

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of E.J. Pontiff
Cranberries, Inc.
OADR Docket Number: WET-2024-011
DEP File No. SE 126-0672
Carver, Massachusetts

TEN RESIDENTS GROUP EMERGENCY MOTION FOR AN ORDER DIRECTING:

- (1) THE APPLICANT EJ PONTIFF CRANBERRIES, INC. TO IMMEDIATELY
CEASE WORK, AND**
- (2) THE DEPARTMENT TO ENFORCE THE WETLANDS PROTECTION ACT
AND WETLAND REGULATIONS**

In blatant and egregious violation of the Wetlands Protection Act, G.L. c. 131, § 40 (“Act”) and the Wetlands Protection Act Regulations, 310 CMR 10.00 (“Regulations”) the Applicant, E.J. Pontiff Cranberries, Inc. (“Pontiff”) is conducting Work described in a notice of intent as the construction of five cranberry bogs. The location is known as approximately 18 acres of land at 104 Tremont Street, Map 123, Lot 13, in the Town of Carver, Massachusetts (“Project Site”). Pontiff’s Work on the Project Site is the subject of a Superseding Order of Conditions SE 126-0672, (“SOC”) issued by the Department of Environmental Protection (“Department”) that has been appealed by the Ten Residents Group, Petitioners. There is no Final Order and therefore Pontiff is prohibited from undertaking the Work.

In support of this Motion, the Ten Residents Group relies on the affidavits, exhibits and memorandum submitted herewith.

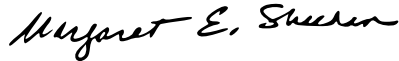
The Department refuses to stop the blatant and egregious violations of its Act and its own Regulations. Accordingly, the Petitioners, Ten Residents Group of the Town of Carver, Massachusetts (“Ten Residents Group”), hereby move pursuant to 310 CMR 10.01(11)(a)(1) and 310 CMR 10.08 that the Presiding Officer issue an Order requiring the Department to find:

- (1) That Pontiff is conducting Work, defined as “Activity” by the Regulations, 310 CMR 10.04, including the excavating, grading, construction and/or improvement of roads and other ways, the changing of run-off characteristics, the intercepting or diverging of ground or surface water, the destruction of plant life and all other changing of the characteristics land on the Project Site as described in the Notice of Intent and the Department’s SOC,
- (2) That the Work is within the jurisdiction of the Department under the Act and Regulations,
- (3) That there is no Final Order within the meaning of the Regulations, 310 CMR 10.04 for the Work at the Project Site,
- (4) That the Act and the Regulations prohibit the undertaking of the Work on the Project Site including the excavating, grading, construction, and/or improvement of roads and other ways, the changing of run-off characteristics, the intercepting or diverging of ground or surface water, the destruction of plant life, the removal of trees, vegetation and soils, on the Project Site (“No work proposed in any notice of intention shall be under taken until the final order...with respect to such work has been recorded in the registry of deeds....” G.L. c. 131, § 40),

- (5) That Pontiff has no Final Order and is undertaking an Activity subject to Regulation under G.L. c. 131, § 40 as defined in 310 CMR 10.02(2) and is in violation of the Act and the Regulations by undertaking Activity on the Project Site without a Final Order,
- (6) That the Department be directed to enforce the Act and the Regulations under 310 CMR 10.08(2),
- (7) That an Order be issued directing Pontiff, his agents, contractors, subcontractors, assigns, affiliates, and those acting jointly and in concert with Pontiff to cease and desist all Activity on the Project Site, including the excavation and removal of earth materials, sand, gravel, trees, soil, and topsoil from the Project Site,
- (8) That the Presiding Officer order the Department to take action under its *Enforcement Response Guidance* to:

- (a) Issue an Administrative Order directing Pontiff to cease and desist all Work until there is a Final Order,
- (b) Issue an Administrative Penalty for the maximum amount of \$25,000.00 per day of violation;
- (c) Refer the violations to the Attorney General's Office for Criminal Prosecution because the violations, and/or
- (d) Sanction the Applicant pursuant to 310 CMR 1.01(10) by issuing a final recommended decision against EJ Pontiff Cranberry Co. and for the Ten Residents Group.

Signed,

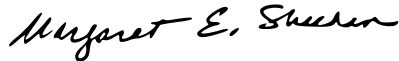


Margaret E. Sheehan, Esq.
Authorized Representative
Ten Residents Group

Certificate of Service

I, Margaret E. Sheehan, hereby certify that this 9th day of May 2024, pursuant to 310 CMR 1.01(4)(f) that I have sent a copy of the foregoing document to all parties by electronic mail, to the persons below at the address indicated below.

Signed,



Margaret E. Sheehan, Esq.
Authorized Representative
Ten Residents Group

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In the Matter of E.J. Pontiff
Cranberries, Inc.
OADR Docket Number: WET-2024-011
DEP File No. SE 126-0672
Carver, Massachusetts

**TEN RESIDENTS GROUP MEMORANDUM IN SUPPORT OF EMERGENCY
MOTION FOR AN ORDER DIRECTING:
(1) THE APPLICANT EJ PONTIFF CRANBERRIES, INC. TO IMMEDIATELY
CEASE WORK, AND
(2) THE DEPARTMENT TO ENFORCE THE WETLANDS PROTECTION ACT
AND WETLAND REGULATIONS**

INTRODUCTION

The Ten Residents Group of the Town of Carver, Massachusetts (“Ten Residents Group”) submits this memorandum in support of its *Emergency Motion for An Order Directing (1) The Applicant To Immediately Cease Work And (2) The Department To Enforce The Wetlands Protection Act And Wetland Regulations* (“Motion”). The Ten Residents Group relies on the affidavits, exhibits and memorandum submitted herewith.

In blatant and egregious violation of the Wetlands Protection Act, G.L. c. 131, § 40 (“Act”) and the Wetlands Protection Act Regulations, 310 CMR 10.00 (“Regulations”) the Applicant, E.J. Pontiff Cranberries, Inc. (“Pontiff”) is undertaking Work without a Final Order. The Work is described in a notice of intent as the construction of five cranberry bogs. The location is known as approximately 17.8 acres of land located off 104 Tremont Street, Map 123, Lot 13, in the Town of Carver, Massachusetts (“Project Site”). Pontiff’s Work on the Project Site is the subject of an Order of Conditions dated October 5, 2023 (“OOC”) issued by the Carver Conservation

Commission (“Commission”). Following a request for Department review, the Department of Environmental Protection (“Department”) issued a Superseding Order of Conditions SE 126-0672 (“SOC”) on April 12, 2024. Neither the October 5, 2023 OOC nor the SOC of April 12, 2024 are a “Final Order” for purposes of the Act and the Regulations. Therefore Pontiff is prohibited by the Act and Regulations from undertaking the Work. In blatant and obvious disregard of the Act and the Regulations Pontiff has been undertaking the Work since at least April 1, 2024 as shown by the Ten Residents Group affidavits and photographs supporting this Memorandum. Affidavit of Sandra Fosgate (“Fosgate Aff.”) ¶ 6; Exhibit 1 hereto.

The Petitioner’s counsel has notified the Department that Pontiff has been undertaking the Work without a Final Order. Exhibit 2 hereto, Affidavit of Margaret E. Sheehan (“Sheehan Aff.”) ¶ 3. Despite notice and evidence, the Department has failed and refuses to enforce the Act and Regulations, abrogating its most basic, clear-cut non-discretionary duty to enforce the Act and Regulations to prevent Work without a Final Order. This leaves the Ten Residents Group with no option but to seek enforcement of the Act and Regulations in this administrative proceeding. Accordingly, the Ten Residents Group moves pursuant to 310 CMR 10.01(11)(a)(1) and 310 CMR 10.08 that the Presiding Officer issue an Order directing relief, including site restoration, maximum civil and criminal penalties and referral to the Attorney General’s Office for Criminal Prosecution, pursuant to the Department’s *Enforcement Response Guidance, Policy ENF-97.001*. The Ten Residents Group also moves that the Presiding Officer sanction the Applicant and the Department by entering a Recommended Final Decision for the Ten Residents Group. The relief sought is set forth further in Petitioner’s motion and in this memorandum.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 2023, the Carver Conservation Commission issued the OOC purporting to authorize Pontiff to do Work “to construct 17.8 acres of cranberry bogs.” See, Department’s Basic Documents, # 01a, NOI Filing dated August 28, 2023 and #11, SOC. On February 21, 2024 the Carver Earth Removal Committee (“ERC”) voted to grant Pontiff an “Earth Removal Permit” to conduct commercial mining to excavate and remove about 1.5 million cubic yards of sand and gravel from the Project Site for the construction of the “five (5) cranberry bogs on 17.8 acres of land.” The Earth Removal Permit is Exhibit 3 hereto.¹ The Applicant states in its November 6, 2023 Letter to the Department (Ms. Whitney McClees): “In fact, the Farmer filed an Earth Removal Application with the Town of Carver Earth Removal Committee on August 8, 2023.” The earth removal under the Earth Removal Permit is the same Work purported to be authorized by the SOC – the “construction of five cranberry bogs” as stated in the SOC. Department Basic Documents #6. The site plans and area of Work are shown in the Flaherty & Stefani, Inc. plans dated December 28, 2023 referred to in the SOC.

The SOC identifies the Inland Resource Area Impacts as:

Buffer Zone

Bordering Vegetated Wetland

Bordering Land Subject to Flooding

Riverfront Area

The SOC found the areas in which the work is proposed is significant to: groundwater supply, storm damage prevention, prevention of pollution, protection of wildlife habitat and flood

¹ The unlawfully granted Earth Removal Permit has been appealed to Superior Court. See, *Brian Coppennath et al. vs. Scott Hannula*, as he is Chair of the Earth Removal Committee et al., Superior Court Civil Action 2484CV00305.

control. The Appeal Notice asserts the area in which the work is proposed is also significant to public water supply and private water supply.

On October 17, 2023, Community Land & Water Coalition (“CLWC”), a project of a non-profit public interest group, Save the Pine Barrens, Inc., requested a Superseding Order of Conditions which the Department issued on April 12, 2024. On April 26, 2024, the Ten Residents Group filed an Appeal Notice under 310 CMR 10.00 and 310 CMR 1.01 to initiate this proceeding (“Appeal Notice”). The Appeal Notice seeks to remand the SOC to the Department with an Order that the SOC be denied.

Pontiff started the Work on or before April 1, 2024. The Fosgate Affidavit, ¶ 6, states that Ms. Fosgate observed that a portion of the Project Site had been clear cut as of April 1 and April 5, 2024. Exhibit 1. In order to accomplish the clear-cutting observed by Ms. Fosgate and shown in Photograph 1 of her Affidavit, Pontiff would have started Work before April 1, 2024. The Fosgate Affidavit paragraph 7 shows the Project Site on May 6, 2024 with trees cleared and bare sand exposed. Commercial sand and gravel processing equipment is shown on the Project Site in photograph 2 of the Fosgate Affidavit. Exhibit 1.

The work under the SOC entails a massive years’ long Commercial Mining operation to extract the maximum volume of sand and gravel (1.5 million cubic yards) from the Project Site. The Earth Removal Permit is Exhibit 3 hereto. Pontiff’s Work that is underway includes the export of sand and gravel from the Project Site. The Fosgate Affidavit states that on May 6, 2024, she observed “tractor trailer trucks going in and out of the Site via an access road near 104 Tremont Street.” ¶ 8. Exhibit 1. The Affidavit of Aaron Keaton (“Keaton Aff.”) states that on May 9, 2024, he observed nine trucks leaving the Project Site via the access road near 104 Tremont Street. Exhibit 4, Keaton Aff. ¶ 4-10. The Keaton Affidavit provides photographs of

the nine trucks leaving the Project Site via the access road, the name of the trucking company shown on the cab of the tractor trailer, and the date and time of his observation. Exhibit 4, Keaton Aff. ¶ 4-10.

LEGAL STANDARD

The Regulations define a Final Order as the “Order issued by the Commissioner after an adjudicatory hearing or, if no request for hearing has been filed, the Superseding Order or, if no request for a Superseding Order has been filed, the Order of Conditions.” 310 CMR 10.04.

The Act states, “No work proposed in any notice of intention shall be undertaken until the final order...with respect to such work has been recorded in the registry of deeds...” G.L. c. 131, § 40.

The Regulations state “No work shall be undertaken until all administrative appeal periods from a Reviewable Decision have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.” 310 CMR 10.05(7)(j)(2)

310 CMR 10.08(1)(b), Enforcement Orders, provides in pertinent part,

(1) When the conservation commission, the Department or the Office of Law Enforcement of the Executive Office of Energy and Environmental Affairs determines that an activity is in violation of M.G.L. c. 131, § 40, 310 CMR 10.00 or a Final Order, the conservation commission, Department or the Office of Law Enforcement may issue an Enforcement Order. Violations include...(c) failure to obtain a valid Final Order or Extension Permit prior to conducting an Activity Subject to Regulation under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2)...

Under the OADR Regulations, 310 CMR 1.01(5)(a)(5), the Presiding Officer shall have the power to take any action authorized by M.G.L. c. 30A to conduct a just, efficient and speedy

adjudicatory appeal, and to write a fair and impartial recommended decision for consideration by the Commissioner. The Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate, without limitation, issue orders to show cause.

The Act, G.L. c. 131, § 40 states,

Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation.

ARGUMENT

I. Pontiff should be ordered to immediately cease work because there is no Final Order

Pontiff should be ordered to immediately cease work because there is no Final Order. The Act and the Regulations are clear: no Work shall be undertaken until there is a Final Order. Act, G.L. c. 131, § 40 and 310 CMR 10.05(7)(j)(2): “No work shall be undertaken until all administrative appeal periods from a Reviewable Decision have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.” Procedures before the Department have not been completed.

A. Pontiff has undertaken Work since at least April 1, 2024

Pontiff is and has been undertaking Work on the Site since at least April 1, 2024. Fosgate Aff. ¶ 6; Keaton Aff. ¶ 9-10.

The Regulations define “Work” to be the same as “Activity”:

..any form of draining, dumping, dredging, damming, discharging, **excavating, filling or grading**;...the construction and/or improvement of roads and other ways; the **changing of run-off characteristics**, the intercepting or diverging of ground or surface water,...the discharge of pollutants; **the destruction of plant life; and any other changing of the physical characteristics of land.**

310 CMR 10.04, Definitions (Emphasis supplied). The Fosgate Affidavit and accompanying Photographs 1 and 2 show excavation and grading of the Project Site as of April 1, 2024. The Fosgate photographs show the land has been clear-cut and scraped down to bare sand. This constitutes “destruction of plant life” and the “changing of the physical characteristics of land.” It is established science that removing trees and vegetation and earth material by excavating and grading results in the “changing of run-off characteristics” which is defined as Activity under 310 CMR 10.02.

Prior to Pontiff’s undertaking the Work, the land was wooded upland forest habitat and Priority Habitat for Endangered Species. Department’s Basic Documents, 01b, page 1. The Work “contemplates the disturbance of 1.7 acres of NHESP Priority and Estimated Habitat...” Department’s Basic Documents, #07c, page 1. The “Project” (construction of cranberry bogs) “will occur within the actual habitat” of the Northern Red-bellied Cooter, a species listed as Endangered under the Massachusetts Endangered Species Act. Id., August 1, 2023 Division of Fisheries and Wildlife letter.

The Work is within the Department’s jurisdiction. SOC finds the Work to construct the five bogs will impact Inland Resource Areas identified as Buffer Zone, Bordering Vegetated Wetland (BVW), Bordering Land Subject to Flooding (BLSF) and Riverfront area. SOC Part B. The BVW, BLST and Riverfront are Areas Subject to Protection under G.L. c. 131, 40 and the Regulations, 310 CMR 10.02(1). The Applicant’s “Proposed Cranberry Bog Construction” plan, the NOI application, and the SOC make it clear that the Work to construct the five proposed cranberry bogs impacts some or all of the Inland Resource Areas identified in the SOC, Findings B(3). Department’s Basic Documents #01b. The Appeal Notice challenges the wetlands delineation. Appeal Notice ¶8. The Appeal Notice alleges the SOC does not adequately protect

the Resource Areas. The Work should not be allowed to proceed without final adjudication of the issues raised in the Appeal Notice. If it is allowed to proceed, it will alter Resource Areas as admitted in the SOC, potentially without adequate conditions as asserted in the Appeal Notice. “Work outside a Resource Area, such as BVW, but within its buffer zone may affect the wildlife habitat of that Resource Area.” In the Matter of Bosworth, OADR Docket No. WET 2015-015, Recommended Final Decision, Feb. 17, 2016.

Pontiff’s earth removal as described in the Earth Removal Permit, Exhibit 3, is the same as the Work under the SOC. The SOC states that the “proposed project is for the construction of five (5) cranberry bogs on 17.8 acres of land.” Department’s Basic Documents # 11. Therefore, by Pontiff’s own admission, all Activity on the 17.8 acre site, including removing the hills and transporting the wood, sand and gravel off site for commercial sale, is the Work under the SOC.

B. The SOC is not a Final Order

The SOC is not a Final Order within the meaning of the Regulations, 310 CMR 10.04.

C. The Department has failed and refuses to act, despite notice of Pontiff’s illegal Work

On May 9, 2024, Petitioners counsel informed the Department that Pontiff was undertaking Work without a Final Order in violation of the Act and Regulations and has been for many weeks. Sheehan Aff. ¶ 3. Petitioners provided the Department’s Counsel Brett Hubbard and Bruce Hopper a photograph of the Project Site showing it denuded of vegetation, graded, and excavated. Id. The Department was previously informed of the illegal work on or about April 26, 2024 and has done nothing to stop it.

Under 310 CMR 10.08(2) when the Department determines that an activity is in violation of G.L. c. 131, § 40, 310 CMR 10.05 the Department or the Office may issue an Enforcement

Order. Violations include the failure to obtain a valid Final Order “prior to conducting an Activity Subject to Regulation under M.G.L. c. 131, § 40 as defined in 310 CMR 10.02(2)....”

While the Department may have some measure of enforcement discretion, its affirmative decision to ignore Pontiff’s blatant violations is an abuse of discretion. The Department’s failure to determine that Pontiff’s Activity is being done without a Final Order is arbitrary, capricious and violates its public duty to protect the environment and the interests of the Act.

II. The Presiding Officer should order Pontiff to cease Work and issue an Order to address the egregious violations

The Petitioner Ten Residents Group respectfully requests that the Presiding Officer order Pontiff to immediately cease Work, restore all land unlawfully altered, and issue a comprehensive order and remedial measures to address the gross, egregious and blatant violations. The Presiding Officer should Order the Department to investigate the duration, geographic extent of the Work done without a Final Order and the impacts to interests protected under the Act. The Department should take immediate action under its *Enforcement Response Guidance* (“ERG”). The Presiding Officer and/or the Department should issue an Administrative Penalty for the maximum amount of \$25,000.00 per day of violation beginning with the start of the Work at some time prior to April 1, 2024, and for minimum of 38 days (April 1 and May 9, 2024) and as long as the Work continues. The Department should be ordered to refer the violations to the Attorney General’s Office for Criminal Prosecution because the violations fit the criteria of the ERG:

- The violations can be proved in court beyond a reasonable doubt,
- The violations actually caused, or potentially could have caused, significant harm to the public health, safety, or welfare or the environment,

- The violations were the result of “willfulness and/or negligence and/or indifference so serious that society should respond by imposing the stigma and punishment associated with being convicted of a crime.”

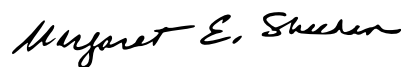
EWG, page 20.

Petitioners also request that the Presiding Officer issue a Unilateral Administrative Order to restore the Site, and Issue a Penalty Assessment Notice. Finally, the Petitioners request that the Presiding Officer sanction the Department and Pontiff pursuant to 310 CMR 1.01(10) by issuing a Final Recommended Decision in favor of Ten Residents Group on all issues in the Appeal Notice.

CONCLUSION

The Ten Residents Group affidavits and evidence submitted in support of its Motion and this Memorandum establish that Pontiff has been undertaking Work without a Final Order since at least April 1, 2024. The Department is acting in gross derogation of its duty in failing and refusing to enforce the Act and Regulations. The Ten Residents Group respectfully requests that they be granted the relief requested.

Signed,



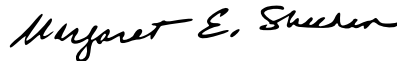
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Certificate of Service

I, Margaret E. Sheehan, hereby certify pursuant to 310 CMR 1.01(4)(f) that on May 10, 2024 I have sent a copy of the foregoing document to all parties by electronic mail, to the persons below at the address indicated below.

Signed,



Margaret E. Sheehan, Esq.
Authorized Representative
Ten Residents Group

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