

The Simon Law Firm

A LEGAL PROFESSIONAL ASSOCIATION

1300 EAST NINTH STREET 1717 PENTON MEDIA BUILDING CLEVELAND, OHIO 44114-1503

PHONE 216.575.1002 FAX 216.575.1556

September 4, 2002

VIA OVERNIGHT MAIL

Molly Holt, Esq.
Department of Commerce
National Oceanic & Atmospheric Administration
General Counsel for Ocean Services
SSMC-4, Room 6111
1305 East-West Highway
Silver Spring, MD 20910

RE: Barnes Nursery Inc.

Dear Ms. Holt:

Enclosed please find the original of Appellant Barnes Nursery Inc.'s Initial Brief which was filed with your Office today (via telecopier).

Please contact us if you have any questions.

Sincerely,



Maryann Schultz Kuzila
Paralegal

Enclosure

UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF THE SECRETARY

see'd up
SEP - 4 2002

In Re: Barnes Nursery Inc.)
)
)

APPELLANT'S INITIAL BRIEF

For its initial appeal, Barnes Nursery Inc. hereby states as follows:

STATEMENT OF FACTS

A. Permitting History

Barnes Nursery Inc. ("Barnes") has operated a commercial nursery at 3511 West Cleveland Road, Huron (Erie County), Ohio for more than fifty (50) years. As is the case with any agricultural operation, Barnes cannot remain in business without access to water.

The Barnes property is bounded to the north by East Sandusky Bay. This Bay is connected to Lake Erie. Until the late 1990s, there was an abundance of water in East Sandusky Bay that was accessible to Barnes for agricultural purposes. An intake channel located on Barnes' property collected water that was distributed throughout Barnes' agricultural operations by a large pump located adjacent to the intake channel.

In the late 1990s, water levels in Lake Erie began to drop. In dry late-summer months, Barnes began to encounter difficulty having enough water for irrigation purposes. Barnes thus needed to find a way to capture water from East Sandusky Bay in order to stay in business.¹ On

¹ Barnes has exhaustively investigated obtaining water for agricultural purposes from sources other than East Sandusky Bay. There is no access to a sufficient amount of ground water. The use of municipally-supplied water is not practical because municipal watering bans have historically been imposed during just the times in late-summer when Barnes most needs access to water for irrigation purposes.

June 19, 2000, a group of property owners headed by Robert W. Barnes applied for a permit issued by the U.S. Army Corps of Engineers under the authority of Nationwide Permit 27 (Exhibit 1).²

In the June 19th Corps permit application, the "purpose" for the construction of the Project was to create deep water habitat and nesting islands for water fowl. During meetings with the Corps, Barnes made it clear that the construction of the Project would also allow Barnes to have access to water needed for agricultural operations.

On June 20, 2000, the Corps issued a permit to Barnes (Exhibit 2). This permit allowed Barnes to remove accumulated sediment, and install the water control berm eventually constructed as part of the Project. Barnes began construction of the Project only after receiving this approval from the Corps. Construction of the Project was conducted in strict compliance with the terms of the Corps permit.

In July 2000, the Ohio Environmental Protection Agency asked Barnes to voluntarily cease further construction activities while Ohio EPA's concerns about the Project could be addressed (Exhibit 3). Barnes immediately stopped work on the Project. The Corps' Nationwide Permit was eventually revoked.

On March 13, 2001, Barnes applied to the Corps for an after-the-fact Individual Permit (Exhibit 4). Throughout 2001, the Corps conducted an intensive review of Barnes' application for the issuance of an after-the-fact permit. During the summer and fall of 2001, Barnes – at the

² The project described in the Corps permit extended over properties owned by Jim Corso, Chuck Corso, Cedar Point, Inc., John Murray and Barnes. The applicant for the initial permit was thus designated as "CCCMB." Each of these adjoining property owners have given written consent to the construction of the Barnes project. Robert W. Barnes filed the application on behalf of CCCMB.

request of the Corps – retained numerous experts and consultants to provide information to the Corps concerning various aspects of the Project. On June 12, 2001, the Corps conducted a public hearing on the Barnes' after-the-fact permit application.

On December 7, 2001, the Corps issued a provisional permit to Barnes (Exhibit 5). This provisional permit would allow Barnes to maintain the current excavated channel, and to take other action to enhance the appearance and functionality of the Project.

In stark contrast to the transparent review of the Project conducted by the Corps, the Ohio Department of Natural Resources ("ODNR") has conducted no formal public inquiry into whether the Barnes Project is consistent with Ohio's Coastal Management Program.³ ODNR conducted no public hearing, requested no input from Barnes' experts and consultants, and afforded Barnes little (if any) opportunity to participate in the process that lead ODNR to conclude that the Barnes Project was not consistent with Ohio's Coastal Management Program. In sharp contrast to the open, public process conducted by the Corps, ODNR made a closed-door decision that the Barnes Project should not be allowed to exist.

B. The Barnes Project

No series of photographs or verbal or written material can adequately describe the Barnes Project as it sits in its current half-completed state. Over the past two years, Barnes has welcomed State and federal regulators, newspaper reporters, environmental activists, vocal (and occasionally hostile) opponents of the Project, and any other member of the public to visit the Project site. Should the Secretary or his designee(s) wish to visit the Project, arrangements can

³ Ohio's Coastal Management Program can be found in Chapter 1506 of the Ohio Revised Code, and the regulations promulgated thereunder.

be made by contacting the undersigned counsel.

As constructed before work was stopped in 2000, the Project consists of a channel excavated entirely on private property across the northern property lines of Barnes and several of its neighbors. The excavated channel is approximately fifty (50) feet wide, and the bottom of the channel is approximately 3.4 feet below Low Water Datum ("LWD"). The material excavated from the channel has been placed into a berm that extends along the northern boundary of the excavated channel. This berm rests entirely on private property owned by Barnes and its neighbors. The top elevation of the berm is approximately 7.6 feet above LWD.

The berm is fully vegetated. There is an active habitat for fish, birds and other animals. As currently constructed, the Barnes Project has dramatically improved the neighboring habitat. Barnes is aware of no study, report or opinion issued by any federal, State or private entity that concludes that the Barnes project -- as constructed -- has had any adverse impact on any wetland or upon any surface water, or upon any plant or animal species. The Barnes project is visible in only two ways: by standing on property owned by Barnes and its neighbors or by flying over the Project in a small airplane. Otherwise, the Barnes project cannot be seen by any person.⁴

As currently constructed, the Barnes Project acts as a reservoir holding enough water to meet Barnes' agricultural watering needs for approximately five to seven days. Lake water levels in Lake Erie were higher in the spring of 2002 than was originally forecast, but the summer of 2002 has been generally dry in northern Ohio. The summer of 2001 was also dry, and water levels in Lake Erie in 2001 were significantly lower than they had been in previous years. But

⁴ The water depth in East Sandusky Bay is such that no navigation of the Bay is possible. The depth of water in the Bay is rarely more than a few inches.

for the water contained in the Project, Barnes would not have been able to water its crops consistently during the summers of 2001 and 2002.

The water contained in the Project has allowed Barnes Nursery to remain in business – and to keep hundreds of persons employed in Huron County, Ohio. If water levels in the Great Lakes continue to fall (as is predicted), and if the Barnes Project is not allowed to exist, then Barnes Nursery will be forced to either modify or abandon its agricultural use of its property. Any such modification or abandonment of the use of Barnes' property will result in the loss of jobs.

STATEMENT OF THE CASE

On June 11, 2001, the Ohio Department of Natural Resources concluded that the Barnes Project was not consistent with Ohio's Coastal Management Program, Ohio Revised Code Chapter 1506 (Exhibit 6).

Pursuant to 15 CFR Section 930, Subpart H, Barnes has timely perfected the within appeal.

LAW AND ARGUMENT

The Coastal Zone Management Act ("CZMA"), 16 U.S.C. Section 1451 *et seq.*, was enacted in 1972. The CZMA does not impose a blanket restriction on the ability of property owners to conduct commercial activity in coastal zones. Instead, the CZMA requires the balancing of a number of factors in order to:

1. Preserve, protect, develop, and, where possible, restore and enhance the resources of coastal zones;
2. Encourage and assist the 28 coastal states participating in the Coastal Zone Management Program to achieve wise use of land and water resources,

giving full consideration to ecological, cultural, historic, and aesthetic values, as well as the need for compatible economic development;

3. Encourage the preparation of plans to provide for the protection of natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas and improved predictability in governmental decision-making; and
4. Encourage the participation, cooperation and coordination of federal, State, local, interstate and regional agencies affecting the coastal zone.

The State of Ohio has developed a coastal zone program pursuant to the CZMA. Ohio's Coastal Management Program Document and Final Environmental Impact Statement was published in April 1997. This document describes the Ohio Coastal Management Plan.

On June 11, 2001, ODNR sent to Barnes a letter notifying Barnes – for the first time – that ODNR had “completed its formal consistency review of your proposed project.” (Exhibit 6 at p. 1). ODNR's determination that the Barnes project is not consistent with several ODNR Policies came as quite a surprise to Barnes. No effort had been made by ODNR prior to June 11, 2001 to have a meaningful dialogue with Barnes concerning the Project.⁵

It is thus no surprise that ODNR's consistency determination is riddled with gross factual inaccuracies, scientific blunders and unsubstantiated conclusions. The attached affidavit of Dr. Charles E. Herhendorf, Emeritus Professor of Oceanography at Ohio State University details the numerous inaccuracies contained in ODNR's consistency determination (Exhibit 7). Dr. Herhendorf has vast experience in the study of Lake Erie, having served as Ohio State's Director of the Center for Lake Erie Area Research from 1971 through 1988. Dr. Herhendorf has been

⁵ Prior to June 11, 2001, Barnes and its representatives had attempted to engage ODNR in a conversation about the Project. ODNR failed to participate in meetings held between the Ohio Attorney General's Office and Ohio EPA convened to discuss the Project.

actively involved as a paid consultant to Barnes during the past several years. Dr. Herhendorf assisted Barnes in the completion of Barnes' after-the-fact permit application submitted to the U.S. Army Corps of Engineers.

Dr. Herhendorf's opinion is that ODNR's consistency objections are "unfounded and that the [p]roject is consistent with [Ohio Coastal Management Plan] policies." (Exhibit 7, ¶ 4). In his affidavit, Dr. Herhendorf dissects ODNR's consistency determination, and uses real science and accurate facts to review the construction and environmental impact of the Project.

In his affidavit, Dr. Herhendorf challenges ODNR's entire approach to reviewing the consistency of the Project. Contrary to ODNR's unsubstantiated conclusions, Dr. Herhendorf concludes that the "[p]roject will both protect and enhance existing wetlands, will create new wetlands and [will] restore damaged wetlands without intruding [upon] existing marshes." (Exhibit 7, p. 8). Dr. Herhendorf thus concludes that "[b]y restoring all disturbed coastal wetlands to their pre-existing condition, [Barnes] is now in compliance with the State's wetland policy." *Id.*

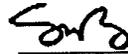
Dr. Herhendorf concludes that the Project provides "additional habitat for rare and endangered plant and animal species." *Id.* Such habitat creation is consistent with the Ohio Coastal Management Plan. Similarly, Dr. Herhendorf concludes that the Project is consistent with the OCMP by fostering efforts to control exotic plant species to preserve the balance and diversity of the East Sandusky Bay ecosystem. *Id.* at p. 10.

In summary, Dr. Herhendorf's affidavit contains an articulate, well-reasoned and scientifically based refutation of ODNR's conclusions as to consistency.

CONCLUSION

For the reasons stated in Dr. Herhendorf's affidavit, Barnes respectfully requests that the Secretary conclude that the Project is not inconsistent with the Ohio Coastal Management Program or with the CZMA. Barnes respectfully requests that it be authorized to maintain and improve the Project in accordance with the terms of the provisional permit issued in December 2001 by the U.S. Army Corps of Engineers.

Respectfully submitted,



Steven D. Bell (0031655)
THE SIMON LAW FIRM, LLP
1717 Penton Media Building
1300 East Ninth Street
Cleveland, OH 44114-1503
Tel. No. (216) 575-1002
Fax No. (216) 575-1556
sbell@esimonlaw.com

Attorney for Appellant

Certificate of Service

This will certify that on this 4th day of September, 2002, a copy of the foregoing Appellant's Initial Brief was sent to Cynthia K. Frazzini, Assistant Attorney General, Environmental Enforcement Section, Fountain Square Building C-4, Columbus, Ohio 43224.



Attorney for Appellant