not familiar with”, more credible than the statements made by the Petitioners after it had been made clear to them that this plan had been in their possession as early as March 2017 and had been provided to them multiple times throughout the course of the proceedings on these permits. It was the Petitioners’ and Mr. Shea’s responsibility to ensure that Mr. Shea had complete and accurate materials so that he could prepare his testimony. Because they did not do so, Mr. Shea did not have the benefit of the relevant site plan or the MEPA materials when he drafted his PFT, and the conclusions he drew and the opinions he formed were based on insufficient familiarity with the projects as conditioned, and a significant mistake of fact. Mr. Shea’s conclusion that there will be a “new pathway” under the house depends mostly on his belief that the crest elevation of the reconstructed dune will be at elevation 15, the Base Flood Elevation, and he was mistaken. The dune crest elevation will be elevation 18. Other gaps in his knowledge about the projects, particularly about the construction requirements and conditions relating to revegetation, certainly played a role in undermining his credibility, and the competency of his testimony.

Mr. Shea had an opportunity in his rebuttal testimony to correct his errors and re-evaluate his conclusions based on a complete review of all of the relevant materials. He did not do so. He maintained his opinion throughout his PFR; his review of the revised plan, with the correct information plainly set out in the cross-section, did not alter his conclusion about a “new pathway”. When Mr. Gray identified the error regarding dune elevation in his pre-filed direct testimony, Gray PFT at ¶ 42 (“The highest elevation of the re-created dune will be at elevation 18’ (2’ below the proposed structure at 20’)), Mr. Shea responded

I completely disagree with this statement. Mr. Gray may want to carefully review the project site plans, which he filed with the Notice of Intent application for this project. The proposed project site plans show that the highest elevation of the re-created dune (unvegetated dune) will only be 15', not 18'. The re-created dune (unvegetated dune) elevation at 15' will then be 5' (not 2') below the lowest horizontal structural member elevation – elevation 20 of the proposed house, refer to the project site plans.

Shea PFR to Robert M. Gray at ¶ 7. Mr. Shea further insisted that the crest elevation of the re-created dune would be 15'. Shea PFR to Robert M. Gray at ¶ 15. See also Shea PFR to Testimony of James O'Connell at ¶ 8 ("The proposed site plans show the crest elevation of the proposed unvegetated dune under and adjacent to the chosen house location is at the FEMA-mapped Base Flood Elevation of 15 feet NAVD" and "The proposed reconstruction of the Primary Frontal Dune to an Elevation of 15 (current 100 year flood zone elevation) includes unvegetated dune areas under the proposed Chosen house and sunroom location.") and Shea PFR to Testimony of Maissoun Reda at ¶ 6.a (referring to the re-constructed dune crest elevation as 15'). Rather than acknowledging his mistake and considering whether the correct information changed or confirmed his opinion, Mr. Shea doubled down on the mistake. Consequently, Mr. Shea's testimony at the Hearing lacks credibility and I accord it no weight. I do this for the following reasons.

First, Mr. Shea did not review all of the relevant materials prior to preparing his direct testimony, including the Plan of Record and the MEPA Certificate. His review of the projects as conditioned ignored the numerous conditions imposed on the work to ensure it meets the performance standards. Therefore, I have determined that Mr. Shea lacked "familiarity with the subject matter of [his] testimony." He lacked or ignored crucial factual information regarding the

projects as conditioned, including the proposed dune reconstruction, construction sequencing and related conditions for the projects, and the planned and required re-vegetation at the Property.<sup>28</sup>

Second, given an opportunity in his rebuttal testimony to correct these deficiencies and perhaps reaffirm his conclusions based on the complete factual record, Mr. Shea nonetheless maintained opinions that were grounded in factual errors and omissions. He not only failed to acknowledge the errors, but he insisted he was correct.

Third, throughout his PFT and PFR, Mr. Shea failed to support his statements that the projects' do not meet the applicable performance standards with a factual foundation; his opinions are mere speculation unsupported by credible evidence. While he discussed the performance standards in general terms, he did not provide specific credible evidence that the projects as conditioned fail to comply with them and do not enhance the interests of flood control and storm damage prevention at the Property. Consequently, I do not find his testimony credible nor do I find it probative of any of the issues in these appeals. The Petitioners' case depended on this testimony, and the testimony is not credible.

### **FINDINGS**

Consequent to my determination that the Petitioners have not met their burden of production, I make the following findings.

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<sup>28</sup> See, e.g., Shea PFT at ¶ 28 ("There will be a permanent loss of established native coastal dune vegetation within Lot 7A and Lot 8A from the proposed building activities, use of heavy construction machinery, permanent site alterations, and soil impacts to the loose, unconsolidated sandy soils located within the Primary Coastal Dune & Barrier Beach; there will be undermining of established dune vegetation and long term erosion impacts on adjacent properties, including the Warringtons' property; along with negative construction impacts to the loose, unconsolidated, sandy soils, located within the Primary Coastal Dune & Barrier Beach within Lot 7A, which will destabilize the Primary Coastal Dune."). Special Conditions 19 and 20 in the OOC, and the MEPA Certificate specifically address avoidance or mitigation of Mr. Shea's concerns. Additionally, there is no vegetation where the existing house occupies the dune; the re-constructed dune face will be planted with American Beach Grass. Any areas disturbed by the construction must be re-vegetated and a 90% survival rate ensured. Overall, the property will see a net gain in vegetation.

## **I. THE PETITIONERS ARE NOT AGGRIEVED**

### **A. The Jurisdictional Nature Of Standing**

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), at 13, adopted as Final Decision (July 7, 2015). Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”). As discussed in detail below, I find that the Petitioners lack standing as “aggrieved persons” because they have failed to support their claims of aggrievement with a minimum quantum of credible evidence. See, generally, Matter of Town of Andover, OADR Docket Nos. WET-2011-036 and 039, Recommended Final Decision (January 10, 2012), adopted by Final Decision (January 19, 2012).

### **B. The Petitioners have not met the minimal evidentiary threshold.**

The Petitioners failed to meet this threshold because, as discussed above, the evidence presented to support their claims that the work in the coastal resource areas either doesn’t comply with the regulations at 310 CMR 10.27-10.29 or will adversely impact the statutory interests for these coastal areas is not credible. Nor is there credible evidence to support claims of unique injury to their property caused by the SOC’s. In fact, the Petitioners’ own testimony and

the photographs they submitted support a conclusion that the type of injury they anticipate already occurs, and will not result from the proposed projects.

The Petitioners offered argument to support their claims of standing, but argument is not evidence. As noted above, credible evidence of injury to support a claim of unique injury is absent here. To establish standing, the Petitioners did not need to prove their claims of injury by a preponderance of the evidence, but in these cases the evidence presented does not meet the threshold for “minimum quantum of credible evidence” due to the problems with Mr. Shea’s testimony. The Petitioners’ claims of injury and Mr. Shea’s testimony (which I do not accord any weight) amount to unsubstantiated speculation and conjecture, not grounded in the actual facts.

Because the Petitioners’ claims of injury depend on the existence of a “new pathway” for ocean waters, a claim I do not find credible, as noted above, the Petitioners may not pass through the standing threshold to a hearing on the merits of their claims. I do not find the fact that portions of the existing septic system are located on the Petitioners’ property to be dispositive of this issue of standing in the appeal of the SOC approving the septic project, where the Petitioners have failed to state a claim under the wetlands protection regulations, but rather assert a claim under the Title 5 regulations, see above at pp. 20-21, and below at p. 48, and where there is no credible evidence that they will or might suffer injury as a result of the project.

## **II. The PROJECTS AS CONDITIONED MEET THE APPLICABLE PERFORMANCE STANDARDS AND CONTRIBUTE TO THE RELEVANT STATUTORY INTERESTS.**

Even if the Petitioners had standing, they nonetheless have not put forth credible evidence in support of their substantive claims because, as discussed above, their expert’s testimony lacks credibility, fails to address the specific performance standards, and is conclusory

and speculative. Consequently, they failed to meet their burden of production in support of their positions. By contrast, there is ample credible evidence in the administrative record that the statutory interests of flood control, storm damage prevention, prevention of pollution and protection of wildlife habitat will be enhanced by both projects. Specifically, these interests will be enhanced by upgrading the existing septic system; removing the existing house and the impervious surfaces around it from the coastal dune; elevating the new house on timber piles above the elevation of the flood zone; reconstructing the coastal dune beneath the house to Elevation 18, above the flood zone and matching the contours of the abutting dune; revegetating any disturbed areas; and protecting the wildlife habitat with TOY restrictions on the work and activities that can be conducted during breeding season.

Even if the Petitioners had sustained their burden of production, a preponderance of the credible evidence supports a finding that each project complies with the applicable regulations and protects the interests of the MWPA. As discussed below, the existing house does not comply with 310 CMR 10.28(3) and the proposed septic system, new house project (including the deck, stairs and shed), and dune reconstruction are designed to meet the stringent performance standards of this regulation, as well as 310 CMR 10.27 and 310 CMR 10.29, as applicable. I make these findings based on the testimony of Mr. Gray, Mr. O'Connell, and Ms. Reda, to which the Petitioners have provided no credible rebuttal testimony. As discussed above, Mr. Shea's glaring and uncorrected error regarding the elevation of the reconstructed dune, and his failure to credibly consider the proposed mitigation and the regulatory exemptions for portions of the work, undermines the credibility of his testimony.

### **A. The Septic System**

The Petitioners challenge the septic system project based on alleged non-compliance with 310 CMR 15.00, not 310 CMR 10.00. I explained to them at the pre-hearing conference that the septic system's compliance with the Title 5 regulations is not within the scope of this wetlands appeal. They did not appeal the Sandwich Board of Health's approval of the septic system design to Superior Court. See Macero v. Macdonald, 73 Mass. App. 360 (2008) (case involving appeal of board of health decision to permit construction of septic system in coastal dune; remanded to board for further findings). They have not presented credible evidence in this appeal that the septic system does not comply with the wetlands regulations, and have not met their burden of production on this claim.

On the other hand, a preponderance of the evidence supports the following findings related to the septic system. The septic system meets the performance standards for coastal dune and barrier beach that the work not have an adverse impact on the dune. See 310 CMR 10.28(3)(a)-(f). This is so because the project reduces the number of solid components in these resource areas and thereby reduces the system's interference with the natural migration of the dune Reda PFT at ¶ 17; O'Connell PFT at ¶ 37. In addition, all non-driveway areas that are disturbed will be re-vegetated. This vegetation is critical to protecting the MWPA's interests of storm damage prevention and flood control because the vegetation helps increase dune volume and maintain dune stability, thereby improving the dune's functions. Reda PFT at ¶ 19.

### **B. The House Project**

A preponderance of the evidence supports the following findings related to the house project. Based on the testimony of Mr. Gray, Mr. O'Connell and Ms. Reda, I find that the

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removal of the existing house and the construction of the new house on pilings, and reconstruction of the dune will not adversely affect the coastal dune or barrier beach in contravention of 310 CMR 10.28(3) or (4) or 310 CMR 10.29(3) or (4). See above at pp. 26-27 and 29-30. At present, the existing house does not comply with these regulations because it replaces dune volume; prevents the dune from eroding in response to beach conditions; alters the natural dune form; replaces the dune's vegetative cover; acts as a barrier to dune migration; and replaces an area of potential wildlife habitat. O'Connell PFT at ¶ 35. Gray PFT at ¶ 51. I also find that removing the solid structure and replacing it with 215 cubic yards of sand, planting beach grass, and eliminating existing low-lying areas on the sides of the house as part of the dune reconstruction will stabilize the dune and enhance the dune functions. O'Connell PFT at ¶¶ 71, 80 (noting that the existing low-elevation concrete walk along the east side of the existing house and the non-vegetated area on the west side of the house are potential pathways for storm overwash, and restoring the dune will enhance the interests of storm damage prevention and flood control)

The house project adds vegetation to an area of the dune where no vegetation is presently able to grow. Any vegetation that is disturbed by the construction will be less than what will be planted to replace it throughout the property, and the SOC conditions the project on the vegetation remaining undisturbed. Special Condition 18 in the OOC for the house requires revegetation of all non-driveway areas that are disturbed, as well as the dune slope on the northern side of the property, and further requires a 90% survival rate after 18 months. The SCC may require additional plantings if this benchmark is not met, and highly recommends that the Applicants plant multiple native plants.

Although the Petitioners asserted that the re-constructed dune will wash away because the newly planted vegetation's growth will be hindered by shading from the house and deck, they did not present any specific factual support for this speculative conclusion. See Matter of Militades and Phyllis Tzitzenikos, Docket No. WET-2010-033, Recommended Final Decision (August 3, 2011), adopted by Final Decision (October 12, 2011) (extensive expert testimony regarding growth of new vegetation). For instance, Mr. Shea provided no testimony about the specific plantings that are proposed and their requirements for growth, nor did he testify as to why the light that will penetrate the deck or enter from the sides of the structure will be insufficient for the plantings. As a consequence, the evidence presented by the Applicants is un-rebutted.<sup>29</sup> Mr. O'Connell acknowledged that a small square footage of existing vegetation under the planned sunroom and shed may be affected due to shade. He considers this amount, [150 square feet], negligible<sup>30</sup> to the stability of the dune. O'Connell PFT at ¶ 39. I also note that presently there is no vegetation in the location where the dune will be constructed because the existing house occupies the dune. There is no credible evidence that the dune reconstruction will fail due to the effects of shading.

Because most project-related activities are prohibited during the time of the year when the birds are nesting, see Special Condition 34 (OOC) and Special Condition g. Other (SOC), I find that the project will not have an adverse impact on the dune by interfering with bird nesting

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<sup>29</sup> In many instances, the rebuttal testimony offered by Mr. Shea was a conclusory statement: "I disagree". Such a statement does not tend to disprove the facts given in evidence by the Applicants' witnesses.

<sup>30</sup> 310 CMR 10.23 defines "Adverse Effect" as "a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area to one or more of the specific interests of M.G.L. c. 131, § 40, as determined by the issuing authority. Negligible means small enough to be disregarded."

habitat. Because the existing structure will be removed and the dune reconstructed to match the elevation and contours of the adjacent dune forms, I find that the project will not adversely impact the coastal dune as described in 310 CMR 10.28 (3), but will enhance the dune's ability to serve the functions of storm damage prevention and flood control. For the same reasons, I find that the project meets the performance standards for Barrier Beach at 310 CMR 10.29(3).

I also find that the House project will not adversely affect the coastal beach by increasing erosion, decreasing the volume or changing the form of the coastal beach or downdrift coastal beach. The impact from the eight pilings in the beach, at 3.18 square feet, is considered negligible. O'Connell PFT at ¶ 47. Although Mr. Shea testified that the pilings for the deck will cause scouring of the beach, his testimony was conclusory in nature and ignored the language of 310 CMR 10.23. See note 30 at p. 50. The testimony of the Applicants' experts on this issue is persuasive. O'Connell PFT at ¶ 47; Gray PFT at ¶ 48 (actual disturbance to the beach from the piles and stair posts of 3.18 square feet is negligible and the approved design is consistent with other beach decks approved on Salt Marsh Road). Based on the foregoing, I find by a preponderance of the evidence that the proposed Project would not result in adverse impacts to the fronting and adjacent beaches by increasing erosion of those resource areas by wave reflection and scouring. It therefore meets the performance standards for coastal beach.

A preponderance of the credible evidence presented by the Department and the Applicants demonstrates that the projects will increase and improve the ability of the coastal dune and barrier beach to serve the functions of storm damage prevention and flood control. I attach significant weight to the testimony of the Applicants' expert witness, Mr. O'Connell, a coastal processes specialist with extensive experience, including several years working with the

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Massachusetts Office of Coastal Zone Management. His testimony was unrebutted by any competent or credible expert testimony.

### **CONCLUSION**

The Petitioners have not satisfied their burden of production on any of the issues for resolution, including their claim of standing as “persons aggrieved” As a result, their claims must fail. An overwhelming preponderance of the credible evidence supports a finding that the proposed work in the identified resource areas “will contribute to the protection of the [statutory interests] by complying with the general performance standards established by 310 CMR 10.00 for [those areas]”. 310 CMR 10.03(1)(a)2. See also 310 CMR 10.27, 10.28 and 10.29. The projects will result in an improvement over current development at the property by reducing the direct physical impact to the coastal dune by removing the existing house from the dune itself and erecting the new house on pilings, and removing and upgrading the existing septic system.

As noted throughout the administrative record, particularly in the MEPA Certificate and throughout the testimony of the Applicants’ and Department’s experts, elevating the house above the coastal dune, reconstructing the dune to elevation 18 and matching the contours of the adjacent dunes, and re-vegetating the property will improve conditions at the site for the resource areas, and complies with both FEMA requirements and the state building code for construction in a Velocity Zone, something the existing house does not do.

I recommend that the Department’s Commissioner issue a Final Decision dismissing the appeals because (1) the Petitioners lack of standing as “persons aggrieved”, or alternatively (2) because the Petitioners have not met their burden of going forward as required by 310 CMR 10.05(7)(j)3.b. Alternatively, I recommend that the Department’s Commissioner issue a Final

Decision affirming the SOC's, finding that the preponderance of the evidence demonstrates that the proposed work in the identified resource areas "will contribute to the protection of the [statutory interests] by complying with the general performance standards established by 310 CMR 10.00 for [those areas]". This would result in the Superseding Orders of Condition for each project being affirmed.

Date: 6/26/2018



Jane A Rothchild  
Presiding Officer

### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, 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 Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

## SERVICE LIST

### IN THE MATTERS OF:

**Docket No. WET-2017-015**  
**Docket No. WET-2017-016**

**Jean T. Ricupero**  
**Tom and Karen Doyle**

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DEPARTMENT

**In the Matter of Jean T. Ricupero**  
**In the Matter of Karen and Thomas Doyle**  
OADR Docket Nos. WET-2017-015 and WET-2017-016  
Recommended Final Decision  
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CONSERVATION COMMISSION