



MASSWILDLIFE

**DIVISION OF
FISHERIES & WILDLIFE**

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

In the Matter of)
)
)

A/C Mobile Home Park, Inc.)
NHESP File No. 16-35870)
)

Truro, MA)
)
)
_____)

Docket No. 2017-01-RL

FINAL DECISION

I adopt the attached Recommended Final Decision of the Presiding Officer.

A person who has the right to seek judicial review may appeal this Final Decision of the Division to Superior Court pursuant to M.G.L. c30A, s.14 (1). The complaint must be filed in Court within thirty (30) days of receipt of this Final Decision.

Mark S. Tisa

Director

Date

9/11/2019

MASSWILDLIFE

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

In the Matter of)

A/C Mobile Home Park, Inc.)

Truro, MA)
_____)

Docket No. 2017-01-RL
NHESP File No. 16-35870

**RECOMMENDED FINAL DECISION ON
THE DIVISION'S MOTION FOR DIRECTED DECISION
AND THE PETITIONER'S CROSS MOTION FOR SUMMARY DECISION**

I. Summary

This appeal arose out of the 2016 construction of a sewage treatment plant and installation of related sewer lines at the existing Horton's Campground in Truro, MA ("Horton's" or the "Campground") owned by A/C Mobile Home Park, Inc. ("A/C MHP"). None of this work had been previously reviewed or approved by the Division of Fisheries and Wildlife (the "Division") pursuant to the Massachusetts Endangered Species Act ("MESA") regulations at 321 CMR 10.00. Since 1988, the Division has mapped the Campground as Priority Habitat for the Eastern Box Turtle ("EBT"), a state-listed species of special concern protected under MESA. A/C MHP thereafter applied to the Division for a determination of whether its activities had resulted in a Take of the EBT, and the Division determined on February 15, 2017 that it had. On February 21, 2017 A/C MHP (the "Petitioner") appealed the Division's Take Determination, claiming the work is exempt from the Division's review under 321 CMR 10.14(6) and that the Campground should no longer be mapped as Priority Habitat for the EBT pursuant to 321 CMR 10.12(4).

I thereafter agreed to joint requests by the Division and the Petitioner to stay this adjudicatory appeal for almost a year and a half until they notified me in September, 2018 that the Petitioner did not wish to continue settlement discussions. After the parties filed their prefled written direct and rebuttal testimony, the Division filed a Motion for Directed Decision on February 7, 2019 arguing that by reason of the facts or the law the Petitioner failed to sustain its direct case. On February 14, 2019 the Petitioner filed an Opposition to the Division's Motion, and then filed a cross Motion for Summary Decision on March 13, 2019, arguing that A/C MHP's sewage system upgrade and associated land clearings in Priority Habitat are all grandfathered from MESA review under 321 CMR 10.13(2)(c)(2).

This Recommended Decision grants a Directed Decision in favor of the Division for the reasons stated herein. In Section III., I explain and clarify for the record my thinking on the relationship of the identified issues for adjudication to the scope of appealable decisions under the MESA regulations. Section IV.B.1.-4., in turn, set forth my findings of fact and conclusions of law that: (1) the Petitioner's sewage system work and the associated land clearings are neither grandfathered nor exempt under the MESA regulations; (2) the Campground is properly mapped as Priority Habitat; and (3) the Petitioner confirmed that it is not challenging the Division's determination that A/C MHP's activities caused a Take of the EBT; in any event, none of its witnesses are qualified to provide credible evidence on that issue.

II. Factual Background and Procedural History

In a February 15, 2017 letter to Wayne Klekamp, the President of A/C MHP, the Division determined A/C MHP's construction of a sewage treatment plant and installation of related sewer lines at the existing Campground located off of South Highland Road in Truro, MA occurred

within EBT Priority Habitat¹ and resulted in a Take² of that state-listed species of special concern (the “Division’s Take Determination”). The Division stated that the approximately 40 acre property (across two contiguous parcels) is a camping facility known as “Horton’s Camping Resort” situated within pitch pine-oak woodlands. *Division’s Take Determination at 1.* Prior to 2016, the Campground consisted of two distinct sections: (1) the “Lower Loop,” an open area with shell and gravel roadways intended for recreational vehicle campers; and (2) the “Upper Loop,” a more primitive camp in a wooded environment with dirt and gravel roads intended for tent camping. *Id.*

In July, 2016 the Division received a MESA Information Request from Wilkinson Ecological Design (“WED”), on behalf of A/C MHP, seeking site-specific information for state-listed species found on the Campground. *Division’s Prehearing Statement at 2.* On August 19, 2016 the Division provided the requested site-specific state-listed species information, including informing A/C MHP that the Campground is within Priority Habitat of, among other state-listed species, the EBT. *Id.* On August 22, 2016 the Division received a letter from Bennett Environmental Associates (“BEA”), on behalf of A/C MHP, seeking confirmation from the Division that A/C MHP’s upgrade of sewage disposal facilities at the Campground, which BEA indicated had already begun in early spring of 2016, was exempt from review in accordance with 321 CMR 10.14(6). *Id.* On August 29, 2016 the Division responded by email that the upgrade was not exempt under 321 CMR 10.14(6) because the exemption did not apply to upgrades to unpaved roads and the sewage treatment facility did not appear to be within a previously landscaped or lawn area. *Id.* The Division directed A/C MHP to submit a MESA Project Review

¹ Pursuant to 321 CMR 10.12, the Division has delineated the geographic extent of habitat for state-listed species within the Commonwealth (“Priority Habitat”), as shown in the Division’s *Natural Heritage Atlas*.

² “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.

Checklist, supporting documentation and filing fee to initiate the MESA review process in accordance with 321 CMR 10.18. *Id. at 3.* By email dated September 21, 2016, WED provided supplemental information regarding A/C MHP activities and a proposed plan to restore the resulting impacts to Priority Habitat. *Id.* Thus, by September, 2016 the Division had confirmation that A/C MHP had initiated construction and land clearing activities on the Campground without completing the MESA review and, if needed, the permitting process under 321 CMR 10.18³ and 10.23⁴ respectively. Thereafter, on October 31, 2016, WED submitted a MESA Project Review Checklist and a revised restoration plan to the Division for the purpose of determining whether the work and associated land clearing activities resulted in a Take of state-listed species. *Division's Prehearing Statement at 3.* In response, the Division determined that the work at the Campground resulted in the clearing of 11.7 acres of Priority Habitat for the EBT. *Id.* In January 2017 A/C MHP provided the Division with supplemental information on the extent to which the total acreage of unpermitted work had occurred in pre-existing disturbed areas. *Id.* The Division's Take Determination issued on February 15, 2017 confirmed that A/C MHP's activities "has and will result in a Take" of the EBT, but reduced the total acreage of unpermitted work from 11.7 acres to 9.11 acres based on the Division's determination that 2.59 acres were pre-existing disturbed areas. *Division's Take Determination at 2.*

On February 21, 2017 A/C MHP (the "Petitioner") filed a Notice of Claim for an Adjudicatory Hearing with the Division pursuant to 321 CMR 10.25(1). The Petitioner's appeal states that the activities alleged to have caused a Take was work ordered by the Massachusetts

³ 321 CMR 10.18 requires any Project or Activity proposed to take place in Priority Habitat to be reviewed by the Division to determine if it will cause a Take of a state-listed species. "Project or Activity" is broadly defined in 321 CMR 10.02 to mean "any action, including, but not limited to...(a) grading...excavating; (c) the construction, reconstruction, improvement or expansion of roads and other ways...(d) the installation of ...sewage...systems; (g) the destruction of plant life;" and the other actions specified thereunder.

⁴ Under 321 10.23 a Take of a state-listed species may be authorized by the Division through its issuance of a Conservation and Management Permit, provided the applicant meets the performance standards specified therein.

Department of Environmental Protection (“MassDEP”) to upgrade A/C MHP’s current subsurface sewage disposal system by installing a private sewage treatment facility to serve existing campsites at a long established commercial campground facility. *Notice of Claim at 1.* As grounds for its appeal, the Petitioner claims that (1) under 321 CMR 10.14(6)⁵ this upgrade work is exempt from the Division’s review and permitting requirements of 321 CMR 10.18 through 10.23; and (2) the Project site no longer provides important habitat for the state-listed species and should be excluded from the delineated Priority Habitat for the EBT pursuant to 321 CMR 10.12(4).⁶

On March 20, 2017 I provided notice to the Division and A/C MHP (the “Parties”) of my appointment by the Division Director as the Presiding Officer for this appeal, scheduled a prehearing conference for April 27, 2017, and ordered the Parties to confer as to whether the matter could be resolved by settlement and to submit their prehearing statements by April 20, 2017.

On March 29, 2017 the Division responded to a request made by A/C MHP for reconsideration of the Division’s delineation of the Property as Priority Habitat by providing it with information from the Division’s files that were used as the basis for the delineation. *Division’s Prehearing Statement at 4; see also 321 CMR 10.12(8).* However, the Division did not thereafter receive a written request from A/C MHP to proceed with the reconsideration as required by 321 CMR 10.12(8). *Id.*

⁵ 321 CMR 10.14 sets forth 18 categories of projects and activities that are exempt from the Division’s review and permitting requirements of 321 CMR 10.18 through 10.23. The category at 321 CMR 10.14(6) exempts from such review:

“the construction, repair, replacement or maintenance of septic systems, private sewage treatment facilities, utility lines, sewer lines, or residential water supply wells within existing paved areas and lawfully developed and maintained lawns or landscaped areas, provided there is no expansion of such existing paved, lawn and landscaped areas.”

⁶ 321 CMR 10.12 sets forth the Division’s requirements and procedures for delineating Priority Habitat of state-listed species. As specified therein, 321 CMR 10.12(4) allows the Division to exclude areas previously disturbed by projects or activities from delineated Priority Habitat.

On April 18, 2017 the Parties filed a Joint Motion to Stay the Adjudicatory Proceeding Pending Further Settlement Negotiations. I granted the Parties' Motion on April 19, 2017 and ordered them to file a Joint Status Report by May 18, 2017. Thereafter, I agreed to the Parties' further requests to stay this adjudicatory appeal for almost a year and a half based on their representations in joint status reports that they were engaged in good faith settlement negotiations. Then, in response to their September 11, 2018 Joint Status Report on Settlement Negotiations that reported that the Petitioner did not wish to continue settlement discussions, I issued an Order on September 14, 2018 that the Parties file their prehearing statements by October 18, 2018. As required by my September 14, 2018 Order, the prehearing statements filed by the Division and the Petitioner included a list of their respective witnesses and a brief description of each witness' proposed testimony. The Petitioner's October 18, 2018 Prehearing Statement identified Seth Wilkinson, principal of WED, as its expert witness and described his proposed testimony as providing an "[e]cological assessment of [the] campground facility." *Petitioner's Prehearing Statement at 2.*

In my October 25, 2018 Response to Prehearing Statements and Order, I set forth the issues for adjudication and established the schedule for adjudication. More specifically, I noted that the Petitioner and the Division took different approaches to identifying the issue(s) for adjudication in their respective prehearing statements. The Division's position is that the only issue for adjudication is whether it properly applied its regulatory criteria at 321 CMR 10.18 when the Division made its Take Determination. The Petitioner's proposed issues for adjudication essentially seek a legal resolution of the two grounds for its appeal. I stated that all three issues "are relevant to adjudicating this appeal," which I set forth as follows:

1. *Whether the Petitioner's land clearing activities in connection with its upgrade of a subsurface sewage disposal system serving an existing commercial campground facility are*

exempt from the requirements of 321 CMR 10.18 through 10.23, pursuant to 321 CMR 10.14(6).

- 2. Whether the Petitioner's pre-existing commercial campground facility no longer provides important habitat for state-listed species such that, under 321 CMR 10.12(4), it should be excluded from the delineated priority and estimated habitat of the Eastern Box Turtle.*
- 3. Whether the Division properly applied its regulatory criteria at 321 CMR 10.18 when it made its February 15, 2017 determination that the Petitioner's land clearing activities resulted in an unpermitted Take of the Eastern Box Turtle.⁷*

In accordance with the schedule for adjudication, the Division and the Petitioner filed the prefiled written direct testimony of their respective witnesses on December 20, 2018. The Division submitted Prefiled Written Direct Testimony ("PDT") from two witnesses, Amy Hoenig and David Paulson.

The PDT of Ms. Hoenig, an Endangered Species Review Biologist for the Division's Natural Heritage and Endangered Species Program ("NHESP"), which includes 21 Exhibits, sets forth her qualifications as an expert witness (§§ 1-10); provides a background summary of the Campground site and its status as Priority Habitat for the EBT⁸ and the chronology and nature of the Division's interactions with A/C MHP leading up to the Division's Take Determination and A/C MHP's initial request for reconsideration of the Property delineation as Priority Habitat (§§ 11-33); explains why A/C MHP's land clearing activities are not exempt under 321 CMR 10.14(6) (§§ 34-44); describes the important habitat features of the Property and why it was properly delineated as Priority Habitat for the EBT (§§ 45-58); and discusses the basis for the Division's determination that A/C MHP's activities resulted in a Take of the EBT, including how the Division applied the regulatory criteria at 321 CMR 10.18 (§§ 59-68).

⁷ In Section III of this Recommended Decision, I have further explained and clarified my understanding of the relationship of the above issues identified for adjudication and the scope of appealable decisions under the MESA Regulations.

⁸ Ms. Hoenig testified that the site of the Campground has been continuously delineated as Priority Habitat for the EBT since 1988, when the first edition of the *Natural Heritage Atlas* was published by the Division. Hoenig PDT at ¶ 12.

Ms. Hoenig's PDT concludes by expressing her expert opinion that: (1) A/C MHP's unpermitted land clearing activities are not exempt from the review requirements of 321 CMR 10.18 through 10.23 because it included the clearing of forest within the Lower Loop, the installation of utility lines within the Upper Loop occurred within unpaved roadways, and the unauthorized clearing within the Upper Loop included the destruction of 9.11 acres of natural forested areas that provide suitable habitat for the EBT; (2) the Campground is properly delineated as Priority Habitat consistent with the Division's EBT Mapping Guidelines based on (a) the habitat features it provides to the EBT, and (b) the 64 occurrence records of EBTs observed on and in the immediate vicinity of the Property, including 4 occurrences within the Property boundaries; and (3) the Division properly applied its regulatory requirements at 321 CMR 10.18 when it determined that the unpermitted clearing resulted in a Take of the EBT by (a) directly harming or killing of individual EBTs, (b) the destruction of Priority Habitat, and (c) the disruption of EBT feeding, breeding, nesting, sheltering, migratory, and overwintering activities. *Hoenig PDT at Section VI.*

The PDT of Mr. Paulson, a Senior Endangered Species Review Biologist for NHESP, which includes 9 Exhibits, sets forth his qualifications as an expert witness (§§ 1-9); describes the regulatory requirements and the related Division guidelines for delineating Priority Habitat (§§ 10-17); discusses the habitat requirements and life stages of the EBT and the Division guidelines for delineating Priority Habitat for the EBT (§§ 18-34); summarizes the pre and post clearing conditions of the Campground (§§ 35-43); discusses the EBT occurrence observations on or in the immediate vicinity of the Campground, the evidence of a local population of EBTs in the surrounding landscape, and the state-wide conservation significance of the EBT population in Truro (§§ 44-58); summarizes his overall conclusions regarding the Division's delineation of

the Property as Priority Habitat for the EBT (§§ 59-63); and describes how the Division applied its regulatory criteria at 321 CMR 10.18 resulting in the Division's Take Determination (§§ 64-79). Similar to Ms. Hoenig, Mr. Paulson's PDT concludes by expressing his expert opinion that the Campground is properly delineated as Priority Habitat for the EBT and that the application of the regulatory requirements at 321 CMR 10.18 to the evidence summarized in his testimony supports the Division's determination A/C MHP's unpermitted land clearings resulted in a Take of the EBT. *Paulson PDT at Section IV.*

On December 20, 2018 the Petitioner submitted PDT from three witnesses: Wayne Klekamp, James Bourne and Greg Morris. The PDT of Mr. Klekamp, the President of A/C MHP and owner of Horton's Campground, which includes 35 Exhibits, summarizes the history of the Campground from when it first began operating as a campground since at least 1950, identifying the various approvals it received over the years from local permitting authorities. *Klekamp PDT at §§ 3-12.* He further recounts, since acquiring ownership of the Campground in 2012, the history of actions associated with A/C MHP's upgrade of the existing sewage disposal system and the related interactions with the Cape Cod National Seashore Advisory Commission, MassDEP (and its administrative consent order with A/C MHP requiring the system upgrade), and the Town of Truro Board of Health, Planning Board, including the Stop Work Order issued by the Building Inspector in response to the upgrade work and the resulting appeal by A/C MHP to Zoning Board of Appeals and then to Superior Court. *Klekamp PDT at §§ 18-47.*

The PDT of James Bourne, who is employed by A/C MHP as the Campground manager, describes the composition of the internal roadways within the Campground. *Bourne PDT at §§ 3-8.* He testified that the hardening material in these roads "is an aggregate, containing crushed asphalt, brick and concrete ('ABC')...on the average 6 to 8 inches thick." *Id. at §§ 5 and 7.* Mr.

Bourne also testified that “[a]fter the installation under the existing roadways, the existing roadways were not widened, relocated, or enlarged, and are in the same location and configuration as the original roadways.” *Id. at ¶ 10*. Finally, his PDT discusses the rationale for the removal of trees associated with the installation of the sewage system, as well as his general duties and approach to landscaping areas within and around campsites and related facilities. *Bourne PDT at ¶¶ 12-16*.

The PDT of Greg Morris, the President of GFM Enterprises, Inc., explains that he was hired by A/C MHP to install sewer pipes and related underground utilities at the Campground and describes how this construction work was implemented on-site, including representative photos documenting the work as Exhibit A to his PDT. Consistent with James Bourne’s testimony, Mr. Morris testified that “[d]uring trench excavation, I encountered 6-8 inches of crushed asphalt, brick, and concrete, which formed a solid, cohesive, and impervious surface for the roadways.” *Morris PDT at ¶ 10*.

None of the above three witnesses of A/C MHP claim to have expertise in state-listed species matters or otherwise provided testimony related to the Campground’s status as Priority Habitat for the EBT or the Division’s application of the regulatory criteria at 321 CMR 10.18 that resulted in its determination that A/C MHP’s unpermitted land clearing activities caused a Take of the EBT.

The Petitioner’s filing on December 20, 2018 also included a Motion for Leave to Identify Additional Expert Witnesses for Rebuttal. As grounds for its Motion, the Petitioner stated that it was apprised on December 5, 2018 by Seth Wilkinson, the expert witness identified in the Petitioner’s October 18, 2018 Prehearing Statement, that he is no longer available to testify, and that efforts to obtain alternative qualified experts to prepare testimony for submittal

on this day (i.e., December 20, 2018) had been unsuccessful to date. The Petitioner's Motion sought permission to identify additional experts for the purpose of submitting rebuttal testimony on January 31, 2019 (the date established in the schedule for adjudication for the filing of rebuttal testimony). The Division responded on December 26, 2018 that it did not oppose the Petitioner's Motion, but requested that the Petitioner be limited to rebutting the prefiled written direct testimony of the witnesses filed by the Division on December 20, 2018, and that if the Petitioner is allowed to expand the scope of the testimony of its expert witness or witnesses beyond rebutting the testimony of the Division's witnesses, the Division be given an opportunity to rebut any new testimony offered by the Petitioner. I granted the Petitioner's Motion in a Ruling and Order dated December 27, 2018, subject to the condition that the written testimony of any expert identified by the Petitioner is limited to rebutting the direct testimony of the Division's two witnesses.

On January 22, 2019 counsel for the Petitioner electronically filed what he described in his accompanying email as the "Prefiled Direct Testimony" of Kevin Aguiar. Mr. Aguiar identifies himself as Vice President of BETA Group, Inc. ("BETA"), which was retained to prepare documents to support a Site Plan Review application by A/C MHP to the Truro Planning Board. *See Aguiar PRT at ¶ 10.* However, his testimony does not set forth his qualifications to support the opinions expressed therein, particularly with respect to the provisions of the MESA regulations discussed below.⁹ Mr. Aguiar's testimony begins by providing a rebuttal to ¶ 38 of Amy Hoenig's PDT, which states as follows:

"Moreover, when reviewing projects pursuant to 321 CMR 10.14, the Division has consistently interpreted 'lawfully developed and maintained lawns or other landscaped areas' as having existed prior to the delineation of the areas as Priority Habitat in the Massachusetts Natural Heritage Atlas; having received review and approval pursuant to

⁹ The Petitioner subsequently filed a Motion for Summary Decision that also attached a copy of Mr. Aguiar's resume, which the Petitioner stated had been inadvertently omitted from Mr. Aguiar's PRT.

MESA 321 CMR 10.18 and or 10.23; or having qualified under the grandfathering provisions outlined in 321 CMR 10.13(2) for Projects or Activities that met permitting thresholds prior to the site being delineated as Priority Habitat in the Massachusetts Natural Heritage Atlas. The ± 11.7 acres of clearing by A/C Mobile expanded far beyond the ± 2.59 acres of pre-existing lawfully developed and maintained campground areas to include the disturbance of ± 9.11 acres of undeveloped natural vegetation providing suitable habitat for the EBT.”

Mr. Aquiar characterizes the above testimony of Ms. Hoëmig as her recognizing that Horton’s “is among ‘Projects or Activities’ that qualify under the grandfathering provisions under 321 CMR 10.13(2).”¹⁰ *Aquiar PRT at ¶ 3*. He then opines that the Campground is “protected from MESA review under 321 CMR 10.12(2)(c)(2) [sic]¹¹ because, established in 1950, the Campground preceded the mapping of the area as priority habitat for which several documented building permits were issued.” *Id. at ¶ 4 and Attachment A; see also ¶ 17*. Mr. Aquiar further states that “[i]f there is agreement that the campground itself is grandfathered (which there is, because I agree with Ms. Hoëmig’s testimony that there is ‘ ± 2.59 acres of pre-existing lawfully developed and maintained campground areas’), then it is not reasonable to argue that necessary repairs to the campground are not.” *Id. at ¶ 5*. He characterizes the construction impacts are “temporary,” and states that A/C MHP “has agreed to mitigate all impacts to habitat” by implementing the restoration plan prepared by WED. *Id. at ¶ 6*.

Mr. Aquiar’s PRT also responds to the Division’s position that the total acreage of unpermitted impacts is 9.11 acres. He states that since no pre-construction existing conditions plan was prepared, “any calculation or comparison of the extent of post-construction impacts to pre-construction conditions is based on assumptions only.” *Aquiar PRT at ¶ 7*. Citing the

¹⁰ 321 CMR 10.13(2) provides that Project or Activities that were not in Priority Habitat when they were proposed but the project site is thereafter delineated by the Division as Priority Habitat shall not be subject to review by the Division pursuant to 321 CMR 10.18, provided the applicable milestones set forth in 321 CMR 10.13(2)(a)-(d) have been met prior to the project site being mapped as Priority Habitat or within the timeframes specified therein.

¹¹ I presume from the context that Mr. Aquiar meant to cite 321 CMR 10.13(2)(c)(2), which exempts from review by the Division pursuant to 321 CMR 10.18 project or activities that have been issued a building permit before the site of the proposed project was delineated as Priority Habitat (and have met the other conditions specified thereunder).

explanation and calculation by the Petitioner's consultant, WED, contained in Attachment 14 of Ms. Hoenig's PDT, Mr. Aguiar states that this information "indicates that 2.59 acres was a reasonable estimation of allowable impact within the campground facility." *Aguiar PRT at ¶ 14*. However, he sets forth his own assumptions and calculations to support his opinion that more of the impacts should be considered to be within the roadways and the pre-existing lawfully developed and maintained campground areas, thereby reducing the total acreage of unpermitted impacts from 9.11 acres to 6.5 acres. *Aguiar PRT at ¶¶ 15 and 16 and Attachment D*.

On January 23, 2019 the Division filed a Motion to Strike Testimony of Kevin Aguiar. In support of its Motion, the Division stated that the Petitioner's December 20, 2018 Motion for Leave to Identify Additional Expert Witnesses for Rebuttal sought to replace the expert testimony of Seth Wilkinson, who was to provide an ecological assessment of the Campground. The Division argued that allowing Mr. Aguiar's testimony would prejudice the Division because (1) he had not been previously identified in the Petitioner's Prehearing Statement as a witness; (2) his testimony is outside the subject matter of what Seth Wilkinson was to testify to; (3) and he has provided no basis to qualify him as an expert who could provide rebuttal testimony as to the ecological assessment of the Campground.

On January 24, 2019 the Petitioner filed an Opposition to the Division's Motion to Strike, characterizing my December 27, 2018 Ruling and Order as allowing a previously unidentified witness of the Petitioner to file rebuttal testimony provided that such testimony be limited to the scope of the Division's Prefiled Direct Testimony. The Petitioner stated that because Mr. Aguiar's testimony is limited to rebutting issues raised in Amy Hoenig's PDT, the Division's Motion to Strike should be denied.

In my January 29, 2019 Ruling denying the Division's Motion to Strike, I determined that the fact that the Petitioner chose to submit the testimony of Mr. Aguiar to rebut certain other aspects of Ms. Hoenig's PDT is not so far outside the bounds of my December 27, 2018 Ruling and Order to warrant striking his testimony. However, I stated that I will treat it as rebuttal testimony consistent with its content. Finally, I noted that the Division would have the opportunity to address the question of Mr. Aguiar's qualifications as an expert and the evidentiary weight his testimony should be accorded in any dispositive motion the Division may choose to file and/or through its cross examination of him at a hearing.

On January 29, 2019 the Division filed the Prefiled Written Rebuttal Testimony ("PRT") of its two witnesses, David Paulson and Amy Hoenig. On the issue of whether A/C MHP's land clearing activities are exempt from MESA review requirements of 321 CMR 10.18 through 10.23, the PRT of Mr. Paulson and Ms. Hoenig both begin by responding to the PDT of two of the Petitioner's witnesses, James Bourne and Greg Morris, who testified that the Campground roadways are composed of "ABC" and are therefore "paved" roads covered under the exemption at 321 CMR 10.14(6). *See Hoenig PRT at ¶¶ 9-12; Paulson PRT at ¶¶ 4, 8-10.*

In his PRT, Mr. Paulson explained that in his capacity as the Division's transportation liaison to the Massachusetts Department of Transportation ("MassDOT"), he has reviewed an array of MassDOT, municipal and private roadway projects involving the construction of different types of roadways and infrastructure, and as a result, has regularly interpreted the applicability of the MESA exemptions at 321 CMR 10.14. *Paulson PRT at ¶ 4.* He testified that he reviewed the PDT of two of the Petitioner's witnesses, Mr. Bourne and Mr. Morris, who both describe the roadways as being "composed of aggregate material containing crushed asphalt, brick and concrete ('ABC') 6-8 inches thick and 'impervious,' forming a 'cohesive and sable

pavement.”” *Id. at* ¶ 8. Mr. Paulson noted that ABC is traditionally used as a base layer under paved asphalt roads, concrete slabs, and structural foundations. *Id. at* ¶ 9. While he agreed with Mr. Morris that ABC provides a stable surface, he testified that ABC is designed to be “permeable in order to provide drainage for the overlaid pavement structure” and is not considered to be a paved surface, but is akin to a gravel roadway. *Id. at* ¶¶ 9-10. Consistent with Mr. Paulson’s PRT, Ms. Hoenig testified that after reviewing the photos included with Mr. Morris’ PDT, she regarded the vegetation roots shown in the photos as evidence that the pre-existing roadway surface was permeable. *Hoenig PRT at* ¶ 10. Ms. Hoenig also cited to the description of the roadways by A/C MHP’s consultant, WED, in the MESA Project Checklist as “dirt and gravel roads,” which is consistent with the description of the roadways in the June 13, 2017 decision of the Town’s Zoning Board of Appeals and with WED’s photos of the roads included as Attachment 10 of Ms. Hoenig’s PDT. *Id. at* ¶ 11.

Mr. Paulson concluded his rebuttal testimony on this issue by opining:

“[w]hen reviewing projects pursuant to 321 CMR 10.14, the Division has consistently interpreted ‘paved areas’ as solid, uniform imperious surface comprised of heated/treated asphalt or poured concrete that is regularly maintained. As a result of these differences, the applicability of paved and unpaved roads are articulated in the MESA exemption at 321 CMR 10.14. Based on the information provided, the Campground’s roadways are not considered by NHESP to be ‘paved,’ and therefore, the unpermitted clearing and utility installation would not qualify as exempt from MESA review.” *Paulson PRT at* ¶ 10.

Ms. Hoenig further testified that even if the roadways had been paved, A/C MHP’s unpermitted clearings would still not qualify as exempt under 321 CMR 10.14(6) because the unpermitted clearings went far beyond the roadways and resulted in the destruction of ±9.11 acres of pitch-pine oak woodland. *Hoenig PRT at* ¶ 13. Similarly, she testified that the unpermitted clearings would not qualify for the separate exemption under 321 CMR 10.14(10), which allows utility work within 10 feet from the edge of existing paved roads, because the

extent of unpermitted clearings far exceeded the scope of clearing allowed under this exemption.

Id. at ¶ 14, citing to the referenced maps in Attachments 1 and 2.

Finally, Ms. Hoenig's PRT explained that 321 CMR 10.14(6) seeks to differentiate between "lawfully developed and maintained lawns or landscaped areas," which, typically, do not provide habitat for state-listed species, and areas of naturalized vegetation, which are likely to do so. *Hoenig PRT at ¶ 16.* The Division has therefore consistently interpreted "lawn" or "landscaped areas as being maintained or manicured on a regular basis. *Id.* Pointing to Mr. Bourne's PDT and the photos included with Mr. Morris' PDT, Ms. Hoenig opined that they both support the Division's assessment that the impacted ±9.11 acres of pitch-pine oak woodland within Upper Loop at Horton's rarely, if ever, experienced vegetation management and occurred outside of "existing paved areas and lawfully developed and maintained lawns or landscaped areas" covered by the exemption at 321 CMR 10.14(6). *Id. at ¶¶ 18-19.*

On the issue of whether the Project site is properly delineated as Priority Habitat, Ms. Hoenig and Mr. Paulson testified that the PDT of James Bourne and Greg Morris support the Division's position that the site contained suitable habitat for the EBT prior to the unpermitted land clearing by A/C MHP. *See Hoenig PRT at ¶¶ 23-33; Paulson PRT at ¶¶ 11-19.* They both testified that Mr. Bourne's description of the area of unpermitted clearing as "natural" and consisting of "native plants and trees," subject only to managing the vegetation on an infrequent or as-needed basis to provide access to campsites or for safety reasons, supports the Division's assessment that the Upper Loop was suitable habitat for the EBT and that the minimal landscaping activities would not have affected the ability of the site to provide suitable overwintering, foraging, resting, and migratory habitat for the EBT. *See, in particular, Hoenig PRT at ¶ 28; Paulson PRT at ¶¶ 15-17 and ¶¶ 18-19 (discussing Mr. Paulson's November 18,*

2018 site visit). Ms. Hoenig and Mr. Paulson also testified that the photos included with Mr. Morris' PDT, in turn, document evidence of the site conditions prior to the unpermitted clearing (i.e., a native overstory, understory, organic duff layer, and underlying sandy soils) that served as habitat for the EBT and are consistent with extent and contiguity of high quality EBT habitat surrounding the Campground and the 64 EBT occurrence records on or in the immediate vicinity of the Property. *See, in particular, Hoenig PRT at ¶¶ 30-33; Paulson PRT at ¶¶ 17-22.*

On the third and final issue of whether the Division properly applied its regulatory criteria at 321 CMR 10.18 when it made its Take Determination, the PRT of Mr. Paulson and Ms. Hoenig both cite to the testimonies of all three of the Petitioner's witnesses as confirming that the unpermitted clearings occurred during the EBT's overwintering period (mid-October through mid-April) when the turtles were in the forested habitats. *Hoenig PRT at ¶ 35; Paulson PRT at ¶¶ 26-27.* Because A/C MHP did not apply for review by the Division or otherwise implement Division-required EBT protection measures (e.g., installing temporary barriers to prevent the turtles from accessing the construction area or having a qualified biologist search for and remove any turtles from the work area) prior to the unpermitted clearing, Ms. Hoenig and Mr. Paulson both opined that the destruction of this habitat likely resulted in a Take through the direct harming or killing of individual EBTs. *Hoenig PRT at ¶ 36; Paulson PRT at ¶¶ 27-28.* They also testified that, as documented by Mr. Morris' photos, the exposed mineral soils and increased solar exposure resulting from the unpermitted clearing is likely to attract a larger number of EBTs to the campground areas in the Upper Loop to nest and bask in these attractive habitat features, thereby creating new risks of ongoing harm to EBTs and hatchlings and eggs from humans and/or predators. *Hoenig PRT at ¶¶ 38-39; Paulson PRT at ¶¶ 30-31.* Ms. Hoenig and Mr. Paulson each concluded on this issue that the Division properly determined that A/C

MHP's unpermitted clearing resulted in a Take of the EBT through: a) harming and/or killing of individual EBTs; b) the degradation and destruction of suitable habitat; and c) interference with the EBT's feeding, breeding, nesting, sheltering, migratory, and overwintering activities. *Hoening PRT at ¶ 40; Paulson PRT at ¶ 33.*

The Schedule for Adjudication of this appeal allowed the parties to file any dispositive motions by March 14, 2019. The Schedule also established a May 15, 2019 date for the hearing, but was silent on the status of the hearing in the event that any dispositive motions were filed by the Parties and still pending by the date of the hearing.

On February 7, 2019 the Division filed a Motion for Directed Decision for Petitioner's Failure to Sustain a Direct Case. In setting forth the standard of review for its Motion, the Division states that the Petitioner has the burden of proof of showing that the Division erred when it made its Take Determination, as well as the initial evidentiary burden of going forward by presenting a direct case with sufficient support for its position. *Division's Motion for Directed Decision at 6.* Moreover, the Division states, the Petitioner must produce competent evidence from a credible source when making an offer of proof sufficient to meet its burden of proof. *Id. at 7.* Otherwise, the Division is entitled to move for dismissal of the Petitioner's claims on the ground that by reason of the facts or the law the Petitioner has failed to sustain its case. *Id.*

In moving for a directed decision, the Division argues that "read as a whole, the Petitioner's direct and rebuttal testimony which comprises the Petitioner's entire direct case, is "completely devoid of any evidence that the Division erred in delineating the Campground as Priority Habitat, or determining that the unpermitted clearing has or will cause a Take of the EBT." *Division's Motion for Directed Decision at 19.* Specifically, the Division states that the Petitioner has not met its burden of going forward on the issue of whether its land clearing activities are

exempt from review under 321 CMR 10.18 through 10.23. *Division's Motion for Directed Decision at 7-13.* First, the Division argues, it is well settled that an agency interpretation of its own regulations is entitled to substantial deference and will not be overturned unless it is arbitrary, unreasonable or inconsistent with the plain terms of the regulations itself. With that standard of review in mind, the Division argues that for the purposes of the exemption at 321 CMR 10.14(6), it has reasonably and consistently interpreted dirt and gravel roads comprised of ABC not to be "paved" roads, and that even if the Division agreed the roads were paved, the unpermitted clearing of ± 9.11 acres of EBT Priority Habitat far exceeds what would have been allowed under the exemptions at 321 CMR 10.14(6) or (10). Similarly, based on its reasonable and consistent interpretation of the terms "lawfully developed and maintained lawns or landscaped areas" in 321 CMR 10.14(6), the Division properly excluded ± 2.59 acres of from its calculation of the total acreage of unpermitted impacts. Finally, the Division contends that Mr. Aquiar misinterprets 321 CMR 10.13 and Ms. Hoenig's PDT at ¶ 38 in which she points out that Projects or Activities "that met permitting thresholds prior to the site being delineated as Priority Habitat" are "grandfathered." The Division states that the grandfathering provisions in 321 CMR 10.13 do not apply because at the time of A/C MHP's unpermitted clearing activities the Campground was delineated as Priority Habitat.

The Division further asserts that the Petitioner also has not met its burden of going forward on the issue of whether its pre-existing Campground no longer provided important habitat features such that it should be excluded from EBT Priority Habitat pursuant to 321 CMR 10.12(4). *Division's Motion for Directed Decision at 14-16.* Specifically, the Division contrasts the "detailed and fully supported testimony" of its two witnesses on this issue with what it characterizes as "no testimony from a competent witness" of the Petitioner "to refute the

Division's determination, based on the Best Scientific Evidence Available, that the Campground is and was properly delineated as Priority Habitat for the EBT." *Id. at 15*. The Division argues that testimony from the Petitioner's witnesses was limited to explaining the context and reasons for the cutting trees and vegetation on-site, instead of producing competent evidence on the biology and habitat requirements of the EBT to meet its burden of showing why the Campground should not be delineated as Priority Habitat. *Id.*

Finally, again highlighting the "robust and detailed" PDT and PRT of its witnesses, the Division argues that the PDT of the Petitioner's witnesses "did not address in any way the question of whether the Division erred when it determined that the ± 9.11 acres of Priority Habitat has and will cause a Take of EBT." *Division's Motion for Directed Decision at 16-19*. Responding to what it viewed as Kevin Aquiar's attempt to address this issue in ¶¶ 6 and 14 of his PRT, the Division argues that Mr. Aquiar provides no basis for showing why he is competent to testify on the nature of EBT habitat, disputes his claim that the habitat impacts are "temporary" and will be fully mitigated by WED's plan, and considers these latter assertions as evidence of Mr. Aquiar's misunderstanding of the need to comply with the MESA review requirements under 321 CMR 10.18 and 10.23. *Id. at 17*. In short, the Division concludes, the Petitioner provided no credible testimony to support its argument that the Division's Take Determination was in error. *Id. at 19*. For the reasons stated in its Motion, the Division therefore requests that I dismiss the Petitioner's appeal and issue a directed decision in its favor.

On February 14, 2019 the Petitioner filed an Opposition to the Division's Motion for Directed Decision, which included a copy of the resume of Kevin Aquiar, which the Petitioner stated had been inadvertently omitted from his PRT. The Petitioner states that the Division's Motion should be denied because it erroneously relies solely upon its assertion that the

Petitioner's witnesses have no experience or expertise as to the biology, including habitat requirements of the EBT or the MESA regulations and their application. *Petitioner's Opposition at 1.* The Petitioner argues that the first two of the three issues for adjudication, which raise questions of "MESA jurisdiction over state-mandated improvements to a pre-existing campground," are "purely legal issues" that do not require the Petitioner's witnesses to be "MESA experts to testify to facts that support this proposition." *Id. at 1-2.* Notably, the Petitioner then states as follows:

"The third issue for adjudication, whether the Division properly determined that the Petitioner's construction activities resulted in a take, was proposed by the Division, and is not addressed in any of the Petitioner's testimony because the Petitioner has not challenged the Division's determination of a take. This issue is moot if the campground and improvements thereto are exempt and/or grandfathered under MESA."

Id. at 2.

Thus, the Petitioner states, because the testimony of its witnesses address the first two issues for adjudication only, the Division's reliance on the lack of expert testimony from witnesses qualified in wildlife habitat in support of its Motion for Directed Decision is misplaced. *Id.*

The Petitioner argues that dismissing an appeal for failure to sustain a case (i.e., a directed decision) is appropriate when party's direct case presents no evidence from a credible source in support of its position on the identified issues, and that this standard has been "easily met" by the Petitioner. *Petitioner's Opposition at 3-4.* On the issue of whether A/C MHP's land clearing activities are exempt under 321 CMR 10.14(6), the Petitioner argues that by testifying to the fact that the internal roadways in the Campground contain ABC that acts as a hardened surface for vehicles to travel over, the PDT of James Bourne and Greg Morris provide credible evidence that these roads are "paved areas" within the meaning of the exemption. *Id. at 4.* The Petitioner further notes that the phrase "paved areas" is not defined in the MESA

regulations or in any reported case law, and argues that “[i]t is not reasonable to conclude that the entire private treatment plant must be constructed within the limits of ‘paved areas.’” *Id.* at 5. The Petitioner claims that, in contrast, the Division has provided no support for its own view of what it considers “paved areas” or explained why two asphalt roadways bordering the Campground do not qualify under the exemption. *Id.*

The Petitioner’s Opposition also elaborates on a claim first made in Kevin Aquiar’s PRT – that the pre-existing Campground as well as the upgrade to the Campground’s sewage disposal system that is the subject of the Division’s Take Determination are both grandfathered under 321 CMR 10.13. *Petitioner’s Opposition* at 6-9. The Petitioner points to the PDT of Wayne Klekamp as establishing that the Campground was in existence prior to the site being mapped as Priority Habitat in 1988, and to Kevin Aquiar’s PRT as specifically documenting that building permits were also issued for the construction of the Campground prior to its mapping as Priority Habitat. *Id.* at 7. The Petitioner asserts that the testimony of Mr. Klekamp and Mr. Aquiar “are conclusive in providing credible and documented facts supporting Petitioner’s qualification under the grandfathering provisions.” *Id.* The Petitioner characterizes ¶ 38 of Ms. Hoenig’s PDT as conceding that the pre-existing Campground is grandfathered under 321 CMR 10.13, “assigning a footprint of” ± 2.59 acres of lawfully developed and maintained areas therein, but determining that impacts outside of these areas are not. *Id.* The Petitioner asserts that it is “patently arbitrary and capricious” for the Division to claim that the Campground is grandfathered but the “temporary disturbances resulting from maintenance and state-mandated improvements to the infrastructure of the campground are not.” *Id.* at 8.

Finally, the Petitioner Opposition argues that no credible testimony by the Division contradicts Mr. Morris’ PDT that the construction impacts to vegetation were limited to those

necessary to install the utilities within the existing roadways, and that Mr. Aquiar is qualified as a P.E. to provide his opinion on the scope of acreage impacted by A/C MHP's activities.

Petitioner's Opposition at 8-9. The Opposition concludes by stating that because the Petitioner's testimony provides sufficient basis to rule that the Campground is exempt, and alternatively, grandfathered from the MESA Regulations, the Division's Motion for Directed Decision should be denied. *Id. at 9.*

On March 13, 2019 the Petitioner filed a cross Motion for Summary Decision, which explains that following its appeal of the Division's Take Determination, "the ensuing submittal of prefiled direct and rebuttal testimony has raised the issue, not previously identified, of whether the so-called grandfathering provisions under 321 CMR 10.13(2) apply to this project."

Petitioner's Motion for Summary Decision at 2-3. The Petitioner asserts that Ms. Hoenig's PDT "conflates the exemption provision under 321 CMR 10.14(6) with the grandfathering provisions under 321 CMR 10.13(2)," claiming that her position is that A/C MHP does not qualify for either the exemption or grandfathering because its land clearings extended far beyond the ± 2.59 acres of pre-existing lawfully developed and maintained Campground areas. *Id. at 3.* The Petitioner regards Ms. Hoenig's PDT, as characterized above, as a "blatant mis-application of the regulations [that] would not survive judicial scrutiny [] as an arbitrary, capricious, and unlawful application of the regulations." *Id. at 4.* The Petitioner argues that Kevin Aquiar's PRT successfully rebutted Ms. Hoenig's PDT when he testified that the Campground and the sewage system serving it qualified for grandfathering under 321 CMR 10.13(2)(c)(2) because the Campground was established in 1950 and was issued building permits prior to the mapping of the Property as Priority Habitat. *Id.* Consequently, the Petitioner contends, "there is no genuine dispute as to the material facts regarding the lawfully permitted existence of the of the [sic]

sewage system prior to commencement of its upgrade, and as a matter of law, the system upgrade is grandfathered under 321 CMR 10.13(2)(c)(2), even if its construction impacts extend beyond the internal roadways where the sewer pipes had been installed.” *Id. at 4-5.*

Specifically, the Petitioner argues that the pre-existing Campground and the “numerous infrastructure projects necessary for the construction, repair, maintenance, and replacement of campground features fit within the meaning of ‘Project of [sic] Activity’ under the definition section at 321 CMR 10.02 (referencing the examples of such Project or Activities in (b) and (c) thereunder). *Petitioner’s Motion for Summary Decision at 10.* Acknowledging that the example Project or Activity in (d), “the installation of drainage, sewage and water systems,” does not include related activities such as reconstruction, improvement or expansion, the Petitioner argues that the separate grandfathering provisions in 321 CMR 10.13 clearly intended to cover such subsequent activities, even if each enumerated example in the definition of Project or Activity does not repeat these words.” *Id. at 11.* The Petitioner states that “[i]n this instance, the correct interpretation of the grandfathering provisions affords protection for the reconstruction and improvement of the sewage system serving Horton’s in existence prior to its mapping as priority habitat.” *Id. at 11-12.* In conclusion, for the reasons set forth in its Motion, the Petitioner requests that I grant Summary Decision in its favor, ruling that A/C MHP’s upgrade of its pre-existing sewage system, for which a building permit was issued prior to its location being mapped as Priority Habitat, is grandfathered from review under MESA, “and that all other issues identified for adjudication are moot.” *Id. at 14.*

While the Division did not file a response to the Petitioner’s Motion for Summary Decision, its Motion for Directed Decision does address the Petitioner’s claim that A/C MHP’s sewage system upgrade and associated land clearings are grandfathered from MESA review

under 321 CMR 10.13(2)(c)(2). *See, e.g., Division's Motion for Directed Decision at 10-11, as discussed in more detail in Section IV.B1. of this Recommended Decision.*

Finally, on April 23, 2019, the Petitioner filed a written request for clarification as to whether a hearing was still scheduled for May 15, 2019. In a Response dated April 23, 2019, I informed the Parties that my rulings on the pending dispositive motions would not be issued prior to May 15, 2019 and confirmed that the hearing scheduled for that date is stayed.

III. Relationship of the Identified Issues for Adjudication to the Scope of Appealable Decisions under 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. Under 321 CMR 10.25(1), a person aggrieved by a final decision of the Division made pursuant to the following three provisions of the MESA regulations shall have the right to an adjudicatory hearing before the Division:

1. 321 CMR 10.12 (regarding the Division's delineation of Priority Habitat of state-listed species);
2. 321 CMR 10.18 (regarding the Division's review of a project or activity for a Take of state-listed species in Priority Habitat); and
3. 321 CMR 10.23 (regarding an application to the Division for a Conservation and Management Permit authorizing a Take of a state-listed species).

As summarized in Section II, in September 2016 the Petitioner submitted a MESA Project Review Checklist, supporting documentation and filing fee to initiate a review by the Division under 321 CMR 10.18 as to whether A/C MHP's sewage system upgrade and associated land clearings caused a Take of the EBT. On February 15, 2017 the Division determined that such activities have resulted in a Take, and A/C MHP filed an appeal of the Division's Take

Determination within the 21 day deadline, on February 21, 2017. Thus, the Petitioner timely appealed a final decision of the Division for which the MESA regulations provides for an appeal.

In comparison, earlier in August 2016 A/C MHP sought written confirmation from the Division that A/C MHP's upgrade of sewage disposal facilities at the Property was exempt from review in accordance with 321 CMR 10.14(6). The Division responded later that month by email that the upgrade was not exempt under 321 CMR 10.14(6) because the exemption did not apply to upgrades to unpaved roads and the sewage treatment facility did not appear to be within a previously landscaped or lawn area. Had A/C MHP filed an appeal on this earlier determination made by Division pursuant to 321 CMR 10.14(6), the Division would not have had jurisdiction to adjudicate it because the MESA regulations do not provide for an appeal of such decisions.

As grounds for its appeal of the February 15, 2017 Take Determination made by the Division pursuant to 321 CMR 10.18, the Petitioner claimed that (1) under 321 CMR 10.14(6) its sewage system upgrade work is exempt from the Division's review and permitting requirements of 321 CMR 10.18 through 10.23; and (2) the site where its work and associated land clearings occurred no longer provides important habitat for the state-listed species and should be excluded from the delineated Priority Habitat for the EBT pursuant to 321 CMR 10.12(4). When, in October 2018, I considered how to frame the issue(s) for adjudication, the Division took the position that the only issue for adjudication is whether it properly applied its regulatory criteria at 321 CMR 10.18 when the Division made its Take Determination. The Petitioner identified the above two grounds in its appeal as the issues for adjudication. I stated that all three issues were relevant to adjudicating this appeal and set them out as separate issues.

For the record, my thinking at the time was that determining whether the Division's Take Determination was made in accordance with the requirements of 321 CMR 10.18 necessarily

included consideration of whether an applicable exemption from such review under 321 CMR 10.14 applies and/or whether the site where its land clearing activities occurred is properly delineated as Priority Habitat. In the circumstances of this case, these considerations are relevant to the authority for, or basis of, the Division's review of A/C MHP's activities pursuant to 321 CMR 10.18. In retrospect, identifying three separate issues for adjudication has the potential to create ambiguity as to whether a person has the right to challenge a final decision of the Division for which the MESA regulations do not provide an independent avenue for appeal. Instead, to underscore the fact that the instant appeal arose out of and has a reasonable nexus to Petitioner's timely appealed Take Determination made by the Division pursuant to 321 CMR 10.18, it would have been clearer to set forth a single issue for adjudication as follows:

Whether, taking into consideration the applicability of any exemption under 321 CMR 10.14 or the criteria for delineating Priority Habitat under 321 CMR 10.12, the Division properly applied its regulatory criteria at 321 CMR 10.18 when it made its February 15, 2017 determination that the Petitioner's land clearing activities resulted in an unpermitted Take of the Eastern Box Turtle.

However, as reflected in my findings of fact and conclusions of law Section IV.B.1.-4 below, the framing of the issues for adjudication in this appeal is not determinative of my ruling that the Division is entitled to a Directed Decision in its favor.

IV. Rulings on the Cross Motions

A. Applicable Standards of Review

1. Authority to Request and Rule on Motions for Directed Decision or Summary Decision

The MESA regulations at 321 CMR 10.25(1) provide that MESA appeals are adjudicated in accordance with the Informal Hearing Rules for Adjudicatory Proceedings at 801 CMR 1.02. Under 801 CMR 1.02(7)(c) ("Other Requests"), a party may "request rulings or relief in writing at any time." These regulations "contemplate that parties may submit dispositive motions to be

decided by a presiding officer with or without a hearing.” *Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 228 (2014). Moreover, “if a specific issue is not addressed by the informal rules the [Presiding Officer] may look to all provisions of G.L. c. 30A, including the formal rules and adjudicatory hearing rules used by other agencies.” *In the Matter of South Road, Lots 11 and 12, Hampden, MA, Docket No. 721460-09-DH, Recommended Decision dated July 10, 2009; see also In the Matter of Conditional No-Take Determination, NHESP File No. 15-34327, Docket No. 2018-01-RL, Presiding Officer’s Response regarding the Rules for Responsive Pleadings and Further Filings related to Ten Citizens’ Motion to Intervene (February 13, 2019) at 1* (“As a matter of practice, in cases where the Informal Hearing Rules are silent on the procedures for the filings or deadlines associated with responsive pleadings, the adjudication of MESA appeals has followed the applicable, specific rules in the Formal Hearing Rules at 801 CMR 1.00.”)

Under 801 CMR 1.01(7)(g)1. of the Formal Hearing Rules, a party to an adjudicatory proceeding may “upon completion by the Petitioner for the presentation of his evidence...move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his case.” Under 801 CMR 1.01(7)(h), “when a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and [the party] is entitled to prevail as a matter of law, the party may move, with or without supporting affidavits, for summary decision on the claim or defense.” In summary, the above Informal and Formal Hearing Rules governing the adjudication of MESA appeals allow a party to move for a directed decision or for summary decision, and for the presiding officer to rule on such motions.

2. Applicable Standards of Review for Motions for Directed Decision and Summary Decision

There is one previous MESA adjudicatory decision that involved a motion for directed decision by the Division after the parties to the appeal had filed the prefiled written direct and

rebuttal testimony of their witnesses. *In the Matter of South Road, Lots 11 and 12, Hampden, MA, Docket No. 721460-09-DH, Final Decision dated August 5, 2009, adopting the Presiding Officer's Recommended Decision dated July 10, 2009.* In granting the Division's motion, the presiding officer ruled that as a matter of law and fact, the petitioners had presented no credible evidence to support their claim that the Division had improperly applied the regulatory criteria at 321 CMR 10.12 when the Division reconsidered and confirmed the petitioner's property as Priority Habitat for the EBT. *Id. at 27-30.* On appeal, the Supreme Judicial Court ("SJC") affirmed that the Division properly adopted the presiding officer's decision granting a directed decision in favor of the Division. *Pepin v. Div. of Fisheries & Wildlife at 227-229.* As summarized below, the presiding officer in the underlying adjudicatory appeal and the SJC on appeal both addressed the standard of review applicable to a motion for directed decision.

A petitioner challenging an agency's determination "has the burden of coming forward with evidence that could support a reversal of the determination," and the "relevant evidentiary burden is the initial burden of going forward," which is also on the petitioner. *In the Matter of South Road, Lots 11 and 12 at 15, citing Matter of Cormier Construction Co., Final Decision, 1 DEPR 159, 160 (1994).* "The burden of persuasion through the introduction of evidence is upon the petitioner...to show by a preponderance of the evidence entitlement to the favorable administrative determination sought from the agency," *Pepin v. Div. of Fisheries & Wildlife at 227, citing A.J. Cella, Administrative Law and Practice § 243 (1986).* The party initiating the appeal "must produce 'competent evidence from a credible source' sufficient to meet his burden of proof." *In the Matter of South Road, Lots 11 and 12 at 15, citing Matter of Nelson, 6 DEPR 120, 123 (1999).* Thus, because "not all claims that are entitled to an adjudicatory proceeding necessarily reach the hearing stage," the Informal Hearing Rules "provide a mechanism for

resolving a claim summarily where the petitioner has not sustained his or her case.” *Pepin v. Div. of Fisheries & Wildlife* at 227. Administrative procedures providing for dispositive directed or summary decisions “do not transgress statutory or constitutional rights to a hearing where those procedures are such that they allow the agency to dispense with a hearing only when the papers or pleadings filed conclusively...show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision.” *Id.* at 228, citing *Massachusetts Outdoor Advertising Council v. Massachusetts Advertising Bd.*, 9 Mass. App. Ct. 775, 785-786 (1980). “Much like the entry of directed verdict in the trial courts, in a state administrative proceeding the judge may, upon motion, dismiss a case at the close of the plaintiff’s direct case for failure to sustain his case.” *In the Matter of South Road, Lots 11 and 12 at 14-15*, citing *Widen v. Oxford Housing Authority*, 1994 WL 90905 (Mass. Superior Court, October 20, 1994). “Evidence sufficient to withstand a motion for directed verdict must rest on something more than surmise or conjecture.” *Id.* at 16, citing *Knox v. Lamoureaux*, 338 Mass. 167 (1958).

Other MassDEP adjudicatory decisions address the standard of review for a motion for directed decision in a similar manner. *In the Matter of John O’Brien, Jr., Trustee, Scenic Heights Realty Trust*, 1997 MA ENV LEXIS 79, affirms that the party contesting the agency’s position has the burden of going forward, meaning that it must produce at least some credible evidence from a competent source in support of its position on an issue identified for adjudication. *Id.* at 45. “A competent source is a witness who has sufficient expertise through education, training, or experience to render testimony on the factual issues on appeal.” *In Matter of Margaret Reichenbach*, 2014 MA ENV LEXIS 52 at 23. A directed decision may be granted against the petitioner for failure to sustain a direct case where its prefiled testimony and exhibits do not meet its burden of going forward, or show no right to relief on its claims as a matter of law. *Id.*, citing

Matter of Crowley, Docket No. 89-152, Final Decision, 2 DEPR 153 (July 19, 1995) and Matter of Town of Truro, Docket No. 94-066, Final Decision at 11-2, 2 DEPR 179 (August 21, 1995) respectively.

The standard of review for summary decision mirrors the standard governing summary judgment motions in civil suits in Massachusetts trial courts. *In the Matter of SEMASS Partnership, 2013 MA ENV LEXIS 34 at 14, citing In the Matter of Lowe's Home Centers, Inc., OADR Docket No. WET-2009-013, Final Decision (June 30, 2009), adopting Recommended Final Decision (June 19, 2009).* In sum, a party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law. *Id.*

Relevant to this appeal, *In the Matter of John O'Brien, Jr., Trustee*, also addresses when to treat a motion for summary decision as a motion for directed decision. The presiding officer explained that because a motion for summary decision tests for the presence of a genuine and material factual issue requiring adjudication via a hearing, the test is of practical use before a hearing begins. *Id. at 43.* For this reason, "a motion for summary decision generally makes no sense, as a practical matter, once the hearing begins" because there is "a shift in focus, for purposes of dispositive motion practice, ...to testing the sufficiency of a party's case, the objective of a motion for directed decision." *Id.* Because the motion for summary decision was made after the filing of prefiled testimony, the presiding officer treated the motion as one for a directed decision, it being "the only useful dispositive motion" because it sought dismissal for failure to sustain a direct case. *Id. at 44-45; see also In the Matter of Naim G. Raheb and Rina Raheb, 2013 MA ENV LEXIS 17* (the presiding officer treated a motion for summary decision as a motion for

directed decision because the parties had filed prefiled testimony in support of their respective positions in the case.)

3. Standard of Review Applicable to the Division's interpretation of its MESA Regulations

A regulation is interpreted in the same manner as a statute, according to the words of a regulation in their usual and ordinary meaning. *In the Matter of City of Pittsfield Airport Commission*, 2010 MA ENV LEXIS 89 at 16, footnote 6, citing *Ten Local Citizen Group v. New Eng. Wind, LLC*, 457 Mass. 222, 229 (2010). "Normally, the application of a regulation to the particular facts of a case is within the agency's discretion and we accord an agency's interpretation of its own regulations substantial deference," and "apply all rational presumptions in favor of the validity of the administrative action." *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 184, 187 (2009), citing *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782 (1980), *Consolidated Cigar Corp. v. Department of Pub. Health*, 372 Mass. 844, 855 (1977). "An agency's interpretation of its own regulation is ordinarily accorded considerable deference unless it is arbitrary, unreasonable, or inconsistent with the plain terms of the regulations themselves." *In the Matter of City of Pittsfield Airport Commission* at 16, footnote 6, citing *Rasheed v. Commissioner of Correction*, 446 Mass. 463, 476 (2006). "The party challenging an agency's interpretation of its own rules has a 'formidable burden' of showing that the interpretation is not rational." *Ten Local Citizen Group* at 228. "A construction...that would lead to an...unreasonable conclusion should not be adopted, where the language is fairly susceptible to a construction that would lead to a logical and sensible result." *In the Matter of Blackinton Common LLC*, 2009 MA ENV LEXIS 5 at 53, citing *Bell v. Treasurer of Cambridge*, 310 Mass. 484, 489 (1941).

B. Findings of Fact and Conclusions of Law on the Cross Motions for Directed Decision

My findings of fact and conclusions of law in this Section IV. B. address the issues in the following order: *first*, whether the Campground, including A/C MHP's upgrade to its sewage disposal system and associated land clearings are grandfathered from MESA review pursuant to 321 CMR 10.13(2)(c)(2); *second*, in addition to or alternatively, whether the above activities of A/C MHP are exempt from MESA review pursuant to 321 CMR 10.14(6) or (10); *third*, whether the Campground is properly delineated as Priority Habitat for the EBT; and *finally*, whether the Division properly determined pursuant to 321 CMR 10.18 that A/C MHP's unpermitted activities have caused a Take of the EBT.

1. The issue of whether the Campground, including A/C MHP's upgrade to its sewage disposal system and associated land clearings, are grandfathered from MESA review pursuant to 321 CMR 10.13(2)(c)(2)

The Petitioner's Motion for Summary Decision¹² argues at the outset that following its appeal of the Division's Take Determination, "the ensuing submittal of prefiled direct and rebuttal testimony has raised the issue, not previously identified,¹³ of whether the so-called grandfathering provisions under 321 CMR 10.13(2) apply to this project." *Petitioner's Motion for Summary Decision at 2-3*. This issue was first raised in Kevin Aquiar's PRT in which he states that Amy Hoenig's direct testimony recognizes that the pre-existing Campground "is among 'Projects or Activities' that qualify under the grandfathering provisions under 321 CMR 10.13(2), assigning a

¹² I am treating the Petitioner's Motion for Summary Decision as a cross Motion for Directed Decision for the reasons discussed in *In the Matter of John O'Brien, Jr., Trustee*, summarized, *supra*, at 31-32. In short, because the Parties have already filed their direct and rebuttal testimony, their respective dispositive motions both test for the sufficiency of each other's direct case. Thus, the Petitioner's Motion for Summary Decision has the same objective of a motion for directed decision.

¹³ This new claim of the Petitioner constitutes an after-the-fact expansion of the grounds for appeal set forth in its Notice of Claim and is not one of the three issues for adjudication that I established for this appeal. While I believe that I have the authority as the Presiding Officer not to consider this claim for the above reasons, the Division did not object to it being made in Mr. Aquiar's PRT or in the Petitioner's Motion for Summary Decision, and given the implications for the Division's application of the grandfathering provisions in 321 CMR 10.13(2), I want my Recommended Decision to be clear for the record why I am rejecting the Petitioner's arguments as a matter of law.

footprint of ± 2.59 acres of pre-existing lawfully developed and maintained campground areas.”

Aquiar PRT at ¶ 3. Mr. Aquiar then opines that the Campground is protected from MESA review under 321 CMR 10.13(2)(c)(2) because it was originally established in 1950 and therefore preceded the mapping of the area as Priority Habitat. *Id. at ¶ 4 and Attachment A; see also ¶ 17.* He further argues that since there is agreement that the Campground itself is grandfathered, then it would be unreasonable for the Division to conclude that necessary repairs to the Campground are not. *Id. at ¶ 5.*

The Division responds that Mr. Aquiar’s PRT provides “no basis for his expertise in...the application of the MESA Regulations.” *Division Motion for Directed Decision at 10.* The Petitioner argues, however, that issues which raise questions of whether the Division has regulatory jurisdiction over A/C MHP’s upgrade to its sewage disposal system - i.e., whether such activities are grandfathered under 321 CMR 10.13 or exempt under 321 CMR 10.14(6) - are “purely legal issues” that do not require the Petitioner’s witnesses to be “MESA experts to testify to facts that support this proposition.” *See Petitioner’s Opposition to Division’s Motion for Directed Decision at 1-2; Petitioner’s Motion for Summary Decision at 1 and supporting Affidavit of Donald Nagle, Esq.*

As the party contesting the Division’s position, A/C MHP has the burden of going forward, meaning that it must produce at least some credible evidence from a competent source in support of its position on each issue identified for adjudication. *See In the Matter of South Road, Lots 11 and 12 at 15; In the Matter of John O’Brien, Jr., Trustee, at 45.* While this evidentiary burden does not require the same showing of one’s qualifications to, e.g., render an opinion on whether a Take of a state-listed species has occurred, it still applies to the jurisdictional issue of whether A/C MHP’s unpermitted land clearing activities are exempt pursuant to 321 CMR

10.13(2). Accordingly, Mr. Aquiar is required to make an adequate showing that he has some relevant experience or qualifications to support his opinion that 321 CMR 10.13(2) not only grandfathers the pre-existing Campground but the upgrade to its sewage system as well. But neither his PRT nor his resume provides any information on his MESA-relevant qualifications or experience. Instead, his testimony essentially claims that because Ms. Hoenig herself acknowledges that the Campground is grandfathered, it would be unreasonable to argue that the sewage system upgrades are not. I do not find Mr. Aquiar's interpretation of the applicability of 321 CMR 10.13(2) to be credible because he has no demonstrated experience with this MESA regulation, and as discussed below, his interpretation is based on a misreading of Ms. Hoenig's testimony.

Consistent with Mr. Aquiar's PRT, the Petitioner's Motion for Summary Decision sets forth a more specific regulatory argument that A/C MHP's project of upgrading its preexisting sewage disposal system, which was established prior to the mapping of the Campground as Priority Habitat, is grandfathered from review under MESA. *See Section IV of Petitioner's Motion for Summary Decision at 8-13.* Essentially, the Petitioner argues that "Project or Activities," as defined in 321 CMR 10.02 and referenced in 10.13(2)(c)(2), also means "the numerous infrastructure projects necessary for the construction, repair, maintenance, and replacement of the campground features." *Id. at 10.* The Petitioner further argues that any interpretation of these MESA regulatory provisions that would grandfather the original Campground infrastructure that was in place prior to the mapping of the site as Priority Habitat, but not any subsequent repairs, reconstruction or expansions to such infrastructure after the site has been mapped, "would be inconsistent with the overall regulatory scheme." *Id.* With this reading of the MESA regulations in mind, the Petitioner asserts that ¶ 38 of Ms. Hoenig's PDT "conflates

the exemption provision under 321 CMR 10.14(6) with the grandfathering provisions under 321 CMR 10.13(2),” claiming that her position is that A/C MHP does not qualify for either the exemption or grandfathering because its land clearings extended far beyond the ± 2.59 acres of pre-existing lawfully developed and maintained Campground areas. *Id. at 3.* This assessment by Ms. Hoenig, the Petitioner argues, is a “blatant mis-application” of the MESA regulations that is “arbitrary, capricious, and unlawful.” *Id. at 4.*

The Division’s response to the Petitioners arguments is summarized in its Motion for Directed Decision, which states that the Petitioner’s characterization of Ms. Hoenig’s PDT at ¶ 38 as recognizing the Campground’s grandfathered status under 321 CMR 10.13(2) not only misinterprets her testimony but the regulation itself. *Division’s Motion for Directed Decision at 10.* The Division then sets forth its interpretation of the applicability of 321 CMR 10.13(2) to the pre-existing Campground and the subsequent upgrade of the sewer system:

“321 CMR 10.13 is designed to ‘grandfather’ Projects or Activities that are not located or will not take place in Priority Habitat and have achieved permitting milestones specified at 321 CMR 10.13(a) through (d) prior to new information about the occurrence of a State-listed species on a project site being brought to the attention of the Division. Not only was the Campground delineated as Priority Habitat at the time of the unpermitted clearing, it was also delineated as Priority Habitat at the time the Petitioner acquired its permit from DEP in 2015 for the installation of the new sewer lines. [Klekamp PDT at 28-36.] Therefore, the grandfathering provisions of 321 CMR 10.13 are not applicable. Moreover, the Division determined that the unpermitted clearing resulted in the loss of ± 9.11 acres of EBT habitat, it excluded the ± 2.59 acres of pre-existing developed campground features including roadway and camp site areas associated with the campground facilities from the total of ± 11.7 acres cleared. [Hoenig PDT at 37-8.]

Id. at 10-11.

In short, the Division’s position is that the grandfathering provisions in 321 CMR 10.13(2) do not apply because at the time of A/C MHP’s “Project or Activity” (i.e., the unpermitted upgrade to its sewage disposal system), the Campground was mapped as Priority Habitat. *Id. at 10.*

In addressing the Parties' cross Motions on this issue, I will begin by discussing my understanding of Amy Hoenig's testimony in ¶ 38 of her PDT. To put it in context, her testimony is on the issue of whether A/C MHP's unpermitted land clearings are exempt pursuant to 321 CMR 10.14(6), not whether the grandfathering provisions in 321 CMR 10.13(2) apply. Section III of her PDT, which includes ¶ 38, addresses the former issue. *See Hoenig PDT at ¶¶ 34-44.* Paragraph 34 of her PDT distills the purpose of 321 CMR 10.14, which is to specify the types of Projects or Activities that are exempt from the requirements of 321 CMR 10.18 through 10.23. Paragraph 35 notes that the definition of Project or Activities in 321 CMR 10.02 includes installation of drainage, sewage and water systems. Paragraph 36 summarizes the language of the exemption in 321 CMR 10.14(6), which applies to:

“the construction, repair, replacement or maintenance of septic systems, private sewage treatment facilities, utility lines, sewer lines, or residential water supply wells *within existing paved areas and lawfully developed and maintained lawns or landscaped areas, provided there is no expansion of such existing paved, lawn and landscaped areas.*” (Emphasis added.)

Paragraph 37 explains that the Division determined in August, 2016 that A/C MHP's upgrade to its sewage disposal system did not qualify for this exemption “because the unpermitted clearing associated with the proposed sewage treatment facility was not located entirely within lawn and/or landscaped areas,” and that the clearing destroyed ±9.11 acres of suitable EBT habitat “less the ±2.59 acres of pre-existing disturbance associated with the campground facilities.” Ms. Hoenig then testified in ¶ 38 as follows:

“Moreover, when reviewing projects pursuant to 321 CMR 10.14, the Division has consistently interpreted ‘lawfully developed and maintained lawns or other landscaped areas’ as having existed prior to the delineation of the areas as Priority Habitat in the Massachusetts Natural Heritage Atlas; having received review and approval pursuant to MESA 321 CMR 10.18 and or 10.23; or having qualified under the grandfathering provisions outlined in 321 CMR 10.13(2) for Projects or Activities that met permitting thresholds prior to the site being delineated as Priority Habitat in the Massachusetts Natural Heritage Atlas. The ±11.7 acres of clearing by A/C Mobile expanded far beyond

the ± 2.59 acres of pre-existing lawfully developed and maintained campground areas to include the disturbance of ± 9.11 acres of undeveloped natural vegetation providing suitable habitat for the EBT.”

I read the first sentence in ¶ 38 as making the general point that the Division has consistently interpreted the term “lawfully developed and maintained lawns or other landscaped area” used in the exemption at 321 CMR 10.14(6) as applicable in three different scenarios: (1) when lawns or other landscaped areas existed prior to the delineation of such areas as Priority Habitat; or (2) when these areas were previously reviewed and approved as such by the Division in its issuance of a Take determination under 321 CMR 10.18 and/or a Conservation and Management Permit under 321 CMR 10.23; or (3) when a proposed Project or Activity has met permitting thresholds specified in 321 CMR 10.13(2) prior to the site being delineated as Priority Habitat, thereby grandfathering that Project or Activity as well as any lawfully developed and maintained lawns or landscaped areas already established on the same site. The concluding sentence in ¶ 38 reiterates the Division’s position that the ± 11.7 acres of clearing by A/C MHP expanded far beyond the ± 2.59 acres that the Division determined falls within the exemption under 321 CMR 10.14(6).

Mr. Aquiar’s interpretation of ¶ 38 appears to be based on his assumption that because Ms. Hoenig acknowledges therein that the Campground includes ± 2.59 acres of lawfully developed and maintained lawns or landscaped areas that are exempt from review under MESA, she is therefore recognizing that the Campground itself is a “Project or Activity” for the purposes of the MESA Regulations, including under 321 CMR 10.13(2). Furthermore, based on his premise that “there is agreement [between the Petitioner and the Division] that the campground itself is grandfathered,” Mr. Aquiar concludes – without citing any testimony by the Division or

the MESA regulations as support - that the sewage system upgrade should therefore be grandfathered too.

Contrary to Mr. Aquiar's interpretation, I find that ¶ 38 of Ms. Hoenig's PDT cannot be reasonably read as her recognizing or even addressing the question of whether the Campground is a Project or Activity that is grandfathered under 321 CMR 10.13(2). In a nutshell, her testimony generally summarizes the ways under the MESA regulations that pre-existing lawns and landscaped areas can be excluded from review by the Division, and then returns to the specific Project or Activity at issue in this appeal - A/C MHP's upgrade to its sewage system - to underline the Division's position that A/C MHP does not qualify for the exemption under 321 CMR 10.14(6) because the scope of impacts to undeveloped EBT Priority Habitat far exceeded the ± 2.59 acres of pre-existing lawfully developed and maintained areas within the Campground credited by the Division under the exemption at 321 CMR 10.14(6). With respect to 321 CMR 10.13(2), Ms. Hoenig states plainly that it applies to a Project or Activity that has met permitting thresholds specified in 321 CMR 10.13(2) "prior to the site being delineated as Priority Habitat." Nowhere in ¶ 38 of her PDT or elsewhere does Ms. Hoenig agree that the entire, pre-existing Campground is grandfathered under 321 CMR 10.13(2). Nor, as claimed in the Petitioner's Motion for Summary Decision, does Ms. Hoenig's PDT at ¶ 38 conflate the exemption provision under 321 CMR 10.14(6) with the grandfathering provisions under 321 CMR 10.13(2). Instead, she generally discusses how lawfully developed and maintained lawns or other landscaped areas on-site are considered for the purposes of applying the exemption under 321 CMR 10.14(6), and confirms that the Division credited ± 2.59 acres of the pre-existing Campground as falling within the exemption for such areas. She does not address the question of grandfathering because: (1) at the time of her PDT, it was not even an argument being made by the Petitioner, and (2) as confirmed

in the Division's subsequent Motion for Directed Decision, the Division's position is that 321 CMR 10.13(2) does not apply to A/C MHP's upgrade to its sewage system because the Campground was mapped as Priority Habitat at the time of this Project or Activity.

As a matter of law, the burden is on the Petitioner to show that the Division's interpretation of its own regulations at 321 CMR 10.13(2) is arbitrary, unreasonable or inconsistent with the plain terms of the regulation itself. *See In the Matter of City of Pittsfield Airport Commission at 16, footnote 6.* To that end, the Petitioner's direct case on this issue hinges on its regulatory argument that the pre-existing Campground is the "Project or Activity" for purposes of 321 CMR 10.13(2)(c)(2) and that any repairs, reconstruction or expansions to the existing Campground infrastructure undertaken subsequent to the mapping of the Campground as Priority Habitat are necessarily grandfathered as well. Whether or not the Petitioner's misreading of Ms. Hoenig's PDT was the genesis for its regulatory interpretation, the Petitioner's position is unsupported by the relevant language of the relevant MESA Regulations, and is fundamentally at odds with Division's own interpretation and application of these regulations.

With respect to the relevant MESA Regulations, 321 CMR 10.02 defines "Project or Activity" to mean any action, including but not limited to, the installation of a sewage system; 321 CMR 10.12(1) explains that Priority Habitats are used for screening Project and Activities that may result in a Take of a state-listed species; and 321 CMR 10.18(1) states that except in as provided 321 CMR 10.13 and 321 CMR 10.14, any Project or Activity that will be located or will take place in Priority Habitat shall be reviewed by the Division prior to the commencement of any physical work to determine whether it will result in a Take. Thus, unless 321 CMR 10.13 and 321 CMR 10.14 apply, these Regulations clearly provide that if a person is proposing any action that

will take place in an area that is currently mapped as Priority Habitat, that person must first obtain a Take determination from the Division.

Turning to the grandfathering provisions at 321 CMR 10.13(2) relied upon by the Petitioner, it applies to the limited situations where a Project or Activity that is not in Priority Habitat when they were proposed but the project site is thereafter delineated by Priority Habitat. The project proponent must also show that the project met the specified milestones or timeframes prior to the project site being mapped as Priority Habitat. As a threshold matter, this regulation requires a showing that the site where the project will occur was not in Priority Habitat at the time of the project. There is no dispute that the site of the Campground was mapped as Priority Habitat at the time of A/C MHP's project to upgrade to its sewage system, and has been since 1988. There is nothing in the language of 321 CMR 10.13(2) that reasonably supports the Petitioner's contention that its sewage system upgrade is grandfathered because the Campground was originally established and permitted before the site was mapped as Priority Habitat. The Petitioner's proposed regulatory interpretation would shield from the Division's review under MESA an open-ended succession of repairs, modifications and expansions to facilities located in Priority Habitat simply because the facility was originally established prior to the mapping of the site as Priority Habitat. As noted above, the definition of Project or Activity in 321 CMR 10.02, read together with 321 CMR 10.18, requires "any action" proposed to take place in Priority Habitat to first be reviewed by the Division. The upgrade to the Campground's sewage system is an action within meaning of 321 CMR 10.02 that occurred while the Campground was mapped as Priority Habitat. To adopt the Petitioner's expansive construction of the term "Projects or Activities" as used in 321 CMR 10.13(2) would lead to outcomes that fundamentally conflict with the MESA Regulations' use of Priority Habitats to screen Projects and Activities for their

impact to state-listed species – e.g., by precluding the Division from conducting a Take determination on a range of projects in Priority Habitat that do not qualify for an exemption under 321 CMR 10.14. *See In the Matter of Blackinton Common LLC, 2009 MA ENV LEXIS 5 at 53, citing Bell v. Treasurer of Cambridge, 310 Mass. 484, 489 (1941).* Indeed, the instant case is a stark illustration of the adverse consequences of the Petitioner’s regulatory interpretation. The detailed, well supported testimony of the Division’s two experts comfortably supports a finding that A/C MHP’s construction of a sewage treatment plant and related sewer lines - which the Petitioner agrees occurred when the Campground was mapped as EBT Priority Habitat - cleared over 9 acres of high quality habitat and likely killed an unknown number of individual turtles. The idea that an infrastructure project of this scale and impact would be grandfathered from review by the Division because the original Campground was established decades before the site’s mapping as Priority Habitat cannot be reasonably reconciled with the Division’s core responsibilities under its own MESA regulations to assess and address the impact of such projects on state-listed species and their habitats. Moreover, the need for the Division to undertake such a Take determination is heightened when, as here, the impacts occurred without any review or approval by the Division.

In contrast, the Division’s straight forward interpretation of the application of grandfathering provisions in 321 CMR 10.13(2) to A/C MHP is consistent with usual and ordinary meaning of the language used therein and rationally related to the achievement of the Priority Habitat screening framework in the MESA Regulations. In short, because the Petitioner has failed to meet its formidable burden of showing that the Division’s interpretation of its own regulation is arbitrary, unreasonable or conflict with the language of the regulation, the Division’s interpretation is entitled to deference. *See Ten Local Citizen Group v. New Eng.*

Wind, LLC, 457 Mass. 222, 229 (2010); *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 184, 187 (2009).

For all of the above reasons, I deny the Petitioner's Motion for Summary Decision and grant the Division's Motion for Directed Decision on this issue as a matter of law.

2. The issue of whether the A/C MHP's sewage system upgrade and associated land clearings are exempt from MESA review pursuant to 321 CMR 10.14(6)

A key component of the above issue is whether A/C MHP's installation of the sewage system is exempt under 321 CMR 10.14(6) because it occurred, in whole or in part, within the Campground roadways. The Division argues that that because the Campground roads are comprised of permeable crushed asphalt, brick and concrete ("ABC"), they are not "paved areas" within the meaning of the exemption. *See Division's Directed Decision at 9-13*. The Petitioner's position is that the PDT of James Bourne and Greg Morris offer credible evidence that these roads are "paved areas," which is not defined in the MESA regulations, and that the Division has offered no support for its own view of what it considers "paved areas." *Petitioner's Opposition at 4-6*.

The PRT of David Paulson, the Division's expert who serves as their transportation liaison to MassDOT, notes that it is the Petitioner's witnesses who testified that the roadways within the Campground are composed of ABC, which Mr. Paulson explains is an aggregate material that is designed to be permeable and is akin to a gravel road. *See Paulson PRT at ¶¶ 8-10; Bourne PDT at ¶¶ 5 and 7; Morris PDT at ¶ 10*. In support of the Division's understanding, Ms. Hoenig points out that the Petitioner's own consultant, WED, describes the Campground as having "dirt and gravel roads," which is consistent with the description of them in the Town's Zoning Board of Appeals decision. *Hoenig PRT at ¶ 10-11*. Ms. Hoenig also testified that the vegetation roots shown in the photos in Mr. Morris' PDT is further evidence of the permeability

of the roadways. *Hoenig PRT at ¶ 10*. Finally, Mr. Paulson testified that the Division does not consider the Campground's roadways to be "paved," and therefore exempt from MESA review, because "[w]hen reviewing projects pursuant to 321 CMR 10.14, the Division has consistently interpreted 'paved areas' as a solid, uniform imperious surface comprised of heated/treated asphalt or poured concrete that is regularly maintained." *Paulson PRT at ¶ 10*.

Contrary to the Petitioner's claim, I find that David Paulson's expert testimony provides a rational and credible explanation of why the Division does not consider the permeable ABC composition of the Campground roadways to be exempt "paved areas." Within the context of determining what types of sewer and other utility projects in Priority Habitat are nonetheless exempt from MESA review, the Division's position that the term "paved area" is limited to "a solid, uniform imperious surface comprised of heated/treated asphalt or poured concrete that is regularly maintained" is reasonable and consistent with the purpose of 321 CMR 10.14 to only exempt work in areas that clearly no longer serve as habitat for state-listed species. As important, Mr. Paulson testimony affirms that the Division's determination that the Campground roadways are not "paved areas" is based on its consistent interpretation of the term in 321 CMR 10.14(6).

While the term "paved areas" is not separately defined in the MESA regulations, its meaning has been established through Mr. Paulson's expert testimony on the Division's consistent interpretation of the term. The Petitioner opposes a directed decision in the Division's favor on this issue because it argues that it has met its burden of producing credible evidence that a stable roadway comprised of ABC reasonably falls within the definition of "paved areas." However, because this question turns on the Division's interpretation of its own regulation, the applicable burden on the Petitioner is to show that the Division's interpretation is

arbitrary, unreasonable or contrary to the plain meaning of the regulation. *See Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 184, 187 (2009). For all of the above reasons, my conclusion of law is that the Division's consistent interpretation of the term "paved areas" has none of the above characteristics and is, therefore, entitled to deference.

Accordingly, I uphold the Division's determination that A/C's MHP's work and beyond in the Campground unpaved roadways is not exempt from MESA review under 321 CMR 10.14(6).

Moreover, I concur with the Division that even if the roadways had been paved, A/C MHP's sewage system upgrade would still not qualify as exempt under 321 CMR 10.14(6) or (10), which allows utility work within 10 feet from the edge of existing paved roads, because the associated land clearings of EBT Priority Habitat clearly extended beyond the roadways and the other pre-existing lawfully developed and maintained areas of the Campground. *See Hoenig PRT at ¶ 13 and Attachment 12 to her PD; and ¶ 14 and Attachments 1-3 thereto.* As to the latter, the Division reasonably seeks to differentiate between exempt "lawfully developed and maintained lawns or landscaped areas," which it explains do not typically provide habitat for state-listed species, and areas of naturalized vegetation, which are likely to do so. *Hoenig PRT at ¶ 16.* Based on such distinctions, the Division affirmed that it has consistently interpreted the terms "lawn" and "landscaped areas" in 321 CMR 10.14(6) as areas that are maintained or manicured on a regular basis. *Id.* Furthermore, Mr. Bourne's PDT and the photos included with Mr. Morris' PDT both support the Division's assessment that the impacted ± 9.11 acres of what had been undeveloped EBT Priority Habitat on the Campground rarely, if ever, experienced vegetation management and occurred outside of "existing paved areas and lawfully developed and maintained lawns or landscaped areas" covered by the exemption at 321 CMR 10.14(6). *Id. at ¶¶ 18-19.* Finally, the Petitioner does not dispute that its land clearings expanded

substantially beyond the roadways and pre-existing Campground developed and maintained areas. While Kevin Aquiar's PRT argues that more of A/C MHP's work fall within the exemption under 321 CMR 10.14(6) than determined by the Division, by his own calculation there is at least an additional 6.5 acres of impacts that extend beyond these exempt areas. *Aquiar PRT at ¶¶ 15 and 16 and Attachment D.*

Over the course of this adjudication it has become clear that the Petitioner is relying on its grandfathering argument as the determinative basis for excluding the sewage system work and all of the associated land clearings from review under MESA, independent of whether or the extent to which these impacts qualify for the exemptions under 321 CMR 10.14(6) and/or (10). This rationale is made explicit in the Petitioner's Opposition to the Division's Motion for Directed Decision which claims that Ms. Hoenig lacks the "regulatory support for determining that the disturbance caused by this construction [of the sewage system] went too far to be protected by grandfathering." *Petitioner's Opposition to the Division's Motion for Directed Decision at 8.* Similarly, in its Motion for Summary Decision, the Petitioner reiterates that the sewage system upgrade is grandfathered as a matter of law, "even if its temporary construction impacts extend beyond the internal roadways where the sewer pipes had been installed." *Petitioner's Motion for Summary Decision at 4-5.* In short, the Petitioner recognizes that the only way to reconcile the full scope of its land clearings in Priority Habitat is to demonstrate that they are grandfathered under the MESA regulations.

However, as addressed in the preceding Section IV.B.1, I have granted a Directed Decision in favor of the Division upholding its determination that the grandfathering provisions in 321 CMR 10.13(2) do not apply to A/C MHP's sewage system work and the associated land clearings. Consequently, this regulatory justification is not available to the Petitioner. With

respect to the Petitioner's alternative arguments, it has failed to meet its burden of showing that the Division's consistent interpretation of the exemption in 321 CMR 10.14(6) and/or (10) is arbitrary, unreasonable or contrary to the plain meaning of the regulation, nor has the Petitioner produced some credible evidence challenging the Division's determination that A/C MHP's extensive clearing of EBT Priority Habitat extended far beyond such exempt areas.

For all of the above reasons, I enter a Directed Decision in favor of the Division on this issue as well.

3. The issue of whether the Campground is properly delineated as Priority Habitat for the EBT

This issue involves the Petitioner's claim that the Campground no longer provides important habitat for the state-listed species and should be excluded from the delineated Priority Habitat for the EBT pursuant to 321 CMR 10.12(4). The latter regulatory provision allows the Division to exclude areas previously disturbed by Projects or Activities from delineated Priority Habitat. *See footnote 6, supra, at x.*

The PDT of both of the Division's witnesses, Amy Hoenig and David Paulson, demonstrate their qualifications to opine as experts on this issue and, collectively, provide a comprehensive and strong evidentiary basis for their conclusion that the Campground has been and is properly delineated as Priority Habitat in accordance with the Best Scientific Evidence Available standard in 321 CMR 10.12 and the Division's related EBT Mapping Guidelines. With reference to these Priority Habitat mapping standards, they: (1) explain why the ecological features within the Campground serve as suitable habitat for the EBT; and (2) cite, as further support, the total of 64 occurrence records of EBTs observed on and in the immediate vicinity of the Campground (including 4 occurrences within the boundaries of the Campground), the evidence of a local population of EBTs in the surrounding landscape, and highlights the state-wide conservation

significance of the EBT population in Truro. *See Section VI of Hoenig PDT and Section IV of Paulson PDT.*

The PRT of Ms. Hoenig and Mr. Paulson, in turn, point to the PDT of James Bourne and Greg Morris, which describe the area of unpermitted clearing as “natural,” consisting of “native plants and trees,” and subject to minimal vegetation management on an infrequent or as-needed basis. *See Hoenig PRT at ¶¶ 28, 30; Paulson PRT at ¶¶ 15-17.* Thus, the Petitioner’s own direct case supports the Division’s position that the site contained suitable habitat for the EBT prior to the unpermitted land clearings by A/C MHP. Moreover, as highlighted by the Division’s PRT, the photos included with Mr. Morris’ PDT provide evidence of pre-existing site conditions consistent with high quality EBT habitat, which is also in line with the findings from Mr. Paulson’s site visit in 2018. *See Hoenig PRT at ¶ 30; Paulson PRT at ¶¶ 17-19.*

In contrast, the PDT of the Petitioner’s witnesses (Wayne Klekamp, James Bourne and Greg Morris) - none of who claim to have expertise in state-listed species matters - provide no testimony on the issue of whether the Campground is properly delineated as Priority Habitat. In that regard, I concur with the Division that the testimony from these witnesses was limited to explaining the context and reasons for the cutting trees and vegetation on-site, instead of producing competent evidence on the biology and habitat requirements of the EBT to support a conclusion that the Campground no longer serves as Priority Habitat. *See Division’s Motion for Directed Decision at 13-16.* Similarly, the PRT of Kevin Aquiar does not demonstrate (in his testimony or through his resume) that he is qualified to offer an expert opinion on the issue of whether the Campground is properly mapped as Priority Habitat. The Petitioner’s Opposition to the Division’s Motion for Directed Decision admits as much by arguing that the issue of whether the Campground is properly delineated as Priority Habitat is “purely legal” in nature and does not

require its witnesses to be MESA experts to testify to facts that raise questions of MESA jurisdiction over A/C MHP's sewage system upgrade. *See Petitioner's Opposition at 1.*

I disagree. Under 321 CMR 10.12(4), the question of whether the Campground should be mapped as Priority Habitat requires that such a determination be made "consistent with the Best Scientific Evidence" and only to the extent that areas "no longer provide important habitat features" for the EBT, findings that clearly necessitate expertise in MESA scientific and regulatory matters. I further rule that the Petitioner has not met its burden of putting forward credible evidence from a competent source that challenges the Division's conclusion that the Campground continues to be properly delineated as Priority Habitat in accordance with 321 CMR 10.12, as applied by the Division through its related EBT Mapping Guidelines.

Finally, if the Petitioner's actual argument is that the Campground should no longer be delineated as Priority Habitat under 321 CMR 10.12(4) because the impact of its own extensive land clearings has eliminated any important EBT habitat features, I reject that reasoning as a matter of law. As set forth in Section IV.B.1. and 2. above, I have ruled that A/C MHP's sewage system work and the associated land clearings are neither grandfathered under 321 CMR 10.13(2) nor exempt under 10.14(6) and/or (10). Accordingly, the Petitioner is not entitled to have the Campground "de-mapped" as Priority Habitat because its own unauthorized actions have eliminated the ecological features that served as important habitat for the EBT, including causing an undisputed Take of the EBT. Instead, A/C MHP is obligated as a matter of law to restore and/or mitigate the impacted Priority Habitat and related Take in accordance with the MESA Regulations.

For the above stated reasons, I grant a Directed Decision in favor of the Division on this issue.

4. The issue of whether the Division properly determined pursuant to 321 CMR 10.18 that A/C MHP's sewage system upgrade and associated land clearings resulted in a Take of the EBT

In adjudicating this final issue, I begin with the Petitioner's own explanation of its position. In its Opposition to the Division's Motion for Directed Decision, the Petitioner states as follows:

"The third issue for adjudication, whether the Division properly determined that the Petitioner's construction activities resulted in a take, was proposed by the Division, and is not addressed in any of the Petitioner's testimony *because the Petitioner has not challenged the Division's determination of a take*. This issue is moot if the campground and improvements thereto are exempt and/or grandfathered under MESA." (Emphasis added.)

Petitioner's Opposition at 2.

In other words, the Petitioner makes clear that its appeal was never a challenge to the Division's determination pursuant to 321 CMR 10.18 that A/C MHP's land clearing activities have caused a Take of the EBT, but is entirely predicated on the Petitioner's claims that the Division has no jurisdiction over the resulting Take because this work is exempt and/or grandfathered under MESA. The Petitioner implicitly acknowledges that if the Division's final adjudication of this appeal determines that the exemption and grandfathering provisions of the MESA regulations do not apply to A/C MHP's unpermitted actions, then A/C MHP does not dispute that it has caused a Take of the EBT that subject to the MESA regulations. In any event, I find that none of the Petitioner's witnesses, including Mr. Aquiar, is qualified to provide credible evidence on the issue of whether A/C MHP's land clearing activities have caused a Take of the EBT under the MESA regulations. In summary, I have determined above in Section IV.B.1.-3. that the Petitioner's sewage system work and the associated land clearings are neither grandfathered nor exempt under the MESA regulations and that the Campground is properly mapped as Priority Habitat. I have further noted in this Section IV.B.4. that the Petitioner has affirmed that it is not

challenging the basis for the Division's Take Determination, and in any event, the Petitioner has not shown that it is qualified to do so. For all of these reasons, I enter a Directed Decision in favor of the Division upholding its determination pursuant to 321 CMR 10.18 that A/C MHP's land clearing activities resulted in a Take of the EBT.

V. Conclusion

In conclusion, for the reasons set forth in Section IV.B.1-4., I dismiss the Petitioner's appeal and issue a Directed Decision in favor of the Division. As a consequence, A/C MHP is obligated to fully mitigate the impacts of its Take of the EBT and/or to apply to the Division for a Conservation Management Permit for a determination of whether or the extent to which the Take may be authorized in accordance with the requirements of 321 CMR 10.23.

Dated: 6/27/19

By: Richard Lehan
Richard Lehan, Esquire
Presiding Officer

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.

SERVICE LIST

In the Matter of A/C Mobile Home Park, Inc., Truro, MA

Docket No. 2017-01-RL

NHESP File No. 16-35870

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