

Commonwealth of Massachusetts

County of Hampden  
The Superior Court

CIVIL DOCKET# HDCV2009-00838

William Pepin, Marlene Pepin,  
Plaintiffs

vs.

Division of Fisheries and Wildlife,  
Defendant

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

MAR 29 2011

*Brian P. Lewis*  
CLERK-MAGISTRATE

PARTIAL  
SUMMARY JUDGMENT M.R.C.P. 56  
AS TO COUNT TWO

This action came on to be heard before the Court, Constance M. Sweeney, Justice presiding, upon motion of the defendant, Division of Fisheries and Wildlife, for Summary Judgment pursuant to Mass. R. Civ. P. 56, the parties having been heard and the Court having considered the pleadings and other documentary submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law as to Count Two of the Complaint,

It is **ORDERED** and **ADJUDGED**:

That Part II of the Division of Fisheries and Wildlife's regulations, "Delineation of Priority Habitat and Review of Projects or Activities Within Priority Habitat," 321 Code Mass Regs, Section 10.11-10.25, are valid and enforceable.

Dated at Springfield, Massachusetts this 29th day of March, 2011.

By: *Stephane Roscoe*  
.....  
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
HDCV2009-00838A

WILLIAM PEPIN & another<sup>1</sup>

vs.

DIVISION OF FISHERIES AND WILDLIFE

MEMORANDUM OF DECISION AND ORDER ON  
CROSS-MOTIONS FOR SUMMARY JUDGMENT

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

MAR 22 2011

*Brian P. [Signature]*  
CLERK/MAGISTRATE

The plaintiffs, William and Marlene Pepin, filed this action challenging a determination by the Division of Fisheries and Wildlife ("DFW"), pursuant to the Massachusetts Endangered Species Act ("MESA"), that their property is a "Priority Habitat" for Eastern Box Turtles. This matter is before the court on DFW's motion for summary judgment pursuant to Mass. R. Civ. P. 56 on Count II of the complaint seeking a declaratory judgment that the MESA regulations are facially invalid. The plaintiffs have cross-moved for summary judgment on this issue. For the reasons discussed below, the defendant's motion is ALLOWED and the plaintiffs's cross-motion is DENIED.

OVERVIEW OF MESA

MESA was enacted in 1990 to protect and conserve wildlife and wildlife habitat. To that end, section 2 of the statute provides that "no person may take, possess, transport, export, process, sell or offer for sale, buy or offer to buy . . . any plant or animal species listed as endangered, threatened or of special concern or listed under the Federal Endangered Species Act." G.L. c. 131A, § 2. For purposes of MESA, "take" in reference to animals means "to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory

<sup>1</sup>Marlene Pepin

activity or attempt to engage in any such conduct, or to assist such conduct." G.L. c. 131A, § 1. Section 6 of the statute provides penalties, including fines and imprisonment, for violating the prohibition against a "take" of a protected species. See G.L. c. 131A, § 5(a).

MESA contains specific definitions of endangered, threatened and special concern species. See G.L. c. 131A, §1. Section 4 of the statute requires DFW to work with the Chapter 131 National Heritage and Endangered Species Advisory Committee to determine which plants and animals are endangered, threatened, or of special concern, and to maintain a species list subject to review every five years. G.L. c. 131A, § 4.

Section 4 of MESA authorizes DFW to:

designate significant habitats of endangered or threatened species populations by regulation, after a public hearing, and subject to the provisions of chapter thirty A, on the basis of the best scientific evidence available, after taking into consideration the following criteria:

- (i) the current and foreseeable threats to the population or its habitat;
- (ii) the size of the population;
- (iii) the potential benefits of designation to the population and to the status and welfare of the species generally; and
- (iv) current and foreseeable uses of the land.

G.L. c. 131A, § 4. The statute defines "significant habitat" as "specific areas of the commonwealth, designated in accordance with section four, in which are found the physical or biological features important to the conservation of a threatened or endangered species population and which may require special management considerations or protection." G.L. c. 131A, § 1. The location of designated significant habitat must be marked on maps available for inspection by record owners. Section 4 requires that DFW notify record owners of land affected by a proposed significant habitat designation prior to holding a public hearing on the issue. In addition, record owners of land

containing significant habitat may appeal a designation of significant habitat to the Secretary of the Office of Environmental Affairs within 21 days of the designation and receive a hearing, and may further petition DFW to consider purchasing such habitat with public funds. See G.L. c. 131A, § 4.

Section 5 of MESA prohibits the alteration of a significant habitat without a written permit from DFW, and outlines the procedure for obtaining such a permit, stating that DFW may issue an alteration permit only if it determines that "the proposed action will not reduce the viability of the significant habitat to support the threatened or endangered species involved." G.L. c. 131A, § 5(a). Section 5 gives an affected property owner the right to appeal a permitting decision to the Secretary of the Office of Environmental Affairs. See G.L. c. 131A, § 5(c). In addition, the property owner may file an action in Superior Court to determine whether DFW's permitting decision constitutes a taking requiring compensation under the U.S. Constitution. See G.L. c. 131A, § 5(e). Finally, section 6 of MESA provides penalties, including fines and imprisonment, for violating the prohibition against altering significant habitat without a permit. See G.L. c. 131A, § 5(b). As of the date of this decision, it appears that DFW has yet to designate any area in the Commonwealth as significant habitat.<sup>2</sup>

Notably, Section 4 of MESA authorizes DFW to adopt in accordance with Chapter 30A "any regulations necessary to implement the provisions of this chapter." Said regulations:

shall include, but not be limited to; criteria to be applied by the director in determining which activities will reduce the viability of significant habitat to support endangered or threatened species; criteria to further define alteration of a significant habitat; and other regulations designed to carry out the purposes of this chapter. This provision shall not affect existing regulations listing endangered, threatened or special concern species in effect on the effective date of this chapter.

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<sup>2</sup>The section of the DFW regulations set aside to list Significant Habitat is blank. See 321 Code Mass. Regs. § 10.99 (Designated Significant Habitats: Reserved).

G.L. c. 131A, § 4. DFW has adopted extensive regulations pursuant to MESA. See 321 Code Mass. Regs. § 10.01 *et. seq.* The regulations set forth in comprehensive detail the procedures for protecting significant habitat, as required by sections 4 and 5 of MESA. See 321 Code Mass. Regs. §§ 10.30-10.72. As set forth in the statute, DFW may issue an alteration permit only if determines that “the proposed action will not reduce the viability of the significant habitat to support the threatened or endangered species involved.” G.L. c. 131A, § 5(a). Under the regulations, DFW is required to determine that a proposed alteration will reduce the viability of the significant habitat if the alteration may directly or indirectly:

- (a) change the environment in any way which likely will result in stress, lowered reproduction or growth, or decline of the local population of the Endangered or Threatened species involved;
- (b) prevent, hinder, or stop ecological processes which are important for the survival or recovery of the Endangered or Threatened species involved;
- (c) isolate portions of the Endangered or Threatened species populations from each other;
- (d) disrupt seasonal or daily movements or migrations of Endangered or Threatened animals or dispersal of Endangered or Threatened species;
- (e) decrease the probability of long term survival or recovery of the affected local population(s) of Endangered or Threatened species.

321 Code Mass. Regs. § 10.66.

DFW’s regulations also create an additional category of habitat called “Priority Habitat” not mentioned in the statute. As explained in the regulations:

included are environmental review provisions for habitat areas (Priority Habitat) identified as areas where there is the potential that a Take of any Endangered, Threatened, or Special Concern species may occur as a result of any Project or Activity. Separate review mechanisms are established for Projects or Activities in these areas. Priority Habitats are used for screening Projects or Activities that may result in the Take of State-listed Species and to provide guidance to project

proponents regarding a Project or Activity through consultation with the Division. The Priority Habitat review procedures are designed to assist proponents with Projects or Activities that will take place in mapped Priority Habitat in order to avoid a Take of a State-listed Species.

321 Code Mass. Regs. § 10.01(2) (purpose of regulations). The regulations define "Priority Habitat" as "the geographic extent of Habitat for State-listed Species as delineated by the Division pursuant to 321 CMR 10.12. Priority Habitats are delineated based on records of State-listed Species observed within the 25 years prior to delineation and contained in the Division's NHESP<sup>3</sup> database." 321 Code Mass. Regs. § 10.02. Priority Habitats "are used for screening Projects and Activities that may result in the Take of a State-listed Species and to provide guidance to Record Owners regarding a Project or Activity through consultation with the Division. Priority Habitats shall be delineated based on the Best Scientific Evidence Available." 321 Code Mass. Regs. § 10.12(1). DFW must examine individual occurrence records in the context of species listing status, and consider the nature and/or significance of the occurrence as it relates to the conservation and protection of the species, including but not limited to, evidence of breeding, persistence, life stage present, number of individuals, extent of necessary supporting habitat, and proximity to other occurrences. See 321 Code Mass. Regs. § 10.12(2).

In contrast to the provisions with respect to significant habitat, the regulations do not require DFW to give potentially affected property owners advance notice of a proposed Priority Habitat delineation, nor do they require a public hearing prior to delineation. See 321 Code Mass. Regs. § 10.12. DFW is required to provide a town-based Priority Habitat map to planning boards and conservation commissions and to make them available electronically to the public. DFW must re-

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<sup>3</sup>NHESP is the program within DFW responsible for the inventory, research, and protection of rare plant and animal species. See 321 Code Mass. Regs. § 10.02.

evaluate the delineation of Priority Habitat every two years. See 321 Code Mass. Regs. §§ 10.12(6) & (7). An aggrieved land owner is entitled to move the Director of DFW for reconsideration of a Priority Habitat delineation and receive a written decision, which may be appealed first in an adjudicatory hearing before the agency, and then under Chapter 30A. See 321 Code Mass. Regs. §§ 10.12(8), 10.25. However, the regulations contain no provision authorizing a property owner to petition DFW to purchase Priority Habitat. Contrast 321 Code Mass. Regs. § 10.39 (authorizing petition to purchase significant habitat).

All proposed projects or activities within Priority Habitat must be reviewed by DFW to determine whether they will result in a "take" of a listed species. See 321 Code Mass. Regs. § 10.18. If DFW concludes that a project or activity will cause a "take," it may permit the take by issuing a Conservation and Management Permit, provided that the applicant has adequately assessed alternatives to impacts to the listed species, the project or activity impacts an insignificant portion of the local population, and the applicant agrees to perform a conservation and management plan that provides a long-term net benefit to the conservation of the impacted species. See 321 Code Mass. Regs. §§ 10.23(1) & (2). A property owner may appeal a "take" determination or a permit decision and receive an adjudicatory hearing, followed by judicial review pursuant to Chapter 30A. See 321 Code Mass. Regs. § 10.25. However, the regulations do not authorize a property owner to petition the Superior Court to determine whether DFW's Priority Habitat permitting decision constitutes a compensable taking in the constitutional sense. Contrast 321 Code Mass. Regs. § 10.72 (landowner aggrieved by permitting decision relating to significant habitat may petition Superior Court for taking determination).

## BACKGROUND

The Pepins own 36 acres of undeveloped land identified as Lots 11 and 12 South Road in Hampden, Massachusetts ("the Premises"). They wish to construct a single family residence on the larger lot and sell the other lot to a buyer who would construct a single family residence there. The Pepins began the engineering design process for their proposed subdivision in the Spring of 2006.

The Eastern Box Turtle is listed by DFW as a species of "Special Concern."<sup>4</sup> See 321 Code Mass. Regs. § 10.90(4) (list of all MESA-protected species). On October 1, 2006, NHESP included the Premises in a Priority Habitat Map for the Eastern Box Turtle pursuant to 321 Code Mass. Regs. § 10.12. This determination was based on a single June 3, 1991 sighting of a turtle within 200 to 300 meters of the Premises by a woman who removed the turtle from the road and transported it to the Audubon Society Laughing Brook Sanctuary, where a professional herpetologist confirmed that it was a female Eastern Box Turtle approximately 20 years in age. At the time of the sighting, the turtle reportedly was crossing the road in the early evening, during the June nesting season. NHESP received a Rare Animal Observation Form documenting this observation on June 7, 1991.

In January of 2007, the Pepins submitted to DFW a Project Review Checklist and supporting materials in connection with their proposal to construct a single family home on the Premises. By letter dated February 28, 2007, DFW notified the Pepins that the Premises was located within Eastern Box Turtle Priority Habitat and that their proposed construction had the potential to result

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<sup>4</sup>A Species of Special Concern is "any species of plant or animal which has been documented by biological research and inventory to have suffered a decline that could threaten the species if allowed to continue unchecked or that occurs in such small numbers or with such a restricted distribution or specialized habitat requirements that it could easily become threatened within the commonwealth." G.L. c. 131A, §1.



in a "take" of a state listed species. DFW stated that the Pepins could proceed only with a MESA Conservation and Management Permit. Accordingly, the Pepins submitted development plans to DFW in April of 2007. By letter dated May 9, 2007, DFW notified the Pepins that the project site plan as revised did not result in a take under MESA, but that a deed restriction and conservation easement must be recorded in the Registry prior to the commencement of work on the project. DFW thus authorized the Pepins's proposed subdivision of the Premises and construction of a residence, subject to conditions.

In September of 2008, the Pepins requested reconsideration of the decision to include the Premises in the Priority Habitat Map, but on November 6, 2008, DFW issued a final decision confirming the delineation. The Pepins requested and received an adjudicatory hearing before an administrative magistrate. On July 10, 2009, the magistrate issued a Recommended Final Decision affirming the Priority Habitat delineation. The Pepins appealed this decision to the Director of DFW who adopted it on August 5, 2009.

The Pepins filed this action on September 1, 2009. Count I of their complaint seeks judicial review of DFW's final decision, pursuant to General Laws Chapter 30A. Count II seeks a declaratory judgment that DFW's Priority Habitat regulations are facially invalid because they are contrary to and in excess of the authority granted by MESA. The parties agreed that the court should stay Count II pending the resolution of Count I. On April 7, 2010, this Court (Kinder, J.) denied the Pepins's motion for judgment on the pleadings on Count I and affirmed DFW's final decision under Chapter 30A.

**DISCUSSION**

The Pepins contend that DFW's regulations are inconsistent with and in excess of the authority granted by MESA. They do not, however, argue that DFW improperly promulgated the regulations. In assessing the legality of an administrative agency's properly promulgated regulations, the court must first determine, using conventional tools of statutory interpretation, whether the Legislature has spoken with certainty on the topic in question, and if the statute is unambiguous, must give effect to the Legislature's intent. Taylor v. Housing Appeals Comm., 451 Mass. 149, 153-154 (2008); Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633 (2005).<sup>5</sup> If the Legislature has not directly addressed the relevant issue, the court then must determine whether the agency's resolution of that issue can be reconciled with the governing legislation. Taylor v. Housing Appeals Comm., 451 Mass. at 154; Goldberg v. Board of Health of Granby, 444 Mass. at 633.

MESA provides for the designation and restriction of alteration of significant habitat, but provides no guidance with respect to the Priority Habitat created by DFW's regulations. The statute does, however, explicitly prohibit and penalize the "take" of endangered, threatened and special concern species and grant DFW broad authority to promulgate regulations governing the protection of all state-listed species. Section 4 of MESA requires that said regulations "shall include, but not be limited to" certain subjects, but does not prohibit the rule making at issue here. Thus, because the statute neither expressly forbids nor expressly allows the delineation and regulation of a second category of habitat, this Court must examine whether DFW's Priority Habitat regulations can be

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<sup>5</sup>A statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief to be remedied, and the main object to be accomplished. Commonwealth v. Connor C., 432 Mass. 635, 640 (2000).

reconciled with the governing legislation.

The party challenging the validity of an agency's regulations bears a formidable burden. Biogen IDEC MA, Inc. v. Treasurer and Receiver Gen., 454 Mass. 174, 187 (2009). Administrative agencies are charged with the task of crafting regulations that are more detailed than the governing statute and tailored to more situations than specified by the legislation. Goldberg v. Board of Health of Granby, 444 Mass. at 633. This Court gives substantial deference to the agency's expertise and statutory interpretation, applies all presumptions in favor of the validity of administrative action, and declares a regulation void only if its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. Taylor v. Housing Appeals Committee, 451 Mass. at 154; Goldberg v. Board of Health of Granby, 444 Mass. at 633. The court cannot substitute its judgment as to the propriety of the means chosen to implement the statutory goals, as long as the regulation is rationally related to those goals. Biogen IDEC MA, Inc. v. Treasurer and Receiver Gen., 454 Mass. at 187; American Family Life Assurance Co. v. Commissioner of Ins., 388 Mass. 468, 477 (1983). The court will overturn a properly promulgated regulation only when it is inconsistent with the authorizing statute or is irrational. Taylor v. Housing Appeals Committee, 451 Mass. at 154. See also Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 722, cert. den., 464 U.S. 850 (1983) (in facial challenge to regulation, plaintiff must prove regulation is illegal, arbitrary or capricious).

This Court concludes that in general, the regulatory scheme for delineating and regulating activity within Priority Habitat does not exceed the scope of authority granted to DFW by MESA. Specific statutory authority to act in one particular respect does not bar consistent action under general statutory authority. Water Dept. of Fairhaven v. Department of Envir. Protection, 455 Mass. 740, 751 (2010); Grocery Mfrs. of Am., Inc. v. Department of Pub. Health, 379 Mass. 70, 76 (1979).

See, e.g., Goldberg v. Board of Health of Granby, 444 Mass. at 635 (where statute prohibited Board from approving “expansion” of existing solid waste management facility unless it found that seventeen enumerated criteria were met, Board acted within statutory authority in establishing abbreviated procedure for “major modification” of existing facility, although that term did not appear in the statute and new procedure gave Board discretion to consider fewer than all of the statutory criteria). See also Grocery Mfrs. of Am., Inc. v. Department of Pub. Health, 379 Mass. at 75 (regulation may be authorized even where it cannot be traced to specific statutory language). That MESA provides detailed guidance for protecting endangered and threatened species through the designation and regulation of significant habitat does not prevent DFW from determining that all listed species should be protected further by delineation and regulation of a different category of habitat.

The Priority Habitat regulations are consistent with MESA’s prohibition on the “take” of any listed species and the statute’s broad purpose of protecting and conserving wildlife and wildlife habitat. In enacting MESA, the Legislature recognized that certain types of threats to wildlife are more harmful than others, and authorized different administrative procedures to handle various threats. WRT Mgmt. Corp. v. Commonwealth, 2002 Mass. Super. LEXIS 178 at \*8-10 (Bohn, J.) (noting that MESA distinguishes between disruption of species’ activities that trigger a “take” as defined in § 1 and the alteration of habitat of endangered and threatened species addressed in § 4). DFW’s creation of the Priority Habitat regulations is a reasonable means of implementing § 1 of MESA by recognizing that the alteration of habitat which does not fall within the statutory definition of significant habitat may nonetheless lead to the “take” of a listed species. See Capolupo v. Massachusetts Dept. of Envir. Protection, 2003 Mass. Super. LEXIS 438 at \*13-14 (Billings, J.)

(whether disruption of habitat will disrupt nesting, breeding, feeding or migratory activity of listed species so as to constitute a "take" under MESA falls within DFW's expertise).

The Pepins emphasize that MESA expressly provides certain protections for property owners potentially impacted by a significant habitat designation: 30 days advance notice by certified mail; a public hearing on the proposed designation; the filing of a map of the significant habitat at the registry of deeds or registry district of the Land Court; the right to petition DFW to consider purchase of the habitat; and the right to file an action in Superior Court to determine whether a permitting decision constitutes a compensable taking. See G.L. c. 131A, §§ 4, 5(e). They argue that DFW's failure to extend these protections to property owners affected by a Priority Habitat designation contravenes the Legislature's intent.<sup>6</sup> However, the Priority Habitat regulatory scheme is less restrictive and more flexible than the significant habitat scheme. In accordance with MESA, DFW may not issue an alteration permit for significant habitat unless it determines that "the proposed action will not reduce the viability of the significant habitat to support the threatened or endangered species involved." G.L. c. 131A, § 5(a). This stringent requirement may in practice make it difficult for a property owner to obtain a permit once property is designated as significant habitat. Accordingly, the Legislature deemed it necessary to provide specific protections to property owners in connection with the significant habitat designation and permitting process.

In contrast, the Priority Habitat regulations provide maximum flexibility for DFW to grant

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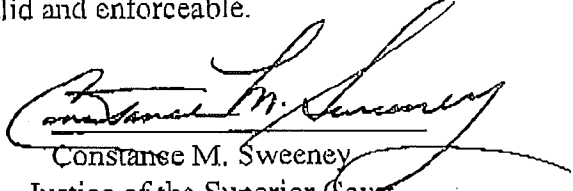
<sup>6</sup>The Pepins emphasize that DFW has never designated any significant habitat in the Commonwealth, and contend that DFW instead regulates land by designating it Priority Habitat for the purpose of avoiding the statutory protections afforded property owners. This Court declines to focus on that charge, because the court must apply all presumptions in favor of the validity of administrative action. See Taylor v. Housing Appeals Committee, 451 Mass. at 154; Goldberg v. Board of Health of Granby, 444 Mass. at 633.

a permit to a property owner even if the proposed project would result in a "take" of a listed species and even if the project cannot meet the regulatory standard of a long-term net benefit to species conservation, by allowing financial or in-kind contributions toward an off-site conservation plan for the impacted species. See 321 Code Mass. Regs. § 10.23(3). In light of the differences between the significant habitat and Priority Habitat schemes, DFW's failure to include the § 4 and § 5 property owner protections in the Priority Habitat regulations does not conflict with MESA. Cf. Goldberg v. Board of Health of Granby, 444 Mass. at 635 (where statute prohibited Board from approving "expansion" of existing solid waste management facility unless it found that seventeen enumerated criteria were met, Board acted within statutory authority in establishing abbreviated procedure for "major modification" of existing facility, although that term did not appear in the statute and the new procedure gave Board discretion to consider fewer than all of the statutory criteria). MESA does not unambiguously bar the approach taken by DFW, and the Legislature's intent can be achieved under the Priority Habitat regulations as enacted. Accordingly, the Pepins have not met their formidable burden of overcoming the presumption that DFW's regulations are valid.

### ORDER

For the foregoing reasons, it is hereby ORDERED that the defendant Division of Fisheries and Wildlife's motion for summary judgment on Count II of the complaint be ALLOWED and that the plaintiffs's cross-motion be DENIED. It is DECLARED and ADJUDGED that Part II of DFW's regulations, "Delineation of Priority Habitat and Review of Projects or Activities Within Priority Habitat," 321 Code Mass. Regs. §§ 10.11-10.25, are valid and enforceable.

**DATED:** March 21, 2011

  
Constance M. Sweeney  
Justice of the Superior Court

