

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CONSERVATION AND RECREATION

INFORMAL HEARING
251 Causeway Street, Suite 600
Boston, Massachusetts 02114

December 31, 2019

Appeal from Disapproval by DCR of
Forest Cutting Plan and Notice of Intent
File No. 286-21470-20

Alan DiPietro

FINAL DECISION

FOREST CUTTING PRACTICES: Appeal from the Disapproval of a Forest Cutting Plan and Notice of Intent dated October 3, 2019 applicable to property located at Maple Street in Stow and Bolton, Massachusetts is DENIED.

Alan DiPietro, Appellant

Laura Dietz, Assistant General Counsel
Peter Church, Director of Forest Stewardship (DCR)
Laura Dooley, Service Forester (DCR)

LOUIS ROSS, Hearing Officer

Introduction

On December 23, 2019, the Department of Conservation and Recreation (the "Department" or "DCR") held an informal hearing pursuant to 801 CMR 1.02 regarding an appeal by the Appellant, Alan DiPietro of 110 Teele Road, Bolton, Massachusetts (the "Appellant" or "Mr. DiPietro") of a decision by the Department to disapprove a forest cutting plan and the following matters.

On or about October 7, 2019, the Appellant filed with the Department a Forest Cutting Plan and Notice of Intent dated October 3, 2019 bearing File No. 286-21470-20 (the "Forest Cutting Plan" or "Application"). The Application included a Forest Cutting Layout sketch as Attachment 1 and a topographic map as Attachment 2. The Forest Cutting Plan was prepared with the assistance of John F. Robbins, Consulting Forester.

The Application requested the Department, acting through the Director of the Division of State Parks and Recreation in the Department (the "Director") or her designee, to approve a proposal to cut trees on land owned by Appellant and located in both Stow and Bolton,

Massachusetts (the “Premises”). The Application states that the harvest of timber would yield 16,000 board feet, 40 cords of wood and 450 tons of chips. The Application also requested Department approval of two stream crossings and four wetlands crossings with three filter strips to be located at the Premises

The Forest Cutting Plan was filed with the Town of Stow (“Stow”) Conservation Commission (the “Stow Conservation Commission”) and with the Town of Bolton (“Bolton”) Conservation Commission (the “Bolton Conservation Commission”) for comments. Appellant and DCR did not state who filed or how the Forest Cutting Plan was filed with the Stow Conservation Commission and Bolton Conservation Commission (the “Conservation Commissions”) or how or whether the Forest Cutting Plan was filed with abutters or the Massachusetts Department of Environmental Protection (the “MassDEP”).

On October 30, 2019, the Stow Conservation Commission provided comments to DCR (“Stow Comments”). The Stow Comments provided among other things notice to the Department that Stow and Bolton brought a lawsuit (docket no. 1785-CV-00789) in Worcester County Superior Court (the “Court”) against Appellant to enforce significant violations of the Wetlands Protection Act (G.L. c. 131, § 40) (the “Wetlands Protection Act” or “WPA”) at the Premises (the “Lawsuit”). As part of that Lawsuit, the Court issued a preliminary injunction against Appellant dated May 24, 2017 (the “Preliminary Injunction”) that prohibited all further work in the Wetland Resource Areas and Buffer Zone at the Premises, as defined by a 2005 Bolton Conservation Commission Order of Resource Area Delineation (the “2005 ORAD”), unless and until Appellant obtained Orders of Conditions from the Conservation Commissions or further order of the Court.

The Department disapproved the Forest Cutting Plan pursuant to a Disapproval Letter to Appellant, dated November 19, 2019 (the “Decision”) and issued by Laura Dooley, Service Forester and designee of the Director.¹ The Decision denied the Application on several grounds including:

1. outstanding wetland violations and enforcement orders at the Premises issued by MassDEP pursuant to the Wetlands Protection Act,
2. materials provided by the Conservation Commissions to the Department, including the Preliminary Injunction, and
3. a finding by the Department that Appellant impermissibly sought permission to cut trees located within Wetland Resource Areas and Buffer Zones at the Premises based on the 2005 ORAD.

By letter dated December 9, 2019, the Appellant appealed the DCR’s Decision to disapprove the Application (the “Appeal”). The Appeal alleges among other things that:

1. the Forest Cutting Plan complies with the Forest Cutting Practices Act (G.L. c. 132, §§ 40-46) (the “Forest Cutting Practices Act” or “FCPA”);

¹ The Service Forestry Program within the Department acts as the Director’s designee to implement the Forest cutting practices Act and Regulations.

2. there are no violations of the WPA in the areas of the Premises where trees are proposed to be harvested;
3. the Stow Conservation Commission wetland delineation map inaccurately represents conditions on the ground;
4. there are no Perennial Streams or Riverfront Areas on the Premises as determined by the Conservation Commissions;
5. the Premises are actively used for agricultural purposes and for-profit breeding of alpacas and are therefore exempt from the WPA; and
6. no permits are required and no wetlands to be restored.

On or about December 9, 2019, DCR received the Appeal. By letter dated December 17, 2019, DCR caused a written notice of the informal hearing on the matter to be delivered to the Appellant via first class mail, return receipt requested, and electronic mail. On December 19, 2019, the Appellant confirmed that he had received notice via electronic mail and that he would attend the informal hearing.

At the hearing, the Appellant read his Appeal into the record. The Appellant also submitted copies of the following written materials (“Appellant Materials”) to the Hearing Officer and to DCR:

1. the Appeal dated December 9, 2019,
2. an email exchange between Appellant and MassDEP dated December 3, 2019,
3. an email exchange between Appellant and Michael Downey, DCR Service Forester, dated December 6 and December 9, 2019,
4. a letter from John F. Robbins, Consulting Forester, to DCR dated December 5, 2019,
5. a statement regarding Agricultural Burn Permit Application from Stow and a signed Agricultural Burn Permit from Bolton,
6. excerpts from several Massachusetts General Laws,
7. a Determination of Applicability from the Bolton Conservation Commission to Appellant, as applicant, dated February 14, 2018, and
8. a Determination of Applicability from the Stow Conservation Commission to Appellant, as applicant, that is undated but was transmitted to Appellant by letter dated February 9, 2018,
9. an Order of Conditions from the Bolton Conservation Commission to Appellant, as applicant, dated March 6, 2018, and
10. a Memorandum of Understanding between MassDEP and the DCR regarding the Wetlands Protection Act and Forest Cutting Practices Act.

At the hearing, Appellant asserted among other things that: (1) all the Premises are presently in agricultural use for alpaca breeding and therefore exempt from the WPA; (2) his

Forest Cutting Plan is in complete compliance with the Wetlands Protection Act; (3) the work proposed by the Forest Cutting Plan would not be located in or affect any wetlands; (4) there were no violations of the Wetlands Protection Act or its applicable regulations (310 CMR 10.00, et seq.) (the “Wetlands Protection Regulations”) at the Premises; (5) the only reason that a Forest Cutting Plan was necessary was for a crossing of a non-perennial stream; and (6) the Preliminary Injunction was no longer applicable as it was superseded by a judgment by the Court in the Lawsuit brought by Stow and Bolton against the Appellant. Appellant additionally asserted at the hearing that Stow and Bolton are biased and refuse to issue permits. Appellant made no statement at the hearing regarding how he intends to use the wood that would be harvested from the Premises pursuant to his Forest Cutting Plan, but rather stated that the main reason why he submitted the Forest Cutting Plan to DCR under the Forest Cutting Plan Act was because the work to be performed under the Forest Cutting Plan would be outside the Wetlands Protection Act.

After the hearing, consistent with the hearing proceedings and the Appellant’s allegation that the Court issued a final judgment that superseded the Preliminary Injunction,² the Appellant additionally submitted a copy of Plaintiffs’ Motion for Assessment of Damages and Entry of Default Judgment (the “Motion”) that Stow and Bolton had filed with the Court as part of their Lawsuit against Appellant, who apparently defaulted for failing to respond to the Lawsuit.

At the hearing, DCR submitted copies of the following written materials (“DCR Materials”) to the Hearing Officer and to the Appellant:

1. the Forest Cutting Plan,
2. comments by the Stow Conservation Commission given to DCR by email to Laura Dooley from Kathy Sferra dated October 30, 2019,
3. the Disapproval Letter from DCR dated November 19, 2019,
4. the Preliminary Injunction,
5. a 2005 Wetland Delineation Plan dated March 3, 2005 to which the Preliminary Injunction refers (and presumably the same plan related to the 2005 ORAD), and
6. the Bolton Wetlands Bylaw.

At the hearing, and as stated in the Decision, DCR stated that DCR disapproved the Forest Cutting Plan as requested by Mr. DiPietro because (1) the Forest Cutting Plan proposed work within Wetland Resource Areas and Buffer Zones at the Premises; (2) there were existing violations of the Wetlands Protection Act at the Premises; and (3) the Preliminary Injunction prevented the Department from approving the Forest Cutting Plan.

² Where Appellant alleged at the hearing that the Court had issued a judgment that superseded the Preliminary Injunction, Appellant was allowed to provide a copy of the judgment post-hearing to supplement his materials and allegations related to his Appeal.

Massachusetts Forest Cutting Practices Act and Regulations

The Forest Cutting Practices Act was adopted “for the purpose of conserving water, preventing floods and soil erosion, improving the conditions for wildlife and recreation, protecting and improving air and water quality, and providing a continuing and increasing supply of forest products for public consumption, farm use, and for the woodusing industries of the commonwealth.” See G.L. c. 132, § 40. The regulations issued under the Forest Cutting Practices Act (302 CMR 16.00, et seq.) (the “Regulations”) were adopted to establish minimum forest cutting practices to implement the purposes of the FCPA, including but not limited to the conservation of water, the maintenance of air and water quality, prevention of floods and the prevention of soil erosion. See 302 CMR 16.01. The Regulations define and clarify the “administration of the [FCPA] by establishing standard definitions and uniform procedures by which [persons] can carry out their responsibilities under the [FCPA].” See 302 CMR 16.01. In other words, the Regulations provide the mechanics to administer the broad policy goals set forth by the FCPA and the process to obtain Department approval of forest cutting plans.

Pursuant to the Regulations, certain types of cutting or clearing activities may be wholly exempt from the FCPA and its Regulations. See 302 CMR 16.02(3). If a particular forest cutting is exempt from the Regulations, then the landowner must determine if he or she must file a Notice of Intent with the local Conservation Commission or MassDEP pursuant to the Wetlands Protection Act and Wetland Protection Regulations. See 302 CMR 16.02(4)(c).

If a cutting or clearing activity is not exempt from the FCPA and its Regulations, then a landowner must submit a forest cutting plan and notice of intent. to the Department, the local conservation commission(s) and abutters. See 302 CMR 16.04(2). If such forest cutting plan complies with the FCPA and Regulations, then the Director or her designee shall approve that forest cutting plan. See 302 CMR 16.04(3)(b). If such forest cutting plan does not comply with the standards set forth by the FCPA or Regulations, then the Director or her designee shall not approve that forest cutting plan. See 302 CMR 16.04(3)(d). Compliance with such standards are mandatory. See 302 CMR 16.05. The Regulations additionally provide guidelines for landowners to incorporate forest cutting practices that would avoid harm to wildlife habitat, vernal pools, isolated vegetated wetlands and riparian areas. See 302 CMR 16.07. The Regulations state that the guidelines are “strongly recommended,” but are not mandatory. See 302 CMR 16.07.

In addition, the Regulations allow a landowner to qualify for an agriculture exemption from the Wetlands Protection Act and the Wetlands Protection Regulations. See 302 CMR 16.02(4)(b)³ and (d). The agriculture exemption is an exemption from the Wetlands

³ For reference, 302 CMR 16.02(4)(b) states:

- (b) Under the agricultural exemption section of 310 CMR 10.00: Wetlands Protection, a forest cutting which is usually subject to M.G.L. c. 131, § 40 shall be exempt if the landowner meets the following requirements:
1. wetland resource areas are properly identified in the forest cutting plan;
 2. the forest cutting plan is approved by the Director or the Director's Agent;
 3. the forest cutting plan is filed with the local Conservation Commission(s) as required under 302 CMR 16.04(2) allowing for an opportunity for comment;
 4. the Director or the Director's Agent sends the approved forest cutting plan to the appropriate DEP regional office; and
 5. the landowner faithfully executes the forest cutting plan.

Protection Act and the Wetlands Protection Regulations. It does not provide a landowner with an exemption from the Forest Cutting Practices Act or Regulations.

If a landowner qualifies for the agriculture exemption, then he or she may avoid having to comply with the Wetlands Protection Act and the Wetlands Protection Regulations, including possibly having to filing notices of intent and obtaining orders of conditions as may ordinarily be required. If a landowner fails to qualify for the agriculture exemption, then he or she must comply with the Wetlands Protection Act and the Wetlands Protection Regulations, including filing notices of intent and obtaining orders of conditions, as applicable, before undertaking work in Wetland Resource Areas and Buffer Zones.

To qualify for the agriculture exemption from the WPA and Wetlands Protection Regulations requires, among other conditions, that the Director or her designee approve an accurately prepared forest cutting plan and the faithful performance of work in accordance with the forest cutting plan. See 302 CMR 16.02(4)(b). If all required conditions are met, including the Department's approval of the forest cutting plan, then per the Regulations, then the landowner can effectively undertake forest cutting or clearing work in a Wetland Resource Area or Buffer Zone without local conservation commission or MassDEP permission required by the WPA and Wetlands Protection Regulations.

Findings of Fact and Discussion

Based upon the Decision and the evidence provided at the hearing (including the Motion that Appellant motion post-hearing), I find and decide as follows.

At the outset, based on the evidence, I find that there are ongoing violations of the Wetlands Protection Act and Wetlands Protection Regulations at the Premises for which Mr. DiPietro is responsible. I also find that Appellant's main reason for submitting the Application to the Department was to obtain Department approval of a Forest Cutting Plan under the FCPA to qualify for the agriculture exemption under the Wetlands Protection Regulations to circumvent requirements of the Wetlands Protection Act and Wetlands Protection Regulations and further proceedings before the Conservation Commissions.

Consistent with the Preliminary Injunction, I find that the Wetland Resource Areas and Buffer Zones at the Premises at issue are as defined by the 2005 ORAD. In addition, based upon the evidence provided at the hearing, I find that the portion of the Premises identified by the Forest Cutting Plan as ST-1 is not located within any Wetland Resource Areas or Buffer Zones and that the portions of the Premises identified by the Forest Cutting Plan as ST-2 and ST-3 are located within Wetland Resource Areas and Buffer Zones. I further find that the portions of the Premises identified by the Forest Cutting Plan as ST-2 and ST-3 are ordinarily subject to the WPA and Wetlands Protection Regulations (unless an exemption, such as the agriculture exemption, were to apply) and are the subject of the Preliminary Injunction.

At the hearing, neither the Appellant or DCR provided any evidence that the proposed Forest Cutting Plan should be exempt from the FCPA or Regulations. Appellant baldly asserted that the FCPA and Regulations should not apply to the work at the Premises as proposed by the

Forest Cutting Plan, but did not provide any further argument or evidence to support that assertion. Given the lack of supporting arguments or evidence, I find that Appellant did not show that he was exempt from the FCPA or its Regulations. Instead, based on the preparation and submission of the Application, including the proposal to harvest 16,000 board feet, forty (40) cords and 450 tons of chips of wood, which in total would exceed the minimum thresholds provided by the Regulations to apply, I find that the FCPA and Regulations do apply in this instance. See 302 CMR 16.02.

Without exemptions from the FCPA and Regulations, Appellant and the Department were bound to follow the requirements of the FCPA and the Regulations, including the Regulations' procedural and substantive requirements. At the hearing, neither Appellant nor the Department argued for or presented evidence regarding any procedural deficiencies under the FCPA or Regulations with respect to any notices or the submission or receipt of the Application, Disapproval or other materials. Based on the lack of arguments and evidence, I find that the Appellant and Department each had sufficient notice of the hearing and assume without finding or deciding that that there has otherwise been full compliance by the parties with regard to the procedural and notice requirements of the FCPA and Regulations.

Similarly, neither Appellant nor the Department argued or presented any evidence that the Forest Cutting Plan conformed to or failed to conform to any substantive standards required by the Regulations or any guidelines recommended by the Regulations. Based on the lack of arguments and evidence, I assume without finding or deciding that that the Forest Cutting Plan complies with the substantive requirements of the FCPA and Regulations. I make no finding or decision as to whether the Department could approve or disapprove a forest cutting plan for failure by a landowner to adopt recommended guidelines set forth by section 16.07 of the Regulations.

Based on the foregoing and statements by the Department at the hearing, I find that DCR issued the Decision to deny the Forest Cutting Plan based upon (1) the existence of the ongoing violations of the Wetlands Protection Act and Wetlands Protection Regulations at the Premises, and (2) the existence of the Preliminary Injunction.

Although the purpose of the Regulations is to conserve water, maintain water quality, and prevent floods and soil erosion and the Regulations do provide some standards⁴ to protect water and wetland resources, the Regulations do not expressly provide the Department with the power to disapprove a forest cutting plan on the basis of the existing violations of the Wetlands Protection Act or Wetlands Protections Regulations. See 302 CMR 16.01 and 16.05. Therefore, even though the stated purpose of the Regulations is to protect water and wetland resources and even though approval of a forest cutting plan might allow the WPA and Wetlands Protection Regulations to be circumvented, I find in this instance that without a showing by the DCR of a violation of any particular standard provided by the Regulations, reliance by the Department on the existence of ongoing violations of the WPA and Wetlands Protection Regulations at the Premises to disapprove the Forest Cutting Plan was inappropriate.

⁴ The Regulations also provide guidelines regarding wetland areas and resources that are not mandatory and therefore not a basis on which to disapprove a forest cutting plan. See 302 CMR 16.07.

The Regulations similarly do not expressly provide the Department with the power to disapprove a forest cutting plan on the basis of the existence of a valid preliminary injunction. However, I find that a valid preliminary injunction ordered by a court with jurisdiction that prohibits the approval of a forest cutting plan or work to be performed in accordance with an approved forest cutting plan would, despite the Regulations, enjoin the approval of a forest cutting plan or work to be performed in accordance with an approved cutting plan.

With regard to the validity of the Preliminary Injunction, based upon the lack of evidence provided at the hearing as to whether the Preliminary Injunction remains valid⁵ and absent further clarification by the Court, I find that the Preliminary Injunction remains valid.⁶

With regard to the substance of the Preliminary Injunction, based upon the lack of evidence provided at the hearing as to the meaning and scope of the Preliminary Injunction and absent further clarification by the Court, I find that the Preliminary Injunction expressly enjoins the Appellant from performing further work in the Wetland Resource Areas and Buffer Zones at the Premises – regardless of the nature of the work to be performed, the type of permits or approvals required for such work, the underlying use for which the work was to be performed or any other facts or circumstances– absent an Order of Conditions or further order of the Court. I further find that even though the Preliminary Injunction does not expressly enjoin the Appellant from applying for or the DCR from approving the Forest Cutting Plan, it was appropriate for the DCR in this instance to disapprove the Forest Cutting Plan on the basis of the existence of the Preliminary Injunction because approval of the Forest Cutting Plan would appear to entitle the Appellant to the benefit of agriculture exemption afforded by section 16.02(4)(b) of the Regulations and allowing Appellant to perform work in the Wetland Resource Areas and Buffer Zones at the Premises, directly contravening the Preliminary Injunction.

Finally, neither the Application nor Decision raised the agriculture exemption. The issue as to whether the agriculture exemption should apply to provide Appellant with an exemption for timber harvesting activities within Wetland Resource Areas and Buffer Zones at the Premises was raised by the Appellant in his Appeal. Although Mr. DiPietro provided credible evidence at the hearing that some portion of the Premises is currently used for the keeping and breeding of alpacas, I find that there is contrary evidence that the Premises are also used for residential purposes and that Appellant did not show that the Premises are in fact wholly or primarily used for agricultural purposes. There is also a real question as to whether work proposed by the Forest Cutting Plan is related to the alpaca use or the residential use. Therefore, I find that the Appellant has failed to show that he is entitled to the agriculture exemption from the Wetlands Protection Regulations as set forth by section 302 CMR 16.02(4)(b) of the Regulations on other grounds. Based on the comments by the Stow Conservation Commission provided by DCR at

⁵ A preliminary injunction issued to enjoin a certain activity will generally become permanent upon a decision being made against the party that has been enjoined, and conversely, if the case is decided in favor of the party that has been enjoined, then the injunction will usually be dissolved.

⁶ At the hearing, the Appellant argued that the Preliminary Injunction was superseded by a final judgment by the Court in the case in which the Preliminary Injunction was issued. The Appellant was allowed to supplement the evidence he provided at the hearing by providing a copy of a final judgment by the Court after the hearing. The Appellant did not provide the judgment as allowed. Instead, the Appellant provided the Motion. The Motion was executed by attorneys for Stow and Bolton and included, as Exhibit A to the Motion, a form of default judgment. It is unclear whether the Court executed any the judgment as provided with the Motion, has not yet made a final judgment, or executed some other judgment, and if so whether such other judgment included a permanent injunction enjoining any work at the Premises or other declaration or relief.

the hearing, I additionally find that the use of the Premises for alpaca keeping and breeding, although agricultural in nature, has placed new land into agricultural use without permission from either of the Conservation Commissions.

Conclusion

Based on the evidence presented at the informal hearing, including the Motion and materials attached to the Motion provided by Mr. DiPietro post-hearing), and for the foregoing reasons, I find that the Department did have the authority under the Regulations to issue the Decision to disapprove the Forest Cutting Plan submitted by Mr. DiPietro to the Department.

This decision pertains only to the Forest Cutting Plan submitted by Mr. DiPietro to the Department and the Department's Decision to disapprove that Forest Cutting Plan. It does not pertain to or affect in any manner any other applicable law, regulation, bylaw, order, permit, decision, appeal, legal or administrative proceeding or other legal or regulatory requirement or condition that may be applicable to the Premises or proposed work or activities at the Premises, including but not limited to requirements of the Wetlands Protection Act or the Preliminary Injunction issued by the Court as part of legal proceedings brought by Bolton and Stow against Appellant.



Louis Ross, Hearing Officer