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310 CMR 23.00: RENOVATION OF ABANDONED CRANBERRY BOGS

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23.01: Authority, Jurisdiction, and Purpose

- (1) Authority. 310 CMR 23.00 is adopted pursuant to St. 1996, c. 258 and establishes procedures and performance standards for the renovation of eligible abandoned cranberry bogs.
- (2) Jurisdiction. 310 CMR 23.00 applies to activities associated with the renovation of cranberry bogs abandoned since 1959 on property in agricultural use. Eligible activities which meet the performance standards and other requirements of 310 CMR 23.00 are not subject to any contrary provisions of other state laws or regulations. After completion of the renovation under 310 CMR 23.00, the operation and maintenance of renovated abandoned cranberry bogs is subject to other state laws and regulations as applicable. Local and federal laws apply.
- (3) Purpose. 310 CMR 23.00 is promulgated by the Department to carry out its statutory obligations to establish a permit process and performance standards for the renovation of eligible abandoned cranberry bogs.

23.02: Definitions

Abandoned Cranberry Bog. A cranberry bog that meets the criteria of 310 CMR 23.03.

Activity - Any proposed action associated with the renovation of an abandoned cranberry bog for the purpose of cultivating and harvesting cranberries. Activity does not include the construction of facilities or structures for the purpose of processing cranberries.

Aggrieved Person. Any person who, because of a determination by the Department, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in St. 1996, c. 258.

Agricultural Use. Any land presently and primarily used in production or raising one or more of the following agricultural commodities for commercial purposes:

- (a) animals, including but not limited to livestock, poultry, and bees;
- (b) fruits, vegetables, berries, nuts, maple sap, and other foods for human consumption;
- (c) feed, seed, forage, tobacco, flowers, sod, nursery or greenhouse products, and ornamental plants or shrubs; and
- (d) forest products on land maintained in forest use, including but not limited to biomass, sawlogs, and cordwood.

Additionally, land in agricultural use means land presently and primarily used in a manner related to, and customarily and necessarily used in, producing or raising such commodities, including but not limited to: existing access roads and livestock crossings, windbreaks, hedgerows, field edges, bee yards, sand pits, landings for forest products, fence lines, water management projects such as reservoirs, farm ponds, irrigation systems, field ditches, cross ditches, canals/ channels, grass waterways, dikes, subsurface drainage systems, watering facilities, water transport systems, and water storage systems; agricultural composting sites, agricultural storage and work areas; and land under farm structures. Land in agricultural use may lie inactive for up to five consecutive years unless it is under a U.S. Department of Agriculture (U.S.D.A.) contract for a longer term pursuant to the Conservation Reserves Program (the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation and Trade Act of 1990; and 7 CFR 1410), or it is used for forestry purposes similar to those described in 310 CMR 10.04: Agriculture(b)14. through 17.

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Applicant. A person proposing any activity associated with the renovation of an eligible abandoned cranberry bog.

Area of Critical Environmental Concern. An area designated by the Secretary pursuant to M.G.L. c. 21A, § 2(7) and 301 CMR 12.00.

Cranberry Bog or Bog. An area actively cultivated for the production of any variety of cranberry (vaccinium).

Department. The Massachusetts Department of Environmental Protection.

Interests Identified in St. 1996, c. 258 - To protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries.

Navigable stream. Any nontidal river or stream on which public funds have been expended for stream clearance, channel improvement, or any form of flood control or prevention work, either upstream or down stream within the river basin, except for any portion of such river or stream which is not normally navigable during any season, by vessel including canoe, kayak, raft, or rowboat.

Person. Any agency or political subdivision of the Commonwealth or the federal government, public or private corporation or authority, individual, partnership or association, or other entity, including any officer of a public or private agency or organization.

Rare and Endangered Species Habitat - Areas within estimated habitat as indicated on the most recent Estimated Habitat Map of State-Listed Rare Wetlands Wildlife published by the Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program or rare animal or plant species as identified by the Department or the Natural Heritage and Endangered Species Program.

Rare species - Vertebrate and invertebrate animal and plant species officially listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife under 321 CMR 8.00.

Renovation. The restoration for the active cultivation of any variety of cranberry of an area formerly cultivated as a cranberry bog.

Vernal Pool - A waterbody that has been certified by the Massachusetts Division of Fisheries and Wildlife as a vernal pool or identified by the Department and determined to be a vernal pool. Vernal pool habitat means confined basin depressions which, at least in most years, hold water for a minimum of two continuous months during the spring and/or summer, and which are free of adult fish populations.

Zone II. the area of an aquifer which contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation). It is bounded by the groundwater divides which result from pumping the well and by the contact of the aquifer with less permeable materials such as till or bedrock. In some cases, streams or lakes may act as recharge boundaries. In all cases, Zone II shall extend upgradient to its point of intersection with prevailing hydrogeologic boundaries (a groundwater flow divide, a contact with till or bedrock, or a recharge boundary). For public water supply wells that lack a Department-approved Zone II, the Department will apply an interim wellhead protection area (IWPA). This interim wellhead protection area shall be a ½ mile radius measured from the well or well field for sources whose approved pumping rate is 100,000 gpd or greater. For wells that pump less than 100,000 gpd, the IWPA radius is proportional to the well's approved daily volume which may be calculated according to the following equation: IWPA radius in feet = [32 x pumping rate in gallons per minute] + 400.

23.03: Eligible Abandoned Cranberry Bogs

310 CMR 23.00 applies only to activities associated with the renovation of cranberry bogs which :

- (1) Are on property in agricultural use as of August 7, 1996 and until the time of application. The abandoned bog must be located on a lot where the land is in agricultural use or on certain adjacent land (either directly adjacent or across a right of way) owned by the applicant on August 7, 1996, or in which the applicant has an ownership interest. Such property adjacent to land in agricultural use shall be eligible only if such adjacent property consists of abandoned cranberry bogs and has not been developed for other purposes but would otherwise be ineligible solely because it is not in agricultural use.
- (2) Were abandoned on or after January 1, 1959;
- (3) Are not located within a Zone II or within the watershed of a surface public water supply designated in 314 CMR 4.00, to protect the public water supply interest of St. 1996, c. 258;
- (4) Are not located within an Area of Critical Environmental Concern;
- (5) Do not contain a navigable stream as defined by M.G.L. c. 91; and
- (6) Do not exceed five acres within any three year period on land in common ownership (*i.e.*, for the total acreage of land owned by the applicant or in which the applicant has an ownership interest). The acreage of renovation includes all areas of abandoned cranberry bogs altered by renovation and construction activities. An applicant may apply for renovation of up to five acres of additional eligible bogs in each subsequent three year period.

23.04: Procedures

- (1) Application Requirements - An applicant shall submit an application on the forms in the Abandoned Cranberry Bog Renovation application package available from the Department. The application shall be prepared in accordance with instructions contained in the Department's application package and submitted to the Southeast Regional Office. A copy of the application shall be sent to the Natural Heritage and Endangered Species Program of the Department of Fisheries, Wildlife and Environmental Law Enforcement concurrently with the submission of the application to the Department. A copy of the Conservation Farm Plan approved by U.S.D.A. Natural Resources Conservation Service shall be submitted with the application. A copy of the application shall be sent at the time of submission to the conservation commission in the city or town where the abandoned cranberry bog is located. Failure to complete an application where required, to provide additional information required when an application is deficient, or to notify other agencies with jurisdiction where required shall be grounds for denial of a permit. The applicant has the burden of demonstrating that the criteria of 310 CMR 23.00 have been met. The Department will conduct a site visit unless the Department determines it is not necessary.
- (2) Fee and Review Schedule - The fee and regulatory review schedule for actions by the Department in the review of an application are set forth in the Timely Action Schedule and Fee Provisions at 310 CMR 4.00.
- (3) Public Notice - Within ten days of submitting an application to renovate an abandoned cranberry bog, the applicant shall publish a public notice of the application in a newspaper of general circulation within the area of the proposed activity. The public comment period shall begin upon publication of the public notice and shall extend for 21 days unless a longer time is specified in the public notice. The public notice shall contain:
 - (a) the name and address of the applicant and the property owner, if different;
 - (b) the location of the proposed activity;
 - (c) a brief description of the activity, including the acreage of renovated bog;
 - (d) the name and address of a person from whom additional information may be obtained and a statement that the application is available for review at the office of the conservation commission;

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- (e) the 21 day time period within which the public may comment;

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(f) a statement that comments should be sent to the Southeast Regional Office, Department of Environmental Protection, 20 Riverside Drive, Lakeville; and

(g) a statement that any ten persons of the Commonwealth or any aggrieved person who have submitted written comments may also appeal the Department's permit decision and that failure to submit written comments before the end of the public comment period may result in the waiver of any right to an adjudicatory hearing.

(4) Abutter Notice. A copy of the public notice shall be sent by certified mail or hand delivered to owners of abutting land located within 1000 feet of the renovation activity.

(5) Public Hearing - The Department may conduct a public hearing upon request or upon its own initiative. The Department shall publish notice of the public hearing in the same manner as public notice of the application, at least 21 days but not more than 30 days in advance of the public hearing.

23.05: Performance Standards

(1) No renovation shall be permitted if it would adversely impact the habitat of rare animal or plant species as determined by the Natural Heritage and Endangered Species Program or the Department. No alteration of a vernal pool shall be allowed.

(2) All activities shall be conducted in accordance with U.S.D.A. Natural Resources Conservation Services (NRCS) Standards and best management practices, available from the Massachusetts Cranberry Experiment Station as approved by NRCS, as applicable. The cranberry operation shall have a Conservation Farm Plan approved by the NRCS prior to application for renovation activities.

(3) A tail water recovery system shall be established as necessary to protect water quality downstream. The system shall be able to retain on site a volume of water equal to the capacity of the bog for at least five days prior to discharging into a pond, river, or wetland. A by-pass canal shall be constructed and maintained as necessary to isolate naturally flowing water away from the bog area. The by-pass canal shall be constructed within the existing dike system or in an upland area. Bypass canals shall be provided with fish passage structures or adequate flows to protect anadromous fish runs.

(4) No cranberry bog renovation activities which will produce siltation or obstruct flows are allowed between March 1 and June 30 or between September 1 and October 31 in areas with anadromous fish runs as identified by the Division of Marine Fisheries. Water intake structures on anadromous fish runs shall have screens with a maximum of ¼ inch mesh and intake velocities cannot exceed ½ cubic foot per second. Adequate flows and water quality shall be maintained during spawning and down running periods of anadromous fish.

(5) No cranberry bog renovation activities shall cause an increase in flood elevations on adjacent or other downstream properties. To conserve water within the bog, the construction should be laser leveled or its equivalent to six inches.

(6) Renovation of abandoned cranberry bogs shall not result in any filling of wetlands or water bodies except that which necessarily occurs as a result of normal renovation practices or the repair or replacement of dikes and water control structures. Alteration of bordering vegetated wetlands that were not in agricultural use on or before January 1, 1959 is prohibited. Any fill shall be composed of suitable material and properly maintained to prevent erosion or other nonpoint sources of pollution. All permanent and temporary alterations shall be properly stabilized to prevent erosion.

(7) Renovation of an abandoned cranberry bog shall include mitigation to protect wildlife habitat by one or a combination of the following:

(a) 1:1 replication for wetlands altered. The replacement area must be substantially equivalent to the abandoned bog in terms of ground and surface water elevations, horizontal configuration, and general location. At least 75% of the surface area shall be reestablished with indigenous wetland plant species within two growing periods;

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(b) implementation of a wildlife habitat enhancement plan approved in writing by the Department and designed to promote wildlife habitat to compensate for the habitat lost to renovation activities; or

(c) for every acre of renovated bog, an equal or greater area of undisturbed land or land managed to enhance wildlife habitat values is protected from development through a conservation restriction for the duration of cranberry production at the cranberry bog.

(8) Any activities must be directly related to the cultivation and harvesting of cranberries. If a renovated bog is subsequently abandoned, the natural hydrology shall be restored.

(9) Activities shall not be permitted in the rare circumstances that the criteria of 310 CMR 23.05(1) through (8) are met but the renovation will result in substantial adverse effects on the interests identified in St. 1996, c. 258.

23.06: Permits from the Department

The Department will issue a permit to an applicant who meets the criteria of 310 CMR 23.00 and deny a permit if the criteria are not met. The permit shall contain:

(1) the name and address of the applicant, the address of the proposed activity, and the Transmittal Number and date of the Department's permit;

(2) any conditions deemed necessary by the Department to ensure that the performance standards of 310 CMR 23.05 are met and to protect the interests identified in St. 1996, c. 258;

(3) the date the work may begin. No activity may begin prior to the expiration of the appeal period or until a final decision is issued by the Department if an appeal is filed;

(4) a requirement that the applicant shall request in writing and obtain a certificate of compliance from the Department within five years of permit issuance, certifying that the activity was completed in compliance with the permit. The Department may grant an extension of no more than three years for just cause;

(5) a requirement that the permit and the certificate of compliance shall be recorded at the Registry of Deeds. The Department will provide a copy of the permit to the conservation commission; and

(6) notification of the right to request an adjudicatory hearing as described in 310 CMR 23.07.

23.07: Appeals

(1) Right to Appeal. Certain persons shall have a right to request an adjudicatory hearing concerning permit decisions by the Department:

(a) the applicant or property owner;

(b) any aggrieved person who has submitted comments during the public comment period; and

(c) any ten persons of the Commonwealth pursuant to M.G.L. c. 30A where a group member has submitted comments during the public comment period.

Any aggrieved person or any ten persons of the Commonwealth may appeal without having submitted written comments during the public comment period only when the claim is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice.

(2) Notice of Claim. Any notice of claim for an adjudicatory hearing must be accompanied by a filing fee as specified in 310 CMR 4.06 and be sent by certified mail or hand delivered to the Office of Administrative Appeals of the Department of Environmental Protection, postmarked within 21 days of the date of the permit.

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(3) Contents of Claim. Any notice of claim for an adjudicatory hearing must include the following information:

- (a) the Transmittal Number and the name of the applicant and address of the project;
- (b) the complete name, address, and telephone number of the party filing the request; the name, address and telephone number of any authorized representative; and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 310 CMR 23.02;
- (c) a clear statement that an adjudicatory hearing is being requested;
- (d) a clear and concise statement of facts which are grounds for the proceeding, the specific objections to the Department's permit decision, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the permit decision; and
- (e) a statement that a copy of the request has been sent by certified mail or hand delivered to
 1. the applicant;
 2. the owner, if different from the applicant;
 3. the Southeast Regional Office of the Department.

23.08: Enforcement

Failure to comply with 310 CMR 23.00 or a permit issued by the Department under 310 CMR 23.00 shall be enforceable pursuant to M.G.L. c. 21A, § 16 and 310 CMR 5.00.

23.09: Effective Date and Severability

- (1) Effective Date. 310 CMR 23.00 shall take effect May 2, 1997.
- (2) Severability. If any provision of any part of 310 CMR 23.00, or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 310 CMR 23.00.

REGULATORY AUTHORITY

310 CMR 23.00: St. 1996, c. 258.

(PAGES 857 THROUGH 860 ARE RESERVED FOR FUTURE USE.)