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BY EMAIL AND HARD COPY

March 14, 2013

Wayne F. MacCallum
Director
Division of Fisheries and Wildlife
Field Headquarters
100 Hartwell Street, Suite 230
West Boylston MA 01583

Re: In the Matter of 16 Medouie Creek, Nantucket, MA
Docket No. 11-30084-2012-01-RL
NHESP File No. 11-30084
Recommended Final Decision

Dear Director MacCallum:

Enclosed is my Recommended Final Decision in the above entitled MESA adjudicatory appeal. The underlying administrative record for this appeal will also be delivered to you as part of your review of and action on the Recommended Final Decision.

This Recommended Final Decision is being sent by electronic mail to counsel for the parties at the same time.

Sincerely,

Richard Lehan

Richard Lehan
Presiding Officer

Enclosure

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

In the matter of

16 Medouie Creek Road
Nantucket, MA

Docket No. 11-30084-2012-01-RL
NHESP File No. 11-30084

RECOMMENDED DECISION

I. SUMMARY

This appeal arises out of a February 6, 2012 determination made by the Division of Fisheries and Wildlife (the “Division”) pursuant to 321 CMR 10.18 of the MA Endangered Species Act (“MESA”) regulations that a residential home project proposed by the Waters Edge Nominee Trust (the “Proponent”) on property located at 16 Medouie Creek Road in Nantucket would not result in a take of a state-listed species protected under MESA, provided the Proponent complies with the conditions set forth therein (the “Division’s Conditional No Take Determination”). Donal C. O’Brien III and Jonathan B. O’Brien, the trustees of the Katherine Louise Slight O’Brien Qualified Personal Resident Trust, which owns the abutting property, and Donal C. O’Brien Jr. and Katherine Louise Slight O’Brien, who have the legal right under the Trust to use and occupy the property for the remainder of their lives, (collectively, “the Petitioners”), filed an appeal challenging the adequacy of the Division’s Conditional No Take Determination.

In response to a joint motion to dismiss filed by the Division and the Proponent at the prehearing conference, I determined that the Petitioners have standing to proceed with their appeal. The single issue for adjudication in this appeal is whether the Division’s Conditional No Take

Determination is based on a proper application of the Division's MESA regulatory criteria at 321 CMR 10.18 and 10.19 for determining whether a project or activity will result in a take of a state-listed species. The parties' witnesses thereafter filed prefiled written direct and rebuttal testimony, which was followed by the live cross examination of certain of the witnesses.

Based on my evaluation of the evidence in the administrative record for this adjudicatory appeal and for the reasons set forth in this Recommended Decision, I have determined that the Petitioners have not met their burden of showing that the Division's Conditional No Take Determination is based on an improper application of the above referenced MESA regulatory provisions and, therefore, affirm the validity of the Division's action.

II. BACKGROUND

1. The MESA Regulatory Program

The Division has the authority and duty under MESA to identify and list those animals and plants in Massachusetts that the Division determines to be endangered, threatened or species of special concern, and to protect such state-listed species against a "take" caused by projects and activities. *M.G.L.c. 131A and 321 CMR 10.00*. "Take," as defined in the MESA regulations in reference to animals, means "to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding, or migratory activity or attempt to engage or to assist in any such conduct...[d]isruption of nesting, breeding, feeding, or migratory activity may result from, but in not limited to, the modification, degradation or destruction of habitat." *321 CMR 10.02*. "Habitat," in turn, is defined to mean "an area which, due to its physical or biological features, protects or provides important elements for the growth and survival of plants or animals such as food, shelter, or living space, and includes without limitation, breeding, feeding, resting, migratory or overwintering areas." *Id.* Priority habitat is defined in 321 CMR

10.02 as “the geographic extent of habitat for state-listed species.” The definition further explains that priority habitats are delineated based on records of state-listed species observed within the 25 years prior to delineation and contained in the Division’s Natural Heritage and Endangered Species Program (“NHESP”) database. *Id.* The Division’s delineation of priority habitat is also based on the Best Scientific Evidence Available¹ and includes an examination of records of the occurrence of a state-listed species in the context of that species listing status. 321 CMR 10.12(1)-(5).

The performance standard under the MESA regulations for proposed projects and activities is for the proponent to demonstrate that the project or activity does not result in a take of a state-listed species. 321 CMR 10.19. To that end, priority habitats are used as a screening tool that assists the Division (and project proponents) in determining whether a proposed project or activity in these areas will result in a take. 321 CMR 10.01. This screening process is set forth in 321 CMR 10.18 of the MESA regulations and requires a project proponent to submit information to allow the Division to determine whether the proposed project or activity will cause a take of a state-listed species. Thus, while the MESA performance standard in 322 CMR 10.19 requires a proponent to show that their project or activity will not result in a take, the Division makes the final determination on whether that standard has been met pursuant to its review under 322 CMR 10.18.

More specifically, under 321 CMR 10.18(2) the Division has the authority to determine that a proposed project or activity occurring within priority habitat (1) has avoided a take of a state-listed species (and may proceed without further review or conditioning of the project), (2)

¹ “Best Scientific Evidence Available” is defined in 321 CMR 10.02 to mean “species occurrence records, population estimates, habitat descriptions, assessments, peer reviewed scientific literature, documented consultation with experts and information contained in the records of the [NHESP] or other credible scientific reports or species sighting information reasonably available to the [Division] Director.”

may proceed without further review, subject to conditions imposed by the Division, or (3) will result in a take of a state-listed species.

2. *Procedural History*

The Proponent is the owner of a 32 acre parcel of land located at 16 Medouie Creek Road in Nantucket, MA (the “Proponent’s property”). Access to the Proponent’s property is by means of an easement granted to the Proponent to use an existing unpaved road that runs across the Petitioners’ abutting property located at 18 Medouie Creek Road. The Proponent’s property has been mapped as priority habitat by the Division for the Northern Harrier, a bird species that is listed as threatened under the MESA regulations.² As a consequence, in September, 2011 the Proponent filed a request for review by the Division pursuant to 321 CMR 10.18 of a proposed single-family dwelling, garage, guest house, barn, driveway, septic system, well, underground utilities, grading, landscaping, and appurtenant structures on approximately 2.9 acres of the Proponent’s property. The Proponent submitted additional information on the project in response to requests made by the Division in October and November, 2011. The Proponent thereafter submitted a proposed land management plan and draft conservation restriction to the Division in January, 2012.

On February 6, 2012 the Division issued its written determination pursuant to 321 CMR 10.18 on whether the Proponent’s proposed project and activities would result in a take of a state-listed species protected under MESA (the “Division’s Conditional No Take Determination”).³ The Division’s Conditional No Take Determination concluded that the

² The Proponent’s property was also mapped as priority habitat for the Straight Lined Mallow Moth, a state-listed species of special concern. The Fisheries and Wildlife Board, which oversees the activities of DFW pursuant to M.G.L. c. 131, s.1A, voted to delist the Straight Lined Mallow Moth effective February 17, 2012.

³ As explained in my April 24, 2012 Prehearing Conference Report and Order (pp. 6-7), the Division’s February 6, 2012 letter to the Nantucket Conservation Commission and the Proponent contained two separate determinations

Determination”).³ The Division’s Conditional No Take Determination concluded that the Proponent’s project must be conditioned to avoid a take of state-listed species. The Division then determined that if the Proponent complies with the conditions set forth in the Conditional No Take Determination and there are no changes to the project plans, the project will avoid a take of state-listed species. The two key conditions in the Division’s Conditional No Take Determination require the implementation of (1) a conservation restriction on approximately 4.5 acres of Northern Harrier habitat on the Proponent’s property, and (2) a Land Management Plan (“LMP”), divided into six (6) management units, for restoring or improving the quality of habitat for the Northern Harrier on 3.05 acres of the Proponent’s property. The LMP also includes an adaptive management strategy and 3 years of annual monitoring followed by a monitoring report every 5 years for a total of 15 years.

On February 27, 2012 the Petitioners filed an appeal challenging the adequacy of the Division’s Conditional No Take Determination.

Subsequent to the Division’s issuance of its Conditional No Take Determination and the filing of the Petitioners’ appeal, the Proponent submitted a revised project plan to the Division on March 28, 2012. This plan is associated with the driveway portion of the project and shows that there would be no widening or significant work in the portion of the unpaved driveway that is within the area of the Proponent’s easement over the Petitioners’ abutting property, except for a turnout area that would allow vehicles a space along the single-lane driveway for passing.

On April 19, 2012 I conducted a prehearing conference with the parties, which included a discussion with counsel for the parties on the potential issue(s) for adjudication, as identified in

³ As explained in my April 24, 2012 Prehearing Conference Report and Order (pp. 6-7), the Division’s February 6, 2012 letter to the Nantucket Conservation Commission and the Proponent contained two separate determinations regarding the Proponent’s project made pursuant to MassDEP’s wetlands protection regulations and the Division’s MESA regulations respectively. The Division concluded that the same set conditions are needed in order to ensure that the project meets the different performance standards under each of these regulations.

their respective Prehearing Statements.⁴ At the prehearing conference, the Division and the Proponent filed a Joint Motion to Dismiss the Petitioners' appeal due to a lack of standing ("Joint Motion to Dismiss"). On April 24, 2012 I issued a Prehearing Conference Report and Order to the parties, which established the single issue for adjudication set forth in Section III below.

Pursuant to the schedule for adjudication that I established in the Prehearing Conference Report and Order, the Petitioners filed their Opposition to the Joint Motion to Dismiss on May 17, 2012. In a ruling dated July 16, 2012 I denied Joint Motion to Dismiss and established the schedule for adjudication of the Petitioners' appeal, which I further amended on July 25, 2012. The schedule provided for the submission of prefiled written direct and rebuttal testimony by the parties' witnesses, followed by the live hearing portion of the adjudication that is limited to the cross examination of the parties' witnesses based on their prefiled testimony.

The witnesses for the parties who filed prefiled written direct and rebuttal testimony⁵ are as follows:

For the Division:

1. Thomas W. French, Ph.D, an Assistant Director of the Division who is responsible for the management of the NHESP, which administers the MESA regulatory program.

For the Proponent:

1. Robert Kennedy, Ph.D, an ornithologist and a former Director of Natural Sciences at the Maria Mitchell Association in Nantucket, MA.
2. Brian O. Butler, President, Owner and Principal Scientist at Oxbow Associates, Inc.

⁴ At the prehearing conference, counsel for the Petitioners clarified for me that it was the three issues identified in the Petitioner's Prehearing Statement, rather than the ones identified in their Notice of Claim (apart from the threshold issue of standing), which the Petitioner proposed for adjudication.

⁵ In this Recommended Decision, I reference a witness' prefiled direct testimony as "PDT" and their prefiled rebuttal testimony as "PRT".

3. Seth S. Wilkinson, President and Senior Restoration Ecologist at Wilkinson Ecological Design.
4. Arthur D. Gasbarro, III, Professional Engineer and Land Surveyor employed by Blackwell & Associates, Inc.

For the Petitioners:

1. Gerard A. Bertrand, President Emeritus of the Massachusetts Audubon Society.
2. Peter Vickery, Ph.D, an ornithologist and an Adjunct Assistant Professor at the University of Massachusetts at Amherst.
3. Laura A. Schofield, wetland scientist and President of Schofield Freeman, Inc.
4. Daniel C. Mulloy, Professional Engineer and President of Site Design Engineering, LLC.

Consistent with the Amended Schedule for Adjudication dated July 25, 2012, the parties' witnesses filed their prefiled written direct testimony on September 13 and 14, 2012, and their prefiled written rebuttal testimony on October 12, 2012. The cross examination of selected witnesses of the parties⁶ occurred on October 22 and 23, 2012 and on November 19, 2012.⁷

III. ISSUE FOR ADJUDICATION

The issue for adjudication in this appeal is as follows:

⁶ The Division and the Proponent chose not to cross examine any of the Petitioners' witnesses. The Petitioners cross examined the Division's witness, Dr. French, and the Proponent's witnesses, Dr. Kennedy, Mr. Butler and Mr. Gasbarro, but chose not to cross examine Mr. Wilkinson. In this Recommended Decision, I reference a witness' testimony on cross examination as "Cross."

⁷ Subsequent to the cross examination of the parties' witnesses on October 22 and 23, 2012, the outside transcription service used to transcribe the hearing tapes determined that the Division's recording equipment did not capture a portion of the Petitioners' cross examination of one of the Proponent's witnesses, Mr. Gasbarro, on October 23rd 2012. After conducting a conference call with counsel for the parties on November 7th 2012, I determined that Petitioners' counsel must be afforded another opportunity to cross examine Mr. Gasbarro, consistent with the scope of her cross examination of him on October 23rd, so that the entirety of Mr. Gasbarro's cross examination is preserved as part of the administrative record of this adjudicatory proceeding. The re-cross examination of Mr. Gasbarro occurred on November 19, 2012.

Whether the Division properly applied its regulatory criteria at 321 CMR 10.18 and 10.19 when it made its February 6, 2012 determination that the Proponent's proposed project at 16 Medouie Creek Road, Nantucket, MA will not result in a prohibited take of the Northern Harrier, a state-listed species protected under MESA, provided the Proponent complies with the conditions set forth in the Division's Conditional No Take Determination.

IV. FINDINGS OF FACT

Based on all of the evidence presented, reasonable inferences drawn from the evidence, and my assessment of the credibility of the witnesses, the relevance of their qualifications and the specificity of their testimony and supporting evidence, I make the following findings of fact under the topic headings below. Additional findings of fact are included in Section V.

(Discussion/Legal Analysis) of this Recommended Decision, as necessary.

1. *The Northern Harrier*

A. General Biology

1. The Northern Harrier, a species that is listed as threatened under the MESA regulations, is a slim, long-legged, long-tailed hawk, about 40 to 60 cm (16 to 24 inches) in length.

Division's Fact Sheet on the Northern Harrier (Exhibit B to Schofield PDT).

2. The Northern Harrier occurs seasonally throughout most of North America. *French PDT*, ¶ 28. Its preferred foraging habitats include upland grasslands, coastal shrublands, freshwater and salt marshes, and open vegetated agricultural land. *Id.* The Northern Harrier's nesting sites are generally located in clumps of shrubs in the above habitats. *Id.* Northern Harriers nest on the ground in open landscapes in both wetland and upland habitats, with the nest site usually located in a patch of dense, often tall vegetation. *Id.* Northern Harrier nest sites in Massachusetts are usually placed in dense shrub patches. *Id.*

3. In order for upland early successional vegetation communities to remain high quality or suitable habitat for the Northern Harrier, they require active habitat management, such as mowing, burning, or grazing. *French PDT*, ¶ 40. If not actively managed, some of these habitats will succeed into serial stages that are too tall and woody, being dominated by trees, and will no longer provide suitable habitat for Northern Harriers. *Id.*

4. Northern Harriers are “area sensitive,” which means that although they do not necessarily return to precisely the same nesting point, once they have identified a suitable nesting area, they typically return to the vicinity for future breeding efforts. *Vickery PDT*, ¶ 12; *see also French PDT*, ¶ 29. However, given that Northern Harriers are fairly short-lived birds for hawks or raptors, it is often not the same birds that return to particular suitable nesting area. *French Cross, Vol. I, p.1-30, line 23-25, p.1-31, line 1-6.*

5. Northern Harriers can be sensitive to disturbance during courtship, which extends from April to mid-May in Massachusetts, and during egg laying, which extends from late April to early June in Massachusetts. *French PDT*, ¶ 30. Northern Harriers are most sensitive to disturbances at the nest site from about a week leading up to egg laying until the clutch of usually five eggs is complete and incubation begins, and they remain sensitive, but much less so, until the chicks hatch, after which they rarely abandon the nest even after significant disturbance events, so long as the chicks remain alive. *French PRT*, ¶ 15. However, even during these most sensitive periods, only a portion of the females will abandon if they are flushed directly off the nest or even captured at the nest. *Id.*

6. Generally speaking, the most significant factor in the Northern Harrier’s decline has been the destruction of suitable habitat by reforestation of agricultural land and destruction of coastal and freshwater wetlands. *Division’s Fact Sheet on the Northern Harrier (Exhibit B to Schofield*

PDT). In coastal areas, human disturbance may cause some Northern Harriers to abandon their nests. *Id.* In addition, natural factors such as prey abundance, prolonged periods of rain (which may destroy nests and eggs), and predation on eggs and nestlings all affect the breeding success of Northern Harriers. *Id.*

B. Priority Habitat Mapping for the Northern Harrier

7. Priority habitats delineated by the Division pursuant to the requirements of 321 CMR 10.12 are not intended to identify the boundaries of habitat within which development will be prohibited; rather, they are intended to identify the boundaries of areas, outside of which a project or activity can be assumed not to pose a risk of a take to state-listed species. *French PDT*, ¶ 31.

8. As applied to the Northern Harrier, the Division delineates priority habitat only when it has confirmed the presence of a nest site. *French PDT*, ¶ 31. The records of the occurrence of such nest sites have to be within the past 25 years. *French Cross, Vol. I, p.1-21, lines 10-11; see also the definition of priority habitat in 321CMR 10.02, supra, p.2.* The Division's mapping of priority habitat for Northern Harriers may extend out to a maximum of 0.5 miles, including all suitable nesting and foraging habitat within that distance, but excluding areas that do not provide habitat. *French PDT*, ¶ 31.

C. Northern Harriers on Nantucket

9. Nantucket provides a large amount of habitat for Northern Harriers. *French PDT*, ¶ 33. In addition to freshwater and saltwater marshes, Nantucket has extensive areas of shrublands, coastal heathland and sandplain grassland. *Id.* Although the Northern Harrier has been classified as an obligate grassland bird that makes little or no use of other habitat types, on Nantucket more nests are located in dense scrub oak than in wetlands or patches of shrubs in grasslands. *Id.*

10. Of the 30,032 acres comprising Nantucket, 13,237 acres – 44% of the Island – is permanently protected for conservation purposes. *French PDT*, ¶ 34 and Attachment 21. 80% of the Northern Harrier nesting territories on Nantucket documented by avian researcher Rhys V. Bowen in 2008 were located on land permanently protected for conservation, with another 8% located on publicly-owned land used as open space or for mixed use. *French PDT*, ¶ 34 and Attachment 20; see also *Kennedy PRT*, ¶ 3 and Attachment 1. Only 12% of these nesting territories were located on privately-owned land. *Id.*

11. Northern Harriers on Nantucket occur at higher densities and use smaller home ranges than populations located in other areas of North America. *French PRT*, ¶ 3; see also *French PDT*, ¶ 40. The high density of Northern Harriers on Nantucket is made possible by large acreages of good quality foraging and nesting habitat distributed across the entire island, together with a generally robust population of meadow voles and a variety of other supplemental prey species, including, in particular, small species of grassland and shrubland birds. *French PDT*, ¶ 40

12. The largest discrete population of Northern Harriers in Massachusetts is located on Nantucket. *French PRT*, ¶ 1. One of the reasons is because Nantucket lacks many of the natural predators of ground nesting birds found elsewhere in the Northern Harrier's range, such as raccoons, skunks, foxes, coyotes and opossums. *Kennedy PRT*, ¶ 14.

13. As documented in the island-wide surveys by Bowen, the population of Northern Harriers on Nantucket in recent years has ranged from 36 to 53 nesting females – specifically, 43 in 2000, 44 in 2002, 53 in 2003, 36 in 2006, 39 in 2007, and 50 in 2008 (with a mean 44.3). *French PDT*, ¶ 33 and Attachment 20. All of the standards for measuring the population strength of Northern Harrier on Nantucket in 2008 were high, including nest success (77%), mean productivity (3.14 chicks fledged per successful nest; 2.2 for all nests), and nesting density (4.2

nests per 10 sq. km). *Id.* In comparison, breeding densities of other Northern Harrier populations across North America have been less than 2 nests per 10 sq. km. *Id.*

14. The NHESP database contains 319 nest records of the Northern Harrier spread across Nantucket. *French PDT, ¶ 35 and Attachments 22 and 23.* Of these 319 nests, 150 of them (47%) were located less than 312 ft from a local public roadway, some of which are paved and some are not. *Id.*; see also *French PRT, ¶ 11.* As noted below in these Findings of Fact, 312 ft is the distance from the Proponent's proposed driveway to the nearest documented Northern Harrier nest located in the cattail marsh on the east side of the Proponent's property. *Id.* In comparison, the closest nest to a public roadway known to have successfully fledged chicks was only 17 ft away. *French PDT, ¶ 35 and Attachments 23 and 24.*

15. The information in the NHESP database supports a finding that Northern Harriers have successfully nested on Nantucket close to public roads that would likely have much higher traffic volumes than a private driveway. As an example, four Northern Harrier nests in a wetlands complex on the south side of Polpis Road were within 328 ft of this public roadway, with the closest nest located only 138 ft from the road. *French PDT, ¶ 35 and Attachment 25.* In addition, chicks have fledged from two of these nests located 213 ft and 328 ft from the road. *Id. and Attachment 23.*

16. The above finding is further supported by the personal observation of Dr. Kennedy, the Proponent's expert ornithologist, in April, 2012 of a pair of Northern Harriers courting and building their nest within 235 to 300 feet of five homes off of Madaket Road, which he described as a busy road with a parallel bike path less than 450 feet away. *Kennedy PDT, ¶ 18.* Dr. Kennedy testified that these birds did not appear to be impacted/disturbed by the presence of the homes or by the families coming and going and even an occasional dog in the yards between the residences

and the courting birds. *Id.* He further testified that the busy traffic on Madaket Road/Madaket Bike Path had no impact as well, observing that the male Northern Harrier flew directly over Madaket Road to forage on the opposite side of the road from the nest site. *Id.* On cross examination, Dr. Kennedy reiterated that there were “constantly construction vehicles passing by on Madaket Road...not only on Madaket Road...but everything from UPS trucks to construction vehicles...” using adjacent roads. *Kennedy Cross, Vol. I, p.1-8, lines 5-13.*

17. Of the 319 Northern Harrier nest records in the NHESP database, 113 (35%) were located less than 738 ft from a structure. *French PDT, ¶ 36 and Attachment 26.* As noted below in these Findings of Fact, 738 ft is the distance from the nearest known nest to the nearest edge of land clearing for the Proponent’s proposed barn (the nearest proposed building). The nearest Northern Harrier nest to a house on Nantucket known to have fledged chicks was only 103 ft away. *French PDT, ¶ 36 and Attachments 26 and 27.*

18. The outcome is known on the success or failure of 124 of the 319 nest records in the NHESP database. *French PDT, ¶ 37 and Attachments 23 and 26.* More specifically, 111 nests (90%) are known to have fledged chicks, while 13 nests (10%) failed. *Id.* Of the nests built closer than 312 ft from a public roadway, 56 (92%) fledged chicks, and 5 nests (8%) failed. *Id.* Of the nests built less than 738 ft from a house, 37 (95%) fledged chicks and 2 nests (5%) failed. *Id.* Of the nests built more than 738 ft from a house, 74 (87%) fledged chicks and 11 nests (13%) failed. *Id.*

19. The above data from the NHESP database supports a finding, consistent with Dr. French’s testimony, that Northern Harriers on Nantucket that choose to nest closer than 312 feet from a local public roadway, or 738 feet from a house, the distances from the Proponent’s proposed driveway and the edge of the lawn of the nearest structure (the barn), respectively, on the

Proponent's property, do not experience increased levels of nest failure or other forms of disturbance to nesting Northern Harriers that would negatively affect their nesting success or rise to the level of a take under MESA. *French PDT, ¶ 37 and Attachments 23 and 26.*

2. *The Proponent's Project and Property as related to Northern Harriers*

20. The Proponent's property is a 32 acre parcel of land located at 16 Medouie Creek Road in Nantucket, MA. *Proponent's Notice of Intent Application (Attachment 3 to French PDT).* Access to the Proponent's property is by means of an easement granted to the Proponent to use an existing unpaved road that runs across the Petitioners' abutting property located at 18 Medouie Creek Road. *Petitioners' Notice of Claim.*

21. The entirety of the Proponent's property is mapped as priority habitat for the Northern Harrier, but portions of the property, through succession, had grown too dense to provide good habitat for Northern Harriers, even though Northern Harriers on Nantucket do successfully use shrubland habitats as well as more open habitat types. *French PDT, ¶ 45.*

22. The Proponent's proposed project consists of a proposed single-family dwelling, garage, guest house, barn, driveway, septic system, well, underground utilities, grading, landscaping, and appurtenant structures on approximately 2.9 acres of the Proponent's property. *French PDT, ¶14 and Attachment 2.*

23. Of the total 32 acres of land on the Proponent's property, the proposed limits of the project work, including structures and surrounding landscapes, will encompass approximately 2.9 acres (9.1%) of the property, leaving the remaining 29.1 acres (91%) undeveloped. *French PRT, ¶*

2. Most of the area that would be impacted by the project work is covered with dense thickets of shrubs covered with fox grape, poison ivy and greenbrier and as such is poor quality foraging habitat for Northern Harriers. *Kennedy PRT, ¶ 12.*

24. Northern Harriers have the ability to fly greater than 100 km per day and are easily capable of flying considerable distances from their nest site to take advantage of good foraging areas. *Massey et al. (2008) at p.181, Attachment 2 to French PRT and ¶ 3.* Northern Harriers forage by flying low over (usually about 20 +/- feet) suitable habitat and a foraging bird may fly tens of miles a day, repeatedly flying over unsuitable habitat to reach preferred foraging habitat. *Kennedy PRT, ¶ 12.* Since the limits of the Proponent's proposed project work are surrounded by good contiguous foraging habitat, the weight of the credible evidence supports a finding that Northern Harriers will fly around the buildings and landscaped areas if they are heading toward foraging areas on the other side. *French PRT, ¶ 3.* This extra flight distance would have an inconsequential impact on a Northern Harrier's ability to provide food for their chicks. *Id.; see also French Cross, Vol. I, p.1-23, lines 18-20.*

25. The acreage left undeveloped by the Proponent's project will encompass all of the 22.4 acres of wetlands, including all of the cattail marsh on the east side of the Proponent's property. *French PRT, ¶ 2.* As set forth below, this cattail marsh is the only documented Northern Harrier nesting habitat on the Proponent's property. *Id.; see also French PDT, ¶ 38 and Attachments 19 and 28.*

26. Of the 9.6 acres of upland habitat, 6.7 acres (70%) will remain undeveloped. *French PRT, ¶ 2.* In addition, 3.05 acres within those 6.7 acres of upland habitat will be actively managed under the Land Management Plan required by the Division's Conditional No Take Determination to maintain quality Northern Harrier foraging habitat on the Proponent's property. *Attachment 11 to French PDT and ¶¶ 23 and 46; see also Wilkinson PDT, ¶¶ 20- 22.* With the improvement of habitat quality as described in the Land Management Plan, there will be more foraging area closer to historic Northern Harrier nests than exist now. *Kennedy PRT, ¶ 12.* The net effect will be

shorter distances to quality foraging areas than currently exists on the upland portions of the Proponent's property, even assuming future nesting occurs near the property. *Id.*

27. The most recent and closest Northern Harrier nest record to the Proponent's project activities is from 2009, which documented a nest located in the cattail marsh that is approximately 312 feet east of the Proponent's proposed driveway, 738 feet from the proposed barn, 853 feet from the proposed guest house, and 1,099 feet from the proposed main house. *French PDT*, ¶¶ 38 and 41 and *Attachments 19 and 28*.

28. This 2009 nest site is far enough into a dense wet cattail habitat to provide reasonably good protection from direct nest disturbance from most humans and terrestrial mammals. *French PRT*, ¶ 15. Since 2009, there have been no documented nesting of Northern Harriers in the cattail marsh by a professional naturalist. *Kennedy PDT*, ¶ 20.

29. Three other Northern Harrier nest/breeding records in proximity to the Proponent's project work have been found in the same cattail marsh at earlier dates: in 2000, a nest with young was found on Nantucket Conservation Foundation land, approximately 754 feet east of the 2009 nest site; in 2003, another nest was found in the same general location as the 2000 nest; and in 2002, three or more Northern Harrier fledglings were observed on Nantucket Conservation Foundation land 197 feet southeast of the 2009 nest site. *French PDT*, ¶ 39 and *Attachments 19 and 28*.

30. As supported by the fact that the only four nest records in the area of the Proponent's property have been located in the cattail marsh, Northern Harriers likely selected this marsh because it is the most optimal breeding place in the area and is typical of the types of habitats that most published references describe as good nesting habitat for Northern Harriers. *French PRT*, ¶

7; see also Massey, et al. (2008), p.180, Attachment 2 to French PRT (“harriers on Nantucket strongly preferred the herbaceous marsh cover type for nesting habitat”...).

31. When considered in relation to the results of the island-wide surveys conducted by Bowen over a 7 year time period (see *Finding of Fact No. 13* above), the above history of use of the cattail marsh as nesting sites by the Northern Harrier supports a finding that the Polpis Harbor area of Nantucket (where the Proponent’s property is located) provides good habitat for Northern Harriers, but not the best or core habitat on the island. *French PRT*, ¶ 4. Furthermore, the weight of the credible evidence supports a finding that the cattail marsh is used by Northern Harriers when the island-wide population is fairly high but not in years when the population is fairly low. *Id.* In any event, because the cattail marsh is ecologically intact and will not be altered by the Proponent’s proposed project, it will remain available as a successful nesting location for Northern Harriers. *French PRT*, ¶¶ 7 and 4.

32. Given the availability of the cattail marsh and its documented history of use for nesting by Northern Harriers, the weight of credible evidence supports a finding that it is unlikely that a pair would choose to nest in an upland area of the Proponent’s property. *French PRT*, ¶ 13.

33. In terms of the effects of disturbances to Northern Harriers depending on the type of habitat they were nesting in, the data in Massey et al. (2008) supports a finding that in upland habitats, Northern Harriers avoided development within 500 meters (1,640 feet); when nesting in their preferred herbaceous marsh habitat, Northern Harriers were able to tolerate development greater than 50 meters (164 feet) away. *Massey, et al. (2008), p.181, Attachment 2 to French PRT; French PRT*, ¶ 13.

34. The distances between the Proponent’s proposed driveway and the nearest structure (the barn) are about 321 feet and 738 feet respectively from the nearest known Northern Harrier nest

site in the cattail marsh, both of which are significantly farther away than the minimum 50 meter (164 foot) buffer needed for Northern Harriers nesting in a herbaceous marsh. *French PRT*, ¶ 13.

35. Data from Massey et al (2008), as summarized in *Finding of Fact No. 33*, and in the NHESP database, as summarized in *Finding of Fact Nos. 14, 15, 17 and 18*, support a finding that Northern Harriers nesting in herbaceous marsh habitats tolerate distances associated with buildings, public roads, and other activities at distances that are closer than those associated with the Proponent's proposed project. *French PRT*, ¶¶ 14 and 16. The weight of this and other credible evidence in the record support a further finding that the temporarily elevated level of traffic required to complete the project, including the presence of construction workers, heavy equipment, material deliveries and concrete mixers, will not disrupt the behaviors of Northern Harriers nesting as close as the nearest documented cattail marsh on the east side of the Proponent's property. *French PRT*, ¶ 16; see also *Kennedy Cross, Vol. I, p.1-16, lines 5-10*.

3. ***The Division's Approach to Take Determinations under MESA***

36. In determining whether a project or activity occurring within priority habitat will result in a take under the MESA regulations, the Division considers the degree of risk and impact to the affected state-listed species. More specifically, to rise to the level of a take, the Division must find that a given project or activity poses a *significant* risk of direct mortality, harassment, harm, and/or disruption of nesting, breeding, feeding, or migratory activity to a state-listed species. In making its determination, the Division considers "significant" to mean more than *de minimus*. For the Division, a *de minimus* increase in the risk of direct mortality, harassment, harm, and/or disruption of nesting, breeding, feeding, or migratory activity is a risk that the Division determines is small enough to be disregarded. *French PDT*, ¶ 12.

37. As applied to Northern Harriers, the Division's position is that the impact associated with a given project or activity is small enough to be disregarded if the project or activity will not significantly decrease the abundance, distribution, survivorship, reproductive success, or recruitment of individuals of the Northern Harriers at the site of the project or activity, or diminish the ability of the Northern Harrier to utilize any significant portion of its habitat at the site. *French PDT*, ¶ 13.

38. By way of example, the Division would regard the occasional flushing of a Northern Harrier from its nest, as might arise from a passing vehicle, as resulting in little, if any, increase in the risk of nest abandonment and chick death and, therefore, this effect would not rise to a take of the Northern Harrier. In comparison, more serious disturbances that result in nest abandonment and the loss of eggs or chicks would, in the Division's view, rise to a take of the Northern Harrier. *French PDT*, ¶ 13.

39. The Division has applied the approach to take determinations described in Dr. French's testimony, as summarized in above Findings of Fact, to project and activities it has reviewed under MESA since 1992. *French Cross, Vol I, p.1-21, lines 19-23.*

4. *The Division's Conditional No Take Determination on the Proponent's Project*

40. On February 6, 2012 the Division issued its written determination pursuant to 321 CMR 10.18 on whether the Proponent's proposed project and activities would result in a take of a state-listed species protected under MESA. The Division found that the Proponent's project, as then proposed, must be conditioned to avoid a take of state-listed species. *Division's Conditional No Take Determination, p.3 (Attachment 13 to French PDT); see also French PDT, ¶ 23.* The Division then determined that if the Proponent complies with the conditions set forth in the

Conditional No Take Determination and there are no changes to the project plans, the project will avoid a take of state-listed species. *Id.*

41. The first of the two main conditions required by the Division's Conditional No Take Determination specifies that prior to the start of work, the Proponent shall submit proof to the NHESP of the filing a draft conservation restriction ("CR") with the Division of Conservation Services in the Executive Office of Energy and Environmental Affairs ("EEA"), which shall be in substantially the same form as the draft CR submitted to the NHESP on January 27, 2012. Prior to the start of work, the Proponent shall also monument the boundaries of the CR area as shown on the plans approved by the NHESP. *Division's Conditional No Take Determination, p.3; see also Attachment 12 to French PDT.*

42. The Division further required that any changes to the CR (other than typographical or grammatical changes) must be approved in writing by the Division before the changes are submitted the Secretary of EEA. The Division's Conditional No Take Determination states that the CR shall be executed and recorded in the applicable Registry of Deeds or the Land Court no later than six (6) months from the initiation of work, and work shall cease if the CR is not recorded and copies provided to the NHESP by this date (unless the NHESP extends the date for the reasons specified in this condition). *Division's Conditional No Take Determination, p.3; see also Attachment 12 to French PDT.*

43. The required CR is to be granted to the Nantucket Conservation Foundation and will permanently protect approximately 4.5 acres of the Proponent's property located between all three of the proposed project structures and the previously documented Northern Harrier nest sites in the cattail marsh. This CR will also ensure that certain parts or larger portions of the Proponent's property are not developed at a later time and/or by a different owner, in violation of the non-

segmentation provisions in the MESA regulations, and that the scale and location of development on the property will remain approximately the same as when it was reviewed by the Division.

Division's Conditional No Take Determination, p.3; see also Attachment 12 to French PDT and ¶¶ 23, 43 and 45.

44. The second main condition in the Division's Conditional No Take Determination requires the implementation of a Land Management Plan prepared by the Proponent's consultant, Wilkinson Ecological Design, dated January 25, 2012 (the "LMP"). *Division's Conditional No Take Determination, p.3.* More specifically, the LMP provides for the restoration and/or management of approximately 3.05 acres of Northern Harrier habitat divided into six (6) management areas (A through F). Management area E, approximately 1.5 acres, and management area F, approximately 0.7 acres, are within the 4.5 acre area that will be permanently protected by the required CR. The other four management areas (A through D), totaling approximately 1.49 acres, are located outside of the CR area. *Attachment 11 to French PDT and ¶¶ 23 and 46; see also Wilkinson PDT, ¶¶ 20- 22.*

45. All work within the above land management areas, excluding the installation of the septic system, must adhere to the LMP and any subsequent changes thereto must be pre-approved in writing by the NHESP. *Division's Conditional No Take Determination, p.3.*

46. These six management areas are the areas of Northern Harrier foraging habitat on the Proponent's property that are the most degraded by invasive plant species, but are surrounded by higher quality Northern Harrier foraging habitat. *French PRT, ¶ 22; see also Wilkinson PRT, ¶ 14.* The overall purpose of the LMP is to enhance the value of those areas for foraging Northern Harriers by reducing the dominance of these invasive plants, and to push back the successional stage of these sites by reducing the amount of woody vegetation and managing for a sandplain

grassland community with discrete patches of maritime shrubs. *French PRT*, ¶ 19; *see also French PDT*, ¶ 46.

47. Sandplain grasslands are a globally threatened natural community and provide much better habitat for Meadow Voles than do shrubland communities. *French PRT*, ¶ 19. Because in coastal Massachusetts the nesting success of Northern Harriers depends most significantly on the availability of Meadow Voles (supplemented by shrubland and grassland songbirds), improving the habitat for Meadow Voles improves the habitat for Northern Harriers. *Id.*; *see also French Cross, Vol. I, p.1-24, lines 18-23, and Kennedy PRT*, ¶ 6.

48. Depending on the management area and time of year, these LMP objectives will be accomplished using management techniques ranging from cutting, mowing, mechanical and hand root pulling and the application of herbicides to kill invasive plants. *French PRT*, ¶ 18; *see also Wilkinson PDT*, ¶ 22.

49. The LMP also includes an adaptive management strategy and three years of annual monitoring followed by a monitoring report every five years for a total of 15 years. *French PDT*, ¶

23. The timeline in the LMP outlines the most advantageous time of the year to implement management activities such as invasive species removal, rotational mowing and reseeding.

Wilkinson PDT, ¶ 23. A treatment approach based on seasonality ensures that the goals of maintaining and enhancing open habitat on the Proponent's property can be met with a minimum of disturbance and the highest rate of success. *Id.*

50. By way of illustration, in the first year the opening and most intensive phase is planned for winter, outside of the Northern Harrier nesting season. *French PRT*, ¶ 18. The second phase calls for the mowing of grassland habitats to reduce woody vegetation and is scheduled for March, which is well before nest occupation and egg laying by Northern Harriers. *Id.* The third phase is

scheduled for early June, which is within the chick rearing period, but the management activity will involve the cutting of Phragmites, which does not provide good foraging habitat for Northern Harriers. *Id.* The fourth phase calls for the second mowing of grassland habitats in August, after all chicks have fledged. *Id.* The final phase for the first year occurs in the fall, after the nesting season and when the chicks are independent and dispersed from their natal territories, and involves continuing the management treatments in all management areas and to mechanically uproot or hand-pull woody invasive plants. *Id.* Management activities in successive years will get progressively less intense and frequent until they become maintenance activities that are done on a rotational schedule every few years. *Id.*; see also *Wilkinson PRT*, ¶ 5.

51. None of the areas subject to the LMP are currently utilized by Northern Harriers as nesting habitat, and no land management activities are proposed for the cattail marsh where the previously documented nest site were located. *Wilkinson PRT*, ¶¶ 5 and 6. The absence of LMP activities in the cattail marsh will avoid the possibility of direct nest destruction. *French PRT*, ¶ 20.

52. The LMP proposes to use a Triclopyr-based herbicide, which has two forms. *Schofield PDT*, ¶ 22. Both forms of Triclopyr are approved for use in Massachusetts, and one of them is on the list of herbicides allowed in sensitive areas by the Massachusetts Department of Agricultural Resources. *French PRT*, ¶ 21. The weight of the credible evidence supports a finding that as long as the legal requirements for applying these herbicides are followed, none of them will harm Northern Harriers. *Id.*

53. The LMP was voluntarily proposed by the Proponent and agreed to as a condition of the Division's Conditional No Take Determination and was not considered by the Division to be

necessary to support its Conditional No Take Determination. *French PDT*, ¶ 46 and *French Cross*, Vol. I, p.1-26, lines 3-7.

54. In his prefiled direct testimony, Dr. Kennedy opined that if the access road improvements were made from September through mid-March, they would have no impact on nesting birds since they would not be nesting then. *Kennedy PDT*, ¶ 21. On cross examination, Dr. Kennedy acknowledged that this sort of timing restriction was not included as a condition of the Division's Conditional No Take Determination, but explained that his prior testimony "wasn't a recommendation for timing of construction or anything like that...[i]t's just that if the construction did happen during that time period, there would be absolutely no disturbance to the birds." *Kennedy Cross*, Vol. I, p.1-7, lines 10-16; see also p.1-20, lines 18-25. On cross examination, Dr. French testified that the Division would have included such a timing restriction related to the road improvements if it thought the possibility of disturbance was significant or created a significant risk. *French Cross*, Vol. I, p.1-15, lines 9-16. I find that the weight of this and other credible evidence in the record support a finding that while a timing restriction on the road improvements would eliminate all possibility of disturbance to nesting Northern Harriers, it was not necessary to prevent a take of the Northern Harrier.

55. Dr. French testified that of all the activities related to the Proponent's proposed project that could plausibly cause disruption to nesting Northern Harriers, it would be the four days of road improvement work that occurred about a week before the initiation of egg laying through about the first week of incubation, but only if that year the nest was located relatively close to the Proponent's driveway. *French PRT*, ¶ 16. Dr. French opined that the probability of these four days of road repair falling into this more sensitive window, and in a year when the nest was located fairly close to the driveway is extremely low. *Id.* On cross examination, Dr. Kennedy concurred

with Dr. French's opinion, adding that since the Northern Harriers have only nested in the cattail marsh four out of seven years that have been documented, the Harriers may not even be in the marsh. *Kennedy Cross, Vol. I, p.1-21, lines 20-25, p.1-22, lines 1-8*. I find that the weight of credible evidence supports a finding that the probability of the above scenario occurring is extremely low and does not constitute a sufficient basis for concluding that these road activities will cause a take of nesting Northern Harriers.

56. On February 27, 2012 the Petitioners filed an appeal challenging the adequacy of the Division's Conditional No Take Determination.

57. The Proponent's March 28, 2012 revised project plan, which scaled back the work proposed in the easement area, was not before or known to the Division at the time it made its Conditional No Take Determination. *French Cross, Vol. I, p.1-12, lines 11-24 and p. 1-13, lines 1-8*. Because the Division did not thereafter disapprove these plan changes that further minimized the project impact, it is reasonable to infer that the Division did not object to them. *French Cross, Vol. I, p.1-28, lines 13-16*.

V. DISCUSSION/LEGAL ANALYSIS

1. Standard of Legal Review Governing this Adjudicatory Appeal

As a threshold matter, the standard of legal review governing this adjudicatory appeal centers on who has the burden of proof. The burden of proof is a device for allocating to one party the burden of persuading the decision maker. *Office of the Attorney General Manual for Conducting Administrative Adjudicatory Proceedings (2012 Edition), p.4*. The party with the burden of proof must show by the "clear weight" or the "preponderance" of the credible evidence that their position is justified or else a decision will be granted in favor of the opposing party. *Id.*, citing *Medical Malpractice Joint Underwriting Association of Mass. v. Commissioner of*

Insurance, 395 Mass. 43, 46 (1985). The burden of proof in an adjudicatory proceeding does not shift but rather remains with the same party throughout. *Office of the Attorney General Manual for Conducting Administrative Adjudicatory Proceedings* (2012 Edition), p.5, citing 19 K.B. Hughes, Massachusetts Practice: Evidence, §23 (1961).

In the instant case, the MESA regulations⁸ “clearly place the burden of proof on the party aggrieved by the [Division’s] final determination.” In the Matter of Plymouth Long Beach Management Plan, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, Recommended Decision II, p. 30 (December, 2010), adopted as the Division’s Final Decision (June, 2011); see also In the Matter of South Road, Lots 11 and 12, NHESP File No. 07-21460, Recommended Decision, p. 15 (July, 2009), adopted as the Division’s Final Decision (August, 2009).

A petitioner in an MESA adjudicatory proceeding is required to establish by a preponderance of the evidence that the petitioner is entitled to a favorable decision. In the Matter of Plymouth Long Beach Management Plan, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, Recommended Decision II, pp. 31-32 (December, 2010), adopted as the Division’s Final Decision (June, 2011), citing 28 Mass Practice, §243, Tarta’s Case, 328 Mass. 585 (1952), and Matter of Cormier Construction Co., Final Decision, 1 DEPR 159, 160 (1994). Notwithstanding any doubts that may linger with the fact-finder, a proposition is proved by a preponderance of the evidence if such proposition has been made to appear more likely or probable after weighing all the evidence. In the Matter of Plymouth Long Beach Management Plan, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, Recommended Decision II, p. 32 (December, 2010), adopted as the Division’s Final Decision (June, 2011), citing Sargent v. Massachusetts Accident Co., 307 Mass. 246 (1940).

⁸ Under 321 CMR 10.25(3)(b), a notice of claim for an adjudicatory hearing must include a “clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of the Division and the basis for those objections.”

The party initiating the adjudicatory appeal must produce competent evidence from a credible source sufficient to meet their burden of proof. *Id.*, citing Matter of Nelson, 6 DEPR 120, 123 (1999). Proof by substantial evidence is the standard generally applicable to administrative proceedings. *In the Matter of South Road, Lots 11 and 12*, NHESP File No. 07-21460, *Recommended Decision*, p. 15 (July, 2009), adopted as the Division's Final Decision (August, 2009), citing Craven v. State Ethics Commission, 309 Mass. 191 (1983). As provided in M.G.L. c. 30A, §11(2), substantial evidence requires that agency findings rest on such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*, citing Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37 (1977).

When challenging an agency action, a petitioner must do more than simply speculate, make unsupported allegations, and rely on unsubstantiated arguments; "speculation, even by an expert witness, is not proof from a competent source" to support an allegation. *In the Matter of Plymouth Long Beach Management Plan*, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, *Recommended Decision II*, p. 32 (December, 2010), adopted as the Division's Final Decision (June, 2011), citing Matter of Hoosic Wind, DEP-05-124, 2007 WL 1074631, p. 14.

2. Discussion/Legal Analysis

As stated more specifically in Section III, the issue for adjudication in this appeal is whether the Division's Conditional No Take Determination is based on a proper application of the Division's MESA regulatory criteria at 321 CMR 10.18 and 10.19 for determining whether a project or activity will result in a take of a state-listed species. In a nutshell, the Division determined that the Proponent's project would avoid a take of the Northern Harrier if the Proponent complied with the conditions in the Division's Conditional No Take Determination.

The MESA regulations at 321 CMR 10.18(2)(a) expressly authorize the Division to make conditional no take determinations, i.e., to allow a project, subject to conditions imposed by the Division, to proceed without further review under MESA. I note that at the outset of this appeal, the Petitioners' Notice of Claim identified as a legal issue whether the Division has the authority to make conditional no take determinations. The Petitioners characterized the Division's approach as conditioning a project to avoid the need for a conservation and management permit authorizing a take. While the Petitioners' appeal did not address the Division's authority in 321 CMR 10.18(2)(a), I interpret their claim as, in effect, arguing that the Division does not have authority under the MESA statute to issue conditional no take determinations as provided in the MESA regulations. As stated in footnote 4, *supra*, at p.6, the Petitioners later clarified for me that their Prehearing Statement, which did not include this legal issue, set forth the issues they were proposing for adjudication. Regardless, it is well settled that I do not have the subject matter jurisdiction as a Presiding Officer to adjudicate the validity of the Division's regulatory authority under 321 CMR 10.18(2)(a). See *In the Matter of Plymouth Long Beach Management Plan*, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, *Recommended Decision II*, p. 30 (December, 2010), adopted as the Division's Final Decision (June, 2011).

More specifically, G.L. c. 30A, § 7 provides that review of an agency regulation is by way of an action in the courts for declaratory relief in accordance with G.L. c.231A, unless otherwise provided by law. *In the Matter of South Road, Lots 11 and 12*, NHESP File No. 07-21460, *Decision on Motion of Division of Fisheries and Wildlife to Dismiss* (July, 2009), p. 4, citing *Ryan v. Kehoe*, 408 Mass. 636 (1990). A Presiding Officer may not act on a challenge to the substantive validity of agency regulations of general application, as opposed to the peculiar application of those agency regulations to the party, and that party's remedy is by a judicial action

for declaratory relief. *Id.*, p. 4, citing Beth Israel Hospital Association v. Rate Setting Commission, 24 Mass.App.Ct. 495 (1987); see also Salisbury Nursing & Rehabilitation Center, Inc. v. Division of Administrative Law Appeals, 448 Mass. 365 (2007) and Medi-Cab of Massachusetts Bay, Inc. v. Rate Setting Commission, 401 Mass. 357 (1987).

The Petitioners expressly challenge the Division's long-standing interpretation of the MESA regulatory definition of "take," which centers on whether the proposed project or activity poses a risk to a state-listed species that is *de minimus* (i.e., small enough to be disregarded) or significant, with the latter effect rising to a "take" of a state-listed species. See, e.g., *Bertrand PRT*, ¶¶ 1 – 4 and *Petitioners' Proposed Conclusions of Law*, ¶ 10. In the same way that a determination of the validity of an agency regulation is by way of an action in the courts for declaratory relief in accordance with G.L. c.231A, unless otherwise provided by law, the Petitioners' facial challenge to the Division's consistent interpretation and application of the take definition in the MESA regulations is outside the scope of this adjudicatory appeal. In the Matter of Plymouth Long Beach Management Plan, Docket No. 08-24100-10-DH, NHESP File No. 07-21460, *Recommended Decision II*, p. 30 (December, 2010), adopted as the Division's Final Decision (June, 2011), citing Henderson v. Commissioners of Barnstable County, 49 Mass.App.Ct. 455, 458 (2000). Accordingly, I have no jurisdiction to rule on the Petitioners' claim that the Division's long-standing interpretation of its regulatory "take" definition violates the MESA statute.

Returning again to the issue for adjudication, the MESA regulatory criteria at 321 CMR 10.18 and 10.19 requires the Division to determine whether the project as proposed will result in a take, and if so, whether it can be conditioned by the Division to avoid a take. In the instant case, the Division concluded that the Proponent's project must be conditioned to avoid a take of the

Northern Harrier. Dr. French's testimony discusses as well as summarizes the key factors considered by the Division in deciding that the project, as conditioned in its Conditional No Take Determination, would avoid a take of the Northern Harrier. *See, in particular, French PDT, ¶¶ 45-46.* This is a good framework for me to discuss in more detail below my assessment of the validity of the Division's Conditional No Take Determination. In doing so, I will reference relevant Finding of Facts and other evidence to the record, as needed, keeping in mind that for the reasons summarized above in Section V.1., the Petitioners have the burden of proof in this appeal, and are required to establish by the clear weight of the evidence in the record that the Division's Conditional No Take Determination violated 321 CMR 10.18 and 10.19.

An important consideration for the Division in evaluating the effect of the project on the Northern Harrier was the scope and locations of the project work in relation to the Proponent's property as a whole. The evidence shows that of the total 32 acres of land on the Proponent's property, the proposed project work (buildings, driveway, landscaped areas) will encompass only 2.9 acres (9.1%) of the property, leaving the remaining 29.1 acres (91%) undeveloped. *Finding of Fact No. 23.* The acreage left undeveloped by the Proponent's project will encompass all of the 22.4 acres of wetlands, including all of the cattail marsh on the east side of the Proponent's property that is the only documented Northern Harrier nesting habitat on the Proponent's property. *Finding of Fact No. 25.*

The Petitioners' witnesses, Mr. Bertrand and Dr. Vickery, opined that the impact of the project will actually be "at least 50 acres of Northern Harrier habitat" and "well beyond the 2.9 acre limit of work footprint" respectively. *Bertrand PDT ¶ 10; Vickery PDT ¶ 10.* However, I accorded their opinions limited weight because they were speculative and unsupported by specific, credible evidence. Instead, I find that the weight of credible evidence in the record supports the

Division's assessment that the Proponent's project is a relatively low-density use that will leave most of the property available to Northern Harriers for foraging.

Crucial to the Division's evaluation of the project was also its determination that all of the proposed structures, driveway and project activities will be far enough away not to disrupt nesting that may occur at any of the previously documented Northern Harrier nest sites. The Division reasonably relied on occurrence records in the NHESP database to identify and determine the distances between historic nest locations and the Proponent's project activities. The most recent (2009) and closest nest is located in the cattail marsh that is approximately 312 feet east of the Proponent's proposed driveway, 738 feet from the proposed barn, 853 feet from the proposed guest house, and 1,099 feet from the proposed main house. *Finding of Fact No. 27.* The other three Northern Harrier nest/breeding records in proximity to the Proponent's project work have been found in the same cattail marsh at earlier dates. *Finding of Fact No. 29.* Since the only four nest records in the area of the Proponent's property have been located in the cattail marsh, Northern Harriers likely selected this marsh because it is the most optimal breeding place in the area and because Northern Harriers on Nantucket strongly prefer this type of herbaceous marsh for nesting. *Finding of Fact No. 30; see also Finding of Fact No. 31.*

Given this history and because the marsh will not be altered by the Proponent's project, there is substantial evidence in the record to conclude that it is unlikely that Northern Harriers would choose to nest anywhere else on the Proponent's property. *Findings of Fact No. 32 and 33.* While Dr. Vickery opined in general terms that the entire Polpis Harbor area constitutes excellent Northern Harrier habitat, none of the Petitioners' witnesses offered specific, credible evidence that challenged or persuasively rebutted the Division's documentation of the historic nest locations in

proximity to the Proponent's property or the Division's conclusion that the marsh is the only location where Northern Harriers are likely to nest in the future.

The Division also analyzed information in the NHESP database on the 319 nest records of the Northern Harrier on Nantucket to support its determination that Northern Harriers that choose to nest closer than 312 feet from a local public roadway, or 738 feet from a house (the relevant distances from the Proponent's project activities) do not experience increased levels of nest failure or other forms of disturbance to nesting Northern Harriers that would negatively affect their nesting success or rise to the level of a take under MESA. *Findings of Fact No. 14, 15, 17, 18, and 19; see also Dr. Kennedy's supporting personal observations summarized in Finding of Fact No. 16.* While the Division acknowledged that the above underlying assumption in its Conditional No Take Determination was based on their experience gained from reviewing other projects in Northern Harrier priority habitat, I agree with Dr. French that the Division's retroactive analysis of the information in the NHESP database supports the reasonableness of its conclusion that the project setbacks are sufficient to avoid a take. *See French Cross, Vol. I, p. 1-29, lines 23-25, and p. 1-30, lines 1-3.*

Another important site-specific consideration in evaluating the effects of disturbances to Northern Harriers is the type of habitat they nest in. Dr. Vickery's testimony interpreted the Massey et al. analysis (on p.181) to support his argument that it is likely that the Proponent's project, to be located in upland, will encroach on the 50 to 500 meter distance(s) discussed in Massey et al. *Vickery PDT*, ¶ 17. However, I concur with Dr. French's reading of Massey et al., which identifies different tolerance-to-disturbance distances, depending on whether the nest is located in wetland habitat or in upland habitat. *French PRT*, ¶ 13. As stated in *Finding of Fact No. 33*, the data in Massey et al. (2008) supports a finding that when nesting in their preferred

herbaceous marsh habitat, Northern Harriers were able to tolerate development greater than 50 meters (164 feet) away, as compared to nesting in upland habitats where Northern Harriers avoided development within 500 meters (1,640 feet).

Again, as discussed above, given the history of Northern Harrier nest locations in the cattail marsh only - a preferred habitat that will not be altered by the Proponent's project - it is reasonable to assume that they will not select an upland nesting location on the site of the Proponent's project. In addition, it is undisputed that all of the Proponent's project work activities will be located well beyond the minimum 164 (50 meters) foot buffer specified in Massey et al for any Northern Harriers that may nest in the cattail marsh in the future. *See French PRT, ¶ 13.*

In terms of the potential for disturbance caused by the access road improvements, Dr. Kennedy, on cross examination, clarified that he was not opining that such improvements must occur from September through mid-March to avoid disturbing nesting Northern Harriers. *Finding of Fact No. 54.* His testimony was consistent with the testimony of Dr. French, who confirmed that the Division did not include such a timing restriction in its Conditional No Take Determination because there was no significant possibility or significant risk of disturbance. *Finding of Fact No. 54.* Dr. Kennedy also agreed that due to the minimal nature of the access road construction (no paving; minimal widening and cutting) and the frequency and duration of vehicular traffic (even if it includes heavy construction vehicles), construction can take place when the Northern Harriers are nesting because the historic nests sites in the marsh are far enough away. *Kennedy Cross, Vol. I, p.1-21, lines 20-25, p.1-22, lines 1-8.*

In his testimony Dr. French outlined a two part scenario that could plausibly cause disruption to nesting Northern Harriers: (1) if four days of road improvement work occurred about a week before the initiation of egg laying through about the first week of incubation, and (2) at the

time of the road work there was a nest was located fairly close to the Proponent's driveway
Finding of Fact No. 55. But Dr. French opined that the probability of this happening is extremely low, which I infer is because of how unlikely it would be for Northern Harriers to nest close to the driveway given the cattail marsh is the only historic nesting location in the area. *Id.* On cross examination, Dr. Kennedy concurred with Dr. French's opinion and made the further point that Northern Harriers have nested in the cattail marsh in only four out of seven years surveyed by Bowen. *Finding of Fact No. 55.*

Neither Dr. Vickery nor Mr. Bertrand, the Petitioners' expert witnesses on Northern Harriers, offered opinions supported by specific, credible evidence that effectively addressed or rebutted the several evidentiary sources for the Division's defense of the protectiveness of project work setbacks: its analysis of nest records in the NHESP database; the set-back findings in Massey et al. for marsh habitats; the island-wide population surveys by Bowen; and the Division's extensive experience reviewing projects in Northern Harrier priority habitat. In short, the Petitioners have not met their burden of showing that the clear weight of credible evidence supports a finding that the Division was wrong on this critical aspect of the Conditional No Take Determination.

Finally, my determination that the project work setbacks are protective of nesting Northern Harriers is not dependent on the further minimization of project impacts contained in the Proponent's revised work plan dated March 28, 2012, submitted to the Division after it issued the Conditional No Take Determination. *See Finding of Fact No. 57.* As summarized above, there is substantial evidence in the record to support the Division's position independent of this revised work plan.

The Division also reasonably determined that conditioning its Conditional No Take Determination to require the recording of a conservation restriction on the 4.5 acres portion of the Proponent's property that is located between the proposed project structures and the previously documented Northern Harrier nest sites will provide a permanent buffer from any disturbance related to the construction or the use of the buildings associated with the project, as well as ensure that there will not be any significant future additional development. *French PDT*, ¶ 45. While ignored by the Petitioners' witnesses in their testimony, I regard this strategically-placed CR as substantial mitigation of permanent value that will allow for the open-ended use by the Northern Harrier of important habitat areas on the Proponent's property for foraging and other purposes.

Dr. Vickery opined generally that the Proponent's project will cause habitat fragmentation and directly impact the feeding behavior of Northern Harriers, including requiring them to make longer flights to feed their young. *Vickery PDT*, ¶ 15. Relying again on the independent, expert analysis in Massey et al. and his own experience, Dr. French testified that Northern Harriers have the ability to fly greater than 100 km per day and are easily capable of flying considerable distances from their nest site to take advantage of good foraging areas. *Finding of Fact No. 24*. Dr. Kennedy concurred, testifying that a foraging Northern Harrier may fly tens of miles a day, repeatedly flying over unsuitable habitat to reach preferred foraging habitat. *Id.* Applying these facts about the Northern Harrier's flight behavior to the Proponent's project, Dr. French reasonably opined that since the work limits are surrounded by good contiguous foraging habitat, Northern Harriers will fly around the buildings and landscaped areas if they are heading toward foraging areas on the other side, and this extra flight distance will have an inconsequential impact on a Northern Harrier's ability to provide food for their chicks. *Id.*

Consistent with the Petitioners' burden of proof, none of their witnesses effectively rebutted Dr. French's opinion on this point.

In addition to the CR, the Division's Conditional No Take Determination requires the implementation of the Land Management Plan (or "LMP"). The evidence in the record indicates that a consideration underlying the development of LMP was the varying quality of Northern Harrier habitat on the Proponent's property. Dr. French testified that while the Proponent's entire 32 acre property is mapped as priority habitat for the Northern Harrier, portions of the property, through succession, had grown too dense to provide good habitat for Northern Harriers. *Finding of Fact No. 21*. Dr. Kennedy agreed, testifying that most of the area that would be impacted by the project work is covered with dense thickets of shrubs covered with fox grape, poison ivy and greenbrier, which is poor quality foraging habitat for Northern Harriers. *Finding of Fact No. 23*. Consistent with these site conditions, the six management areas in the LMP are those areas of Northern Harrier foraging habitat that are the most degraded by invasive plant species, but are surrounded by higher quality Northern Harrier foraging habitat. *Finding of Fact No. 46*. The overall purpose of the LMP is to enhance the value of those areas for foraging Northern Harriers by reducing the dominance of these invasive plants, and to push back the successional stage of these sites by reducing the amount of woody vegetation and managing for a sandplain grassland community with discrete patches of maritime shrubs. *Id.*; see also *Finding of Fact No. 3*. The Division explained that enhancing the sandplain grasslands is important because it provides much better habitat for Meadow Voles, which Northern Harriers depend on as a food source. In short, improving the habitat for Meadow Voles improves the habitat for Northern Harriers. *Finding of Fact No. 47*.

The Petitioners' witnesses challenged the LMP on several grounds, including arguing that the LMP itself will result in a take of the Northern Harrier. However, as reflected in my Findings of Fact and as discussed below, the Petitioners have not met their burden of proof of showing by the preponderance of the evidence that their concerns are justified. More specifically, Ms. Schofield took the position that when the six land management areas are included as part of the overall project footprint, the total site "disturbance" (up to 6.26 acres) is of scale that could result in a take of the Northern Harrier. *Schofield PDT*, ¶¶ 11 and 14. In response, Dr. French properly drew a distinction between the 2.9 acre footprint to be impacted by the buildings, driveway and associated landscaping and the 3.05 acre footprint of the six land management areas; the purpose of these latter "disturbances" is to increase the value of these areas for the Northern Harrier, as discussed above, not eliminate or degrade them. *French PRT*, ¶ 19.

Mr. Bertrand, while acknowledging that the LMP could be effective in controlling invasive species, opined that the LMP activities could end up adversely impacting the Harriers because they will occur during the time of nest site selection, nest building, incubation, and rearing of young. *Bertrand PDT*, ¶ 14; *see also Schofield PDT*, ¶ 21. The record contains several sources of evidence that rebut this claim. First, it is undisputed that no land management activities will take place in the cattail marsh where the only previously documented nest sites were located, which will avoid the possibility of direct nest destruction. *Finding of Fact No. 51*. Second, because of this history of nesting only in the cattail marsh (which will remain unaltered), there is substantial evidence in the record to conclude that it is unlikely that Northern Harriers are or will use any of the areas subject to the LMP as nesting habitat. *Finding of Fact No. 32*; *French PRT*, ¶ 20. Third, all the LMP activities will be farther away than the 164 foot buffer required to protect any Northern Harriers nesting in the cattail marsh from disturbance. *French PRT*, ¶ 13. Finally,

Dr. French provided testimony that explained, using the first year of the LMP activities as an example, how each phased treatment approach, based on seasonality, avoids impacting the Northern Harrier behaviors highlighted by Mr. Bertrand. *Finding of Fact No. 50*. Dr. French also pointed out that the LMP activities in successive years will get progressively less intense and frequent until they become maintenance activities that are done on a rotational schedule every few years. *Id.*; see also *Wilkinson PRT*, ¶ 5.

Ms. Schofield further testified that the amount of information on the herbicides to be used under the LMP “makes it impossible to conclude that the proposed herbicide treatment will not be detrimental to Northern Harriers. *Schofield PDT*, ¶ 22. This assertion is predicated on the unsupported assumption that Northern Harriers will be directly impacted by the LMP activities and is speculative in nature. Dr. French responded by pointing out that both forms of the Triclopyr-based herbicide identified in the LMP are approved for use in Massachusetts, and opined that as long as the legal requirements for applying these herbicides are followed, none of them will harm Northern Harriers. *Finding of Fact No. 52*. I find that his testimony adequately rebuts Ms. Schofield’s unsupported claim.

In summary, based on my evaluation of the relevant testimony of the parties’ witnesses, as discussed herein, there is substantial evidence in the record to support the Division’s determination that the LMP will benefit – not adversely impact – the Northern Harrier.

VI. CONCLUSION

Based on my Findings of Fact in Section IV and for the reasons discussed in Section V and elsewhere in this Recommended Decision, I conclude that the Petitioners have not met their burden of demonstrating that the Division’s Conditional No Take Determination is based on an improper application of the regulatory criteria and 321 CMR 10.18 and 10.19. I therefore

recommend that the Director issue a Final Decision affirming the validity of the Division's Conditional No Take Determination.

V. NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Director of the Division of Fisheries of Wildlife, Department of Fish and Game, for his final decision in this matter. This decision is therefore not a final decision of the agency, and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A. The Division Director's final decision is subject to court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Division Director, no party shall file a motion to renew or reargue this recommended final decision or any portion of it, and no party shall communicate with the Director regarding this decision, unless the Division Director, in his sole discretion, directs otherwise.

Dated: March 14, 2013

By: Richard Lehan
Richard Lehan, Esquire
Presiding Officer
Division of Fisheries and Wildlife
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