

SAVE THE PINE BARRENS  
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PLYMOUTH MA 02360  
508-259-9154  
[environmentwatchsoutheasternma@gmail.com](mailto:environmentwatchsoutheasternma@gmail.com)

February 24, 2022

Via Certified Mail: #7019-0700-0001-7987-3238  
Return Receipt Requested  
And Via Email: Mass DEP SERO [Daniel.Gilmore@mass.gov](mailto:Daniel.Gilmore@mass.gov)

Dan Gilmore  
Wetlands Program Chief  
MassDEP Southeast Regional Office  
20 Riverside Drive  
Lakeville, MA 02357

Re: Request for Superseding Determination of Applicability: 301 CMR 10.05(c)  
0 Fuller Street, 0 Plymouth Street; Map 48 Lots 2 and 8  
**No DEP File Number assigned by Carver Conservation Commission**

Dear Mr. Gilmore,

This is a an appeal Save the Pine Barrens, Inc. (“STPB”) under 310 CMR 10.05(3)(c) and 10.05(7)(a) on behalf of at least Ten Residents of Carver<sup>1</sup> (“Ten Residents”) of the Carver Conservation Commission’s failure to act on the Request for Determination (“RDA”) on a commercial mining project on land subject to jurisdiction under the Wetlands Protection Act (“the Act”). The RDA is **Exhibit 1** to this letter.

Elaine and Eric Weston (“Weston”) plan to conduct or are conducting a commercial mining operation under the Earth Removal Permit (# 102) dated October 15, 2021 issued by the Carver Earth Removal Committee purporting to authorize them to excavate 120,000 cubic yards of earth material from Map 48, Lots 2 and 8 (“the Project Site”).

The Carver Conservation Commission (“Commission”) concurs that the Project Site or a portion thereof is subject to jurisdiction under the Act. It claims, however, without any records, that Weston’s commercial mining operation in the wetlands is an exempt agricultural activity within

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<sup>1</sup> Mary Dormer, 162 Plymouth Street, Carver; Wendy Lock, 72 Plymouth Street, Carver; Nancy Ryan, 3 President’s Way, Carver; Betty Sullivan, 38 Roosevelt Ridge, Carver; Wes Swain, 6 Lakeham Driver, Carver; Jennifer McNamee, 1 Captain Perkins Driver, Carver; Dottie Pollitt, 158 High Street, Carver; Thomas Pollitt, 158 High Street, Carver; Deb Rooney, 160 High Street, Carver; James Rooney, 160 High Street, Carver; Cynthia Beard, 168 High Street, Carver; Bill Beard, 168 High Street, Carver; Josh Beard, 168 High Street, Carver.

the meaning of 310 CMR 10.04©(1)(g). There is no factual or legal basis for the Commission’s conclusion.

Weston has not complied with the Wetlands Protection Act for commercial mining of 120,000 cubic yards of earth materials (“the Project”). Weston filed neither a Notice of Intent or Request for Determination of Applicability.

Despite being aware of Weston’s plans to conduct commercial mining in jurisdictional wetlands, the Commission is ignoring the Act and the regulatory requirements of 310 CMR 10.00. In an effort to obtain compliance with the Act, on January 18, 2022, STPB filed the RDA with the Commission by Certified Mail.

### **Weston’s commercial mining is subject to the Wetlands Protection Act and Regulations**

The Project Site is located on Map 48, Lots 2 and 8. **Exhibit 2** is a portion of Carver Assessor’s Map 48. **Exhibits 3 and 4** to this letter, Carver Assessor’s property record cards show:

- Lot 2 consisting of 41. 17 acres owned by Eric and Elaine Weston.
- Lot 8 consisting of 6.14 acres owned by Raymond Elmer of Alton, New Hampshire, acquired by Elmer on January 1, 1903, about 118 years ago

Lot 8, owned by Elmer, who may be deceased, is the area where the Earth Removal Plans show most of the excavation will occur.

The only publicly available plan showing Weston’s commercial mining Project on Lots 2 and 8, the Project Site, is a one-page, 11-year-old plan by Gilmore Associates dated October 12, 2010, submitted to the Carver Earth Removal to obtain the Earth Removal Permit. The Gilmore plan is attached as Exhibit 1 to the RDA, and the Earth Removal Permit is attached as Exhibit 2 to the RDA.

The eleven year old Gilmore plans describe the work as “proposed reservoir expansion & by pass canal” “total volume of earth removed 169,000 cubic yards.” The Earth Removal Permit, Condition 1 states, “Removal not to exceed 120,000 cu. Yards according to plans to provide expansion of water 10 – 15 Depth.” The Gilmore plans show that the “expansion of water” will consist of opening up a new area of land, requiring logging and removal of forests and/or vegetation in order to create the new reservoir and bypass canal. This is not “dredging” of an existing reservoir.

On MassMapper, DEP labeled wetlands abut Lot 8 (Cranberry Bogs) and this is shown on the RDA’s Exhibit 3.

Lot 2 contains Marsh/Bog, Wooded Marsh, Cranberry Bog and Open Water. The proposed canal and reservoir expansion extend on to an abutting lot to the south, excavating through Lot

8 to connect that lot with Lot 2. This has the potential to change and alter water flow direction, hydrology, and wetlands functioning.

There is no record before the Conservation Commission to show that Weston's commercial mining operation is exempt from the Wetlands Protection Act *as Normal Improvement of Land in Agricultural Use*. The Commission has failed to act on the RDA, and certainly has not shown the Project falls within 310 CMR 10.04©(1)(a)-(h) and will not cause a "net loss of flood storage capacity. The Conservation Commission has no certified farm Conservation Plan (CP) for the Project, which relates to work to be conducted in a Bordering Vegetated Wetland, as required by 310 CMR 10.04(c)(1)(g)(2).

There does not appear to be an approved forest cutting plan under G.L. c. 132, Sections 40-46 and the regulations, 302 CMR 16.00. This is required for logging on private property.

### **Conservation Commission Public Hearing on STPB's RDA**

The Commission held a public hearing on STPB's RDA on February 16, 2022. A copy of the Commission's February 16, 2021 agenda containing the public hearing announcement is attached as **Exhibit 5**.

The public hearing can be viewed on Area 58 Cable TV:

<https://www.youtube.com/watch?v=sUMku1RvAvA> from Minute 1 to about minute 36.

The Commission asserted at the public hearing that Project is exempt from the Act under 301 CMR 10.04©(1)(g) as *Normal Improvement of Land in Agricultural Use*. The Commission confirmed it has not received an RDA asserting an agricultural exemption, never previously issued a Form 2 determination on an RDA for the Project and never received a notice of intent filing.

Nonetheless, despite the lack of evidence, the Commission stated at the public hearing that it had previously reviewed the Project, conducted a site visit to view the wetlands, and determined that the Project qualified for an exemption under the Wetlands Protection Act as *Normal Improvement of Land in Agricultural Use*. 310 CMR 10.04©(1). By admitting that they reviewed the Project to see if the agricultural exemption applied, the Commission admitted the Project Site is jurisdictional wetlands; otherwise, there would be no need for the Commission to consider, and allegedly grant, an agricultural exemption.

The Commission's position is unlawful and ludicrous on its face: the Commission admits there is not one document, record, plan, phone note or other evidence -- never mind a properly filed RDA by Weston --- to support its "decision" that the Project is exempt from the Wetlands Protection Act. Yet, it admits the Project is in jurisdictional wetlands.

At the hearing, the Commission claimed that at some unknown time, at a meeting that was never noticed, they deliberated, made a decision and exempted Weston from any filing under the Act on the grounds that the Project is *Normal Improvement of Land in Agricultural Use*. The Commission and Town Counsel have blatantly and unlawfully purported to exempt Weston's Project – mining in a wetland – from the Act. This “decision” also violated the Open Meeting Law. They have refused and failed to require the Weston's to establish an agricultural exemption by meeting the criteria in the regulations, 310 CMR 10.04©(g)(1), including the filing of a relevant portion of a farm Conservation Plan.

At the February 16, 2022 public hearing the Commission declared STPB's RDA “moot” because the Commission had previously determined the Project was exempt from the *Act as Normal Improvement of Land in Agricultural Use*.

Further compounding their blatant disregard for the Act and 301 CMR 10.00, Chair Savery Moore stated the Commission would not issue a written determination or a Form 2 decision on STPB's RDA. 310 CMR 10.05(3)(b)(1) states that “within 21 days after the receipt of the Request for Determination of Applicability, the conservation commission **shall issue** a Determination of Applicability, Form 2.” (Emphasis supplied)

The Commission's alleged grant of an agricultural exemption to Weston without any findings or record and its decision to allow Weston to conduct commercial mining in what they admit is jurisdictional wetland is an intentional act of malfeasance and derogation of the Commission's legal duty. As the Conservation Agent blithely remarked at the hearing “that may seem informal but that's pretty much how it works around here.” Town Counsel from KP Law silently agreed. See, at Minute 33:41, Carver Conservation Commission Recorded Meeting <https://www.youtube.com/watch?v=sUMku1RvAvA>

The Commission has failed to issue an RDA, Form 2 as required by 310 CMR 10.05(3)(b)(1). Under 310 CMR 10.05(7)(b)(4) the Ten Residents may request that the Department issue a Superseding Determination of Applicability because the Commission has failed to issue a Superseding Determination with the time period of the Act. This request is made within 70 days after the expiration of the period within which the Commission was to have acted.

This request is filed in a timely manner, within Attached as **Exhibit 6** is a copy of the filing fee and filing fee transmittal form which have been sent to the DEP Lockbox.

The Ten Residents have standing to make this Request pursuant to 310 CMR 10.05(7)(a)(5) as residents of the town where the land is located.

In sum, the Commission, Conservation Agent and Town Counsel **admit that the Project Site is subject to Wetlands Protection Act jurisdiction. They do not have the authority to exempt Weston from compliance with the Act. They have acted illegally and beyond the scope of their authority in violation of the Act and 310 CMR 10.00.**

For the foregoing reasons, since the Commission failed to act on STPB's RDA, MassDEP should issue Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7). It should issue a positive determination that requires Weston to comply with the Wetlands Protection Act.

All work should be prohibited until Weston is in compliance and all appeal periods have expired.

On behalf of the Ten Residents group, STPB hereby requests that MassDEP issue a positive Superseding Determination of Applicability.

Very truly yours,

*Margaret E. Sheehan*

Margaret E. Sheehan

Send via Certified Mail:

MassDEP SERO

Raymond Elmer, PO Box 218, Alton, NH 03809, Owner, Lot 8

Elaine and Eric Weston, 189 Main Street, Carver MA 02330, Owner, Lot 2

Carver Conservation Commission

**EXHIBIT LIST**  
**REQUEST FOR SUPERSEDING RDA**  
**OWNER: WESTON**  
**LOCATION: MAP 48, LOTS 2, 8**  
**CARVER**

1. RDA filed by STPB dated January 18, 2021  
Exhibit 1: Gilmore Associates plan, 2011  
Exhibit 2: Town of Carver Earth Removal Permit 102  
Exhibit 3: Mass Mapper showing location and wetlands
2. Carver Assessors Map 48 showing Lots 2 and 8
3. Carver Tax Card, Map 48 Lot 2 owned by Weston
4. Carver Tax Card, Map 48 Lot 8 owned by Elmer
5. Carver Conservation Commission Agenda February 16, 2022
6. Copy of Filing Fee and Copy of Filing Fee Transmittal Form