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

RULING ON
JOINT MOTION BY THE DIVISION AND THE PROPONENT
TO DISMISS THE PETITIONERS' APPEAL FOR LACK OF STANDING

I. Introduction

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"). 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 abutting property located at 18 Medouie Creek Road. 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" or the "OBriens"), filed an appeal challenging the adequacy of the Division's Conditional No Take Determination.

At the Prehearing Conference that I conducted with the parties on April 19, 2012, the Division and the Proponent filed a Joint Motion to Dismiss the Petitioners' appeal due to a lack of standing ("Joint Motion to Dismiss"). Pursuant to the schedule for adjudication that I established in my April 24, 2012 Prehearing Conference Report and Order, the Petitioners filed their Opposition to the Joint Motion to Dismiss on May 17, 2012.

For the reasons set forth herein, I deny the Joint Motion to Dismiss and have established the amended schedule for the adjudication of the Petitioners' appeal in Section VI of this Ruling.

II. The Standard of Review for a Motion to Dismiss for Lack of Standing

The threshold question of whether a person has standing to appeal is "one of critical significance," and an issue of subject matter jurisdiction for the reviewing court. *Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998)*, citing *Tax Equity Alliance v. Commissioner of Revenue, 423 Mass. 708, 715 (1996)*. Because of the jurisdictional nature of standing, a petitioner's status as an "aggrieved person" is an essential prerequisite to obtaining review by a court or by an administrative agency in an adjudicatory proceeding. *Nickerson v. Zoning Board of Raynham, 53 Mass.App.Ct. 680, 681 (2002); Matter of Town of Hanson, 2005 WL 4124572, p.2* (standing "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim, " and "impacts the effective adjudication of administrative appeals").

A motion to dismiss for lack of subject matter jurisdiction should be granted where the specific matter raised is not within the jurisdiction granted by law to the court deciding the matter. *Jones v. Jones*, 297 Mass. 198 (1937). In reviewing a motion to dismiss, the Division has adopted the same standards that are applied in Massachusetts courts under Mass. R. Civ. P. 12(b)(1). *In the Matter of Cape Wind Associates, LLC, NHESP Tracking No. 01-9604, Final Decision dated July 2, 2008,* adopting the Recommended Final Decision of the Presiding Officer

dated May 16, 2008 (see p.6). Under those principles, the decision-maker must accept as true the facts alleged by a petitioner to support their notice of claim seeking an adjudicatory hearing for the purposes of the pending motion to dismiss. *Id.* A Motion to Dismiss, unsupported by affidavits, is an attack on the sufficiency of a petitioner's allegations and those allegations must be taken as true for the purposes of resolving such a motion. *Id.*, citing *Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 709-710 (2004). Parties defending against Motions to Dismiss are free to introduce supplemental evidence to bolster their claims. *Id.*

III. Summary of the Law regarding Standing to Appeal under MESA

1. The Standing Requirements under the MESA Regulations

Under MESA and the MESA regulations, the Division has the authority and duty to identify and list those animals and plants in MA that the Division determines to be endangered, hreatened or species of special concern, and to protect such state-listed species against "takes" caused by projects and activities. *M.G.L.c. 131A and 321 CMR 10.00.* To that end, the Division has, by regulation, delineated the geographic extent of habitat for state-listed species in MA ("priority habitat"), and requires any project or activity proposed to take place in priority habitat to be reviewed by the Division to determine if it will cause a "take" of a state-listed species. *See 321 CMR 10.02, 10.12 and 10.18.* The Division also conducts research, data collection and other conservation management activities. All of the above matters fall within the zone of interests of MESA and the MESA regulations. *Id.*

The requirements and process associated with appealing a final decision made by the Division pursuant to the MESA regulations is set forth in 321 CMR 10.25 ("Appeal Process"). Under 321 CMR 10.25(3)(b), any notice of claim for an adjudicatory hearing shall include:

" the specific facts that demonstrate that a party filing a notice of claim satisfies the requirements of an 'aggrieved person,' including but not limited to how they have a definite interest in the matters in contention within the scope of interests or areas of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00 and have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division."

In addition, the plain language of 321 CMR 10.25(3)(b) does not automatically confer standing on property abutters by regulation, or allow abutters to make a more limited or less stringent showing to demonstrate their standing. In that regard, the MESA regulations differ from, e.g., the state Zoning Act, pursuant to which "parties in interest" (which includes abutters) enjoy a rebuttable presumption that they are "persons aggrieved." *See M.G.L. c. 40A, §11 and §17, and Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass. 106, 107, 653 N.E.2d 589 (1995).* Consequently, an abutting property owner is still required to demonstrate their compliance with all of the standing requirements in 321 CMR 10.25(3)(b) in the same manner as any other aggrieved person.

2. ***Relevant Case Law on the Standards for Demonstrating Standing***

There is one previous Division adjudicatory decision that extensively discusses and applies the standards for demonstrating standing under the MESA regulations. *In the Matter of Marion Drive, Kingston, MA,* Docket No. 07-22182-2010-02-RL, NHESP File No. 07-22182, Final Decision dated October 20, 2010, adopting the Recommended Final Decision of the Presiding Officer dated September 28, 2010, resulted in the dismissal of a petitioner who was an abutter appealing the Division's No Take Determination on an earth removal project in Kingston, MA. As discussed in more detail below and in Section V of this Ruling, my Recommended Final Decision in *Marion Drive*, which was adopted without modification by the Director of the Division, determined that the petitioner lacked standing because her claims of injury to her

personally were speculative and insufficiently traceable to the Division's No Take Determination, and because her primary interest in the matter was to ensure the proper application and enforcement of MESA to the proponent's project. *Marion Drive* discusses federal standing case law in an environmental context (including under the federal Endangered Species Act), Massachusetts standing case law (primarily in a zoning context), and three Department of Environmental Protection ("DEP") adjudicatory decisions on standing. Drawing on the case law cited in *Marion Drive* and by the parties in their filings, I will summarize the relevant case law for demonstrating standing under the MESA regulations

In *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)*, the United States Supreme Court reiterated the three part, "irreducible constitutional minimum of standing" as follows:

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

2. there must be a causal connection between the injury and the conduct complained of – the injury has be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

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

Focusing first on the injury in fact standard, Massachusetts case law similarly requires a showing that a plaintiff has suffered a non-speculative, concrete injury that is different from that of the public. See *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 27 (2006); quoting *Havard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge,* 27 Mass.App.Ct. 491, 493 (1989) ("A person aggrieved...must assert a plausible claim of a definite violation of a private right, a private property interest, or private legal interest.") *; see also Fraser v. Zoning Bd. of*

[1] By "particularized," the Court said, "we mean that the injury must affect the plaintiff in a personal and individual way." *Id., n.1 at 561.*

Appeals of Marshfield, 2009 WL 1975388 (Mass. Land Ct) (2009). An aggrieved person must also "establish – by direct facts and not speculative personal opinion – that his injury is special and different from the concerns of the rest of the community." *Barvenik v. Alderman of Newton, 33 Mass.App.Ct. 129, 132 (1992); see also Standerwick, supra, at 208; Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass. 551, 554 (1999); Nickerson v. Zoning Bd. of Appeals of Raynham, 53 Mass.App.Ct. 680, 761 N.E.2d. 544, 547 (2002); Butler v. City of Waltham, 63 Mass.App.Ct. 435, 440 (2005); Fraser, supra.* "Injuries that are speculative, remote, and indirect are insufficient to confer standing." *Ginther, at p. 323.* "[T]he aggrieved party must show that the injury suffered is one that is nonspeculative and a substantial injury to him personally, as distinct from a speculative injury or an injury to the public generally." *Lopez v. Board of Health of Topfield, 76 Mass.App. Ct. 1118 (2010).*

The above Massachusetts court decisions primarily address standing in a zoning context. When an alleged injury in fact is environmental in character, the courts focus on the extent to which the plaintiff has a direct stake in the outcome of the matter threatened by the adverse decision. In that regard, the United States Supreme Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity'". *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000), citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). In *Friends of the Earth*, the Court found that the affidavits and testimony provided by the plaintiff that describe the affiants' reasonable concerns about the effects of the challenged wastewater discharges directly affected those affiants' recreational, aesthetic, and economic interests and constituted more than general averments and conclusory allegations. *Id.* The Court in *Lujan* also acknowledged that the desire

to use or observe an threatened or endangered animal species is a "cognizable interest" for the purpose of showing standing under the federal Endangered Species Act, but further stated that the injury in fact test "requires more than an injury to a cognizable interest...[i]t requires that the party seeking review be himself among the injured." *Lujan, at 563.*

Similarly, in two 9th Circuit Court of Appeals decisions cited by the Petitioners, the Court found standing based on the nature and degree of plaintiffs' interest in and experience with the the federally listed species at issue. In *Idaho Farm Bureau Federation v. Babbit*, 58 F.3d 1392 (9th Cir. 1995), the U.S. Fish and Wildlife Service ("USFWS") challenged the standing of two conservation organizations allowed to intervene in litigation brought by a plaintiff who sought to set aside a USFWS rule listing a snail as an endangered species. The Court held that the conservation organizations demonstrated their standing by describing in affidavits their members' visits to the two springs where the snail was originally discovered and the surrounding area, and by the fact that they also maintain a factual and scientific understanding of the snail, its habitat, and threats to the species. *Id.*, at 1399. In the second decision, the Court found that the Seattle Audubon Society ("SAS"), which challenged the U.S. Forest Service management plan for spotted owl habitat, satisfied the injury in fact requirement by describing in affidavits the frequency with which members visit owl-inhabited forests, their proximity to such forests, and their aesthetic and scientific interest in the owl. *Seattle Audubon Society v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993). In finding that the SAS had standing, the Court stated, "[i]t is clear that the declarants have been using and will continue to use forest lands suitable for owl habitat on a regular basis." *Id.*, at 703.

In another case cited by the Petitioners, *Vermont Public Interest Research Group v. U.S. Fish and Wildlife Service*, 247 F.Supp.2d 405, 510 (D. Vt. 2002), different groups of plaintiffs

challenged the USFWS' compliance with the National Environmental Policy Act ("NEPA") regarding the release of a lampricide, TFM, into Lewis Creek. The Court began its analysis of whether the plaintiffs had standing by reiterating that "[t]he injury in fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public." However, based on a review of the supporting affidavits, the Court determined that certain of the affiants provided sufficient facts to demonstrate that their long-term and regular use and enjoyment of, and interest in protecting, Lewis Creek biodiversity, and in particular its rare species, set them apart from the general public. *Id.* For example, the Court found that specific testimony by one affiant that he regularly uses the affected sections of Lewis Creek and describes how the TFM application will harm him "is more than sufficient to demonstrate a direct stake in the litigation." *Id.*

Three DEP adjudicatory decisions discussed in *Marion Drive* further illustrate how standing is determined in an environmental context. First, in *Matter of Town of Ipswich, supra*, the DEP administrative magistrate ('magistrate") granted the Town of Ipswich's motion to dismiss two watershed associations for lack of standing.[2] The magistrate determined that the associations' claims that water withdrawals allowed by the appealed Water Management Act ("WMA") permit would lead to a loss of fisheries, water quality degradation and other environmental injuries, and would diminish its members' ability to use and enjoy the river, were matters of general public concern. Such matters, the magistrate found, are not concrete injuries to the associations' own rights, property or legal interests, even though the associations' stated purpose was to protect the river.

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

Consistent with MA case law addressing standing in a zoning context, the magistrate stated that "[c]oncerns about water degradation, loss of habitat and other environmental damages are not 'concrete injuries' to the Petitioners…[r]ather, these are 'matters of general public concern which…do not establish a plausible claim of a definite violation of a private right, property interest, or legal interest sufficient to bring [the association] within the zone of standing." *Id., at p.4*, quoting *Havard Sq. Defense Fund, Inc., at 493.* The fact that one of the associations had recently relocated its headquarters in the same watershed basin as the permitted withdrawal did not, the magistrate determined, automatically endow the association with standing or mean that it is likely to suffer an injury in fact as a result of the permit. *Id., at p.7*, citing, e.g., *Matter of Northland Residential Corp, 11 DEPR 74, 76, n.5 (2004)* (property ownership by itself, is not enough to make a Petitioners aggrieved).

The magistrate also made clear that private petitioners do not acquire standing based on a contention that they seek to enforce an environmental law. *Matter of Town of Ipswich, 2005 WL 4124572, at p.6.* To do so "would permit almost anyone to claim standing to appeal…[o]ne 'zealous in the enforcement of law but without private interest' is not an aggrieved person.", *Id.* quoting *Ginther, at 322.* The U.S. Supreme Court affirmed the same principle in *Lujan*, stating "[w]e have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and the laws and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, at 574-575

The magistrate distinguished *Matter of Town of Ipswich* from a second DEP adjudicatory decision, *Matter of Town of Hanson, 2005 WL 4124572,* "because the association in that case owned property on the banks of the Jones River and had submitted a detailed affidavit outlining

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

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

The question of the Petitioners's standing was decided by the magistrate in response to cross motions for summary decision. The magistrate determined that the petitioner had no reasonable expectation of proving that the golf course well will cause her an injury in fact because her motion for summary decision was not supported by an affidavit from her hydrogeologist (whom she discharged after he completed the above referenced report), and did not contain proof of the existence of a hydraulic connection between the campground and golf

course wells. As a consequence, the magistrate ruled that the Petitioners lacked standing and granted summary decision in favor of Crumpin-Fox.

The magistrate's analysis highlights another criterion for demonstrating standing – i.e., establishing a plausible causal nexus between the alleged injury and the action being challenged. In *Crumpin-Fox*, it turned on the plaintiff's failure to show a hydraulic connection between her campground and the permitted well. But when in the adjudicatory process the challenge to the petitioner's standing occurred was another important consideration. The magistrate made the point that if the petitioner's standing had been challenged by a motion to dismiss, "her claim of personal aggrievement based on a potential hydrogeologic connection between the two wells might have sufficed to save her appeal from dismissal." *Crumpin-Fox, at p.6.*

Finally, standing to appeal under the MESA regulations requires a petitioner to demonstrate how they have a definite interest in the matters in contention that fall within the scope of interests or areas of concern in the statute and regulations at issue. "Of particular importance, the right or interest asserted must be one that the statute under which a plaintiff claims aggrievement intends to protect." *Standerwick, at 204.* (diminution of real estate values are not a concern that M.G.L. c. 40B, the affordable housing statute, is intended to protect.); *Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007)* (same holding); *Circle Lounge & Grille, Inc. v. Board of Appeals of Boston, 324 Mass 427 (1947)* (zoning act does not protect against business competition). "Alleging injury is not enough, a plaintiff must allege a breach of duty owed to it by the public defendant." *Ginther, at 323.* "The injury alleged must fall within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." *Id.*

In *Marion Drive*, I determined that the petitioner's claims that the Division's No Take Determination will diminish her property values and cause increased traffic were outside the zone of interests of MESA. However, in an environmental appeal where the plaintiff is able to demonstrate that their injury in fact arises out of a direct stake in the protection of natural resource or species threatened by the challenged action, it usually follows that the plaintiff's concerns falls within the zone of interests of the corresponding environmental statute or regulation that governs the challenged action. For example, in *Matter of Town of Hanson*, the magistrate determined that the watershed association's interest in the protection of water supplies and the viability of rivers and watersheds are within the zone of interests of DEP's WMA regulations. *Id.*, at p.6.

IV. The Parties' Filings related to the Petitioners' Standing

In September, 2011 the Proponent applied to the Division for a review of their project pursuant to 321 CMR 10.18 of the MESA regulations. At the time, the O'Brien property was designated as priority habitat for two state-listed species protected under MESA: (1) the northern harrier (*Circus cyaneus*), a threatened species; and (2) the straight lined mallow moth (*Bagisara rectifascia*), a species of special concern. The Division subsequently delisted the straight lined mallow moth from protection under MESA on February 27, 2012. The Proponent's proposed project involves the construction of a single family dwelling, garage, guest house, barn, driveway, septic system, well, underground utilities, grading, landscaping and habitat management activities. The project footprint associated with these structures and activities will encompass 2.9 acres of the 32 acre parcel owned by the Proponent.

The Division's Conditional No Take Determination made pursuant to 321 CMR 10.18 of the MESA regulations stated that the above project must be conditioned to avoid a take of state-

listed species.[3] The Division then determined 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.[4] The 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 dated January 25, 2012 that restricts all building activities to the western portion of the upland property and more than 500 feet from documented Northern Harrier nest sites, and provides for the management of the remaining upland property by removing invasive plant species and creating approximately 1.48 acres of grasslands and/or other high value habitat for northern harriers and other avian species.

In response to the Division's Conditional No Take Determination, the Petitioners filed a Notice of Claim for an Adjudicatory Hearing with the Division pursuant to 321 CMR 10.25(1) on February 27, 2012 (the "notice of claim" or "appeal"). The Petitioners' notice of claim contends that the Division's Conditional No Take Determination does not adequately condition the Proponent's project to assure that no take of a state-listed species will occur. Highlighting the fact that access to the Proponent's property is through the O'Brien property, the notice of claim states that the Proponent's proposed work on the O'Brien property is reason enough to show that the O'Briens are aggrieved persons entitled to appeal the Division's Conditional No Take Determination. The Petitioners' appeal provides additional reasons why the O'Briens have standing, including citing the conservation purposes underlying their original subdivision of the larger parcel, the O'Briens' status as lifelong conservationists with acute interests in protecting endangered bird species, their regular activity of watching birds from their property and the

[3] Under 321 CMR 10.18(2)(a), the Division may determine that a proposed project occurring within priority habitat has avoided a take of a state-listed species, or with conditions may proceed without further review.

[4] As explained in my April 24, 2012 Prehearing Conference Report and Order (pp. 6-7), the Division's February 6, 2012 letter 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.

surrounding marsh and open areas, and their concern that the Proponent's project will negatively affect northern harrier habitat, thereby leading to a reduction in the presence of northern harriers not only on the Proponent's property, but also on the Petitioners' property.

The Division and the Proponent filed their Joint Motion to Dismiss the Petitioners' appeal due to a lack of standing at the April 19, 2012 Prehearing Conference. The Joint Motion to Dismiss characterizes the Petitioners' notice of claim as arguing that because the Petitioners is an abutter and has an interest in land that serves as access to the Proponent's property, the Petitioners are, by default, aggrieved within the meaning of the MESA regulations. The Division and the Proponent regard this claim as clearly erroneous, responding that simply having rights in a property does not confer standing even in a zoning context where there is actually a presumption of standing, unlike a MESA matter. In support of their position, the Division and the Proponent cite to a MA Appeals Court decision in *White Sands Beach Club, Inc. v. Zoning Board of Appeals of Provincetown, 57 Mass. App. Ct. 1116 (2003)*, which affirmed a Superior Court judge's dismissal of a zoning appeal of a plaintiff that shared an easement with the defendant permit holder. The Appeals Court held that the plaintiff easement holder's contentions about increased traffic and noise associated with the defendant's use of its motel property were "entirely speculative" and unsupported by evidence and, therefore, did not confer standing on the plaintiff. In short, the Joint Motion to Dismiss contends that being an abutter or having an interest in the land upon which the Division makes a determination does not automatically give the O'Briens standing or mean that they are likely to suffer an injury in fact.

The other arguments advanced in the Joint Motion to Dismiss are that the O'Briens' history of environmentalism, bird watching and personal interest in protecting state-listed

species on the Proponent's property and on contiguous priority habitat on their property do not rise to a plausible claim that they have suffered a concrete, actual injury that is special and different from the public. The Division and the Proponent regard the O'Briens' concerns as stated in the notice of claim to be speculative and directed at ensuring that MESA is properly applied and enforced with respect to the Proponent's project. An interest in ensuring that MESA is properly enforced with respect to the Proponent's project, the Division and the Proponent argue, does not confer standing on the Petitioners.

On May 17, 2012, the Petitioners filed their Opposition to the Joint Motion to Dismiss, which includes supporting affidavits from Donal C. O'Brien, Jr. ("Mr. O'Brien") and five other witnesses. Mr. O'Brien's affidavit and related exhibits set forth in detail the history of activities, accomplishments, and recognition by others as to his status as a lifelong conservationist with a long standing and demonstrated interest in protecting endangered species of birds and their habitat. As set forth in his affidavit, Mr. O'Brien's accomplishments include serving as a board member on the National Audubon Society for 25 years and as Chairman of the board for 15 years. As the Chairman, he was responsible for numerous bird conservation efforts, including the Audubon Important Bird Area Program, which Mr. O'Brien describes as a globally significant bird conservation initiative that Audubon partnered with BirdLife International (where he also served on their board) to identify and protect bird habitat throughout the western hemisphere. Mr. O'Brien states that to date, the Audubon Important Bird Area Program has identified 2,500 places across the United States, encompassing more than 300 million acres, and that Audubon and BirdLife International have been successful in preserving hundreds of thousands of acres of land identified as vital to bird survival. In 2010 Mr. O'Brien was awarded the prestigious Audubon Medal by the National Audubon Society, in recognition of his

dedication to advancing conservation for over five decades. Mr. O'Brien is also the founding Director and Chairman Emeritus of the American Bird Conservancy. In addition, he served as a member and then Chairman for 8 years of the State of Connecticut Council on Environmental Quality ("Connecticut CEQ"), and served on the President's Council of Connecticut Fund for the Environment, where he and Mrs. O'Brien played major roles in helping to preserve 18,000 acres of water company land in Connecticut.

The notice of claim and/or Mr. O'Brien's affidavit also describe the long standing interest and commitment to these bird and wildlife conservation concerns shared by his wife, Katherine Louise Slight O'Brien ("Mrs. O'Brien"). Mrs. O'Brien's interests and activities in this area include hosting annual "birdathons" with her husband for almost 30 consecutive years (raising over $3 million); regularly watching birds from the O'Brien property and maintaining a bird list of species observed over a period of several decades; serving on the Board of Directors of Audubon Connecticut since its inception 11 years ago and for the past 3 years as its chair; being one of four conservation leaders credited with helping the Trust for Public Land preserve 334 acres of land in Simsbury, CT; and, as noted above, serving with her husband on the President's Council of Connecticut Fund for the Environment, which helped preserve 18,000 acres of water company land in Connecticut.

Affidavits from Frank Gill, who served as the National Audubon Society's Chief Scientist from 1996 to 2004, and Gerard Bertrand, who served as the President of the Massachusetts Audubon Society from 1980 to 1999, describe their work with Mr. O'Brien on bird conservation efforts and attest to Mr. O'Brien's dedication to and experience in this area. An affidavit from Karl J. Wagener, the Executive Director of the Connecticut CEQ, attests to Mr. O'Brien's accomplishments while serving with the Connecticut CEQ.

Regarding the history of the relevant properties, Mr. O'Brien's affidavit states that in the early 1970s, the O'Briens purchased approximately 282 acres of vacant land in the vicinity of Medouie Creek in Nantucket because it contained an abundance and variety of wildlife. In the mid-1970s, the O'Briens subdivided the Medouie Creek land and gifted 195 acres to the Nantucket Conservation Commission Foundation ("NCF") and the Trustees of Reservations, while retaining a 9-acre lot on the western edge of the Medouie Creek land on which they built their home. With the permission of the former owner, he used and "patrolled" the Proponent's property for close to 40 years, including supervising the repair of portions of the access road on the Proponent's property. For several decades, the O'Briens have spent considerable time at the O'Brien property, a significant portion of which has been dedicated to observing various wildlife species, including the northern harrier. Mr. O'Brien describes how he regularly observes northern harriers from the O'Brien property as they hunt over the open fields that are in direct view from his house and deck and over the Proponent's property. Citing his lifelong devotion to the protection of birds and bird habitat, Mr. O'Brien states that it is of great importance to him that the wildlife in and around the Medouie Creek area on Nantucket – including on the O'Brien property, the NCF and Trustees of Reservations properties and the Proponent's property – be protected.

In addition to describing the O'Briens' commitment to protecting rare bird species and their habitat, the Petitioners' opposition also highlights the close proximity of the Proponent's project to and its negative effect on the Petitioners' property. As to the latter, the Petitioners include an affidavit from Daniel C. Malloy, a civil engineer who has supervised over a dozen construction projects on Nantucket, many of which have been similar to what is proposed by the Proponent. Mr. Malloy reviewed the Proponent's project submittals to the Nantucket

Conservation Commission and the Division, and states that the proposed work will involve the widening of the existing 8.5 foot dirt track on the O'Brien property to ten feet in width. Mr. Malloy opines that this widening of the access road will necessitate the use of a front loader or similar construction vehicles and dump trucks over a two day period. Mr. Malloy further opines that the construction of the project on the Proponent's property will, in turn, result in "a constant stream of construction vehicles" to travel over the O'Brien property, including as many as 45 concrete mixers weighing 35 tons each when fully loaded, and take approximately two years to complete.

The Petitioners' Opposition contends that all of the above activities will disrupt the northern harrier habitat on the O'Brien property, as well as on the adjacent properties of the Proponent and the NCF. In support of their position, the O'Briens include an affidavit from Simon Perkins, a professional naturalist and the president and founder of Notice Nature, Inc., a consulting firm that specializes in habitat evaluations for endangered and threatened bird and other animal species. Mr. Perkins attests that he has over 30 years of experience as a professional field ornithologist, including serving as a senior field ornithologist with the Massachusetts Audubon Society. From 2007 to 2010 Mr. Perkins was a state project coordinator and Nantucket county coordinator for the state-wide Breeding Bird Atlas, during which time he became intimately familiar with the status and distribution of all the species of breeding birds on Nantucket, including the northern harrier.

Based on his review of the project information on file with the Division and site visits to the properties of the O'Briens, the Proponent and the NCF, Mr. Perkins states that a breeding pair of northern harriers has repeatedly located their nests on a parcel immediately adjacent to the Proponent's property, as close as 115 yards from the access road. Highlighting the nature

and extent of the proposed work on the access road and the Proponent property, Mr. Perkins opines that these activities will not only reduce the area of usable northern harrier habitat, but will cause direct disturbance to the local pair of nesting harriers on the adjacent NCF property and likely cause that pair to abandon what Mr. Perkins considers this "historic, highly productive nesting area." Mr. O'Brien's affidavit offers a similar opinion about the negative effect of the Proponent's project on the northern harrier habitat on the Proponent's property and on the O'Brien property and the adjacent NCF and Trustees of Reservation properties.

In summary, it is the scope and duration of the Proponent's proposed work, as detailed in Mr. Malloy's affidavit, which will result in adverse impacts to northern harrier habitat located on and adjacent to the O'Brien property, including, as Mr. Perkins opines in his affidavit, causing a resident pair of northern harriers to abandon their nest.[5] In a nutshell, the Petitioners argue because the O'Briens' personal stake in the conservation of northern harriers is special and different from that of the general public, the above specified harm to the northern harriers, in turn, results in an injury in fact to the O'Briens and gives them standing to appeal the Division's Conditional No Take Determination.

V. Determination of the Petitioners' Standing to Appeal

The Joint Motion to Dismiss filed by the Division and the Proponent was unsupported by any affidavits and represents a facial challenge to the sufficiency of the Petitioners' standing to pursue their appeal of the Division's Conditional No Take Determination. In response to the Joint Motion to Dismiss, the O'Briens were free to introduce supplemental evidence to bolster their claims and did so by filing an Opposition that includes six affidavits. As discussed in

[5] Noting the reliance by the Division and the Proponent on the *White Sands Beach Club* decision, *supra* at p.x, the Petititioners' argue that it is not the O'Briens' status as the servient tenement holder, *per se*, that establishes their aggrievement, but rather the impacts resulting from the Proponent's proposed work in the easement area that creates the O'Briens' injury in fact. *Petitioners' Opposition*, at p.11, footnote 8.

Section II, pp.2-3, in determining whether the Petitioners have standing, I must accept as true the facts alleged by the Petitioners in their notice of claim and Opposition to the Joint Motion to Dismiss and supporting affidavits.

With the above standard of review in mind, the first question to address is whether the O'Briens have demonstrated they have an interest or stake in the validity of the Division's Conditional No Take Determination that is special and different from that of the public. Mr. and Mrs. O'Brien are beneficiaries of the Trust that owns the property at 18 Medouie Creek Road and have the legal right under the Trust to use and occupy the property for the remainder of their lives.[6] As summarized in Section IV, the affidavits of Mr. O'Brien, Frank Gill, Gerard Bertrand, and Karl Wagener attest in detail to the status of Mr. O'Brien, in particular, but also Mrs. O'Brien, as recognized lifelong conservationists with a demonstrated interest in protecting endangered birds and their habitats. These affidavits support the conclusion that the O'Briens' commitment to bird conservation is not a recent development triggered by their concerns about the Proponent's proposed project, but has been a hallmark of their professional work and/or personal interests. The affidavits also attest to the O'Briens' decades-long interest and actions with respect to the Medouie Creek area properties that are germane to this appeal. These include the O'Briens' original subdivision of their land, which resulted in the gifting the 195 acres for conservation purposes; Mr. O'Brien's 40 year history of using and monitoring the Proponent's property with the permission of the former owner; and the considerable time spent by the O'Briens over several decades observing the northern harrier on their property and on the surrounding marsh and open areas. Moreover, a necessary component of the Proponent's

[6] Given Mr. and Mrs. O'Brien's status as express beneficiaries of the Trust that owns the property and as parties with the right thereunder to reside on the property for the remainder of their lives, their demonstration of standing, particularly in response to a motion to dismiss, may reasonably determine whether the Petitioners' collectively have satisfied the showing of an aggrieved person under the MESA regulations.

proposed work - the widening of the access road and its use to construct the project - will take place on the O'Brien property, on land within priority habitat of the northern harrier. While I concur with the Division and the Proponent that this fact alone does not confer standing on the Petitioners, it is a relevant consideration in determining whether the O'Briens' interest or stake in this matter is special and different from that of the public.

Accepting the facts alleged in the supporting affidavits as true, I find that the O'Briens have made a sufficient showing that they have a cognizable interest in the northern harrier that is special and different from that of the public. The O'Briens have a long standing professional and/or personal commitment to bird conservation which pre-dates and goes beyond seeking to ensure that MESA is properly enforced with respect to the Proponent's project. They have also maintained a conservation interest over several decades in the northern harrier and other wildlife on their Medouie Creek property and on surrounding areas, including spending considerable time observing the northern harrier. Finally, according to Mr. Malloy's affidavit, the O'Briens are faced with approximately two years of construction-related activity occurring on their property, within priority habitat for the northern harrier. The above considerations, in aggregate, reasonably set the O'Briens apart from the general public.

The next question is whether the Petitioners' allegations of the harm to the northern harrier resulting from the Proponent's project are sufficiently concrete and specific to support a finding that such harm will cause an injury in fact to the O'Briens. Again, accepting the facts alleged in the supporting affidavits as true, Mr. Malloy, the O'Briens' construction engineer expert, attested that the construction of the Proponent's project will take approximately two years to complete and result in a constant stream of construction vehicles traveling over the O'Brien property, including as many as 45 concrete mixers weighing 35 tons each when fully loaded.

Mr. Perkins, the O'Briens' state-listed species expert, attested that the proposed project work on the access road and the Proponent property will not only reduce the area of usable northern harrier habitat, but will cause direct disturbance to the local pair of nesting harriers on the adjacent NCF property and likely cause that pair to abandon an historic, highly productive nesting area. Mr. O'Brien's affidavit also attested to the negative impact of the Proponent's project on the northern harrier habitat on the O'Brien property and surrounding properties. Citing to his lifelong devotion to the protection of birds and bird habitat, Mr. O'Brien affirmed the importance to him of protecting the northern harrier and other wildlife in these locations.

I find that for the purposes of responding to the Joint Motion to Dismiss, the specific factual allegations contained in above affidavits are sufficient to show an injury in fact to the O'Briens. See. e.g., *Lujan*; *Friends of the Earth*; and *Matter of Town of Hanson* (detailed affidavit from civil engineer jointly filed by a neighboring town and a watershed association sufficient to demonstrate their standing). Although the Petitioners' notice of claim asserts that the Proponent's work on the O'Brien property is reason enough to grant standing to the O'Briens, the Petitioners' Opposition explains more precisely that injury in fact to the O'Briens arises out of the impacts to the northern harrier resulting from the work on the O'Brien property, not solely because the O'Briens are the servient property owner. *Petitioners' Opposition*, at p.11, footnote 8. In the *White Sands Beach* decision cited by the Division and the Proponent, the Court dismissed the appeal because the plaintiff easement holder's claims were entirely speculative and unsupported by evidence. In comparison, the Petitioners' Opposition is supported by detailed affidavits from expert witnesses that set forth concrete factual allegations of injury to the O'Briens.

Moreover, the O'Briens' demonstration of an injury in fact can be distinguished from the petitioner in *Marion Drive*. In the latter appeal, no portion of the Division-authorized project was on the petitioner's property, and the sole supporting affidavit from the petitioner made more general and speculative claims about the nature and basis of her personal stake in the Division's decision, which were colored by her desire to act as a "private attorney general" to vindicate the interests of MESA on behalf of herself and the public.

Finally, this is not a case where the O'Briens are arguing that they have standing because of reasons that are outside of the zone of interests of MESA and the MESA regulations, such as a claim that the Proponent's project will diminish their property values or that the Proponent's project work will overburden the easement for the access road. See *Marion Drive*, at pp.17-18; *Prehearing Conference Report and Order dated April 24, 2012*, pp. 6-7. Instead, the O'Briens' special interest in the protection of the northern harrier and its habitat, which they contend is threatened by the Division's Conditional No Take Determination, falls squarely within the zone of interests of MESA and the MESA regulations.

For the above reasons, I rule that the Petitioners have standing and therefore deny the Joint Motion to Dismiss filed by the Division and the Proponent. As a result, the Petitioners' appeal will proceed forward in accordance with the amended schedule established below.

VI. Order Establishing Amended Schedule for Adjudication

A. Introduction

As established in my April 24, 2012 Prehearing Conference Report and Order, the issue for adjudication in this appeal is as follows:

> *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.

The amended schedule for adjudication is set forth below. Unless otherwise notified by the Presiding Officer, the hearing will take place in the main conference room of the Department of Fish and Game, 251 Causeway Street, Suite 400, Boston MA 02114. The hearing will begin promptly at 9:30am on each of the scheduled days.

The parties shall confer and report back to the Presiding Officer in accordance with the corresponding amended schedule deadline as to whether a stenographer will be present for the hearing. If so, given the Department's limited financial resources, copies of the hearing transcript would need to be provided to the Presiding Officer and Division counsel without charge. If the parties elect not to have a stenographer, the hearing will be taped.

B. Amended Schedule for Adjudication

The schedule for adjudication in this appeal is as follows:

Action	Filing Deadline
1. Prefiled Written Direct Testimony of parties' witnesses & report on whether a stenographer will be present at the hearing	September 7, 2012
2. Prefiled Written Rebuttal Testimony of parties' witnesses	October 5, 2012
3. Hearing (limited to cross-examination of parties' witnesses)	October 22-24, 2012
4. Proposed Findings of Fact Conclusions of Law	November 9, 2012

Dated: July 16, 2012

By: Richard Lehan
Richard Lehan, Esquire
Presiding Officer

SERVICE LIST

In the Matter of 16 Medouie Creek Road, Nantucket
Docket No. 11-30084-2012-01-RL
NHESP File No. 11-30084

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