

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

SJC No. 11332

William Pepin and Marlene Pepin,

Plaintiffs-Appellees

v.

Division of Fisheries and Wildlife,

Appellant-Defendant.

On appeal from a Judgment of the
Hampden County Superior Court
No. 01-2737 (Roscoe, J.)

**SUPPLEMENTAL BRIEF OF AMICI CURIAE MASSACHUSETTS
AUDUBON SOCIETY, MASSACHUSETTS ASSOCIATION OF
CONSERVATION COMMISSIONS, AND CONSERVATION LAW
FOUNDATION**

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ARGUMENT

Amici curiae Massachusetts Audubon Society, Massachusetts Association of Conservation Commissions, and Conservation Law Foundation filed an *amicus* brief before the Appeals Court that has been transferred to this Court. Dkt. # 2. That brief addressed the authority of the Division of Fisheries and Wildlife ("Division") to promulgate the Priority Habitat regulations under the Massachusetts Endangered Species Act ("MESA"), the importance of those regulations for protecting Massachusetts' biodiversity, and the reasonableness and flexibility of the Priority Habitat regime. *Amici* now supplement that filing to address a question raised by this Court in its call for *amici*: "what procedural protections are required when the division so designates 'priority habitat.'" Dkt. # 6.

The Priority Habitat regulations protect landowners through several different procedural safeguards, including notice that a development may violate the "take" provision and an opportunity to consult with the Division to modify development plans. Specifically:

- The Priority Habitat designation provides notice to landowners that their development may violate MESA.

- The regulations help ensure that developers do not violate MESA's "take" provision by engaging developers in a review process and consultation before development begins.
- The consultation provides a clear, consistent, timely, and fair process whereby landowners are made aware of the Division's preliminary determination and in the majority of cases are only required to at most make minor modifications to their design plans in order to ensure compliance with MESA.
- Where landowners disagree with the Division's position, they are able to request an adjudicatory hearing with the agency to challenge that determination, subject to further judicial review.

The Pepins therefore fundamentally misunderstand the Priority Habitat regulations in arguing that they do not provide "any of the landowner protection mandated by the Legislature." Pepin Br. at 16.

Priority Habitat designations under G.L. c. 131A and 321 CMR § 10.11-10.25 help screen potentially habitat-altering projects and provide notice and guidance to landowners. 321 CMR § 10.01(2) (the purpose of Priority Habitat designation is to notify landowners "where there is the potential that a Take of any Endangered, Threatened, or Special Concern species may occur"); id. § 10.12(1) ("Priority Habitats are used for screening Projects and Activities that may result in the Take of State-listed Species and to provide guidance to Record Owners

regarding a Project or Activity through consultation with the Division.”) Under the regulations, the Division delineates Priority Habitat based on “the Best Scientific Evidence Available” so as to provide notice and guidance to landowners that any habitat alteration could potentially result in a “take” under MESA. Id. § 10.12.¹ The Division will then screen any proposed “Project or Activity” in Priority Habitat to determine whether it will in fact constitute a “take.” Id. § 10.18. If the Division determines that the activity will result in a “take,” the landowner “may request a consultation with the Division to discuss options for the Project or Activity that may avoid a Take.” Id. § 10.18(3). The landowner may also appeal

¹ The Division revised the Priority Habitat regulations in 2010, subsequent to the events giving rise to this case, and provided a further level of procedural protection as part of the Priority Habitat delineation. The regulations require the Division to periodically re-evaluate Priority Habitat delineation. 321 CMR § 10.12(6)(a). The older regulations required only that the Division publish an updated version of the Priority Habitat map within sixty days of the re-evaluation. See 321 CMR § 10.12 (2009). The current regulations require the Division to “provide a 60 day public comment period on all proposed revision or updates to the map. Specifically the Division will request public comment on the status of areas proposed for delineation or removal as Priority Habitat.” By adding a notice and comment period to the delineation process, the Division has added yet another layer to the procedural protections in its Priority Habitat regulations.

the Division's determination that a project will result in a "take." Id. § 10.25. And an adverse decision is subject to judicial review. G.L. c. 30A § 14.

This tiered delineation and screening process offers landowners two layers of procedural protection: first it provides notice that land has been designated Priority Habitat, second it advises landowners if proposed activity will result in a "take," and provides for consultation about how to avoid any such "take." In the vast majority of cases the Division will propose modifications that would allow the development to move forward without violating MESA's "take" provision. Indeed, in around 75% of project reviews, the Division determines that no "take" will occur and the project may proceed as originally proposed. See Natural Heritage & Endangered Species Prog., MESA Determinations FY 08 - FY 12 (2012), available at <http://www.mass.gov/eea/docs/dfg/nhosp/regulatory-review/reg-rev-outcomes-fy08-fy12.pdf>, attached hereto as "Exhibit 1"; see also 321 CMR § 10.18(2)(a),(4). In around 20% of reviews, the Division identifies reasonable steps by the landowner that would avoid a "take," often

involving construction impact mitigation measures or seasonal timing restrictions. MESA Determinations FY 08 - FY 12; 321 CMR § 10.18(2)(a),(4); Supp. App. 4-5. In less than 5% of all reviews, the Division determines that the project may not proceed unless the property owner applies for a Conservation and Management Permit. MESA Determinations FY 08 - FY 12; 321 CMR §§ 10.18(2)(b), 10.23.

The Priority Habitat regulations are thus designed to provide notice to landowners regarding the potential for their conduct to result in a "take," and to promote proactive consultation with project proponents to ensure that habitat alteration does not violate MESA. The regulations provide a clear, consistent, fair, and timely process for these consultations that ensure that the Division's determinations are available to landowners in a timely fashion. In practice, the regulations work very well at helping development projects proceed apace, most often without any modifications or only minor revisions to development plans.

Ironically, if the Pepins received the relief they seek--namely, to "void" the Priority Habitat regulations, Pepin Br. at 45--landowners would be far

less protected than they are at present. Even without the Priority Habitat regulations, it would still be illegal to "take" a listed plant or animal by, among other things, disrupting its habitat. G.L. c. 131A §§ 1, 2, 6. Designating land as Priority Habitat provides notice to landowners that their project may result in a "take"; by contrast, the Pepins' requested relief would leave landowners in the dark. The review and consultation process helps landowners find a way to proceed with a project without violating the "take" provision; without the regulations, landowners would be deprived of a formalized process designed to identify, before the expenditure of funds, what changes, if any, the Division thinks are necessary to avoid a "take" of rare species.

In this case, the Division included the Pepins' thirty-six acre property at issue in a Priority Habitat for the Eastern Box Turtle. JA 133. After the Pepins submitted a proposal to build a single family home on the property, the Division notified them that their proposed project "had the potential to result in a 'take.'" JA 133-34. The Pepins submitted a modified plan, proposing a deed restriction on undeveloped portions of the property; the Division

found that the modified development plan "did not result in a 'take' under MESA." JA 136-37. The Division approved of the Pepins' modified plans, subject to the proposed deed restriction to prevent additional habitat destruction or degradation. Id. The Pepins ultimately decided to neither proceed with the modified plan nor challenge the Division's "conditional no take" determination through an adjudicatory appeal pursuant to G.L. c. 30A § 14. JA 334. Instead, they challenged only the Division's designation of their property as Priority Habitat, first by requesting reconsideration of the Division's delineation and pursuing an adjudicatory appeal, followed by G.L. c. 30A § 14 judicial review of the Division's final decision affirming the delineation. Id.

Without the procedural protections of the Priority Habitat regulations, the Pepins may have proceeded to build their house only to find later that the construction violates MESA, subjecting them to fines and potentially imprisonment. G.L. c. 131A § 6(a). They may have been able to make modifications after the fact to comply with MESA, but doing so would likely be more costly than incorporating those

modifications into the construction plan from the beginning. There would also be no pre-take adjudicatory hearing for the Pepins to challenge the Division's determination. The Priority Habitat provisions thus served to protect the Pepins by providing notice, a way to proceed with their development without violating the law, and the opportunity to challenge both the Division's Priority Habitat designation and "conditional no take" determination.

Although they do not say so explicitly, the Pepins' true quarrel appears to be with the "take" provision itself--the notion that their construction may be inhibited somewhat to protect habitats of rare species. That is, with or without the Priority Habitat regulations, the "take" provision would preclude the Pepins from proceeding with their development plans exactly as they hoped. But the Pepins do not challenge the "take" provision in this action. And any such challenge would be misplaced because the habitat protection afforded by MESA's "take" provision is a policy choice that lies well within the Legislature's prerogatives.

The Pepins also contend, citing Mass. Const. art. X, that the Legislature would not have intended for the Division to promulgate the Priority Habitat regulations because the regulations restrict landowner rights without providing "compensation." Pepin Br. at 42. *Amicus* Pacific Legal Foundation similarly argues that without the same protections as the Significant Habitat provisions, the Priority Habitat regulations make it "more likely that private property will be taken without just compensation" in violation of the Fifth Amendment of the U.S. Constitution. PLF Br. at 24. In addition to overlooking the procedural protections afforded by the Priority Habitat regulations, these arguments ignore the fact that nothing in these regulations limits a property owner's right to bring a Fifth Amendment "takings" challenge in response to the Division's Priority Habitat decision.

The Priority Habitat regulations protect landowners by providing notice and consultation with the Division before proceeding with a development. The situation would be far less favorable for landowners if the regulations did not exist, since


ensuring compliance with MESA's "take" provision would become much more difficult.

CONCLUSION

For the forgoing reasons, *amici curiae* respectfully request that this Court uphold the Superior Court's final decision.

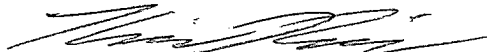
Respectfully submitted,
MASSACHUSETTS AUDUBON SOCIETY,
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CONSERVATION LAW FOUNDATION,
by their attorneys

Dated: August 19, 2013

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CERTIFICATION OF COMPLIANCE WITH
MASS. R.A.P. 16(K)

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including but not limited to Mass. R.A.P. 13, 16, 18, and 20.



Kevin P. Budris (BBO # 680075)

CERTIFICATE OF SERVICE

I, Kevin P. Budris, hereby certify that, on August 19, 2013, I caused to be served by first class mail the foregoing SUPPLEMENTAL BRIEF OF AMICI CURIAE MASSACHUSETTS AUDUBON SOCIETY, MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS, AND CONSERVATION LAW FOUNDATION to the attorneys of record for the parties in the above-captioned matter.

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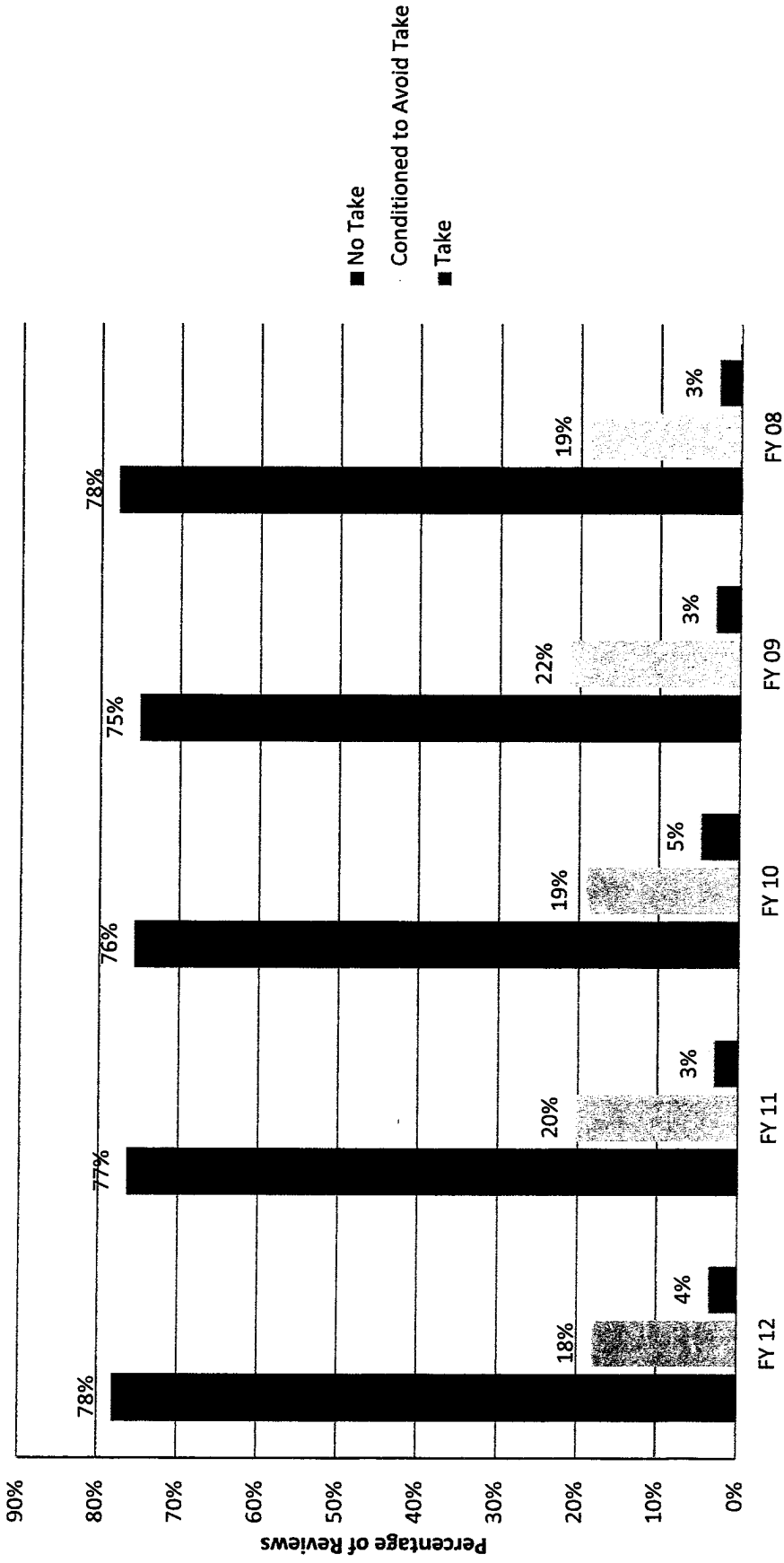
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EXHIBIT 1

MESA Determinations FY 08 - FY 12



<u>Review Outcomes</u>		FY 12	FY 11	FY 10	FY 09	FY 08
No Take		843	868	912	981	1277
Conditioned to Avoid Take		196	231	234	281	314
Take		39	35	59	42	47
		<i>n</i> =1078	<i>n</i> =1134	<i>n</i> =1205	<i>n</i> =1305	<i>n</i> =1638
		78.2%	76.5%	75.7%	75.2%	78.0%
		18.2%	20.4%	19.4%	21.5%	19.2%
		3.6%	3.1%	4.9%	3.2%	2.9%