

1-21-2015

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Recommended Citation

Marisa P. Kaley, *Protecting Endangered Species Habitat on Private Property: The Public-Private Constitutional Balance Need Not Be a Zero-Sum Game*, 42 B.C. Env'tl. Aff. L. Rev. 229 (2015),
<http://lawdigitalcommons.bc.edu/ealr/vol42/iss1/8>

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PROTECTING ENDANGERED SPECIES HABITAT ON PRIVATE PROPERTY: THE PUBLIC-PRIVATE CONSTITUTIONAL BALANCE NEED NOT BE A ZERO-SUM GAME

MARISA P. KALEY*

Abstract: In 2006, the thirty-six acre parcel of land in Hampden, Massachusetts on which William and Marlene Pepin planned to build their retirement home was designated as “priority habitat” for the eastern box turtle, a species of special concern in the Commonwealth. The designation triggered development restrictions intended to prevent harm to the turtle, prompting the Pepins to challenge both the validity of the Massachusetts Endangered Species Act regulations that implement the priority habitat scheme, and the decision by the Department of Fisheries and Wildlife to so delineate their property. The Massachusetts Supreme Judicial Court upheld the priority habitat scheme and its application to the Pepins’ property. Although the outcome was a victory for the environment, this Comment argues that the court should have broadened its explanation in order to prevent confusion among Massachusetts landowners regarding what avenues for defending their private property rights remain available.

INTRODUCTION

The town of Hampden, Massachusetts traces its origins back to 1741.¹ Located about eighty miles southwest of Boston, the town boasts wetlands that make it a suitable habitat for the *Terrapene carolina*, or the eastern box turtle (the “tur-

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

¹ *History of Hampden, MA*, HAMPDEN MASS., <http://www.hampden.org/history.html> (last visited Jan. 10, 2015), archived at <http://perma.cc/R3VU-BKEG>. In 1741, the first European settlers followed the Nipmuck Indians to a site along the banks of the Scantic River. *Id.*

tle”).² The turtle is so named because of a hinge on its lower shell that allows it to withdraw its head, legs, and tail completely into its shell.³

The turtles can be found all along the eastern seaboard of the United States, from northern Florida to southern Maine, and their range extends west into Michigan, Illinois, and Tennessee.⁴ Within Massachusetts, the turtles face a multitude of threats stemming from development, forestry and agricultural practices, roadways, illegal collection, all-terrain vehicle use, increased predation, and climate change.⁵ Although individual turtles may live for over 100 years, females do not reach sexual maturity until age fourteen and typically lay only a half dozen eggs each year.⁶ Because even small increases in the mortality rate can have a destabilizing effect on an already sparse population, the species is especially vulnerable to destruction.⁷ In an effort to address this vulnerability, the Division of Fisheries and Wildlife (“DFW”), pursuant to the Massachusetts Endangered Species Act (“MESA”), has listed the turtles as a species of special concern.⁸

The turtles, however, were not the only ones drawn to Hampden, Massachusetts.⁹ William and Marlene Pepin purchased approximately thirty-six acres of land in Hampden with the intention of building a single-family home.¹⁰ Much to their chagrin, however, in 2006 their land was designated “priority habitat” for the turtles, meaning they faced certain limitations on building, and were required to submit a development proposal to the DFW.¹¹ Unhappy with the conditions the DFW proposed to attach to their building permit, the Pepins filed suit in Massachusetts Superior Court, challenging both the validity of the

² See LORI ERB, MASS. DIV. OF FISHERIES & WILDLIFE, EASTERN BOX TURTLE CONSERVATION PLAN FOR MASSACHUSETTS 9 (2011), available at <http://www.mass.gov/eea/docs/dfg/nhesp/species-and-conservation/complete-teca-plan.pdf>, archived at <http://perma.cc/WH4E-FWD8>; NATURAL HERITAGE & ENDANGERED SPECIES PROGRAM, MASS. DIV. OF FISHERIES & WILDLIFE, EASTERN BOX TURTLE (*TERRAPENE CAROLINA*) (2007), available at <http://www.mass.gov/eea/docs/dfg/nhesp/species-and-conservation/nhfacts/terrapene-carolina.pdf>, archived at <http://perma.cc/WMN3-WG8A>; *The Town of Hampden, MA*, HAMPDEN MASS., <http://www.hampden.org/town.html> (last visited Jan. 10, 2015), archived at <http://perma.cc/W2AD-QN4F>.

³ NATURAL HERITAGE & ENDANGERED SPECIES PROGRAM, *supra* note 2.

⁴ *Id.*

⁵ ERB, *supra* note 2, at 27–28, 31–33, 35.

⁶ *Id.* at 26.

⁷ *Id.* at 8.

⁸ See 321 MASS. CODE REGS. 10.90(1)–(2) (2008); 321 MASS. CODE REGS. 10.90(4) (2012). The eastern box turtle is listed as a “species of special concern,” defined in MESA as “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.” MASS. GEN. LAWS ch. 131A, § 1 (2012).

⁹ ERB, *supra* note 2, at 9.

¹⁰ Pepin v. Div. of Fisheries & Wildlife, 4 N.E.3d 875, 878 (Mass. 2014).

¹¹ *See id.*

priority habitat scheme and the DFW's review of its decision to designate the Pepins' property as priority habitat.¹²

In 2014, in *Pepin v. Division of Fisheries and Wildlife*, the Massachusetts Supreme Judicial Court (SJC) upheld the validity of both the priority habitat scheme and the DFW's actions.¹³ This Comment argues that *Pepin* was rightly decided and that the outcome is consistent with the statutory purpose of MESA and its regulations.¹⁴ It further argues that the decision reinforced the rights of priority habitat landowners.¹⁵ To correct the misconception that owners of land designated as priority habitat are without robust protection of their private property rights, however, this Comment suggests that the SJC should have gone further in its explanation of why the absence of explicit landowner protections in the MESA regulations did not invalidate the priority habitat scheme.¹⁶ The SJC should have clarified that despite the absence of explicit protections, both the Massachusetts Constitution and the U.S. Constitution protect landowners from an invalid uncompensated regulatory taking.¹⁷

I. FACTS AND PROCEDURAL HISTORY

The Pepins began the process of purchasing their thirty-six acre parcel of land in 2006, just months before it was designated priority habitat for the eastern box turtle.¹⁸ They intended to build a retirement home, but the DFW's implementation of the MESA regulations complicated their plans.¹⁹ In October 2006, the DFW designated an area of land in Hampden, Massachusetts—including the Pepins' parcel—as priority habitat for the turtle, on the basis of a 1991 sighting of a female turtle of reproductive age in the area.²⁰

Although the priority habitat designation did not trigger a ban on all development of their property, it required the Pepins to secure DFW approval of their plans before construction could begin.²¹ The Pepins submitted their proposal to the DFW in January 2007, and the DFW determined that the project had the potential to result in a “take” of a State-listed species, meaning that the

¹² See *id.*

¹³ See *id.* at 887, 889.

¹⁴ See *id.* at 885–86; *infra* notes 36–51 and accompanying text (establishing the statutory purpose of MESA and its regulations).

¹⁵ See *infra* notes 101–106 and accompanying text.

¹⁶ See *infra* notes 80, 92–93 and accompanying text.

¹⁷ See *infra* notes 81–100 and accompanying text.

¹⁸ Conor Berry, *Bill Pepin's Quest to Build Retirement Home in Hampden Derailed by Alleged Turtle Spotting Near His Land*, MASS LIVE (July 30, 2012, 5:11 PM), http://blog.masslive.com/breakingnews/print.html?entry=/2012/07/bill_pepin_quest_to_build_retirement_home_in_hampden_eastern_box_turtle.html, archived at <https://perma.cc/XTW4-BZHP>?type=image. The Pepins did not take possession of the land until 2008. *Id.*

¹⁹ See *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875, 878 (Mass. 2014).

²⁰ See *id.*

²¹ See *id.*

construction might harm the turtles or disrupt their habitat.²² The Pepins then submitted a revised building plan, whereby the DFW concluded that the project could proceed as long as the Pepins agreed to record a deed restriction and a conservation easement prior to beginning construction.²³

Instead of accepting the DFW's conditional approval, the Pepins sought DFW review of their property's designation in September 2008.²⁴ The DFW sent a turtle conservation biologist and a regulatory review manager to the Pepins' property to perform a habitat evaluation.²⁵ The results indicated that the Pepins' planned construction site was an "ideal habitat" for the turtles, and thus, the DFW upheld the priority habitat designation.²⁶

In response, in November of 2008, the Pepins requested a hearing before a magistrate judge pursuant to the MESA regulations.²⁷ They were granted an informal hearing.²⁸ At the hearing, they challenged the DFW's ability to delineate priority habitats using a method that did not "afford landowners the same procedural protections due under MESA to those owning property within significant habitats."²⁹ They also contended that the DFW did not follow the prescribed method for re-examining its original decision to designate their land as priority habitat.³⁰ Because the Pepins' claim was "a direct challenge to the validity of the regulation, the magistrate granted the DFW's motion to dismiss without prejudice to the Pepins' right to seek judicial review in the Superior Court."³¹

On September 1, 2009, the Pepins filed their claim for declaratory relief regarding the validity of the priority habitat regulations in the Massachusetts Superior Court, while also seeking review of the magistrate's decision addressing the alleged procedural failure by the DFW.³² The court denied the Pepins' motion for judgment on the pleadings and granted summary judgment in favor of the DFW on the Pepins' challenge to the validity of the priority habitat regu-

²² *Id.*; see *supra* note 8 and accompanying text (defining a species of special concern in MESA).

²³ *Pepin*, 4 N.E.3d at 878. The DFW reportedly requested that the Pepins set aside seven acres in the corner of their parcel that would not be developed, with the expectation that future development of the remaining property would require additional permits. Maureen Turner, *Fighting for Habitat*, VALLEY ADVOC. (Nov. 26, 2009), <http://www.valleyadvocate.com/article.cfm?aid=10912>, archived at <http://perma.cc/PRJ8-MQU5>.

²⁴ *Pepin*, 4 N.E.3d at 878; see *infra* note 47 and accompanying text.

²⁵ *Pepin*, 4 N.E.3d at 878.

²⁶ *Id.*

²⁷ *Pepin v. Div. of Fisheries & Wildlife*, No. HDCV2009-00838, 2011 WL 12555413, at *1, *4 (Mass. Supp. 2011); see 321 MASS. CODE REGS. 10.25(1) (2010).

²⁸ *Pepin*, 4 N.E.3d at 879; see 801 MASS. CODE REGS. 1.02(7)(c) (1998).

²⁹ *Pepin*, 4 N.E.3d at 879; see *infra* notes 38–51 and accompanying text (illustrating the difference between significant habitat designation and priority habitat designation).

³⁰ *Pepin*, 4 N.E.3d at 879.

³¹ *Id.*

³² *Pepin*, 2011 WL 12555413, at *4.

lations.³³ The court reasoned that the regulations were consistent with the purpose of MESA and did not exceed the scope of the DFW's authority as granted to it by MESA.³⁴ The Pepins appealed the decision to the Massachusetts Appeals Court, at which time the Supreme Judicial Court transferred the case directly on its own initiative.³⁵

II. LEGAL BACKGROUND

Enacted in 1990, the Massachusetts Endangered Species Act ("MESA") aims to "protect rare species and their habitats by prohibiting the 'Take' of any plant or animal species listed as [e]ndangered, [t]hreatened or of [s]pecial [c]oncern by the Division of Fisheries & Wildlife" ("DFW").³⁶ MESA authorizes the director of the DFW (the "director"), in consultation with a committee and after a public hearing, to compile a list of endangered, threatened, and of special concern species.³⁷ These species and their habitats are protected through two types of habitat designations: significant and priority.³⁸

Significant habitat designation is intended for areas "where in the Division's opinion a [p]roject or [a]ctivity would result in the [t]ake of any endangered or threatened species."³⁹ Significant habitat designations are to be made "on the basis of the best scientific evidence available" after considering the threats to the population and its habitat, population size, the potential benefits of designation to the welfare of the species, and alternative uses of the land.⁴⁰

Owners of significant habitat who wish to develop their land must obtain a written permit issued by the director.⁴¹ Aggrieved landowners may appeal significant habitat designation or denial of a permit to alter significant habitat to the Secretary of the Executive Office of Environmental Affairs, petition the

³³ *Id.*

³⁴ *See id.*

³⁵ *Pepin*, 4 N.E.3d at 879. Under certain circumstances, such as when the appeal presents a question of first impression, a novel question of law, a question related to the U.S. or Massachusetts Constitutions, or a question of public interest, a party may request that a case bypass the Appeals Court and appeal directly to the SJC. MASS. R. APP. P. 11(a). Justices on the SJC may also vote for direct appellate review of a case when they believe it to be in the public's interest. *Id.* at 11(f).

³⁶ *MA Endangered Species Act (MESA) Overview*, MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, <http://www.mass.gov/eea/agencies/dfw/natural-heritage/regulatory-review/mass-endangered-species-act-mesa/> (last visited Jan. 10, 2015), archived at <http://perma.cc/R5TC-PMQT>. A "[t]ake" is defined as, "in reference to 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." MASS. GEN. LAWS ch. 131A, § 1 (2012). "Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of [h]abitat." *MA Endangered Species Act (MESA) Overview*, *supra*.

³⁷ MASS. GEN. LAWS ch. 131A, § 4. This list must be reviewed every five years. *Id.*

³⁸ 321 MASS. CODE REGS. 10.01(2) (2010).

³⁹ *Id.*

⁴⁰ MASS. GEN. LAWS ch. 131A, § 4.

⁴¹ 321 MASS. CODE REGS. 10.66 (2005).

director of the DFW to consider purchasing the land, or sue the state for “an unconstitutional taking without compensation.”⁴²

Priority habitat designation, on the other hand, is intended for areas “where there is the potential that a [t]ake of any [e]ndangered, [t]hreatened, or [s]pecial [c]oncern species *may* occur as a result of any [p]roject or [a]ctivity.”⁴³ The text of MESA does not mention the priority habitat scheme at all, but it does instruct the DFW to “adopt any regulations necessary to implement the provisions of this chapter.”⁴⁴ The DFW in turn promulgated regulations to implement the MESA prohibition on “takes” of species of special concern through priority habitats.⁴⁵ Besides expanding the application of a protected habitat designation to include all three categories of species—endangered, threatened, and of special concern—the priority habitat designation allows the DFW to preemptively screen projects and provide guidance to landowners seeking to avoid improper takes.⁴⁶

Owners of priority habitat may request reconsideration of the designation by the DFW and may appeal a final agency decision by requesting an adjudicatory hearing before the DFW.⁴⁷ Whereas the MESA regulations specifically provide that owners of significant habitat may petition the director to consider purchasing their land or sue based on an invalid uncompensated regulatory taking, owners of priority habitat are not explicitly invited to do the same.⁴⁸

Owners of priority habitat who wish to develop their land must submit to a review by the DFW to determine whether the project can proceed as proposed, proceed pursuant to certain conditions, or cannot proceed because it will result in an impermissible take of a State-listed species or habitat.⁴⁹ “If the Division has made a determination of a [t]ake,” the landowner may consult the agency to find a way to avoid it or may apply for a permit to proceed despite the take.⁵⁰ An owner who is denied a permit has a right to an adjudicatory hearing.⁵¹

Legislation like MESA that restricts the freedom of private property owners to do with their land as they please has been challenged as undue govern-

⁴² *Id.* 10.38–39; 321 MASS. CODE REGS. 10.71–72 (2008).

⁴³ 321 MASS. CODE REGS. 10.01(2) (2010) (emphasis added).

⁴⁴ *See* MASS. GEN. LAWS ch. 131A, § 4 (2012); *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875, 882 (Mass. 2014).

⁴⁵ *See* MASS. GEN. LAWS ch. 131A, §§ 2, 4; 321 MASS. CODE REGS. 10.01(2) (2010).

⁴⁶ 321 MASS. CODE REGS. 10.01(2).

⁴⁷ *Id.* at 10.12(8), 10.25(1).

⁴⁸ *See id.* at 10.25; 321 MASS. CODE REGS. 10.72 (2008); 321 MASS. CODE REGS. 10.39 (2005).

⁴⁹ 321 MASS. CODE REGS. 10.18(1), (2)(a)–(b) (2010).

⁵⁰ *Id.* at 10.18(3). The DFW may decide to issue a permit provided the landowner agrees to take action in the form of a combination of onsite and offsite mitigation and financial contribution that “provides a long-term Net Benefit” to conservation of the species in question, despite the take. *Id.* at 10.23(2), 10.23(6)(b)(2).

⁵¹ *Id.* at 10.25(1).

ment interference.⁵² Both the Massachusetts Constitution and the U.S. Constitution include provisions aimed at balancing respect for private property rights with the notion that government may intrude upon those rights for the benefit of the public.⁵³ The Fifth Amendment to the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation.”⁵⁴ The language in Article X of the Massachusetts Constitution closely mirrors that of the U.S. Constitution and reads, “[w]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”⁵⁵ The Massachusetts Constitution is the supreme law within the Commonwealth’s borders—subject only to the U.S. Constitution—and it limits the power of the state legislature and various departments within the state government.⁵⁶ The Fifth Amendment applies equally to the state and federal governments, such that even if the Massachusetts Constitution did not include its own mirror provision, the U.S. Constitution would still protect the property rights of the citizens of the Commonwealth.⁵⁷

An owner of private property who believes government regulation has intruded too far on his property rights may challenge the government action as an invalid regulatory taking.⁵⁸ In 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court articulated a multi-pronged test for determining whether government action has resulted in a regulatory taking.⁵⁹ A court is to consider three factors: the economic impact of the regulation, any interference with the property owner’s investment-backed expectations, and the character of

⁵² See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107, 138 (1978) (holding New York City’s Landmarks Preservation Law restricting the development Grand Central Terminal did not affect an invalid regulatory taking); *Blair v. Mass. Dep’t of Conservation & Recreation*, 932 N.E.2d 267, 269–70 (Mass. 2010) (affirming the Department of Conservation and Recreation’s denial of a variance under the Watershed Management Act—intended to protect the public water supply—to owners of lakefront property in Massachusetts, did not constitute a regulatory taking).

⁵³ See U.S. CONST. amend. V; MASS. CONST. pt. I, art. X.

⁵⁴ U.S. CONST. amend. V.

⁵⁵ MASS. CONST. pt. I, art. X.

⁵⁶ See David Fellman, *Constitutional Law*, in 3 GUIDE TO AMERICAN LAW 197 (1983).

⁵⁷ See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE § 16.1(a) (2014). The Fourteenth Amendment extended the Fifth Amendment to apply to states such that “the rules that govern when a government may take property for public use and when it must pay just compensation to private individuals when exercising its regulatory or eminent domain powers are identical under the two clauses.” *Id.* § 14.2(a); see also *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (confirming the Fourteenth Amendment extends the takings clause of the Fifth Amendment to the states).

⁵⁸ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 412, 414 (1922) (finding a Pennsylvania law prohibiting mining for coal in a manner that would damage a house on the land’s surface as an invalid government taking of its contract and property rights).

⁵⁹ See *Penn Central*, 438 U.S. at 124.

the governmental action.⁶⁰ A court must regard the parcel as a whole rather than just the impacted portion, and if the owner is still able to “obtain a reasonable return” from his property, even when it is subject to the regulation, then there is no taking.⁶¹ The Supreme Court summarized the underlying rationale for this limit on private property rights, saying “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁶²

In 2010, in *Blair v. Massachusetts Department of Conservation and Recreation*, the Massachusetts Supreme Judicial Court (SJC) held that unless government regulation of private property rises to the level of a taking, the property owner is not entitled to compensation.⁶³ At issue in *Blair* was the Watershed Management Act (“WMA”), which prevented a Massachusetts couple from making certain changes to their lakefront property.⁶⁴ The Massachusetts Department of Conservation and Recreation denied the Blairs’ request for a variance under the WMA, prompting them to claim the effect of the law resulted in an uncompensated regulatory taking of their land in violation of both the Massachusetts Constitution and the Fifth Amendment.⁶⁵ The SJC disagreed and, applying the *Penn Central* analysis, concluded that there was no regulatory taking and thus no requirement that the Commonwealth compensate the Blairs for the effect the WMA had on their property.⁶⁶

III. ANALYSIS

In 2014, in *Pepin v. Division of Fisheries and Wildlife*, the Massachusetts Supreme Judicial Court (SJC) upheld both the validity of the Massachusetts Endangered Species Act (“MESA”) priority habitat scheme as implemented by the Division of Fisheries and Wildlife (“DFW”), as well as the procedure the DFW used in reviewing its application of the designation to William and Mar-

⁶⁰ See *id.* With respect to the “character” of the governmental action, the Court distinguished between a physical invasion and a regulatory interference, stating that the former is more likely to lead to a finding that there has been a taking. *Id.*

⁶¹ See *id.* at 130–31, 136–38. The Court held that New York’s historical preservation laws did not “interfere with what must be regarded as *Penn Central*’s primary expectation concerning use of the parcel,” namely the continued operation of Grand Central Terminal, and thus permitted *Penn Central* to “obtain a ‘reasonable return’ on its investment.” *Id.* at 136.

⁶² *Penn. Coal Co.*, 260 U.S. at 413. This statement by Justice Holmes appears frequently in subsequent opinions on the topic of government takings, including *Penn Central*, 438 U.S. at 124, and *Blair v. Mass. Dep’t of Conservation & Recreation*, 932 N.E.2d 267, 275 (Mass. 2010).

⁶³ See 932 N.E.2d at 269–70.

⁶⁴ See *id.* at 269. One purpose of the Division of Water Supply Protection, created by the WMA, was to “utilize and conserve said water and other natural resources in order to protect, preserve and enhance the environment of the commonwealth and to assure the availability of pure water for future generations.” See MASS. GEN. LAWS ch. 92A1/2, § 2 (2003).

⁶⁵ See *Blair*, 932 N.E.2d at 269, 271, 273.

⁶⁶ *Id.* at 276–77.

lene Pepins' property in Hampden, Massachusetts.⁶⁷ The SJC upheld the scheme as a whole by rejecting the Pepins' contention that "procedural mechanisms" similar to those incorporated into the significant habitat scheme should also apply to priority habitat.⁶⁸ The court acknowledged that the regulations do not extend comparable protections to owners of priority habitat, but concluded that this variation was appropriate given the degree to which each designation restricts private property rights.⁶⁹ It reasoned that, because the development restrictions on priority habitat are not intended to be as severe as those imposed on significant habitat, the protections need not be correspondingly robust.⁷⁰ The SJC correctly interpreted MESA in light of its statutory purpose, but it could have gone further in explaining the operation of the state and federal constitutional backstop that continues to protect owners of priority habitat.⁷¹ Doing so would have prevented confusion among such landowners regarding their right to challenge the development restrictions that accompany priority habitat designation.⁷²

The court was correct in finding that the priority habitat regulations need not be as protective of private property owners as the significant habitat regulations because they are consistent with the purpose of MESA and do not trigger the comparably more severe development restrictions that accompany significant habitat designation.⁷³ As the court pointed out, the purpose of MESA is to "prevent the decline of at-risk species by protecting species themselves, as well as the habitats in which they live, from undue human encroachment."⁷⁴ Although it addresses a method by which the Commonwealth may protect habitat belonging to endangered and threatened species, MESA gives no explicit indication of how the habitat of species of special concern should be protected.⁷⁵ The DFW conceived of priority habitat regulations that are designed to enable the agency to review individual development projects and provide tai-

⁶⁷ 4 N.E.3d 875, 887, 889 (Mass. 2014). In upholding the magistrate's decision to grant the DFW's motion for a directed decision, the court determined that the priority habitat scheme was properly applied to the Pepins' property. *See id.* at 887–89. Even though the Pepins did not have the opportunity to challenge the testimony of the DFW's witnesses because an informal hearing never took place, the court noted that the regulations governing such hearings permit the presiding officer to decide dispositive motions without a hearing. *Id.* at 887–88. The court held that "this type of procedure does not contravene the requirements of either the Administrative Procedure Act or due process." *Id.* at 888.

⁶⁸ *Id.* at 887.

⁶⁹ *See id.* at 886–87.

⁷⁰ *See id.*

⁷¹ *See infra* notes 79–100 and accompanying text.

⁷² *See infra* notes 79–100 and accompanying text.

⁷³ *See Pepin*, 4 N.E.3d at 886–87.

⁷⁴ *Id.* at 880.

⁷⁵ *See* MASS. GEN. LAWS ch. 131A, § 4 (2012); *see also Pepin*, 4 N.E.3d at 882 ("In promulgating regulations to implement the take provision, the division has established a second type of habitat designation, that of 'priority habitat,' for which MESA makes no express provision.").

lored guidance to landowners regarding how to prevent a violation of MESA with respect to species of special concern.⁷⁶ Thus, the statute and regulations implicitly allow the Commonwealth to impede development of private property.⁷⁷ The court correctly concluded that in the Pepins' case, the regulations did what they were intended to do, and it is not necessary to add more landowner protections given that restrictions on development resulting from priority habitat designation will be minimal.⁷⁸

Although the SJC correctly determined that owners of priority habitat-designated land retain adequate procedural protections under the MESA regulations, the scope of its explanation was too narrow to prevent continuing confusion about what that protection includes.⁷⁹ In response to *Pepin*, landowners have decried the priority habitat designation as stripping them of the ability to protect their private property rights.⁸⁰ Contrary to this perception, however, the protections available to owners of priority habitat-designated land are not limited to what is set forth in the MESA regulations.⁸¹ The Pepins argued that whereas the statute and regulations each provide four specific protections to owners of significant habitat—ranging from advance written notice to the right to seek compensation for a government taking—the regulations do not afford

⁷⁶ *Pepin*, 4 N.E.3d at 882; 321 MASS. CODE REGS. 10.01(2) (2010).

⁷⁷ See *Pepin*, 4 N.E.3d at 882, 886–87; MASS. CODE REGS. 10.01(2).

⁷⁸ See *Pepin*, 4 N.E.3d at 882, 886–87. Indeed, the DFW did not seek to bar all development on the Pepins' parcel. See *id.* at 878.

⁷⁹ See *id.* at 887; *infra* notes 80–83 and accompanying text.

⁸⁰ See *Pepin v. Division of Fisheries and Wildlife*, NAT'L ASS'N OF HOME BUILDERS, <http://www.nahb.org/generic.aspx?genericContentID=217232> (last visited Jan. 10, 2015), *archived at* <http://perma.cc/W2WA-4VFB> (“One of the primary differences [between the significant and priority habitat programs] is that when the development of private land is restricted by the Division, the legislature’s program permits the landowner to apply to the Superior Court for damages for the taking of private land for a public purpose . . . while the Division’s regulatory program does not allow the same.”); Seth Jaffe, *In Massachusetts, Regulatory Agencies Are Still (Almost) Always Right*, LAW & ENV’T, FOLEY HOAG (Feb. 18, 2014), <http://www.lawandenvironment.com/2014/02/18/in-massachusetts-regulatory-agencies-are-still-almost-always-right/>, *archived at* <http://perma.cc/UW64-S3D7> (“After the decision by the Supreme Judicial Court yesterday in *Pepin v. Division of Fisheries and Wildlife* . . . one could almost say that MESA is a blank slate, authorizing DFW to write any regulations it chooses that might arguably benefit species that are endangered, threatened, or of ‘special concern.’”); Michael Seward, *Massachusetts Supreme Judicial Court Decision Imperils Private Property Rights; MESA a Good Law with Bad Implementation*, SAWICKI REAL ESTATE (Jun. 26, 2014, 7:28 PM), <http://www.westernmassproperties.com/pioneer-valley-real-estate-news/massachusetts-supreme-judicial-court-decision-imperils-private-property-rights-mesa-a-good-law-with-bad-implementation/>, *archived at* <http://perma.cc/W25W-JYJG> (“Although MESA acknowledges property rights with its significant habitat designation . . . this is not the case with the MassWildlife’s priority habitat designation. There is no judicial recourse or compensation for a property owner if their property has been designation [sic] as such.”).

⁸¹ See U.S. CONST. amend. V (“Private property [shall not] be taken for public use, without just compensation.”); MASS. CONST. pt. I, art. X (“Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”); NAT'L ASS'N OF HOME BUILDERS, *supra* note 80; Jaffe, *supra* note 80; Seward, *supra* note 80.

any of these protections to owners of priority habitat.⁸² The absence of explicitly enumerated statutory rights, however, does not mean that owners of priority habitat-designated land are left unprotected from undue government interference.⁸³

If the Pepins felt that the conditions attached to their permit would constitute an invalid uncompensated regulatory taking, nothing in the priority habitat regulations would have prevented them from defending their state or federal constitutional rights by filing a takings suit.⁸⁴ The absence of a provision in the priority habitat regulations inviting aggrieved landowners to seek compensation for a government taking does not bar their ability to do so.⁸⁵ Although the Pepins desired explicit regulatory permission to seek compensation, given the constitutional protection already afforded to them at both the state and federal levels, such an invitation was not necessary to safeguard their right to pursue a takings claim.⁸⁶

The SJC should have clarified that one's right to challenge a regulatory taking emanates not from any statute but from the Massachusetts Constitution and the U.S. Constitution.⁸⁷ Both Constitutions provide that owners of private property diverted to public use are entitled to reasonable compensation.⁸⁸ Thus, the court should have clearly explained that this right, granted by both Constitutions, is ever present because both documents implicitly supplement

⁸² Brief for Plaintiff-Appellant at 27–29, *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875 (Mass. 2014) (No. 2012-11332), 2012 WL 8684862, at *27–29.

⁸³ See *supra* notes 53–66 and accompanying text. As discussed above, constitutional protections against invalid government takings are always available regardless of the language in a statute or regulation. See *supra* notes 53–66 and accompanying text.

⁸⁴ See 321 MASS. CODE REGS. 10.12(8), 10.25 (2010) (containing no prohibition on bringing a takings challenge); see also *Blair v. Mass. Dep't of Conservation & Recreation*, 932 N.E.2d 267, 269, 274 (Mass. 2010) (recognizing a Massachusetts couple's constitutional takings challenge apart from any statutory right to bring such a claim).

⁸⁵ See *Blair*, 932 N.E.2d at 269, 274; 321 MASS. CODE REGS. 10.12(8), 10.25.

⁸⁶ See *Blair*, 932 N.E.2d at 269, 274; 321 MASS. CODE REGS. 10.12(8), 10.25 (containing no prohibition on bringing a takings challenge); Brief for Plaintiff-Appellant, *supra* note 82, at 27–28, 46. The procedure for obtaining relief from the DFW's improper habitat designation may differ, but the compensatory remedy is ultimately the same. See 321 MASS. CODE REGS. 10.39 (2005); 321 MASS. CODE REGS. 10.72 (2008); *supra* note 84. The significant habitat regulations provide for both petitioning the director of the DFW to consider purchasing the land and suing the state for "an unconstitutional taking without compensation." 321 MASS. CODE REGS. 10.39; 321 MASS. CODE REGS. 10.72. Both the Massachusetts Constitution and the U.S. Constitution allow for compensation as a remedy for successful claims of an invalid government taking. See *Blair*, 932 N.E.2d at 269, 277.

⁸⁷ See *supra* notes 53–57 and accompanying text; see also *Blair*, 932 N.E.2d at 267 (affirming the protection afforded to private property rights by both the Massachusetts Constitution and the U.S. Constitution in the context of an alleged invalid taking resulting from the operation of state law).

⁸⁸ See U.S. CONST. amend. V; MASS. CONST. pt. I, art. X. Specifically, the U.S. Constitution states, "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The Massachusetts Constitution includes a similar provision, which states, "[w]henver the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." MASS. CONST. pt. I, art. X.

the text of all statutes and regulations.⁸⁹ Because owners of priority habitat-designated land are already constitutionally protected from uncompensated regulatory takings, any equivalent protection provided in the priority habitat regulations would be redundant and a potential source of confusion.⁹⁰

Without judicial clarification as a guide, landowners like the Pepins have misinterpreted the priority habitat designation in a way that would essentially require redundancy in all statutes and regulations.⁹¹ The Pepins accused the DFW of implementing a conservation strategy that relies exclusively on the priority habitat designation as a way to avoid compliance with the landowner protections explicitly afforded by significant habitat designation—namely the ability to petition the director to purchase the land or file suit for an invalid regulatory taking.⁹² They perceived the DFW’s failure to include certain language in the priority habitat regulations as the Commonwealth’s attempt to avoid paying compensation by eliminating their ability to seek that remedy.⁹³ In effect, the Pepins sought to impute a new requirement that a state regulatory agency must include language in its regulations that explicitly invites aggrieved citizens to exercise and vindicate their constitutional rights.⁹⁴ Nevertheless, because the state and federal constitutional provisions that grant individual rights—including the right to due process with respect to deprivation of

⁸⁹ See *supra* notes 84–88 and accompanying text.

⁹⁰ See *supra* notes 84–88 and accompanying text. A subdivision of a state, including an administrative agency like the DFW, “represents government or state authority to a sufficient degree to invoke constitutional restrictions on its actions.” See ROTUNDA & NOWAK, *supra* note 57 § 16.1(a).

⁹¹ See NAT’L ASS’N OF HOME BUILDERS, *supra* note 80; Jaffe, *supra* note 80; Seward, *supra* note 80.

⁹² See Brief for Plaintiff-Appellant, *supra* note 82, at 34–35, 41–42. The Pepins argued:

The four protections which the Legislature mandated in favor of the landowner under the terms of the Act should not be avoided by the Division by merely creating a second class of land designation with ever so slight, cosmetic differences in the wording of the burden placed upon the landowner and then naming these areas “priority habitats,” rather than “significant habitats” It is apparent that the priority habitat regulations represent the Division’s attempt to restrict the development of land for the benefit of protected species of plants and animals without having to comply with the statutory requirement that the Division grant to landowners the protections and rights guaranteed under the terms of the Act.

Id. At the time this case was decided, no land in Massachusetts had yet been designated as significant habitat, but nearly four hundred thousand acres in the western part of the state were designated priority habitat. *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875, n.7 (Mass. 2014).

⁹³ See Berry, *supra* note 18. In July 2011 William Pepin testified before the Joint Committee on Environment, Natural Resources and Agriculture that government officials “know that money would be hard to come by, so they’ve invented a way to command the use of the land for free.” *Id.* Mr. Pepin told MassLive.com that he had spent at least half a million dollars, including the purchase price of the land and legal and consulting costs, trying to build his house and said, “[t]hey appropriated the use of my land to accomplish their goal. Where’s my compensation?” *Id.*

⁹⁴ See *id.*

private property rights—already supplement state and federal statutes and regulations, such a requirement would have no practical effect.⁹⁵

By failing to emphasize the constitutional backstop in its opinion, the SJC sent the wrong message to the average Massachusetts landowner.⁹⁶ Lay landowners who are presumably unfamiliar with constitutional law could interpret this decision to mean that witnessing an animal designated as a species of special concern—a designation not as severe as either endangered or threatened—scurry over their property fifteen years ago could leave them helpless against the DFW’s ability to restrict their property rights.⁹⁷ In reality, however, the effect of the decision in *Pepin* is much narrower.⁹⁸ The court did not foreclose a landowner’s option to seek compensation for an invalid uncompensated regulatory taking.⁹⁹ And yet, by confining its explanation to a discussion of MESA, with no mention of the Fifth Amendment, the SJC forewent an opportunity to clarify to Massachusetts landowners that the difference between the language in the regulations associated with significant versus priority habitats has no effect on their constitutional rights.¹⁰⁰

The SJC’s decision in *Pepin* actually appears to be beneficial to Massachusetts landowners’ rights.¹⁰¹ It indicates that the DFW can work *with* landowners, rather than against them, to facilitate development projects that avoid MESA violations.¹⁰² By upholding the priority habitat regulations, the court guaranteed that the DFW has a tool to screen development projects before they begin.¹⁰³ This was crucially important because the priority designation is the less restrictive of the two habitat designations available to the DFW, and so far, it is the only one that has been applied.¹⁰⁴ By relying solely on the priority hab-

⁹⁵ See *supra* notes 84–88 and accompanying text.

⁹⁶ See *supra* notes 84–95 and accompanying text.

⁹⁷ See Bery, *supra* note 18; NAT’L ASS’N OF HOME BUILDERS, *supra* note 80; Jaffe, *supra* note 80; Seward, *supra* note 80; *supra* note 93 and accompanying text.

⁹⁸ See *supra* notes 84–88 and accompanying text.

⁹⁹ See *supra* notes 84–88 and accompanying text. Both the Massachusetts Constitution and the U.S. Constitution ensure that when landowners and the DFW disagree about how “minimal” the government’s intrusion into private property rights is, the landowner retains the right to bring a takings challenge. See *supra* note 84–88 and accompanying text (illustrating why, regardless of the language in the regulations, landowners maintain constitutional rights to challenge the state action).

¹⁰⁰ See *Pepin v. Div. of Fisheries & Wildlife*, 4 N.E.3d 875, 875–89 (Mass. 2014); *supra* notes 84–95 and accompanying text.

¹⁰¹ See *infra* notes 102–106 and accompanying text.

¹⁰² See *Pepin*, 4 N.E.3d at 882, 887; 321 MASS. CODE REGS. 10.01(2), 10.12(8), 10.25 (2010). The decision enables DFW to do this without eliminating a landowner’s ability to bring a takings challenge. See *Pepin*, 4 N.E.3d at 882, 887; 321 MASS. CODE REGS. 10.01(2), 10.12(8), 10.25 (containing no prohibition on bringing a takings challenge); see also Blair v. Mass. Dep’t of Conservation & Recreation, 932 N.E.2d 267, 269, 274 (Mass. 2010) (recognizing a Massachusetts couple’s constitutional takings challenge apart from any statutory right to bring such a claim).

¹⁰³ See *Pepin*, 4 N.E.3d at 882, 887; 321 MASS. CODE REGS. 10.01(2).

¹⁰⁴ See *Pepin*, 4 N.E.3d at 881–82; 321 MASS. CODE REGS. 10.99. Because the DFW has yet to designate any area in MA as significant habitat, there are no test cases, but the language in MESA

itat designation, the DFW is more often than not able to guide landowners to a compromise that allows building to proceed while also avoiding a take of a State-listed species.¹⁰⁵ This outcome is consistent with the goal of the priority habitat regulations, which the court concluded “are designed to facilitate property development, albeit in an environmentally sensitive manner.”¹⁰⁶

CONCLUSION

In *Pepin v. Division of Fisheries and Wildlife*, a Massachusetts couple, William and Marlene Pepin, refused to make certain concessions to the state in order to obtain a permit to build a house on land designated as priority habitat for the eastern box turtle under the Massachusetts Endangered Species Act (“MESA”). The Pepins challenged the priority habitat scheme based on the absence of landowner protections that mirroring those codified in the MESA provisions applicable to owners of significant habitat. The Massachusetts Supreme Judicial Court (SJC) held that because priority habitat designation does not result in the same severe land use restrictions that significant habitat designation likely would, the priority habitat regulations need not include comparable statutory landowner protections.

In upholding the priority habitat scheme as a valid method of habitat management, this Comment argues that the SJC preserved a valuable tool that allows the Massachusetts Division of Fisheries and Wildlife (“DFW”) to be proactive—rather than reactive—in seeking landowner compromise related to species conservation and habitat protection. The decision thus achieves the statutory goal of conservation on a grand scale, without sacrificing substantial private property rights. Nevertheless, some people continue to hold the mistaken belief that the absence of explicit safeguards in the MESA priority habitat regulations leaves them without any protection against the DFW’s interference. This Comment argues that although this belief is misplaced, the SJC missed an opportunity to reassure landowners that both the Massachusetts Constitution and the U.S. Constitution grant them the right to pursue a claim that priority habitat designation has resulted in an invalid uncompensated regulatory taking.

prohibiting any alteration of significant habitat without a permit creates a presumption that any development is forbidden. *See* MASS. GEN. LAWS ch. 131A, § 2 (2012); 321 MASS. CODE REGS. 10.99. In contrast, the language in the priority habitat regulations makes it clear that the DFW intends to allow development in those areas. *See* 321 MASS. CODE REGS. 10.12(1).

¹⁰⁵ *See* EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, MESA DETERMINATIONS FY 08–FY 12 (2012), available at <http://www.mass.gov/eea/docs/dfg/nhesp/regulatory-review/reg-rev-outcomes-fy08-fy12.pdf>, archived at <http://perma.cc/99MK-FMN9>. From 2008 through 2012, the DFW determined that at least 75% of the proposed development projects it reviewed each year under MESA could proceed without modification. *See id.* Another 18% to 22% of the projects each year could be conditioned to avoid a take, meaning that over the five year period, 5% or fewer of the proposed projects were blocked because they would result in a take of a state-listed species. *See id.*

¹⁰⁶ *See Pepin*, 4 N.E.3d at 886.