

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. ) Carver, Massachusetts )	OADR Docket Number: WET-2024-011 DEP File No. SE 126-0672
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**PETITIONER TEN RESIDENTS GROUP’S  
MOTION TO COMPEL DISCOVERY**

The Petitioner Ten Residents Group (“Ten Residents” or “Petitioner”) hereby moves for an Order to Compel the Applicant, E.J. Pontiff Cranberries, Inc. (“Pontiff”) to provide entry on to land for the purpose of allowing Petitioner to obtain evidence relevant to this Appeal. In the Matter of Carlton W. Leonard III, October 17, 2003; 10 DEPR 228; In the Matter of Fitchburg Redevelopment Authority, January 3, 1996.

The Ten Residents seek this Order pursuant to 310 CMR 10.05(7)(j)(2), 310 CMR 1.01(12)(d) and 301 CMR 1.01(11)(a)(1) to investigate 7 specific areas circled in yellow on the map labeled “Figure 1: Supplemental Areas of Investigation” (“Figure 1”). 310 CMR 10.58. These areas are on the 752-acre parcel (“Parcel”) owned by Pontiff that contains the Project Site. The Project consists of excavation and removal from the Parcel of 1,533,706 cubic yards of sand and gravel for the alleged eventual construction of five cranberry bogs on 17.8 acres. SOC page 1; Site Plans Note 9. There is no timetable for installation of the bogs.

The excavation Work covers about 46.5 acres of land that includes the 17.8 acres, plus modification of a roadway within the Parcel. The 7 areas of investigation (yellow circles) are relevant to the Department’s finding in the Superseding Order of Conditions (“SOC”) that the

Project Site includes Riverfront area as defined by 310 CMR 10.58. The Ten Residents seek entry onto land to verify the location of the river and its Riverfront areas as stated by the SOC.

In support of this Motion the Ten Residents rely on the Affidavit of Brandon Faneuf, PWS (“Faneuf Aff.”), Affidavit of Margaret Sheehan (“Sheehan Aff.”) and the Affidavit of Katherine Harrelson (“Harrelson Aff.”).

The Applicant has not cooperated in good faith following the Ten Residents Authorized Representative’s attempt to conduct the discovery. 301 CMR 1.01(12)(d). On August 2, 2024, at 3:20 p.m. the Ten Residents Authorized Representative emailed Pontiff’s attorney a request for said discovery explaining the purpose and extent of the site investigation. Exhibit 1. On Monday, August 5, 2024 after being informed that Pontiff had a new lead attorney, at 8:10 the Ten Residents Authorized Representative contacted Pontiff’s new attorney requesting a response. Exhibit 2. At 10:34 a.m. on Monday August 4, 2024, the Ten Residents sent a follow up email to Pontiff’s counsel specifying the areas for investigation and including Figure 1. Exhibit 3. The email explained that the SOC states Riverfront area is present on the Project Site. On Monday August 5, 2024, Pontiff’s attorney informed the Ten Residents access for the Site Investigation was denied. Exhibit 4.

The Ten Residents conducted a site visit on July 17, 2024 (“Site Investigation”). As explained below, this Site Investigation was inadequate to obtain the evidence necessary for their testimony, giving rise to this request for supplemental investigation and a discovery order for entry upon land to investigate the areas on Figure 1.

As noted, the total site acreage of the Applicant’s property is 752 acres. NOI Filing, Department’s Basic Document 01a, PDF page 17. Work under the SOC covers approximately 46.5

acres plus a roadway. Faneuf Aff. ¶ 9. The SOC identified three Areas Subject to Protection on the Project Site (Resource Areas). SOC, page 1. 310 CMR 10.02(1). These are:

Bordering Vegetated Wetlands (“BVW”),

Riverfront Area, and

Bordering Land Subject to Flooding (“BLSF”).

The Issues for Adjudication concern whether the Department’s SOC adequately protects the interests of the Act and Regulations. To adjudicate the issues it is necessary to determine whether the Site Plans the SOC relies upon accurately delineate the Resource Areas. Specifically, this Motion pertains to a site investigation on the Applicant’s property to identify the river and the Riverfront area, 310 CMR 10.58. The Department’s SOC does not identify the name or location of the river itself or where the Work is in relation to the Riverfront area. The Wetlands Protection Act, G.L. c. 131, § 40 defines the Riverfront area as “that area of land situated between a river’s mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river’s mean annual high-water line.” See also, 310 CMR 10.58(2). The Wetlands Regulations provide, “the physical characteristics of a Riverfront Area as described in 310 CMR 10.58(2)(a) are critical to the protection of the interests specified in 310 CMR 10.58(1).” 310 CMR 10.58(2)(b), The Ten Residents seek to observe and investigate the 7 locations in yellow on Figure 1 to verify the location of the river and its Riverfront area pursuant to 310 CMR 10.58(2)(b). The Site Plans indicate that there is Work within 200 feet of Riverfront area. Faneuf Aff. ¶ 9.

The Ten Residents are entitled to verify the Department’s statement that there is Riverfront and its apparent conclusion that there the Work will not remove, fill, dredge or alter Riverfront. G.L. c. 131, § 40. If Project involves work within the Riverfront area, the Department was required

to presume the area is significant to protect certain interests of the Act, including public or private water supply and fisheries. 310 CMR 10.58(3). The Department did not find that the Work is significant to these interests and did not overcome the presumption of significance. SOC, Findings B.

The reasons the Petitioner requests a further investigation and this order are:

- a. During the July 17, 2024 Site Investigation, the Applicant denied the Ten Residents' expert access to Resource Areas on the Project Site and in the Riverfront area, which the Department's SOC identifies as on the Project Site, Faneuf Aff. ¶ 13-16;
- b. The time allotted for the July 17, 2024 Site Investigation was insufficient in part due to the size of the area of the Work (46.5 acres plus a roadway) and the Applicant refused to extend the time, Id. ¶ 14, 16;
- c. New facts and evidence gathered on the July 17, 2024 site inspection gave rise to the need for further investigation to identify the location of the river and Riverfront area, Id. ¶ 11;
- d. The Ten Residents cannot adequately prepare their testimony without further investigation and thus the Site Investigation is reasonably calculated to lead to the discovery of admissible evidence, Id ¶ 15;
- e. The request is not overly broad or unduly burdensome and the Ten Residents have identified the specific areas to investigate as outlined in the attached Figure 1.
- f. Department's attorney together with the Applicant's attorney created an unprofessional, hostile and threatening environment during the three-hour July 17, 2024 Site Inspection that prevented the Ten Residents from conducting a thorough, efficient and complete investigation. Faneuf Aff.; Sheehan Aff.; Harrelson Aff.

The Ten Residents have moved to recuse the Department's counsel from this proceeding for actions arising out of the Site Investigation on July 17, 2024.

The Ten Residents acted promptly following the Site Inspection to bring this motion. Immediately following the July 17, 2024 Site Investigation, the Ten Residents experts studied the range of information gathered and analyzed the observations they had made during the Site Investigation. Based on new information gathered, they prepared the Exhibit B attached to the Faneuf Aff. to specify the areas needing further investigation. The Ten Residents sought voluntary cooperation from the Applicant starting on Friday, August 2, 2024. By email on August 5, 2024, the Applicant denied the request for the site investigation. They analyzed the data and on August 2, 2024 sought the permission of the land owner for the site inspection. The landowner denied permission on August 5, 2024. See, Exhibits 1-4.

The Ten Residents prefiled direct testimony is due on August 9, 2024. Since it appears unlikely the requested site investigation will occur in time for the Ten Residents to completely prepare their testimony based on the new information, Petitioner reserves the right to supplement, revise and/or amend its prefiled direct testimony based on new information obtained at such investigation.

### **CONCLUSION**

For the reasons stated here and the accompanying affidavits and exhibits, the Ten Residents request that the Presiding Officer issue an Order that the Applicant provide to provide entry on to land as identified on Exhibit B to the Faneuf Affidavit at a reasonable time to be mutually agreed upon by the Applicant and the Ten Residents Group.

FOR THE PETITIONER  
TEN REISENTS GROUP

*Margaret E. Sheehan*  
*Signed electronically*

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Margaret E. Sheehan, Esq.  
P.O. Box 1699  
Plymouth MA 02362  
ecolawdefenders@protonmail.com

### **Certificate of Service**

I, Margaret E. Sheehan, hereby certify 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,

*/s/Margaret E. Sheehan*

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

August 7, 2024

### **SERVICE LIST**

E.J. Pontiff Cranberries Inc. Applicant 184 Marshall Street Duxbury MA 02332  
Via Robb D'Ambrusso, Esq. Applicant's Representative D'Ambrusso Law, LLC 15 Caswell Lane  
Plymouth, MA 02360 [robb@dambrosolaw.com](mailto:robb@dambrosolaw.com)

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Michael Pontrelli, [mpontrelli@foley.com](mailto:mpontrelli@foley.com)

Michael K. Crossen, [mcrossen@foley.com](mailto:mcrossen@foley.com)

Foley & Lardner LLP, 111 Huntington Avenue, Suite 2500, Boston MA 02199





# EXHIBIT 1

## Exhibit 1: Friday August 2, 2024 Email to Applicant

On Friday, August 2nd, 2024 at 3:20 PM, EcoLawDefenders  
<EcoLawDefenders@protonmail.com> wrote:

Dear Attorney D'Ambruoso,

This is a request pursuant to 310 CMR 10.05(7)(j)(2) to be allowed to visit the Project Site at 104 Tremont Street that is the subject of the above Appeal in order to investigate facts relating to Issue 3 for adjudication, whether the Department properly determined that the proposed work will not remove, fill, dredge or alter an Area Subject to Protection.

The investigation seeks to determine the Riverfront Area near the area designated on the SOC plans as being near the Bog 4 and 5 area of excavation.

During the July 17, 2024 Site Visit, the Ten Residents' expert, Brandon Faneuf, PWS asked to investigate this area. You stated that would not be allowed. This investigation is necessary for the Ten Residents to obtain relevant and material evidence in order to present its case.

The Regulations state that the site visit shall be allowed within 5 days unless you propose an alternate date. Time is of the essence as the Ten Residents' testimony is due 8/9.

Please let me know as soon as possible whether you will allow a site visit next week. If not we will file a motion for a discovery order.

Thank you.

Meg Sheehan

For the Ten Residents Group

# EXHIBIT 2

Exhibit 2: Email to Applicant's new counsel, August 5, 2024

**From:** EcoLawDefenders <[EcoLawDefenders@protonmail.com](mailto:EcoLawDefenders@protonmail.com)>

**Sent:** Monday, August 5, 2024 8:10 AM

**To:** Robb D'Ambruoso <[robb@dambruosolaw.com](mailto:robb@dambruosolaw.com)>

**Cc:** Hubbard, Brett (DEP) <[Brett.Hubbard@mass.gov](mailto:Brett.Hubbard@mass.gov)>; [Emil.Assing@carverma.gov](mailto:Emil.Assing@carverma.gov);  
Hopper, Bruce E (DEP) <[Bruce.E.Hopper@mass.gov](mailto:Bruce.E.Hopper@mass.gov)>; Katherine Harrelson  
<[katherine.clwc@gmail.com](mailto:katherine.clwc@gmail.com)>; Crossen, Michael K. <[mcrossen@foley.com](mailto:mcrossen@foley.com)>; Pontrelli,  
Mike <[MPontrelli@foley.com](mailto:MPontrelli@foley.com)>; James, Lea Gulotta <[ljames@foley.com](mailto:ljames@foley.com)>

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

**\*\* EXTERNAL EMAIL MESSAGE \*\***

Thank you for letting me know Robb.

Mr. Crossen, please respond to the Ten Residents' request for a site investigation promptly. Time is of the essence. We request your cooperation prior to filing a motion for a discovery order.

Regards,

Margaret E. Sheehan

Attorney

# EXHIBIT 3

### Exhibit 3: Email to Applicant's counsel August 5, 2024 sending Figure 1, Exhibit B to Faneuf Affidavit.

**From:** EcoLawDefenders <EcoLawDefenders@protonmail.com>  
**Sent:** Monday, August 5, 2024 10:34 AM  
**To:** James, Lea Gulotta <james@foley.com>  
**Cc:** Robb D'Ambruso <robb@dambrosolaw.com>; Hubbard, Brett (DEP) <Brett.Hubbard@mass.gov>; Emil Assing@carverma.gov; Hopper, Bruce E (DEP) <Bruce.E.Hopper@mass.gov>; Katherine Harrelson <katherine.clwc@gmail.com>; Crossen, Michael K. <mcrossen@foley.com>; Pontrelli, Mike <MPontrelli@foley.com>  
**Subject:** RE: In the Matter of E.J. Pontiff Cranberries, Inc., OADR Docket No. WET-2024-011, DEP File No. SE 126-0672

Thank you Lea.

To further clarify the request, the purpose is to verify whether the waterway on the site is perennial river per definitions at 310 CMR 10.58(2)(a).1.a, and 310 CMR 10.58(2)(a).1.b.

The Petitioners seek to verify whether Work under the SOC that is proposed and/or is being conducted presently is or will be with 200 feet of Riverfront.





The SOC identified Riverfront on the Project Site.

The areas for investigation yellow-circled areas on the attached map. The Applicant refused the Petitioner's experts access to these areas during the July 17, 2024 site visit.

The specific areas of additional investigation are circled in yellow on the attached map.

# EXHIBIT 4

## Exhibit 4: Applicant denies access to land, August 5, 2024

**From**   James, **Lea** Gulotta <ljames@foley.com>   Yesterday  
**To** ecolawdefenders@protonmail.com, Robb D'Ambruoso, Hubbard, Brett (... 



Meg,

We have reviewed your request and discussed with our client. As an initial matter, Applicant disagrees with your characterization of what occurred during the discovery site visit. Applicant does not agree to conduct an additional discovery site visit in this matter as you have already been provided ample time and opportunity to conduct all discovery relevant to this matter, and because the areas you have identified for further inspection are outside the project area at issue in this appeal and are therefore not germane. Applicant would oppose any motion for a further site visit.

Thank you,

**Lea**