

**PROVINCETOWN
CONSERVATION COMMISSION
JUDGE WELSH ROOM
December 16, 2014
6:30 P.M.**

Members Present: Dennis Minsky, Lynne Martin, David Hale and Mark Irving.

Members Absent: Barbara Prato (excused).

Others Present: Austin Brandt (Conservation Agent) and Ellen C. Battaglini (Recording Secretary).

Chair Dennis Minsky called the Public Hearing to order at 6:34 P.M.

PUBLIC STATEMENTS:

None.

NEW BUSINESS:

Confirmation of Austin Brandt as Conservation Agent for Provincetown Conservation Commission:

The Commission officially welcomed Austin Brandt as the new Conservation Agent for the Town of Provincetown.

Progress report and discussion on Phragmites removal project located at 67 Harry Kemp Way in Provincetown:

The Commission was in possession of a letter from Independent Environmental Consultants, Inc., signed by Paul Shea and dated December 1st, stating that the removal of the Phragmites at 67 Harry Kemp Way was done in accordance with the approved Order of Conditions, which was issued by the Commission to the property owner, Demetrios Daphnis.

Discussion of potential surplus of Town-owned property located at 311 Bradford Street in Provincetown:

This property is a small parcel of land located west of Allerton Street. The Town asked the Commission if it would be interested in a deed restriction that would keep that parcel in its natural, undisturbed state. The Commission discussed whether a deed restriction was necessary. *Dennis Minsky moved that the parcel of land located at 311 Bradford Street does not require any special deed restriction beyond the protection it already enjoys, Mark Irving seconded and it was so voted, 4-0.*

Discussion of hydraulic clamming activity and relevant Conservation Commission by-law:

Enforcement Order for Thomas Slaughter fishing vessel:

The Commission issued an Enforcement Order to the F/V Tom Slaughter for a violation of Article 8 of the Commission's Regulations regarding hydraulic clamming activity off Herring Cove Beach. Harbormaster Rex McKinsey reported on his experiences regarding the activity and

explained why the Enforcement Order had been issued to the F/V Tom Slaughter. The vessel had been observed operating a hydraulic dredge inside 40' of mean low water, disturbing the substrate of land containing shellfish. This was in violation of Article 8 of the Commission's Regulations. He indicated on a nautical chart that was projected onto a white board in the meeting room where the area in question was located. He also projected pictures of hydraulic clam dredging equipment and explained how it worked. He then showed a video of the F/V Tom Slaughter using its clam dredging equipment off Herring Cove Beach.

He explained that there were two ways that the location of a vessel can be determined, one being by boat. On December 12th, at 9:41 A.M., the depth sounder on the Harbormaster's boat read 33.5' and the F/V Tom Slaughter was located directly behind the boat. Mr. McKinsey explained that a compass, a chart and a laser range finder could also be used to pinpoint the location of a vessel. This method had been used as well to locate the F/V Tom Slaughter while it deployed its hydraulic dredge in the same area. He related what he and Assistant Harbormaster Luis Ribas observed the morning of December 12th and how many bushels of clams he estimated were harvested by the fishing vessel. Since that surveillance on December 12th, both he and Mr. Ribas have continued to monitor the area and have observed additional clamming activity inside the 40' contour, in violation of the Commission's Regulations. He had communicated with Captain Nathan Davis of the F/V Tom Slaughter, as well as the buyer of the product and the owner of the vessel, Monte Rome, concerning the violation regarding hydraulic dredging.

Mr. McKinsey stated that on December 16th, a complaint was received that the F/V Tom Slaughter, and other clam dredging vessels, were in 11' of water. When he arrived on the scene to take measurements, he saw the F/V Tom Slaughter, with another clam dredging vessel not far behind, operating hydraulic dredges in the vicinity of what he determined to be the 12' contour.

Monte Rome appeared to make a statement concerning the Enforcement Order issued by the Commission. He stated that he was not going to respond to the assertions of jurisdiction of the Commission or its alleged authority to impose restrictions or fines as noted in the Enforcement Order. He stated that he was appearing at the request of the Commission. He had consulted two lawyers who were willing to defend his right to fish in the waters off Herring Cove Beach and to address the 'taking' of these waters from the Commonwealth of Massachusetts by the Town of Provincetown. However, neither attorney was able to appear that evening due to previous commitments.

He said he had given the captain of the F/V Tom Slaughter instructions to fish in the waters off Herring Cove Beach at a depth of 40' or greater, in compliance with the Town's regulations. According to the information he received, Captain Davis had never towed his dredge in water shoreward of the 40' contour. He refuted the Harbormaster's contention that the vessel in question was dredging anywhere near the 20' contour. He maintained that the vessel was only floating over the 20' contour. He had been in contact with the Department of Environmental Protection, which was involved in coastal zone management issues, but not involved in shellfish activity in coastal zones. According to Mr. Rome, DEP relied on the Division of Marine Fisheries to set policy for all shell fishing activities. He said that DMF Director Paul Diodati supported surf clam fishing up to the 12' contour in the specific region in question. He stated that DEP indicated that the use of the Enforcement Order form without its permission was improper,

and would give its recipient the impression that DEP approved of the Order. This was untrue and the DEP had not sanctioned the taking of the waters in question. He then said that the scientific studies conducted by the Commonwealth that justified the Town's regulation had many discrepancies. He contended that there was hardly any eelgrass in the vicinity in question because it was a zone of high-energy sand movement and therefore could not support its growth. He claimed that hydraulic clamming was an effective method of harvesting clams with little negative impact on the land beneath the water.

He stated that in December of 2007, Mr. Diodati encouraged the continuation of hydraulic dredging in the Herring Cove Beach area. He said that DMF's current regulations governing surf clamming in that area are protective of the wildlife and shellfish habitat concerns cited in the Town's wetlands regulations and that hydraulic dredging was an acceptable fishing technique for that area. He stated that the Town had not attempted to secure the required permit for the management of surf clams as required by Massachusetts General Laws and the Code of Massachusetts Regulations. He claimed that this was because the Commission knew that DMF would not sanction that kind of a 'taking' of a state-managed habitat. The passage of the Town regulations, Mr. Rome stated, has been threatening surf clam dredgers since 2007. He requested that the Commission 'cease and desist' from its unsanctioned harassment of fishers who needed access to resources managed by the Commonwealth until its actions were permitted by DMF in accordance with state law. He said he intended to lawfully access the mandated resources and fish in accordance with the laws of the Commonwealth, as his fishing vessel has been doing since arriving in Town this fishing season.

He then requested, under the Massachusetts Public Record Law, a broad list of documents.

Captain Nathan Davis made a statement that he had abided by all Provincetown "rules" and that he always fished deeper than the 40' contour line.

Dennis summed up the issue before the Commission as whether or not the F/V Tom Slaughter violated the Town's By-Law against hydraulic dredging by fishing within the 40' contour. Other issues that have been raised, including the alleged 'taking' by the Town of Provincetown of Commonwealth waters, will be addressed at a later time. Mr. Rome disagreed that the other issues raised were ancillary.

The Commission briefly questioned Mr. McKinsey, Mr. Rome and Mr. Davis.

Public Comment: Tony Jackett, former Shellfish Constable for the Town of Provincetown, stated the Harbormaster did not have the authority to issue any citations and the Commonwealth, specifically DMF, overruled any Town By-Laws. Surf clam fishing was an activity that was regulated by the Commonwealth. Fishing vessels have the right to fish after November 1st in 12' of water. The Herring Cove Beach area was traditionally an area open to surf clam fishers who were permitted. The area was too dynamic for the growth of eelgrass. If the citation did get challenged, the Court would have to define the intent of dredging referred to in the By-Law. He speculated that the dredging referred to in that By-Law was not surf clam dredging, but the type of dredging activity, such as, for example, the County did, that moved sand from one place to another.

Dieter Groll, former Conservation Commission chair, stated that the Conservation Commission did not answer to the DMF, but only DEP. In fact, the Commission was an enforcement agent of the Commonwealth. He estimated how much land was covered by the dredging activity within a certain period of time. He described the impact that dredging had on the land beneath the water. He said that DMF contended, and would continue to contend, that there was no impact to that land as a result of dredging activity. He reminded the Commission that the F/V Kimberly Ann got a citation for surf clam dredging activity in 2007, went to Court to contest it and lost. He said that if this type of activity were taking place on land above water near a wetland, the Commission and the public would be paying more attention.

Keith Rose said that Jon Nordahl, the previous captain of the F/V Kimberly Ann, was 'fed up' and just gave in and paid the citation.

Tony Jackett said that Mr. Nordahl paid the fine and did not challenge the citation in Court.

Tom Scherer, a local fisherman, was very familiar with the area in question. He had worked in the area for 25 years and there had been many changes. There were numerous eelgrass beds there at one time, and due to hydraulic dredging activity, they all but disappeared. But the eelgrass beds had started to make a comeback. He said that some of those who deny the existence of eelgrass beds in the area were making observations from boat and not from under the water. They have not done any diving in the area. He said that the tracks left by hydraulic dredging equipment remained for a long period of time and nothing was left behind after an area had been dredged. Some trenches can be up to 5' deep. He suggested taking photographs of the bottom after a dredge had been over it in order to document the damage.

Sara Treadwell had a question of clarification concerning the stopping of a boat while it was still dredging. Mr. Scherer explained his assertion.

Josiah Mayo suggested that buoys be put out on the water in the area in question in order to delineate it as 'off limits' to hydraulic dredging.

Tony Jackett claimed that the Commonwealth had conducted biological surveys with divers and had not found any significant eelgrass in the area. If there were, the area would have been closed to fishing activity already. If the surf clams were being over-fished, the Commonwealth would have stepped in to manage the area and the clams would then replenish themselves over a period of time as they have done for decades. The area had traditionally been harvested in this way and, in fact, the Town used to have a surf clam fishery and used a dry dredge technique, which was even more damaging to the area.

Monte Rome read a 2007 letter from a marine fisheries biologist to Mr. Diodati, which stated that an assessment of existing information of all types found that no eelgrass was present in the inter-tidal or sub-tidal areas ranging from Race Point to Long Point. He suggested that the public trust the regulatory agencies and rely on the evidence they present and assume that they are representing the best interests of the public. In his experience, they have done a great job, above average, in fact, of taking care of the habitat and biology of the Commonwealth.

Dennis reiterated that the issue before the Commission was whether hydraulic dredging activity took place within the 40' contour and any other questions about eelgrass and other topics would be resolved at another time. The Commission had a Regulation that needed to be enforced.

David Hale moved to ratify the Enforcement Order issued by the Conservation Commission to the F/V Tom Slaughter, Stellwagen Bank Fisheries Corp., Howard Monte Rome, for the violation of Chapter 12 of the Provincetown General By-Laws, Mark Irving seconded.

Public Comment: Katherine Davis said that the evidence presented by the Harbormaster that the F/V Tom Slaughter illegally dredged off Herring Cove Beach was unreliable and not credible.

Monte Rome inquired as to how the penalties for violating the Article 8 of the Commission's Regulations had been devised.

Rex McKinsey said that those penalties were associated with the Commonwealth's Wetlands Protection statute and explained that the Enforcement Order is a cease and desist directive and carried no penalties. He has contacted Town Counsel to defend the by-law and the Center for Coastal Studies, in order to use its side scan sonar. He would like to begin to quantify what is going on out there.

Dieter Groll said that the Enforcement Order was a cease and desist order only. No fine was being issued at this point. A lot of issues needed to be hashed out and the Commission should enforce its By-Law. If the issue ended up in Court, then some of these other matters raised could be decided, but DMF was not the agency the Commission had to listen to.

Dennis said that the Commission had options such as whether a Notice of Intent or a restoration plan went along with the Enforcement Order. He suggested that the Order could be amended to include a restoration plan prepared by a qualified professional, such as mapping the bottom or documenting the hydraulic dredge tracks or eelgrass beds.

Dennis Minsky moved to amend the Enforcement Order ratified by the Conservation Commission to the F/V Tom Slaughter, Stellwagen Bank Fisheries Corp., Howard Monte Rome, for the violation of Chapter 12 of the Provincetown General By-Laws with the condition that a restoration plan for the area is prepared, David Hale seconded.

The Commission discussed the motion. Mr. Rome objected to the amended motion, claiming that no damage to the area had been done and that the area had restored itself continually in the past.

Dennis retracted the amended motion.

The original motion to ratify the Enforcement Order was so voted, 4-0.

Dennis stated that the Enforcement Order did not carry a fine, however the Commission could impose fine for a Type I violation for altering a resource area without a permit.

Dennis Minsky moved to impose a fine for a Type I violation for the illegal hydraulic dredging activity that took place on December 12, 2014 off Herring Cove Beach, Mark Irving seconded.

Mr. Rome vehemently objected to the imposition of a fine. Mr. McKinsey recommended to the Commission that it not impose a fine for the Enforcement Order, but suggested that going forward, all parties involved agree that this matter would get resolved through the systems that were already in place. He asked Mr. Davis and Mr. Rome to respect what was out there now in order to avoid a long drawn-out and expensive process.

The motion was so voted, 0-4. The motion was defeated.

Assistant Harbormaster Luis Ribas voiced his opposition to not imposing a fine for the violation.

Comments for Cape Cod Commission hearing on proposed fertilizer regulations:
Dennis moved that the Commission support the proposed Nitrogen Control By-Law – Fertilizer Management Plan and direct the Conservation Agent to convey that support to the Cape Cod Commission, Mark Irving seconded. The Commission briefly discussed the issue.
The motion was so voted, 4-0.

Review and discussion of Environmental Notification Form for Cabral's Wharf Pier Compliance to Provincetown Harbor Management Plan: This discussion was postponed until the next Public Meeting.

Discussion and approval of proposed 2015 Conservation Commission Meeting Schedule: Lynne suggested scheduling more Work Sessions. A Work Session was scheduled for May 5, 2015. The Commission approved the proposed 2015 Meeting Schedule.

MINUTES: November 18, 2014 – *Dennis Minsky moved to approve the language as written, Lynne Martin seconded and it was so voted, 4-0.*

Minutes from 2011: Postponed.

CONSERVATION COMMISSION STATEMENTS:

Dennis received a memorandum regarding the restoration of the Route 6 staging area.

Dennis and Austin met with the Commonwealth's white cedar swamp man. At most, Dennis said, there would be a small demo plot created for educational purposes, as major white cedar swamp restoration would be an expensive process. The Commission would discuss the issue later.

ADJOURNMENT: *Mark Irving moved to adjourn at 8:20 P.M. and it was so voted unanimously.*

Respectfully submitted,
Ellen C. Battaglini

Approved by _____ on _____, 2015
Dennis Minsky, Chair