

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

SUFFOLK, SS.

DIVISION OF FISHERIES & WILDLIFE
ADJUDICATORY PROCEEDING
DOCKET NO. 08-24100-10-DH

IN THE MATTER OF:

PLYMOUTH LONG BEACH
MANAGEMENT PLAN, NHESP
FILE NO. 07-21460

RECOMMENDED FINAL DECISION II¹

I. INTRODUCTION SUMMARY

Goldenrod Foundation, Inc., (“Goldenrod”)² appeals the April 28, 2009 conditional no-take determination made by the Natural Heritage and Endangered Species Program (“NHESP”) of the Massachusetts Division of Fisheries and Wildlife (“DFW”). In its determination DFW found that implementation by the Town of Plymouth (“Plymouth” or the “Town”) of its Long Beach Management Plan (“plan”)³ would not result in a take of state-listed species of shorebirds in violation of G.L. c.131A, the Massachusetts Endangered Species Act (MESA), or 321 CMR 10.00, MESA regulations, provided that additional conditions and restrictions as contained in the April 28, 2009 and March 11, 2010 DFW letters to Plymouth were complied with during implementation of the plan.⁴

¹ In the interests of justice, and to avoid unnecessary confusion, I have made corrections to my December 13, 2010 Recommended Final Decision. In no way do these corrections alter the findings of fact, conclusions of law or the recommended decision. The corrections contained herein apply solely to matters of form, grammar, spelling and typographical errors. An errata sheet identifying all corrections to the Recommended Final Decision is attached. For purposes of the MESA appeal, this December 22, 2010, Recommended Final Decision II shall replace the December 13, 2010 Recommended Final Decision. Although there have been no substantive changes to my recommended decision, the parties may by motion filed within seven days from their receipt of this corrected recommended decision request adjustments to the schedule of this proceeding or the date for the Final Decision.

² Goldenrod Foundation, Inc. is a Massachusetts non-profit foundation. See Findings of Fact, ¶¶11 and 12, *supra*).

³ The plan submitted to DFW by the Plymouth Department of Public Works, Division of Environmental Management for MESA review consisted of the 1998 plan provisions and management measures, special conditions to protect rare species habitat established by the Department of Environmental Protection (“DEP”) and incorporated in their 2003 and 2010 Final Order of Conditions pursuant to the Wetlands Protection Act, G.L. c.131, §40, a 2003 DEP Settlement Agreement incorporating further plan conditions for habitat protection, and the plan conditions as most recently established in 2009 and 2010 by DFW as part of its plan review under MESA and its conditional no-take determination.

⁴ MESA regulations adopted by DFW are codified at 321 CMR 10.00. The term “state-listed” as used throughout this recommended final decision means those shorebirds that have been designated by DFW as endangered, threatened or special concern species. A list of those state-listed shorebirds may be found at 321 CMR §10.90, and include the “endangered” roseate tern, the “threatened” piping plover, and the “special concern species” of arctic, common and least tern.

The parties did not request, nor was this proceeding placed on an accelerated schedule.⁵ This appeal involves a complex matter requiring the determination of scientific, biological, environmental and statistical facts. Seven witnesses pre-filed their extensive direct and rebuttal testimony with numerous exhibits. Five witnesses were cross-examined over a four day hearing which concluded on July 21, 2010. The parties filed pre-hearing memoranda, recommended findings of fact, conclusions of law, and presented oral summations at the conclusion of the hearing. There were numerous post hearing motions and actions which extended the schedule of events.

Goldenrod's argument breaks down to the following elements: the plan provisions authorize and facilitate significant recreational access to and use of Plymouth Long Beach ("beach") by off-road vehicles ("ORV")⁶ and their beach-going occupants, and numerous boats and their occupants; that such intensive recreational use of the beach degrades particular areas of rare species habitat and disrupts the breeding, nesting, feeding, resting or migratory behaviors of state-listed species of shorebirds on the beach; the plan fails to sufficiently restrict these recreational uses so as to prevent degradation to particular areas of rare species habitat and prevent disruptions to state-listed migratory shorebirds using the beach; implementation of the plan, therefore, constitutes a "take" of state-listed species as that term is defined in 321 CMR 10.02; and that the DFW April 28, 2009 conditional "no-take" approval of the implementation of the plan violates MESA.⁷

After a thorough study of the testimony and exhibits in this proceeding, and upon a long and thoughtful consideration of Goldenrod's position, I find no merit to their argument as it relates either to the plan provisions, to implementation of the plan by Plymouth, or to the DFW conditional no-take determination approving plan implementation.⁸ Even if there were some merit to this argument it still must fail because it is unsupported by any meaningful or competent evidence. While I find Goldenrod witnesses Scott Hecker and C. Diane Boretos to be

⁵ Pursuant to 801 CMR §1.02(7)(b) parties may by motion, jointly filed or otherwise, request that an adjudicatory proceeding be heard and/or decided on an accelerated schedule. See *Matter of South Road, Lots 11 and 12, Hampden, MA*, NHESP File No. 07-21460, Docket No. 721460-09-DH, July 10, 2009, where the parties agreed at the pre-hearing conference to an expedited schedule for the proceeding.

⁶ ORVs include those vehicles used by recreational beach users, recreational and commercial fishermen and shellfishermen, recreational campers (trailered or self-contained) private property owners of houses and cottages on the beach, researchers and monitors, law enforcement, emergency, maintenance and public safety. (Plan, §5.0, p.15).

⁷ In addition to their primary argument set forth above, Goldenrod presents two secondary arguments that: (1) DFW unlawfully placed the burden of proof in this appeal on the petitioner, when it should be on the project proponent; and (2) during this particular plan review, for political purposes, DFW adopted and applied a "*de minimus*" standard not contained in MESA or the regulations when it determined that ORV use on the beach as conditioned by the plan would not degrade plover and tern habitat.

⁸ The question being adjudicated is whether the DFW April 28, 2010 decision properly determined that implementation of the plan would not result in a take of state-listed species. Thus, the evidentiary focus on the establishment of facts needed to answer this questions is on the specific plan provisions, conditions and restrictions that, when properly implemented will prevent a take of state-listed species in violation of MESA.

credible based on their education, experience, and technical backgrounds, with few exceptions I am unable to attach much weight to their testimony and opinions due to a lack of evidentiary support necessary to lay the foundation upon which such testimony and opinion are based. Their testimony and exhibits do not support an evidentiary finding that ORV and human activities on the beach as conditioned by the plan rise to the level of a take in violation of MESAs no-take prohibition.

On the other hand, I find substantial evidence in the record of this proceeding to support the testimony and opinions of the DFW and Plymouth witnesses. Not only were these witnesses credible based on their education, experience, and technical backgrounds, but their testimony and opinions were supported by substantial evidence. This evidence is found in the plan's management provisions which, in addition to the DEP and DFW recreational use conditions, include the beach parking plan, the beach staffing schedule, the job descriptions for beach management staff, especially for the Natural Resource Officers who enforce the plan by issuing citations for violations of its requirements by recreational users of the beach, the Plymouth Long Beach Rules & Regulations, Plymouth's By-Laws relevant to use of the beach, the 2003 and 2010 DEP special conditions, the 2003 settlement agreement, and the DFW conditions added to the plan on April 28, 2009 and March 11, 2010.

Based on the record of this proceeding, I conclude that the DFW April 28, 2009 conditional no-take determination made pursuant to 321 CMR 10.18 properly decided that implementation by Plymouth of its management plan will not result in a take, as that term is defined in 321 CMR 10.02, of state-listed species of shorebirds, including from a behavioral or habitat perspective, provided that Plymouth incorporates, implements and complies with the added conditions set forth in the DFW conditional no-take determination.

II. ISSUE FOR ADJUDICATION

The parties agreed to the following issue for adjudication:

Whether the agency's April 28, 2009 conditional no-take decision made pursuant to 321 CMR 10.18 properly determined that the implementation of the Town's 2008 plan would not result in a take of a state-listed species as defined in 321 CMR 10.02, including from a behavioral or habitat perspective, provided the town incorporated and complied with the conditions in the agency no-take decision.

III. HISTORY OF THE BEACH, THE PLAN AND PRIOR PROCEEDINGS

Since the development and implementation of the plan by Plymouth, what was once year round uncontrolled ORV access to and use of the beach has been replaced by a suite of management measures

that provide the multiple restrictions to ORV access and use of the beach. Salient features of the ORV restrictions are:

- ORV use of the beach is prohibited year-round in Zones 1, 3 and 4;
- ORV access to the beach is restricted to particular areas of Zone 2 only;
- the number of ORVs that may access the beach in Zone 2 is limited to no more than 225 vehicles per day;
- ORV use of the beach in Zone 2 is restricted to a vehicle corridor 12' wide located within 42' above the mean high tideline, and marked by posts and signs;
- provisions for in-season adjustments to further limit the number of ORVs, decrease the size of the vehicle corridor, and increase the size of plover and tern protected areas whenever natural conditions on the beach or plover and tern behaviors require adjustments to ensure their protection;
- ORV access to Zone 2 is restricted to a 3 month period between Memorial Day and Labor Day;
- ORV use is prohibited in areas marked with symbolic fencing made from poles, string and warning signs that provide a buffer area to protect habitat for plovers and terns, to protect plover and terns nests, and to protect areas on the beach where plovers and terns are scraping (using their bodies to mark the sand for potential nest sites);
- camping is prohibited in Zones 1, 3 and 4;
- limited camping is restricted to particular areas in Zone 2 only; and
- there is 24-hour security at the gates during plover and tern hatching and chick periods.

The plan is the most stringent for any beach in Massachusetts where ORV access is allowed. It contains the most rigorous restrictions to ORV access and requires the most expansive suite of symbolic fencing requirements to protect plover and tern nesting areas from ORV access.⁹ The Plan has been recognized by some serious players in the field of endangered shorebirds. In its 1994 Annual Report, the Massachusetts Audubon Society commented that “[t]he Plymouth Long Beach ORV/Wildlife Management Plan prepared by the Plymouth Parks Department in 1992 is one of the most comprehensive documents of its kind in the Commonwealth.”¹⁰ As recently as July 20, 2009, during the height of the summer season, the National Audubon Society praised the plan, Plymouth staff and DFW

⁹ Melvin PDT, ¶¶11-13; Hecker cross-examination, Transcript, p.17).

¹⁰ McCall PDT, ¶10.

wildlife experts noting that “on beaches that allow ORVs, Massachusetts sets the standard for protecting piping plovers ... wildlife managers and park service personnel in Massachusetts are setting the gold standard for piping plover management.”¹¹ The United States Fish and Wildlife Service which manages inland wildlife under the Endangered Species Act (“ESA”) had this to say about the plan: “[S]ince 1998 town officials have demonstrated their commitment to protecting piping plover nests and chicks from human harm ... Now that the *formal guidelines* are in place, we are confident that the town will continue to do its best to conserve this threatened species.” (Emphasis added).¹²

A history of the beach, the plan and prior proceedings surrounding the plan begins with the Wetlands Protection Act (“WPA”), G.L. c.131, §40, and DEP plan review pursuant to regulations implementing the WPA, 310 CMR 10.00.¹³

1. The 1992 Plan Review. For decades ORV access to the beach was a year round activity, unregulated and unmanaged. In September 1992 Plymouth obtained a superseding order of conditions (“SOC”) from DEP approving the first Plymouth Long Beach ORV/Wildlife Management Plan which, among other things, regulated ORV access to town owned portions of the beach to protect endangered wildlife and wildlife habitat.¹⁴ An unpaved trail has been historically used by vehicles to access the beach, as well as accessing private homes on the beach. Known as Ryder Way, it is an unpaved trail marked with large boulders, wood posts and signs maintained by Plymouth.¹⁵ For the first time in 1992 a management plan with restrictions governing ORV use on the beach to

¹¹ McCall PDT, Exhibit E.

¹² McCall PDT, Exhibit B. A potential fine of \$12,000 which could have been levied on the Town by the U.S. Fish and Wildlife Service was dismissed after the DEP 2003 FOC incorporated into the plan the DFW Guidelines which establish the performance standards for ORV access to beaches that contain plover and tern habitat, and parties to the DEP appeal reached a settlement agreement which also incorporated additional restrictions on ORV use of the beach. In dismissing the potential penalty the Service stated in its press release that “the money can best be used to support local effort too protect the piping plover.” (Id). The “formal guidelines” referred to in the press release are the 1993 DFW Guidelines.

¹³ Public and agency review of proposed projects that have the potential to alter, impact or adversely effect wetland habitats for state-listed species require the project applicant to file a NOI with the commission and, if within a DFW priority habitat, with DFW. Within thirty days of the Notice of Intent (“NOI”) filing, DFW determines if the project is in fact within a wetland resource habitat area for state-listed species; if the project will have an adverse effect on that habitat or result in a take of the state-listed species in violation of MESA; and what conditions, if any, must be included by the commission in its order of conditions to avoid an adverse effect to the habitat and the state-listed species. 321 CMR §10.18; 310 CMR §§10.37, 10.58(4)(b) and 10.59. Persons aggrieved by an order of project conditions adopted by the commission, or lack of such order, may appeal to DEP for a review and determination of whether the project area is significant for protecting wildlife habitat. G.L. c.131, §40.

¹⁴ Plymouth Long Beach Management Plan, Plymouth Parks and Forestry Divisions, November 1998, p.15.

¹⁵ *Matter of Plymouth*, Docket No. WET-2009-016, Recommended Final Decision, February 18, 2010, pp. 2 and 73-74. Vehicular access to private houses on the beach takes place over an unpaved right of way maintained by Plymouth known as Ryder Way.

protect plover and tern nests was established in accordance with a DEP SOC.¹⁶ The 1992 SOC was extended by DEP on various occasions.¹⁷

2. The 1998 Plan Review. In 1998 Plymouth revised its 1992 plan to implement guidelines issued by state and federal agencies for managing recreational beach activities to protect endangered and threatened species of shorebirds.¹⁸ In February 1999 the Plymouth Conservation Commission issued an order of conditions approving the plan with special conditions. In July 2000 DEP issued a SOC approving the plan subject to additional conditions and restrictions designed to further protect wetlands resources. For purposes of this MESA appeal, those wetland resources identified pursuant to the WPA include the nesting habitat for rare species of shorebirds.¹⁹ The SOC was subsequently appealed by aggrieved parties. In the course of the appeal, the parties entered into extended negotiations which resulted in a settlement agreement (“SA”) as well as an amended 1998 plan. The parties to the SA included Plymouth, DEP, the Massachusetts Audubon Society, Long Beach Conservation Realty Trust, Laughlin Realty Trust, and Catherine S. Muther, Dennis Aftergut and Joseph P. Laughlin, Jr., trustees and as individual owners of property with houses on the beach.²⁰

In July 2003 DEP incorporated the SA and the 1998 amended plan into a final order of conditions (“FOC”) with special conditions.²¹ The FOC specifically provided that habitat for rare species of shorebirds as determined by DFW must be identified, delineated and maintained with warning signs and symbolic fencing in all areas of the beach where ORV access was allowed.²²

16 *In the Matter of Town of Plymouth, DPW/Parks & Forestry Division*, Docket Nos. 2000-108 and 2000-109, Settlement Agreement, July 24, 2003, ¶¶11 and 14 (“settlement agreement”).

17 *Id.*

18 These include: DFW, Guidelines for Managing Recreational Use of Beaches to Protect Piping Plovers, Terns and their Habitats in Massachusetts, and Massachusetts Tern and Piping Plover Handbook: a Manual for Stewards; Massachusetts Barrier Beach Task Force, Guidelines for Barrier Beach Management in Massachusetts; US Fish and Wildlife Service, Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat in the US Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act, April 15, 1994).

19 Settlement Agreement, ¶15.

20 Goldenrod acknowledged that that the “settlement signed in 2003, which increased protections for shorebirds and habitat, led to improved management of the Beach.” April 17, 2008 letter from Goldenrod to DFW appealing the DFW no-take determination

21 Final Order of Conditions, DEP Wetlands File No. SE57-1560, ¶22, July 24, 2003.

22 *Id.*

3. The 2008 Plan Review. In March 2008, thirteen months prior to its April 28, 2009 MESA conditional no-take determination, DFW had undertaken review of the February 2008 plan in accordance with the provisions of the WPA and WPA regulations. The provisions of the February 2008 plan consist of the November 1998 plan, the DEP August 2003 final order of conditions (“FOC”) and the July 2003 SA.

In March 2008 Plymouth filed the plan and a NOI with the Plymouth Conservation Commission and DFW. DFW informed Plymouth of its determination that activities and uses of the beach managed by the plan will occur within priority habitat for state-listed shorebirds. DFW further determined that in order to avoid adverse effects to priority habitat of state-listed shorebirds which might result during recreational use of the beach, Plymouth must take three actions: (1) implement and comply with all of the February 2008 plan provisions; (2) provide in its plan and implement a process to erect and expand as necessary symbolic fencing made of poles with rope strung between them to protect any areas of the beach where territorial or courting plovers were using their bodies to scrape pre-nest shallow depressions in the sand; and (3) provide DFW with additional information to complete its MESA review including, specifically, a description of how Plymouth would address the potential impacts of unrestrained dogs on the beach.

In March 2009 DEP issued a SOC incorporating the DFW conditional no adverse effect determination and approved implementation of the plan. Goldenrod appealed the SOC. In February 2010, after a three-day hearing involving nine witnesses and a Tentative Decision, the DEP Magistrate concluded that: (1) “conditions set out in the DFW Determination, the SOC and the 2008 plan sufficiently prevent the potential impacts from ORVs to the extent that no adverse effect is caused to ... state listed rare species habitat on Plymouth Beach”; and (2) “that the SOC conforms to the Regulation’s [310 CMR 10.00] performance standards applicable to the resource areas on Plymouth Beach, including ... wildlife habitat.”²³ On March 16, 2010, the DEP Commissioner adopted the Recommended Final Decision, including the Magistrate’s Recommended Revisions (special conditions), incorporated it into the FOC as DEPs Final Decision.²⁴

Upon review of the plan as submitted (additional information on the results of Plymouth’s dog control program remained to be sent), DFW issued its conditional no-take decision that determined plan implementation would not result in a take of state-listed species provided that additional conditions be incorporated into the plan and

²³ *In the Matter of Town of Plymouth*, Docket No. WET-2009-016, Recommended Final Decision, February 18, 2010, pp. 2 and 73-74.

²⁴ *In the Matter of Town of Plymouth*, Docket No. WET-2009-016, Final Decision, March 16, 2010

implemented by Plymouth. DFW completed the MESA process after it reviewed the additional information submitted by Plymouth containing a study of the plan's dog control measures. A review of that study resulted in DFW requiring that Plymouth implement as part of its plan a ban on dogs from town owned property on the beach in Zones 4, 3, 2 and portions of 1, from April 1st to September 30th of each year. Dogs that are allowed on the remaining portions of Zone 1 during this period are required to be on leash at all times.²⁵

IV. FINDINGS OF FACT

The hearing record in this MESA appeal incorporates the pre-filed written direct and rebuttal testimony with exhibits of the following seven witnesses: Goldenrod Executive Director Scott Hecker, Goldenrod President Catherine Muther, and C. Diane Boretos, Wetland Scientist, Call of the Wild Consulting and Environmental Services; Plymouth Environmental Manager David Gould, Plymouth Environmental Technician Kerin McCall, and John Ramsey, Coastal Engineer, Applied Coastal Research and Engineering, Inc.; and DFW Senior Zoologist Dr. Scott Melvin. Five of these seven witnesses, Hecker, Gould, McCall, Ramsey and Melvin were subject to cross-examination over a four-day period.

As previously discussed, the specific provisions and management measures of the plan as contained in this record include: (1) the February 2008 plan; (2) the plan conditions established by the DEP 2003 FOC special conditions; the 2003 settlement agreement ("SA"); the plan conditions as most recently established by the DEP 2010 FOC special conditions; and the plan conditions newly established by DFW on April 28, 2009 and March 11, 2010. None of these specific plan measures, conditions and restrictions are disputed by the parties. Nonetheless, I have decided to set forth in the Findings of Fact the specific provisions and management measures of the plan.

Therefore, based on the record of this proceeding I find the following facts:

1. Plymouth Long Beach is a barrier beach spit approximately 2.8 to 3 miles in length that separates two bodies of water – Plymouth Harbor and Cape Cod Bay, and is attached to the upland at its southern end near Plymouth's Manter's Point. (Plan, p.8).

25 March 11, 2010 letter from Thomas French, Assistant Director, DFW Endangered Species Program to Kerin McCall, Plymouth Environmental Technician. In response to the DFW expansion of the plan's dog prohibition to cover most, if not all, of the Town owned portions of the beach In response to the DFW March 16, 2010 expansion of the plan's prohibition of dogs on the beach Goldenrod noted that "the trial of this matter has just become considerably simplified, as a major issue (i.e. the effect of dogs present on Plymouth Long beach during the nesting season and during an important portion of the Fall migratory season) has been removed as an item of dispute." Goldenrod's March 17, 2010 communication to all counsel; see also, In the Matter of: Plymouth ach Management Plan, NHESP File No. 07-21460, Docket No. 08-24100-10-DH, Decision and Order on Pre-Hearing Conference, March 24, 2010, note 10.

2. The beach contains natural resource areas that provide important and significant breeding, nesting, feeding and staging habitat for rare species of migratory shorebirds. (*Id.*, p.10).

3. NHESP is a program within DFW and is administered by the DFW Director. (G.L. c.131, §5B).

4. There are over 400 state-listed species of animals and plants that are protected under MESA through a DFW process that reviews projects and activities that may result in a take of these species. In 2009 DFW completed 1,305 reviews of projects ranging from small single home additions, to major large scale residential, commercial and mixed use developments with 75.2% receiving a no-take determination, 21.5% were conditioned by DFW to avoid a take, and 3.2% were determined to result in a take requiring a conservation and management permit. (Melvin PRT, ¶¶2-4, Exhibit A).

5. Between 1993 and 2008 numbers of plovers in Massachusetts increased from 289 to 566 breeding pairs; between 1993 and 2009 least terns increased from 2,622 to 3,569 pairs; between 1993 and 2009 the beach numbers of plovers increased from 4 to 24 breeding pairs and least terns increased from 223 to 475 pairs; the beach supported the fifth largest number of plover pairs and the second largest number least tern pairs of any site in New England.

6. On February 4, 2008, Plymouth filed with DFW for a MESA review of its plan, providing a MESA project review checklist and a copy of the notice of intent filed with the Plymouth Conservation Commission in accordance with the WPA and 310 CMR 10.37. (Melvin PDT, ¶14).

7. On March 10, 2008, DFW determined that the activities and management actions described in the plan occurs within the priority habitat of five state-listed species of migratory shorebirds and, in order to avoid any adverse effects to this priority habitat DFW required that Plymouth implement and comply with all of the provisions of the February 2008 plan, erect and expand as necessary symbolic fencing to protect any areas of the beach where territorial or courting plovers are “scraping” in the sand (identifying potential areas for nesting sites), and provide DFW with additional information, especially with regard to the issue of unleashed dogs, to complete its MESA review. (321 CMR 10.19; Melvin PDT, ¶¶8 and 15).

8. The species of migratory shorebirds listed by DFW at 321 CMR 10.90 are: the endangered roseate tern, the threatened piping plover, and three species of special concern – the common, least and arctic tern. (Melvin PDT, ¶15).

9. The beach has historically served, and continues to serve as an important recreational resource in Plymouth by providing the public with seasonal activities including sunbathing, playing, exercising, walking, camping, picnicking, boating and fishing. (Plan, pp. 4, 8 and 10).

10. For purposes of this appeal only, the beach consists of the coastal dune area (secondary and primary dunes), and the coastal beach area (dry beach/berm, embryo dunes, wrack lines, and tidal flats between the mean high and mean low tides). (Boretos PDT, Exhibit B).²⁶

11. Except for portions of the coastal dunes that are too densely vegetated, too precipitously steep or too developed, the remainder of the beach within Zone 2 facing the bayside contains priority habitat for state-listed species of migratory shorebirds. (Melvin cross-examination, Transcript, pp. 235-236)

12. The petitioner, Goldenrod Foundation, Inc., is a non-profit foundation incorporated in 2000 under the laws of the Commonwealth of Massachusetts. The stated mission of Goldenrod is to preserve and protect coastal habitat in southeastern, Massachusetts and to support stewardship practices, policy and programs that are critical to the survival of shorebirds. (Muther PDT, ¶¶1-9).

13. Goldenrod owns a parcel of real property and a cottage, the fifth cottage north of the crossover, on the beach that it uses for educational and scientific programs that involve the observation, monitoring and preservation of birds. (Claim for Adjudicatory Appeal, May 19, 2009, ¶4; Muther PDT, ¶9).

14. From January 2006 through 2009, the Wildlife Services section of the U.S. Department of Agriculture, at the request of DFW and pursuant to a cooperative agreement with Goldenrod, developed and conducted a predator control program that successfully removed a number of adult red fox, their kits and opossums which had been captured and dispatched by Wildlife Services personnel. The program resulted in an increase in the number of least tern, common tern, arctic tern and plover breeding pairs on the beach. (Wildlife Services Report, pp.5-8).

15. Goldenrod president Catherine Muther is a trustee of the Long Beach Realty Trust which owns both a parcel of real property and a cottage, the second cottage north of the crossover, on the beach. (Muther PDT, ¶10).

16. The plan specifically incorporates the DFW Guidelines for Managing Recreational Use of Beaches to Protect Piping Plovers, Terns and their Habitats in Massachusetts ("Guidelines"), and Massachusetts Tern and Piping Plover Handbook: A Manual for Stewards. Plymouth's approach to beach management was adopted from the

²⁶ Boretos exhibit B lists "embryo dune" as a natural resource area within the coastal dunes, the DEP Magistrate concluded that "including embryo dunes located in the intertidal zone within the Regulations [310 CMR 10.28(2) and (3)] is inconsistent with the definition of a coastal beach ..." *Matter of Plymouth*, WET 2009-016 Recommended Final Decision, p.12. Counsel for Goldenrod acknowledged that "[I] don't think anyone's going to disagree that there was significant and fairly sharp disagreement over whether embryo dunes were dunes under the wetlands act over the DEP matter..." (Transcript, p.230).

Barrier Beach Task Force's Guidelines for Barrier Beach Management in Massachusetts; and Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat, U.S. Fish and Wildlife Service, April 15, 1994. (Plan, §§3.22 and 7.0; McCall PDT, ¶11).

17. Ryder Way is an unpaved "established trail" marked by boulders and posts and maintained by the Town. It extends 1.3 miles from the northern end of the main parking lot at Manter's Point to the shared boundary line of Zone 1 and Zone 4. Ryder Way provides ORV barrier beach access along the harborside. At the end of Ryder Way in Zone 2, there is a "crossover" to the beach on which ORVs may proceed to the bayside or continue west in a northerly direction on the harborside. At the entrance to the crossover is a guard shack and lockable gate maintained by Plymouth. (Plan, §5.1, p.17).

18. Using state and federal regulations and guidelines for managing barrier beaches that contain habitat for plovers and tern, the plan incorporates "verbatim" the performance standards contained in the DFW 1993 Guidelines. (Plan, §7.0, p.24, and Part 7.01, pp.24-30).

19. The plan divides the beach into four management zones based on the sensitivity of the environment and the particular wildlife present. (Plan, §5.0; Gould PDT, ¶38; McCall PDT, ¶11, Exhibit F).

20. Zone 1 begins at the south end of the beach facing both Plymouth Harbor ("harborside") and Cape Cod Bay ("bayside"), and includes the main parking area and Ryder Way. It extends north to a point 200' south of the crossover.²⁷ Except for emergency vehicles, ORV use of the bayside beach is restricted from Memorial Day to Labor Day of each year; overnight camping and ORV use of the bayside beach is prohibited year round. Zone 1 is marked at both ends with cable or cordage and posts sufficient to restrict vehicle passage, prevent damage to vegetation and tidal flats, and prevent any parking prohibited by the plan. Parking along Ryder Way within Zone 1 is only allowed in those areas expressly designated by the plan and appropriate signage. ORV use and camping is prohibited on the beach throughout the year. (Gould PDT, ¶¶38-53; McCall PDT, ¶¶12-17 and 34; 2003 FOC Special Conditions, ¶26).

21. Zone 2 is approximately 5,500' long extending from a point 200' south of the crossover to a point 790' south of a stone groin at the northerly tip of Beach Point, and includes the northeastern portion on the bayside. Except for emergency vehicles, ORV access to Zone 2 is restricted to Memorial Day through Labor Day. Zone 2

²⁷ At the end of Ryder Way in Zone 2, ORVs may cross over to the beach on the bayside or proceed west in a northerly direction on the harborside. Appropriately referred to as the crossover, this area contains a guard shack and lockable gate maintained by Plymouth.

may not be opened until such time as all beach staff is present, including but not limited to staff at both the crossover gate and the main beach boat ramp gate. ORV access to, and use of Zone 2 is limited to a vehicle corridor between the hours of 9:00 a.m. to 7:00 p.m. ORV travel over intertidal areas is prohibited. To protect the hatching of new plover and least tern chicks the plan requires 24-hour staffed security at both gates. To ensure the prevention of vehicular use of foredunes and the protection of nesting activity ORV access to the beach may be further limited, up to and including a closure by Plymouth staff when higher than normal tides or storms results in overcrowded conditions on the beach. (*Id.*; 2010 FOC Special Conditions, ¶2).

22. Before the beach in Zone 2 is opened to ORVs, symbolic fencing or post and sign marking of the vehicle corridor must be staked and maintained throughout the year. If, after the beach is opened to ORV use, it is closed for a continuous period of 2 weeks or more, the seaward edge of the vehicle corridor on that portion of the beach so closed must be re-established at a meeting(s) scheduled by the Town before ORV access is reopened. From April 1st to May 31st of each year, the symbolic fencing or posts and signs marking the landward edge of the vehicle corridor must be inspected on a weekly basis and adjusted seaward to insure ORV use does not impact plover and tern nesting habitat. (2003 FOC Special Conditions, ¶¶24 and 25).

23. Except for emergency vehicles, Zone 2 may not be opened to ORV use before Memorial Day without prior written approval from DEP. If prior to the Memorial Day opening of Zone 2, the distribution of active nests is such that the area from the crossover to the adjustable groin²⁸ has significantly less active plover nests than the prior year, Plymouth must consult with DEP and DFW to determine if any modifications should be made to the layout of the corridor or conditions under which ORVs may use the beach to ensure that potential nesting areas are not disturbed. (*Id.*).

24. Northern Zone 3 includes the far end of the beach located on the tip of Beach Point. The area is marked by symbolic fencing, enclosure fencing and fragile area signs to protect tern breeding, plover nesting and staging areas. ORV access is prohibited from April 1st to September 30th of each year, and, in conjunction with an off-season locked gate, is effectively excluded from Zone 3 year-round. No overnight camping is allowed and no activities are allowed within bird nesting sites. (Gould PDT, ¶¶48-50).

25. Zone 4 of the plan on the harborside in the northwest begins at the tip of Beach Point and extends 3,300 feet south along the harborside to the first parcel of private property. The southern boundary of Zone 4 abuts the

²⁸ The adjustable groin is a point on the beachfront used for the purpose of measuring distances and locating points on the beachfront for management purposes.

northern boundary of Zone 1, with all boundaries marked by post and cable fencing. The northerly tip of Zone 4 contains important staging areas for state-listed shorebirds, and coastal dune habitat for plovers and terns are protected by posts, wire cable, exclosure fencing, symbolic fencing and fragile area warning signs. While pedestrian and marine use is allowed, ORVs and overnight camping are prohibited year round. Zone 4 is effectively made inaccessible year round to vehicles by the post and cable fencing at each end. (*Id.*, ¶¶51-53).

26. In those portions of the beach where ORVs are allowed to travel all areas of suitable plover nesting habitat as determined by DFW must be identified and delineated with warning signs and symbolic fencing no later than May 15th of each year. Symbolic fencing delineating where nesting activity is occurring must be maintained and expanded as necessary through July 31st or through the end of any period of nesting activity, whichever is later, provided that any such nesting activity began on or before July 31st. Nesting activity is defined by the presence of plover or tern courting, scrapes on the ground anywhere above the mean high tide line and any other evidence of footprints, nest's, eggs or unfledged chicks. (2010 FOC Special Conditions, ¶3).

27. Excluding Ryder's Way, on those portions of the beach where ORVs are allowed to travel a vehicle corridor no greater than 12 feet wide for vehicle travel must be established using symbolic fencing. In areas of the beach where parking is permitted and where sufficient width exists, the vehicle corridor may be expanded up to 42 feet wide to allow for vehicles traveling in opposite directions to pass and park safely. To prevent ORVs from traveling within ten feet of the toe of the dune and impacting the expanding dune vegetation, symbolic fencing or posts must be installed at least 10 feet seaward of the toe of the primary dune and any dune vegetation community. In order to allow the wrack to adequately perform its wildlife habitat functions, the seaward edge of the vehicle corridor described above must be established on the mean high tide line. The landward edge of the vehicle corridor must be either the line 42 feet landward of the mean high tide line, or at the symbolic fencing placed as described above, whichever is further seaward. (*Id.*, ¶23).

28. In the spring of each year, before the beach is opened to ORV use, Plymouth must notify all interested parties and schedule a meeting(s) to determine where to place or review the placement of the poles marking the seaward edge of the vehicle corridor at a mean high tide event determined from tide tables, or at a time sufficiently close to a mean high tide event that the mean high tide line may be readily determined from the location of the wrack line, twice a year; once prior to April 1st or before any ORV access is granted to off-road vehicles and again

prior to July 15th or before nesting areas that were closed to ORV access are reopened, whichever comes first. In the event of a dispute concerning the placement of the poles, DEP will decide. (2003 FOC Special Conditions, ¶25).

29. When tidal conditions, beach configuration and shorebird nesting activities permit, may Plymouth allow no more than 225 vehicles on the beach in Zone 2 from Manter's Point to the 790' line. The number of ORVs allowed on the beach must be further limited by Plymouth based on the availability of the safe parking area during high tide conditions and bird nesting activities. Except for emergency vehicles, ORVs are not permitted beyond the 790' line. Whenever ORV access to the beach is allowed, Plymouth beach staff must be present at the crossover gate in accordance with provisions of Plymouth's beach staffing plan. If at any time staffing is not present in the locations and in a manner set forth in the staffing plan, then those portions of the beach must be closed to ORV access. (2003 FOC Special Conditions, ¶28).

30. Except for emergency vehicles, any section of the beach where unfledged plover or tern chicks are present should be temporarily closed to all ORV. (Guidelines, Part IV., pp. 8-9; see also Conclusions of Law, ¶20, *supra*).

31. Whenever a section of beach contains a plover nest found with a complete clutch of eggs precluding estimation of the hatching date, and the availability of wrack has been substantially reduced within the vehicle corridor, or ruts have been created that could reasonably be expected to impede chick movements, then further restrictions on ORV beach use must begin immediately. That section of beach must then be closed until all remaining plover chicks associated with the nest have fledged (able to fly). The 100 yard boundary to the south must be expanded to 200 yards on or before the anticipated hatch date, if known, or upon observation that hatching has commenced. The 200 yard southern boundary may be reduced to 100 yards after the first week. If unfledged plover chicks or unfledged tern chicks move outside of the original protected area, then the boundaries of that protected areas shall be adjusted to provide at least a 100 yard buffer between the unfledged chicks and ORV use unless site specific conditions allow for a reduction in this distance. (2010 FOC Special Conditions, ¶¶5 and 6; Guidelines, Part IV., pp. 8-9).

32. Except for emergency vehicles, ORV access to the beach from the entry point at Manter's Point northward is restricted to vehicles bearing a valid, current beach sticker issued by the Town. Invitees of beachfront property owners must have a "Ryder Way Pass" to access private properties via Ryder Way and a dashboard pass to

park on private property on the beachfront. Beach stickers are issued with the condition that the holder agrees to comply with all beach rules and regulations. (SA, ¶20).

33. Between 2006 and 2008 beach conditions were such that the plan management measures allowed an average of 18 days for ORV access to the full length of the travel corridor up to the 790' line; an average of 28 days to access 75% of the vehicle corridor up to the B30 post; and an average of 49 days to access 43% of the vehicle corridor up to the adjustable groin.

34. In 2009, because of an early nesting period and beach conditions later in the summer season, ORVs were not allowed any days to access the full length of the travel corridor; 12 days to access 93% of the vehicle corridor up to the B55 post; 3 days to access 75% of the travel corridor up to the B30 post; and 16 days to access 43% of the travel corridor up to the adjustable groin.²⁹ (McCall PDT, ¶¶57-59, and Exhibits L, M and N).

35. Any requested extensions by the Town of a SOC or FOC must be sent to the Wetlands Section Chief of the DEP Southeast Regional Office, the Audubon/Citizens Group and the private property owners. DEP must notify the parties and hold a meeting on the extension request. Persons attending the meeting may present information or argument, orally or in writing, relevant to the DEP criteria to be used for evaluating such extension request. (SA, ¶24).

36. Symbolic fencing shall be erected or expanded as necessary to protect any areas of beach where territorial or courting Piping Plovers are "scraping" (i.e. using their bodies to scrape shallow depressions in the sand that are precursors to nests). (April 28, 2009, Letter from DFW to Plymouth).

37. From April 1st through September 30th, dogs are prohibited from Zones 4, 3, 2 and areas of Zone 1 north of the entrance parking lot and main beach to the northern boundary of the day parking lot. In the remaining areas of Zone 1, except areas that are fenced to protect breeding terns and plovers, dogs are allowed provided they are leashed and under the control of their owner. (March 20, 2011, Letter from DFW to Plymouth)

38. Existing signage must be modified to inform the public of the dog closures in Zones 2, 3, 4 and the northern portion of Zone 1. Additional signage informing the public must be posted along Ryder Way at the north boundary of the day parking area, on the beachfront immediately seaward of the north boundary of the day parking area, on the beach front at the crossover. Signage posted on the beaches in Zones 2, 3 and 4 must inform the public of these closures. (*Id.*)

²⁹ Like the adjustable groin, numbered posts on the beachfront are used for the purpose of measuring distances and locating points on the beachfront for management purposes.

39. There must be staff coverage of at least 10 hours per week in Zones 2, 3, and 4 and the portion of Zone 1 north of the day parking area to monitor and enforce compliance with the dog prohibition. (March 20, 2011, Letter from DFW to Plymouth).

40. Informational flyers explaining the dog control program must be developed and distributed at the entrance to the beach parking lot by April 1, 2010, with dog licenses during the next annual licensing cycle, in a press release to local newspapers, in the bi-weekly beach updates that appear in local newspapers, in the Bulletin Board section of the local cable access channel, on the News and Beach pages of the Town's website and to boaters through the Harbormaster. (*Id.*)

41. Plymouth must continue to obtain assistance from the Police Department and animal control officers to help enforce the dog control program, including weekend police patrols and real-time access to an animal control officer to issue citations or remove unattended dogs. On or before November 30, 2010, the Plymouth must provide NHESP with a report on the results of the dog control program. (March 20, 2011, Letter from DFW to Plymouth).

V. CONCLUSIONS OF LAW

For purposes of this appeal, the following legal conclusions and principles shall apply:

1. It is a violation of MESA for any person to take any animal species listed as endangered, threatened or of special concern. (G.L. c.131A, §2).

2. Person is any officer, agent, department or instrumentality of any state or its political subdivisions, including but not limited to any agency, department, board, commission or authority thereof. (321 CMR 10.02).

3. Take 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. Disruption of nesting, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of habitat. (G.L. c.131A, §1; 321 CMR 10.02).

4. Habitat is defined as 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 for state-listed species. (321 CMR 10.02).

5. Priority habitat is defined as the geographic extent of habitat for state-listed species as delineated by DFW pursuant to 321 CMR 10.12. (321 CMR 10.02).

6. MESA contains authority for DFW to adopt any regulations necessary to implement its provisions. Such regulations have been adopted by DFW and are codified at 321 CMR 10.00. (G.L. c.131A, §4).

7. The parties stipulated that Dr. Scott Melvin possesses the necessary authority to act on behalf of, and testify for DFW in all respects concerning the plan review by DFW as well as the DFW April 28, 2009 conditional no-take determination.

8. Priority habitat are areas where there is the potential for a take of endangered, threatened, or special concern species as the result of a project or activity. Priority habitats are used for screening projects or activities that may result in the take of state-listed species and to provide guidance to project proponents regarding a project or activity through consultation with DFW. The priority habitat review procedures assist proponents with projects or activities that will take place in a priority habitat to avoid a take of state-listed species (321 CMR 10.01).

9. A proposed project or activity that will be located or will take place in a priority habitat must be reviewed by DFW for the purpose of determining if it will result a take of state-listed species. (310 CMR 10.37; 321 CMR 10.18; Melvin PDT, ¶8).

10. Project or activity means any action, including, but not limited to the construction, reconstruction, improvement or expansion of roads and other ways. (321 CMR 10.02).

11. Project proponents shall demonstrate that the proposed project or activity does not result in a take, as defined in 321 CMR 10.02 and 10.04. (321 CMR 10.18)

12. Any person aggrieved by a final agency decision made pursuant to 321 CMR 10.18 shall have the right to an adjudicatory hearing, the notice of claim for which shall include, among other things, a clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of DFW, the basis for those objections, and the relief sought through the adjudicatory hearing. (310 CMR 10.25(1) and (3)).

13. The roseate tern and piping plover are listed by DFW as endangered and threatened respectively; the common tern, least tern and arctic tern are listed by DFW as species of special concern. (310.CMR 10.90).

14. DFW may establish in guidance, performance standards for projects or activities in a priority habitat that, if complied with, will receive a no-take determination from DFW under 321 CMR 10.18. (321 CMR 10.18(5)(b)).

15. In April 1993 DFW promulgated Guidelines for Managing Recreational Use of Beaches to Protect Piping Plovers, Terns and their Habitats in Massachusetts, to establish performance standards for ORV and

pedestrian use of beaches that lie within a priority habitat for plovers and terns. DFW has consistently applied these guidelines to its review of projects and activities pursuant to 321 CMR 10.18. (Guidelines, Part I.; Melvin PDT, ¶11).

16. Plymouth has incorporated the performance standards contained in the 1993 Guidelines “verbatim” into its plan. (Plan, Part 3.22, p.12, Part 7.0, pp.22-24 and Part 7.1, pp.24-30)

17. Compliance with the 1993 Guidelines by the proponent of a proposed project or activity that takes place within a priority habitat for plovers and terns will receive a no-take determination from DFW. (321 CMR 10.18(5)(b)).

18. The Guidelines are designed to provide the necessary protection to plovers and terns without unnecessarily restricting access along Massachusetts beaches for appropriate uses. (Guidelines, Part IV., p.1).

19. The purpose of the Guidelines is “to assist beach managers ... with protecting piping plovers, least terns, common terns, roseate terns, arctic terns, and their habitats. Implementing these guidelines will help beach managers ... avoid potential violations of the Massachusetts Endangered Species Act (MGL c. 131A) and its implementing regulations (321 CMR 10.00) involving recreational use of beaches used by piping plovers and terns for breeding and nesting habitat.” (Guidelines, Part I., p.1).

20. Application of the Guidelines complement other forms of DFW guidance during the regulatory review process regarding recreational activities on beaches by providing a standard set of scientifically based management recommendations that are applied by DFW during its review of proposed projects and activities that are subject to a notice of intent (“NOI”) filed by the proponent with the local Commission pursuant to WPA regulations at 310 CMR 10.37, and which involve vehicular use of beaches where plovers and terns are present. (*Id.*).

21. The Guidelines provide that ORV access and use of beaches where plovers and terns are present will be restricted for, among other purposes, the protection of habitat, nests, and unfledged chicks. (Guidelines, p.2).

22. The Guidelines provide that on beaches where ORVs will be driven, all areas of suitable piping plover nesting habitat, as determined by DFW, should be identified and delineated with posts and warning signs or symbolic fencing on or before April 1st of each year. Suitable nesting habitat for all species of terns should be identified and delineated in like manner on or before May 15th of each year. (*Id.*).

23. The Guidelines were promulgated by DFW for Conservation Commissions to apply in developing Orders of Conditions allowing for ORV use on beaches, and expressly affirm that restrictions on recreational uses shall be imposed whenever it is necessary to protect habitat, nests and unfledged plover and tern chicks. (Guidelines

24. An agency is bound by the guidelines it promulgates. (*Macioci v. Commissioner of Revenue*, 386 Mass. 752, 763 (1982).

25. The Guidelines provide that ORV beach access should be prohibited when it occurs in or through delineated nesting habitat. However, prior to hatching, ORVs may pass by such areas along a “designated vehicle corridor” established along the outside edge of plover and tern nesting habitat. ORVs may also park outside delineated nesting habitat, if beach width, configuration and tidal conditions allow. Designated vehicle corridors or parking areas should be moved, constricted, or temporarily closed if territorial, courting, or nesting plovers or terns are disturbed by passing or parked ORVs, or if disturbance is anticipated because of unusual tides or expected increases in ORV use during weekends, holidays or special events. (Guidelines, Part I., p.8).

26. The Guidelines provide that ORVs should be prohibited from any areas of the beach where unfledged plover, roseate, common or arctic tern chicks are present. (*Id.*).

27. The Guidelines provide that when unfledged least tern chicks are present, ORVs should be prohibited from all dune, beach, and intertidal habitat within 100 yards of either side of lines drawn through the outermost nests in the colony and perpendicular to the long axis of the beach. The resulting area of protected habitat for least tern chicks should extend from the oceanside low water line to the bayside low water line or to the farthest extent of dune habitat if no bayside intertidal zone exists. If unfledged least tern chicks move outside the original protected area, then the boundaries of the protected area should be adjusted to provide a least a 100 yard-wide buffer between unfledged chicks and ORVs. However, ORVs may pass through any portion of the protected area considered inaccessible to least tern chicks because of distance, steep topography, dense vegetation, or other naturally occurring obstacles. (Guidelines, Part I., p.8).

28. The Guidelines provide that because least tern chicks disperse from nests shorter distances and at older ages than plover chicks, under some circumstances it may be possible to allow passage of ORVs through portions of protected least tern chick habitat if, in the opinion of DFW, this can occur without substantially increasing threats to least tern chicks or their habitats. (Guidelines, Part IV., p.8).

29. The Guidelines provide that when unfledged plover chicks are present, ORVs should be prohibited from all dune, beach, and intertidal habitat within 100 yards of either side of a line drawn through the nest site and perpendicular to the long axis of the beach. The resulting 200 yard-wide area of protected habitat for plover chicks should extend from the oceanside low water line to the bayside low water line or to the farthest extent of dune habitat if no bayside intertidal habitat exists. However, vehicles may be allowed to pass through portions of the protected area that are considered inaccessible to plover chicks because of steep topography, dense vegetation, or other naturally occurring obstacles. If unfledged plover chicks move outside the original 200 yard-wide area of protected habitat, then the boundaries of the protected area should be adjusted to provide at least a 100 yard buffer between chicks and ORVs. (*Id.*).

30. The Guidelines provide that restrictions on use of ORVs in areas where unfledged plover or tern chicks are present should begin on or before the date that hatching begins and continues until chicks have fledged. For purposes of ORV management, plover chicks are considered fledged at 3 days of age or when observed in flight, whichever occurs first. Tern chicks are considered fledged when they are capable of flight. (Guidelines, Part IV., pp. 8-9).

31. The Guidelines provide that when piping plover nests are found before the last egg is laid, restrictions on vehicles should begin on the 26th day after the last egg is laid. This assumes an average incubation period of 27 days, and provides a 1 day margin of error. Whenever possible, nests should be monitored from a distance with spotting scope or binoculars to minimize disturbance to incubating plovers. (*Id.*).

32. The Guidelines provide that when plover nests are found after the last egg has been laid, making it impossible to predict a hatch date, ORV restrictions should begin on a date determined by one of three scenarios: (a) in the case where a plover nest is found with a complete clutch and is monitored twice per day at dawn and dusk (before 0600 hrs and after 1900 hrs) to minimize the time that hatching may go undetected if it occurs after dark, ORV use may continue until hatching begins; or (b) in the event a plover nest is found with a complete clutch before May 22nd (the earliest recorded hatch date for plovers in Massachusetts), and is not monitored twice per day at dawn and dusk, then ORV restrictions should begin; or (c) in the event a plover nest is found with a complete clutch on or after May 22nd and is not monitored twice per day at dawn and dusk, then ORV restrictions should begin immediately. (Guidelines, Part IV., p.9).

33. The Guidelines provide that if hatching occurs earlier than expected, or chicks are discovered from an unreported nest, restrictions on ORV use of the beach should begin immediately. (*Id.*).

34. The Guidelines provide that if or when ruts are present that are deep enough to restrict movements of plover chicks, or ORV impacts on wrack are so severe that wrack must be allowed to accumulate naturally prior to hatching, then ORV restrictions should begin at least 5 days prior to the anticipated hatching date of plover nests. If a plover nest is found with a complete clutch, precluding estimation of hatching date, and the availability of wrack has been substantially reduced by ORV passage or deep ruts have been created that could reasonably be expected to impede chick movements, ORV restrictions should begin immediately. (Guidelines, Part IV., p.9).

35. The plan provisions comply with the performance standards established by DFW for projects or activities that allow the recreational use of beaches that contain priority habitat for plovers and terns, and implementation of the plan would not result in a take of a state-listed species as defined in 321 CMR 10.02, including from a behavioral or habitat perspective, provided the town incorporated and complied with the additional conditions in the DFW April 28, 2009 no-take decision. (321 CMR 10.18(5)(b); Melvin PDT, ¶¶11-13, 21 and 23; Melvin PRT, ¶¶5-7; Melvin cross-examination, p.411, 8-15).

VI. DISCUSSION AND ANALYSIS

Issue for Adjudication. The issue to be adjudicated in this appeal is DFWs conditional no-take decision approving implementation of the plan. What will or might happen on the beach after the DFW approval has no bearing on the issue to be adjudicated. Should a particular recreational use or user on the beach this summer violate the no-take prohibition of MESA would be a matter addressed by an enforcement action of the Commonwealths' DEP, the U.S. Fish and Wildlife Service, and a criminal action or a civil action or both to impose the penalties contained in MESA for a violation of its provisions.³⁰ Arguments asserting that in the future Plymouth will or will not implement the conditions and management measures of the plan in a way that results in a take of state-listed shorebirds in violation of MESA are irrelevant and immaterial to the issue for adjudication.³¹

³⁰ MESA contains a schedule of fines and penalties based on the violation. The fines run from \$500 to \$20,000, including a civil assessment of \$10,000. Penalties range from 90 days to 180 days in prison.

³¹ In response to a hypothetical question, Dr. Melvin perhaps stated it best: there was an "incentive to maintain the 12' wide vehicle corridor while shorebirds are nesting], but I would presume it is strongly overridden by their [Plymouth's] desire not to violate state and federal endangered species laws...I think if the Town elected to maintain fencing that resulted in disturbance to the birds as determined by the Division, they would do so at their own peril." (Transcript, pp.441-442).

The record shows an extensive twenty year history of prior plan development and agency proceedings. One might say that the plan has an impressive pedigree of private, public, municipal, state and federal agency review and comment, as well as state agency and federal appellate and court review respectively. One might also say that the plan has been burnished over this twenty year period by adapting to changing conditions, facts and law through a repeated cycle of plan amendment, public comment, commission review and conditional approval, multi-agency review by DEP and DFW pursuant to the WPA and MESA respectively, conditional DEP approval through numerous SOCs, FOCs and special conditions, DFW conditions and restrictions, agency appellate review with on the record adversarial, adjudicatory proceedings, and federal agency review.

The beach itself has a century long history of providing the public with recreational uses and seasonal activities that include swimming, bathing, playing, walking, camping, picnicking, boating and fishing. In order to access the 2.8 - 3 mile long beach in the pursuit of these public recreational activities, as well as providing access to the private property (cottages and houses) on the beach, Plymouth has historically maintained an unpaved trail for use by ORVs. Known as Ryder Way, it ends at the crossover where ORVs may then proceed north on the harborside to access private property, or use a sand ramp to cross over a stone dike constructed by the U.S. Army Corps of Engineers and onto the beachfront facing the bayside.

The plan divides the beach into four management zones based on the sensitivity of the environment and the particular wildlife present. The stated purpose of the plan is to “construct and regulate a balance between the project areas recreational use of its natural resources and the conservation of those environmentally sensitive areas.” (Plan, Part 1.0, p.1). The plan makes clear to the public that in certain zones, portions of zones and at certain times “areas that are protected for wildlife, its habitat or for protection of fragile areas are delineated by wire cable, symbolic fencing, flagging, and/or signs and are closed to all recreational activities.” (Plymouth Long Beach Rules & Regulations, p.1). The plan also contains a multitude of provisions requiring Plymouth to implement a public awareness campaign using the Town’s internet web site, local community cable channel, local newspapers and publications, flyers, mailings to town residents and dog owners.

One of the main determining factors in deciding the issue for adjudication is the 1993 Guidelines, the performance standards they require for recreational activities on beaches that contain priority habitat, how the Guidelines work together with the regulations, and how they are applied by DFW during its MESA review of particular projects and activities. As noted earlier, the Guideline’s performance standards for recreational activities

are incorporated into the plan and provide the necessary restrictions to recreational uses, including ORV use, of the beach in areas that contain priority habitat.³² To be sure, DEP adopted similar guidelines for their use in reviewing projects pursuant to the WPA; in 1994 the U.S. Fish and Wildlife Service adopted federal guidelines based on the DFW 1993 Guidelines, to be used in their implementation of the federal ESA; as well as the barrier beach guidelines, also adopted around the same time as DFWs, by the Massachusetts Barrier Beach Task. The performance standards contained in these guidelines are also incorporated in the plan and provide similar levels of restrictions to recreational uses of the beach in areas that contain priority habitat.³³

For approximately 17 years DFW has consistently applied the Guidelines and the definition of take to over a thousand projects and activities located in priority habitats. With this background in mind, DFW necessarily assesses the degree of risk to, and impact on the affected state-listed species and its habitat from the project or activity when deciding whether that effect rises to the level of a take. (Melvin PRT, ¶2). To rise to the level of a take DFW must find that the 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, DFW has determined significant to mean more than *de minimus*. 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 DFW has determined to be small enough to disregard. (Melvin PDT, ¶9). This determination has been consistently applied by DFW to its review of projects and activities that allow recreational use of beaches that contain plover and tern priority habitat in accordance with 321 CMR 10.18.

The performance standards contained in the Guidelines take into account behaviors that are specific to plovers and terns, including their abundance, distribution, reproductive success, mortality rates, patterns of immigration and emigration, habitat preferences and site specific habitat conditions. (Melvin PRT, ¶7). Additionally, consistent with the Guidelines, DFW has drawn scientifically sound and reasonable distinctions regarding those types of risks to and impacts on plovers and terns in a beach environment where there is recreational access and use..

32Comparisons of ¶¶16-41 of the Findings of Fact with ¶¶16-34 of the Conclusions of Law establish that the DFW Guidelines have in fact been incorporated into the plan either by Plymouth, DEP, DFW or as a result of the SA.

33 Approximately one year after DFW adopted their Guidelines, the U.S. Fish and Wildlife Service adopted similar federal guidelines entitled, Guidelines for Managing Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to avoid Take Under Section 9 of the Endangered Species Act. The DEP Magistrate noted that the federal guidelines “mirrored” DFWs. *Matter of Plymouth*, WET-2009-16, p.10, note 4.

³⁴ The stated purpose of the Guidelines is to provide the necessary protection to plovers, terns and their habitats required by MESA and the WPA without unnecessarily restricting access to, and recreational use of coastal beaches in Massachusetts. The Guidelines embody DFWs long standing and well established interpretation of what specific measures are necessary from a scientific and biological standpoint on beaches that contain both priority habitat and recreational uses to avoid a take in violation of MESA. ³⁵

The Guidelines as incorporated in the plan apply different restrictions to ORV access to the beach in Zone 2 based on specific plover and tern behavioral activities. The ORV restrictions designed to protect plovers and terns are based on their scraping, courting, nesting, foraging and staging activities. The Guidelines also provide for necessary adjustments to ORV restrictions to meet changing conditions on the beach. Natural occurrences which change the conditions on the beach may include: storms, poor weather, extreme winds, or higher than normal tides that diminish beach areas; newly discovered nests or clutches of eggs, or hatching of eggs that occurs earlier or later than planned, or chicks that move outside their protected areas. For example, higher than normal tides may result in further limits, including zero, of the number of vehicles allowed access to the beach, closing certain areas, or the entirety of the beach, to ORV access.

The only historical recreational beach activity that has been, and continues to be the primary source of controversy for Goldenrod is the ORV/occupant use of the beach in Zone 2. Goldenrod points to the continued recreational ORV/occupant activities, and to a lesser extent boat/occupant activities, as uses that modify, degrade or destroy priority habitat, which in turn causes a disruption of the nesting, breeding, feeding or migratory activity of state-listed shorebirds in violation of MESAs no-take prohibition. All of Zone 2 contains priority habitat for state-listed species; the plan allows significant recreational activities to take place, particularly ORV use, within areas of

³⁴ The 1993 beach management guidelines are not the only guidelines adopted NHESP to be used in the implementation of MESA. Others include: guidelines for the certification of vernal pool habitat (310 CMR 10.04, 10.57(1)(a)(3) and (1)(a)(4), and 10.58(1)); species-specific guidelines applied to the mapping of priority habitat which describes the methodology used for priority habitat delineation (321 CMR 10.12(3)); criteria for the acceptance and inclusion of occurrence records into the data base used by NHESP to map priority habitats (321 CMR 10.12(5)); and species-specific guidelines applied to forest harvesting practices and forest harvesting management plans for the conservation of rare species.

³⁵ This same regulatory approach taken by DFW in implementing MESA to ensure the protection of rare shorebirds and their habitats while, to the extent appropriate, allowing conditional recreational access and use of the beach is also taken by DEP in its implementation of WPA. DEP issued a similar guidance document that parallels DFWs and operates in the same fashion. Recommended Conditions for Activities on Barrier Beaches, provides recommendations to project applicants and Conservation Commissions on performance standards that should be incorporated into orders of conditions in order to comply with 310 CMR 10.37. The DEP guidance document is intended to appropriately balance the use of ORVs with the protection of wildlife and their habitat. A third set of recommendations, Guidelines for Barrier Beach Management in Massachusetts, was also adopted in 1994 by the Massachusetts Barrier Beach Task Force with the same objective as the DFW and DEP guidelines; to allow public access to, and recreation on beaches that is consistent with avoiding impacts to state-listed species of shorebirds and their habitat. (Melvin PDT, ¶12; *Matter of Plymouth*, WET-2009-16, Recommended Final Decision, p.11).

Zone 2 during the summer when the birds are present; the recreational activities that take place in the presence of the state-listed shorebirds on the beach constitutes a violation of MESA's no-take prohibition. Therefore, Goldenrod argues, the DFW April 28, 2009 conditional no-take decision which approved implementation of the plan violates MESA.

Goldenrod asserts that the proximity of recreational uses allowed by the plan to plovers, terns and their habitat establish that the former use has or will disrupt and degrade the later. They preface "ORV activities" with words such as "high levels of" or "intense" or "extreme" or "heavily utilized" to support their argument that the plan allows recreational uses of the beach at the same time that plovers and terns are using the beach habitat constitutes a take as that term is defined by MESA.

There is no regulatory presumption under 321 CMR 10.18 that a take will occur whenever a recreational activity is proposed in an area that contains priority habitat used by state-listed species, as Goldenrod would have you believe. Nor do the recreational activities allowed to occur on a beach which is also occupied by plovers and terns, *per se*, violate MESA. As set forth in the Conclusions of Law, MESA provides in relevant part that a take, in reference to animals, means to ... "disrupt the nesting, breeding, feeding or migratory activity ..." The definition goes on to provide that the "[D]isruption of nesting, breeding, feeding or migratory activity *may* result from, but is not limited to, the modification, degradation or destruction of Habitat." (321 CMR 10.02; emphasis added). Furthermore, priority habitat by regulatory definition is an area where there is the *potential* for a take of state-listed species by projects or activities that are intended to take place within these areas. (321 CMR 10.01; emphasis added). Goldenrod's reading of the MESA regulations is incorrect. Because the plan incorporates the performance standards of the Guidelines in restricting recreational uses on the beach, in accordance with 321 CMR 10.18(5)(b) DFW found that its implementation would not result in a take in violation of 321 CMR 10.02.

In stark contrast to the evidence presented by DFW, is the lack of evidence presented by the petitioner. The evidence put forward by Goldenrod consists of the PDT and PRT, including exhibits, from their three witnesses. Most of Goldenrod's exhibits are color photographs purporting to represent actual conditions on the beach during selected summer seasons. Photographs that Goldenrod asserts are competent evidence that seasonal ORV, boat and occupant use of the beach takes place in a manner that constitutes a take under MESA. However, neither the witnesses nor their exhibits establish the scientific or biological framework necessary to provide an evidentiary basis for their testimony and opinions with regard to the negative or adverse effect these recreational uses have on plovers,

terns and their priority habitat.³⁶ This lack of evidence is highlighted by their failure to address in any meaningful sense the plan's performance standards that impose restrictions on these recreational uses in order to protect priority habitat used by the plovers and terns, and prevent actual disruptions to plover and tern behaviors.

With very few exceptions that are discussed in detail below, the record is void of any factual evidence to support their cause and effect argument. For example, the color photographs fail to accurately depict conditions and activities on the beach in any clear and convincing fashion, leading in many instances to witness confusion, especially orienting to the multiple subjects in the photographs.³⁷ Many of these photographs used to cross-examine Dr. Melvin added nothing from an evidentiary standpoint. The colloquy that takes place regarding Muther Exhibit BB shows that Dr. Melvin had difficulty identifying what was depicted in the photograph. Counsel for Goldenrod was unable to adequately describe what was depicted to the satisfaction of the witness until Town Environmental Manager David Gould confirmed counsel's description. (Transcript, pp.255-257). Based on only one photograph marked Muther Exhibit V, Dr. Melvin had difficulty when asked whether ORVs travelling in the vehicle corridor had degraded the wrack present in the corridor because there were no additional photographs taken of that same area during the same period of time to provide a before and after view. (Transcript, p.246, 4-13).

Dr. Melvin expressed his difficulty in responding to the claim that seasonal ORV and camping activities disrupted terns that were staging in the area based on a photograph that he was shown during cross-examination:

“Part of the difficulty I have in addressing these questions is, without more information on the patterns of movements of these staging terns, the patterns of use, and a clear understanding the survey methodology that took place - - in other words, if terns are present or not present, what is the likelihood that observers would detect them or detect that they weren't

36 Based on their curriculum vitae, Goldenrod witnesses Scott Hecker, and C. Diane Boretos are credible witnesses, and capable of testifying to their personal observations and matters of a biological, environmental, and natural resource nature as it relates to the beach, the plan, habitat, plovers and terns. Clearly Goldenrod's witness Catherine Muther has an impressive background, is successful in the world of entrepreneurship and is a recognized leader in the business community. I find Goldenrod's witness Catherine Muther to be less credible concerning such scientific matters due to her lack of education and experience in any of these specialized fields. In addition, Ms. Muther and her family spends part of every summer on the beach where she owns or has a beneficial interest in two private cottages north of the crossover. Portions of Ms. Muther's testimony may be motivated more by her longstanding opposition to any ORV access to the beachfront due perhaps to her family summering experiences at her beachfront cottage. At one point in her testimony Ms Muther states: "Later in the afternoon I walked down towards the crossover where the vehicles were parked. The travel corridor had narrowed to a single lane. People were socializing in the travel corridor, drinking beer, playing catch, and horseshoes. A dozen or more dogs were in the densely packed area, some of which were in the travel corridor next to the symbolic fencing. The noise level was high. A couple of dogs were barking, music was blaring from vehicles. When I returned to our cottage I could still hear the dogs barking and car radios." (Muther PDT, ¶64).

37 Most exhibits to the Hecker, Muther and Boretos testimony are color photographs taken with what appears to be a wide-angle or zoom lens making it difficult to determine precisely what is in the photograph. (Transcript, pp.245 and 260). It is difficult to find a sense of distances in the photographs of activities simultaneously taking place in the background and foreground of the same frame. There can be a distorting effect on distances when a wide angle or zoom lens is used to photograph multiple subjects, far away, in the same picture. Administrative Notice. Transcript, p.260, 20).

present - - there's some question in my mind as to what
is going on and what these data are showing.

* * *

It's unclear to me what's going on here, and I think it's unclear to
me how these terns are utilizing Plymouth Long Beach.

* * *

It's just grossly inadequate for us to reach a conclusion that camping
is disturbing staging terns to the extent that they can't continue to
utilize habitat at Plymouth Long Beach - - completely inadequate."
(Transcript, pp.164-165, 169).

Scott Hecker, Executive Director of Goldenrod, conceded that he did not actually see a pair of plovers being flushed by ORV use or human activity north of the crossover during May of 2009. (Transcript, p.31, 7-16). Mr. Hecker conceded that he had no supporting documentation of his monitors' observations in the summer of 2010 of repeated and persistent flushing by a pair of plovers with a nest marked by symbolic fencing. When questioned further in this regard, he had no specific dates of when these observations were made, and while he had taken notes and video at the time he did not bring them to the hearing. (Transcript, p.44, 10-15). The Wildlife Services Report on the results of the predator control program states that Mr. Hecker's reports of roseate terns bringing fish into the common tern colony at the Beach Point during the 2008 and 2009 breeding season were contradicted by Plymouth beach personnel who did not report locating any roseate tern nests during this same period. (Wildlife Services Report, p.8). As to his claim that a pair of plovers was displaced by ORVs north of the crossover in May, 2009, Mr. Hecker acknowledged that he never actually saw a pair of plovers north of the crossover at that time, and generally conceded that there are other plausible explanations for his theory. (Transcript, pp.31 and 38). Goldenrod's insistence that the recovery of plovers and terns on the beach was the result of the predator control program is undermined by Mr. Hecker's cross-examination where he concedes that the recovery was a combined result of the plan and the predator control program.

Goldenrod points to one particular instance of overnight camping as evidence that ORV and human activity degrades the habitat and disrupts plovers and terns by comparing the condition and quality of habitat in an area where camping had taken place as it was depicted in 2 photographs marked Muther Exhibits BB and EE. The cross-examination of Dr. Melvin elicited this response to the photographs:

Q. Do you agree that the feeding habitat as shown in Exhibit EE
has been degraded from what was shown in Exhibit BB?

* * *

A. No, because I'm still having trouble sorting out the exact location of the photo taken that's labeled August 22 ...

* * *

The problem I'm having is the only conditions that I'm able to assess are shown in this limited photo. (Transcript, pp.260, 263).

Goldenrods argument that ORV camping activities degrades plover and tern habitat and disrupts their migratory behavior ignores the conditions and restrictions imposed on that recreational activity. The plan prohibits overnight camping in Zones 1, 3 and 4. Overnight camping is restricted to a designated area of Zone 2 for a single six-night period each season. Camping is allowed by permit only, with each permit being issued for only two of the six nights. On any single night camping is limited to a maximum of 9 vehicles with no more than 4 persons per vehicle for a total of 36 people. (SA, ¶32). No camping is allowed within 200 yards of any active Piping Plover or Least Tern nest site. The number of overnight campers may also be reduced during the nesting season. (Gould PDT, ¶¶57 and 120; McCall PDT, ¶¶7 and 93). During camping, the symbolic fencing is pushed back slightly from the landward edge of the ORV corridor to accommodate campers, but is still maintained at least 10 feet away from any vegetative community. On the day the six-day camping season ends, the fencing is moved back to the landward edge of the ORV corridor. The monthly high tide extends well past the vehicle corridor and washes out the camping area. (McCall PDT, ¶38, and Exhibit N).

In 2008, camping was restricted to that portion of the beach between the B35 and B45 posts, which is approximately 500' long and represents only 7% of the length of the vehicle corridor in Zone 2. In 2009, the camping area was located in the same area, and the camping season was only four nights long due to severe weather. (McCall PDT, ¶39). Appendix F to Mr. Hecker's PDT, a 2008 report by Dr. Becky Harris from the Massachusetts Audubon Society, shows the numbers of roseate and common terns staging on the beach, by date and time, including descriptions of observed activities, if any, that disturbed these terns. Entitled Table 1, the report showed that at dusk on August 14, 2008, approximately 5000 to 6000 terns were observed in the staging area. At dawn the following morning, August 15, 2008, after there was overnight camping near the staging area that involved 3 vehicles, 4 tents and the remnants of 3 fires found near the "no vehicles" sign, approximately 5000 terns were still observed in the staging area.

Similarly, Appendix G to Mr. Hecker's PDT, a report titled, Plymouth Long Beach Staging Common and Roseate Terns – Summary 2009, by the Massachusetts Audubon Society provides little direct evidence to support the witnesses assertions that the plan is deficient in protecting terns from ORV and human disturbances. For example, the report contains a few anecdotal incidents of disturbance caused by 1, 2 or 3 pedestrians or dogs. The observation on August 27 contains insufficient detail to determine the extent to which terns were using habitat in Zones 3 and 4 (where ORVs are prohibited) when ORVs were present in Zone 2. The report also contains observations that suggest unexplained patterns of behavior such as repeated flushes without obvious stimuli, and instances of flocks of terns flying past the beach without stopping. In general, the report contains insufficient, unreliable or unsubstantiated conclusions. (See Melvin PRT, ¶14).

Goldenrod has failed to provide any evidentiary support for its claim that multiple boat use of the beach flushes birds from their staging area in the northern part of Zone 3. During the cross-examination of Mr. Hecker, counsel for DFW had difficulty sorting out exactly how many boats are shown in a photograph taken on August 13, 2009 and marked Exhibit Q. Exhibit Q was introduced as part of Mr. Hecker's testimony that on weekends during July and August he counted as many as 110 boats anchored along the beach, with as many as 35 within the northern tip of the beach alone, and that such numbers of boats were disturbing state-listed shorebird migratory staging behavior in the area. (Transcript, p.67, 5-10). Not only did the photograph show just 14 boats, but also showed a flock of resting gulls seemingly undisturbed by the boats. (Melvin PRT, ¶13). Plymouth's rebuttal testimony also contradicted Goldenrod's by stating that on the busiest summer weekends there would be a daily number of 20 to 30 boats, with an average weekend daily number of 10 to 15, and fewer than 5 boats on a weekday. (McCall PRT, ¶5).

Goldenrod offered no other exhibits to support their claim that large numbers of boats were disrupting the staging behavior of terns. The fact that the entirety of the beach in Zone 2 lies within an area that serves as priority habitat for plovers and terns does not mean the habitat is or will be degraded by ORV use in Zone 2 without ignoring the plan's extensive restrictions and conditions imposed on ORV use in Zone 2. Nor does it follow that ORV use in Zone 2 degrades that priority habitat and/or disrupts plovers and terns within that habitat without providing evidence that establishes an actual cause and effect on a particular date and in a particular area of the beach.

Burden of Proof. Goldenrod also argues that the burden of proof in this appeal is on the project proponent, and not the petitioner, citing the case, *Charles M. Blair & Co. v. Securities Division*, 401 Mass 660, 661-662 (1988)

for the proposition that the burden of proof in an agency decision that results in an adjudicatory hearing remains with the party that had the burden during the initial phase of the agency decision, unless provided otherwise by regulation. Because 321 CMR 10.19 requires that Plymouth demonstrate to DFW that the plan does not result in a take, then that requirement remains with Plymouth at this MESA hearing. The argument is misplaced for a number of reasons.

First, a close reading of the *Blair* case shows that the Supreme Judicial Court found that regulations of the Securities Division required the agency to find that it is in the public interest to deny a permit to an applicant. The reason the burden of proof remained with the Securities Division at the hearing was because the regulations expressly placed it on the agency, not the applicant. *Blair*, 401 Mass. at 661.

Second, unlike the Securities Division regulations, the MESA regulations place no such burden on DFW either at the plan review process or during the hearing of a MESA appeal. The MESA regulations specifically state that: the project proponent shall demonstrate that the proposed activity does not result in a take, as defined in 321 CMR 10.02 and 10.04. (321 CMR 10.19); that DFW may establish in guidance, performance standards for projects or activities that, if complied with, will receive a no-take determination pursuant to 321 CMR 10.18. (321 CMR 10.18(5)(b)); and that DFW shall review the materials submitted by the proponent to determine if the proposed project or activity has avoided a take as proposed or with DFW conditions. (321 CMR 10.18(2)(a)).

Third, DFW regulations clearly place the burden of proof on the party aggrieved by the final determination. (321 CMR 10.25(1)). The claim filed by the aggrieved party must contain, among other information, specific facts that demonstrate aggrieved party status, a definite interest in the matter, 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 DFW; specific objections to the actions of DFW and the basis for those objections; and the relief sought through the adjudicatory hearing. (321 CMR 10.25(3)(b) and (d)). The claim for an adjudicatory hearing is filed by the aggrieved party, not by the project proponent or the agency. The party that carries the burden of proof on this MESA appeal is therefore, Goldenrod.

Ultra Vires. Rather than assess the 1993 Guidelines, Goldenrod simply dismisses them, and argues instead that the DFW *de minimus* standard for determining a take under MESA is contrary to the definition of a take as contained in both MESA and the MESA regulations, and is therefore *ultra vires* and unenforceable. This argument must also fail. It is well settled that the Magistrate presiding at an adjudicatory proceeding lacks subject matter

jurisdiction to hear a challenge to the agency regulations themselves. *Salisbury Nursing & Rehabilitation Center, Inc. v. Division of Administrative Law Appeals*, 448 Mass. 365 (2007); Decision on Motion of Division of Fisheries and Wildlife to Dismiss, Matter of South Road Lots 11 and 12, Hampden, MA, NHESP File No. 07-21460, Docket No. 721460-09-DH, July 10, 2009; (“The Presiding Officer of an agency adjudicatory proceeding lacks subject matter jurisdiction to act on a direct challenge to the agencies’ substantive regulations of general applicability” citing *Ryan v. Kehoe*, 408 Mass. 636 (1990)). *Beth Israel Hospital Association v. Rate Setting Commission*, 24 Mass.App.Ct. 495 (1987); (a presiding officer may not act on a challenge to the substantive validity of agency regulations of general application); *Henderson v. Commissioners of Barnstable County*, 49 Mass.App.Ct. 455 (2000); (complaints challenging the defendant’s statutory interpretation, their practice of acting under that interpretation, and “*their construction of the regulations and handbook* are appropriately brought under the Declaratory Judgment Act”, emphasis added).

Recreational Uses. Finally, I find nothing in the record or in Dr. Melvin’s cross-examination to support Goldenrods last minute assertion that the DFW conditional no-take decision was politically motivated because it “impermissibly elevated” recreational uses over habitat protections. This finding is underscored by the extensive suite of management measures and conditions imposed on recreational uses of the beach, including the Guidelines, to protect plovers, terns and their habitat. In no evidentiary or logical sense can it be said that DFW “elevated” recreational uses over protections of the priority habitat, and the nesting, courting, breeding, feeding, resting and migratory behaviors of plovers and terns on the beach.³⁸

Evidentiary Standard. Agencies have wide discretion in ruling on evidence. *Rate Setting Commission v. Baystate Medical Center*, 422 Mass. 744 (1996). Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. c.30A, §11(2). A petitioner challenging an agencies’ final determination has the burden of going forward with evidence sufficient to support a reversal of that decision. *Matter of Cormier Construction Co.*, Final Decision, 1 DEPR 159, 160 (1994). The party initiating the adjudicatory hearing must produce “competent evidence from a credible source” sufficient to meet his burden of proof. *Matter of Nelson*, 6 DEPR 120, 123 (1999). The petitioner in an adjudicatory proceeding is required to establish by a preponderance of the evidence that he is entitled to a

³⁸ Goldenrod’s recommended findings and conclusions contains the following statement: The Division’s policy as expressed in the “guidelines” is a conscious, overt, and unlawful decision that, for its own self described critical strategic and political reasons, the Division will not implement MESA as written in the context of barrier beach management plans for fear that the law may be “rolled back”. This is not my understanding of Dr. Melvin’s testimony during his cross-examination. (Transcript, pp.399-408).

favorable decision. 28 Mass. Practice, §243, citing *Tarta's Case*, 328 Mass. 585 (1952). 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. *Sargent v. Massachusetts Accident Co.*, 307 Mass 246 (1940).

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. *Hoosic Wind*, DEP-05-124, 2007 WL 1074631, p.14. Mere speculation constitutes a failure to state a claim. *Matter of Wannie*, DEP No. 94-059, pp.12-13. To be sure, the purpose of using pre-filed direct and rebuttal testimony is to test the evidentiary sufficiency of the petitioner's claim prior to conducting a hearing. *Matter of South Road, Lots 11 and 12, Hamden, MA*, NHESP File No. 07-21460, Docket No. 721460-09-DH. A petitioner challenging an agency decision has the burden of going forward with evidence sufficient to support the challenge. *Matter of Sughrue*, No. 93-019, 1994 WL 762868.


Goldenrod's challenge to the validity of DFWs interpretation of the statute it administers and the regulations it promulgated, including the Guidelines, requesting that it be invalidated may only be made by way of an action for declaratory judgment in a court of competent jurisdiction.

Goldenrod has failed to provide adequate evidence to support its argument that the DFW conditional no-take decision approving implementation of the plan violates MESA. On the other hand, I find that the Guidelines' performance standards required for recreational access to and use of the beach, including ORVs and pedestrians, are contained in the plan, and in conjunction with DFWs long standing interpretation and application of its take determination pursuant to MESA constitutes substantial evidence to support DFWs April 28, 2009 conditional no-take decision.

VI. CONCLUSION

I conclude that the DFW April 28, 2009 decision made pursuant to 321 CMR 10.18 properly determined that the implementation of Plymouth's 2008 Long Beach Management Plan would not result in a take of a state-listed species as defined in 321 CMR 10.02, including from a behavioral or habitat perspective, provided the town incorporated and complied with the conditions in the agency no-take decision.

As Corrected: December 22, 2010


David C. Hoover, Esq.
Administrative Law Magistrate

NOTICE

This decision is a recommended final decision of the Administrative Law Magistrate. It has been transmitted to the Director of the Division of Fisheries and Wildlife for his final decision. This decision is therefore not a final decision of the agency and may not be appealed to the Superior Court pursuant to G.L. c. 30A. The Division Director's final decision is subject to court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Division Director, no party shall file a motion to renew or reargue this recommended final decision or any portion of it and no party shall communicate with the Division Director regarding this decision, unless the Division Director, in his sole discretion, directs otherwise.

ERRATA SHEET FOR DECEMBER 22, 2010
RECOMMENDED FINAL DECISION II

- Page 1, ¶1: in the first sentence delete the word “expedited” and replace it with the word “accelerated”
- Page 1, ¶1: in the first sentence delete the word “expedited” and replace it with the word “accelerated”
- Page 25, ¶1: in the second sentence after the word “habitat” add the phrase “and that this”
- Page 25, ¶2: in the seventh sentence delete “310” and replace it with “321”
- Page 25, ¶2: in the ninth sentence delete “310” and replace it with “321”
- Page 29, ¶1: in the fifth sentence adjust the spacing between the word “to” and the word “which”
- Page 29, ¶1: in the seventh sentence delete the duplicate word “that”
- Page 29, ¶1: in the fifth sentence adjust the spacing between the word “to” and the word “which”
- Page 29, ¶2: move the first sentence of ¶3 to the end of the last sentence of ¶1, and begin a new ¶2 starting with the word “Goldenrod”
- Page 29, ¶4: in the first sentence change the font of “Burden of Proof” from regular to bold
- Page 29, ¶4: in the second sentence change the font of “Charles M. Blair & Co. v. Securities Division” from regular to script
- Page 30, ¶1: change the font of “Blair” from regular to script
- Page 31, ¶2: add to the beginning of the first sentence the term “**Recreational Uses**” in bold font
- Page 31, ¶3: add to the beginning of the first sentence the term “**Evidentiary Standard**” in bold font