

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: WET2024-011 DEP File No. SE 126-0672
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**PETITIONER**  
**TEN RESIDENTS GROUP'S**  
**MOTION TO RECUSE DEPARTMENT COUNSEL**

The Petitioner Ten Residents Group (“Ten Residents”) hereby moves pursuant to 301 CMR 1.01(11)(a)(1) to recuse Attorney Brett (“Attorney Hubbard”), counsel for the Department of Environmental Protection (“Department”) from this proceeding. The grounds for this Motion as set forth below. Attorney Hubbard’s participation in this proceeding has to date tainted and will continue to taint the proceeding to the extent that it has unduly prevented and interfered with the rights of the Ten Residents to collect evidence to which they are entitled and to effectively present their case. 301 CMR 1.01(5)(b).

The facts forming the basis for this Motion arise from Attorney Hubbard’s actions during the Petitioners’ investigation at the Project Site (104 Tremont Street, Carver, MA) on July 17, 2024 (“Site Investigation”). This Site Investigation was authorized under 310 CMR 10.05(7)(j)e and 301 CMR 1.01(12). It related to the Ten Residents appeal of the Department’s Superseding Order of Conditions issued to Applicant E.J. Pontiff Cranberry, Inc. (“Pontiff”) on April 12, 2024 (“SOC”) that is the subject of this proceeding. During the Site Investigation Attorney Hubbard ignored the Ten Resident’s professional’s call for safety protocols and joined Pontiff’s efforts to prevent the Ten Resident’s experts from conducting a full and complete Site Investigation, which

succeed in part. Throughout the three-hour Site Investigation, Attorney Hubbard acted in an unprofessional, bullying and intimidating manner. Attorney Hubbard, acting with Pontiff's representatives, prevented the Ten Residents from gathering relevant, material evidence. These actions demonstrate that Attorney Hubbard's continued participation in this proceeding has tainted and will continue to taint the process and prevent the Ten Residents from presenting their case in the manner to which they are entitled under the law. 301 CMR 1.01(b). This motion is supported by the affidavits of the Ten Residents' experts, Brandon Faneuf, PWS ("Faneuf Aff.") Katherine Harrelson ("Harrelson Aff."), wetlands scientist, and authorized representative, Margaret E. Sheehan, Esq. ("Sheehan Aff.").

### **BACKGROUND AND RELEVANT FACTS**

The Pre-Hearing Conference Report and Order of June 28, 2024 identifies three issues for adjudication:

1. Whether the Department properly determined that the majority of the proposed activity is not subject to the Regulations under G.L. c. 131, § 40?
2. Whether the Department properly determined that portions of the proposed work will occur within the 100-foot buffer zone to Bordering Vegetated Wetlands?
3. Whether the Department properly determined that the proposed work will not remove, fill, dredge or alter an Area Subject to Protection and thus complies with the Act under G.L. c. 131, § 40, and the Regulations at 310 CMR 10.00.<sup>1</sup>

The WPA Regulations provide for the right to a site visit. 301 CMR 10.05(7)(j)e states,

Within five days of the receipt by the applicant and/or property owner of a written request by any person who has filed an appeal or intervened, and/or such person's consultants, attorneys, or other representatives, shall be allowed to visit the site with the property owner, upon reasonable conditions of the applicant and/or property owner. The purpose of a site visit shall be related solely to the Reviewable Decision under appeal and shall be specifically identified by the requesting party. The person

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<sup>1</sup> The Petitioner's moved to amend the statement of the issues. The Presiding Officer denied the motion.

requesting the site visit may request a later date for the site visit, which shall be reasonably accommodated by the applicant and/or property owner.

310 CMR 1.01(12) provides for cooperative discovery and discovery by permission of the Presiding Officer. To conduct the Site Inspection, the Ten Residents proceeded under 310 CMR 1.01(12)(a) to attempt to obtain cooperative discovery and to exercise their rights to a site visit under 301 CMR 10.05(7)(j)e.

The Applicant agreed to a site visit to be held on July 17, 2024, from 10 a.m. to 1 p.m. (3 hours). For the Site Investigation the Ten Residents hired and arranged for five professionals to participate at great expense: Professional Wetlands Scientist, Brandon Faneuf and Professional Engineer, Margaret Bacon, P.E. of Ecosystem Solutions, Inc., authorized representative attorney Margaret Sheehan, wetlands scientist Katherine Harrelson and environmental scientist Aaron Keaton. Sheehan Aff. ¶ 5. They have a cumulatively over 100 years of professional experience in wetlands delineations, site visits, and environmental law and engineering.

During the Site Investigation the Ten Residents professionals sought to carry out “incidental procedures relevant to the issues to be decided in the adjudicatory appeal by measures including, without limitation, surveying, sampling and photographing the property or any designated object or operation thereon.” 301 CMR 1.01(12(a)(3). At the start of the Site Investigation, the Ten Residents professionals showed Attorney Hubbard and the Applicant’s representatives the areas on the Site Plans where they planned to conduct the investigation and carry out the procedures authorized under 301 CMR 1.01(12(a)(3). Sheehan Aff. ¶ 4. Thereafter, Hubbard repeatedly took proactive actions that interfered with the ability of the Ten Residents’ professionals to carry out the authorized activities during the Site Investigation which they had shown on the Plans. As described further below, this included standing by while the Applicant’s attorney threatened to “call the police” if Sheehan, Bacon and Faneuf attempted to access the

Riverfront area (310 CMR 10.02(1) (Area Subject to Protection) where Pontiff's plans show Work on the Project Site (modification and construction of a roadway), and attempting to prevent the Petitioners PWS from investigating an Area Subject to Protection under 310 CMR 10.00. Sheehan Aff. ¶ 5, 9. Attorney Hubbard refused the Ten Residents' request for safety protocols on the Project Site, which was at the time operating a mine regulated under the federal Mine Safety and Health Act, according to a sign prominently posted on the area of the Work identified in the SOC. Harrelson Aff. ¶ 15.

Throughout the Site Visit Attorney Hubbard continually yelled out to the Ten Residents' professionals to the effect, "where are you going" and "that is not in the buffer zone, you can't go there." Sheehan Aff. ¶ 8. Attorney Hubbard handled herself in a manner unbecoming for a public official engaged in carrying out her public duty, raising her voice and mocking the Petitioners' representatives. The result of the behavior was to substantially and significantly interfere with Petitioners' effort to carry out the Site investigation in an efficient and professional manner and prevent them from obtaining evidence to which they are entitled. This conduct has tainted the discovery process and will continue to taint this proceeding. Sheehan Aff. ¶ 10; Faneuf Aff. The specific facts of these incidents show that Attorney Hubbard's participation will taint this proceeding and she should be recused. Pursuant to 301 CMR 1.01(a) the Ten Residents sought to obtain Hubbard's assent to this motion which was denied.

## **ARGUMENT**

### **1. Attorney Hubbard's unprofessional disregard for federal Mine Safety and Health Act protocols warrants disqualification**

Attorney Hubbard showed a blatant, unprofessional disregard for safety concerns that were brought to her attention during the Site Investigation. At the time of the Site Inspection, the

Project Area was an active open pit mine with mining equipment operating and tractor trailer trucks traveling back and forth on the roadway. The Project is regulated as a “mine” within the meaning of the Federal Mine Safety & Health Act of 1977 (“Mine Act”) administered by the United States Department of Labor and is governed by numerous mandatory safety and health standards including the Mine Safety and Health Administration (“MSHA”) respirable crystalline silica (silica dust or quartz dust) rule for air emissions.<sup>2</sup> 30 U.S.C. § 813.

A sign at the entrance to the Project Site states: PIT 37, Notice this mine operates under MSHA federal guidelines, authorized personnel only, speed limit 10 mph, loader has right of way, seat belts required, PPE required, back up alarms required, drivers remain in cab while being loaded, loader on CB CH #23.” Harrelson Aff., Photo 1.

The Site Investigation started at the entrance to 104 Tremont Street. Id. ¶ 14. Attorney Sheehan explained the areas of the Site Investigation, referring to the Site Plans. Sheehan Aff. ¶ 4. The parties then drove to the entrance to the mine where the PIT 37 sign is posted. Harrelson Aff. ¶ 13. The mine was in active operation during the Site visit. Id. ¶ 12-14. This is generally in the area marked as proposed “Bog 1” on the Department’s SOC and the Applicant’s Site Plans. Id. The mine’s weigh station (scale house) is located in the area where the Petitioners parked their car. Tractor trailer trucks were entering and leaving the Project site carrying sand and

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<sup>2</sup> Occupational exposures to respirable crystalline silica (also known as silica dust or quartz dust) cause adverse health effects, including silicosis (acute silicosis, accelerated silicosis, simple chronic silicosis, progressive massive fibrosis), nonmalignant respiratory diseases (e.g., emphysema and chronic bronchitis), lung cancer, and kidney disease. Each of these effects is chronic, irreversible, and potentially disabling or fatal.

On April 18, 2024, MSHA issued its final rule, *Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection*, to reduce miner exposures to respirable crystalline silica and improve respiratory protection for all airborne hazards.  
<https://www.msha.gov/regulations/rulemaking/silica>

gravel and returning to load as Petitioners began walking to investigate Resource Areas under the SOC. Id. ¶ 14.

Shortly after the Site Investigation began, the Ten Residents' wetlands scientist, Katherine Harrelson, privately approached Attorney Hubbard to ask for a "safety minute" because she believed in professional opinion that the conditions presented a safety hazard. Harrelson Aff. ¶ 15. Ms. Harrelson has 18 years' experience as a trained professional working on construction sites and conducting inspections. Harrelson Aff. ¶ 5. Attorney Hubbard rejected Ms. Harrelson's call for a "safety minute" and said something to the effect of, "We don't do that during these things, dear." Harrelson Aff. ¶ 15. Attorney Hubbard treated the Ten Residents' professional wetlands scientist in a demeaning and insulting manner, creating a toxic working environment for the Site Investigation.

When Attorney Hubbard rejected Ms. Harrelson's private request for a safety meeting, Harrelson continued to observe tractor trailer trucks traveling to and from the Bog 1 excavation area, using the same road that she and others were walking on to conduct the Site Investigation. Harrelson Aff. ¶ 16. The conditions continued to present a safety hazard. Id.

Ms. Harrelson next asked the group, including Attorney Hubbard, to gather to review safety concerns and to agree on protocols. Id. ¶ 17. Attorney Hubbard essentially dismissed the request for safety protocols, state to the effect of "you are here on your own recognizance." Id. The Applicant's attorney something to the effect, "let's get going, this is a waste of time" Id. Hubbard implicitly agreed. Hubbard's response was unprofessional considering that the Project Site is a mine and was in operation at the time. Id. ¶ 19.

Because of the safety concerns, Petitioners' experts were not able to conduct a proper Investigation in this area of the Site. This safety incident reflected a complete disregard for the

facts and circumstances under which the Site Inspection was being conducted, a disregard for federal safety protocols called for on the Pit 37 sign, and a disrespect for Petitioners' professionals. It tainted the entire Site Visit and caused safety concerns throughout the Site Visit. Sheehan Aff. ¶ 10.

For the remainder of the Site Investigation, proceeded to attempt to control the Site visit, calling out to the Ten Residents' professionals to the effect, they were "going in areas beyond the Buffer Zone" or areas where they were "not allowed" such as an area near Myles Standish State Forest, and calling out, "where are you going." Sheehan Aff. ¶ 6, 8-9. It was not the Department's job to try to prevent the Ten Residents from conducting the Site Inspection, but that was the effect of Attorney Hubbard's actions throughout the three-hour inspection.

At the beginning of the Site Inspection, the Ten Residents attorney attempted to explain to Attorney Hubbard that this was the Ten Residents site inspection, not the Department's and the Ten Residents would inspect Resource Areas on the Project Site. Nonetheless, throughout the three hours, Hubbard continued to harass the Ten Residents representatives including Attorney Sheehan. Sheehan Aff.

**2. Attorney Hubbard stood by while the Applicant threatened to "call the police" if the Ten Residents' experts and attorney attempt to view the River Front area on the Project Site**

Attorney Hubbard inappropriately interfered with the Ten Residents attempt to obtain evidence relating to the SOC and this Appeal during the Site Visit. Hubbard stood by while the Applicant's attorney threatened to "call police" if the Ten Residents' professionals attempted to observe the River Front area on the mining roadway. Sheehan Aff. ¶ 6.

At the start of the Site Inspection, Ten Residents' attorney made it clear to the Applicant and the Department that the Site Investigation would address the three Resource Areas identified

in the SOC (Bordering Vegetated Wetlands (“BVW”), Riverfront Area and Bordering Land Subject to Flooding), Buffer Zone and areas of Work could dredge, fill or alter Areas Subject to Protection. Attorney Sheehan indicated by referring to the Site Plans of these areas was the “Entrance Road” shown on the Entrance Road Plan, Sheet 5. Sheet 5 states that “a new entrance/exit truck route will be constructed along with widening of existing gravel bog roads being used for truck access.” Sheehan Aff. ¶ 4. The Site Plans show this crosses a Riverfront. As the Ten Residents professionals announced their intent to observe the roadway where it crossed the Riverfront area, Attorney Hubbard aggressively stated to the Ten Residents professionals to the effect they could not go there because it was not “in the buffer zone” identified by the Applicant. Sheehan Aff. ¶ 6. Sheehan, Bacon and Faneuf started to walk the short few hundred yards down the road to view the Riverfront. Attorney Hubbard started to yell to the effect, “You can’t do that.” Id. The Applicant’s attorney yelled out “we are going to call the police if you go any further Meg,” and repeated this at least once. Id. Hubbard and the Applicant continued to yell out as Attorney Sheehan, Mr. Faneuf and Ms. Bacon waded to the Riverfront area. Id. Bacon and Faneuf proceeded to observe the Riverfront area for approximately five minutes. Neither Hubbard nor the Applicant actually called the police, apparently realizing viewing a Riverfront area where Work is shown on the Site Plans is a proper subject for a site investigation.

Furthermore, it was inappropriate for Department to get involved in such a dispute since DEP does not own the property. This behavior tainted the Site Investigation and was another incident that created a threatening, antagonistic and confrontational atmosphere for the remaining approximately 2 hours and 45 minutes of the Site Inspection. This interfered with the ability of the Ten Residents’ professionals to carry out the Site Inspection. Sheehan Aff. ¶ 10.



The Ten Residents and their experts proceeded to the three Resource Areas identified in the SOC conduct the remainder of the Site Investigation to gather information to determine whether the SOC adequately protects the interests of the Wetlands Protection Act. Throughout the remaining hours of the Site Visit Hubbard proceeded to continually shout at the Ten Residents' representatives to the effect, "Where are you going", "That is not the buffer zone, Meg, you can't go there." Sheehan Aff. ¶ 8. This was distracting, inappropriate and interfered with the ability of the Ten Residents' representatives to efficiently carry out the Site investigation. No petitioner before the Office of Alternative Dispute Resolution should be required to endure this type of harassment from a Departmental representative during a site investigation.

**3. Attorney Hubbard's attempt to prevent the Ten Residents' PWS from taking a sample of Resource Area warrants disqualification.**

At approximately 12:50 p.m., Mr. Faneuf, through Attorney Sheehan, asked to collect a core sample from a cranberry bog adjacent to Proposed Bog 3. Sheehan Aff. ¶ 9. Hubbard, joined by the Applicant, stated they would not allow this to occur, that Faneuf was not to go on to the bog and he could not collect a sample. Id. Sheehan and Faneuf explained that collecting the sample was necessary in order to verify the Resource Areas present within a few feet from the edge of the Work. Sheehan Aff. ¶ 9; Faneuf Aff. ¶ 9d. Mr. Faneuf stated he required access to the bog to carry out the investigation. Id. Sheehan stated to the effect this was within the Issues for Adjudication. At 12:56 p.m. Attorney Sheehan then sent an email to the Presiding Officer seeking a discovery order to conduct the investigation and walked away. See, **Figure 1 below**.

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

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From ecolawdefenders@protonmail.com <EcoLawDefenders@protonmail.com>  
To CaseAdmin OADR (DEP)<caseadmin.oadr@mass.gov>  
CC CaseAdmin OADR (DEP)<caseadmin.oadr@mass.gov>, Robb D'Ambruoso<robb@dambrosolaw.com>, Hubbard, Brett (DEP)<Brett.Hubbard@mass.gov>, Emil Assing<Emil.Assing@carverma.gov>, McClees, Whitney (DEP)<Whitney.McClees@mass.gov>, Walsh, Shaun (DEP)<shaun.walsh@mass.gov>, Reda, Maissoun (DEP)<maissoun.reda@mass.gov>, Childers, Jakarta (DEP)<jakarta.childers@mass.gov>, Hopper, Bruce E (DEP)<Bruce.E.Hopper@mass.gov>, Katherine Harrelson<katherine.clwc@gmail.com>  
Date Wednesday, July 17th, 2024 at 12:56 PM

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This is to notify the Presiding Office that the applicant refused access for discovery purposes to the area shown on applicants plans as existing bogs next to proposed bogs 4 and 5. An investigation of the existing bogs is necessary for petitioner's expert to verify wetland boundaries shown on the NOI plans. The petitioners hereby request an Order from the Presiding Officer to allow the discovery requested.

For the Petitioners

Attorney Sheehan

A few moments after Sheehan informed Attorney Hubbard and the Applicant she had sent the email and copied them, they then changed their minds and allowed Mr. Faneuf to proceed with the sampling and analysis. Sheehan Aff. ¶ 9.

A lawyer may be disqualified if the trier of fact determines that their continued participation as counsel taints the legal process or the trial of the case. *Iatridis v. Zahopoulos*, 99 Mass. App. Ct. 1117 (Mass. App. Ct. 2021) ("even where attorney participation does not conflict with professional code, disqualification may occur where judge determines that attorney's continued participation in litigation "taints the legal system or the trial of the cause before it").

Here, individually and cumulatively the actions described above have so tainted the process that Attorney Hubbard should be recused from this matter. The Ten Residents have been deprived of relevant material evidence which prejudices their right to present their case. The Ten

Residents and their attorney and professionals should not have to endure the continued abuse of process and insulting behavior that Attorney Hubbard demonstrated throughout the three hour Site Visit on July 17, 2024.

### CONCLUSION

For the reasons stated here, Attorney Hubbard's continued participation in this proceeding so taints the process that the Presiding Officer should disqualify her and the Department should assign another attorney to represent its interests.

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

August 7, 2024

### 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 Sheehan*

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Margaret E. Sheehan, Esq.  
Authorized Representative  
Ten Residents Group  
August 7, 2024

## SERVICE LIST

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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

**AFFIDAVIT OF MARGARET E. SHEEHAN, ESQ.**

I, Margaret E. Sheehan, being duly sworn, depose and state as follows:

1. I am an attorney and member of the Massachusetts Bar.
2. I am the authorized representative of the Ten Residents Group in the above matter.
3. I participated in a site investigation on July 17, 2024 at the location that is the subject of the April 12, 2024 Superseding Order of Conditions (“SOC”) appealed by the Ten Residents Group that is the subject of this proceeding (“Site Investigation”).
4. At the start of the Site Investigation, I explained to the assembled group, including Attorney Hubbard (“Attorney Hubbard”) representing the Department of Environmental Protection (“Department”), that the Ten Residents’ representatives planned to investigate the three Resource Areas identified in the SOC determine whether the SOC adequately protected those Resource Areas.
5. The Ten Residents’ arranged at great expense to hire four professionals to conduct the Site Inspection in order to prepare testimony for this proceeding: Brandon Faneuf, PWS (“Faneuf”), Margaret Bacon, P.E (“Bacon”), Katherine Harrelson, environmental scientist and Aaron Keaton, environmental scientist. These professionals and myself, an attorney with over 40 years of environmental law experience, were treated in a demeaning and insulting manner throughout the Site Inspection by Attorney Hubbard. This included angry remarks in a raised voice such as,

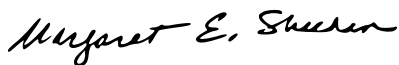
“You know Meg, if you don’t like the Department’s position about the site visit, there is a gold domed building next to our office where you can go and get the law changed.”

6. When the Ten Residents’ professionals Faneuf, Bacon and myself stated we intended to view the Riverfront area shown on the SOC Site Plans where the roadway shown on the Site Plans crosses the Riverfront area, Attorney Hubbard joined the Applicant’s attorney Robb D’Ambruoso in taking affirmative steps to attempt to prevent us from walking on the roadway to view the Riverfront area. They both yelled to the effect, “Meg where are you going, you can’t go there.” Mr. D’Ambruoso yelled out several times when I was about 50 feet away, “we will call the police if you don’t come back.” Attorney Hubbard joined in stating to the effect, “that’s not the buffer zone to the Bordering Vegetated Wetlands, it’s not allowed.” This was entirely uncalled for and inappropriate because the SOC states the Project Site includes Riverfront area and we previously informed Hubbard we intended to view the roadway shown on the Site Plans where the roadway crosses over the Riverfront area. We proceeded to view the Riverfront area despite these threats.
7. I observed Attorney Hubbard act in a dismissive manner, demeaning and insulting manner when Ms. Harrelson called for a safety moment due to the mining operations on the site.
8. Throughout the three-hour site visit, Attorney Hubbard, joined by Attorney D’Ambruoso, continually yelled out to me and the Ten Residents’ representatives to the effect, “where are you going,” “that’s not allowed,” “you can’t go there.” I attempted to explain to Ms. Hubbard that I was accompanying the wetlands professionals and the professional engineer who were investigating the Resource Areas subject to the SOC. Ms. Hubbard’s behavior created a threatening and confrontational atmosphere that prevented me from focusing on the Site Investigation itself and put me in the position of constantly having to defend against her aggressive behavior instead of on carrying out the inspection in an efficient and professional manner.
9. At approximately 12:50 p.m. during the Site Inspection, Mr. Faneuf stated a request to investigate Resource Areas near proposed Bogs 4 and 5. Ms. Hubbard joined with Attorney D’Ambruoso in

insisting this would not be allowed. Given the allotted time for the Site Inspection was near an end, the Ten Residents offered a temporary compromise, without waiving rights to a complete inspection, and stated they would use the remaining few minutes to collect a sample on only one spot on a bog adjacent to the Project Site. Still, Attorney Hubbard and Attorney D'Ambruoso refused access. I then sent the email to the Presiding Officer informing him of this and requesting a discovery order. See, Figure 1 to the Ten Residents' Memorandum for a Discovery Order. Shortly thereafter Attorney Hubbard changed her mind and informed me that she and Pontiff would agree to allow the requested access. However, Attorney Hubbard continued to join in the Applicant's position that no other access would be allowed. The Applicant's attorney shouted at me, "you have three minutes, Meg you better get going, this is over, you need to leave."

10. Attorney Hubbard's remarks, actions and attitude tainted the Site visit and created a hostile and toxic environment. Attorney Hubbard's behavior during the Site visit prevented the Ten Residents Group from obtaining evidence to which they are entitled under the OADR regulations and the Wetlands Regulations.

Signed under the pains and penalties of perjury this 7th day of August, 2024.



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Margaret E. Sheehan

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

**AFFIDAVIT OF BRANDON FANEUF, PWS**

I, Brandon Faneuf, Professional Wetlands Scientist (“PWS”), being duly sworn, depose and state as follows:

1. I am President of Ecosystem Solutions, Inc. (“ESI”), 100 Jefferson Boulevard, Suite 225, Warwick, RI 02888, an environmental consulting firm.
2. I have been a professional wetland scientist, soil scientist, and certified wildlife biologist on a full-time basis for more than twenty-six years. As a Wetland Scientist at ESI, I regularly conduct wetland boundary determinations (including Bordering Vegetated Wetland and Bank), Riverfront Area studies, wildlife habitat evaluations, and soil evaluations for a variety of clients in the private and public sector. During this time, I have routinely prepared reports and permit applications applying and interpreting the regulations, performance standards and policies of the Massachusetts Wetlands Protection Act (“WPA”) and the Massachusetts Department of Environmental Protection (“DEP”). I have experience providing professional wetland consulting services to numerous Conservation Commissions throughout Massachusetts. My private clients include real estate developers, contractors, builders, professional engineers, land surveyors, and private landowners. My resume is attached as **Exhibit A**.



3. ESI and I have been retained to provide expert testimony on behalf of the Ten Residents Group (“Ten Residents” or “Petitioner”) in the above-captioned matter (“Matter”) with regard to the appeal of the April 12, 2024 Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection (“DEP”) upholding Carver Conservation Commission Order of Conditions SE-126-0672.

4. The primary purpose of this Affidavit is to provide my expert opinion in support of the Ten Residents’ Motion for a Discovery Order and to explain why such an Order is necessary, and to describe the Site Investigation on July 17, 2024.

5. The SOC identifies three Areas Subject to Protection on the Project Site. SOC, page 1. 310 CMR 10.02(1). These are: Bordering Vegetated Wetlands (“BVW”), Riverfront Area, and Bordering Land Subject to Flooding (“BLSF”).

6. To provide complete expert testimony in this matter it is necessary for me to investigate the areas marked on the attached **Exhibit B, “Figure 1”** *Supplemental Investigation Areas* with yellow circles. I prepared this map.

7. An Area Subject to Protection is also “Resource Area” defined by the DEP wetlands regulations (“Regulations”) 310 CMR 10.00, to mean any of the areas specified in 310 CMR 10.25 through 10.35 and 10.54 through 10.58. I use the term Resource Areas synonymously with Area Subject to Protection under M.G.L. c.131, § 40, each one of which is enumerated.

8. The SOC Site plans (“Site Plans”) are entitled “Proposed Cranberry Bog Construction of Parcel 123-13-0R,” consist of six (6) sheets, dated August 27, 2023, and have a final revision date of December 28, 2023, by Flaherty & Stefani, Inc., stamped by Mark M. Flaherty, P.E. and John R. Farren, PLS. See, Department Basic Document 7b.

9. I estimate that the Work under the SOC covers approximately 46.5 acres plus a roadway. Resource Areas are interspersed throughout the Project Site. My evaluation of the Project Site and the Work indicates that there is or may be Work within 200 feet of Riverfront area and within 100 feet.

10. I was asked by the Ten Residents Group to conduct a site investigation for purposes of preparing my testimony in this Matter. It is my position that such an investigation is a critical part of preparing and providing complete and accurate testimony in an adjudicatory proceeding under the Wetlands Protection Act, the Regulations and the OADR rules at 310 CMR 1.01. Without conducting a full and thorough site investigation of the Resource Areas and the Work proposed in a Notice of Intent, the ability to provide such testimony is curtailed and risks being inaccurate and incomplete. Such investigations for OADR proceedings that I have been involved with routinely involve investigating the Resource Areas to confirm the Department's SOC wetlands delineations which are the basis for the Department's conclusions that the SOC does or does not adequately protect the interests of the Act.

11. On July 17, 2024, I participated in a site investigation on behalf of the Ten Residents Group in my professional capacity as a PWS ("Site Investigation"). I was accompanied by my staff member, Margaret Bacon, a Professional Engineer and Professional Wetland Scientist with over 30 years' experience ("Ms. Bacon"). I understand the Site Investigation duration was agreed to in advance by the lawyers for the parties. It was limited to three hours. I had estimated my investigation would take three hours. This did not take into account new facts and evidence that became apparent to me on the Site Investigation and subsequently when I reviewed the Site Plans in light of what I had observed on the Site.

12. The purpose of the Site Investigation was related to the SOC and the issues for adjudication in this proceeding. This was a routine site investigation in which I planned to investigate the three Resource Areas identified in the SOC and to perform my own observations, tests and sampling to confirm the Resource Area delineation relied upon by the Department.

13. During the Site Investigation the Applicant refused to allow me to investigate certain Resource Areas on the Project Site which prevented me from conducting a thorough investigation in order to prepare my testimony. These areas include but are not limited to the Riverfront Area that the SOC acknowledges is on the Project Site.

14. In addition to refusing to allow me access to Resource Areas for purposes of preparing my testimony, the three-hour time allotted for the Site Investigation was inadequate. At the end of the three-hour period, the Applicant's attorney demanded that the Ten Residents representatives including myself and Ms. Bacon immediately leave the Site.

15. In my professional opinion it is necessary to conduct a further site investigation to provide accurate and reliable testimony in this proceeding, as shown on Figure 1/Exhibit B.

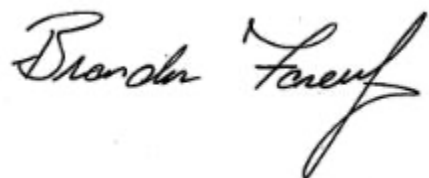
16. My ability to conduct an adequate, thorough and complete site investigation on July 17, 2024 was impaired by the following actions of the Department's representative, Attorney Hubbard, and the Applicant's representatives.

- a. The Department and Applicant's representatives stated to me to the effect that I would not be allowed to view and investigate the body of the Bogs 1 and 2 because the Applicant's wetland consultant had already done that and essentially the Ten Residents were required to rely on that delineation, which is what the Department

relied upon, and it would be a “waste of time” for me to view and attempt to verify those findings. It is standard practice for a petitioner in an OADR appeal to conduct its own wetlands delineation to verify the Department’s findings.

- b. For the other proposed bog areas shown on the Site Plans, the Applicant and the Department again stated to the effect that my investigation and delineation was a “waste of time” and had already been done by the Applicant.
- c. I attempted to investigate and view the area of the Work around proposed Bog 3. Attorney Hubbard questioned me as to why this was necessary. I responded that it was necessary to carry out my investigation of the Resource Areas identified by the Department as being present on the Site.
- d. Attorney Hubbard and the Applicant’s attorney informed me I would not be able to investigate Resource Areas and their Buffer Zones on the western side of the areas marked proposed Bogs 4 and 5. Therefore, I was not able to access these areas. My request to access this area was made close to the end of the Site visit and the Applicant’s attorney said to the effect, “it’s time to go, you have used up your time, let’s get going.” At this point, I proposed an alternative to try to collect at least some information about this Resource Area. At first the Applicant and the Department objected. After some discussion, the Applicant and the Department allowed me limited access to the south bog to conduct soil testing. The Applicant’s attorney stated to the effect, “you have three minutes”.
- e. I was not able to conduct all the required investigation due to insufficient time and the refusal by the landowner, whose position was supported by the Department as it appeared to me, that I could not have access to Resource Areas.

Signed under the pains and penalties of perjury this 7<sup>th</sup> day of August 2024.

A handwritten signature in cursive script that reads "Brandon Faneuf". The signature is written in black ink and is positioned below the sworn statement.

Brandon Faneuf, PWS

# **EXHIBIT A**

# BRANDON FANEUF

## President & Principal Scientist

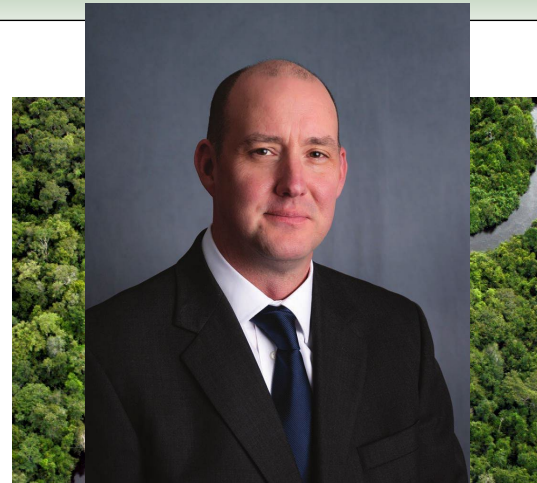
Brandon Faneuf is the Founder, President & Principal Scientist of Ecosystem Solutions, Inc. (ESI). With over 26 years of industry experience, Brandon specializes in wetland & soil science, wildlife studies, project management, land-use permitting & review, and academic instruction.

A native of the Blackstone River Valley, Brandon began his career with the Rhode Island Department of Environmental Management, working in the Wetlands Permitting, Total Maximum Daily Load (TMDL), and Shellfish Protection Programs. This varied background in water resources protection led him to found ESI in 2003 where he helps private and municipal clients. He has delineated over 2,500 wetlands in Rhode Island, Massachusetts, and Connecticut, performed over 750 soil evaluations and infiltration tests for septic and stormwater systems in Rhode Island, and has conducted over 1,200 peer reviews of wetland applications for Conservation Commissions in Massachusetts.

Among his many achievements, Brandon has had a long-standing relationship with the Massachusetts Association of Conservation Commissions (MACC), serving on the Board of Directors. This includes work on the Education Committee, as co-chair of the Annual Environmental Conference put on at Holy Cross College each year in March, and is on the Bylaw Committee. He co-teaches a wetland delineation techniques workshop in Marion, MA twice yearly, as well as a wetlands enforcement workshop.

### Notable Project Experience

- Wrote and oversaw a seven (7) acre wetland restoration project on Almeida Road in Rehoboth, MA, as well as a two (2) acre wetland restoration at the Shawmut Landfill in Fall River, MA.
- Permitting for river re-alignment along Tanyard Brook in Bristol, RI, to alleviate flooding and high tides in Bristol Harbor.
- Two years of erosion & sedimentation control monitoring at a large-scale solar project in West Greenwich, RI. Responsible for weekly and post-rain event logs.
- Continuing services contractor for peer review services in the Towns of Sutton and Mattapoisett, MA.



### Education

- M.S., Wetlands Conservation, University of Massachusetts, Amherst
- B.S. Wildlife Biology, University of Massachusetts, Amherst
- 12 post-graduate credits, soil science, University of Rhode Island

### Credentials

- Professional Wetland Scientist, PWS 1614, Society of Wetland Scientists (2006)
- Certified Wildlife Biologist, The Wildlife Society (2010)
- Certified Professional in Soil Erosion & Sediment Control, CPESC 2694, SWCS & IECA (2003)
- New England Regional Soil Science Certificate (2006)
- Registered Professional Soil Scientist, SSSNE (2006)
- Class IV Soil Evaluator, D4059, RI Department of Environmental Management (2003)
- Certified Coastal Invasives Manager, RI Coastal Resources Management Council (2009)

### Professional Affiliations

- Massachusetts Association of Conservation Commissions (Board of Directors)
- Association of Massachusetts Wetland Scientists
- Society of Wetland Scientists
- Society of Soil Scientists of Southern New England
- International Erosion Control Association
- Soil & Water Conservation Society

## Relevant Experience (B. Faneuf)

**Project/Location:** Various locations in southeast Massachusetts.  
**Client/Industry:** Save the Pine Barrens & Community Land & Water Action Coalition  
**Role:** Abutter & Ten Resident Advocate  
**Description:** Acted as environmental expert in client's efforts to curb illegal sand & gravel removal at over a dozen sites in Carver, Plymouth, and Wareham, MA. Involves representation at local Conservation Commission and Soil Removal Committee meetings, Department of Environmental Superseding Order site meetings, and Office of Appeals and Dispute Resolution (OADR) hearings. Example of work includes disputes associated with removal of sand and gravel and squaring off of bogs under the 310 CMR 10.04 Agriculture exemption, under the Massachusetts Wetlands Protection Act. Work involves preparation of pre-filed testimony and testifying at OADR hearings as wetland scientist & regulatory expert.

**Project/Location:** Sutton and Douglas, Massachusetts  
**Client/Industry:** Towns of Sutton and Douglas / Conservation Commission  
**Role:** Enforcement Officer  
**Description:** Four (4) enforcement actions where M.G.L. c.40, §21D non-criminal disposition allows ticketing for M.G.L. c.131, §40 and local Bylaw violations. One instance involved a single-family residence where the individual was fined \$8,500 for non-compliance with the approved Order of Conditions. This case was appealed by the violator at Uxbridge District Court. Brandon represented the Conservation Commission in front of the Clerk Magistrate in their efforts to bring the owner into compliance. Two instances involve a large-scale solar project where the project was in Douglas, but impacts were in Sutton. Brandon performed review of the restoration plan, weekly site inspections of the construction site, helped the Douglas Conservation Commission steer the issues involved in bringing the project back into compliance, and oversaw clean-up efforts on property in Sutton where the majority of sediment was deposited.

## Professional Affiliations (cont.)

- The Wildlife Society
- Rhode Island Forest Conservator's Organization

## Qualifications

- Wetland Delineation  
Qualified to perform wetland delineations under the Rhode Island Department of Environmental Management (RIDEM) Freshwater Wetlands Program Guidelines, Connecticut DEP, and under the Massachusetts Wetlands Protection Act.
- Wildlife & Wildlife Habitat  
Qualified to perform wildlife & wildlife habitat assessments under the RIDEM Freshwater Wetlands Program Guidelines
- Qualified to perform wildlife habitat evaluations under Massachusetts Wetlands Protection Act.
- Prequalified under the Massachusetts Natural Heritage and Endangered Species Program for rare species habitat assessments (Box and Blanding Turtles).
- RI Coverts Cooperator Training Completion Certificate (2010)

## Expert Qualifications

- Massachusetts Department of Environmental Protection Office of Appeals and Dispute Resolution
- Expert in Wetland Science, RI Coastal Resources Management Council

## Other

- Chair, International Erosion Control Association (IECA) Northeast Chapter 2013 Annual Conference, Warwick, RI
- State Chair for Rhode Island IECA Chapter, 2009-2013
- Environmental Instructor- Wetlands, Rhode Island Realtor's Association, 2005-2012.





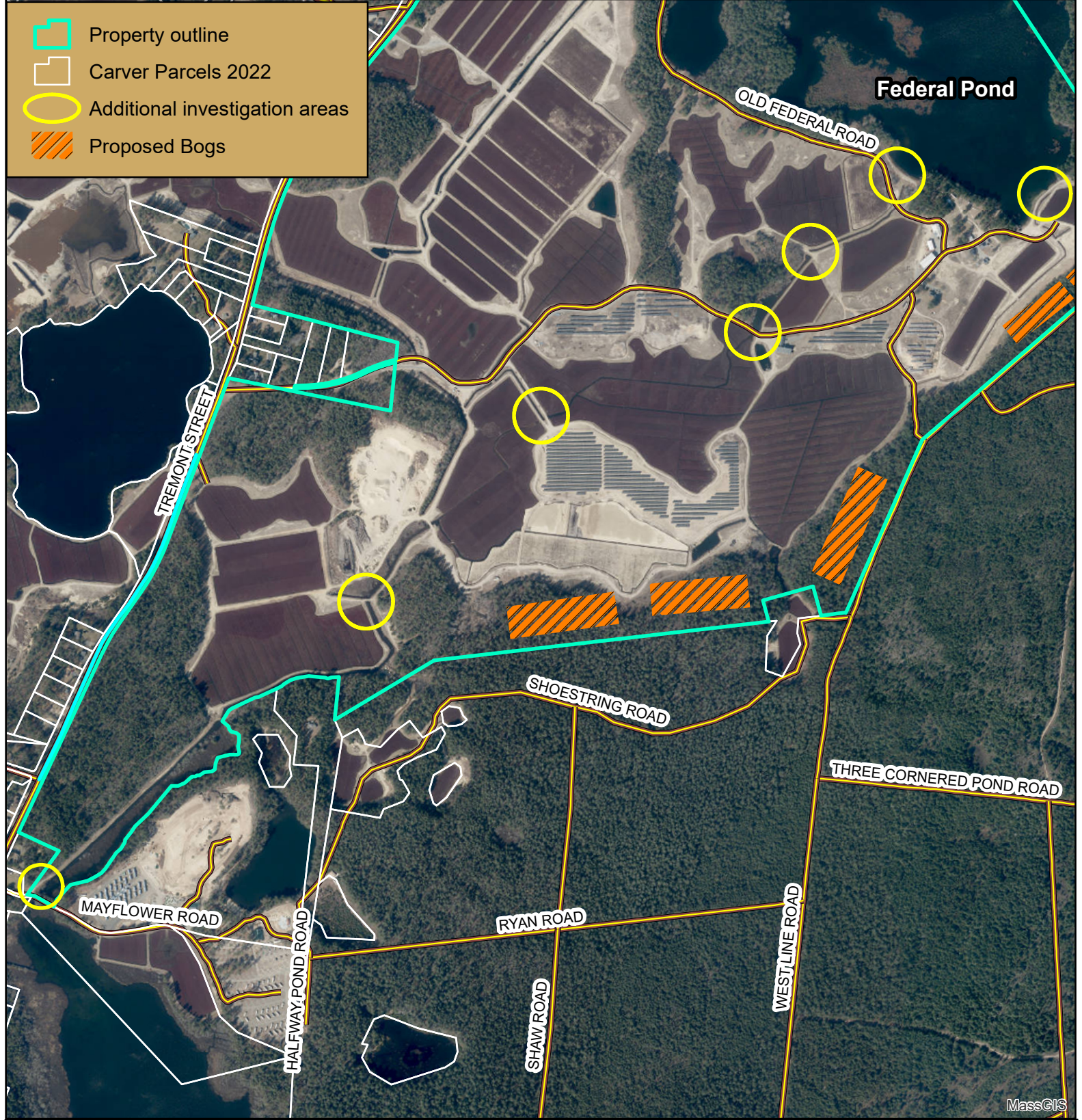
Project/Location: Eastern Massachusetts  
Client/Industry: Vanasse-Hangen-Brustlin (VHB)  
Role: Wetland delineator  
Description: Due to the immense scale and need, Brandon participated in the field work for the Interstate Reliability Project (IRP). ESI was sub-contracted by VHB to delineate over 52 miles of electrical rights-of-way in eastern Massachusetts, including an eighteen (18) mile stretch of right-of-way between the Uxbridge/Burrillville line and Medway, MA. Work was performed between June and December of 2010.





Project/Location: Sutton, Massachusetts  
Client/Industry: Sutton Conservation Commission  
Role: Conservation Consultant  
Description: Brandon starting reviewing applications coming into the Conservation Commission as a subcontractor to Steven Zisk in 2006, taking the position of Conservation Consultant after Mr. Zisk left in 2008, through an RFP process. Since that time, Brandon has reviewed over 750 applications, including Requests for Determination of Applicability (RDA's), Abbreviated Notice of Resource Area Delineation (ANRAD's), Notice of Intent (NOI's), Emergency Certificates (EC's), as well as Enforcement Orders (EO's). Work involves project and site plan review, preparing comments, coordination with applicants and their consultants, including civil engineers, attending all Conservation Commission meetings in-person and providing oral commentary, as well as being able to project plans, pictures, and GIS overlays on-screen using a laptop computer, drafting Determinations of Applicability, Orders of Conditions, Orders of Resource Area Delineation, Emergency Certificates, Enforcement Orders, and Certificates of Compliance. Brandon and his team at ESI provide services through the construction process, providing site inspections for compliance with Orders under the Wetlands Protection Act and Sutton Article 12. ESI handles enforcement of Article 12, including ticket-writing and representation at the District Court. Municipal work is a team effort. Brandon currently brings a team of five (5), including three biologists, a construction inspection and GIS expert, and Professional Engineer. Costs have been 100% covered by 53G during ESI's tenure.

Project/Location: Mattapoisett, Massachusetts  
Client/Industry: Mattapoisett Conservation Commission  
Role: Conservation Agent  
Description: Brandon and ESI was hired as a private consultant to act as the Conservation Agent in 2021, with most costs associated with hiring through the 53G process. Work is similar to that in Sutton, except that Mattapoisett only works under M.G.L. c.131, §40, and has no local Bylaw. ESI has reviewed over 300 applications during their tenure. Most costs are covered under 53G, but the Board of Selectmen have dedicated up to \$30,000/yr for non-53G related work.



# **EXHIBIT B**

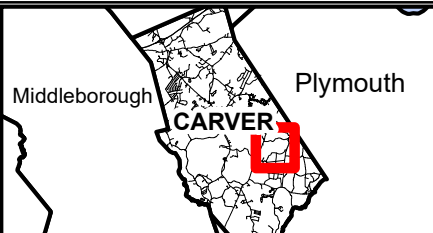
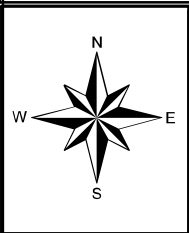


-  Property outline
-  Carver Parcels 2022
-  Additional investigation areas
-  Proposed Bogs



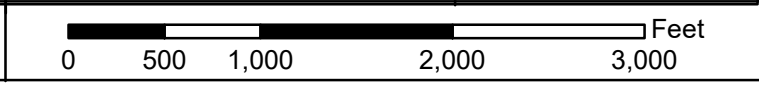
100 Jefferson Blvd., Ste. 225  
Warwick, RI 02888

**Figure 1**



Supplemental Investigation Areas 104 Tremont Street / Map 123, Lot 13 Carver, Massachusetts			
DATE:	07-31-24	PROJECT #:	W23-1848
CREATED BY:	BF	SCALE:	1 inch = 1,000 feet

2023 Aerial Photo



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

AFFIDAVIT OF KATHERINE B. HARRELSON

I, Katherine B. Harrelson, being duly sworn, depose and state as follows:

1. I am employed by Save the Pine Barrens, Inc. as a staff scientist and outreach coordinator.
2. I have a Bachelors of Science in Evolutionary Anthropology, Minor Geological Sciences, graduating summa cum laude from Rutgers University, and a Masters of Science in Applied GeoSciences from the University of Pennsylvania.
3. I hold professional certifications in Construction Site Supervision and OSHA 10 General Industry from the Occupational Safety and Hazard Administration and First Aid and Adult CPR from the American Safety and Health Institute. I have a professional training certificate in Wetlands Delineations from Rutgers University and became a Certified Stream Monitor for the New Jersey Department of Environmental Protection in 2017.
4. I have post-graduate Continuing Education Credits in Site Remediation, Practical Applications in Hydrogeology, Water and Wastewater Chemistry, and Stormwater Management for Engineers from the Rutgers University Office of Continuing Professional Education.
5. I have 18 years experience conducting inspections and investigations on construction sites, sand and gravel mines, rock quarries, landfills, electric generating facilities, liquid terminals, oil refineries, chemical, auto and other manufacturing facilities, and solar arrays amongst other

locations in order to evaluate compliance with wetlands rules, collect samples and assess other aspects of regulatory compliance.

6. During my 18 years of experience I have received on the job training in site-specific safety protocols at facilities and sites regulated by the Department of Labor, Mine Safety and Health Administration (“MSHA”).
7. A standard best practice in my profession, and that I have used or seen used multiple times, is a ‘safety moment.’
8. I am familiar with the location of the E.J. Pontiff Cranberries, Inc. project site at 104 Tremont Street (“the Site”) that is the subject of the Superseding Order of Conditions issued by the Department on April 12, 2024 (“SOC”) that is the subject of this OADR Appeal.
9. I have studied the SOC, the Site Plans referred to in the SOC, the Notice of Intent filed by the Applicant, E.J. Pontiff Cranberries, Inc. (“Pontiff”) and the Department’s Basic Documents submitted in this Appeal. I have also viewed aerial photographs, drone footage and maps of the Project Site.
10. I attended the Department's on site meeting prior to the SOC issuance (but was denied access to the Site itself), the Site Investigation on July 17, 2024 and the Earth Removal Committee public hearings on the earth removal permit for the work described in the SOC.
11. On July 17, 2024, I accompanied representatives of the Ten Residents Group on a site investigation (“Site Investigation”) at 104 Tremont Street, Carver MA. This included Attorney Margaret Sheehan, Professional Wetlands Scientist Brandon Faneuf, and Margaret Bacon who I understand to be a licensed Professional Engineer, and Aaron Keaton, an environmental scientist. I understood the purpose of the Site Investigation to be to delineate and investigate Resource Areas subject to protection under the Wetlands Protection Act and Regulations for purposes related to the SOC. The representatives of the Department included Attorney Brett Hubbard (“Attorney Hubbard”) and Department Environmental Analyst Whitney McClees.

12. The Site Investigation began at the entrance to 104 Tremont Street in Carver. After a short meeting to discuss the purpose and scope of the investigation, the representatives of the Department, the Applicant and the Petitioner drove down a gravel road to a parking area next to a sand and gravel mining operation.
13. When we parked at the entrance to the excavation area on the Project Site, I observed a large sign, "PIT 37, Notice this Mine Operates Under MSHA Federal Guidelines, Authorized Personnel Only." The sign also states that Personal Protective Equipment (PPE) is required. A photo of the sign is below (Photo 1). This area corresponds generally to the area of "Proposed Bog 1" on the Department's Basic Documents 7b, the Site Plans. This was at the western end of the gravel road shown on the Site Plans.
14. After parking at the end of the roadway, I saw tractor trailer trucks entering and exiting and traveling on the roadway where we were standing, a dust control water sprayer truck, and sand and gravel processing equipment (Photos 2, 3 and 4). The mine appeared to be in operation.
15. Since we were on a mine site regulated by MSHA according to the "PIT 37" sign (Photo 1), and the conditions presented a safety hazard in my professional opinion, I called for a "safety minute." I approached Attorney Hubbard with the idea privately out of earshot of others on the site visit, and she put her hand on my shoulder and said words to me to the effect of, "We don't do that during these things, dear."
16. After Attorney Hubbard rejected my request for a safety meeting, I continued to observe tractor trailer trucks traveling to and from the area where excavation was occurring, using the same road we were walking on to conduct our Site investigation. The Site conditions continued to present a safety hazard in my opinion.
17. I asked the group including Attorney Hubbard to gather to review safety concerns and to agree on protocols. The representatives of the Ten Residents Group stopped and gathered to listen to my request, followed by the Department and the Applicant's representatives. In effect, my request was dismissed by the Department. Attorney Hubbard stated something to the effect of, "You are

here on your own recognizance.” The Applicant’s attorney made a remark to the effect of, “let’s get going, there’s no point to this.”

18. In my opinion the DEP was uncooperative during the safety minute, as they did not contribute safety observations or suggestions for protocol, and seemed eager to conclude with the proceedings. I did not consider that to be a professional response regarding a Site Investigation on an MSHA regulated job site, as safety should be the Department’s concern. Identifying potential safety issues and related safety protocol benefits everyone, including the DEP personnel who were present.

19. In my opinion Attorney Hubbard’s response was unprofessional considering that the Project Site is a mine and was in operation at the time the Site Investigation was taking place.

Signed under the pains and penalties of perjury this 6th day of August, 2024

*Katherine Harrelson*

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Katherine Harrelson

Photo 1: MSHA Entrance Sign, 104 Tremont Street (“the Site”)





Photo 2: Tractor trailer exiting the Site



Photo 3: Dust control water sprayer truck



Photo 4: Sand and gravel processing equipment

