COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.	LAND COURT CASE NO. 13 MISC 479028-RBF
CHRISTINE A BOSTEK, et al., Plaintiffs v. ENTERGY NUCLEAR GENERATION CO., et al., Defendants	PLAINTIFFS' OPPOSITION TO DEFENDANT ENTERGY NUCLEAR GENERATION CO.'S MOTION TO DISMISS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT ENTERGY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF STANDING

Plaintiffs Christine A. Bostek et al. ("Plaintiffs") respectfully submit this Opposition to Defendant Entergy's Motion to Dismiss their First Amended Complaint for Lack of Standing ("Opposition"). Defendant Entergy Nuclear Generation Co. ("Defendant" or "Entergy") brought its motion pursuant to Mass.R.Civ.P. 12(b)(1) and 12(b)(6). As grounds for this Opposition, Plaintiffs assert that they are persons aggrieved by the July 24, 2013 Decision of the Plymouth Zoning Board of Appeals to (1) grant a Zoning Permit as of right to Entergy for the storage of spent nuclear fuel ("SNF") at the Pilgrim Nuclear Power Station ("Pilgrim") and (2) deny a request for enforcement of the Plymouth Zoning Bylaws ("Bylaws"), and therefore have standing under G.L. c. 40A, § 17.[1] For the reasons stated herein, the Motion to Dismiss the First Amended

[1] Entergy's memorandum in support of its motion does not address Plaintiffs' standing to bring its claim for declaratory relief under G.L. c. 231A, §§ 1 and 2, see e.g. Memorandum in Support of Defendant Entergy Nuclear Generation Co.'s Motion to Dismiss Plaintiff's Amended Complaint for Lack of Standing ("Def. Br." at 21.) Since Plaintiffs show here that they meet the standing requirements of G.L. c. 40A, they also have standing under G.L. c. 231A.

Complaint ("Complaint") should be denied. Should the Court find the Complaint deficient, Plaintiffs reserve their right to bring a motion to amend pursuant to Mass.R.Civ.P.15.

I. STATEMENT OF THE ISSUES

(1) Whether Plaintiffs have sufficiently alleged and put forth evidence to establish their status as abutters under G.L. c. 40A.

(2) Whether Plaintiffs have sufficiently alleged and put forth credible evidence to substantiate their allegations of aggrievement under G.L. c. 40A.

II. LEGAL STANDARD

A. Rule 12(b)(1) standard

At the motion to dismiss stage, a plaintiff's burden in maintaining a complaint is "relatively light." *Warner Lambert v. Execuquest Corp.*, 427 Mass. 46, 47 (1998). When conducting its inquiry, a court will look not only at the four corners of the complaint but also to any documents that are incorporated by reference and attached thereto. *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985).

"When evaluating the sufficiency of a complaint pursuant to a motion to dismiss, the court must accept as true the allegation of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor." *Murphy v. Morrison*, 2007 WL 2705864, *2 (Mass. Super. 2007). A court should find a complaint sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. A court's consideration of materials outside of the pleadings on a motion pursuant to Rule 12(b)(1)

does not automatically convert that motion into one for summary judgment under Rule 56.[2] *See Watros v. Greater Lynn Mental Health and Retardation Assoc., Inc.*, 421 Mass. 106, 109 (1995).

B. Standing under G.L. c. 40A

General Laws c. 40A, § 17 provides that "any person aggrieved by a decision of the board of appeals" may seek judicial review. A "person aggrieved" is one who "suffers some infringement of his legal rights." *Marashlian v. Zoning Board of Appeals,* 421 Mass. 719, 721 (1996). If a plaintiff's legal or property rights will (or likely will) be infringed by a board's action, then he qualifies as a "person aggrieved." *Id*.; *Circle Lounge & Grill, Inc. v. Bd. of Appeal of Boston*, 324 Mass. 427, 430 (1949). The plaintiff must show a direct injury to a private right, private property interest, or a private legal interest, and that the injured right or interest is one that the Zoning Enabling Act, G.L. c. 40A, or the Bylaw is intended to protect, either explicitly or implicitly. *Butler v. Danforth Green, LLC*, Case No. 13 MISC 477647, 2013 WL 4510385, *9-10 (Mass. Land Court 2013). Plaintiffs must show by direct facts that the claimed injury is "special and different from the injury the action will cause the community at large." *Id*. *14. *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011); *81 Spooner Road, LLC*, 461 Mass. 692, 701 (2012); *Monks v. Zoning Bd. of App. of Plymouth*, 37 Mass.App.Ct. 685, 689 (1994).

[2] Entergy also moves, in the alternative, for summary judgment pursuant to Mass. R. Civ. P. 56. Def. Br.. at 3, n.1. To the extent this Court finds that the consideration of additional evidence requires conversion to a motion for summary judgment, based on the evidence provided, Plaintiffs have, at a minimum, raised a genuine issue of material fact as to Entergy's claims that Plaintiffs lack standing and Entergy's motion should be denied. A party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment only if the party "demonstrates, by reference to material described in Rule 56(c), unmet by countervailing materials, that the party opposing the motion *has no reasonable expectation of proving an essential element of that party's case." Korn v. Paul Revere Life Ins., Co., 83 Mass.App.Ct. 432 (2013) (emphasis added).* The Court must view the material evidence in the light most favorable to the non-moving party. *Standerwick v. Zoning Board of Appeals, 447 Mass. 20, 32 (2006).* Should the Court convert the motion to one for summary judgment, Plaintiffs' respectfully cross move pursuant Rule 56 for a grant of summary judgment in their favor on the issue of standing because the facts shown herein establish that there is not genuine issue of material fact as to Plaintiffs' standing. Plaintiffs also respectfully request the opportunity to file a surreply to Entergy's June 16 reply to this Opposition.

Whether an individual is aggrieved is "a question of fact for the trial judge." *Marashlian*, 421 Mass. at 721, and the determination is a matter of degree calling for discretion rather than inflexible rule. *See Paulding v. Bruins*, 18 Mass.App.Ct. 707, 709 (1984), quoting *Rafferty v. Sancta Maria Hosp.*, 5 Mass.App.Ct. 624, 629, (1977). The injury must be more than speculative, *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 335 (1993) (Abrams, J., dissenting), but the term "person aggrieved" should not be read too narrowly. *Standerwick,* 447 Mass. at 26 (citing *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957)); *see also Cummings v. City Council of Gloucester*, 28 Mass.App.Ct. 345, 350, 46 (1990). A review of standing based on "all the evidence" does not require that the factfinder ultimately find a plaintiff's allegations meritorious. *Marashlian*, 421 Mass. at 721. In challenging standing, it is not sufficient to "simply to raise the issue of standing in a proceeding under § 17 [; t]he challenge must be supported with evidence." *Titanium Group, LLC vs. Brockton Zoning Bd. of Appeals*, 17 LCR 67, 74 (2009).

Abutters enjoy a rebuttable presumption that they are "persons aggrieved" under G.L. c. 40A.[3] *Standerwick*, 447 Mass. at 33. The presumption recedes when a defendant challenges the plaintiff's status as an aggrieved person and offers evidence supporting his or her challenge. *Watros*, 421 Mass. at 111, quoted in *Standerwick*, 447 Mass. at 34-35. "Legal arguments and mere allegations are not sufficient to rebut the plaintiffs' presumed standing." *Watros*, 421 Mass. at 111; *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 128 (1999).
Rather, the evidence must "'warrant[ ] a finding contrary to the presumed fact' of aggrievement." *81 Spooner Road, LLC*, 461 Mass. at 702.

[3] General Laws c. 40A § 11 defines "Parties in interest" as the "petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town."

III. ARGUMENT

The Complaint makes sufficient allegations of standing. In the Complaint and with this Opposition, Plaintiffs' have submitted credible evidence including expert testimony to rebut Entergy's Motion to Dismiss. The Plaintiffs raise concerns protected by G.L. c. 40A and the Bylaw, and have offered credible, expert opinion and supplied credible factual bases substantiating their claims of injury arising from the Board Decision. Entergy has failed to put forth evidence sufficient to challenge the presumption of standing enjoyed by the abutter Plaintiffs and failed to show that Plaintiffs are not otherwise persons aggrieved. Even if the materials submitted by Energy are considered sufficient to challenge the Plaintiffs standing, Plaintiffs have effectively met Entergy's challenge to their standing to appeal the Board Decision, and the Motion to Dismiss should be denied.

Plaintiffs show here that their rights "will or will likely be infringed", *Marashlian* 421 Mass. at 721, in two ways by the issuance of the Zoning Permit and denial of the request for enforcement: (a) as a result of the siting, construction and use of the Independent Spent Fuel Storage Installation ("ISFSI") itself, (2) as a result of the continued operation of Pilgrim's nuclear power operations, made possible by the increased SNF storage capacity provided by the ISFSI.

As shown below, two Plaintiffs are abutters entitled to the presumption of standing. Even if the Court finds they are not abutters, these two Plaintiffs and the additional nineteen[4] Plaintiffs are persons aggrieved.

[4] Plaintiff Aileen Decola wishes to be removed as a plaintiff and counsel will be asking the Court's permission to remove her, leaving eighteen plaintiffs.

A. Two Plaintiffs are abutters are entitled to a presumption of standing

Plaintiffs Virginia Curcio ("Curcio"),and Jacqueline Hochstin ("Hochstin") are abutters within the meaning of G.L. c. 40A § 11 and are presumed to have standing. Curcio and Hochstin own property abutting Entergy's Lot 525, which is within the "Site Boundary" for the Pilgrim Nuclear Power Station as defined by Entergy itself in official documents, as explained further below. *See* Plaintiffs' Response To Defendant Energy Nuclear Generation Co.'s Statement of Material Facts and Plaintiffs' Statement of Material Facts In Support of Their Opposition to Entergy's Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing ("Pl. SOF"), ¶¶ 34, 47-49. Curcio and Hochstin and are included on the Town of Plymouth certified abutters list of persons to receive notice of the Board hearing on the appeal of the Zoning Permit. Pl. SOF ¶ 37. If the Court finds Curcio and Hochstin are not abutters, Plaintiffs here set forth sufficient credible evidence to establish that they are otherwise persons aggrieved.

Entergy's claim that no plaintiff enjoys the presumption of standing, Def. Br. at 7, is based on a cherry picking of the lots encompassed in approximately 1,540 acres of property around Pilgrim that Entergy owns contiguous to Lot 1B, which itself consists of about 134 acres.[5] Pl. SOF ¶ 42. In applying for the zoning permit for the concrete pad Entergy identified the "project site" as "Lot No. 04000001B000." [6] Pl. Ex. 23. Entergy's truncated description of the "project site" flatly contradicts other official documents Entergy and its predecessor Boston Edison have submitted to government regulators describing the "Pilgrim site" as anywhere from 517 acres to nearly 1,700

[5] The Site Boundary consists of a portion of the approximately 1,540 acres of Entergy-owned property surrounding Lot 1B.

[6] For efficiency purposes, when referring to assessor's maps, this memorandum will exclude unnecessary zeros and refer to the map and lot number.

acres. Pl. SOF ¶¶ 42, 47, 48, 49; Affidavit of Margaret Sheehan ("Sheehan Aff."). Entergy cannot manipulate its property boundaries for zoning purposes, depending on what suits its needs.[7] Lot 525 is one of many lots Entergy uses for Pilgrim's operations, and which has merged into one lot that makes up the Site Boundary for Pilgrim as described by Entergy. Entergy's lots have merged under doctrine of merger as shown by the facts here.

1. Doctrine of Merger

"Adjacent lots in common ownership will normally be treated as a single lot for zoning purposes" under the doctrine of merger in certain circumstances. *McGrath v. Chatham Zoning Bd*., 17 LCR 101, 104 (2009). Two requirements must be present for the doctrine of merger to apply. First, "unity of title between the affected parcels must be of a permanent and enduring estate, an estate in fee in both…second this unity of title only occurs when two ownership interests are coextensive." *Busalacchi v. McCabe*, 71 Mass. App. Ct. 493, 498 (2003) (citations omitted). Here, there is unity of title because Entergy owns the lots within the Site Boundary, conveyed under the same deed, in fee simple.[8] Def. App. Ex. 6. The ownership is coextensive because the ownership interest (fee simple) being united is the same. *Id.* The fact that the Deed contains an attachment describing four tracts of land and parcels within each does not negate the fact that there is unity of title, or that Lot 1B has not retained a separate identity, as described below. "The mere fact that the [deeds] refer to [multiple lots] is insufficient to give rise to a presumption of intention to preserve the lots designated therein." *McGrath v. Chatham Zoning Bd*., 17 LCR 101,105 (2009).

[7] Entergy cites *Egri v. Conn. Yankee Atomic Power Co.* to support its claim that the only relevant portion of Entergy land is Lot 1B. Def. Brief at 8. *Egri* is distinguishable on two grounds: (1) plaintiff there was "under the mistaken belief that [subject property] was under common ownership with" another property to which plaintiff's property does adjoin. *See Egri*, 270 F. Supp.2d 285, 292 n.7 (D. Conn. 2002), where here there is no mistake: Entergy admits it owns Lot 525, abutting Curcio and Hochstin's property, and (2) plaintiffs objections to the ISFSI project "were with what they perceived as violations of the land use regulations," and therefore were not particularized enough to maintain standing. *Egri*, 270 F. Supp.2d at 292. Here, Plaintiffs have articulated particularized harms that are substantiated by credible facts including expert opinions.

[8] While the Deed does not state that a fee simple interest is conveyed, it is implied and no more limited estate is specified.

Second, in determining whether merger applies, courts look to whether the lots retain separate identities. *McGrath v. Chatham Zoning Bd*., 17 LCR 101, citing *Lindsay v. Bd. of Appeals of Milton*, 362 Mass. 126, 131 (1972). Factors assisting this inquiry include "(1) the physical division of the lots by a fence or wall; (2) the location of structures on the lot(s); (3) the means in which the lot is assessed; and (4) the description of the lots in the deed." *Lindsay*, 362 Mass. at 131; Def. Br. At 10.

Entergy's Lot 1B has not retained a separate identity, but has been treated as part of the larger whole identified by Entergy itself as the Pilgrim "Site Boundary." Pl. SOF ¶ 47, 55, 56. The lots within the Site Boundary are not "used for diverse purposes" as Entergy argues, Def. Br. at 9.

The Site Boundary for Pilgrim has been the same since 1967 as it is today. Pl. SOF ¶ 49. Indeed, notice of Boston Edison's 1967 original application to the Town for a special permit to build Pilgrim was given to persons abutting what is Lot 525 today, the land that Curcio and Hochstin abut. Pl. SOF ¶ 54. The 1967 Special Permit requires Entergy to retain control over Power House Road, running through Lot 525 and other Entergy land. Pl. App. Ex. 17, Pl. SOF ¶¶ 50, 61. Entergy bars trespassers from Lot 525. Pl. SOF ¶ 62.

The land within the Site Boundary is not physically divided. Entergy admits the land bounded by the Site Boundary is currently posted with No Trespassing signs or has a fence along it, and the general public is prohibited from entering the land. Pl. SOF ¶ 51, 52. Entergy maintains structures used as part of Pilgrim's operations on Lot 525. Pl. SOF ¶ 61. Pilgrim's private access road and its transmission lines cross all four lots that make up the 517 acres within the Site Boundary, and Entergy maintains a gate at the entrance to Power House Road on Route 3A which is used to maintain plant security. Pl. SOF ¶ 62.

Entergy's real estate tax arrangement with the Town of Plymouth treats about 1,540 acres

surrounding Lot 1B, including the land within the Site Boundary, as one. Sheehan Aff. ¶ 2, and ¶ 20 of PILOT agreement (Att. 1 to Sheehan Aff.). While Entergy argues that the Town "assessed and continues to assess the parcels held by Entergy near the Pilgrim Plant as separate and distinct," Def. Br. at 10, in fact, Entergy does not actually pay a separate tax bill for each lot, but rather makes one PILOT payment for all the lots. Att. 1 to Sheehan Aff.

By limiting its zoning application for the concrete pad to Lot 1B, Entergy has arbitrarily divided its property and eliminated hundreds of abutters, cutting the abutters down to Entergy itself and three others, Def. Br. At 7, Ent. SOF ¶ 10, making a mockery of the zoning process. Since Plaintiffs Hochstin's and Curcio's properties abut the Pilgrim Site Boundary, they are abutters for purposes of G.L. c. 40A, § 11.

Entergy's attempt to restrict the merger doctrine's application in zoning context to minimize nonconformities is unavailing and this Court should reject it. *See Williams Bros., Inc. of Marshfield v. Peck*, 81 Mass.App.Ct. 682, 686(2012) ("[A] statute is not to be interpreted as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed."). The common law merger doctrine has been applied in other contexts, including in the context of standing. *See, e.g., Holmes v. Sudbury Bd. of Appeals*, 67 Mass.App.Ct. 1108, 2006 WL 2796289 (2006) (applying merger in standing context); *see also, e.g., Orr v. Fuller*, 172 Mass. 597, 600 (1899) (applying merger in mechanics' lien context); *Williams Bros., Inc. of Marshfield*, *Williams Bros. supra.* (applying merger to extinguishment of easements).

Entergy attempts to minimize the importance of *Holmes* by relegating it to a footnote and mischaracterizing the appellate court holding as dicta. *See* Def. Br. at 9, n.2. Entergy's aversion to *Holmes* is not surprising given that case's direct applicability to the facts here. In *Holmes*, the defendant sought to do what Entergy seeks to do here—"create arbitrary subdivisions within its

property so as to exclude abutters from the presumption of aggrieved person status." *Holmes*, 2006 WL 2796289, at *3. There, the defendant could offer no authority for its position, and the appellate court found it to be absurd.[9] *Id*.

Likewise, here, Entergy offers "no case law to support its contention that parties in interest must abut not just the property where [the project objected to is being built] but the particular subsection of that property." *Holmes*, 2006 WL 2796289, at *3. This Court should follow the logical reasoning of the *Holmes* case and find Plaintiffs Curcio and Hochstin are abutters.

2. Abutters List

Plaintiffs Hochstin and Curcio, as well as Plaintiffs Paris and Buckbee appear on the Town's May 2, 2013 Certified Abutters list, Pl. SOF ¶ 37, which was issued for contiguous Entergy property surrounding Pilgrim. Pl. SOF ¶36. While Plaintiffs do not assert for purposes of this Opposition that Paris and Buckbee are abutters under c. 40A, they do in fact abut Entergy lots contiguous to Pilgrim. Pl. SOF ¶¶ 40, 41, 42.

Entergy claims that the abutters list of April 4, 2013 is conclusive for "all purposes" under G.L. c. 40A, § 11. Def. Br. at 6-7, Def. SOF at 8, 9, 10. This claim is based on an omission of relevant fact – i.e. that the Town issued two abutters lists. Pl. SOF ¶ 35. Thus, the April 4, 2013

[9] Entergy's suggestion that the appellate court's holding is dicta without merit. The defendant in *Holmes* appealed the issue of the plaintiff's standing. The appellate court had no trouble affirming the plaintiff's standing, and, in so doing, *only* discussed the merger issue. The court's analysis is reproduced here in its entirety:

> Fairview argues that plaintiffs are neither abutters nor abutters of abutters within 300 feet because the particular parcel of land on which the activities objected to are taking place and for which the variance was sought (parcel B) is deep inside the locus, at a distance of 740 feet from plaintiffs' property. The problem with this argument is that all of the land surrounding parcel B is owned by Fairview, and parcel B is not, in fact, a separately deeded lot. *See* Land Court decision, at 12 n. 3. Fairview offers no case law to support its contention that parties in interest must abut not just the property where a variance is to be granted but the particular subsection of that property. Additionally, as a practical matter, it would be absurd if Fairview could create arbitrary subdivisions within its property so as to exclude abutters from the presumption of aggrieved person status.

Holmes, 2006 WL 27906289, at *3. It is clear from the court's discussion that the applicability of the presumption is central to its holding that the plaintiff had standing.

abutters list is not conclusive for purposes of determining whether Plaintiffs Curcio and Hochstin are entitled to the presumption of standing as abutters.

Entergy has not met its the burden of coming forward with evidence to rebut the presumption that Curcio and Hochstin are abutters entitled to a presumption of standing. *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011) As Entergy has failed to rebut the abutters' presumption of aggrievement, the Court should deem the abutters to have standing, and allow this case to proceed to the merits.

B. Plaintiffs claims of harm are cognizable under G.L. c. 40A and the Bylaw and are substantiated by credible evidence.

If the Court finds that the presumption of standing for the abutters has been rebutted, it should find that the Plaintiffs have met their burden to show by direct facts that their injury is special and different from the concerns of the community. Plaintiffs' evidence is "quantitatively and qualitatively sufficient." *Michaels v. Zoning Board of Appeals of Wakefield,* 71 Mass. App. Ct. 449, 451 (2008) citing *Butler v. Waltham*, 63 Mass. App. Ct. 435 (2005) at 441. Plaintiffs' evidence provides "specific factual support for each of the claims of particularized injury" and is "of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Id.*

Entergy claims that the harm to Plaintiffs' alleged interests are generalized and indistinct from concerns of the community at large. Def. Br. at 12. This is simply not true. Plaintiffs show harm to their particularized interests in their health, safety, welfare, the environment, and their use and enjoyment of the Plymouth's amenities, including the area's coastline. They show by credible facts that their interests are unique due to factors such as their proximity to Pilgrim, the duration of time they have spent living, working and recreating proximate to Pilgrim. This particularized harm extends to harm from the ISFSI, which is itself a disamenity, and also makes it possible for

Pilgrim to continue operations, expanding the nature and duration of harms to Plaintiffs. Entergy's unsubstantiated and erroneous claims that Plaintiffs harms are generalized are insufficient to defeat Plaintiffs' standing.

As shown here, Plaintiffs interests are both implicitly and explicitly protected by G.L. c. 40A and the Bylaw general and special permit provisions. Credible evidence shows that their legal interest are particularized and will or likely will be infringed, *Marashlian*, 421 Mass. at 721. Plaintiffs will suffer harm from Entergy's siting, construction and use of dry cask storage for SNF and from the fact that such dry cask storage is essential if Pilgrim itself is to continue to operate.

Entergy would like this Court to believe the "concrete pad" exists in a vacuum. It does not. Entergy cannot get the SNF to the pad without using the other connected and integral components of the ISFSI. Pl. SOF ¶ 167. Moreover, use of the pad results in new and increased harms to Plaintiff and a significant change to Pilgrim's industrial operations. Without the pad, Pilgrim could not continue long to operate. Use of the pad extends the period of time during which Entergy can continue to produce nuclear power at the site by providing extra storage capacity for SNF. Use of the pad will expand the volume of SNF over what is presently stored on site, will increase the volume and frequency of SNF handling and transportation on the site as the SNF is moved from the wet pool to the dry casks; and will increase Pilgrim's industrial footprint. Pl. SOF ¶¶ 114, 115.

With respect to the dry cask storage itself, the fuel rods that Entergy will be moving from the wet pool inside the Pilgrim reactor to the dry casks, which will be transported along the haul path to the concrete pad are thermally hot when removed from the reactor and emit great amounts of radiation--enough to be fatal in minutes to someone in the immediate vicinity. Pl. SOF ¶ 75. Even though it is no longer useful for nuclear power, SNF poses a dangerous, long-term health and

environmental risk. It will remain dangerous "for time spans seemingly beyond human comprehension." Pl. SOF ¶ 78.

The Zoning Enabling Act is intended for the "conservation of health, protection of public safety, facilitating the provision of... open space, conservation of property values and the environment, and encouraging the appropriate use of land." *Butler*, 2013 WL 4510385, *5. The Bylaw's general purposes, and the special permit provisions which Plaintiffs seek to enforce, are also intended implicitly and explicitly to protect Plaintiffs' interests. The Bylaws purposes include promoting the health, safety, convenience and welfare of the inhabitants of the Town of Plymouth, including conserving the "value of land and buildings." § 205-1. By definitions, special permits are intended to control a use that would be injurious to the "public health safety and welfare" without special permit conditions, Bylaw § 205-1, and the local permitting authority must condition the operation of the use and ensure prevention of a nuisance and may impose discretionary conditions to protect interests such as water resources and ecology. Bylaw §205-9(B)(1) (a)-(d); §205-9(B)(2)(h). Discretionary conditions may be imposed to protect the landscape and natural ecological processes, visual prominence, social and cultural importance to the Town, and overall impact upon the character and environmental amenity of Plymouth. Bylaw § 205-9(C).

The Plaintiffs below put forth credible evidence "of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Id.* This evidence is not based on documentary evidence of the harms that Plaintiffs will suffer if the Bylaw is not enforced and the ISFSI is approved as an accessory use without proper special permit review. Plaintiffs' evidence provides specific factual support for each of the claimed injuries (quantitative), and is of a type on which a reasonable person could rely (qualitative). *Id.* at 451.

1. Plaintiffs' property values will be harmed by the siting, construction and use of the ISFSI and Pilgrim's continued operations made possible by the ISFSI

Plaintiffs' claims of diminution of property values are tethered to the Bylaw and G.L. c. 40A, which explicitly and implicitly protect real estate values. An interest in property values has been considered derivative of health, safety and welfare. Pl. Ex. 13, Bylaw § 205-1; § 205-3; G.L. 40A. *See also Drummey v. Falmouth*, 31 Mass.L.Rptr. 250, 2013 WL 3205142 *13 (noting "one purpose of the Bylaw is 'to conserve health'").

The Complaint and Plaintiff affidavits allege harm to the value of Plaintiffs' homes from the siting, construction and operation of the ISFSI and Pilgrim's continued operations. Pl. SOF ¶¶ 9, 106. Plaintiffs put forth credible evidence in the form of an expert affidavit by Dr. Stephen Sheppard to substantiate their claims of diminution of real estate value. *See generally* Affidavit of Dr. Stephen Sheppard, Pl. Ex. 10. Dr. Sheppard has studied the effect of Pilgrim on the local residential real estate market in Plymouth. Id. His education and experience are described in his CV, attached to his Affidavit.

The ISFSI constitutes an identifiable change in activity at Pilgrim since the site will encompass both nuclear power production and long-term SNF storage outside in dry casks, rather than temporary inside storage. Pl. SOF ¶ 113. The ISFSI also increases the total volume of SNF stored on-site and the frequency of SNF handling, movement, and transportation at the site, Pl. SOF ¶ 114, both of which can be expected to generate increased negative effects on local residential property values. Pl. SOF 115. These negative property value effects are exacerbated at Pilgrim due to Pilgrim's poor safety record, memorialized by NRC's recent downgrade of Pilgrim's safety rating, and by heightened public awareness and perception of the risks presented by Pilgrim and the ISFSI. Pl. SOF ¶¶ 108, 116.

Plaintiffs live and own property within one and two miles of Pilgrim. Pl. SOF ¶ 32. The real estate located within 1 mile of Pilgrim and owned by Plaintiffs Buckbee, Paris, Hochstin, and Curcio and the properties of Bostek, Barrett, Carr, and Crone within two miles are likely to suffer a reduced market value due to construction and operation of the ISFSI at Pilgrim. Pl. SOF ¶¶ 123, 124. Plaintiffs' harm from diminution in property values differs from that of the community at large since due to their proximity Plaintiffs, particularly those within two miles, will suffer a greater diminution in value.

Proximity to an ISFSI is analogous to proximity to other waste storage or hazardous waste sites, such as landfills and Superfund sites, which create a stigma even if the waste is properly stored, cleaned up, or the site is closed. Pl. SOF ¶ 112. The harm from the ISFSI to Plaintiffs' real estate could include a lower purchase price, inability to access capital, inability to finance or refinance, and/or a delay in sale. Pl. SOF ¶ 109, 110.

In addition to the disamenity of the ISFSI itself, the fact that the ISFSI extends Pilgrim's operating capacity by providing additional storage space for SNF negatively impacts residential real estate by extending Pilgrim's depressive effect on homes and property in close proximity to the plant. Pl. SOF ¶ 117. A 2009 study concluded that there was strong evidence that house prices were adversely affected by proximity to Pilgrim. Pl. SOF ¶ 118. This study is consistent with broader studies that have found statistically significant losses in residential property values of nearly $26,000 per residence. Pl. SOF ¶ 119. Entergy cannot dispute Pilgrim's depressive effect on property values in proximity to the plant. Pl. SOF ¶ 120.

The ISFSI is a disamenity separate from Pilgrim's nuclear power operations, Pl. SOF ¶ 111, which are licensed through 2032. The ISFSI provides extra storage capacity for Pilgrim's SNF and thereby extends the length Pilgrim's operating life. As such, it lengthens the period of

time Plaintiffs will live near an operating nuclear power station. The ISFSI is necessary for Pilgrim to continue to generate electricity. Pl. SOF ¶¶ 68, 69. It is reasonable to expect that if Pilgrim were to cease operation, the value of real property in close proximity to the plant would, over time, rebound from its currently depressed state. Pl. SOF ¶ 121. The ISFSI extends the length of time that the Pilgrim's operations adversely affect local property values, causing an ongoing economic injury to property owners in in close proximity. Pl. SOF ¶ 122.

The existence of risk and the public's perception of the risk associated with a particular property negatively affect the market value of real estate. Pl. SOF ¶ 109. The Fukushima disaster has increased public awareness of the risks of commercial nuclear power plants and has contributed to an elevated public perception of the risks of such facilities. Pl. SOF ¶¶ 168, 169.

Plaintiffs allege concerns arising from the perception of risk of Pilgrim and the ISFSI to their health, safety and welfare and value of their homes. *See, e.g*. Pl. SOF ¶¶ 137, 144, 169, 170. Dr. Sheppard's testimony shows that the perception of risk arising from the IFSFI and Pilgrim's continued operation is concrete, and that it has a measurable impact.

With respect to the long-term dry cask storage of SNF itself, the U.S. NRC identifies numerous factors that can cause or contribute to an accidental release in its regulatory programs governing Entergy's use of the casks. Pl. SOF ¶¶s 91-93. These factors include earthquakes and soil instability, tornado missiles, and radiological sabotage. *Id.* at ¶ 89.

Conditions that could affect the proper performance of the canister that confines the SNF are also identified by the NRC and include loading excessively hot fuel assemblies into dry casks, corrosion of casks from the coastal atmosphere, corrosion from long-term industrial releases, pressurization from corroding fuel, pressurization from failed fuel, and hydrogen gas accumulation when the canister lid and shell are improperly welded. Pl. SOF ¶ 92. A condition of particular

concern to the proper functioning of Entergy's dry casks at Pilgrim is blockage of air vents that prevent the SNF from overheating and releasing dangerous radiation. Pl. SOF ¶ 92-94.

The edge of the ISFSI is 106.5 feet from the shoreline of Cape Cod Bay and is vulnerable to coastal storms. Pl. SOF ¶¶ 97, 98. Coastal storms have resulted in storm damage and flooding in and around the shoreline within 1.6 miles of Pilgrim, including sand that is washed inland onto local streets. Pl. SOF ¶ 99. Moreover, Entergy's plans for the design and siting of the ISFSI are based on outdated estimates of sea level rise at the Pilgrim site. Pl. SOF ¶ 100. The ISFSI is not covered and does not have a roof to prevent snow from accumulating and blocking the vents. Pl. SOF ¶ 96.

These facts relate directly to the public perception of risk that results in the diminution of plaintiffs' properties. Particularly given the site's vulnerability to coastal storms and evidence of storm damage and flooding within 1.6 miles of Pilgrim, there is a credible basis for a perception that a number of the initiating events could occur, including sand and flood waters blocking the vents on the dry casks. Plaintiffs' property values are harmed by the perception of risk from the ISFSI, which is additional to the risk of Pilgrim. Pl. SOF ¶¶ 112, 118.

Similarly, the public perception of risk of harm from a terrorist attack is based on credible evidence. Plaintiff Paris, whose property abuts Entergy owned land, regularly observes paramilitary personnel conducting security drills in the woods behind his home, and Plaintiff Bostek reports a similar paramilitary presence in the neighborhood. Pl. SOF ¶ 16, 162, 163. Plaintiffs state their concerns of harm resulting from a terrorist attack on the casks. There is credible evidence upon which Plaintiffs base their concerns that they may be harmed by

radiological sabotage involving the dry casks, and that the value of their homes will diminish based on the public's perception of this risk.[10] Pl. SOF ¶ 89, 112, 118.

Plaintiffs' concerns about harm from a radiological accident involving the casks are amplified by the events at Fukushima. Pl. SOF ¶ 116. In 2012, citing post-Fukushima concerns, the NRC required Pilgrim to provide updated information regarding the plant's ability to withstand site-specific flood hazards. Pl. SOF¶ 102. Post-Fukushima, the NRC, on March 12, 2012, issued an order modifying Pilgrim's operating license, Pl. SOF ¶ 102, stating "[t]he events at Fukushima Dai-ichi highlight the possibility that extreme natural phenomena could challenge the prevention, mitigation and emergency preparedness" at commercial reactors like Pilgrim. Pl. SOF ¶ 103 and "additional requirements must be imposed" on Pilgrim "to provide adequate protection to public health and safety…." Pl. SOF ¶104. Agency announcements like the one above exacerbate the negative impact of Pilgrim and the ISFSI on the value of Plaintiffs' properties. Pl. SOF ¶109, 117.

Entergy incorrectly relies on *Kenner* for the proposition that Plaintiffs' claim of diminution of property value is not tethered to an interest the zoning scheme seeks to protect. Def. Br. at 17-18. In *Kenner*, Plaintiffs alleged diminution of property value was derivative of the impact on their ocean view. *Kenner*, 459 Mass. at 124. Protection of ocean views was not an interest protected by the town's zoning bylaw, and in any event the court found the impact on ocean views de minimus. *Id*. That case is inopposite because as shown above, Plaintiffs tether their diminution of property values to interests protected explicitly and implicitly by the Bylaw and G.L. 40A.

[10] In determining whether the harm to Plaintiffs from a radiological accident is speculative or remote, the Court should examine not just the probability of a given harm occurring, but "both the probability of a given harm occurring *and* the consequences of that harm if it does occur." *New York v. U.S. Nuclear Regulatory Commission*, 681 F. 3d 471, 482 (D.C. Cir. 2012). The consequences of a radiological accident involving the dry casks, and an accident during Pilgrim's continued operation made possible by the extra SNF storage in the ISFSI, differs from other risks of harm alleged typical zoning cases (i.e. risk of a septic system failure, etc.).

The other cases string-cited by Entergy, Def. Br. at 18, are likewise easily distinguishable. Entergy cites *Standerwick,* but that case arose under G.L. c. 40B, which does not protect property values as an interest. The instant case arises under G.L. c. 40A, a completely different regulatory scheme, and the Plymouth Bylaw explicitly protects the "value of land and buildings." Entergy also cites to *O'Brien v. Laurel-Paine*, 69 Mass.App.Ct. 1109 (2007), 2007 WL 1839729. There, plaintiffs presented no credible evidence supporting their claim. *Id*. at *3. Moreover, the alleged harms had been addressed in conditions of the special permit. *See Almori v. Laurel-Paine*, No. 280605, 2005 WL 1515728, *6 (Mass. Land Ct. 2005). In contrast, Plaintiffs here provide expert testimony and factual support for their harms, which have not been addressed by a special permit conditions. Indeed, a special permit with conditions is exactly the relief that Plaintiffs here seek. In *Murphy v. Sampson*, No. 10 MISC. 433606 (JCC), 2013 WL 867185 (Mass. Land Ct. 2013), and *Kasparian v. Horning*, No. 369211 (HMG), 2009 WL 1622862 (Mass. Land. Ct. 2009), also cited by Entergy (Def. Br.. at 18), plaintiffs did not provide expert testimony to substantiate their diminution claims, and in *Hallock v. Chatham Zoning Bd. of Appeals*, No. 07 MISC 365365 (AHS), 2009 WL 4269936 at *6-7 (Mass Land Ct. 2009), neither plaintiff alleged diminution of property value, and the expert's opinion did not mention either of the plaintiffs' properties specifically.[11] The real import of the numerous cases cited by Entergy is that when plaintiffs diminution-in-value claims are tethered to a zoning interest specified in the bylaw—which Plaintiffs' claims are here—and substantiated by credible expert testimony—which Plaintiffs' claims also are here—then courts should find standing.

2. Plaintiffs health, safety and welfare will or likely will be harmed by the siting, construction and use of the ISFSI and Pilgrim's continued operations made possible by the ISFSI due to increased exposure to radionuclides

[11] Defendant's citation to *Jaffe v. Zoning Bd. of Appeals of Newton* is equally unavailing given Plaintiffs' expert evidence. *See* Def. Br. at 19 (citing *Jaffe* for the proposition that plaintiff's "feelings," without support of expert evidence, likely insufficient to confer standing).

Plaintiffs' allege health concerns resulting from exposure to radionuclides emitted by Pilgrim's nuclear power operations and use of the ISFSI. Pl. SOF ¶¶ 125, 137. Plaintiffs' health concerns are protected by the Zoning Enabling Act, *supra*, and Bylaw provisions intended to protect their health, safety and welfare. G.L. c. 40A and Bylaw, §§ 205-1, 205-9, 205-51. Plaintiffs' concerns of harm from exposure to radionuclides resulting from Pilgrim's operations are not speculative or remote as shown by the testimony of Plaintiffs' expert Dr. Richard W. Clapp, below. Additionally, the perception of risk of harm from exposure to radionuclides from accidental releases from the dry casks is real. As shown below, the harm Plaintiffs allege is particularized because of Plaintiffs' geographical proximity to the Pilgrim site and their past and continued exposure to harmful radionuclides that have cumulative impacts. Pl. SOF ¶ 143. Plaintiffs' submit the expert testimony of Dr. Richard W. Clapp, Professor Emeritus of Environmental Health at the Boston University School of Public Health and former Director of the Massachusetts Cancer Registry. Pl. Ex. 11. He testifies that the longer and closer a person has lived to Pilgrim, the greater the risk of exposure to harmful radionuclides and the greater likelihood of developing a radiation linked disease. Pl. SOF ¶¶ 129, 130.

Pilgrim releases radiation into the air, water, and soil in the form of liquid, gaseous and solid radioactive wastes during its routine operations. Pl. SOF ¶127. Since the 1970s, there have been accidental releases and leaks of radionuclides at Pilgrim, and there are ongoing leaks of radionuclides to the soil and groundwater. Pl. SOF ¶140. The types of radionuclides Pilgrim releases into the environment are linked to certain types of cancer. Pl. SOF ¶108. Studies and scientific data show increases in radiation-linked diseases in people living and working close to Pilgrim. Pl. SOF ¶¶ 130, 132. Adults living and working within ten miles of Pilgrim had a

fourfold increased risk of contracting leukemia between the years of 1978 and 1983 when compared with people living more than 20 miles away. Pl. SOF ¶ 130.

The health and environmental effects of radiation exposure are cumulative and radionuclides released from Pilgrim include substances that will remain active in the local environment for the foreseeable future. Pl. SOF ¶ 131.

New scientific information concludes there is no safe dose of radiation and that exposure to even very low levels of radiation is three times more dangerous than previously estimated– and more so for children and women. Pl. SOF ¶19. This new information is particularly relevant to the issue of the continued operation of Pilgrim because the health and environmental effects are cumulative. Pl. SOF ¶ 132, 144. As the 1990 Health Study cited by Dr. Clapp concluded, the closer one lived to Pilgrim, the greater the risk of cancer. Pl. SOF ¶ 133. The longer and closer a person has lived to Pilgrim, the greater the risk of exposure to harmful radionuclides, and the greater the chance of developing radiation-linked illnesses. Pl. SOF ¶ 134. For example, a person who lives or has lived within two to 10 miles of Pilgrim for a longer period of time has a greater risk of exposure than one who has not lived either as close, or for as long. Pl. SOF ¶ 135.

Many of the Plaintiffs have lived in their current homes within ten miles of Pilgrim for long periods of time. Pl. SOF ¶¶ 125, 135, 167. All live within ten miles, the distance within which the Health Study showed a four-fold increase. Pl. SOF ¶ 131. Plaintiffs' proximity and cumulative exposure makes the harm to them from the Board Decision different from that suffered by residents who live further away, those who have lived near Pilgrim for a lesser duration, and the general public.

3. The siting, construction and use of the ISFIS and Pilgrim's continued operations made possible by the ISFSI will harm Plaintiffs' interest in the environment, natural resources, ecology amenities, and tidelands area.

Plaintiffs allege particularized harm to their protected interests in the environment, natural resources, ecology, and amenities of the area surrounding Pilgrim and a legal right to use the tidelands in front of Pilgrim.[12] Pl. SOF ¶ 154. Plaintiffs will suffer, or are likely to suffer, *Marashlian,* 421 Mass. at 721, concrete harm to these legal interests that differs from that of the community at large.

Both Pilgrim itself and the ISFSI are environmental dismenities. Pl. SOF ¶ 111. An environmental disamenity is a disamenity whose impact is a characteristic of the local environment and whose impact is or could be transmitted via the air, land or water that surrounds or is part of a particular property. Pl. SOF ¶ 111. Plaintiffs show by credible evidence herein that Pilgrim's power production operations cause pollution of the air, soil, groundwater, and surface water at and around the Pilgrim site. Pl. SOF ¶ 127, 140, 149, 159. Just as the presence of the ISFSI and Pilgrim's continued operations are disamenities that harms Plaintiffs' real estate values, the presence also will harm or will likely harm their legal interests in the environment and local amenities. Pl. SOF ¶¶ 141-167. As noted above, the ISFSI's extra SNF storage makes it possible for Pilgrim to continue nuclear power generation.

Pilgrim releases dangerous radionuclides into the environment that have cumulative effects and substances released from Pilgrim include substances that will remain active in the local environment for the foreseeable future. Pl. SOF ¶¶ 131, 144, 127. Plaintiffs allege concerns about

[12] The public trust doctrine confers legal rights on Plaintiffs to use of waterways in front of Pilgrim. These rights are embodied in Massachusetts' tidelands law, G.L. c. 91, §§1-63 (2011) and the government is obliged to protect these rights. *Moot v. Mass. Department of Environmental Protection*, 456 Mass. 309 (2009). The Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation. *Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 198 (2000).

radionuclides from Pilgrim in the environment. Pl. SOF ¶¶ 144, 145. These concerns are based on credible evidence and therefore are not speculative or remote.

Pilgrim pollutes coastal waters and harms marine life through use of a once through cooling water system (CWIS) that takes in large volumes of sea water that is necessary for power production operations. Pl. SOF ¶ 147. "[T] he ecological harms associated with CWISs are well understood. The intake of water by a CWIS at "a single power plant can kill or injure billions of aquatic organisms in a single year. The environmental impact of these systems is staggering[,] ... destabilizing wildlife populations in the surrounding ecosystem"). *Entergy Nuclear Generation Co. v. Mass Department of Environmental Protection* 459 Mass 319, 322 (2011) (citations omitted). The thermal plume of pollution from Pilgrim covers about 5 square miles. Pl. SOF ¶ 148.

Pilgrim's power production operations also pollute the soil and groundwater at the Pilgrim site with radionuclides and other contaminants. Pl. SOF ¶¶ 150, 160. Pilgrim is located over a sole source drinking water aquifer, which Plaintiffs use as a source of drinking water. Pl. SOF ¶¶ 142, 143. Plaintiffs allege harm from the operation of the CWIS and the groundwater pollution. Pl. SOF ¶¶ 152, 153, 160.

The ISFSI itself, separate and apart from enabling Pilgrim's power production operations, will or likely will infringe Plaintiff's interest in the environment and amenities of the environment. If an accident involving the handling, transport, movement or long-term storage of SNF were to occur, the consequences would be of serious magnitude. SNF poses a dangerous, long-term health and environmental risk. It will remain dangerous "for time spans seemingly beyond human comprehension." Pl. SOF ¶75, 79. The ISFSI will or will likely cause pollution from stormwater runoff. Pl. SOF ¶ 151. Acts of radiological sabotage will harm Plaintiffs' interest in the environment and related amenities by causing a release of deadly radionuclides that would

eliminate or seriously harm marine life and contaminate the environment. Pl. SOF ¶¶ 153, 132, 144.

Plaintiffs' interests in the environment, natural resources, ecology, tidelands and amenities in the local area surround Pilgrim are tethered to the purposes of the Zoning Enabling Act,[13] and the Bylaw[14] including the Manomet Village Master Plan.[15] Each of these is intended to protect, explicitly or implicitly, Plaintiffs' interests. In particular, the Master Plan protects Plaintiffs' interests in the natural beauty of the area, the coastline, and the view from Manomet Point and Cleft Rock, all amenities the Plaintiffs use and enjoy. Pl. SOF ¶ 157. In addition, Plaintiffs right to the conservation of water and natural resources is a public use protected by the Massachusetts Constitution.[16]

Plaintiffs interests are particularized and the harm they will suffer differs from that of the community at large. Plaintiffs have a lifelong unique interest in and commitment to protecting and restoring the environment in the area of Pilgrim, including the marine life that inhabits the shoreline and uses it for habitat. Pl. SOF ¶ 156, 157. The economic livelihood of Plaintiff Buckbee is directly linked to the health of the coastal waters that Pilgrim pollutes. Pl. SOF ¶ 156. Plaintiffs assert life long interests and enjoyment of scuba diving, swimming, walking, fishing and

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[13] Acts of 1975, ch. 808, section 2A includes as purposes: "to facilitate the adequate provision of ...parks, open space and other public requirements,... "conservation of natural resources and the prevention of blight and pollution of the environment,", and "to encourage the most appropriate use of land throughout the...town, including the consideration of the master plan…."

[14] The purposes of the Plymouth Bylaw include to "preserve and increase its amenities," § 205-1; and the special permit provisions include addressing impacts on the "landscape and natural ecological processes, visual prominence, social and cultural importance to the Town and overall impact upon the character and environmental amenity of Plymouth," § 205-9(C)(1); prevent any adverse effect to groundwater and the ecology in the vicinity, § 205(9(B)(2).

[15] The Master Plan is part of the Town's comprehensive plan and is intended to protect the natural beauty, coastal water and beaches, and views from Cleft Rock and Rocky Hill Road. Copies of relevant pages of the Master Plan are attached to Sheehan Aff. Ex. 4 thereto.

[16] Article XLIX of the Amendments to the Constitution provides: "The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the commonwealth are public uses…"

[16]

boating in and on the coastal waters around Pilgrim. Pl. SOF ¶¶ 157, 158, 159. Plaintiffs also assert a legal interest and in the scenic vistas that is particularized due the fact that some of their homes are located in Manomet Village and they enjoy the vistas frequently. Pl. SOF ¶ 161.

Pilgrim's surface water pollution occurs in and near areas that the Plaintiffs use or would use regularly for recreation, fishing, boating, and walking. Pl. SOF ¶ 157. Plaintiffs can hear noise from Pilgrim's operations from their homes, and see lights. Pl. SOF ¶ 162. Pilgrim's security presence in Plaintiffs' neighborhood and within feet of their homes, Pl. SOF ¶163, 164, "negative overall impact upon the character" of their neighborhood. Bylaw § 205-9(C). The negative effect on the environment, including natural resources, ecology, and amenities of the area around Pilgrim will continue as long as Pilgrim operates and the ISFSI is used for SNF storage.

Plaintiffs are currently excluded from the tidelands in front of Pilgrim. Pl. SOF ¶ 60, 165, 166. Since this area is included in the Pilgrim security zone, as long as Pilgrim continues to operate Plaintiffs will be prevented from exercising their public trust rights. This infringement on their rights will continue as long as the ISFSI is used for SNF storage since Entergy is required to maintain a security zone around the dry casks.

Entergy argues that Plaintiffs cannot rely on their recreational, aesthetic and interests because these interests are generalized and do not rise to the level of a particularized injury. Def. Br. at 15-17. The cases Entergy cites are distinguishable. In *Morrison*, the court noted that the plaintiff's "affidavit merely states that he regularly hikes the foot-trails within the project site; and that as a part-time professional nature photographer, he will suffer harm if the property is altered in any way." at 10. In *Egri,* the court admonished that neither plaintiff "articulated any 'concrete and particular' injury he has suffered. When pressed on this issue at the March 15, 2002 injunction hearing, both stated their objections were with what they perceived as violations of the land use

regulations. These concerns regarding the land use laws are 'general' objections, not the specific harm required to maintain standing." *Egr*i at 17-18.

Further, the harm to the environment caused by the ISFSI and by the ISFSI's extension of Pilgrim's operating life is neither remote nor speculative, as Entergy asserts. *See* Def. Mot. at 14 (citing cases). In all of the cases cited by Entergy, plaintiffs alleged that potential contamination could occur under certain circumstances, i.e. "accidents happen," "radio tower might collapse," "septic tank might fail," or permit conditions may not be met. Here, by contrast, Plaintiffs provide extensive credible evidence of the ongoing contamination of air, groundwater, and surface water from direct discharges and unpermitted leaks of pollution, including radioactive tritium. Pl. SOF ¶ 127, 141, 160. This contamination is neither remote nor speculative, but ongoing daily. *Id.* Approval of the ISFSI extends the operating life of Pilgrim, and thus extends the length of time Pilgrim will negatively impact the recreational, aesthetic and environmental qualities. In addition, the environmental disamenity associated with the presence of a long-term storage facility for SNF is real, as Plaintiffs' have shown. The perception of risk and the continued security presence, visual blight, and environmental impacts are not speculative.

Entergy argues that the Plaintiffs' injuries are not special and different from the rest of the community. Def. Br. at 15-17. As shown here, Plaintiffs injuries differ in kind, scope and duration from the rest of the community.

Conclusion

Entergy's Motion to Dismiss must be denied because Plaintiffs are aggrieved by the Board's Decision and have standing to appeal pursuant to G.L. c. 40A, § 17. Accordingly, the

Plaintiff respectfully requests that the Court deny the Motion to Dismiss and allow this case to proceed on the merits.

Respectfully submitted on behalf of the Plaintiff,

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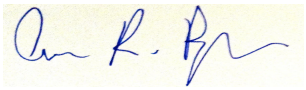

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CERTIFICATE OF SERVICE

I, Margaret E. Sheehan, Esq. do hereby certify that a true copy of the foregoing document was served upon all counsel of record by electronic mail on this 9th day of June 2014.

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