

Massachusetts' Highest Court Upholds State's Endangered Species Regulations

Friday, April 25, 2014

In a long-awaited ruling, the Massachusetts Supreme Judicial Court affirmed the legality of the “priority habitat” regulations created by the Division of Fisheries and Wildlife (DFW) of the Massachusetts Department of Environmental Protection under the **Massachusetts Endangered Species Act (MESA)**. In *Pepin v. Division of Fisheries and Wildlife*, SJC No. 11332 (February 18, 2014), the petitioners challenged the DFW’s establishment of “priority habitat” regulations “for which MESA makes no express provision.”

MESA does expressly authorize DFW to designate certain areas as “significant habitats” of endangered or threatened species. Land designated a “significant habitat,” entitles an owner to (i) advance written notice that the land is being considered for designation as a significant habitat, (ii) a public hearing before any decision on the proposed designation is made, and (iii) an opportunity to appeal and seek compensation under the “takings” clause of the U.S. Constitution. Arguably to avoid paying just compensation, the DFW has never designated land “significant habitat.”

Instead, the DFW promulgated regulations establishing a second type of protected habitat denoted “priority habitat,” to protect species that are either endangered or threatened, or that fall into a third category of “species of special concern.” Delineations are “based on the best scientific evidence available.” A sixty-day public comment period follows the reevaluation of the priority habitat map every four years and a final map is posted on the DFW’s web site. The DFW reviews projects in a “priority habitat” on a case-by-case basis to determine whether it would result in either (i) a “no” take, (ii) a “conditional” no take, or (iii) a take. Even if DFW finds the project would be a “conditional” no take or a “take,” the project may proceed under DFW-imposed conditions or a “conservation and management permit.”

Here, the petitioners’ property consists of two building lots, totaling approximately 36 acres. In 2006, the property was delineated a priority habitat for a species of special concern (eastern box turtle). Challenging the validity of the “priority habitat” regulations, the petitioners maintained that MESA’s creation of the “significant habitat” designation with critical procedural protections meant that all landowners were entitled to the same protections whenever property development is restricted under MESA. Citing the broad authority granted by MESA, the Court rejected this view and instead found that that statute “extends to the formulation of the priority habitat concept as a means of implementing MESA’s prohibition on takes.” The Court refused to “substitute [its] judgment as to the need for a regulation, or the propriety of the means chosen to implement the statutory goals, for that of the agency, ...[where] the regulation ... [was] rationally related to those goals.” The petitioners could not overcome the presumption of validity accorded “duly promulgated regulations of an administrative agency....”

The Court also ruled that in deciding the petitioners’ challenge to the application of the priority habitat mapping guidelines to their property, a Division of Administrative Law Appeals (DALA) magistrate judge properly ruled in favor of the DFW even without a hearing because the petitioners failed to meet their burden of demonstrating that the DFW improperly delineated their property as priority habitat.



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