

Great and General Court
Massachusetts State House
Boston, MA 02133

June 26, 2012

Re: **Senate Bill 1854**, *An Act relative to land takings* and the Massachusetts Endangered Species Act

Dear Legislator:

Our **72** conservation and sportsmen's organizations are writing in **strong opposition** to the redraft of **Senate Bill 1854**, *An Act relative to land takings*, filed by Senator Gale Candaras and reported favorably by the Joint Committee on Environment, Natural Resources and Agriculture on June 14, 2012 and reported to the House. The redraft of **SB1854** would:

- Dismantle the Massachusetts Endangered Species Act (MESA) Priority Habitat framework for protecting imperiled species of plants and animals administered by the Division of Fisheries and Wildlife (DFW) Natural Heritage & Endangered Species Program.
- Leaves property owners with no advance notice of or ability to avoid harm to a state-listed species, leaving them potentially subject to fines and criminal prosecution for causing harm to that species. The existing permitting process, which takes into account the characteristics of each proposed development site, would be replaced by a costly, administratively cumbersome, and punitive regime that would rely on action against landowners after the harm to the protected species has occurred. Such a regime would neither provide effective guidance to landowners nor protect endangered species.
- Would fundamentally alter long-standing adjudicatory procedures established by the Legislature under Ch. 30A and case law, putting DFW on different footing than all other agencies in the Commonwealth with respect to judicial review of agency actions or decision-making and will inject additional uncertainty, delays and unnecessary conflict in the project review process. The bill is contrary to well settled administrative law principles, which require a person to first exhaust his/her administrative remedies prior to a "ripe" judicial proceeding.

Habitat loss is the greatest threat to native species and in Massachusetts 435 species of animals and plants are at risk of extinction. This natural heritage is ours to steward and protect for future generations. MESA (MGL c. 131A) provides a framework for ensuring the continued survival through habitat protection of the Commonwealth's most imperiled 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 animals and plants will not disappear from the Commonwealth – a goal the Legislature established when it passed MESA and that remains compatible with preserving the character of the Massachusetts communities where we live and work.

In recent years (2005 and 2010), DFW modified its regulations to address concerns raised by the Legislature and the development and conservation communities. These regulations were formally endorsed by all stakeholders. They are reasonable and fair and indicate willingness on behalf of DFW to consider and address concerns, including those now before the Legislature. We believe the issues being raised now were in part addressed in the 2010 regulatory revisions, such as providing new public notice and comment procedures on the Priority Habitat maps, and that additional notification concerns regarding small landowners can be further addressed through administrative means rather than through what is effectively a repeal of endangered species protections. Many of the project-specific complaints now being raised originated prior to promulgation of the new regulations. We ask that the bill not move forward this session and that we engage in a stakeholder-wide dialogue to develop a reasonable response. Additionally, we note that in the past five years, DFW has moved close to 80% of all projects in Priority Habitat to proceed as proposed. The rest proceeded with manageable conditions and some with mitigation.

While we applaud the efforts of many legislative leaders to fund DFW's Natural Heritage Program by restoring the line item in the state operating budget, after funding was zeroed out in 2003, \$150,000 annually remains inadequate. Additionally, passage of **SB1854** would require the creation of an entirely new and costly administrative structure, while

at the same time effectively eliminating funding for project review which is currently provided through the Priority Habitat process.

A section by section analysis of the redraft is attached as well as a list of questions and answers regarding MESA that was circulated to the legislature last month. They address questions we have received regarding public notification, exemptions and single family homes, grandfathering, and mitigation.

If you have questions please contact Jennifer Ryan at Mass Audubon, jryan@massaudubon.org/ 617-523-8448, Nancy Goodman at ELM, ngoodman@environmentalleague.org /617-742-2553, or Steve Long at The Nature Conservancy in Massachusetts, slong@tnc.org /617-532-8367.

Sincerely,

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Cc: Secretary Rick Sullivan, Executive Office of Energy and Environmental Affairs
Commissioner Mary Griffin, Department of Fish and Game

SB1854 (An Act relative to land takings), summary of redraft reported favorably by the Joint Committee on Environment, Natural Resources and Agriculture June 14, 2012:

SB1854 would result in the effective repeal of the Massachusetts Endangered Species Act (MESA) framework administered by the Division of Fisheries and Wildlife for protecting imperiled species of plants and animals in the Commonwealth.

Summary. By imposing an unworkable array of requirements on DFW for the purpose of essentially reauthorizing the Priority Habitat delineations already in place across the state, the bill's practical effect will be that beginning on February 1, 2013, the foundation of MESA protections will no longer be in effect. This deregulation of Priority Habitats, in turn, will create uncertainty and leave property owners with no advance notice or guidelines for knowing whether a project will cause harm to a state-listed species, and leaves them potentially subject to fines and criminal prosecution. The bill would also put DFW at odds with all other state agencies regarding time-tested and established administrative law statutes and caselaw, and will inject additional uncertainty, delays and unnecessary conflict in the project review process. In short, this bill will upend and radically alter the protection afforded under MESA, one of the Commonwealth's keystone environmental protection statutes.

Imposes Burdensome and Impractical Requirements for Parcels Mapped as Habitat, While Simultaneously Applying More Stringent Permit Standards Across the Board. Under **Section 4** of the bill DFW would be required by February 1, 2013 to satisfy a range of costly and resource intensive procedural requirements for each individual parcel of property included within existing mapped Priority Habitat for state-listed species across the state; otherwise these previously designated habitat areas would have no regulatory effect. In addition to notification of each property owner by certified mail, these requirements also include surveying the boundaries of the habitat on each individually owned parcel, conducting a public hearing, and recording a habitat designation document on the deed of each individual property at the registry.

The barriers associated with these procedures would effectively put a halt to the existing Priority Habitat regulatory screening process, which has a proven track record of protecting state-listed species while allowing development to proceed. In the past five years, the vast majority – more than 78% - of projects in Priority Habitat proceed as proposed without the need for a permit or any conditions. Only 3% of the projects required a permit and the remaining 19% did not require a permit because certain conditions were met that avoided a take, such as construction impact mitigation measures and seasonal timing requirements. Moreover, state superior courts have repeatedly upheld DFW's statutory authority under MESA to regulate projects in Priority Habitat as a screening tool separate from and in addition to the different standards and purpose of the statute's Significant Habitat provisions. In addition, since the promulgation of the MESA standards, the legislature has referred to *priority habitats delineated as such by DFW pursuant to chapter 131A* in two statutes: MGL chapt 90B, § 26(f) (enacted July 31, 2010), and MGL chapt. 43E, § 2(a) (enacted Aug. 5, 2010.) The legislature has therefore impliedly recognized the validity of Priority Habitat designation and procedure, as well as DFW's authority under MESA to promulgate standards.

Section 4 would replace current more flexible permitting standards with more stringent permitting standards that currently apply only to Significant Habitats. For example, under current Significant Habitat review standards, DFW is prohibited from permitting a project that would result in any reduction of the viability of the habitat to support the species involved.

Effectively Eliminates the Continued Use of Estimated Habitat Under the Wetlands Protection Act. Burdensome requirements for Priority Habitat mapping would effectively mean that DFW would no longer produce estimated habitat maps, which are a subset of Priority Habitat maps, and eliminate an important environmental protection element of the Wetlands Protection Act.

Provision for Substituting Habitat Area Has Practical Limitations. **Section 2** of the bill would authorize DFW to reach agreement with a land owner to issue a permit for a project on an existing habitat area, notwithstanding a reduction in the habitat's viability, provided the land owner agrees to substitute other land of "approximately equal size." However, the latter designation of the new "substitute" habitat area would also be subject to the above described procedural

requirements. Moreover, given science-based mapping of habitat across the state for individual species, it will be in practice difficult for the individual landowners to identify new habitat for the impacted species.

Upends Established Judicial Review Standards and Procedures. **Section 3** of the bill would fundamentally alter long-standing adjudicatory procedures established by the legislature under Ch. 30A and caselaw, putting DFW on different footing than all other agencies in the Commonwealth with respect to judicial review of agency actions or decision-making. Specifically, section 3 would give any land owner who felt aggrieved by an action or inaction of DFW during or within a reasonable time of a DFW MESA review “event” (broadly defined to be a land owner’s request for a permit, a hearing, proceeding or non-judicial appeal) to sue DFW in superior court. Section 3 also makes clear that the above right to go to court is in addition to any other available remedy or appeal or judicial review. This would allow a land owner who unsuccessfully sues DFW in the middle of a project review proceeding to still file an appeal with DFW at the conclusion of the DFW administrative process. The availability of this new, legally unprecedented broadly defined avenue for judicial review is contrary to well settled administrative law principles, which require a person to first exhaust his/her administrative remedies prior to a “ripe” judicial proceeding.

Timing Uncertainties. Finally, the bill’s last two sections set forth the effective dates for the other sections in the bill. **Section 6** of the bill provides that Section 4 will take effect on February 1, 2013, about 7 months from now. This means that DFW would have 7 months to review all individual habitat parcels across the state and hold public hearings. In addition, during these 7 months, review of pending projects and permits would effectively be suspended. The other provisions of the bill take effect immediately.

Massachusetts Endangered Species Act FAQ

What is the responsibility of the Division of Fisheries and Wildlife (DFW) under the Massachusetts Endangered Species Act (MESA)? In order to ensure the survival of the Commonwealth's most imperiled native species, the Legislature authorized DFW to regulate the "take" of native plants and animals designated on the state list of Endangered, Threatened, and Special Concern species (http://www.mass.gov/dfwele/dfw/nhesp/species_info/mesa_list/mesa_list.htm). "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, or to assist 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? Since 1993, DFW has been publishing Priority Habitat maps 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 DFW. 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 city and town offices where municipal-wide wall sized maps were sent.
- After the 2005 regulatory revisions, DFW was required to provide municipal-based maps to planning boards and conservation commissions in cities and towns where Priority Habitat exists. DFW 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; DFW is required to publish notice of the availability of the proposed updated Priority Habitat map and the public comment period on DFW'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 municipalities do not notify property owners of their zoning type. Zoning and wetlands laws regulate 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. Those maps, however, are also available at city and town halls across the Commonwealth.
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. DFW 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 this regard, the legislative history of MESA demonstrates that the Massachusetts Legislature intended the “take” provision to prevent loss of rare species’ habitat due to destruction or modification of that habitat. 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, in *William & Marlene Pepin v. the Div. of Fisheries & Wildlife*, **the Hampden Superior Court upheld the 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 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, it “...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 Env’tl. Assocs., Inc. v. Dep’t of Env’tl. 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 Env’tl. 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 Env’tl.*, 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? An owner may file a request with DFW and DFW 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? DFW has taken steps to minimize the Priority Habitat “footprint” while still providing adequate protection for endangered species. Priority Habitat acreage has thus been declining consistently since 2006. Although DFW 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/nhosp/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 DFW 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 under other federal, state and local 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? And does DFW require property owners in Priority Habitat to donate to environmental organizations? 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 DFW 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 a project proponent as an option provided to a developer for mitigation. Environmental organizations across the country are routinely asked to voluntarily partner in mitigation projects.

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 conditioning 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 across the nation to be a regulatory taking.

The *Blair* Supreme Judicial Court decision, in particular, is 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.

How does DFW 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 DFW’s 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 biologists formulate a recommendation based on best scientific evidence available, which is presented to DFW senior staff for their review. The NHESAC then reviews the recommendations, and submits its recommendation to the DFW Director. 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>.