

# Memo to Public Files

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**To:** Public Files  
**From:** Kenneth Hogan  
**Date:** July 11, 2013  
**Dockets:** P-1889-081 & P-2485-063  
**Project:** Turners Falls and Northfield Mountain Projects

**Subject:** Teleconference between Commission staff and the MA Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program staff.

On July 10, 2013, Commission staff met (via teleconference) with staff of the MA Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program (MA DFW). In attendance from the Commission was: Timothy Welch, Kenneth Hogan, Alan Mitchnick, Elisabeth Blaug, and Nicholas Ettema. The MA DFW was represented by Jesse Leddick and Misty-Anne Marold.

The purpose of the meeting was to discuss the Commission's ILP process and the MA DFW's Endangered Species Program and its permitting process in an effort to determine the potential for the integration of the two processes with respect to the relicensing of the Turners Falls and Northfield Mountain projects.

Emails and supporting documentation for the meeting were exchanged prior to the meeting and are attached to this memo.

## Kenneth Hogan

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**From:** Leddick, Jesse (FWE)  
**Sent:** Monday, July 01, 2013 3:56 PM  
**To:** kenneth.hogan@ferc.gov  
**Cc:** Marold, Misty-Anne (FWE); Glorioso, Lauren (FWE)  
**Subject:** Turners Falls, MADFW Additional Information re: MESA, Follow-Up Call?  
**Attachments:** MESA Regs - 321 CMR 10.18\_10.23.doc

Hi Ken,

Many thanks for sitting in on last week's call. We greatly appreciated your feedback and will seek to address those concerns/comments within our written comments on the proposed study plans.

In the meantime – and as we discussed – I have provided below additional information regarding the Massachusetts Endangered Species Act and our regulatory review process for your reference. I have also attached here, for your reference, the most relevant sections of the MESA's implementing regulations. This information details the Division's authority to regulate state-listed species, the review process for proposed projects within rare species habitat, and the performance standards an applicant must meet in order to qualify for a Conservation & Management Permit (a discretionary permit allowing the "Take" of rare species). In all cases, our study requests are intended to facilitate the collection of information necessary to enable impact analyses, assess whether a "Take" of rare species will occur, and more broadly, determine whether the conservation, protection, mitigation and/or enhancement measures proposed by the applicant will qualify for a Conservation & Management Permit.

We would also like to set up a brief call to provide additional clarification, answer any questions you may have regarding the attached, and further discuss how the FERC and MESA review processes may (or may not) be joined. Please let me know when you would be available; currently, we are fairly flexible Tuesday through Friday of next week and greatly look forward to speaking with you again soon.

Best regards,

... Jesse

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**Jesse Leddick**

Endangered Species Review Biologist  
Natural Heritage & Endangered Species Program  
MA Division of Fisheries & Wildlife  
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**Summary:**

The Massachusetts Division of Fisheries and Wildlife (Division) is the agency responsible for the protection and management of the fish and wildlife resources of the Commonwealth. The Division is also responsible for the regulatory protection of imperiled species and their habitats as codified under the Massachusetts Endangered Species Act (M.G.L. c.131A) through its Natural Heritage & Endangered Species Program. The Massachusetts Endangered Species Act (MESA) was enacted in December 1990. Implementing regulations (321 CMR 10.00) were promulgated in 1992 and recently revised and implemented as of November 2010. The MESA provides a

framework for review of projects or activities that occur within mapped areas of the state, called *Priority Habitat*, and published in the Natural Heritage Atlas. This review process is outlined in 321 CMR 10.18, which I have attached here for your reference. State-listed wildlife species and their habitats are also protected by the Division pursuant to the Massachusetts Wetlands Protection Act (WPA) (310 CMR 10.59).

The MESA protects rare species and their habitats by prohibiting the "Take" of any plant or animal species listed as Endangered, Threatened, or Special Concern by the MA Division of Fisheries & Wildlife. Projects resulting in a "Take" of state-listed rare species may be eligible for a Conservation and Management Permit (CMP) (321 CMR 10.23; also attached, for your reference). To be eligible for a CMP, the applicant must demonstrate that the project, as proposed, has avoided, minimized and mitigated impacts to State-listed Species consistent with the following performance standards:

1. The applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
2. An insignificant portion of the local population would be impacted by the Project or Activity, and;
3. The applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species. The applicant may propose various options for "Net Benefit" which may include, but are not limited to, one or more of the following:
  - a. on or off-site permanent habitat protection
  - b. management or restoration of state-listed species habitat
  - c. conservation research designed to benefit the species affected by a given project.

Under 321 CMR 10.23, in determining the appropriate nature and scope of mitigation necessary to achieve the long-term Net Benefit performance standard, the following areal habitat mitigation ratios will generally apply, based on the category of State-listed Species:

- a. Endangered Species: 1:3 (i.e., protection of three times the amount of areal habitat of the affected Endangered Species that is impacted by the Project or Activity);
- b. Threatened Species: 1:2 (i.e., protection of two times the amount of areal habitat of the affected Threatened Species that is impacted by the Project or Activity).
- c. Special Concern Species: 1:1.5 (i.e., protection of one and one half times the amount of areal habitat of the affected Species of Special Concern that is impacted by the Project or Activity).

It is important to note that alternative mitigation ratios or proposals that diverge from the above referenced ratios may be considered.

## 321 CMR 10:00 Massachusetts Endangered Species Act

<http://www.mass.gov/eea/agencies/dfg/dfw/laws-regulations/cmr/321-cmr-1000-massachusetts-endangered-species-act.html>

### 10.18: Review of Projects or Activities for Take of State-listed Species in Priority Habitat

(1) Except as provided in 321 CMR 10.13 and 10.14, any Project or Activity that will be located or will take place in Priority Habitat shall be reviewed by the Division as provided in this section prior to commencement of any physical work or action in Priority Habitat. The Division shall review any such Project or Activity for the purposes of determining if a Take will result from any temporary or permanent modification, degradation or destruction of Priority Habitat occurring as a result of the proposed Project or Activity. Prior to the commencement of any physical work in Priority Habitat, the Record Owner of the land where such Project or Activity will occur shall submit the information listed in 321 CMR 10.20 to the Division. The Division shall notify the Record Owner within 30 days if the materials submitted satisfy 321 CMR 10.20 and request submission of any missing materials. Once the Division has determined all of the materials required by 321 CMR 10.20, including a review fee, the amount of which shall be determined by the commissioner of administration under the provisions of M.G.L. c.7, §3B, then the Division shall issue a file number for the review of that Project or Activity.

(2) After the issuance of a file number, the Division shall review the submitted materials to determine, based on the performance standard in 321 CMR 10.19, if the proposed Project or Activity either:

(a) has avoided a Take as proposed, or with conditions and may proceed without further review; or

10.18: continued

(b) will result in a Take and cannot proceed as proposed. For purposes of M.G.L. c. 30A, §§ 10 through 14, the determination of a Take shall constitute final agency decision in the form of a denial. The Division's determination shall be made in writing within 60 days after the issuance of a file number. Failure of the Division to issue a written determination within 60 days after the issuance of a file number shall be deemed to be a determination that the proposed Project or Activity does not result in a Take and requires no further review. The Director may extend the 60-day review period for up to two successive 20 day periods if circumstances beyond the control of the Division require additional time to complete the review, in which case the Division shall notify the Record Owner in writing of the extension and the reason for the extension. The response time may also be extended at the written request of the Record Owner.

(3) If the Division has made a determination of a Take, the Record Owner may request a consultation with the Division to discuss options for the Project or Activity that may avoid a Take.

(4) Any Project or Activity that receives a determination that no Take will result (whether in writing or by expiration of the 60-day review period, as may be extended) shall not be subject to further review under 321 CMR 10.18 if physical work on the Project or Activity is commenced within five years from the date of the determination (or the expiration of the 60-day review period, as may be extended). If no physical work is commenced on the Project or Activity within that five-year period, or there is a material change in the plans that were submitted to the Division, the Project or Activity may be subject to further review by the Division.

(5) Performance Standards for Obtaining a No Take Determination for Certain Activities

(a) Notwithstanding 321 CMR 10.18(1) and (2), a Project or Activity that impacts no more than 10,000 square feet of Priority Habitat mapped solely for a State-listed animal Species of Special Concern will receive a No Take determination from the Division under 10.18, provided that the Division determines that the following performance standards have been met:

1. such Project or Activity is not subject to regulation under the Wetlands Protection Act and 310 CMR 10.00;
2. such Project or Activity will not occur within three hundred (300) feet of a vernal pool that has been certified or otherwise determined to provide vernal pool habitat by the Division, or is subject to protection by a municipality, and such vernal pool is mapped as Priority Habitat for any State-listed animal Species that uses vernal pool habitat;
3. the proponent files a plan with the Division that clearly delineates the limit of the work and the location and scope of the impact to Priority Habitat;
4. the proponent thereafter records the plan on the deed of the affected property or properties; and provided that:
5. no more than one such Project or Activity shall be allowed for the affected property; no action has been taken to segment the Project or Activity to evade compliance with the above performance standards or MESA, as determined by the Division; and the Division, in reviewing any subsequent Project or Activities for the site pursuant to 321 CMR 10.18 may take into account the impact previously authorized under 321 CMR 10.18(5)(a)1.-4. when determining the MESA permitting and mitigation requirements for the subsequent Project or Activity.

(b) The Division may establish in guidance, performance standards for other Projects or Activities that, if complied with, will receive a No Take determination from the Division under 321 CMR 10.18.

## 10.23: Conservation and Management Permit

(1) The Director may, in accordance with provisions of M.G.L. c. 131A, § 3, permit the Taking of a State-listed Species for conservation or management purposes provided there is a long-term Net Benefit to the conservation of the impacted species. The requirements for permitting the Take of a State-listed Species for conservation or management purposes, including a State-listed Species of Special Concern that will occur within a conservation protection zone established in a conservation plan issued by the Division pursuant to 321 CMR 10.26, are set forth in 321 CMR 10.23(2) through (5). The general permit requirements authorizing the Take of a State-listed Species of Special Concern that will occur outside of a conservation protection zone established in a conservation plan issued by the Division pursuant to 321 CMR 10.26 are set forth in 321 CMR 10.23(6). The general mitigation standards to be applied by the Director when issuing individual and general conservation and management permits are set forth in 321 CMR 10.23(7).

(2) Except as provided in 321 CMR 10.23(6) below, if the Director determines that the applicant for a permit has avoided, minimized and mitigated impacts to State-listed Species consistent with the following performance standards, then the Director may issue a conservation and management permit, provided:

- (a) The applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
- (b) An insignificant portion of the local population would be impacted by the Project or Activity, and;
- (c) The applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species that has been approved by the Director, as provided in 321 CMR 10.23(5), and shall be carried out by the applicant.

(3) Except as provided in 321 CMR 10.23(6) below, if a conservation and management permit applicant is unable to demonstrate the long-term Net Benefit performance standard on the project site and the applicant has made every reasonable effort to avoid, minimize and mitigate impacts to the State-listed Species on site, then the conservation and management plan may with the approval of the Director, be designed to meet the long-term Net Benefit performance standard by providing for financial or in-kind contributions toward the development and/or the implementation of an off-site conservation recovery and protection plan for the impacted species.

(4) Except as provided in 321 CMR 10.23(6) below, within 30 days of the receipt of a final conservation and management plan including a review fee, the amount of which shall be determined by the commissioner of administration under the provisions of M.G.L. c. 7, § 3B or, if a conservation and management plan has been

submitted and the Project or Activity is undergoing a MEPA review, then 30 days after the issuance of a final MEPA certificate, whichever is longer, the Director shall make a determination that the submitted plan meets the performance standards and is approved, or a determination that the plan as submitted is inadequate and is denied. Failure of the Director to respond to the final conservation and management plan shall constitute approval of the submitted plan as an approved conservation and management permit. The 30 day response time may be extended for two successive 30 day periods by the Director due to circumstances beyond the control of the Division and the applicant shall be notified in writing of the extension, its period and the reason for the extension.

(5) The conservation and management permit, if and when issued, shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of M.G.L. c. 131A, including but not limited to, adequate funding for the conservation and management permit provided by the applicant, and appropriate monitoring and reporting of the results of the conservation and management permit. After being notified in writing, and confirming that the terms of a conservation and management permit have been fulfilled, the Division will promptly issue a certificate of compliance.

(6) Projects or Activities Eligible for Coverage under a General Conservation and Management Permit when the Division has issued a Conservation Plan

(a) Eligibility. The Director may permit the Take of a State-listed Species of Special Concern that will occur outside of a conservation protection zone established in a conservation plan issued by the Division pursuant to 321 CMR 10.26 through the issuance of a general conservation and management permit meeting the requirements of 321 CMR 10.23(6). Notwithstanding the above, a project proponent retains the option of obtaining an individual conservation and management permit meeting the requirements of 321 CMR 10.23(2) through (5) in lieu of obtaining coverage under a general permit issued pursuant to 321 CMR 10.23(6).

(b) Minimum Requirements and Performance Standards applicable to the General Permit. The Director may authorize an eligible Project or Activity to be covered under a general conservation and management permit if the Director determines that the applicant has submitted a complete and timely application for coverage to the Division, including paying the applicable review fee, that obligates the applicant to comply with the following minimum requirements and performance standards, which will be further specified by the Division in the general permit.

1. The applicant shall implement and comply with species-specific development standards or best management practices, or both, applicable to the geographic area and the species habitat that would be impacted by the Project or Activity. Notwithstanding 321 CMR 10.23(2), the proponent is not required to provide an alternatives analysis or to

demonstrate that an insignificant portion of the local population of the affected State-listed Species of Special Concern would be impacted by the Project or Activity.

2. The applicant shall provide off-site mitigation, or a combination of on-site and off-site mitigation subject to the Division's approval, that achieves the long-term Net Benefit standard in 321 CMR 10.23(1), as determined by the Division. Any off-site mitigation provided by the applicant in the form of a financial contribution will be used to fund habitat management or the protection of land or other appropriate mitigation within one or more conservation protection zones established in the conservation plan issued by the Division pursuant to 321 CMR 10.26. The amount of any such off-site mitigation payment will be determined by the Division based on a formula set forth in written guidance that, at a minimum, considers the area of impact on the on-site habitat of the affected State-listed Species of Special Concern and the land values within one or more of the conservation protection zones. Notwithstanding 321 CMR 10.23(3), the applicant may propose off-site mitigation without a showing that the applicant has made every reasonable effort to avoid, minimize and mitigate impacts to the affected State-listed Species of Special Concern on-site.

3. An applicant that submits a complete application for coverage meeting the requirements 321 CMR 10.23(6) and fulfills in a timely manner all of the obligations required by the general permit, as determined by the Division, will be deemed to have carried out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species as required by 321 CMR 10.23.

(c) Other Provisions and Requirements related to the Director's General Permit Authority

1. The contents of the application for coverage under the general permit and related requirements will be specified by the Division in the general permit or in an application for coverage form developed by the Division. The application for coverage will require the submission of information and other action by the applicant as deemed necessary by the Division for its effective administration of the general permit program.

2. The general permit shall contain such terms and conditions as the Director deems necessary or appropriate to ensure compliance with M.G.L. c. 131A and for the Division's effective administration of the general permit program, including but not limited to, the species-specific development standards or best management practices, or both, applicable to the geographic area and the species habitat that would be impacted by the Project or Activity; funding for the mitigation of impacts to the affected species; and appropriate monitoring and reporting requirements.

3. Within 30 days of an applicant's submission of a complete and timely application for coverage form to the Director and payment of the required fee, the Director will issue a written notification of inclusion of coverage under the



general permit to the proponent or a determination that the notice as submitted is inadequate and that coverage is denied. Failure of the Director to respond to the application for coverage within the above time period will constitute the Director's approval that the Project or Activity is authorized under the general permit. The 30 day response time may be extended for two successive 30 day periods by the Director due to circumstances beyond the control of the Division and the applicant shall be notified in writing of the extension, its duration and the reason for the extension.

4. The Director may require any permittee authorized under the general permit to apply for and obtain an individual conservation and management permit pursuant to 321 CMR 10.23(2) through (5). Cases where an individual conservation and management permit may be required include a written determination by the Director that:

- a. the permittee is not in compliance with the general permit;
- b. circumstances have changed since the time of the submittal of the application for coverage so that the Project or Activity is not longer appropriately regulated for conservation and management purposes under the general permit; and
- c. other relevant factors.

(7) General Mitigation Standards applicable to Individual and General Conservation and Management Permits issued by the Director.

(a) The Director, in determining the appropriate nature and scope of mitigation necessary for an applicant for an individual or general conservation and management permit to achieve the long-term Net Benefit performance standard in 321 CMR 10.23(1), will generally apply the following areal habitat mitigation ratios, based on the category of State-listed Species:

1. Endangered Species: 1:3 (i.e., protection of three times the amount of areal habitat of the affected Endangered Species that is impacted by the Project or Activity);
2. Threatened Species: 1:2 (i.e., protection of two times the amount of areal habitat of the affected Threatened Species that is impacted by the Project or Activity).
3. Special Concern Species: 1:1.5 (i.e., protection of one and one half times the amount of areal habitat of the affected Species of Special Concern that is impacted by the Project or Activity).

(b) The Director reserves the right to require, on a permit-by-permit basis, an areal habitat mitigation ratio or an alternative mitigation approach that differs from the otherwise applicable ratio in 321 CMR 10.23(7)(a)1.-3. when the Director determines in writing that the alternative mitigation ratio or alternative mitigation approach is either sufficient or required to achieve the long-term Net Benefit performance standard in 321 CMR 10.23(1). A project

proponent may also request in writing that the Director apply an alternative mitigation ratio or alternative mitigation approach to the Project or Activity. Any such request shall explain why an alternative mitigation ratio or alternative mitigation approach is appropriate, addressing the relevant factors in 321 CMR 10.23(7)(b)1.-5. below. In determining whether an alternative mitigation ratio or alternative mitigation approach is appropriate, the Director will consider factors that include but are not limited to:

1. the size and configuration of the habitat impact;
2. the threats to the affected State-listed Species posed by uses or activities located adjacent or in close proximity to the Project or Activity that is the subject of the conservation and management permit;
3. the size, configuration and quality of the habitat proposed to be protected by the applicant;
4. the population density of the affected State-listed Species; and
5. the habitat management and research needs associated with the affected State-listed Species.

(c) For the purposes of providing ongoing, updated guidance to project proponents and the public, the Division will post guidelines on its website for avoiding and minimizing impacts and for achieving the long-term Net Benefit performance standard in 321 CMR 10.23(1) for those State-listed Species for which the Director has issued three or more conservation and management permits during a three year time period. The Director reserves the right to require, on a permit-by-permit basis, mitigation that differs from any relevant mitigation guidelines developed by the Division when the Director determines in writing that the permit-specific mitigation is either sufficient or required to achieve the long-term Net Benefit performance standard in 321 CMR 10.23(1). In determining whether to require permit-specific mitigation that differs from any relevant mitigation guidelines, the Director will take into consideration factors that include those set forth in 321 CMR 10.23(7)(b)1.-5.

Document Content(s)

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