

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 13, 2017

In the Matter of Richard S. Cuda

OADR Docket No. WET-2015-012
DEP File No. SDA
Orleans, MA
consolidated with

In the Matter of Town of
Orleans Board of Selectmen (Park
Commissioners)

OADR Docket No. WET-2016-014
DEP File No. SE-54-2289
Orleans, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

These two consolidated Wetlands Permit Appeals involve the Town of Orleans' Board of Selectmen's ("the Board") proposed allowance of off road vehicles ("ORV")¹ on Inlet Road in Orleans ("the proposed Project"), which is opposed by Richard S. Cuda ("Mr. Cuda") and 12 of his fellow Town residents (collectively "the Petitioners"). In the first appeal (OADR Docket No. WET-2015-012 or "the SDA Appeal"), the Board challenges a Superseding Determination of

¹ "ORVs are any motor vehicle designed or modified for use over unimproved terrain if used for recreation or pleasure off a public way and all legally registered motor vehicles when used off a way."
<http://www.mass.gov/eea/agencies/dcr/massparks/recreational-activities/off-road-vehicles.html>.

Applicability (“SDA”) that the Department’s Southeast Regional Office issued to Mr. Cuda pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”), which determined that the Board’s proposed Project was subject to authorization under the MWPA and the Wetlands Regulations because the Project impacted Coastal Dune, Land Subject to Coastal Storm Flowage (“LSCSF”), and Buffer Zone to Bordering Vegetated Wetlands (“BVW”).² The SDA reversed an earlier Negative Determination of Applicability (“NDA”) issued by the Town of Orleans Conservation Commission (“OCC”) determining that the proposed Project was not subject to authorization under the MWPA and the Wetlands Regulations. In the second appeal (OADR Docket No. WET-2016-014 or “the SOC appeal”), the Petitioners challenge a Superseding Order of Conditions (“SOC”) that the Department issued to the Board pursuant to the MWPA and the Wetlands Regulations approving the proposed Project. The SOC affirmed an earlier Order of Conditions issued by the OCC approving the proposed Project.

I conducted a one day evidentiary Adjudicatory Hearing (“Hearing”) to resolve the Board’s appeal of the SDA and the Petitioners’ appeal of the SOC.³ The Hearing was recorded by a certified court stenographer/reporter retained at the Board’s and the Petitioners’ joint expense, who prepared a written transcript of the Hearing that was filed with the Office of

² The nature of these protected wetlands areas is discussed below, at pp. 9-15.

³ The day before the Hearing, I conducted a view of the proposed Project site at Inlet Road (“the Site Visit”) with the parties and their respective legal counsel and wetlands experts pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j) to assist me in “[my] understanding of the evidence that ha[d] been or [would] be presented” by the parties in the appeal. In accordance with 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j), the parties “point[ed] out objects [at] or features [of the proposed Project site] that . . . assist[ed] [me] in understanding [the] evidence’ in this appeal. In accordance with the same rules, I “rel[ied] on the . . . observations [that I made] during [the] view as evidence to the same extent permissible as if observed in the hearing room” at the Hearing that I conducted on the following day to resolve the Board’s appeal of the SDA and the Petitioners’ appeal of the SOC.

Appeals and Dispute Resolution (“OADR”). At the Hearing, the parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions in the case. A total of nine witnesses filed sworn Pre-filed Testimony (“PFT”) on behalf of the parties for the Hearing in support of the parties’ respective positions in the case and were available for sworn cross-examination at the Hearing. The parties’ respective witnesses were as follows.

The Petitioners’ witnesses were:

- (1) Mr. Cuda;⁴
- (2) Peter S. Rosen, Ph.D. (“Dr. Rosen”), a Coastal Geologist with “over 40 years of experience with the Massachusetts coastline, including Cape Cod” and a partner for over 30 years in GEO/PLAN Associates, a private environmental consulting firm, where he has worked mostly on projects subject to permitting under the MWPA and Wetlands Regulations;⁵
- (3) Michael Tichnor (“Mr. Tichnor”), one the Petitioners who has appealed the SOC;⁶ and
- (4) Lenore White (“Ms. White”), a Professional Wetlands Scientist and private environmental consultant with more than 30 years of experience in the wetlands field.⁷

The Board’s witnesses were:

- (1) Kenneth Hull (“Mr. Hull”), the Town of Orleans’ Assessor;⁸

⁴ Pre-filed Direct Testimony of Richard S. Cuda (“Mr. Cuda’s PFT”).

⁵ Pre-filed Direct Testimony of Peter S. Rosen, Ph.D. (“Dr. Rosen’s Direct PFT”), ¶¶ 1-2; Rebuttal Pre-filed Testimony of Peter S. Rosen, Ph.D. (“Dr. Rosen’s Rebuttal PFT”), ¶ 1.

⁶ Pre-filed Direct Testimony of Michael Tichnor (“Mr. Tichnor’s PFT”).

⁷ Pre-filed Direct Testimony of Lenore White (“Ms. White’s Direct PFT”), ¶¶ 1-3 and Exhibit A to Ms. White’s PFT; Rebuttal Testimony of Lenore White (“Ms. White’s Rebuttal PFT”), ¶ 2.

⁸ Pre-filed Direct Testimony of Kenneth Hull (“Mr. Hull’s PFT”).

- (2) John Jannell (“Mr. Jannell”), the Town of Orleans’ Conservation Administrator and Assistant Town Planner;⁹ and
- (3) Nathan Sears (“Mr. Sears”), the Town of Orleans’ Natural Resources Manager.¹⁰

The Department’s witness was Gregory DeCesare (“Mr. DeCesare”), a senior Environmental Analyst in the Wetlands and Waterways Program of the Department’s Southeast Regional Office with nearly 30 years of experience in the environmental field.¹¹

As discussed in detail below, based upon the testimonial and documentary evidence that the parties’ respective witnesses presented at the Hearing and the applicable law, I find that:

- (1) Mr. Cuda had standing to request the SDA from the Department as a “person aggrieved” by the OCC’s NDA pursuant to 310 CMR 10.04;
- (2) in issuing the SDA, the Department properly determined that the Board’s planned allowance of continued OVR use of Inlet Road in Orleans is subject to authorization by the MWPA and the Wetlands Regulations; and
- (3) the Department properly issued the SOC approving the proposed Project pursuant to the MWPA and the Wetlands Regulations, but its Final Order of Conditions approving the Project should include additional Special Conditions as set forth below that will further enhance Coastal Dune protection.

Accordingly, I recommend that the Department’s Commissioner issue a Final Decision affirming the Department’s: (1) SDA and (2) SOC, approving the proposed Project, provided additional Special Conditions as set forth below to further enhance Coastal Dune protection are included in the Final Order of Conditions approving the Project.

⁹ Pre-filed Direct Testimony of John Jannell (“Mr. Jannell’s PFT”).

¹⁰ Pre-filed Direct Testimony of Nathan Sears (Mr. Sears’ PFT”).

¹¹ Pre-filed Direct Testimony of Gregory J. DeCesare (“Mr. DeCesare’s PFT”).

BACKGROUND

“Inlet Road [in Orleans], from Aspinet Road to Callanan’s Pass, is an existing roadway within the Town of Orleans.” Board’s Notice of Intent Pursuant to MWPA and Wetlands Regulations (June 1, 2015) (“Board’s NOI”), Project Description, at p. 1.¹² “The length of Inlet Road between these two cross streets is 1,600 feet and the road is a single width road approximately 12 feet wide (variable).” *Id.* “The roadway is used by the public to access at least 5 single family homes as well as access [to] the existing ORV trail network to the Nauset Spit.” *Id.*¹³ “[Wetlands] Resource Areas present include Barrier Beach, Coastal Dune, Estimated Habitats [for the Piping Plover and Least Tern,] Rare Species [of birds], and [LSCSF], as well as the buffer zone to a [BVW].” *Id.*, pp. 1, 5-6.

“[T]he [proposed] [P]roject entails the [Board’s] proposed implementation of a management plan . . . for the continued operation of [ORVs] on Inlet Road between Callanan’s Pass and Aspinet Road [in Orleans].” [MEPA] Certificate of the Secretary of [the Massachusetts Executive Office] of Energy and Environmental Affairs¹⁴ on the [Board’s MEPA] Environmental Notification Form (November 6, 2015) (“EEA Secretary’s MEPA Certificate”), at p. 1.¹⁵ The [Board’s] proposed ORV Plan is substantially similar to the ORV and Beach Management Plan that the Town has implemented on the Nauset Spit and at the southern end of Nauset Beach, and is subject to additional use restrictions specified in an existing agreement

¹² A copy of the Board’s NOI is contained in Exhibit 12 to the PFT that Mr. Jannell, the Orleans’ Conservation Administrator and Assistant Town Planner, submitted on behalf of the Board for the Hearing.

¹³ Nauset Spit is an area of Nauset Beach north of Callanan’s Pass. Mr. Cuda’s PFT, ¶ 14.

¹⁴ “MEPA” is the acronym for the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H. MEPA requirements and procedures are discussed below, at pp. 35-37.

¹⁵ A copy of the EEA Secretary’s MEPA Certificate is contained in Exhibit 14 to Mr. Janell’s PFT.

(Aspinet Road Agreement) between the Town and owners of lots abutting Aspinet Road.” Id., at p. 1.¹⁶

“Callanan’s Pass is a single-lane road that currently serves as the only ORV access and egress point to and from Nauset Spit. ORV use on Nauset Spit is currently allowed north of Callanan’s Pass in . . . Orleans. The Town has implemented a traffic management plan for Callanan’s Pass to manage ORV use of the single-lane road; however, at times Callanan’s Pass becomes blocked by disabled vehicles or trees and brush, or must be closed for road repairs. The objective of the [Board’s proposed Project] is to continue to allow ORV access to Nauset Spit by allowing limited use of Inlet Road to address traffic issues and provide an additional means of emergency vehicle access while ensuring that this critical Barrier Beach ecosystem is managed in a sensitive and flexible manner in response to changing conditions.” Id., at p. 2.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;

¹⁶ The Aspinet Road Agreement is dated May 12, 2014 and was executed by the Board’s Chairman and several individuals identified in the Agreement as “Lot Owners,” including Mr. Cuda. The Agreement is incorporated in the Project Description section of the Board’s NOI for the proposed Project, and a copy of the Agreement is also attached to the NOI. The provisions of the Agreement are discussed below, at pp. 49-53.

- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and
- (8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter¹⁷ any [wetlands] area subject to protection under [the MWPA and Wetlands

¹⁷ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

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

Regulations] without the required authorization, or cause, suffer or allow such activity”

G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7;

Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204;

Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to

Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also

file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the

(c) the destruction of vegetation;

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

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

Wetlands Regulations]” and to require that “all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Condition, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations]. . . and all work shall be done in accordance with the [Department’s] order,” Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA “establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements” by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based “on provisions of a local bylaw that are more protective than the [MWPA].” Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because both the OCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands Regulations.

II. THE PROTECTED WETLANDS AREAS OF COASTAL DUNE, LSCSF, AND BUFFER ZONE TO BVW

As previously noted above, in issuing the SDA, the Department determined that the Board’s proposed Project would impact wetlands areas protected by the MWPA and the

Wetlands Regulations: Coastal Dune, LSCSF, and Buffer Zone to BVW, and as a result, the Board was required to obtain a permit for the Project pursuant to the MWPA and the Wetlands Regulations. The nature of each of these wetlands resources is as follows.

A. Coastal Dune

The Wetlands Regulations at 310 CMR 10.28(2) define a Coastal Dune as:

any natural hill, mound or ridge of sediment landward of a coastal beach¹⁸ deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

“When a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the [permit] issuing authority shall presume that the area is significant to the [MWPA] interests of storm damage prevention, flood control and the protection of wildlife habitat.” 310 CMR 10.28(1). “This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the [permit] issuing authority makes a written determination to that effect.” Id.

If a Coastal Dune is determined to be significant to the MWPA interests of storm damage prevention, flood control, or protection of wildlife habitat, the Performance Standards of 310 CMR 10.28(3) govern the authorization of proposed activities in a Coastal Dune.¹⁹ Under 310

¹⁸ The Wetlands Regulations at 310 CMR 10.27(2) define a Coastal Beach as:

unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

¹⁹ “Performance Standards” are “th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA].” 310 CMR 10.04.

CMR 10.28(3):

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

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

B. LSCSF

“LSCSF” is “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” 310 CMR 10.04. “Under the Wetlands Regulations, LSCSF is ‘likely to be significant to [the MWPA interests of] flood control and storm damage prevention.’” In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 17, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79. “Although there are no Performance Standards in the Wetlands Regulations for LSCSF, the [wetlands] permit issuing authority may only authorize activities in LSCSF if the issuing authority determines that the proposed activities will not interfere with the MWPA

interests of flood control and storm damage prevention.” Id.

C. BVW

The Wetlands Regulations define BVW as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. [BVW] are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in [the MWPA].

310 CMR 10.55(2)(a); In the Matter of Town of Hopkinton, OADR Docket No. WET-2007-010, Recommended Final Decision, 15 DEPR 203, 205 (May 1, 2008), adopted as Final Decision (May 30, 2008), affirmed, Morrison v. Massachusetts Department of Environmental Protection, Middlesex Superior Court, C.A. MICV2008-02876 (October 16, 2009); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 19-20, adopted as Final Decision, 2013 MA ENV LEXIS 20. BVW are likely to be significant to the MWPA interests of protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, and protection of fisheries and to wildlife habitat. 310 CMR 10.55(1); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20. “The plants and soils of [BVW] remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters.” Id.

Here, in issuing the SDA, the Department determined that the proposed Project would be located in Buffer Zone to BVW. Mr. DeCesare’s PFT, ¶ 14. As discussed above, Buffer Zone is any area within 100 feet of a protected wetlands area, and a party must obtain approval under the MWPA and the Wetlands Regulations for any activity in the Buffer Zone, “which in the

judgment of the [permit] issuing authority, will alter [the protected wetlands area].” 310 CMR 10.02(2)(b).

Where a proposed activity will alter BVW, the Department is required to presume that the BVW is significant to the MWPA interests set forth above. 310 CMR 10.55(3); Hopkinton, 15 DEPR at 205; Enos, 2013 MA ENV LEXIS 21, at 20-21. “This presumption is rebuttable and may be overcome upon a clear showing that the [BVW] does not play a role in the protection of [those] interests.” Id. Where this presumption “is not overcome, any proposed work in [BVW] shall not destroy or otherwise impair any portion of [the] area.” 310 CMR 10.55(4)(a); Hopkinton, 15 DEPR at 205-206; Enos, 2013 MA ENV LEXIS 21, at 21.

Notwithstanding this prohibition, the Department nevertheless has the discretion to issue an SOC authorizing activities “result[ing] in the loss of up to 5,000 square feet of [BVW] when [the] area is replaced in accordance with . . . [seven] general conditions and any additional, specific conditions the [Department] deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost.” 310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at 206. The seven general conditions are the following:

1. the surface of the replacement area to be created (“the replacement area”) shall be equal to that of the area that will be lost (“the lost area”);
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;

6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and

7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

310 CMR 10.55(4)(b).

In exercising its discretion under 310 CMR 10.55(4)(b) to authorize the loss of a maximum 5,000 square feet of BVW, the Department must consider the following factors:

1. the magnitude of the alteration and the significance of the project site to the interests identified in [the MWPA];
2. the extent to which adverse impacts can be avoided;
3. the extent to which adverse impacts are minimized; and
4. the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in [the MWPA].

310 CMR 10.55(4)(b); Hopkinton, 15 DEPR at 206.

In 2002, the Department adopted the Massachusetts Inland Wetland Replication Guidelines (“Replication Guidelines”) “to increase the effectiveness of [wetlands] replication mitigation by providing [project proponents] with an outline of the steps necessary to design an appropriate wetland [s] replication project.” Replication Guidelines, § 1.1, at p. 5. The Replication Guidelines “also assis[t] [local conservation commissions] and [the] Department . . . in determining if a replication project is designed appropriately, constructed as designed, and

adequately monitored to ensure the success of the [replication] project.” Id.

III. THE LIMITED PROJECT PROVISIONS OF 310 CMR 10.24(7)(c)1

310 CMR 10.24(7) provides in relevant part that:

“[n]otwithstanding the provisions of 310 CMR 10.25 through 10.35 [governing proposed activities in various protected wetlands areas, including Coastal Dunes], the [Permit] Issuing Authority may issue an Order of Conditions and impose such conditions as will contribute to the interests [of the MWPA], permitting [certain] limited projects listed in 310 CMR 10.24(7)(a) through (c), [provided] no such project may be permitted which will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37.”

The limited projects authorized by 310 CMR 10.24(7)(a) through (c) include projects involving “[the] [m]aintenance and improvement of existing public roadways” 310 CMR 10.24(7)(c)(1). As discussed below, at pp. 38-53, the Department contended at the Hearing that it approved the proposed Project as a limited project for “[the] maintenance and improvement of existing public ways” pursuant to 310 CMR 10.24(7)(c)(1).

FINDINGS

I. THE SDA APPEAL

A. Prior Proceedings

In November 2013, Mr. Cuda filed a Request for Determination of Applicability (“RDA”) with the OCC seeking a determination that the Board’s proposed Project was subject to authorization by the MWPA and the Wetlands Regulations because “use of [Inlet Road as a] roadway by vehicular traffic constitute[d] an alteration [of protected Wetlands].” Mr. Cuda’s PFT, ¶ 18; Exhibits B and C to Mr. Cuda’s PFT; Ms. White’s Direct PFT, ¶ 9. His RDA was prepared by Ms. White, one of his wetlands experts who testified at the Hearing. Ms. White’s Direct PFT, ¶¶ 1-3, 9. His RDA described the proposed Project Site as “Inlet Road, from

Callanan's Pass to Aspinet Road[,] . . . a coastal roadway existing between Callanan's Pass to the north and Aspinet Road to the south, in E. Orleans." Exhibit B to Mr. Cuda's PFT, at p. 2; Mr. DeCesare's PFT, ¶ 9. His RDA also stated that Inlet Road "is used by the general public and [that] the Town . . . directs the general public to use it to access portions of Nauset Beach and the Cape Cod National Seashore." *Id.* His RDA contended that Inlet Road was within the jurisdiction of the MWPA and the Wetlands Regulations because: (1) "it includes coastal wetlands and their respective 100-foot buffer zones,"; (2) "[m]ost of the roadway is defined as coastal dunes and other portions are within the buffer zone of a bordering vegetated wetland"; and (3) "[a]ll of the roadway is with [LSCSF]." *Id.*

In December 2013, the OCC issued an NDA finding that the Board's proposed Project "[was] within [wetlands] area[s] subject to protection under the [MWPA and the Wetlands Regulations],"²⁰ but did not require authorization by the MWPA and the Wetlands Regulations because in the OCC's determination, the Project "[would] not remove, fill, dredge, or alter that area." Exhibit C to Mr. Cuda's PFT; Mr. DeCesare's PFT, ¶ 10.

Mr. Cuda appealed the OCC's NDA to the Department seeking an SDA that the proposed Project required authorization by the MWPA and the Wetlands Regulations. Mr. Cuda's PFT, ¶ 18; Ms. White's Direct PFT, ¶ 11; Mr. DeCesare's PFT, ¶¶ 12-17. Mr. DeCesare, the Department's wetlands expert witness at Hearing, conducted the Department's SDA review. Mr. DeCesare's PFT, ¶¶ 1-16.

During the course of the Department's SDA review, Mr. DeCesare learned from the

²⁰ The OCC stated that use of Inlet Road "as an access roadway . . . by the general public to access Nauset Beach . . . include[d] passage through a Dune Field, [LSCSF], and the buffer zone of a [BVW]." Exhibit C to Mr. Cuda's PFT; Ms. White's PFT, ¶ 10.

Massachusetts Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program,²¹ that "the [proposed Project] site [was] within an area of Estimated Habitat of Rare Wildlife Species," specifically for the Piping Plover and the Least Tern, two endangered species of birds. *Id.*, ¶¶ 11, 33-34, 39. He also conducted an on-site inspection and informational meeting at Inlet Road with Mr. Cuda and the OCC's representatives and their respective wetlands experts. *Id.*, ¶ 12.

"During the on-site meeting, [the] parties discussed the site's resource areas and walked the entire length of Inlet Road, as described in [Mr. Cuda's] RDA, from Aspinet Road to Callanan's Pass to the North." *Id.*, ¶ 13. During the site visit, Mr. DeCesare also "verified . . . that the roadway was located within [the protected wetlands areas of] Coastal Dune, [LSCSF], and the buffer zone of a [BVW]." *Id.*, ¶ 14. "[He] also determined that the [Board's allowance of] continued [ORV] use [of Inlet Road was] in effect maintaining a 'roadway,'" . . . an Activity [that would] . . . Alter" a protected wetlands area within the meaning 310 CMR 10.04,²² and

²¹ The Massachusetts Division of Fisheries and Wildlife "is [a state agency of the Commonwealth] responsible for the conservation-including restoration, protection, and management - of fish and wildlife resources for the benefit and enjoyment of the public." <http://www.mass.gov/eea/agencies/dfg/dfw/about-masswildlife>.

²² The Wetlands Regulations at 310 CMR 10.04 define "Activity" as including:

- (1) "any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures;"
- (2) "the driving of pilings";
- (3) "*the construction or improvement of roads and other ways*";
- (4) "the changing of run-off characteristics";
- (5) "the intercepting or diverging of ground or surface water";
- (6) "the installation of drainage, sewage and water systems";
- (7) "the discharging of pollutants"; and

thus, was subject to authorization by the MWPA and the Wetlands Regulations. *Id.*, ¶¶ 15-16; Adjudicatory Hearing Transcript, p. 97, lines 18-24; p. 98, lines 1-18. As a result, on May 12, 2015, the Department issued the SDA requiring the Board to file an NOI with OCC pursuant to the MWPA and the Wetlands Regulations seeking approval of the proposed Project.

On May 29, 2015, the Board appealed the SDA to OADR contending that Mr. Cuda lacked standing to make his SDA request to the Department because in the Board's view, he was not a "person aggrieved" by OCC's NDA within the meaning of 310 CMR 10.04.²³ Board's Appeal Notice in OADR Docket No. WET-2015-012, at p. 1. The Board also contended that approval of its allowance of continued ORV use of Inlet Road was not required by the MWPA and the Wetlands Regulations because Inlet Road purportedly "ha[d] been used since prior to 1938 as a vehicle access road to Nauset Spit." *Id.*, at pp. 1-2.

On July 20, 2015, Mr. Cuda moved to dismiss the Board's appeal of the SDA as moot because: (1) on June 1, 2015, the Board had filed an NOI with the OCC seeking approval of the proposed Project; (2) on June 29, 2015, the OCC issued an Order of Conditions to the Board approving the proposed Project; and (3) on July 10, 2015, Mr. Cuda and several other Orleans residents filed a request with the Department for the SOC that is at issue in the second appeal in this case requesting that the Order of Conditions be vacated. The Department supported Mr. Cuda's Motion to Dismiss, contending that in filing its NOI with the OCC, the Board had admitted that the Department had properly issued the SDA. Department's Response to

(8) "the destruction of plant life; and any other changing of the physical characteristics of land."
(emphasis supplied).

²³ Mr. Cuda's standing to request the SDA is discussed in detail below, at pp. 20-32.

Applicant's Motion to Dismiss (July 29, 2015), at p. 1. Specifically, the Department asserted that "in filing the NOI, the [Board] admitted, by pains and penalties of perjury, that its proposed activity does require a permit under the [MWPA] and [the Wetlands Regulations]" *Id.* The basis for the Department's position was the Board's sworn certification on p. 9 of the NOI "that the [NOI] and accompanying plans, documents, and supporting data [were] true and complete to the best of [the Board's] knowledge." *Id.*, at p. 2.

The Board disagreed with the Department's position and opposed Mr. Cuda's Motion to Dismiss, contending that the Board did not waive its right to pursue its appeal of the SDA when it filed the NOI with and obtained the Order of Conditions from the OCC approving the proposed Project. *See* [Board's] Opposition . . . to [Applicant's] Motion . . . to Dismiss . . . (July 29, 2015). I agreed with the Board and denied Mr. Cuda's Motion to Dismiss based on a transcript of a portion of the OCC's June 16, 2015 hearing on the Board's NOI, which the Board attached to its opposition to Mr. Cuda's Motion to Dismiss. *Id.*; Affidavit of John Jannell (July 29, 2015) ("Mr. Jannell's Affidavit"); Attachment to Mr. Jannell's Affidavit. The transcript revealed that the Board, through its legal counsel, stated the following at the OCC's hearing:

[The Board] got a decision . . . from the Department and that decision was a positive [SDA] under the [MWPA] The [Board] ha[s] done two things response to that [decision]. First [the Board] . . . appeal[ed] [the SDA] Recognizing that [the] appeal is in the nature of a request for an adjudicatory hearing which would be an evidentiary hearing and could take a considerable period of time, the [Board], wanting to resolve the issue prior to the season if at all possible, also . . . file[d] a[n] NOI with the [OCC] [If] the [OCC] . . . grant[s] an order of conditions[,] . . . [the Board] would obviously revisit [its appeal of the SDA] . . . and [it] could make a determination whether to pursue [the appeal] or whether [it] would simply rely on an order [of conditions] that [the OCC] sees fit to issue

Attachment to Mr. Jannell's Affidavit; *See* Orders: (1) Denying [Mr. Cuda's] Motion to Dismiss;

and (2) Continuing Stay of Appeal Resolution Deadlines (September 15, 2015) (“September 2015 Ruling on Mr. Cuda’s Motion to Dismiss”).

B. Mr. Cuda Had Standing to Request the SDA from the Department As A “Person Aggrieved” By The OCC’s NDA Pursuant To 310 CMR 10.04

At the Hearing, the Board continued to maintain its position that Mr. Cuda lacked standing to request the SDA from the Department challenging the OCC’s NDA. As discussed in detail below, I reject the Board’s position based the applicable law and the evidence introduced at the Hearing.

1. The Jurisdictional Nature of Standing

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps

the most important of the jurisdictional doctrines”).

2. The Wetlands Regulations Require a Party to Have Standing to Seek an SDA from the Department

The Wetlands Regulations at 310 CMR 10.05(3)(c), which are entitled “Appeal to the Department,” provides that:

[f]ollowing a positive or negative Determination of Applicability [by a local conservation commission], . . . any person specified in 310 CMR 10.05(7) may, within ten days, request the Department to issue a Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7). . . .

The provisions of 310 CMR 10.05(7), in turn, state that “[certain] persons may request the Department to act,” including “*any person aggrieved* by a Determination [of Applicability made by a local conservation commission].” 310 CMR 10.05(7)(a) (emphasis supplied). 310 CMR 10.05(7)(b) provides that such a person “may request the Department to issue a Superseding Determination of Applicability”

The Wetlands Regulations at 310 CMR 10.04 define a “person aggrieved” as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.’” Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS 22, at 28-29; Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 26-27; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final

Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 16; Vacirca, 2017 MA ENV LEXIS 22, at 29-30; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

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

63 Mass. App. Ct. at 441; Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA

ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs' case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury").

To summarize, in order to demonstrate that he had standing to seek the SDA from the Department as a "person aggrieved" by the OCC's NDA, Mr. Cuda was required to put forth a minimum quantum of credible evidence supporting his claim that the Board's proposed Project would or might cause him to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. If Mr. Cuda met that minimal evidentiary threshold, the Board's appeal of the SDA would then proceed "to [the] inquiry on the merits" regarding whether the Department properly issued the SDA, specifically whether the Department properly determined that the Board's planned allowance of ORV use on Inlet Road in Orleans is subject to authorization by the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441.

3. Mr. Cuda Demonstrated Standing to Seek the SDA

At the Hearing, the Board contended that Mr. Cuda lacked standing to seek the SDA from the Department because he purportedly does not have any right, title, or interest in real property located in the vicinity of Inlet Road, the site of the proposed Project, that might or will be impacted by the proposed Project. [Board's] Post-Hearing Memorandum, at pp. 5-16. Based

on the evidence introduced at the Hearing, I reject the Board's claim for the following reasons.

First, in May 2014, the Board executed the Aspinet Road Agreement associated with the proposed Project with several individuals identified in the Agreement as "Lot Owners," including Mr. Cuda. Mr. Cuda's address in the Aspinet Road Agreement is listed as "15 Cullum Road, E. Orleans, Mass.," the same real property, as discussed below, that the Board contends Mr. Cuda has no right, title, or interest in. In my view, the Board's execution of the Aspinet Road Agreement with Mr. Cuda undermines the Board's assertion that Mr. Cuda lacked standing to seek the SDA, because the Board's execution of the Agreement with Mr. Cuda evinces the Board's admission that Mr. Cuda had a right, title, or interest in real property that could be impacted by the Board's proposed Project, and that he also had the legal standing to be bound by terms of the Agreement.

Second, contrary to the Board's contentions, the evidence shows that Mr. Cuda has a right, title, or interest in residential real property in the vicinity of Inlet Road: at 15 Cullum Road ("the Cullum Road Property") referred to above. Mr. Cuda's PFT, ¶¶ 1-2. Cullum Road is a dead-end street off of Aspinet Road. Mr. Cuda's PFT, ¶ 3. Mr. Cuda and his late wife, Ellen B. Cuda ("Mrs. Cuda"), purchased the Cullum Road Property in 1970. Mr. Cuda's PFT, ¶ 1; Mr. Hull's PFT, ¶¶ 3-7; Exhibits 1-4 to Mr. Hull's PFT. The Cullum Road Property was part of three parcels of real property that Mr. and Mrs. Cuda purchased at that time known as Lots 1, 3, and 4 as depicted in a 1960 plan recorded in the Barnstable County Registry of Deeds in Plan Book 160, page 65 ("the Plan"). Mr. Hull's PFT, ¶ 7; Exhibit 4 to Mr. Hull's PFT. The Cullum Road Property is Lot 1, which directly abuts Lot 4, which in turn, directly abuts Inlet Road, the site of the Board's proposed Project. Mr. Hull's PFT, ¶ 7; Exhibit 4 to Mr. Hull's PFT. Although, Mr.

and Mrs. Cuda sold Lot 4 to the federal government in 1974 and their deed conveying Lot 4 did not expressly reserve any right by them to cross or pass over Lot 4 to access Inlet Road, the Board presented no evidence that the federal government expressly precluded them from such passage. Mr. Hull's PFT, ¶ 8; Exhibits 5 and 6 to Mr. Hull's PFT.

Mr. and Mrs. Cuda continued to own the Cullum Road Property jointly as husband and wife until August 23, 1982, when Mr. Cuda conveyed his interest in the Property to Mrs. Cuda. Mr. Hull's PFT, ¶ 9; Exhibit 7 to Mr. Hull's PFT. Mr. Cuda inherited the Cullum Road Property from Mrs. Cuda in April 2010, when she died. Mr. Hull's PFT, ¶ 10; Exhibit 8 to Mr. Hull's PFT. As part of his estate planning, in December 2012, Mr. Cuda conveyed the Cullum Road Property to an irrevocable Qualified Personal Residence Trust ("the Trust"), under which he is the Trust's sole beneficiary and his children, Corrine C. Ackerman, Fred B. Cuda, and Beth C. Baker, serve as the Trust's Trustees. Mr. Cuda's PFT, ¶ 21; Exhibit E to Mr. Cuda's PFT; Mr. Hull's PFT, ¶¶ 11-12; Exhibit 9 to Mr. Hull's PFT. Under the Trust, Mr. Cuda's children, as the Trust's Trustees, hold the Premises "for use [by Mr. Cuda] as [his] personal residence," and he "ha[s] the exclusive right to use and possession of the [Premises,] . . . subject to the Trustees' power of sale." Exhibit E to Mr. Cuda's PFT, ¶¶ 5.1, 6.1. Under the Trust, Mr. Cuda is responsible for "pay[ing] all administration expenses of the Trust and all costs reasonably incurred by the Trustees in connection with the Trust, including real estate taxes, insurance, and ordinary maintenance of the [Property]." Exhibit E to Mr. Cuda's PFT, ¶ 6.3.

In sum, I find that Mr. Cuda demonstrated that he has a right, title, or interest in the Cullum Road Property by virtue of being the Trust's sole beneficiary. In the Matter of Frank Donaldson, Trustee, Gardner Realty Trust, OADR Docket No. 2006-041, DALA Docket No.

DEP-06-343, Motion Rulings (June 27, 2006), 13 DEPR 184 (2006) (“a beneficial interest in . . . land [is sufficient] for standing”). At a minimum, Mr. Cuda demonstrated that he is a long-standing tenant at the Cullum Road Property, and his tenancy at the Property was sufficient to accord him standing to request the SDA. Quimby v. Zoning Board of Appeals, 19 Mass. App. Ct. 1005, 1006 (1985) (tenant at property could challenge local zoning decision); Liebman v. Moriarty, Massachusetts Land Court, Case No. 14 Misc. 484527 (KCL), Slip Op. (August 18, 2017), 2017 Mass. LCR LEXIS 155, at 20-23 (long-time resident and non-record title owner of property had standing to challenge local zoning decision).

I also find that Mr. Cuda satisfied the minimal evidentiary threshold for proof of standing by demonstrating through the testimony from his expert witnesses, Ms. White and Dr. Rosen, that his right, title, or interest in the Cullum Road Property might be harmed by the proposed Project.

Ms. White testified that the Cullum Road Property is at the top of a Coastal Bank²⁴ which borders the Coastal Dunes which are the subject of the SDA. Ms. White’s Direct PFT, ¶ 30; Adjudicatory Hearing Transcript, p. 137, lines 13-24; p. 138, lines 1-11. She testified that ORV traffic has diminished and will continue to diminish the ability of the Coastal Bank to provide

²⁴ A Coastal Bank is a wetlands resource area protected by the MWPA and the Wetlands Regulations at 310 CMR 10.30 that is critical to flood control and storm damage prevention. The Wetlands Regulations at 310 CMR 10.30(2) define a Coastal Bank as:

the seaward face or side of any elevated *landform*, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

(emphasis supplied). A “landform” is “[a] discernible natural landscape that exists as a result of wind, water or geological activity.” Rankow, 2013 MA ENV LEXIS 45, at 30-31.

storm prevention to the Cullum Road Property. Ms. White's Direct PFT, ¶ 30.

Dr. Rosen testified that the 2014 Federal Emergency Management Agency ("FEMA") maps for the area indicate that the Aspinet Road area is in Zone AE, flood elevation 14 feet, and that the seaward end of Callanan's Pass is in Zone VE, flood elevation 15 feet. Dr. Rosen's Rebuttal PFT, ¶ 2; Exhibit 1 to Dr. Rosen's Rebuttal PFT.²⁵ He testified that the Massachusetts Office of Coastal Zone Management ("CZM")²⁶ has overlain the FEMA flood boundary onto high-resolution air photographs, and this overlay indicates that flood levels currently extend about 75 feet landward of Inlet Road up Aspinet Road, and immediately south of Aspinet Road, the flood boundary extends about 175 feet landward of Inlet Road, bringing the present flood boundary about 60 feet (+/-) from the Cullum Road Property. Dr. Rosen's Rebuttal PFT, ¶ 3; Exhibit 2 to Dr. Rosen's Rebuttal PFT; Adjudicatory Hearing Transcript, p. 184, lines 7-24; p. 185, 1-3. He testified that the FEMA and CZM maps support Mr. Cuda's testimony at the Hearing that "[t]he area of Inlet Road that abuts the [Coastal] [B]ank that abuts [the Cullum Road Property] floods frequently, both with ocean water and freshwater," and that "[t]he [Coastal] [D]unes get washed over every year or nearly every year." Dr. Rosen's Rebuttal PFT, ¶ 4; Mr. Cuda's PFT, ¶ 8; Adjudicatory Hear Transcript, p. 125, 4-10.

²⁵ FEMA is responsible for furthering the U.S.'s ability to "sustain and improve [the nation's] capability to prepare for, protect against, respond to, recover from[,] and mitigate all hazards." <https://www.fema.gov/about-agency>. "The FEMA Flood Map Service Center (MSC) is the official public source for flood hazard information produced in support of the National Flood Insurance Program (NFIP)." <https://msc.fema.gov/portal>. FEMA Flood Zone Designations "are geographic areas that the FEMA has defined according to varying levels of flood risk. These zones are depicted on a community's Flood Insurance Rate Map (FIRM) or Flood Hazard Boundary Map. Each zone reflects the severity or type of flooding in the area." <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf>. "Coastal areas with a 1% or greater chance of flooding and an additional hazard associated with storm waves" are designated by FEMA as "VE." *Id.* "These areas have a 26% chance of flooding over the life of a 30-year mortgage" on real property located in such areas. *Id.*

²⁶ "[CZM] is the lead policy and planning agency on coastal and ocean issues within the [Commonwealth's] Executive Office of Energy and Environmental Affairs (EEA)" responsible for "balanc[ing] the impacts of human activity with the protection of coastal and marine resources." <http://www.mass.gov/eea/agencies/czm>.

Ms. White supported Dr. Rosen's testimony by testifying that the base flood elevation has been moving landward over time toward to the Cullum Road Property. Ms. White's Rebuttal PFT, ¶ 14. She testified that based on the Town's GIS maps,²⁷ in 1992, the base flood elevation had been at Inlet Road and since then the elevation had moved significantly landward onto the property between Inlet Road and the Cullum Road Property. Id. She testified that serious flooding in the area of Inlet Road abutting the lot that abuts the Cullum Road Property has been documented for a number of years. Ms. White's Direct PFT, ¶¶ 31-34. She supported her testimony with the results of several scientific studies of the area that have been conducted for the Town by the Woods Hole Oceanographic Institution ("WHOI")²⁸ during the last 19 years, beginning in 1998. Id.

In its initial 1998 study, WHOI stated that:

Aspinet Road . . . is an access road servicing four homes [and] . . . is often flooded from the ocean during northeast storms [causing] the homeowners [to] lose access to their homes. . . .

The dunes along [T]ransect 4 [the area at issue in this case] are of particular concern[,] [because] this is the location of a significant breach in the entire dune system of Nauset. The extensive wetlands of the Aspinet Road area have been altered due to overwash of the beach following destruction of the dunes. The extensive freshwater wetland pond between the dunes and Aspinet Road has died due to saltwater incursion, leaving a mass of dead vegetation where healthy

²⁷ "'GIS is the acronym for 'Geographic Information System[,] a computer system capable of capturing, storing, analyzing, and displaying geographically referenced information; that is, data identified according to location. Practitioners also define a GIS as including the procedures, operating personnel, and spatial data that go into the system.'" In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 21, n.7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77.

²⁸ WHOI is an "independent non-profit organization dedicated to ocean research, exploration, and education." <http://www.whoi.edu/who-we-are>.

freshwater wetlands once thrived. At Transects four and five, dune recession rates have averaged 5 and 7 feet per year respectively, higher than at Transects farther south. . . .

Ms. White's Direct PFT, 1st paragraph No. 32. WHOI also stated that:

[t]his flooding [would] continue until the dunes . . . repaired themselves naturally (which [could] take a decade or more), or until some more active management plan [was] implemented [by the Town] (such as rebuilding the dunes artificially, using sand fencing or sand trucking).

Id.

In 2006, WHOI prepared another study in which it recommended that the Town take a number of actions to protect the shoreline against adverse impacts to natural resources and upland areas. Ms. White's Direct PFT, 2nd paragraph No. 32. Two years later in 2008, WHOI proposed in another study that the Town adopt several management options to address flooding on Aspinet Road and Inlet Road and erosion of the Coastal Dune. Ms. White's Direct PFT, ¶ 33. In its recent 2016 study, WHOI concluded "that a 10-year storm event . . . will induce a barrier breach at Nauset Heights." Ms. White's Direct PFT, ¶ 34.

In his testimony, Dr. Rosen supported WHOI's studies by testifying that the northern end of Inlet Road, which is at the intersection with Callanan's Pass and a beach access point through the Coastal Dune that is managed by the Town for ORV use, has suffered extensive erosion (deep cuts in the Dune) resulting from ORV use. Dr. Rosen's Direct PFT, ¶ 17. He testified that the cuts in the Coastal Dune resulting from ORV use are up to four feet below adjacent vegetated Dunes and that Dune sand is being scoured by wind from the roadway into other areas. Id. He testified that the scoured Coastal Dune areas increase risk of coastal flooding to landward areas, and that the impacts of intensive ORV traffic include the destabilization of the Dune and changing the Dune form and volume in the vicinity of Callanan's Pass, which

increases the danger of flooding to inland areas. Id. He testified that the proposed Project will divert ORV traffic, with a comparable level of Coastal Dune management by the Town, onto Inlet Road, and that these characteristics of Callanan's Pass are among the adverse impacts that Inlet Road will sustain if the proposed Project is approved. Id.

In response, the Department does not dispute that Mr. Cuda had standing to seek the SDA, accepting his contentions that he has a right, title, or interest in the Cullum Road Property and that the Property is at the top of a Coastal Bank adjacent to the proposed Project. Department's Closing Brief, at pp. 2-3. The Department also acknowledges that the Cullum Road Property "*could* potentially be harmed if the proposed Project caused adverse impacts to the [wetlands] resource areas protected by the [MWPA]." Id., at p. 2.

The Board does not agree with the Department, contending that if Mr. Cuda has a right, title, or interest in the Cullum Road Property (which the Board disputes as discussed above), the Property cannot be harmed by the proposed Project because it is not located at the top of a Coastal Bank that fronts on Inlet Road as Mr. Cuda claims. Board's Closing Brief, at pp. 10-13. In support of its position, the Board relied on the testimony of Mr. Jannell, the Town's Conservation Administrator. Id.

Mr. Jannell testified that in his opinion the Cullum Road Property is not located at the top of a Coastal Bank based on his review of the Property and the Wetlands resource area along the portion of Inlet Road from Aspinet Road running northerly to Callanan's Pass, and applying to the Property, the Department's Wetlands Guidance Document entitled "Wetlands Program

Policy 92-1: Coastal Banks” (“WPP 92-1”).²⁹ Mr. Jannell’s PFT, ¶¶ 8-13. He testified that further evidence of the Cullum Road Property not being located at the top of a Coastal Bank is reflected by the fact that a new house was built on the Property in 2002 without prior approval from the OCC pursuant to the MWPA and the Wetlands Regulations. Mr. Jannell’s PFT, ¶ 14. He testified that if the Cullum Road Property was located on the top of a Coastal Bank then the new house could not have been built on the Property without the OCC’s prior approval pursuant to the MWPA and Wetlands Regulations. Id. He testified that he reviewed the OCC’s records and found no filing with the OCC seeking approval of construction of the house pursuant to the MWPA and the Wetlands Regulations. Id.

I am not persuaded by the Board’s position because while it is undisputable that no approval was sought from the OCC pursuant to the MWPA and the Wetlands Regulations to build the house at issue on the Cullum Road Property in 2002, the lack of such an approval does not mean that the Property is not located on the top of a Coastal Bank. The Board did not present any evidence showing that Mr. Cuda and/or any other person or entity having a right, title, or interest in the Cullum Road Property, knew or should have known in 2002 that the Property was located on the top of a Coastal Bank, and, as such, approval from OCC for construction of the house was required pursuant to the MWPA and the Wetlands Regulations. Moreover, as discussed above, Mr. Cuda’s wetlands expert witnesses at the Hearing, Ms. White and Dr. Rosen, provided probative testimony (not challenged by the Department, the state agency having the principal responsibility for enforcing the MWPA and the Wetlands

²⁹ See <http://www.mass.gov/eea/agencies/massdep/water/regulations/wetlands-program-policy-92-1-coastal-banks.html>. “The purpose of [WPP 92-1] is to clarify the definition of coastal bank contained in the Wetlands Regulations, 310 CMR 10.00, by providing guidance for identifying ‘top of coastal bank.’” Id.

Regulations) that the Cullum Road Property is located on the top of a Coastal Bank that could be potentially harmed by the proposed Project. Based on their level of substantial expertise, I credit their testimony over Mr. Janell's testimony.³⁰

C. The Department Properly Issued the SDA

As discussed above, in issuing the SDA, the Department "determined that the [Board's allowance of] continued [ORV] use [of Inlet Road]" constituted an "Activity" that would "Alter" a protected wetlands area within the meaning 310 CMR 10.04, and thus, was subject to authorization by the MWPA and the Wetlands Regulations. Mr. DeCesare's PFT, ¶¶ 14-16. The Department's expert witness, Mr. DeCesare, supported the Department's determination by testifying at the Hearing that Inlet Road "was located within Coastal Dune, [LSCSF], and the buffer zone of a [BVW]" and that "the continued [ORV] use [of Inlet Road] was] in effect maintaining a 'roadway,'" . . . an Activity [that would] . . . Alter" those protected wetlands. *Id.*, ¶¶ 15-16; Adjudicatory Hearing Transcript, p. 97, lines 18-24; p. 98, lines 1-18.

Through the testimony of its witness, Mr. Sears, the Town's Natural Resources Manager, the Board contended that its proposed Project was not subject to authorization by the

³⁰ My finding that Mr. Cuda had standing to request the SDA does not mean that he and his fellow Petitioners prevail on the merits of their substantive claims in the second appeal in this case challenging the Department's SOC authorizing the proposed Project. See below, at pp. 35-59. My finding only means that Mr. Cuda had standing to seek the SDA based on the much lower evidentiary threshold that only required him to put forth a minimum quantum of credible evidence in support of his claim that the Board's proposed Project would or might cause him to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; *Webster Ventures I*, 2015 MA ENV LEXIS 14, at 17-18; *Vacirca*, 2017 MA ENV LEXIS 22, at 31-32; *Gordon*, 2010 MA ENV LEXIS 114, at 11 and cases cited; *Enos*, 2013 MA ENV LEXIS 21, at 17-18; *Rankow*, 2013 MA ENV LEXIS 45, at 29. However, to successfully challenge the SOC, Mr. Cuda and his fellow Petitioners had the higher burden of proving by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Department erred in issuing the SOC approving the proposed Project. *Webster Ventures I*, 2015 MA ENV LEXIS 14, at 13-14, 31-37. As explained below, they did not meet their burden because a preponderance of the evidence introduced at the Hearing demonstrated that the Department properly issued the SOC to the Board approving the proposed Project.

MWPA and the Wetlands Regulations because “Inlet Road . . . has been used for vehicular traffic since at least 1938 and as a result continued use for vehicular traffic does not . . . require [authorization] under the [MWPA] or the [Wetlands] [R]egulation[s].” Board’s Appeal Notice in SDA Appeal, at p. 2; Mr. Sears’ PFT, ¶¶ 1-4. Mr. Sears testified that he has served as the Town’s Natural Resources Manager since 2014, and that in that role, he oversees the Town’s Beaches and is responsible for implementation of all facets of the Town’s ORV Programs. Mr. Sears’ PFT, ¶¶ 1-2. He testified that “the Town’s limited seasonal use of Inlet Road is historical in nature” and that “[t]he road has been used in various forms since at least 1938 as access to the front beach all as shown on plans filed with the Town’s NOI [for the proposed Project].” *Id.*, ¶ 4. I do not find Mr. Sears’ testimony to be persuasive for the following reasons.

First, the plans that the Town filed with its NOI for the proposed Project do not prove the Town’s claim that Inlet Road has been used for vehicular traffic since at least 1938. The purported plans filed with the NOI consist of a one page document containing photographic copies of two undated plans, marked “1-26” and “13-65,” respectively. At the Hearing, Mr. Sears admitted that the plans do not show Inlet Road extending from Aspinet Road to Callanan’s Pass. Adjudicatory Hearing Transcript, p. 30, lines 2-24; p. 31, lines 1-7.

Second, Mr. Sears testified at the Hearing that he also relied on four black-and-white photographs dated 1938, 1997, 2005, and 2013, respectively, that the Town included with its NOI, to assert that Inlet Road has been used for vehicular traffic since at least 1938. Adjudicatory Hearing Transcript, p. 33, lines 20-24; p. 34, lines 1-4. The photographs are not

probative because they are of poor quality and present no evidence of a road or trail.

Additionally, Mr. Sears admitted at the Hearing that he is neither a photogrammetrist³¹ nor has any particular expertise in interpreting photographs. Id., at p. 34, lines 5-10.

Lastly, Mr. Sears' testimony that Inlet Road has been used for vehicular traffic since at least 1938 was undercut by the testimony of the Board's other witness, Mr. Jannell, the Town's Conservation Agent, who testified at the Hearing that the ORV Program in Orleans on Nauset Spit, north of Callanan's Pass, has been in existence for many years and that in 1991, the Town was required to obtain an Order of Conditions from the OCC under the MWPA and the Wetlands Regulations authorizing the Program in that area. Adjudicatory Hearing Transcript, p. 59, lines 10-24; p. 60, lines 1-4. Mr. Jannell testified that the OCC also issued the Town an Order of Conditions authorizing ORV use on Nauset Spit, south of Callanan's Pass. Id., at p. 60, lines 11-17. Mr. DeCesare corroborated Mr. Jannell's testimony that the Town has been using Nauset Spit for ORV traffic since at least 1991 pursuant to Orders of Conditions issued by the OCC. Id., at p. 90, lines 10-15. Indeed, Mr. DeCesare testified that the 1991 Order of Conditions authorizing the Town's ORV Program on Nauset Spit, north of Callanan's Pass, had been preceded by the Department's 1990 SDA requiring the Town to obtain the Order of Conditions. Id., at p. 90, lines 16-24. He also testified that the Town contended then as it has done now in this case that Inlet Road had been used for vehicular traffic since at least 1938, and as such, an

³¹ "[P]hotogrammetrists collect, measure, and interpret geographic information in order to create and update maps and charts for regional planning, education, and other purposes. . . . [They] are specialized mapmakers who use aerial photographs, satellite images, and light-imaging detection and ranging (LIDAR) technology to build models of the Earth's surface and its features for the purpose of creating maps." <https://www.bls.gov/ooh/architecture-and-engineering/cartographers-and-photogrammetrists.htm#tab-2>.

Order of Conditions under the MWPA and the Wetlands Regulations authorizing ORV use was not required. Adjudicatory Hearing Transcript, p. 97, lines 18-24; p. 98, lines 1-18.

II. THE SOC APPEAL

A. Prior Proceedings

As noted above, following the Department's issuance of the SDA, the Board filed an NOI with the OCC seeking approval of the proposed Project pursuant to the MWPA and the Wetlands Regulations; on June 29, 2015, the OCC issued an Order of Conditions to the Board authorizing the proposed Project; and on July 10, 2015, Mr. Cuda and several other Orleans residents filed an SOC request with the Department requesting that the Order of Conditions be vacated. Shortly after beginning its SOC review, the Department stayed its review pending a determination by the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA") whether the Board would be required to file an Environmental Impact Report ("EIR") for the proposed Project pursuant to MEPA. Department's Status Report in OADR Docket No. WET-2015-012 (July 27, 2016), at p. 1; Mr. DeCesare's PFT, ¶ 23.

EEA is a Massachusetts Gubernatorial Cabinet level agency, whose "mission . . . is to safeguard public health from environmental threats and to preserve, protect, and enhance the natural resources of the Commonwealth." <http://www.mass.gov/eea/about-eea.html>; See also G.L. c. 21A, §§ 1, 2, 4, 4A, 7. EEA's mission also includes "[promoting] energy efficiency [and] renewable energy[;] . . . reducing . . . dependence on fossil fuels; diversifying . . . energy sources [in the Commonwealth]; and [advancing] . . . energy technology innovation." *Id.* "To meet its mandate, [EEA] oversees [the Department and five other state agencies of the

Commonwealth].” Id.; G.L. c. 21A, § 7.³² Each of these state agencies, including the Department “[is] headed by a commissioner . . . appointed . . . by the [EEA] secretary, with the approval of the governor.” Id.

MEPA and the MEPA Regulations at 301 CMR 11.00 that were promulgated by EEA “establish a process to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project [(Damage to the Environment)] are avoided or minimized.” City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 201, n.12 (2014) (“Brockton I”); In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), 2016 MA ENV LEXIS 66, at 143, n. 44, adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017), 2017 MA ENV LEXIS 21. EEA’s MEPA Office “[is] responsible for day-to-day administration of the MEPA review process.” <http://www.mass.gov/eea/agencies/mepa/about-mepa>. “Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [EEA] Secretary], . . . who determines whether the project meets the review threshold requiring an . . . [EIR under MEPA].” Brockton I, 469 Mass. at 201, n.12; Brockton Power, LLC, 2016 MA ENV LEXIS 66, at 143, n. 44. “If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA] Secretary certifies whether the FEIR has complied with MEPA” Id. A Certification by the EEA Secretary that the FEIR complies with MEPA “does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies.” Id. The Certification “[also] does not

³² The other five state agencies that EEA oversees are: (1) Department of Conservation and Recreation (“DCR”); (2) the Department of Agricultural Resources (“DAR”); (3) the Department of Fish and Game (“DFG”); (4) the Department of Public Utilities (“DPU”); and (4) the Department of Energy Resources (“DER”). G.L. c. 21A, § 7.

mean that a proposed project meets applicable permitting standards.” In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. “Instead, it only means that the project’s proponent has adequately described the environmental impacts and addressed mitigation” as required by MEPA. Id. The permitting agency “retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review” 301 CMR 11.01(1)(b). Here, the proposed Project was subject to MEPA review by the EEA Secretary because it involved “the alteration of a coastal dune, barrier beach[,] or coastal bank.” 301 CMR 11.03(3)(b)(1)(a); Mr. DeCesare’s PFT, ¶ 23.

During the MEPA review, Mr. DeCesare and a MEPA analyst from EEA “conducted another on-site inspection and information meeting with the parties . . . in order to inspect the wetland resource areas again, discuss issues from each [party,] and facilitate project review.” Mr. DeCesare’s PFT, ¶ 24. “During the on-site meeting [the] parties walked the length of Inlet Road again, from Aspinet Road to Callanan’s Pass to the North to observe the layout of the roadway and the wetland resource areas.” Id.

On November 6, 2015, the EEA Secretary issued a MEPA certificate stating that the proposed Project did not require an EIR and that the Board’s ENF for the proposed Project “sufficiently defined the nature and general elements of the project for MEPA review and demonstrated that the project’s environmental impacts could be avoided, minimized, and/or mitigated to the extent practicable.” EEA Secretary’s MEPA Certificate, at p. 8; Mr. DeCesare’s PFT, ¶ 25. The MEPA Certificate also indicated that “[the Department] ha[d] sufficient

regulatory authority to address outstanding issues . . . [and that] no further MEPA review [would be] required.” Id. As a result, the Department resumed its SOC review. Id.

On June 16, 2016, the Department completed its SOC review and issued an SOC approving the proposed Project, specifically, “the continued vehicular use of Inlet Road running from Aspinet Road North to Callanan’s Pass subject to certain conditions to protect the wetland resource areas, the interests of the [MWPA], and the habitat of state-listed, rare wetland wildlife species [of the Piping Plover and Least Tern].” SOC Transmittal Letter, at p. 1. The SOC stated that the wetlands areas in which the proposed Project was to be located were significant to the MWPA interests of prevention of pollution, protection of Wildlife Habitat, storm damage prevention, and flood control. SOC, at p. 2. In its August 1, 2016 Pre-Hearing Conference Statement, the Department asserted that “the SOC properly limits the historic off-road vehicle use at the Site in a manner that conforms with the relevant performance standards [under 310 CMR 10.28(3)] for [activities in] Coastal Dune and protects the interests of the Buffer Zone [to BVW] and [LSCSF].” Department’s Pre-Hearing Statement (August 1, 2016), at p. 2. Neither the SOC nor the Department’s Pre-Hearing Statement indicated that the Department had approved the proposed Project as a limited project for “[the] maintenance and improvement of existing public ways” pursuant to 310 CMR 10.24(7)(c)(1).

B. The Department’s Basis for Approving the Proposed Project

At the Hearing, the Department did not present any evidence through its witness, Mr. DeCesare, supporting its previous assertions at the August 1, 2016 Pre-Hearing Conference that the proposed Project satisfied the Performance Standards under 310 CMR 10.28(3) for activities in Coastal Dune, and protected the interests of Buffer Zone to a BVW and LSCSF. Instead, the

Department, through Mr. DeCesare, indicated that “[its] review and . . . SOC issuance approving [the proposed Project] focused on the limited project provisions of 310 CMR 10.24(7)(c)1 [for] ‘[t]he maintenance and improvement of existing public roadways,’” the provisions of which are discussed below. Mr. DeCesare’s PFT, ¶¶ 28-48; Department’s Pre-Hearing Brief, at 4-5; Department’s Closing Brief, at 4-6.

In response, the Petitioners objected, contending in essence that the Department’s reasoning at the Hearing for approving the proposed Project as a limited project under 310 CMR 10.24(7)(c)1 was a post hoc (after the fact) rationalization for approving the Project because, undisputedly, the NOI that the Town filed with the OCC seeking approval of the Project did not assert that the Project was a “limited project” associated with “[the] [m]aintenance and improvement of existing public roadways” pursuant to 310 CMR 10.24(7)(c)1. NOI; Hearing Transcript, at p. 69, lines 4-11; p. 88, lines 16-22; Petitioners’ Closing Brief, at pp. 23-24. Also undisputedly, as noted above, the SOC did not state that the Department had approved the proposed Project as a limited project pursuant to 310 CMR 10.24(7)(c)1. SOC; Department’s Pre-Hearing Statement; Hearing Transcript, p. 88, lines 23-24; p. 89, lines 1-7; Petitioners’ Closing Brief, at pp. 23-24.

The Department should have stated in the SOC and its Pre-Hearing Conference Statement that it had approved the proposed Project as a limited project associated with “[the] [m]aintenance and improvement of existing public roadways” pursuant to 310 CMR 10.24(7)(c)1, given Mr. DeCesare’s testimony at the Hearing that from the outset of its SOC review, the Department “focused on the limited project provisions of 310 CMR 10.24(7)(c)1 [for] ‘[t]he maintenance and improvement of existing public roadways,’” and that “ultimately[,]

the Department's SOC issuance approving the continued use of Inlet Road [for ORV use]" was based on that regulation. Mr. DeCesare's PFT, ¶ 28. However, I have no reason to doubt Mr. DeCesare's testimony because he was a credible witness for the Department at the Hearing. Also factoring into my finding that Mr. DeCesare gave credible testimony regarding the basis of the Department's SOC approval is the Department's de novo review authority upon appeal through the SOC process.

C. The Department's De Novo Review Authority

It is well settled that when it receives an SOC request, "[t]he Department [conducts] a de novo review of [the proposed] Project [at issue]," meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations. In the Matter of Chappaquonsett Realty Trust, OADR Docket No. 1988-222, Order of Dismissal and Grant of Motion to Intervene (July 19, 1989), 7 MELR 1421, 1426 (1989). Indeed, in issuing an SOC affirming a local conservation commission's approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations "[to] adopt conditions identical to those adopted by [the] conservation commission." Id. For these reasons, the Department could approve the Board's proposed Project as a limited project pursuant to 310 CMR 10.24(7)(c)1 for the maintenance and improvement of existing public roadways, even though the Board's NOI for the Project did not seek the Project's approval pursuant to that regulation.

It is also important to note that the Department's de novo review authority carries over to an administrative appeal of an SOC filed with OADR. During the pendency of the

administrative appeal before OADR, the Department “is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].” In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014). Hence, if during the pendency of an administrative appeal, “[the Department] becomes convinced” based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, “that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],” the Department is authorized to, and should change its position. Id.

D. The Limited Project Provisions of 310 CMR 10.24(7)(c)1

The Petitioners contended at the Hearing that the proposed Project does not fall within the limited project purview of 310 CMR 10.24(7)(c)(1) for “[the] [m]aintenance and improvement of existing public roadways” because in their view, “[t]his provision contemplates . . . an already constructed road, where the alteration, such as by pavement, is complete, and the continued use does not create continuing new impacts[,] [and] [t]his case by contrast involves an ORV trail through a sand dune.” Petitioners’ Closing Brief, at p. 25. The Petitioners’ contention is without merit because, as Mr. DeCesare noted in his testimony, the proposed Project involves approval of the continued vehicular use of a public roadway, specifically, “Inlet Road, from Callanan’s Pass to Aspinet Road,” which Mr. Cuda described in his RDA as “a coastal roadway existing between Callanan’s Pass to the North and Aspinet Road to the South, in [East] Orleans

[that] is used by the general public.” Mr. DeCesare’s PFT, ¶ 29.

1. The Proposed Project’s Compliance with the Alternatives Analysis Requirement of 310 CMR 10.24(7)(c)1

310 CMR 10.24(7) provides that “[i]n determining whether to exercise its discretion to approve a project as a limited project pursuant to 310 CMR 10.24(7)(c)(1), “the [Permit] Issuing Authority [must] consider the following factors: [1] the magnitude of the alteration and the significance of the project to the interests [of the MWPA], [2] the availability of reasonable alternatives to the proposed activity, and [3] the extent to which adverse impacts are minimized and the extent to which mitigation measures including replication or restoration are provided to contribute to the protection of the interests [of the MWPA].” 310 CMR 10.24(7).

At the Hearing, the Petitioners contended that the Department failed to consider the “reasonable alternatives” factor as set forth above in approving the proposed Project as a limited project pursuant to 310 CMR 10.24(7)(c)(1) because the Department did not require the Board to perform an alternatives analysis. Petitioners’ Closing Brief, at pp. 25- 27. While it is true that the Department did not require the Board to perform such an analysis, the Board had already performed such an analysis for EEA during the MEPA review process. Hearing Transcript, at p. 89, lines 8-24. The EEA Secretary referred to the Board’s alternatives analysis in his November 6, 2015 MEPA Certificate for the proposed Project. The EEA Secretary’s MEPA Certificate stated that:

[t]he [Board’s] ENF [for the proposed Project had] indicated that a “no-action” alternative was not considered [by the Board] as it would not achieve the goals of the project, which are to provide an additional means of egress for ORVs during seasonal periods of high use and to allow for a secondary access/egress point to be used when Callanan’s Pass becomes blocked due to disabled vehicles, trees or brush, or road repairs. . . . Additionally, a ‘no-action’ alternative was not considered [by the Board] as it would permanently eliminate the only access way

to some residences. As Inlet Road is an existing . . . used road-way, other routes of providing ORV access/egress were not considered as they would result in new impacts to environmental resource areas.

EEA Secretary's MEPA Certificate, at p. 5; Mr. DeCesare's PFT, ¶ 31.

Mr. DeCesare testified that the Department relied on the alternatives analysis that the Board performed during the MEPA review process in approving the proposed Project as a limited project pursuant to 310 CMR 10.24(7)(c)(1). Mr. DeCesare's PFT, ¶ 31; Hearing Transcript, at p. 89, lines 8-23. The Petitioners contend that it was improper for the Department to have relied on that analysis because in the Petitioners' view, the Department "delegate[d] to another [state agency, EEA,] . . . the determination of an issuance of substance" that was before the Department: whether the Board had conducted a proper alternatives analysis for the proposed Project. Petitioners' Closing Brief, at p. 26. The Petitioners claims are without merit for the following reasons.

First, the Petitioners' claim fails to accurately set forth the relationship between EEA and the Department. The relationship is that EEA oversees the Department and five other state agencies as a Massachusetts Gubernatorial Cabinet level agency, whose "mission [includes] . . . to safeguard public health from environmental threats and to preserve, protect, and enhance the natural resources of the Commonwealth." <http://www.mass.gov/eea/about-eea.html>; See also G.L. c. 21A, §§ 1, 2, 4, 4A, 7.

Second, the Petitioners' claim also fails to recognize EEA's role and determinations in the MEPA review process and the Department's ability to rely on EEA environmental analyses and determinations resulting from EEA's MEPA review of a project. As previously discussed above, EEA's MEPA Office is the office through which "the [EEA] Secretary conducts

environmental impact reviews of certain projects requiring state agency action [such as] . . . granting state permits or licenses, providing state financial assistance, or transferring state land.” <http://www.mass.gov/eea/about-eea.html>. These reviews are conducted “to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project [(Damage to the Environment)] are avoided or minimized.” Brockton I, 469 Mass. at 201, n.12; Brockton Power Co., LLC, 2016 MA ENV LEXIS 66, at 143, n. 44.

Here, as also discussed above, EEA’s MEPA Office conducted a MEPA review of the proposed Project and following its review, the EEA Secretary issued a MEPA certificate which made positive pronouncements about the alternatives analysis that the Board performed of the proposed Project during the MEPA review process, and stated that “[the Department] had sufficient regulatory authority to address outstanding issues and that no further MEPA review would be required.” EEA Secretary’s MEPA Certificate, at pp. 5, 8; Mr. DeCesare’s PFT, ¶¶ 25, 31. In sum, contrary to the Petitioners’ assertions, the Department did not delegate to EEA the Department’s determination whether the Board had conducted a proper alternatives analysis for the proposed Project; it was EEA that *first* reviewed the Board’s alternatives analysis during the MEPA review process and passed positive judgment on it to the Department. The Department, in turn, conducted its own review of the Board’s alternatives analysis, which also included reviewing EEA’s evaluation of the analysis as set forth in the EEA Secretary’s MEPA Certificate. There is no provision in the MEPA statute or the MEPA Regulations precluding the Department from relying on EEA’s environmental analyses and determinations resulting from EEA’s MEPA review of a project. Moreover, the Petitioners, the parties with the burden of

proof, presented no probative evidence demonstrating that the Board's alternatives analysis was faulty.

2. The Proposed Project Will Not Have An Adverse Impact on Rare Species Pursuant to 310 CMR 10.24(7)

As noted above, under 310 CMR 10.24(7) the Department cannot authorize any project as a limited project pursuant to 310 CMR 10.24(7)(c)(1) if the project "will have any adverse effect on specified habitat sites of Rare Species, as identified by procedures established under 310 CMR 10.37." The Wetlands Regulations at 310 CMR 10.04 define "Rare Species" as "vertebrate and invertebrate animal species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 10.60."

The EEA Secretary's MEPA Certificate noted that Inlet Road is located "within the actual Resource Area Habitat of the Piping Plover . . . and Least Tern," two species of birds which "are listed as Threatened and of Special Concern, respectively, pursuant to the Massachusetts Endangered Species Act." EEA Secretary's MEPA Certificate, at p. 7. Based on the evidence presented at the Hearing, I find that the proposed Project will not have an adverse impact on these two Rare Species of birds for the following reasons.

First, the Board's ORV Plan requires compliance with federal and state guidelines governing protection of the Piping Plover and the Least Tern. ORV Plan, at pp. 5-6; Mr. DeCesare's PFT, ¶¶ 33, 38-39. The federal guidelines are set forth in a 1994 publication of the U.S. Fish and Wildlife Service's Northeast Region³³ entitled "Guidelines for Managing

³³ The U.S. Fish and Wildlife Service is a federal agency within the U.S. Department of the Interior responsible for enforcing federal wildlife laws, protecting endangered species, managing migratory birds, restoring nationally significant fisheries, and conserving and restoring wildlife habitat such as wetlands. https://www.fws.gov/help/about_us.html. "The U.S. Fish and Wildlife Service's Northeast Region encompasses 13 states from Maine to Virginia." <https://www.fws.gov/northeast/about.html>.

Recreational Activities in Piping Plover Breeding Habitat on the U.S. Atlantic Coast to Avoid Take Under Section 9 of the Endangered Species Act.”³⁴ ORV Plan, at p. 5; Mr. DeCesare’s PFT, ¶ 33. The state guidelines are set forth in a 1996 publication of the Massachusetts Division of Fisheries and Wildlife entitled “Massachusetts Tern and Piping Plover Handbook: A Manual for Stewards.” *Id.*

In accordance with these federal and state guidelines, the Board’s ORV Plan “requires, among other measures, observation and tracking [of Piping Plover and Least Tern birds] to determine exact habitat sites, including foraging routes; requir[ing] temporary closures of the identified sites and route to ORV and pedestrian use; and provid[ing] placement of fencing and predator barriers to afford habitat protection.” ORV Plan, at p. 5. The Board’s ORV Plan also calls for the Board “[to] hir[e] . . . a suitably qualified person to serve as a State and or Federally listed Shorebird Specialist, . . . who will . . . under the [supervision of the Town’s] Natural Resources Manager [and] . . . with [the] assistance and consultation from State and Federal Endangered species biologists, be responsible . . . for habitat evaluation and closure requirements for [the Piping Plover and Least Tern].” *Id.*, at p. 6. “[This Specialist] will be employed [by the Town] annually from April 1 through August 31 to provide technical information relative to the habitat and characteristics of the [Piping Plover and Least Tern] populations on the Nauset Spit, and will be responsible for alerting the [Town’s] Natural Resources Manager and the [OCC], or other designated agents, as to the need to temporarily close access to ORV traffic during [Piping Plover and Least Tern] nesting and fledgling activity periods.” *Id.* “[This Specialist] will also be responsible for providing the [Board] and the [OCC] regular updates on [Piping Plover and Least

³⁴ <https://www.fws.gov/northeast/pipingplover/pdf/recguide.pdf>.

Tern] activity, as well as a season-end report.” Id.

I also find that the proposed Project will not have an adverse impact on the endangered Piping Plover and Least Turn based on a June 27, 2015 letter that Thomas W. French, Assistant Director of the Natural Heritage and Endangered Species Program of the Massachusetts Division of Fisheries and Wildlife, forwarded to the OCC regarding the proposed Project. Mr.

DeCesare’s PFT, ¶ 39. The letter stated that the Program had determined that “this project, as currently proposed in the [Board’s ORV] Plan[,] . . . [would] not adversely affect the actual Resource Area Habitat of state-protected rare wildlife species,” and as a result, [the] . . . project [met] the state-listed species performance standard for the issuance of an Order of Conditions [approving the project].” Id. The Petitioners presented no evidence refuting Mr. French’s assertions.

3. The Proposed Project’s Compliance with the Mitigation Requirement of 310 CMR 10.24(7)(c)1

Another factor under 310 CMR 10.24(7) that the Department must consider in determining whether to approve a project as a limited project pursuant to 310 CMR 10.24(7)(c)(1) is “the extent to which adverse impacts [of the project] are minimized and the extent to which mitigation measures including replication or restoration are provided to contribute to the protection of the interests [of the MWPA].” Based on a preponderance of the evidence presented at the Hearing, I find that the Department properly considered this factor in approving the Board’s proposed Project by including several Special Conditions in the SOC discussed below that further enhance Coastal Dune protection. However, the Final Order of Conditions approving the proposed Project should include additional Special Conditions

discussed below to further enhance Coastal Dune protection even more based on the provisions of Aspinet Road Agreement.

a. The Special Conditions of the SOC

As part of NOI that it submitted to the OCC seeking approval of the proposed Project, the Board presented a Proposed Off Road Vehicle (ORV) Plan for Inlet Road ("the ORV Plan") "to mitigate any impacts to [protected Wetlands] Areas" Exhibit 12 to Mr. Janell's PFT (NOI Project Description, at p. 1); Mr. DeCesare's PFT, ¶ 32. The ORV Plan set forth the following mitigation measures which were adopted in the first numbered Special Condition No. 1 of the SOC³⁵:

1. Placement of signage and wooden barrier posts, [(a)] to be located as necessary to confine ORV traffic to defined access ways, [(b)] maintained by hand, and [(c)] spaced an average of 100 feet apart; [the] signage [was] to be attached to posts and/or fencing where possible[,] [and the] posts [were] to be placed in such a manner as to not disturb vegetative cover;
2. Placement of symbolic fencing and/or predator exclosures, as necessary, around potential nesting habitat, actual nesting, and foraging sites; and
3. Placement of fencing barriers for access closures and/or openings, as deemed necessary for State and/or Federally listed shorebird habitat, nesting, and foraging protection.

Exhibit 12 to Mr. Janell's PFT (NOI Project Description, at pp. 2-3); Mr. DeCesare's PFT, ¶ 32.

In addition, the SOC's second numbered Special Condition No. 2 and Special Conditions Nos. 3 and 4 imposed the following extra mitigation requirements:

1. Second numbered Special Condition No. 2: A vehicle corridor not greater than 12 feet wide for ORV travel [was to] be established using symbolic fencing (posts and strings) or posts for the northern portion of Inlet Road

³⁵ The SOC's Special Conditions are set forth on p. 13 of the SOC. The Special Conditions include two Special Conditions numbered as No. 1 and two Special Conditions numbered as No. 2.

from the point it turns from generally north/south to west (Cliff Road), to the intersection at Callanan's Pass;

2. Special Condition No. 3: The symbolic fencing or posts delineating the Inlet Road vehicle corridor [were to] be maintained throughout the year for so long as [the SOC] remain[ed] in effect[,] [and] [i]n the event of damage to or destruction or removal of symbolic fencing or posts, [the] fencing or posts [were to] be repaired or replaced as soon as practicable; and
3. Special Condition No. 4: No vehicle driving or parking [would be] permitted on dunes outside of the delineated corridor of Inlet Road.

SOC, at p. 13; Mr. DeCesare's PFT, ¶¶ 34-37.

**b. Additional Special Conditions Based On
the Aspinet Road Agreement**

In its NOI Project Description for the proposed Project, the Board stated that its ORV Plan for Inlet Road "[was] subject to the 'Aspinet [Road] Agreement,' an agreement [between the Board] and the Aspinet Road lot owners." Board's NOI, Project Description, at p. 1. The Board stated that the Aspinet Road Agreement "dictate[d] the frequency of use, the level of use, the directional flow of use, and [was expected to] provide mitigating measures and additional protection to [the Wetlands] Resource Areas present." *Id.* The Aspinet Road Agreement established the time periods when Inlet Road could be used for ORV:

- (1) from "2:00 p.m. to 6:00 p.m. [on] Friday, Saturday, Sunday, and Holidays during the seasonal period each year," primarily from late June through Labor Day in September;³⁶ and
- (2) "at any time that Callanan's Pass [became] impassable due to the blocking of Callanan's Pass by disabled vehicles, trees, brush or

³⁶ Aspinet Road Agreement, ¶¶ 2, 8.

otherwise, or for road repairs on Callanan's Pass or during storm events where road repairs on Callanan's Pass [were] necessary."³⁷

In issuing its Order of Conditions approving the proposed Project, the OCC adopted all aspects of the Board's ORV Plan, including the provisions of the Aspinet Road Agreement setting forth the time periods when Inlet Road could be utilized. OOC, at p. 10A (Conditions). However, the Department did not adopt the provisions when it issued its SOC approving the proposed Project, stating that "[t]he provisions of the Aspinet Road Agreement . . . "[were] excluded from, and not controlled by, [the SOC]." SOC, at p. 13 (first numbered Special Condition No. 2).

At the Hearing, Mr. DeCesare testified that the Department excluded the provisions of the Aspinet Road Agreement from the SOC as being "beyond [the] jurisdiction of the [MWPA]" because in the Department's view, "the Agreement was generally a traffic control plan" and a contractual promise by the Town not to exercise its eminent domain power over Aspinet and Inlet Roads as long as the Agreement remained in place. Mr. DeCesare's PFT, ¶¶ 41-43; Aspinet Road Agreement, ¶¶ 6, 8-9. However, the Department's counsel at the Hearing indicated that "[the Department was] open to the possibility of including some of th[e] provisions [of the Aspinet Road Agreement in the Final Order of Conditions] if it would enable the parties to reach settlement." Department's [Pre-Hearing] Memorandum of Law, at p. 6; Department's Closing Brief, at p. 7.

In response, the Petitioners contended in a summary fashion that "the Department . . . erred by not including [in the SOC]," the provisions of the Aspinet Road Agreement setting forth the time periods when Inlet Road could be utilized for ORV] "which were specifically included

³⁷ Aspinet Road Agreement, ¶ 1.

[by the OCC] in [its Order of Conditions approving the proposed Project]” Petitioners’ Closing Brief, at p. 30. The Board, while not asserting that the Department erred in not adopting the provisions in the SOC, “suggest[ed] that a Special Condition b[e] added to the SOC to limit the use of Inlet Road for ORV use in accordance with the [provisions],” because such a Special Condition, “would strengthen the Department’s decision to classify the Project as a limited project [pursuant to 310 CMR 10.24(7)(c)(1)].” Board’s Closing Brief, at p. 17.

As a result of my review of the Aspinet Road Agreement, I disagree with the Department’s position that the Agreement is nothing more than “generally a traffic control plan” and a contractual promise by the Town not to exercise its eminent domain power over Aspinet and Inlet Roads as long as the Agreement remains in place. Mr. DeCesare’s PFT, ¶¶ 41-43; Aspinet Road Agreement, ¶¶ 6, 8-9. Based on the Agreement’s express terms, I find that the Agreement was executed in part to further enhance Coastal Dune protection, consistent with the MWPA’s mission to preserve such an important wetlands resource. Specifically, the Agreement states that one of the reasons “the Town and Lot Owners [entered into the Agreement was because they were] desirous of developing a partnership to address the issue of dune erosion.” Aspinet Road Agreement, 4th Whereas Clause. The Agreement also states that “[a] public/private partnership between [the] Lot Owners and the Town [would] be developed and implemented to stabilize and re-nourish the dunes between Callanan’s Pass and the parking lot at the beach.” Aspinet Road Agreement, ¶ 5. Indeed, the EEA Secretary referenced the great importance of this provision of the Aspinet Road Agreement in his MEPA Certificate for the proposed Project. MEPA Certificate, at p. 7. Specifically, the EEA Secretary stated the

following in his MEPA Certificate:

The Aspinet Road Agreement indicates that a public/private partnership will be developed to implement a project to stabilize and re-nourish the dunes between Callanan's Pass and the main beach parking lot to minimize and mitigate potential impacts to coastal dunes. . . . [T]he Town has retained a consultant to prepare an Outer Beach Management Plan and evaluate the natural systems (such as sediment transport, wave energy and direction, shoreline retreat rate, and storm events) and human activities (including pedestrian access, existing beach facilities, vehicle access for emergency vehicles and seasonal activities, and ORV access on the south trails) that are impacting the central area of Nauset Beach. While the scope and study area of the plan will not directly address the impacts of ORV use, it will evaluate the conditions of the existing coastal dune system in the central area of Nauset Beach and recommend methods to stabilize or enhance coastal dunes in the study area. The results of the study will be used to inform the dune nourishment and stabilization project to be completed by the public/private partnership.

Id.

In conclusion, I find that the provisions of the Aspinet Road Agreement setting forth the time periods when Inlet Road can be utilized for ORV and establishing a "Public/Private Partnership" for Coastal Dune stabilization and re-nourishment should be included as Special Conditions Nos. 3 and 4 in the Final Order of Conditions approving the proposed Project because these provisions further the MWPA statutory interest of protecting Coastal Dune, an important wetlands resource area. Special Conditions Nos. 3 and 4 should provide as follows:

3. *The provisions of ¶¶ 1, 2, and 8 of the Aspinet Road Agreement cited in the ORV Plan governing the time periods when Inlet Road can be utilized for ORV further the MWPA's statutory interest of protecting Coastal Dune, an important wetlands resource area, and as a result, are incorporated in this Final Order of Conditions as follows:*
 - (a) *In accordance with ¶ 1 of the Aspinet Road Agreement, the Town may direct traffic onto Aspinet Road at any time that Callanan's Pass becomes impassable due to the blocking of Callanan's Pass by disabled vehicles, trees, brush or otherwise, or for road repairs on Callanan's Pass or during storm events where road repairs on Callanan's Pass are necessary; and*

(b) *At all other times, in accordance with ¶¶ 2 and 8 of the Aspinet Road Agreement, the Town may use Aspinet Road for an alternate route for traffic exiting Nauset Spit between the hours of 2:00 p.m. and 6:00 p.m. on Friday, Saturday, Sunday, and Holidays during the seasonal period in Calendar Year 2018 (June 29, 2018 through September 3, 2018).³⁸ In every Calendar Year thereafter, the Town may use Aspinet road for the same purpose on Friday, Saturday, Sunday, and Holidays during the seasonal period commencing on the last Friday in June and concluding at the end of Labor Day in September.³⁹*

4. *The provisions of Paragraph 5 of the Aspinet Road Agreement cited in the ORV Plan stating that “[a] public/private partnership between [the] Lot Owners and the Town will be developed and implemented to stabilize and re-nourish the dunes between Callanan’s Pass and the parking lot at the beach” further the MWPA’s statutory interest of protecting Coastal Dunes, an important wetlands resource area, and as a result, are incorporated in this Final Order of Conditions. This Public/Private Partnership shall be established within 90 days after the date of this Order.*

E. The Provisions of the Board’s ORV Plan Requiring Annual Inspection of the ORV Corridor and Adjustments to all Protective Measures By the Town’s Natural Resource Manager and Conservation Agent Do Not Violate the MWPA and the Wetlands Regulations

The Board’s ORV Plan provides that “[g]iven the ‘dynamic nature’ of [the dune system in which Inlet Road is located], the ORV Corridor will be inspected every year by the [Town’s] Natural Resources Manager, in consultation with the [Town’s] Conservation Agent, and adjustments will be made to all protective measures.” ORV Plan, at p. 7. These provisions were adopted by the Department in the SOC’s first numbered Special Condition No. 1. SOC, at p. 13. The Petitioners contend that these provisions violate the MWPA and the Wetlands

³⁸ Paragraphs 2 and 8 of the Aspinet Road Agreement also authorized the Town’s use of Aspinet Road as an alternate route for traffic exiting Nauset Spit for seasonal periods in Calendar Years 2014, 2015, 2016, and 2017, but since those periods have passed, I have not included them above in Special Condition No. 3.

³⁹ The seasonal periods in ¶¶ 2 and 8 of the Aspinet Road Agreement for the Town’s use of Aspinet Road did not go beyond Calendar Year 2018. I believe the seasonal period requirement should go beyond Calendar Year 2018 to further enhance Coastal Dune protection, and, as a result, I have included that condition above.

Regulations because in their view the provisions “impl[y] that the [Town’s] Natural Resource Manager and Conservation Agent will have the discretion to make whatever changes they see fit [to protective measures in place]” without prior approval from the OCC and the Department. Petitioners’ Closing Brief, at p. 29. They contend that under the MWPA and the Wetlands Regulations, “[i]t is up to the [OCC] and the Department to determine whether a change requires a new Notice of Intent and to approve or disapprove, and a public hearing may be required.” *Id.* I reject the Petitioners’ assertions based on Mr. DeCesare’s testimony at the Hearing.

Mr. DeCesare testified that the provisions at issue “[do] not allow [the Town’s Natural Resource Manager and Conservation Agent to make unilateral] adjustments to the continued use of the roadway, the location of the roadway, or the size (width) of the roadway.” Mr. DeCesare’s PFT, ¶ 45. He testified that under General Conditions Nos. 13 and 14 of the SOC, “[all] work [authorized by the SOC] shall conform to the plans and special conditions referenced in [the SOC],” and “[a]ny change to the plans . . . require the applicant to inquire of the Department in writing whether the change is significant enough to require the filing of a new Notice of Intent.” *Id.*, ¶ 46. As a result, “before any physical changes are made to the roadway or conditions of the ORV Plan, the applicant must make a written inquiry to the Department describing the desired change(s).” *Id.*, ¶ 47. Mr. DeCesare testified that the Department will review any proposed changes pursuant to the Department’s Wetlands Program Policy 85-4: Amended Orders (“the Department’s Amended Order Policy”) to determine if an amendment to

the SOC or a new NOI filing with the OCC will be required. Id.

The Department's Amended Order Policy provides in relevant part that:

[r]elatively minor changes which result in the same or decreased impact on the [wetlands] interests protected by the [MWPA] are appropriate for amendments. If the determination is made that the project purpose or scope has changed substantially or that the interests specified in the [MWPA] are not protected, then the [Department] should not issue the amendment, but should require the filing of a new [NOI by the applicant with the local conservation commission].

Department's Amended Order Policy, ¶ 3.2; Rankow, 2013 MA ENV LEXIS 79, at 13, 38-43

(Edgartown Conservation Commission's approval of applicant's installation of a marine pedestal for water and electrical power was within purview of original Order of Conditions' landscaping requirement and did not constitute major change to proposed Project requiring filing of new NOI with Commission). While Mr. DeCesare's testimony is clear that the Board is required to follow the Department's Amended Order Policy with respect to any changes to the proposed Project, the SOC's General and Special Conditions are not as specific in detail. Thus, to ensure the Board's compliance with the Policy, I recommend that the Final Order of Conditions issued by the Department approving the proposed Project contain the following new Special Condition No. 2:

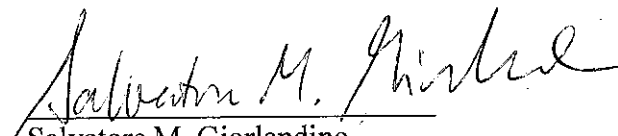
2. *The Proposed Off Road Vehicle (ORV) Plan for Inlet Road ("ORV Plan"), which was adopted in Special Condition No. 1 of this Order as set forth above, provides that "[g]iven the 'dynamic nature' of [the dune system in which Inlet Road is located], the ORV Corridor will be inspected every year by the [Town of Orleans'] Natural Resources Manager, in consultation with the [Town's] Conservation Agent, and adjustments will be made to all protective measures." ORV Plan, at p. 7. These provisions do not authorize the Town of Orleans' Natural Resource Manager and Conservation Agent to make unilateral adjustments to the continued use of the roadway, the location of the roadway, or the size (width) of the roadway. Under General Conditions Nos. 13 and 14 of this Order, "[all] work [authorized by this Order] shall conform to the plans and special conditions referenced in [the Order]," and "[a]ny change to*

the plans . . . require the applicant to inquire of the Department in writing whether the change is significant enough to require the filing of a new Notice of Intent [with the Orleans Conservation Commission]" in accordance with the Department's Wetlands Program Policy 85-4: Amended Orders ("the Department's Amended Order Policy"). Accordingly, before any physical changes are made to the roadway or conditions of the ORV Plan, the Town of Orleans must make a written inquiry to the Department describing the desired change(s), and the Department's review of any proposed changes will be pursuant to the Department's Amended Order Policy.

CONCLUSION

For the reasons discussed in detail above, I recommend that the Department's Commissioner issue a Final Decision affirming: (1) the Department's SDA determining that the Board's proposed Project was subject to jurisdiction and authorization by the MWPA and the Wetlands Regulations; and (2) the Department's SOC approving the Project, provided additional Special Conditions discussed above and set forth below in italics to further enhance Coastal Dune protection are included in the Final Order of Conditions approving the Project.

Date: 12/13/17


Salvatore M. Giorlandino
Chief Presiding Officer

Proposed Special Conditions for Final Order of Conditions Approving Proposed Project⁴⁰

1. The Town of Orleans shall comply with the provisions of the **Proposed Off Road Vehicle (ORV) Plan for Inlet Road**, dated June 1st, 2015

⁴⁰ The proposed Special Conditions set forth above at pp. 56-59, are identical to the Special Conditions set forth in the SOC except for Special Conditions Nos. 2, 3, and 4, set forth above in italics, which I have recommended in this Recommended Final Decision.

except to the extent that it is inconsistent with this *Final Order of Conditions*.⁴¹

2. *The Proposed Off Road Vehicle (ORV) Plan for Inlet Road ("ORV Plan"), which was adopted in Special Condition No. 1 of this Order as set forth above, provides that "[g]iven the 'dynamic nature' of [the dune system in which Inlet Road is located], the ORV Corridor will be inspected every year by the [Town of Orleans'] Natural Resources Manager, in consultation with the [Town's] Conservation Agent, and adjustments will be made to all protective measures." ORV Plan, at p. 7. These provisions do not authorize the Town of Orleans' Natural Resource Manager and Conservation Agent to make unilateral adjustments to the continued use of the roadway, the location of the roadway, or the size (width) of the roadway. Under General Conditions Nos. 13 and 14 of this Order, "[all] work [authorized by this Order] shall conform to the plans and special conditions referenced in [the Order]," and "[a]ny change to the plans . . . require the applicant to inquire of the Department in writing whether the change is significant enough to require the filing of a new Notice of Intent [with the Orleans Conservation Commission]" in accordance with the Department's Wetlands Program Policy 85-4: Amended Orders ("the Department's Amended Order Policy"). Accordingly, before any physical changes are made to the roadway or conditions of the ORV Plan, the Town of Orleans must make a written inquiry to the Department describing the desired change(s), and the Department's review of any proposed changes will be pursuant to the Department's Amended Order Policy.*
- 3.⁴² *The provisions of ¶¶ 1, 2, and 8 of the Aspinet Road Agreement cited in the ORV Plan governing the time periods when Inlet Road can be utilized for ORV further the MWPA's statutory interest of protecting Coastal Dune, an important wetlands resource area, and as a result, are incorporated in this Final Order of Conditions as follows:*
 - (a) *In accordance with ¶ 1 of the Aspinet Road Agreement, the Town may direct traffic onto Aspinet Road at any time that Callanan's Pass becomes impassable due to the blocking of*

⁴¹ This Special Condition is identical to the SOC's first numbered Special Condition No. 1, except that the word "Final" has been substituted for "Superseding."

⁴² Special Condition Nos. 3 and 4 above replace the first numbered Special Condition No. 2 in the SOC which provided that:

The provisions of the *Aspinet Road Agreement* cited in the *Proposed Off Road Vehicle (ORV) Plan for Inlet Road* is excluded from, and is not controlled by this Superseding Order of Conditions.

Callanan's Pass by disabled vehicles, trees, brush or otherwise, or for road repairs on Callanan's Pass or during storm events where road repairs on Callanan's Pass are necessary; and

(b) *At all other times, in accordance with ¶¶ 2 and 8 of the Aspinet Road Agreement, the Town may use Aspinet Road for an alternate route for traffic exiting Nauset Spit between the hours of 2:00 p.m. and 6:00 p.m. on Friday, Saturday, Sunday, and Holidays during the seasonal period in Calendar Year 2018 (June 29, 2018 through September 3, 2018).⁴³ In every Calendar Year thereafter, the Town may use Aspinet road for the same purpose on Friday, Saturday, Sunday, and Holidays during the seasonal period commencing on the last Friday in June and concluding at the end of Labor Day in September.⁴⁴*

4. *The provisions of Paragraph 5 of the Aspinet Road Agreement cited in the ORV Plan stating that "[a] public/private partnership between [the] Lot Owners and the Town will be developed and implemented to stabilize and re-nourish the dunes between Callanan's Pass and the parking lot at the beach" further the MWPA's statutory interest of protecting Coastal Dunes, an important wetlands resource area, and as a result, are incorporated in this Final Order of Conditions. This Public/Private Partnership shall be established within 90 days after the date of this Order.*

5. The ORV program controlled by this Order shall comply with the provisions of the **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** published by the Northeast Region, U.S. Fish and Wildlife Service on April 15, 1994 and the **MASSACHUSETTS TERN AND PIPING PLOVER HANDBOOK: A MANUAL FOR STEWARDS** published

⁴³ As previously discussed in note 38 above, ¶¶ 2 and 8 of the Aspinet Road Agreement also authorized the Town's use of Aspinet Road as an alternate route for traffic exiting Nauset Spit for seasonal periods in Calendar Years 2014, 2015, 2016, and 2017, but since those periods have passed, I have not included them above in Special Condition No. 3.

⁴⁴ As previously discussed in note 39 above, the seasonal periods in ¶¶ 2 and 8 of the Aspinet Road Agreement for the Town's use of Aspinet Road did not go beyond Calendar Year 2018. I believe the seasonal period requirement should go beyond Calendar Year 2018 to further enhance Coastal Dune protection, and, as a result, I have included that condition above.

by the Massachusetts Division of Fisheries and Wildlife dated May, 1996.⁴⁵

6. A vehicle corridor not greater than 12 feet wide for ORV travel shall be established using symbolic fencing (posts and strings) or posts, for the northern portion of Inlet Road from the point it turns from generally north/south to west (Cliff Road), to the intersection at Callanan's Pass.⁴⁶
7. The symbolic fencing or posts delineating the Inlet Road vehicle corridor shall be maintained throughout the year for so long as this Order remains in effect. In the event of damage to or destruction or removal of symbolic fencing or posts, such fencing or posts shall be repaired or replaced as soon as practicable.⁴⁷
8. No vehicle driving or parking is permitted on dunes outside of the delineated corridor of Inlet Road.⁴⁸
9. This Order is Valid for three years from the date of Issuance. Per General Condition #5, this Order may be extended for one or more periods of up to three years each upon application to the Department at least 30 days prior to the expiration date of the Order.⁴⁹
10. This Order does not relieve the permittee or any other person of the necessity of receiving approval of the proposed project under the Town of Orleans Wetland By-law.⁵⁰

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or

⁴⁵ Special Condition No. 5 above is identical to the SOC's second numbered Special Condition No. 1.

⁴⁶ Special Condition No. 6 above is identical to the SOC's second numbered Special Condition No. 2.

⁴⁷ Special Condition No. 7 above is identical to the SOC's Special Condition No. 3.

⁴⁸ Special Condition No. 8 above is identical to the SOC's Special Condition No. 4.

⁴⁹ Special Condition No. 9 above is identical to the SOC's Special Condition No. 5.

⁵⁰ Special Condition No. 10 above is identical to the SOC's Special Condition No. 6.

14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In the Matter of Richard S. Cuda

OADR Docket No. WET-2015-012

DEP File No. SDA

Orleans, MA

consolidated with

**In the Matter of Town of
Orleans Board of Selectmen (Park
Commissioners)**

OADR Docket No. WET-2016-014

DEP File No. SE-54-2289

Orleans,

The Parties in OADR Docket No. WET-2015-012:

Petitioner: Town of Orleans Park Commissioners;

Legal representative: Michael D. Ford, Esq.
Law Offices of Michael D. Ford
72 Main Street, P.O. Box 485
West Harwich, MA 02671
e-mail: mdfesq1@verizon.net;

Applicant: Richard S. Cuda;

Legal representative: Michael J. O'Neill, Esq.
McGregor & Associates, P.C.
15 Court Square, Suite 500
Boston, MA 02108
e-mail:
MONEill@McGregorLaw.com;

Local Conservation Commission:

Town of Orleans Conservation Commission
Orleans Town Hall
19 School Road
Orleans, MA 02653;

Legal representative: None stated in Petitioner's
Appeal Notice;

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The Department: Greg DeCesare, Wetlands Analyst
MassDEP/Southeast Regional Office
Bureau of Resource Protection
20 Riverside Drive
Lakeville, MA 02347;
e-mail: Greg.DeCesare@state.ma.us;

Legal Representative: David Bragg, Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108;
e-mail: David.Bragg@state.ma.us;

The Parties in OADR Docket No. WET-2016-014:

Petitioners: 13 Residents of the Town of Orleans, Massachusetts, including
Richard S. Cuda;

Legal representative: Michael J. O'Neill, Esq.
McGregor & Associates, P.C.
15 Court Square, Suite 500
Boston, MA 02108
e-mail:
MONEill@McGregorLaw.com;

Applicant: Town of Orleans Park Commissioners;

Legal representative: Michael D. Ford, Esq.
Law Offices of Michael D. Ford
72 Main Street, P.O. Box 485
West Harwich, MA 02671
e-mail: mdfesq1@verizon.net;

[continued on next page]

[continued from preceding page]

Local Conservation Commission:

Town of Orleans Conservation Commission
Orleans Town Hall
19 School Road
Orleans, MA 02653;

Legal representative: None stated in Petitioner's
Appeal Notice;

The Department: Greg DeCesare, Wetlands Analyst
MassDEP/Southeast Regional Office
Bureau of Resource Protection
20 Riverside Drive
Lakeville, MA 02347;
e-mail: Greg.DeCesare@state.ma.us;

Legal Representative: David Bragg, Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108;
e-mail: David.Bragg@state.ma.us;

cc: Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
Office of General Counsel
20 Riverside Drive
Lakeville, MA 02347
e-mail: Shaun.Walsh@state.ma.us;

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108.