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The Honorable Robert A. DeLeo, Speaker  
State House, Room 356  
Boston, MA 02133

Dear Speaker DeLeo,

I want to thank you for meeting with me regarding the Natural Heritage and Endangered Species Program (NHESP). As I promised at the meeting, I am writing to follow-up with you on a few of the issues we discussed. My Office has received numerous complaints regarding NHESP in the last few years. I have attended several meetings regarding the subject and have discussed the issue with Secretary Rick Sullivan, and more recently with you. I recommend that the Legislature amend the Massachusetts Endangered Species Act (MESA) to clarify the rights of property owners.

MESA was enacted in 1990 with the intention of protecting wildlife and wildlife habitat. Under M.G.L. c. 131A §4, the Director of the Division of Fisheries and Wildlife (DFW) is authorized to designate “significant habitats” of endangered or threatened species populations. Significant habitat designations are to be reviewed on an annual basis. A significant habitat cannot be altered without the permission of the Director. Such permission will only be granted if the Director determines that any alterations “will not reduce the viability of the significant habitat to support the endangered or threatened species population involved.” There is an appeal process and a property owners’ bundle of rights available to the property owner. To my knowledge, no significant habitat has been designated in the Commonwealth.

DFW, through regulation, has also implemented a lesser designation called “priority habitat.” This designation is frequently used and has been the subject of complaints. Priority habitats are identified as areas where there is potential to adversely impact a protected species through a project or activity. A review process separate from that of significant habitat exists in the regulations. The priority habitat regulations do not share the same property owners’ bundle of rights available under the significant habitat designation.

DFW in 2010 made a number of changes to the regulations to try to address some complaints about the priority habitat process. For example, starting in 2012 the priority habitat mapping cycle was increased to a four-year cycle to provide a longer period between mapping cycles. The map is now subject to a 60-day public comment period. However, there is no public

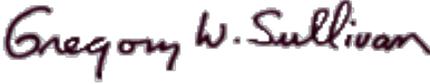
hearing or notice to property owners included in these regulations, as is required by statute for the significant habitat process.

In my opinion, it is the difference on the owner's property rights that causes the problem. In a 2011 Superior Court ruling, *William Pepin and Marlene Pepin v. Division of Fisheries and Wildlife* (Civ. A No. 09-838 MA SUPER CT March 28, 2011) (BHF, J), the court identified the key differences between significant and priority habitat as relating to these owner's property rights. The decision also provides a detailed summary of MESA. I have attached the decision for your reference.

I believe the only way for this situation to be corrected is for the Legislature to amend MESA to make the owner's bundle of rights applicable to priority habitat. The two key elements provided under significant habitat that are missing under the priority habitat regulations are: 1) the ability of an owner to petition DFW to consider purchasing the property; and, 2) allowing an owner to file an action in Superior Court to determine whether a permitting decision of DFW constitutes a taking requiring compensation under the Constitution of the United States. Making these two rights applicable to priority habitat by statute will help to alleviate a number of the problems being reported with the current system. The Legislature may also want to consider including an owner's notification and public hearing process for priority habitat.

As always, do not hesitate to contact me if I can be of further assistance in this matter.

Respectfully,

A handwritten signature in black ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan  
Inspector General