May 21, 2012

Re: The Massachusetts Endangered Species Act (MESA)

Dear Legislator,

There has been a lot of discussion recently about MESA and Senate Bill 1854 (An Act relative to land takings, filed by Senator G. Candaras and currently before the Joint Committee on Environment, Natural Resources and Agriculture). We are opposed to S. 1854, which would severely undermine the Commonwealth’s ability to protect Massachusetts’ endangered species. For more on S. 1854, please see the attached summary.

The Massachusetts Endangered Species Act (MGL c. 131A), enacted in 1991, provides a framework for ensuring the continued survival of the Commonwealth’s most imperiled plant and animal species. MESA is not about choosing between endangered species and growth. Rather, MESA is a vital, flexible law that enables project proponents, regulators, technical experts and communities to work together to ensure that as we grow and pursue economic development, we do so in a way that ensures that our most imperiled plants and animals will not disappear from the Commonwealth—a goal that is compatible with preserving the character of the Massachusetts communities where we work and live.

Attached also find a list of questions and answers regarding MESA. They address questions we have received regarding notification, exemptions, grandfathering, and mitigation. We note that many concerns regarding public comment, notification, and exemptions have been addressed in the both 2005 and 2010 MESA regulatory revisions which were supported by both conservation and property development groups.

If you have questions please contact Jennifer Ryan, Legislative Director at Mass Audubon, jryan@massaudubon.org or 617-523-8448. Further information is available on the Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program website: http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm.

Thank you for your time and consideration.

Sincerely,

Jennifer Ryan
Legislative Director
Mass Audubon

Mike Gildesgame
Southern New England Policy Manager
Appalachian Mountain Club
Nancy Goodman  
Vice-president for Policy  
Environmental League of Massachusetts

Steve Long  
Director of Government Relations  
The Nature Conservancy in Massachusetts

James McCaffrey  
Director  
Sierra Club of Massachusetts

Linda Orel  
Executive Director  
Massachusetts Association of Conservation Commissions

Sue Reid  
Vice President and Director  
Conservation Law Foundation, Massachusetts

Wesley T. Ward  
Vice President for Land Conservation  
The Trustees of Reservations
S. 1854 *(An Act relative to land takings)*, summary of testimony to the Joint Committee on Environment, Natural Resources and Agriculture:

We oppose this bill, which would roll back 20 years of protections afforded by the Massachusetts Endangered Species Act to the Commonwealth’s most vulnerable native plants and animals.

*The Massachusetts Endangered Species Act* (MESA) statute (M.G.L. Ch. 131A) requires that rare plants and animals listed as Endangered, Threatened or of Special Concern be protected from “take”, defined for “animals… to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct.” The statute also states that the Division of Fisheries and Wildlife (the Division) has the authority to draft regulations to implement the statute, which has been upheld by the courts. In addition to the prohibition on take, the statute allows for the designation of “Significant Habitat” for Endangered and Threatened Species, but not Species of Special Concern.

To protect rare species, regulate take, and to let landowners know when they are at risk of violating the statute and through take of a rare species, the Division has delineated Priority Habitat *(321 CMR 10.11-10.25)* for Endangered, Threatened, and Species of Special Concern. This was done through the normal process of promulgating regulations, including public hearing and consideration of comments. The mapping of regulated areas is common to many forms of environmental law, such as the Wetlands Protection Act, as a means to notify landowners that a statute may apply to them and that they need to review their plans with the applicable agency. If during this review it is determined that the proposed activity will not result in a take, the landowner may proceed. *The bill before you would remove the Division’s authority to regulate for a rare species outside of Significant Habitat, thus gutting their authority to regulate take – leaving rare species unprotected and landowners without a mechanism to know if they are at risk of take of a rare species. Landowners would be deprived of an orderly, timely process to know whether or not they may cause a take, and thereby will be at risk of prosecution for destruction of rare species that could be avoided through the regulatory process.*

Additionally, the Division is responsive to concerns from the regulated community and has implemented regulatory changes which received broad support from both conservation organizations and developers. The regulatory changes increased transparency in priority habitat mapping, streamlined review for species of special concern, set permit mitigation standards and guidance, clarified and expanded grandfathering for sites, expanded exemptions from review, extended the time within which shovels must be in the ground from three to five years, and allowed comprehensive MESA reviews and permits for certain municipalities.

*The Massachusetts Endangered Species Act* is one of the most important and effective environmental laws in the Commonwealth, and the Natural Heritage & Endangered Species Program within the Division, which implements MESA, is one of the most effective rare species programs nationally. Land protection programs, conservation commissions, coastal waterbird protection programs, and wetlands restoration programs are all guided by the information and regulatory decisions provided through MESA. To undo their authority to protect rare species from take would be devastating.
What is the responsibility of the Division of Fisheries and Wildlife under the Massachusetts Endangered Species Act (MESA)? In order to ensure the survival of the Commonwealth’s most imperiled native species, the Legislature authorized the Division to regulate the “take” of native plants and animals designated on the state list of Endangered, Threatened, and Special Concern species. “Take”, in reference to animals, is to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, and in reference to plants, to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of habitat.

What is Priority Habitat? The Division has been publishing Priority Habitat maps since 1993 as a screening tool to ensure that the location of habitat necessary for the survival of listed species is publically available, and so that these habitat areas would not be inadvertently destroyed in violation of the MESA “take” provision. With the exception of exemptions and grandfathering (see below), projects within Priority Habitat have the potential to result in a take of a state-listed species, and are subject to review by the Division. Through Priority Habitat screening, the majority of projects can be quickly reviewed and determined not to pose a threat to listed species (FY’12, 77% of 1,134 reviews). A smaller subset of projects require some conditioning to avoid a take (20%), and a yet smaller subset result in a take and require a MESA permit to proceed (3%). Priority Habitat is described in the MESA regulations.

This stands in contrast to the use of Significant Habitat, detailed in the MESA statute, which would designate habitat for certain species as off limits to most types of development because the habitat requires special management or protection considerations. Since Significant Habitat is a tool of last resort that would be considerably more restrictive than Priority Habitat, none has been designated to date.

How many projects proposed in Priority Habitat have been conditioned or permitted? In FY11, 1,134 projects were reviewed. Of these, 76.5% went forward with no conditioning, 20.4% were conditioned to avoid a “take” (e.g. time of year restrictions, construction monitoring), and 3.1% were found to have a “take” requiring a MESA Conservation and Management Permit. As discussed above, using Priority Habitat as a screening tool is essential in order to identify the relatively small subset of projects that do require conditioning and/or a permit in order to adequately protect endangered species.

Who is exempt under MESA? There are 18 classes of exemptions in the regulations, from agriculture to expanding existing buildings to road and utility maintenance. The construction of a new residential dwelling, including the proposed lawfully developed paved areas, lawns and landscaped areas associated with such dwelling, on an infill lot, with frontage, of no greater than two acres in size, is exempt. For the full list, visit http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_exemptions.htm.

What about a single family home, do they require a permit? There are exemptions for single family homes, see above link under “Who is exempt…”. Of the 161 total Conservation and Management Permits ever issued in the history of MESA, only four have been issued for single family homes. Three were large estate homes, and all four allowed to be built with a permit. In FY11, there were 147 MESA filings flagged as single family homes, and of those 16 (10.9%) were conditioned and 131 (89.1%) proceeded with no conditions.

How does a landowner know they are subject to MESA? A landowner is only subject to MESA review if she/he has a project or activity within Priority Habitat. A project proponent can determine if a project site is within Priority Habitat through various media including: online, http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/priority_habitat/priority_habitat_home.htm, at town hall, or by compact disk available at http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/priority_habitat/atlas_book.htm.

The availability of Priority Habitat maps has expanded with each regulatory review:
• Prior to 2005, Priority Habitat maps were viewable through the Natural Heritage Atlas, a book found in many local libraries and government agencies, and at town offices where town-wide wall sized maps were sent.
• After the 2005 regulatory revisions, the Division was required to provide town-based maps to planning boards and conservation commissions in cities and towns where Priority Habitat exists. The Division was also required to make the maps available via MassGIS.
• The 2010 regulation changes add a 60 day public comment period on the draft Priority Habitat maps before map updates go into effect; the Division is required to publish notice of the availability of the proposed updated Priority Habitat map and the public comment period on the Division's website, in the Environmental Monitor, in a newspaper with state-wide circulation, and in other newspapers with regional or local circulation, and provide such notice to planning boards, building inspectors and conservation commissions in municipalities where existing or new Priority Habitats have been or are proposed to be delineated or modified. These notifications are equal to or exceed the notification required for other state agency actions.

Why are landowners not directly notified when their property is mapped as Priority Habitat?

1. Federal, state, and local agencies typically do not provide this type of notification. For example, the Department of Environmental Protection does not notify individual landowners that they have wetlands on their property and towns do not notify property owners of their zoning type. Zoning and wetlands laws limit use, but do not require notification. Federal flood zone maps affect land use, insurance rates and insurance availability but individual landowner notification does not occur.
2. It is not practical or feasible. Massachusetts does not have a centralized database of all property owners, tracking all changes in ownership and residency.
3. The Division provides a variety of ways to determine whether or not a property is mapped as Priority Habitat, and since 2005 awareness of Priority Habitat maps has grown.

What about Priority Habitat versus Significant Habitat, does the statute support Priority Habitat? While there is no definitive record of legislative intent in Massachusetts, the legislative history of MESA demonstrates that the Legislature intended the “take” provision to prevent loss of rare species’ habitat due to destruction or modification. An earlier version of the bill had a very expansive definition of “significant habitat.” In the enacted version, the Legislature tightened the standard for designating “significant habitat” but also expanded the definition of what constitutes a “take”. These changes demonstrated the Legislature’s resolve to protect habitat both in areas designated as “significant habitat” and areas that had not been so designated.

In 2011, the Hampden Superior Court upheld the entire Priority Habitat approach under MESA, and ruled that it was not necessary for the state to use the Significant Habitat approach which the court observed would have fewer landowner rights than the Priority Habitat procedure in William & Marlene Pepin v. the Div. of Fisheries & Wildlife. In that case, Judge Sweeney noted “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 the Division by MESA” and that it, in fact, “…is a reasonable means of implementing §1 of MESA…”. Also, Massachusetts courts have repeatedly recognized that the loss of habitat constitutes a “take” under MESA. See, e.g., Douglas Envtl. Assocs., Inc. v. Dep’t of Envl. Prot., 429 Mass. 71 (Mass. 1999) (construction of proposed landfill would disturb the feeding and migratory habits of the marbled salamander and thus would constitute a MESA “take”); WRT Mgmt. Corp. v. Div. of Fisheries & Wildlife, 14 Mass. L. Rep. 609 (Mass. Super. 2002) (construction of golf course would result in MESA “take” of protected salamanders); see also Capolupo v. Dep’t of Envl. Prot., 17 Mass. L. Rep. 190 (Mass. Super. 2003). In addition, this “taking” is not restricted to the direct development or modification of the land occupied by an endangered or threatened species or a species of special concern, but also may extend to the land adjacent thereto. See Douglas Envtl., 429 Mass. at 76-77 (discussing the importance of the buffer zone between the salamanders’ breeding pools and the proposed landfill).

What if a landowner wants the Division to reconsider the Priority Habitat map? The owner may file a request with the Division and the Division must respond within 45 days of determination of complete filing. To date, 56 sites have been reconsidered, and 19 acres of Priority Habitat have been revised based on these reviews.

How much Priority Habitat is there? The Division has taken steps to minimize the Priority Habitat “footprint” while still providing adequate protection for endangered species, and the Priority Habitat acreage has been declining
consistently since 2006. Although the Division has yet to release the 2012 Priority Habitat updates (pursuant to regulation, maps are updated every 4 years), it is our understanding that the Priority Habitat footprint is expected to decline about 20% as compared to the 2008 maps, for a total of about 400,000 acres (Note: excludes open water and open space, includes undevelopable wetlands). To put this in perspective, the Commonwealth is roughly 5 million acres.

**How much does it cost to file a project application for MESA review and how long does it take?** The filing fee is dependent on the number of acres proposed for disturbance, starting at $300.00 for a project altering up to 5 acres. For the great majority of projects, review is completed in the first 30 days. Fees increase with project size. For a full fee schedule, visit [http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_fee_schedule.htm](http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_fee_schedule.htm).

**What about mitigation?** Rather than unconditionally prohibit the “take” of state-listed species, the MESA statute specifically provides the Division with the flexibility to permit the “take” of listed species and habitat loss, provided that adequate mitigation is provided. This approach is similar to that taken in other federal and state laws. While onsite mitigation is preferred, a variety of mitigation options are available, including support for offsite habitat protection and conservation research that will benefit the species in the future. It is important to note that offsite mitigation is an option supported by the development community, because it provides for increased flexibility in meeting MESA permitting standards.

**What is mitigation banking?** Environmental law throughout the United States provides project proponents the choice to compensate for “unavoidable” impacts of development – known as compensatory mitigation -- via restoration, enhancement, establishment and preservation of habitat. Under Massachusetts law, public and private developers have the option to mitigate via a third party off-site mitigation program. The Nature Conservancy (TNC) has entered into a Memorandum of Agreement with the Division to create a pilot program to gather voluntary off-site mitigation funds from developers and facilitate habitat conservation through the acquisition of high value habitat for the Eastern Box Turtle. Other conservation organizations, including Mass Audubon, are also from time to time asked to hold Conservation Restrictions, hold and steward land, or conduct species research funded by the project proponent as an option provided to a developer for mitigation. Environmental organizations across the country are routinely asked to partner in mitigation.

**What about landowners that have to preserve a portion of their property; isn’t this a land taking by the state?** The courts have ruled on the question of regulatory taking on numerous occasions (see Clealand B. Blair & others v. Department of Conservation and Recreation, Lovequist v. Conservation Comm’n of Dennis,) and have consistently ruled that restricting certain activities on a portion of a property does not qualify as a regulatory taking. In fact, the courts have noted that such a view would deem almost every valid land use or zoning regulation to be a regulatory taking.

The Blair Supreme Judicial Court decision, in particular, is extremely important as the court ruled that the denial of a variance from the prohibitions of the Watershed Protection Act and state agency regulations did not cause an unconstitutional regulatory taking of the Blair property. The SJC commented that the Blairs had no constitutional right to have a larger lawn or larger beach on their single family property on Demond Pond in the Town of Rutland. It is also worth noting that in communities with “cluster” zoning or open space residential design it is often relatively easy for project proponents to preserve important endangered species habitat and meet MESA permitting standards. An increased focus on and incentives for “smart growth” could not only help to accomplish many local land use and community development goals, but also reduce habitat fragmentation and ease the MESA review process.

**Are certain projects grandfathered?** Yes, if a project is far enough along in the permitting process when the site is mapped as Priority Habitat it is exempt. For full details and more categories of grandfathered projects, visit: [http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_grandfathering.htm](http://www.mass.gov/dfwele/dfw/nhesp/regulatory_review/mesa/mesa_grandfathering.htm).

**How does the Division determine which species are state-listed?** The MA List of Endangered, Threatened, and Special Concern Species (the “MESA list”) defines species at risk, or potentially at risk, of extirpation (local extinction) from Massachusetts, or at risk of global extinction. Species listing proposals are submitted to the NHESP by a staff member, from the public, or a member of the Natural Heritage & Endangered Species Advisory Committee (NHESAC). NHESP staff review the proposal and the proposal is sent for independent assessment to at least three external expert biologists. NHESP staff formulates a recommendation based on best scientific evidence available, which is presented to Division
senior staff for their review. The NHESAC then reviews the recommendations, and submits its recommendation to the Director of the Division. The Director presents the recommendations as approved by senior staff, and with the NHESAC recommendation, to the Fisheries and Wildlife Board with a request that the proposed changes be presented in a public hearing. Any change to the List approved by the Wildlife Board after the Public Hearing must be adopted as a regulation in accordance with the provisions of M.G.L.c. 30A, as outlined in 321 CMR 10.03(9).

If you have questions please contact Jennifer Ryan, Legislative Director at Mass Audubon, jryan@massaudubon.org or 617-523-8448. Also visit the Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program website: http://www.mass.gov/dfwele/dfw/nhesp/nhesp.htm.