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

In the Matter of	)	
Conditional No-Take Determination NHESP File No. 15-34327	)	Docket No. 2018-01-RL
Sudbury, MA	)	

RECOMMENDED FINAL DECISION ON MOTIONS TO DISMISS FOR LACK OF STANDING AND MOTION TO INTERVENE BY TEN CITIZEN GROUP

I. Introduction

This matter involves a November 8, 2018 Notice of Claim for an Adjudicatory Hearing filed by Protect Sudbury, Inc. ("Petitioner" or "Protect Sudbury") in response to a October 19, 2018 review by the Division of Fisheries and Wildlife (the "Division") in the Department of Fish and Game ("Department") of a proposed project by NSTAR Electric dba Eversource Energy ("Proponent" or "Eversource") to install an underground electrical transmission line in an existing MBTA right-of-way within the Priority Habitat of several state-listed species located in the towns of Sudbury, Marlborough, Hudson and Stow MA (the "Project"). The Division determined that the Project must be conditioned in order to avoid a prohibited Take of state-listed species under M.G.L. c. 131A, the Massachusetts Endangered Species Act ("MESA"), and 321 CMR 10.00 (the "MESA Regulations") (the "Division's Conditional No-Take Determination"). Protect Sudbury's Notice of Claim contends that Eversource improperly segmented the

construction of the Project, which resulted in a "gross underestimation" of the impacts on state-listed species and the total acreage of disturbance within Priority Habitats. Both the Division and Eversource filed separate Motions to Dismiss the Petitioner's appeal for lack of standing. Subsequent to the filing of these motions to dismiss, a Ten Citizen Group filed a Motion to Intervene in the Petitioner's appeal pursuant to M.G.L. c. 30A, § 10A.

For the reasons set forth in this Recommended Final Decision, I grant the respective Motions to Dismiss by the Division and Eversource based on my determination that the Petitioner Protect Sudbury, Inc. does not have standing to appeal the Division's Conditional No-Take Determination. Because, as a threshold matter, I have determined that Protect Sudbury is not an "aggrieved person" under the MESA Regulations, there is no jurisdictional basis for the requested adjudication to proceed and therefore no adjudicatory proceeding for the Ten Citizen Group to intervene in. Consequently, I deny the Ten Citizen Group's Motion to Intervene as moot.

II. Factual Background and Procedural History

Under MESA and the MESA Regulations, the Division has the authority and duty to identify and list those animals and plants in MA that the Division determines to be endangered, threatened or species of special concern, and to protect and conserve such state-listed species. To that end, the Division has, by regulation, delineated the geographic extent of habitat for state-listed species in MA ("Priority Habitat"), and requires any project or activity proposed to take place in Priority Habitat to be reviewed

by the Division to determine if it will cause a "Take[1]" of a state-listed species. *See 321 CMR 10.02, 10.12 and 10.18.*

Eversource proposes to construct a new, approximately nine-mile underground electric transmission line between its existing Sudbury Substation and the Hudson Light & Power Department's existing Substation, which would be constructed underground along an inactive railroad corridor owned by the MBTA. *Eversource's Motion to Dismiss at 1-2.* The Division's Conditional No-Take Determination states that the above Project will occur in Priority Habitat for the following four state-listed species: Eastern Box Turtle; Eastern Whip-poor-will; Gerhard's Underwing, and Coastal Swamp Metarranthis. *Division's Conditional No-Take Determination at 2.* Consequently, on September 19, 2018 Eversource filed for review of the Project pursuant to the MESA Regulations and included a map showing the Priority Habitat within the Project Area. *Eversource's Motion to Dismiss at 2*, referencing Figure 1 to the MESA Project Review Checklist submitted to the Division. Neither the existing Sudbury Substation nor the existing Hudson Substation is located in Priority Habitat. *Id.*

The Division determined that the Project will result in a total of four (4) acres of disturbance within Priority Habitat, but that the "[t]otal habitat loss from the project will be minimized through compatible management of 1.9 acres of duct bank and slopes of the construction platform." *Division's Conditional No-Take Determination at 1.* The Division further determined that the Project will not cause a Take of state-listed species, provided that Eversource complies with the following conditions:

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[1] "Take" is broadly defined in 321 CMR 10.02 to include, but is not limited to, the killing or harming of animals as well as the disruption of their nesting, breeding, feeding or migratory activity, and the killing, collection, picking of plants.

1. The implementation of the Eastern Box Turtle Protection Plan and Corridor Management Plan referenced therein, which the Division indicates Eversource developed in coordination with the Department of Conservation and Recreation ("DCR").

2. The implementation of the referenced timing restrictions for construction activities within the habitat of the state-listed Whip-poor-will.

3. Eversource's submittal of a compliance report to the Division within 30 days of the completion of its electrical transmission line project.

Id., at 2.

The Division's Conditional No-Take Determination identifies the above Eversource Project as "Phase 1", reflecting its understanding that following Eversource's installation of its electrical transmission line DCR proposes to install a segment of the Mass Central Rail Trail ("MCRT") within the same right-of-way (Phase 2). *Division's Conditional No-Take Determination at 2.* The Division further states that its review of DCR's Phase 2 MCRT project is ongoing, and that DCR must submit a MESA Project Review Checklist for the MCRT project that includes site plans for the Division's review and written approval. *Id.*

On November 8, 2018 Protect Sudbury filed a Notice of Claim for an Adjudicatory Hearing with the Division pursuant to 321 CMR 10.25. Petitioner's Notice of Claim states that "Protect Sudbury is a 501(c)(4) non-profit organization formed in opposition to the Project," and is requesting an adjudicatory hearing because "the Division failed to identify and prohibit segmentation of several directly related (but undisclosed) component elements of the Project in violation of 321 CMR 10.16.[2]" *Notice of Claim at 1-2.* More specifically, Petitioner describes the reasons for its appeal as follows:

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[2] 321 CMR 10.16 provides that projects "shall not be segmented or phased to evade or defer" the review requirements of the MESA Regulations.

> "As grounds for this appeal, this request is being made with reference to 321 CMR 10.16 'Project and the Availability of Comprehensive MESA Review and Permits for Certain Municipalities.' Protect Sudbury submits that the Proponent, Eversource, has segmented or phased the proposed project to evade the requirements of 321 CMR 10.13, 10.4 and 10.18 through 10.23. The Proponent's filing is deficient in that it circumvents the Massachusetts Division of Fisheries & Wildlife (MDFW) permitting thresholds by segmenting the construction of the project into three separate, but integral pieces, i.e., the construction of an electrical sub-station in Sudbury, MA, the construction of an electrical sub-station in Hudson, MA, and the construction of a high voltage transmission line on the MBTA right of way (ROW). In its submittal here, Eversource only submitted the Project (MBTA right of way line). In contrast to what was submitted here, Eversource submitted all three elements for review at the [Energy Facilities Siting Board]. This segmentation of the project has resulted in a gross underestimation of the impacts on the state listed species and the total acreage of disturbance within Priority Habitats (see determination at p.2.)"
>
> *Notice of Claim at 3.*

The Notice of Claim states that Project Sudbury is an "aggrieved party" because its membership is comprised of concerned Sudbury residents, many of who are direct abutters to the Project. *Notice of Claim at 2.* More specifically, Petitioner states that at least five (5) of its members (identified in a footnote) "are in habitats that will be directly impacted by the proposed project, the disturbance of wetlands and likely degradation to subterranean water quality." Id. Petitioner further asserts that several abutters (also identified in a footnote) "are in areas that stand to be uniquely impacted by the change in topography and impacts upon water flood zones caused by rerouting/redirecting surface water and runoff…[a]ll these changes to wetland and to topography may impact Priority Habitats subject to review by the Division." *Id.* In addition, Petitioner argues that its participation in the review of Eversource's Project by the Energy Facilities Siting Board ("EFSB") gives Protect Sudbury "sufficient standing to appeal this determination [by the Division] given the direct relationship between the EFSB process and this case." *Id.*

Petitioner's Notice of Claim requests that the Division be required to review the entire common project and reevaluate the conditions required to avoid a Take of state-listed species. *Notice of Claim at 3.*

The Division Director has appointed me, the General Counsel of the Department, to serve as the Presiding Officer for this appeal. On December 3, 2018 I sent the parties a written notice of my appointment as Presiding Officer, which also established the schedule for a Prehearing Conference. Specifically, I scheduled the Prehearing Conference for January 10, 2019 and directed the parties to each file a Prehearing Statement with me by no later than January 7, 2019.

On December 18, 2018 the Division filed a Motion to Dismiss Petitioner's Appeal for Lack of Standing, which includes the Affidavit of Lauren Glorioso, an Endangered Species Review Biologist for the Division. The Glorioso Affidavit states that she visited Protect Sudbury's website on December 13, 2018, clicked on the link for its mission, and attached a copy of the corresponding page, which reads:

> "Our Mission
>
> Protect Sudury's *mission* is to preserve and protect the environment, landscape, health, safety, historic character and property values of the town.
>
> Our primary *objective* is to prevent all power lines along the MBTA ROW and to prevent above-ground power lines anywhere in Sudbury." (Emphasis in original.)

The Division's December 18, 2018 filing also requested the Presiding Officer to postpone the January 7, 2019 deadline for submitting Prehearing Statements and the January 10, 2019 date of the Prehearing Conference until such time as Petitioner has responded to the Division's Motion to Dismiss and a decision is made by the Presiding Officer. I granted the Division's request on December 27, 2018.

The Division's Motion to Dismiss argues that Protect Sudbury has not met the standing requirements under the MESA Regulations for several reasons:

- First, accepting as true Protect Sudbury's allegation that it is a non-profit organization, the Division states the organization must show that it has suffered an actual injury that it is personal to it. However, Petitioner's Notice of Claim does not argue that the organization itself has suffered an actual injury that is special and different from the public. Instead, Protect Sudbury merely claims to have standing because its membership is comprised of concerned Sudbury residents, many of whom are direct abutters to the Project.

- Protect Sudbury does not achieve standing simply because its members include concerned residents or abutters to the Project or property owners with habitats for the same state-listed species found on the project site. Neither Petitioner as an organization nor any of its members have provided credible evidence of an injury in fact that is different from the public.

- In response to Protect Sudbury's claims that the Project will adversely impact wetlands, water quality, topography changes and flood zones to members who are abutters, the Division argues that such claims are outside the scope of review under MESA, and that even if Petitioner is arguing that such alleged impacts would cause a take of state-listed species, its claims are overly broad, speculative and unsupported by credible evidence.

- The Division further states that under 321 CMR 10.25(3)(b) Protect Sudbury is required to show how its claims fall within the scope of interests or areas of concern of the MESA statute and the MESA Regulations. The Division notes that Protect Sudbury describes itself in its Notice of Claim as a non-profit organization "formed in opposition to the Project," and that according to the mission statement found on its website, Protect Sudbury's "primary objective is to prevent all lines along the MBTA ROW and to prevent above-ground power lines anywhere in Sudbury." "Clearly," the Division argues, "Protect Sudbury's purpose and mission is far outside the realm for which MESA was intended, which is the protection of state-listed species, not the prevention of powerlines anywhere in Sudbury, MA."

- Finally, the Division states that Protect Sudbury's participation in the review of the Project by the EFSB has no bearing on whether it meets the standing requirements under MESA, and does not bestow standing any more than being an abutter.

Division's Motion to Dismiss at 8-11, and Affidavit of Lauren Glorioso.

On January 9, 2019 Eversource filed its own Motion to Dismiss for Lack of Standing, which adopts all facts and arguments set forth in the Division's December 18,

2018 Motion to Dismiss, and is supported by the Affidavit of John Vieira, a project manager with VHB under contract to Eversource. Eversource's grounds for its Motion to Dismiss are summarized as follows:

- Protect Sudbury's Notice of Claim challenges the Division's Conditional No-Take Determination on the sole ground that Eversource segmented or phased the Project to evade the Division's requirements, specifically by not including the Sudbury and Hudson Substations in its MESA filing with the Division. Eversource responds that because neither the Sudbury Substation nor the Hudson Substation is in Priority Habitat, there has been no segmentation or a resulting "gross underestimation" of the impacts on state-listed species or on the total acreage of disturbance within Priority Habitat, as alleged in Petitioner's Notice of Claim.

- Even if Protect Sudbury's segmentation claim had merit, which Eversource disputes, Protect Sudbury's Notice of Claim does not present any facts or argument to demonstrate organizational standing to maintain its appeal. The fact that certain of Protect Sudbury's members are abutters to the project does not automatically confer standing on them or otherwise presume that they are aggrieved under the MESA Regulations.

- Citing to the Vieira Affidavit showing that not one of the individuals named in the appeal abuts or is in immediate proximity to either of the Substations, Eversource argues that the Notice of Claim fails to provide any factual basis for Protect Sudbury's assertions that it or its members will suffer "any injury at all, let alone one that is unique or different than that of the general public." Like the Division, Eversource regards the allegations of environmental harm to the properties of certain of Protect Sudbury's members to be vague, speculative and insufficient to survive a motion to dismiss for lack of standing.

- Finally, Eversource concurs with the Division that Protect Sudbury's participation in the Project's ESFB proceeding has no bearing on whether it has properly demonstrated in its appeal that it is aggrieved by the Division's Conditional No-Take Determination.

Eversource Motion to Dismiss at 2-7, and the Affidavit of John Vieira.

On January 28, 2019 Protect Sudbury filed its Consolidated Opposition to the respective Motions to Dismiss for Lack of Standing by the Division and Eversource. Petitioner's Consolidated Opposition is supported by six (6) exhibits, as well as six (6) affidavits: two from members of Protect Sudbury who serve on its Board of Directors;

and four (4) from "supporters" of Protect Sudbury, two of whom are affiliated with the Sudbury Valley Trustees, one with the Friends of the Assabet River National Wildlife Refuge; and one who is the Conservation Coordinator for the Sudbury Conservation Commission.

In summary, Petitioner opposes the Motions to Dismiss for the following reasons:

- While it is true that Protect Sudbury began in opposition to Eversource's Project, it was deliberately formed under section 501(c)(4) of the Internal Revenue Service ("IRS") Code as a "social welfare" organization for the purposes of promoting the common good and general welfare of the community as a whole, including the preservation and protection of the environment.

- Protect Sudbury acknowledges that abutter status does not automatically confer standing to a petitioner in a MESA appeal and that its participation in the EFSB proceeding has "little bearing" on the MESA standing requirements. However, as reflected in the affidavits of Protect Sudbury "members/supporters," their knowledge and enjoyment of wildlife within the Project area and nearby conservation lands, and/or actions to preserve habitat and wildlife is evidence of their special interest in the Division's Conditional No-Take Determination.

- Protect Sudbury has been injured by the failure of the Division's Conditional No-Take Determination to protect MESA's "Zone of Interests." Its mission statement includes "to protect and preserve the environment," which is consistent with the goals of MESA. Moreover, as demonstrated by the supporting affidavits, "members/supporters" of Protect Sudbury have long been engaged in activities that fall within MESA's Zone of Interest, including educating the public about the Project area and nearby conservation lands and their unique characteristics, and the failures of the Division's Conditional No-Take Determination as identified by Petitioner have personally injured its members, including because highly knowledgeable members were not consulted or notified by the Division.

- As support for its position that the Division's Conditional No-Take Opposition is inadequate, the affidavits and the Consolidated Opposition identify a range of concerns about the Project impacts as well as the protectiveness of, e.g., Eversource's Corridor and Stormwater Management Plans, and highlight Protect Sudbury's interest in preventing the further disappearance or decline of state-listed species in Project area.

Consolidated Opposition at 1-22 and Exhibits 1-6, and the Affidavits of Protect Sudbury members William Schineller and Renata Aylward, and supporters Karin Paquin, Elizabeth Truebenbach, Laura Mattei, and Deborah Dineen.

Protect Sudbury's January 28, 2019 filing also included a Motion to Strike the Affidavit of John Vieira included with Eversource's Motion to Dismiss. Its Motion did not dispute the fact that the Sudbury and Hudson Substations are not in Priority Habitat, but indicated that they were so when Eversource first sought information from the Division regarding state-listed species in the vicinity of the Project site in 2013.[3] *See Motion to Strike Vieira Affidavit at 2 and the reference in footnote 1 to the Division's informational letter to Eversource's consultant, VHB; Consolidated Opposition at 16.* Petitioner's Motion argued the factual information in the Vieira Affidavit about the distances between Priority Habitat and the Substations and between properties of certain Protect Sudbury members and Priority Habitat points have no relevance to either showing project segmentation under 321 CMR 10.16(1) or whether Petitioner has standing under 321 CMR 10.25(2)(b). *Motion to Strike at 1.*

On February 4, 2019 Eversource filed its Opposition to the Petitioner's Motion to Strike Affidavit of John Vieira. Eversource argued that the Vieira Affidavit is directly relevant to Protect Sudbury's standing because the significant distances between the Substations and the parcels owned by individual members of Protect Sudbury, Inc. "shed light on the issue of whether they will suffer an injury at all, never mind one that is substantial or specific, or unique or different from that of the general public." *Eversource's Opposition to Motion to Strike at 4-5.*

[3] I reasonably infer from the Administrative Record that the Division subsequently determined that these Substations locations were no longer in Priority Habitat as a result of the Division updating its state-wide map of Priority Habitat in 2017 pursuant to 321 CMR 10.12.

In a Ruling dated February 8, 2019, I denied Protect Sudbury's Motion to Strike the Affidavit of John Vieira. While I agreed with Petitioner that the MESA regulatory requirements for showing standing do not expressly identify physical proximity to Priority Habitat as a discrete criterion, I determined the facts in the Vieira Affidavit are relevant and material to the issue whether Protect Sudbury has suffered an injury different from the public.

On January 28, 2019 a Ten Citizen Group filed a Motion to Intervene in Protect Sudbury's appeal pursuant to M.G.L. c. 30A, § 10A. On January 30, 2019 the Division filed its Opposition to the above Motion to Intervene. On February 4, 2019 Eversource filed its Response to the Motion to Intervene. On February 6, 2019 the Ten Citizen Group filed its Response to the Division's Opposition. On February 11, 2019 the Ten Citizen Group filed its Response to Eversource's Response. The respective filings by the Ten Citizen Group and Eversource dated February 6th and 11th, 2019 both noted that nothing in the Informal Hearing Rules at 801 CMR 1.02 and 1.03, which govern MESA adjudicatory appeals, expressly address the filing or deadlines associated with responsive pleadings (e.g., oppositions, responses, replies), and the rules for computation of time.

On February 13, 2019, I responded to these further filings by the parties by providing my guidance on the rules for responsive pleadings under Informal and Formal Hearing Rules. I also granted leave for the filing of the Ten Citizen Group's February 6, 2019 Response and Eversource's February 6, 2019 Reply, but stated that no further replies by the parties would be allowed. Finally, I gave notice that the next action by me would be to rule on the respective Motions to Dismiss for Lack of Standing by the

Division and Eversource, taking into consideration Petitioner's Consolidated Opposition to them.

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

The threshold question of whether a person has standing to appeal is "one of critical significance," and an issue of subject matter jurisdiction for the reviewing court. *Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998)*, citing *Tax Equity Alliance v. Commissioner of Revenue, 423 Mass. 708, 715 (1996)*. Because of the jurisdictional nature of standing, a petitioner's status as an "aggrieved person" is an essential prerequisite to obtaining review by a court or by an administrative agency in an adjudicatory proceeding. *Nickerson v. Zoning Board of Raynham, 53 Mass.App.Ct. 680, 681 (2002); Matter of Town of Hanson, 2005 WL 4124572, p.2* (standing "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim," and "impacts the effective adjudication of administrative appeals"). Thus, a motion to dismiss for lack of subject matter jurisdiction should be granted where the specific matter raised is not within the jurisdiction granted by law to the court deciding the matter. *Jones v. Jones*, 297 Mass. 198 (1937).

In reviewing a motion to dismiss, the Division has adopted the same standards that are applied in Massachusetts courts under Mass. R. Civ. P. 12(b)(1). *In the Matter of Cape Wind Associates, LLC, NHESP Tracking No. 01-9604, Final Decision dated July 2, 2008,* adopting the Recommended Final Decision of the Presiding Officer dated May 16, 2008, at 6). Since 2008 the Massachusetts Supreme Judicial Court (the "SJC") has adopted the United States Supreme Court's refinement of the standard of review for evaluating the sufficiency of a plaintiff's complaint on a motion to dismiss. *Iannacchino*

v. Ford Motor Co., 451 Mass. 623 (2008), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). As discussed by the SJC in *Iannacchino*, the Supreme Court determined in *Bell Atl. Corp. v. Twombly* that the previous, long-standing articulation of the standard in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957) – a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief – had "earned its retirement." *Iannacchino* at 635-636. The Supreme Court explained that under *Conley's* "no set of facts" standard, a wholly conclusory statement of claim would survive a motion to dismiss whenever pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery. *Id.* Under the refined standard adopted by the SJC in *Iannacchino*, the decision-maker generally accepts a petitioner's factual allegations and reasonable inferences drawn from them, but a petitioner's obligation to provide the grounds for its entitlement to relief requires more than "mere labels and conclusions," and factual allegations "must be enough to raise a right to relief above the speculative level....plausibly suggesting (not merely consistent with) an entitlement to relief." *Id.* The SJC noted that it quoted the language of *Conley* "no set of facts" standard in a previous decision of its own, *Nader v. Citron*, 372 Mass. 96, 98 (1977), and affirmed that "we follow the [Supreme Court's] lead in retiring its use."[4] *Id.*

Parties defending against motions to dismiss are free to introduce supplemental evidence to bolster their claims. *In the Matter of Cape Wind Associates, LLC* at 6, citing

[4] Thus, contrary to the statement in Petitioner's Consolidated Opposition (at 6) that the standard in *Nader v. Citron* is "now axiomatic," it has been superseded by the refined standard set forth in *Iannacchino*.

Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709-710 (2004).

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

1. The Standing Requirements under the MESA Regulations

The scope of the Division's interests and areas of concern under MESA and the MESA Regulations[5] encompass its authority and responsibilities to list species for protection thereunder; to delineate the Priority Habitats where state-listed species occur; to review proposed projects and activities within Priority Habitat to determine whether they will result in a prohibited Take of state-listed species; and to conduct research, data collection and other management activities related to the conservation and protection of state-listed species.

In *Pepin v. Division of Fisheries and Wildlife, 467 Mass. 210, 221-225 (2014)*, the SJC's discussion and affirmation of the Division's MESA regulatory provisions requiring the review of project and activities in Priority Habitat make clear that the Division's interest thereunder is not to categorically prohibit any or certain types of development in such areas. Instead, the Division seeks to determine whether the proposed development will avoid, with or without conditions, a Take of state-listed species, and if not, whether the Take can be permitted by the Division in accordance with the performance and mitigation standards in the MESA Regulations.

The requirements and process associated with appealing a final decision made by the Division pursuant to the MESA Regulations is set forth in 321 CMR 10.25 ("Appeal Process"). Under 321 CMR 10.25(1), any person aggrieved by a final decision of the Division made pursuant to 321 CMR 10.12, 10.18 or 10.23 shall have the right to an

[5] Also referred to in this Recommended Final Decision as the "MESA Zone of Interests."

adjudicatory hearing. Under 321 CMR 10.25(2), any notice of claim for an adjudicatory hearing must be sent to the Division within 21 days of the date of the Division's final decision. 321 CMR 10.25(3)(b) provides, in pertinent part, that any such request for an adjudicatory hearing shall include the specific facts that demonstrate that a party filing a notice of claim satisfies the requirements of an aggrieved person, including but not limited to:

1. how they have a definite interest in the matters in contention within the scope of interests or areas of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00; and

2. have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division.

In addition, previous MESA adjudicatory decisions have affirmed that 321 CMR 10.25(3)(b) does not automatically confer standing on property abutters by regulation, or allow abutters to make a more limited or less stringent showing to demonstrate their standing.[6] *In the Matter of Marion Drive, Kingston, MA,* Docket No. 07-22182-2010-02-RL, Final Decision dated October 20, 2010; *In the Matter of 16 Medouie Creek Road, Nantucket, MA,* Docket No. 11-30084-2012-01-RL, Ruling on Joint Motion to Dismiss for Lack of Standing dated July 16, 2012. As discussed in these decisions, the MESA regulations differ from, e.g., the state Zoning Act, pursuant to which "parties in interest" (which includes abutters) enjoy a rebuttable presumption that they are "persons aggrieved." *Marion Drive at 9; 16 Medouie Creek at 4; see also M.G.L. c. 40A, §11 and §17, and Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass.*

[6] As reflected in my February 8, 2019 Ruling denying Petitioner's Motion to Strike the Affidavit of John Vieira, proximity is among the range of relevant fact specific considerations for determining standing. However, proximity in terms of a person's status as an abutting property owner does not automatically confer or create a presumption of such standing under the MESA regulations.

106, 107, 653 N.E.2d 589 (1995). Consequently, it is well established that an abutting property owner is still required to demonstrate their compliance with all of the standing requirements in 321 CMR 10.25(3)(b) in the same manner as any other aggrieved person.

2. Summary of Key Case Law on the Standards for Demonstrating Standing

In summarizing the relevant case law for demonstrating standing under the MESA Regulations, I begin with the three-part, "irreducible constitutional minimum of standing" established by United States Supreme Court case law as set forth in *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*:

1. First, the plaintiff must have suffered an "an injury in fact," meaning, an invasion of a legally protected interest which is (a) concrete and particularized[7], and (b) actual or imminent, not conjectural or hypothetical;

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

3. Third, it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan* at *560-561*.

The party invoking the jurisdiction of the reviewing court or agency bears the burden of establishing the above elements of standing. *Lujan at 562.* "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation." *Id. at 561-562.*

Moreover, the Supreme Court has described injury in fact as "first and foremost of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The

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

Court emphasized that "[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Id. at 548* (Emphasis in original). As stated above in *Lujan*, for an injury to be "particularized", it must affect the plaintiff in a personal and individual way. A "concrete" injury, the Court said, "must be *'de facto;'* that is, it must actually exist." *Spokeo, Inc.* at 548 (Emphasis in original).

Massachusetts case law similarly requires a showing that a plaintiff has suffered a non-speculative, concrete injury that is different from that of the public. *See Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 27 (2006); quoting Havard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass.App.Ct. 491, 493 (1989)* ("A person aggrieved...must assert a plausible claim of a definite violation of a private right, a private property interest, or private legal interest."); *see also Fraser v. Zoning Bd. of Appeals of Marshfield, 2009 WL 1975388 (Mass. Land Ct) (2009).* An aggrieved person must also "establish – by direct facts and not speculative personal opinion – that his injury is special and different from the concerns of the rest of the community." *Barvenik v. Alderman of Newton, 33 Mass.App.Ct. 129, 132 (1992); see also Standerwick, supra, at 208; Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass. 551, 554 (1999); Nickerson v. Zoning Bd. of Appeals of Raynham, 53 Mass.App.Ct. 680, 761 N.E.2d. 544, 547 (2002); Butler v. City of Waltham, 63 Mass.App.Ct. 435, 440 (2005); Fraser, supra.* "Injuries that are speculative, remote, and indirect are insufficient to confer standing." *Ginther, at p. 323.* "[T]he aggrieved party must show that the injury suffered is one that is nonspeculative and a substantial injury to him personally, as distinct from a speculative injury or an injury to the public generally." *Lopez v. Board of Health of Topfield, 76 Mass.App. Ct. 1118 (2010).* While it is not necessary to prove a claim of particularized

injury by a preponderance of evidence, "the possibility of injury must be more than an 'allegation of abstract, conjectural, or hypothetical injury.'" *In the Matter of Three Bays Preservation, Inc. and Massachusetts Audubon Society, 2018 MA Env. Lexis 40, 44.*

The Supreme Court in *Lujan* acknowledged that the desire to use or observe an threatened or endangered animal species is a "cognizable interest" for the purpose of showing standing under the federal Endangered Species Act, but also emphasized that the injury in fact test "requires more than an injury to a cognizable interest…[i]t requires that the party seeking review be himself among the injured." *Lujan at 563.* This necessitates "evidence showing, through specific facts, not only that such federally listed species were in fact being threatened…but also that one or more of the respondents' members would thereby be 'directly' affected apart from their 'special interest' in the subject." *Id.*

The Court has also made clear that persons do not acquire standing based on a contention that they seek to enforce an environmental law, stating "[w]e have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and the laws and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan at 574-575.* In short, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464, 486 (1982); Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 135 (2000).*

Furthermore, 321 CMR 10.25(3)(b) expressly requires a petitioner to demonstrate how they have a definite interest in the matters in contention that fall within the scope of

interests or areas of concern of MESA or the MESA Regulations. "A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred. *Enos at 135, citing Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977).* Determining the proper scope of the interests and area of concerns of a particular statutory and regulatory scheme is a necessary means of assessing a petitioner's compliance with the above standing requirement. By way of example, the SJC held in *Enos* that nothing in the Massachusetts Environmental Policy Act ("MEPA") language, purpose or administrative scheme suggested a legislative intent to allow judicial review of a determination thereunder of what constituted a proper environmental impact report. The SJC found the Appeals Court's characterization of MEPA's area of concern as the "protection of the environment from damage caused by projects" to be "far too broad for our purposes." *Id. at 138.* "To grant standing based on MEPA's ultimate goal of the protection of the environment," the SJC stated, "would allow suit in almost every project within MEPA jurisdiction, based on generalized claims by plaintiffs of injury such as loss of use and enjoyment of property." *Id.* Similarly, the scope of interests and concerns under MESA does not extend to prohibiting any or certain types of development in Priority Habitat or to preventing or regulating broadly defined environmental impacts that do not have a direct enough nexus to protecting state-listed species and their habitats.

Finally, as is also expressly required by 321 CMR 10.25(3)(b), "[i]t is not enough that the plaintiffs be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the defendants." *Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction, 382 Mass. 527, 532 (1981), quoting L.H.*

Tribe, American Constitutional Law § 3-22, at 97-98 (1978). In the same *Enos* decision, the SJC emphasized that "we pay special attention to the requirement that standing is not present unless a governmental official or agency can be found to owe a duty directly to the plaintiffs." *Enos at 136.*

"Under the theory of organizational standing, the organization is just another person – albeit a legal person – seeking to vindicate a right." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 562 (2018), quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F. 3d 286. 294 (2d Cir. 2012). For an incorporated organization to have aggrieved status and standing, it must establish some harm to a corporate legal right. *Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989).* "A mere statement of corporate purpose which expresses a general civic interest in the enforcement of [environmental] laws, or in the preservation of [natural resources], is not enough to confer standing upon the corporate entity." *In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., 2016 MA ENV LEXIS 3, 24, citing Harvard Square Defense Fund, Inc. at 496; see also Chongris v. Board of Appeals, 17 Mass. App. Ct. 999 (1984)* ("It is settled that a statement of organizational purpose cannot clothe a civic association with aggrieved person status."). In determining whether an organization suing on its own behalf has standing to sue, the court conducts the same inquiry as in the case of an individual: "Has the plaintiff alleged such a personal stake in the outcome of the controversy as to warrant his invocation of [the court's] jurisdiction." *Havens Realty Corp. v. Coleman, 102 S. Ct. 1114 (1982).* Thus, when an organization sues on its own behalf, it "bears the burden of showing: (i) an imminent injury in fact to itself as an

organization (rather than to its members) that is 'distinct and palpable;' (ii) that its injury is 'fairly traceable' to the complained-of act; and (iii) that a favorable decision would redress its injuries." *Knight First Amendment Inst. at Columbia Univ.* at 563.

Taking these MESA regulatory requirements and relevant case law standards for demonstrating standing into consideration, I have analyzed and determined Protect Sudbury's standing to proceed with its Notice of Claim for an Adjudicatory in Section V below.

V. Determination of Protect Sudbury's Standing to Appeal

Petitioner Protect Sudbury, Inc., a 501(c)(4) non-profit corporation, bears the burden of establishing that it meets each of the required elements of standing under the MESA regulations at 321 CMR 10.25(3)(b), consistent with the three-part, "irreducible constitutional minimum of standing" described by United States Supreme Court in *Lujan* and with the specific standing test applicable to corporate organizations set forth in *Knight First Amendment Inst. at Columbia Univ., and Harvard Square Defense Fund, Inc.* As discussed in Section III., *supra*, at 11-13, I accept as true the facts alleged by Petitioner in its Notice of Claim and Consolidated Opposition in accordance with the standard of review adopted by the SJC in *Iannacchino*.

A demonstration that Protect Sudbury has suffered injury in fact different that is special and different from the public is, as noted by the Supreme Court, the first and foremost of standing's required elements. To assess the sufficiency of Petitioner's showing as to this element, I begin by focusing on its stated basis for challenging the Division's Conditional No-Take Determination, summarized below.

The specific grounds alleged in Protect Sudbury's Notice of Claim is that the Project was improperly segmented because Eversource's MESA filing was limited to the construction of an electric transmission line in the MBTA right of way, but did not include the work associated with the Sudbury and Hudson Substations.[8] *Notice of Claim at 3; Consolidated Opposition at 6, 20-21.* Petitioner contends that Eversource's alleged segmentation of the Project resulted in a "gross underestimation" of the impacts on state-listed species or on the total acreage of disturbance within Priority Habitat, thereby rendering the Division's Conditional No-Take Determination deficient for the purposes of MESA. *Notice of Claim at 3.* While Protect Sudbury acknowledges that the Sudbury and Hudson Substations are not now in Priority Habitat, it points out that they were when Eversource first sought information from the Division on the state-listed species in the Project area.[9] *Motion to Strike Vieira Affidavit at 2.*

Project Sudbury asserts it is an aggrieved party because some of its members are direct abutters and/or own property in habitats or areas that will be impacted by the Project (e.g., due to changes in topography or upon water flood zones caused by rerouting/redirecting surface water and runoff) that also may impact Priority Habitats. *Notice of Claim at 2.* In addition, Petitioner argues that its participation in the EFSB process is sufficient to give it standing. *Id.*

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[8] Petitioner argues in its Consolidated Opposition that Eversource misinterpreted the project segmentation claim set forth in the Notice of Claim, which Petitioner further characterizes therein as also involving a "common plan" encompassing DCR's future construction of a bike trail over the transmission line. *Consolidated Opposition at 20-21.* I concur with Eversource that Petitioner's clarification goes beyond "fleshing out" its initial claim but constitutes an attempt to add a new claim. *See Eversource's Opposition to Petitioner's Motion to Strike Vieira Affidavit at 3, footnote 2.* The relevant MESA adjudicatory decisions cited in this Recommended Decision allow a party to introduce supplemental evidence to bolster a claim that has been set forth in their Notice of Claim, not to add a new claim. However, for the reasons discussed in this Section V of the Recommended Final Decision, the scope of Petitioner's project segmentation claim is not solely determinative of its standing.

[9] As noted in footnote 3, *supra*, at 10, the Substations were in Priority Habitat prior to the Division's updating of the state-wide map of Priority Habitat in 2017.

Petitioner concedes that its segmentation claim "has little or no bearing on its status as an 'aggrieved person' under 321 CMR 10.25(2)(b)," and that in order to reach the segmentation claim, Protect Sudbury "must first assert injury to its interests that arise under MESA sufficient to show it is 'aggrieved.'" *Motion to Strike Vieira Affidavit* at 3. Protect Sudbury further acknowledges that abutter status does not automatically confer standing to a petitioner in a MESA appeal and that its participation in the EFSB proceeding has "little bearing" on the MESA standing requirements. *Consolidated Opposition at 5.*

Petitioner argues instead that, as reflected in the affidavits of Protect Sudbury members/supporters, their knowledge and enjoyment of wildlife within the Project area and nearby conservation lands and/or actions to preserve habitat and wildlife is evidence of their special interest in the Division's Conditional No-Take Determination. *See, in particular, Consolidated Opposition at 7-11.* Consequently, Petitioner claims, the Division's Conditional No-Take Determination failure to protect MESA's "Zone of Interests" has personally injured Protect Sudbury. *Id.*

Because the Notice of Claim was filed by and on behalf of Protect Sudbury, Inc., this corporate organization must independently satisfy the requirements of standing just like any other person. *Havens Realty Corp.* Accordingly, the first issue to determine is whether Protect Sudbury has met its burden of showing of how it has suffered an imminent injury in fact *as an organization*, as distinct from its members. *Knight First Amendment Inst.* As distilled in the opening paragraphs of this Section V, Petitioner's Notice of Claim and its Consolidated Opposition both characterize the nature of the injury in fact to Protect Sudbury in terms of the alleged impacts of the Project and/or

failings of the Division's Conditional No Take Determination on Protect Sudbury's "members/supporters," some of whom are abutters and/or own property containing affected habitats. Similarly, the affidavits from William Schineller and Renata Aylward - the two affiants of Petitioner who expressly identify themselves as members of Protect Sudbury – discuss the alleged injury to them personally, but not to Protect Sudbury as an organization.

In his Affidavit, Mr. Schineller identifies himself as the Government Relations Coordinator for Protect Sudbury and a member of its Board of Directors. His Affidavit states that as a founding Board member of Protect Sudbury, "[i]t was critical to me that we incorporate as a 501(c)(4) corporation so that we could legally undertake necessary lobbing activities to overcome and correct a flawed energy facility siting process which clearly ignored and devalued the environment." *Schineller Affidavit at 2.* Mr. Schineller further states that "[i]n each legislative session since 2016, I have lobbied in support of legislation to amend [EFSB's enabling statute at M.G.L. c. 164, s.69H] to require the EFSB to place greater weight on the environment." *Id. at 4-5.* After acknowledging that Eversource's Project was the "catalyst" for the formation of Protect Sudbury, Mr. Schineller gives a list of examples of Protect Sudbury's interests and activities as an organization, none of which are within MESA's "Zone of Interests":

> "[T]o discuss the root causes of frequent power outages (Distribution, not Transmission), discuss Town-wide Electricity Aggregation, report on declining summer peak electric demand forecasts due to behind-the-meter solar, decisions concerning transmission projects in other states (New Jersey, Maryland, California, …), to advance Town Meeting articles aimed at encouraging utilities to underground Distribution, and recently informing the community about important Town meeting articles, with links to public information concerning a proposed land swap to move a large residential development out of the historic town center to other town-owned land." *Id.* at 5.

His Affidavit concludes, in the form of a bare allegation, that the Project will "inflict great permanent damage on the habitats and species within them" and that the Division's Conditional No-Take Determination "personally harms me and members of the broad community I represent." *Schineller Affidavit at 6.*

The Affidavit of Renata Aylward also identifies her as a member and on the Board of Directors of Protect Sudbury. The focus of her Affidavit is to describe her long-standing individual and personal interest in the nearby conservation lands that she generally alleges will be adversely impacted by Eversource's Project and the inadequacy of the Division's Conditional No-Take Determination. *Aylward Affidavit at 1-3.* While Ms. Aylward mentions that she led a "Protect Sudbury Walk in the Woods" in 2017, her Affidavit does not speak to the nature of the injury in fact to Protect Sudbury as an organization in any specific way. *Id.* at 2.

There are four other affidavits included with Petitioner's Consolidated Opposition. Three of them are from persons (Karin Paquin, Elizabeth Truebenbach, and Laura Mattei) who identify themselves as supporters of Protect Sudbury. Their affidavits do not purport to speak from the standpoint of representing Protect Sudbury's position as an organization. Instead, these affiants express their support for Protect Sudbury's concerns about Eversource's Project in the context of their interests and work for other organizations: the Sudbury Valley Trustees in the case of Ms. Paquin and Ms. Mattei; the Friends of the Assabet River National Wildlife Refuge in the case of Ms. Truebenbach. The fourth affidavit from Deborah Dineen provides information solely from the standpoint of her position as the Conservation Coordinator for the Town of Sudbury, including excerpts from testimony that she provided on behalf of the Town in the EFSB

proceeding involving Eversource's Project. In short, none of these other four affiants speak for or otherwise directly address the alleged injury in fact suffered by Protect Sudbury as an organization.

Indeed, commenting on the fact that the Division did not provide Protect Sudbury with the Conditional No-Take Determination when it was issued to Eversource, Protect Sudbury's Consolidated Opposition states that "the corporation's chief injury is that, as many members have commented and their affidavits document, they feel that their work is not valued by [the Division] as its Determination engages in a narrow, overly secretive process resulting in an irrational contravention of MESA's laudable goals." *Consolidated Opposition at 22.* For the purpose of standing, this type of perceived injury is not the result of a violation of a duty owed to Protect Sudbury by the Division.

As a corporate entity, Protect Sudbury must establish some harm to a corporate legal right that is traceable to the Division's Conditional No-Take Determination. *See Harvard Square Defense Fund, Inc.* Whether Protect Sudbury has suffered such an injury is determined, in part, by an examination of its corporate purpose, or stated another way, of its core public mission. This inquiry is, in turn, relevant to the required showing under 321 CMR 10.25(3)(b) that Petitioner has a definite interest in the matters in contention within the scope of interests and areas of concern of MESA and the MESA Regulations.

In its Notice of Claim, Protect Sudbury identifies itself as "a 501(c)(4) non-profit organization formed in opposition to the Project." On its website, Protect Sudbury states that its mission "is to preserve and protect the environment, landscape, health, safety, historic character and property values of the town," but that its "primary objective is to

prevent all power lines along the MBTA ROW and to prevent above-ground power lines anywhere in Sudbury." *Glorioso Affidavit at 2.* As discussed above, the Affidavit of William Schineller, who identifies himself as a "founding Board member" of Protect Sudbury, underscores the latter primary objective by recounting Protect Sudbury's history and range of lobbying and opposition efforts against Eversource's Project and directed at changing how DPU considers damage to the environment in the context of its energy facility siting process. Petitioner's Consolidated Opposition stresses the fact that Protect Sudbury was purposely established as a 504(c)(4) "social welfare" organization to allow it to engage in activities beyond exclusively opposing Eversource's Project. But Petitioner's own characterizations of the reason for its formation and its predominate interests and activities support a finding that the core corporate purpose of Protect Sudbury (i.e., its "primary objective") is to oppose Eversource's Project for energy facility siting reasons and to seek changes to DPU's regulation of such facilities – neither of which falls within MESA's Zone of Interests.

Moreover, the inclusion of "preserve and protect the environment" as among the range of matters of civic activities comprising Protect Sudbury's self-described mission is too broadly stated to support a finding that another significant corporate purpose is to engage in activities that fall squarely within MESA's Zone of Interests. *See Enos at 138.* As noted above, *supra*, at 19, MESA's Zone of Interests do not extend to prohibiting certain types of projects in Priority Habitat or to regulating broadly defined environmental impacts that do not have a direct enough nexus to protecting state-listed species and their habitats. In short, Protect Sudbury's core corporate mission is outside of the MESA Zone of Interests, and the effect of the Division's Conditional No-Take

Determination on Protect Sudbury as a corporate organization is not materially greater in scope or magnitude than its effect on the general public.

Similar to the facts in *Marion Drive*, which also involved a petitioner who alleged that the project at issue had been improperly segmented, it is fair to characterize Project Sudbury's appeal as essentially seeking to ensure as a matter of civic engagement on behalf of the organization and the local community that MESA is properly applied to Eversource's Project. *See Marion Drive at 3.* This is also reflected in Petitioner's Consolidated Opposition, which claims that Eversource's Corridor Management Plan and related stormwater management activities are not protective of MESA but fails to show how the alleged inadequacies result in a personal injury or a violation of a duty owed to Protect Sudbury the corporation. *See Consolidated Opposition at 12-13; 15-16.* Without such a showing, Protect Sudbury is acting in a manner akin to the petitioner in *Marion Drive* who described herself as a "private attorney general" vindicating the proper enforcement of MESA on behalf of the public. *See Marion Drive at 20.* It is well settled, however, that Protect Sudbury cannot acquire standing based on its efforts to ensure that Eversource has complied with MESA. *See Lujan at 574-575; Marion Drive at 11, citing Matter of Town of Ipswich, 2005 WL 4124572, at 6.*

Finally, Protect Sudbury's contention in its Notice of Claim that its participation in the EFSB proceeding gives it sufficient standing to appeal the Division's Conditional No-Take Determination "given the direct relationship between the EFSB process and this case" is without merit. Participation in another administrative agency's review of the same project pursuant to a separate statute and regulations has no bearing on a petitioner's status as an aggrieved person under the MESA Regulations.

For all of the above reasons, I find that Protect Sudbury, as a corporate organization, has not met its burden of showing that it has suffered an imminent injury in fact from the Division's Conditional No-Take Determination that is special and different from that of the general public. In addition, Protect Sudbury has not demonstrated that its core corporate mission and activities constitute a definite interest in the matters in contention within MESA's Zone of Interests.

The above grounds are alone sufficient to dismiss Petitioner's Notice of Claim for lack of standing. But even assuming arguendo that Petitioner is allowed to demonstrate standing to appeal as a corporate organization through its members or supporters,[10] I find that it has not shown that such individuals have suffered an actual injury in fact that is fairly traceable to the Division's Conditional No-Take Determination.

Focusing first on the content of the Notice of Claim, Protect Sudbury states that there are "many" members who are "direct abutters" to the Project and that "several" abutters (identified in footnote 3) "are in areas that stand to be uniquely impacted by the change in topography and impacts upon water flood zones caused by rerouting/redirecting surface water and runoff...[a]ll these changes to wetlands and to topography may impact Priority Habitats subject to review by the Division." *Notice of Claim at 2.* The latter allegation – that the above changes caused by the Project "may" impact Priority Habitats - is the only attempt to link them to MESA's Zone of Interests, but is too vague and speculative to satisfy Petitioner's obligation to set forth plausible grounds for its entitlement to relief, as required by *Iannacchino*.

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[10] In its Consolidated Opposition at 4, Petitioner states that Protect Sudbury has "over 3,000 members/supporters," but does not explain the distinction between being a "member" vs. a "supporter" of its organization. In any event, for the purpose of this component of my standing analysis, I am not making a substantive distinction between the two terms.

Moreover, the Notice of Claim contends only that Petitioner has been injured by a deficient Conditional No-Take Determination that is based on a "gross underestimation" of state-listed species impacts and the total area of disturbance within Priority Habitat resulting from Eversource's omission of the Sudbury and Hudson Substations from Eversource's MESA filing. There is no dispute that neither Substation is in Priority Habitat. *Motion to Strike Vieira Affidavit at* 2. The Vieira Affidavit supporting Eversource's Motion to Dismiss, in turn, shows that of the individuals listed in Protect Sudbury's Notice of Claim, the closest abutter to the Hudson substation is more than four miles away and the closest abutter to the Sudbury substation is more than ¼-mile away. *Eversource Motion to Dismiss at 5-6; Vieira Affidavit at ¶ 4 and Exhibit A.* As my Ruling denying Petitioner's Motion to Strike Vieira Affidavit determined, the significant distances between the substations (which are outside of Priority Habitat) and the properties of individual members of the Petitioner are facts that "have some tendency to prove" whether they have suffered any injury or suffered an injury that is different from the public and are also material to the issue whether the Petitioner has standing. *Ruling on Petitioner's Motion to Strike Vieira Affidavit at 8.*

In conclusion, the bare assertions in the Notice of Claim that Protect Sudbury members/abutters will be uniquely impacted by the Project do not rise above speculative, conclusory allegations, particularly (but not exclusively) when considering Petitioner's segmentation claim in light of the Vieira Affidavit that documents the significant distances between the Substation locations and the properties of the allegedly injured members/abutters of Petitioner.

Turning to the Consolidated Opposition that includes six supporting affidavits, Protect Sudbury argues that its members/supporters' knowledge and enjoyment of wildlife within the Project area and nearby conservation lands, and/or actions to preserve habitat and wildlife is evidence of their special interest in the Division's Conditional No-Take Determination. Furthermore, Protect Sudbury claims that these same members/supporters have long been engaged in activities that fall within MESA's Zone of Interest, including educating the public about the Project area and nearby conservation lands and their unique characteristics. Finally, Protect Sudbury alleges that the failures of the Division's Conditional No-Take Determination as identified by Petitioner have personally injured its members, including because highly knowledgeable members were not consulted or notified by the Division.

Each of the supporting affidavits discusses (in varying degrees of specificity) the individual affiant's long-standing personal interest in and efforts associated nearby conservation lands and wildlife areas abutting or in the vicinity of the MBTA ROW. As discussed, *supra*, at 24-25, the primary focus of the Affidavit of William Schineller is to explain the non-MESA related reasons for creating Protect Sudbury and its efforts to oppose to Eversource's Project as an energy facility and to change the EFSB's siting process. His Affidavit ends with an unsupported, conclusory allegation that the Division's Conditional No-Take Determination will "inflict great permanent damage" to state-listed species and their habitats and therefore personally harms him. Ms. Aylward's Affidavit describes her personal interests in and activities associated with the nearby conservation lands in more detail, but similar to Mr. Schineller, she does not explain with the required specificity how the Division's No-Take Determination will injure her. In

short, neither of the affidavits establishes a plausible claim of a concrete injury in fact to these two members of Protect Sudbury that is different from the public and fairly traceable to the Division's Conditional No-Take Determination.

The Affidavit from Deborah Dineen, including the attached excerpts from her testimony in the EFSB proceeding, does not specifically address the impacts of the Project to state-listed species or Priority Habitat or the adequacy of the Division's Conditional No-Take Determination. Ms. Dineen, who does not identify herself as a member or supporter of Protect Sudbury, describes her duties as the Conservation Coordinator for the Town of Sudbury and the context for her testimony before the EFSB on December 14, 2017. The actual excerpts from her testimony before the EFSB comment generally on the Town's use of herbicides, the wildlife species that use the ROW and the potential that the reuse of the ROW may result in habitat fragmentation. Because her testimony was in the context of an EFSB proceeding that predated the Division's Conditional No-Take Determination by almost a year, it does not draw any alleged causal connection between that Determination and a resulting injury to Protect Sudbury or to her personally.

Petitioner also included affidavits from three supporters of Protect Sudbury: Laura Mattei, Director of Stewardship for the Sudbury Valley Trustees ("SVT"); Karin Paquin, who is Chair of SVT's Land Stewardship Committee and serves on its Board; and Elizabeth Truebenbach, who is the President of the Friends of the Assabet River National Wildlife Refuge. All three affiants testify to their deep personal knowledge of and interest and efforts in protecting the nearby conservation lands that they are affiliated with, and identify several similar concerns about the adequacy of the Division's

conditional approval of Project. However, as summarized in the examples below, the connections they draw between their generally stated concerns and any resulting concrete injury to them personally are too speculative, conclusory and/or insufficiently supported by credible evidence.

The Mattei and Paquin Affidavits both question the adequacy of Eversource's Corridor Management Plan ("CMP"), but primarily for the reason that they claim to have witnessed utilities do a substandard job in performing corridor management activities at other sites. *Mattei Affidavit at 4; Paquin Affidavit at 2.* Ms. Mattei and Ms. Paquin both express concerns about the adequacy of the required Eastern Box Turtle Plan, including the time of year restriction ("TOY"), which is squarely within the MESA Zone of Interests, but their concerns make no reference to what the Plan requires[11] or otherwise allege specific enough facts to raise a right to relief above a speculative level.[12] *Id.* All three affidavits express the concern that the Project will result in invasive species adversely impacting the abutting conservation lands, but their allegations are speculative and without the requisite specificity about, e.g., why the CMP will be ineffective. *Mattei Affidavit at 3-4; Paquin Affidavit at 2; Truebenbach Affidavit at 2-3.* The Mattei and Truebenbach Affidavits both allege respectively that the Project will result in "permanent broad linear habitat destruction and fragmentation" and a "wide habitat break in the

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[11] Exhibit 4 to the Consolidated Opposition is identified as the Project's CMP. It states, in pertinent part (at 2), that "per past management guidelines related to state-listed turtle species imposed by [the Division's Natural Heritage and Endangered Species Program] along other utility corridors, [Eversource] will avoid mowing between November 1 and March 1, conduct turtle sweeps prior to mowing, and set mower blades 10 inches above the ground."

[12] Compare with the showing made by the petitioners in *16 Medouie Creek*, where I denied a joint motion to dismiss the appeal for lack of standing by the Division and the project proponent. It included an affidavit from the petitioners' state-listed species expert that attested with specificity that the proposed project work would reduce the area of habitat and directly disturb a local pair of the state-listed species in question (the threatened northern harrier) on adjacent property and likely cause that pair to abandon their nesting area. *See 16 Medouie Creek at*

middle of this important conservation block," but their concerns are broadly stated and are not linked to a more specific explanation as to why the Division's evaluation of the Project impacts on state-listed species habitat within the Project area violated the MESA Regulations. *Mattei Affidavit at 3; Truebenbach Affidavit at 3-4.* All three affidavits also generally allude to the fact that the Division's 2017 updates to the state-wide map of Priority Habitat resulted in the Substation areas no longer being in Priority Habitat, thereby heightening the need for the Division to be protective of the remaining state-listed species and their regulated Priority Habitats. *Mattei Affidavit at 4; Paquin Affidavit at 3; Truebenbach Affidavit at 2; see also Consolidation Opposition at 16-17.* But as with their concern about habitat fragmentation, none of these affiants (or Protect Sudbury in its Consolidated Opposition) draw plausible causal connections between this high level concern about changes to Priority Habitat over time[13] and any alleged failure by the Division to properly regulate the Project impacts that will occur in Priority Habitat, or address how the Division's alleged action or omission results in a personal injury or violation of a duty owed to them. Each of the three affidavits further generally contend that the Project will end up destroying wild lupine alleged to be located in or near the Project area. *Mattei Affidavit at 3; Paquin Affidavit at 2; Truebenbach Affidavit at 3.* However, their allegations are general and conclusory in nature and do not explain why the Division's Conditional No-Take Determination is deficient, particularly in light of the acknowledgment by Ms. Mattei and Ms. Paquin that wild lupine is not a state-listed

[13] I take judicial notice of the fact that prior to 2017 the state-wide Priority Habitat map was last updated in 2008. See, e.g., the Division's response to comments on how its proposed 2017 Priority Habitat map differed from the 2008 map, at the link below to the Division's website: https://www.mass.gov/files/documents/2017/09/11/Summary%20Response%20to%202017%20Draft%20Priority%20Habitat%20Map%20Comments.pdf

species.[14] Finally, Ms. Mattei and Ms. Paquin both contend that the Division owes managers of conservation land a duty to better coordinate its project review and permitting actions under the MESA Regulations.[15] *Mattei Affidavit at 4; Paquin Affidavit at 3;* see also, *supra*, at 26, Protect Sudbury's similar characterization of "the corporation's chief injury." Their affidavits are silent, however, on how the Division's failure to engage in such coordinated activities resulted in a personal injury to them that is special and different from the public. Moreover, as in the case of Protect Sudbury the corporation, the Division's alleged failure to coordinate its review of the Project under MESA with other landowners would not violate a duty owed by the Division to these individuals or their affiliated land organizations.

In closing, for the legal purpose of determining standing and for the reasons stated above, I have determined that the allegations in the above affidavits fall within "matters of general public concern which…do not establish a plausible claim of a definite violation of a private right, property interest, or legal interest sufficient to bring [these individual supporters of Protect Sudbury] within the zone of standing." *Matter of Town of Ipswich, citing Harvard Square Defense Fund, Inc. at 493.* Furthermore, the evidence supports a finding that these affiants share the same interest and objective in this matter as Protect Sudbury, the organization - to ensure that MESA has been properly enforced with respect to Eversource's Project - not to remedy a private injury to themselves.

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[14] Ms. Mattei notes that wild lupine has, however, been identified by the Division as a plant species in decline and in need of management attention. *Mattei Affidavit at 3.*

[15] Petitioner's Consolidated Opposition reiterates this claim, stating that "[Protect Sudbury's] member conservationists are further particularly injured by the fact that…they were never consulted about what they knew of the protected species and their habitats." *Consolidated Opposition at 10.*

Accordingly, I hereby grant the respective Motions to Dismiss by the Division and Eversource based on my determination that the Petitioner Protect Sudbury, Inc. does not have standing to appeal the Division's Conditional No-Take Determination.

VI. Effect of the Dismissal of Protect Sudbury's Appeal for Lack of Standing on Ten Citizen Group Motion to Intervene

Under 321 CMR 10.25(1) of the MESA Regulations, any person aggrieved by a final decision of the Division made pursuant to 321 CMR 10.12, 10.18 or 10.23 shall have the right to an adjudicatory hearing. Stated another way, only aggrieved persons have a right to an adjudicatory hearing before the Division. Under 321 CMR 10.25(2), any notice of claim for an adjudicatory hearing must be sent to the Division within 21 days of the date of the Division's final decision. Such notice of claim is more precisely referred to in 321 CMR 10.25(3)(b) as a "request" for an adjudicatory hearing because this provision provides that the requestor must satisfy the requirements of an "aggrieved person" as specified therein.

In the instant matter, Protect Sudbury was the only party that filed a Notice of Claim with the Division (on November 8, 2018) by the 21-day deadline specified in 321 CMR 10.25(2). Subsequently, the Division (on December 18, 2018) and Eversource (on January 9, 2019) filed their respective Motions to Dismiss Protect Sudbury's appeal for lack of standing. On January 28, 2019 a Ten Citizen Group filed a Motion to Intervene in Petitioner's appeal pursuant to M.G.L. c. 30A, § 10A. Because the threshold question of whether Petitioner Project Sudbury has standing to proceed with its request for an adjudicatory hearing is a matter of subject matter jurisdiction, it was appropriate for me to decide the pending Motions to Dismiss by the Division and Eversource before acting

on the Ten Citizens Group Motion to Intervene. As discussed in this Recommended Final Decision, I have granted those Motions to Dismiss Protect Sudbury for lack of standing.

M.G.L. c. 30A, § 10A, the statute governing the intervention of a ten citizen group in an adjudicatory proceeding, provides in pertinent part:

> "Notwithstanding the provisions of section ten, not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue…Any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter, including specifically the right of appeal."

"Adjudicatory proceeding" is defined in M.G.L. c. 30A, § 1 in pertinent part to mean:

> "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are" required by constitutional right or any other provision of the General Laws to be determined after opportunity for an agency hearing."

My Recommended Final Decision in *Marion Drive*, which was adopted without modification by the Division Director as the Final Decision, addressed the issue of the effect of the dismissal of the petitioner's appeal for lack of standing on a motion to intervene filed by the Town of Kingston pursuant to 321 CMR 10.25(4). I ruled therein that because my decision to grant the Division's motion to dismiss for lack of standing meant that the petitioner's appeal should be dismissed, the Town's motion to intervene was moot.[16] *Marion Drive at 20-21.*

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[16] I also noted for the record that even assuming that the petitioner's appeal had gone forward, I would not have allowed the Town to intervene because it did not demonstrate that it was an "aggrieved person," as required by 321 CMR 10.25(3)(b) and 10.25(4).

The above MESA Final Decision is in line with MassDEP adjudicatory decisions that have also determined that no right exists to intervene in an adjudicatory proceeding where the original petitioner has been dismissed for lack of standing. *In the Matter of John W. Mitchell, Requester, 1999 MA ENV LEXIS 683* is a MassDEP final decision that dismissed the petitioner's appeal for lack of standing and also denied as moot separate motions to intervene by a group of abutters and a ten citizen group, holding: "[h]ere, the petitioner lacked standing to bring the appeal. Since there was no valid appeal in which the intervenors could intervene, the motions to intervene were moot and were properly denied as such." *Id. at 8-9.* Similarly, another MassDEP final decision, *In the Matter of Francis X. Frecentese and Adeline R. Frecentese, 2004 MA ENV LEXIS 96,* involved the dismissal of one petitioner's appeal for lack of standing and a second petitioner's appeal for failure to state a claim. The presiding officer denied a request by a third person to intervene under MassDEP's adjudicatory rules, stating: "the motion fails because there is no viable appeal in which [the requestor] can intervene." *Id. at 13.* See also *In the Matter of Palmer Renewable Energy, LLC, 2012 MA ENV LEXIS 120*, which held that where the permittee had not appealed the permit and the other petitioners had no standing, a ten citizen group had no the right to intervene because there is no existing adjudicatory proceeding, nor did the ten citizen group have authority under § 10A to file its own appeal of the permit.

Returning to the instant matter, Eversource's February 4, 2019 Response to the Ten Citizen Group Motion to Intervene argues that the right conferred by M.G.L. c. 30A, § 10A "is limited to intervention in an *existing* adjudicatory proceeding," citing *Town of Barnstable v. Cape Wind Associates, Inc., 75 Mass. App. Ct. 1104 (2009)* (MA Appeals

Court affirmed an order of the Superior Court that denied as moot a motion by Clean Power Now to intervene in a lawsuit brought by the Town against the EFSB that had been dismissed by the Superior Court). *Eversource's Response to the Ten Citizen Group Motion to Intervene at 2.* (Emphasis in original.) The Ten Citizen Group responded on February 11, 2019 that the language of § 10A does not expressly limit intervention to an "existing" adjudicatory proceeding "although it makes sense that there be an ongoing 'action' as reflected in rules and practice governing intervention" in Mass. Rule of Civil Procedure 24.[17] *Ten Citizen Group Response to Eversource's Response to the Ten Citizen Group Motion to Intervene at 2.* The Ten Citizen Group argues that even if Protect Sudbury's Notice of Claim has been dismissed due to lack of standing, the adjudicatory proceeding is not a "nullity" because "[t]here is a controversy joined here where rights of parties are determined as permitted by law *and where parties include those whom agencies allow to intervene*." *Id. at 4,* citing the definition of "adjudicatory proceeding" in M.G.L. c. 30A, § 1. (Emphasis Added.) The Ten Citizen Group further states that § 10A "confers party status *if the intervention is allowed* and there is nothing in the statute to indicate that, having gained party status, it falls away should the original Petitioner's claim (to standing or otherwise) fail." *Id.* (Emphasis Added.) However, the above arguments of the Ten Citizen Group are predicated on situations where intervention has been allowed, which is not the case here.

Eversource's position that the right to intervene under M.G.L. c. 30A, § 10A is limited to intervention in an existing adjudicatory proceeding is in accord with the language of the statute and consistent with the above cited case law, including the MESA

[17] Rule 24 (a) ("Intervention of Right") and (b) ("Permissive Intervention") both state in pertinent part: [u]pon timely application anyone may be permitted to intervene in an *action*" if that person satisfies the requirements of the corresponding subsection. (Emphasis Added.)

Final Decision in *Marion Drive*. Section 10A provides that not less than ten persons may intervene in "any adjudicatory proceeding," which necessarily requires that there be an ongoing adjudicatory proceeding in which the Ten Citizen Group can intervene. My dismissal of Protect Sudbury's Notice of Claim for lack of standing means that it had no legal right to an adjudication of its claims by the Division; consequently, there is no jurisdictional basis to proceed with its requested appeal. In short, because Protect Sudbury lacks standing, there is no adjudicatory proceeding within the meaning of M.G.L. c. 30A, § 1 before the Division, thereby rendering the Ten Citizen Group pending Motion to Intervene moot. To hold otherwise would be to allow persons who failed to timely appeal the Division's Conditional No-Take Determination to collectively "bootstrap" their way into an adjudicatory proceeding that did not have the requisite legal basis for moving forward in the first instance. Such a result would be contrary to the jurisdictional prerequisites for obtaining review by the Division and adversely impact its effective and efficient adjudication of administrative appeals under MESA.

For the above stated reasons, I hereby deny the Ten Citizen Group Motion to Intervene as moot.

VII. Notice

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

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

Dated: March 15, 2019

By: Richard Lehan

Richard Lehan, Esquire
Presiding Officer
Division of Fisheries and Wildlife
Department of Fish and Game
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SERVICE LIST

Conditional No-Take Determination NHESP File No. 15-34327 (Sudbury, MA)
Docket No. 2018-01-RL

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