

January 21, 2025

Secretary Rebecca Tepper
100 Cambridge Street, Suite 900
Boston, MA 02114

via email: Secretary.Tepper@mass.gov. cc: Michael.gendron2@mass.gov

Re: 301 CMR 52 - comments

Dear Secretary Tepper:

Thank you for the opportunity to comment on draft regulations to implement M.G.L. Ch 3, section 5A, known as ‘An Act Preserving Open Space in the Commonwealth’ or ‘the Open Space Act’. The undersigned individuals and representatives of local, regional, statewide and national conservation and environmental organizations – who all share a commitment to the protection of public lands acquired for Article 97 purposes – respectfully submit the following comments. We are united in advocating for the strongest possible regulations to protect the rights of all Massachusetts residents, as articulated in Article 97 of the Massachusetts Constitution.

- The regulations should open with a statement of the overarching purpose of this law – to protect, preserve and enhance open spaces protected under Article 97 by establishing strict standards for approving any conversion of such land to other uses, and ensuring no net loss of Article 97 lands when conversions cannot be avoided. The regulations should clearly state the Commonwealth’s intent that proponents will avoid conversion if at all possible, minimize conversions that are deemed unavoidable, mitigate conversions with comparable replacement land, and as a last resort, mitigate with in-lieu funding that will be directed to non-contemporaneous protection of comparable replacement land.
- Section 4 (Requirements): Instead of saying that requirements must be met “prior to taking an Article 97 Action” the regulations should require that the proponent must comply with all requirements before the landowning entity takes any vote to authorize the disposition. This will ensure that those responsible for taking such votes have the benefit of all relevant materials before they are asked to make a decision.
- Section 5 (Notification): Since every proposed change of use for Article 97 requires filing an Environmental Notification Form (ENF), the regulations should remind proponents of this requirement, and that proponents must follow the notice requirements for all ENFs. At a minimum, posting in the Environmental Monitor, and notice to community-based organizations and tribal organizations in accordance with the MEPA Public Involvement Protocol, should be required. In addition, EEA should require posting the public notice to the Open Space Act Tracker on EEA’s website, to be supplemented by additional material as they become available. Finally, the proponent should be required to post a physical notice in a highly visible location on the subject parcel or parcels. For something as important as changing the use of protected open space, simply posting on the public entity’s website is insufficient.

- Section 5.1 and 5.2: The minimum public comment period should be extended from 21 days to 30 days, and should be required for all Article 97 conversions, not just for those proposing In-Lieu Funding.
- Section 6.2. (Contents of Alternatives Analysis): Appraisals of the subject parcel(s) and any proposed replacement parcels should be included in the materials that proponents are required to post for the public and provide to EEA.
- Section 6.2.b. (Alternatives considered): Rather than saying that “Cost differences between land owned by the Public Entity and equivalent private land shall not be the sole basis for infeasibility”, this section should say that such differences “shall not be the primary basis for infeasibility.” For Article 97 and the Open Space Act to have real meaning, public entities cannot be allowed to convert land simply because it is most economically expedient to do so.
- Section 6.2.f. (Documentation of affirmative vote by Public Entity) and wherever votes are mentioned: A higher standard than a simple majority vote should be required, in keeping with the 2/3 legislative vote required by Article 97 itself and the seriousness of converting parks and conservation land to other uses. In addition, in circumstances where the subject land is under the care and control of a subsidiary entity (such as a municipal conservation commission or parks commission) the regulations should require at least a 2/3 vote of that entity in addition to the 2/3 vote of the governing body, such as a City Council, Select Board or Town Meeting.
- Section 7.2 (Replacement Land requirements). In addition to issuing the determination of Natural Resource Value specified in Section 7.2.b., EEA needs to communicate to the proponent and the legislature its determination of whether the replacement parcels meet requirements a. and c. – h. This responsibility could be reflected through revision of Section 8, or insertion of a new section in the regulations.
- Section 7.3 (Appraisal Standards). ALL appraisals submitted in support of a proposed change in use of Article 97 land should meet EEA, DCAM or Yellow Book appraisal standards. Self-serving appraisals that are not done to recognized standards will not advance the purposes of the Open Space Act. Monetary Value listed in the appraisal should be valid for one year, requiring updates if more than one year passes between the appraisal date and the date of anticipated vote on the petition by the Legislature.
- Section 7.4. (Certain Easements). As written, the proposed language indicates that no replacement land is required for easements that meet the enumerated conditions –implying all such cases are automatically deemed cash-in-lieu transactions. If that is the case, it must be stated plainly. An additional proviso should be added to 7.4.c. to require that the appraisal take into account the value of loss-of-use resulting from temporary disturbance to the property, as well as the value of any Article 97 uses of the property that are foreclosed by the easement. Further, if the intention is that all such transactions be deemed cash-in-lieu transactions, it does not make sense to include the language in 7.4.d, which references requirements for replacement land. Instead, 7.4.d should require such transactions to meet the terms of Section 9.4., 9.5., and 9.6. which pertain to requirements of cash-in-lieu transactions.

- Section 8.2 (Considerations for a Determination of Nature Resource Value). The determination should reference field observations by EEA staff made during a site inspection of the subject parcel(s) and any proposed replacement parcels.
- Section 9.3.c. (Report of Finding by Secretary) This section should reference the required minimum comment period defined in Section 5.2 – which we request should be changed from 21 to 30 days. In addition, proponents should be required to submit all public comments received to the Secretary, the Finding should state that the Secretary has reviewed those comments, and the comments should be made available to the public as part of the Tracker on EEA's website.
- Section 9.6.c.iii (Secretary's Determination of Nature Resource Value on land acquired with In-Lieu Funding). For the Secretary to make a meaningful determination of Natural Resource Value of any non-contemporaneous replacement parcel, the regulations need to state when and how Proponents must notify EEA of their intentions *before* they acquire it.
- The regulations need to state consequences for non-compliance with the law and regulations. At a minimum, this should include invoking EEA's civil enforcement, suspending any permits issued by EEA, and ineligibility for state assistance programs until the failures are cured to the Secretary's satisfaction.
- Finally, EEA has stated its intention to release an updated Land Disposition Policy, which raises questions about whether confusion will ensue. The regulations should be edited to include any key guidance that is under consideration for inclusion in a new contemplated Land Disposition Policy.

Thank you for your consideration of these comments, and for working to ensure the protection of Article 97 lands across the Commonwealth.

Sincerely,

Robb Johnson, Executive Director
Massachusetts Land Trust Coalition

Dorothy A. McGlincy, Executive Director
Massachusetts Association of Conservation Commissions

Elizabeth Saunders, on behalf of the late Phil Saunders, lead PLPA advocate
Massachusetts Co-Director, Clean Water Action

Steve Long, Director of Policy and Partnerships
The Nature Conservancy in Massachusetts

Katie Theoharides, President & CEO
The Trustees

Regen Jamieson, President
Massachusetts Society of Municipal Conservation Professionals

Rae Ettenger, New England Conservation Policy Coordinator
Appalachian Mountain Club

Doug Pizzi, Executive Director
Mass Parks for All

Vickash Mohanka, Chapter Director
Sierra Club Massachusetts

Julia Blatt, Executive Director
Massachusetts Rivers Alliance

Mark H. Robinson, Executive Director
The Compact of Cape Cod Conservation Trusts

Brendan Annett, Vice President, Watershed Protection
Buzzards Bay Coalition

Karen Grey, President
Wildlands Trust

Christopher LaPointe, President
Greenbelt - Essex County's Land Trust

Laura Mattei, Director of Conservation
Sudbury Valley Trustees

Cabell Eames, Advocacy Director
Charles River Watershed Association

Buzz Constable, President
Lincoln Land Conservation Trust

Kathy Orlando, Executive Director, Land Protection
Sheffield Land Trust

Sally Loomis, Executive Director
Hilltown Land Trust

Kathi Anderson, Executive Director
Walden Woods Project

Emily Molden, Executive Director
Nantucket Land & Water Council

Keith Kirkland, President
Dudley Conservation Land Trust

William Mullin, President
Provincetown Conservation Trust

William Cordin
Brookline Conservation Land Trust

Gary Howland
Ashburnham Conservation Trust

George A. Bauman, Chair
Ashby Conservation Commission

Sherry Anders, Chair,
Shirley Greenway Committee

Kevin F. Galligan, President
Orleans Conservation Trust

Bill Greenwood, President
Dracut Land Trust

Lorena Altamirano, President
Westborough Community Land Trust

Matt Plum, President
Manchester Essex Conservation Trust

Pine duBois, Exec. Dir.
Jones River Watershed Association

Chris Redfern
Friends of the Middlesex Fells

Heather Pruiksma, Executive Director
Grow Native Massachusetts

Renée Scott, Coordinator
Massachusetts Pollinator Network

Rand Wentworth, Adjunct Lecturer in Public Policy, Harvard University
President Emeritus, Land Trust Alliance

Maiyim Baron
Natural Solutions Working Group, Elders Climate Action-Massachusetts Chapter

James Comeau
DCR, Retired

Michael McDonagh
Cape Ann Trail Stewards Member

Keith Zellman
Gloucester, Massachusetts

Charles Devens, Jr.
Essex, Massachusetts

Frederick P. Wales
Manchester by the Sea, Massachusetts

Anita Brewer-Siljeholm
Manchester by the Sea, Massachusetts

Scott Doneghy
Manchester by the Sea, Massachusetts

cc: Senator Jamie Eldridge
Former Representative Ruth Balsler
Undersecretary Stephanie Cooper
Assistant Secretary Kurt Gaertner