

**PROVINCETOWN  
CONSERVATION COMMISSION  
TOWN HALL AUDITORIUM  
January 6, 2015  
6:30 P.M.**

**Members Present:** Dennis Minsky, David Hale, Barbara Prato and Mark Irving.

**Members Absent:** Lynne Martin (excused).

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

Chair Dennis Minsky called the Public Hearing to order at 6:30 P.M. Dennis announced that under 'New Business', the Notice of Intent will be heard before the Enforcement Orders.

**PUBLIC STATEMENTS:**

None.

**NEW BUSINESS:**

**Notice of Intent**

Application by **Gregg Connors**, represented by **Mark Burgess**, for a **Notice of Intent** under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, §40, and the Provincetown Wetlands By-Law, Chapter 12. The scope of work will include the proposed reconstruction of an existing dwelling and deck at the property located **101 Commercial Street** in Provincetown.

**Presentation:** Mark Burgess, of Shorefront Consulting, on behalf of Roy Okurowski, of Land and Sea Engineering, appeared to present the application. The existing dwelling and deteriorated deck will be replaced in-kind and re-built in compliance with the new FEMA V Zone regulations. This will require both the dwelling and the deck to be raised by 4.5'. The elevation of the underlying structural member will be 15.8'. The dwelling will be demolished and all piles and timber will be removed and disposed of at an approved facility. Piles or sonotubes for the dwelling and the deck will be installed with an excavator. The piles are helical and will be driven into place. This will be the only disturbance to the land. Access to the property will be from Commercial Street on the northeast side of the premises. All disturbed areas around the site and to the access area will be returned to pre-existing conditions. A performance standards narrative and construction protocol was submitted with the application. The project has a DEP file number.

**Public Comment:** None.

**Commission Discussion:** The Commission questioned Mr. Burgess. The Commission was interested in whether any equipment would be on the beach. Mr. Burgess said that that issue would be discussed at the proposed pre-construction meeting with the contractor.

***David Hale moved to approve the Notice of Intent under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, §40, and the Provincetown Wetlands By-Law, Chapter 12 for work to include the proposed reconstruction of an existing dwelling and deck at the property located 101 Commercial Street with the Standard Order of Conditions and with the Special Conditions that no vehicles are on the beach outside of the designated limit of work as shown***

*on the site plan, that during the de-construction phase of the project all materials are moved off-site at the end of each day, that fencing or other barriers are erected to prevent debris from entering the water and that it is policed on a daily basis, Dennis Minsky seconded.*

The Commission briefly discussed the motion.

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

**Enforcement Orders for F/V Tom Slaughter, F/V Aimee Marie, F/V Sea Fox and F/V Sentinel:**

Attorney Gregg Corbo, Town Counsel, explained that the Commission was conducting a Public Hearing to determine whether Enforcement Orders should be issued to the F/V Tom Slaughter, the F/V Aimee Marie, the F/V Sea Fox and the F/V Sentinel, and their owners, based on violations of the State Wetlands Protection Act and the regulations of the Department of Environmental Protection, as well as the Town's Wetland By-Law and the regulations of the Conservation Commission.

Dennis requested that any owner, or representative, of the four fishing vessels that are the subject of the Enforcement Orders identify themselves. Seth Wahlstrom, owner/captain of the F/V Sentinel, Attorney Stephen Ouellette, representing the F/V Sentinel, and Nate Davis, Captain of the F/V Tom Slaughter did so.

Attorney Corbo stated that allegations that the fishing vessels in question were conducting hydraulic dredging activities within a resource area subject to the jurisdiction of the Commission would be discussed. He then defined the jurisdiction of the Commission. He added that pursuant to the Town's Wetland By-Law, no person can conduct hydraulic dredging within the Commission's jurisdiction without making a proper filing with the Commission. In addition, under the Commonwealth's Wetlands Protection Act and 310 CMR 10.02, no person can conduct dredging activities in a resource area without making a proper filing and having the approval of the Commission. There are additional requirements for activities occurring within lands under the water, under the ocean and in the near-shore areas that set certain performance standards for this type of work. It is his contention that those performance standards had not been met by any of the fishing vessels in question.

Attorney Corbo introduced Harbormaster Rex McKinsey who will provide background information about the effect of hydraulic dredging on the resource areas and give evidence of violations by each of the four fishing vessels. Subsequently, representatives or owners of the four vessels would be given the chance to present evidence in their defense and public comment would be taken.

Mr. McKinsey presented additional evidence in his continuing investigation of hydraulic dredging activity off Herring Cove Beach. He had presented evidence at the December 16th Conservation Commission meeting, when the Commission was considering an Enforcement Order against the F/V Tom Slaughter. He displayed a chart of the Herring Cove Beach/Long Point areas that showed a colored line representing a trip he took with Mark Borelli, of the Center for Coastal Studies, through this area using a side-scan sonar on December 23<sup>rd</sup>. He showed a diagram of the parts of a hydraulic dredge and explained how it worked. Mr. Borelli, who runs the sea floor mapping program at CCS, explained how a side-scan sonar system works

and presented images that were taken on the trip that took place on December 23<sup>rd</sup>. He explained what the images represented. In the disturbed areas that were mapped, scouring with troughs 6-8' wide and 1-2' deep in less than 20' of water, were visible.

Mr. McKinsey then showed a video taken by a staff diver in the Harbormaster's Office off Herring Cove Beach showing the troughs created as a result of recent hydraulic dredging activity. The dive was conducted at about 30'. He explained that the ocean bottom in this area is mostly compacted sand. He pointed out bottom-anchored vegetation, which was a variety of red algae, broken shells, dead sea worms, sand dollars and crushed razor clams in the video. He reviewed how the locations of the boat were determined by various methods and information concerning the calibrations of the instruments used. He offered to submit to the Commission a collection of evidence from each of the boats on each of the dates of violations showing bearings, times and distances from the locations where he and Assistant Harbormaster Luis Ribas were observing and determining position. Attorney Ouellette questioned the validity of the bearings that Mr. McKinsey collected. Mr. McKinsey explained that great care was taken when using a magnetic compass, in terms of proximity to metal objects, to determine locations. The same compass, binoculars and laser range finder were used in every instance.

Mr. McKinsey presented evidence concerning the mass of clams that were being removed from the area. He showed a picture of cages, which each held about 32 bushels of clams, used by the fishing vessels. From observations of the fishing vessels off-loading activities on MacMillan Wharf, he estimated that approximately 211 bushels to date had been collected, totaling 12,660 cu. ft. of biomass. The value of those clams was determined to be about \$120,000.

Mr. McKinsey next showed a video that was taken from Herring Cove Beach of the F/V Tom Slaughter using his dredging gear. He explained that the images allowed the viewer to get an idea of the amount of pressure that was being forced into the sand beneath the water by the hydraulic mechanism of the dredge.

Attorney Corbo suggested that the Commission review, for each fishing vessel, each of the alleged instances of their hydraulic dredging activities in the resource area. Mr. McKinsey presented a contour map with various marked locations of the four fishing vessels, each represented by a different colored triangle, at different times and showing their location in relation to various depths off Herring Cove Beach. He gave the date, the time, the vessel and the depth of each triangle shown on the contour map. He then explained how the triangles were plotted on the map. The Commission questioned Mr. McKinsey about his presentation.

Craig Thatcher, North District Ranger of the National Seashore, said he was interested in the data presented. He was aware that hydraulic dredging had been occurring recently near the boundaries of the Cape Cod National Seashore. He was informed of two instances when hydraulic dredging took place within the legislative boundaries of the National Seashore. Whereas the Harbormaster was concerned with depths, the Seashore was concerned with distance from mean high tide. The legislative boundary of the Seashore is a quarter of a mile from mean high tide. The Seashore is concerned with protecting resources within its jurisdiction and it has authorization to enforce federal regulations. The hydraulic dredging activities within

the boundaries of the Seashore have not been authorized. He stated that evidence is being collected in regard to the two instances he mentioned.

Attorney Ouellette spoke of his concern about the case. He said that all of the fishing vessels in question were fishing in accordance with the regulations of the Division of Marine Fisheries. He recognized that the Commission had the right to protect shellfish beds and to protect against erosion and other shore-based issues out to the 40' contour. He contended that this area has been fished for over 80 years and included the use of hydraulic dredges and it was more productive than it was 20 years ago. DMF looked at the area in the mid-2000s and determined that the hydraulic dredge had very little impact on the area. The bottom was very dynamic in this area. The owners of the boats in question were just trying to make a living and feed the general public. He alleged that thirteen thousand pounds of food was harvested in the area daily. The clams were a renewable resource, used appropriately and fished sustainably. Year after year the yield has been steady. He alleged that the resource needed to be harvested in order to remain sustainable. He admitted that hydraulic dredging may not be a delicate way of extracting clams, but it was efficient and sustainable. DMF had looked at the issue and it may be time to have a court look at it. He stated that DMF has told the fishermen that they can fish outside the 12' contour from November to May. The Town's regulation pits it against the Commonwealth with fishermen caught in the middle. He claimed that the furrows created by hydraulic dredging disappear within a few months, or one big storm activity, and claimed that there was no evidence that hydraulic dredging was causing any long-term harm to anything.

Seth Wahlstrom said that he has fished in the area up to the 12' contour every year and in accordance with what the Commonwealth allows. He claimed that the Town was losing revenue in dockage by trying to prohibit hydraulic dredging.

Nate Davis said that the trough marks made by hydraulic dredgers were similar to tire tracks made by four-wheel drive vehicles on the beach in that they were temporary. He stated that things such as the Herring Cove Beach parking lot and the breakwater also interacted with the sand. He mentioned that there was debris under the water in this area that didn't belong there and that it had been placed there by a group of fishermen and that, in fact, there were rumors that the Harbormaster had aided in the dumping of that debris.

**Public Comment:** Dieter Groll, former Chair of the Conservation Commission, stated that according to the Commonwealth's law, no person can dredge or alter the ocean or any land under said waters, without filing written notice of his or her intention to remove, dredge or alter to the Conservation Commission. No notice can be sent for permits until approvals required by local by-laws with respect to the proposed activity have been obtained. The Commission and the local by-law have priority, authority and jurisdiction over dredging in the ocean. He said that the Commission's jurisdiction encompassed a large area. He estimated that hydraulic dredging activity churns the equivalent of 10 acres per day per vessel. If even a fraction of that impact were to occur on land, the Commission would require mitigation in some form or another. The Commission was not necessarily prohibiting the activity, but only requiring a filing of a Notice of Intent. Historically, he continued, there had been eelgrass present in the area in question. He said that the public interest would be served by setting reasonable limits in regard to the

frequency, duration and the spatial extent of hydraulic dredging and through sound practices to mitigate its impact and accelerate the ecological recovery of the area.

Dennis stated that the Commission had received letters that would become part of the record. Those included a letter from Attorney Ouellette with an attachment from Dr. Katherine Ford to Paul Diodati dated December 5, 2007, a letter to Mr. Monte Rome from Paul Diodati dated December 11, 2007, and a letter dated April 15, 2008 from Paul Diodati to the Provincetown Conservation Commission. Attorney Ouellette pointed out that a 2007 memorandum written by Paul Diodati was missing and he offered to submit a copy of that letter to the Commission.

The Commission deliberated as to whether Enforcement Orders should be issued to each of the four fishing vessels based on the evidence presented.

***Dennis Minsky moved that based on the facts adduced at this hearing, the Commission finds that Stellwagen Fisheries Corp., F/V Tom Slaughter, has dredged a resource area, i.e. land under the ocean and near-shore area, by use of a hydraulic dredge resulting in an alteration of the resource area. The Commission finds that the resource area is significant to the protection of marine fisheries, the protection of wildlife habitat, storm damage prevention and flood control and that the performance standards of 310 CMR 10.25 have not been met. The work has been done without a proper filing and without the approval of the Conservation Commission, and specifically, the violations have occurred on December 31<sup>st</sup>, twice on December 30<sup>th</sup> and on December 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup>, Barbara Prato seconded.***

The Commission discussed the motion.

That activity, in the absence of the filing of a Notice of Intent, constitutes a violation of Article 8 of the Town's Wetland Regulation, the Town's Wetland Protection By-Law, the State Wetlands Protection Act and the State Regulations. Dennis amended his motion.

***Dennis Minsky moved that based on the facts adduced at this hearing, the Commission finds that Stellwagen Fisheries Corp., F/V Tom Slaughter, has dredged a resource area, i.e. land under the ocean and near-shore area, by use of a hydraulic dredge resulting in an alteration of the resource area. The Commission finds that the resource area is significant to the protection of marine fisheries, the protection of wildlife habitat, storm damage prevention and flood control and that the performance standards of 310 CMR 10.25 have not been met. The work has been done without the proper filing and approval of the Conservation Commission, and specifically, the violations have occurred on December 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, twice on the 30<sup>th</sup>, and on the 31<sup>st</sup>. This activity, in the absence of the filing of a Notice of Intent, constitutes a violation of Article 8 of the Town's Wetland Protection Regulations, the Town's Wetland Protection By-Law, the Commonwealth's Wetlands Protection Act and the DEP Wetlands Protection Regulations and the Commission orders that the activity cease and desist and that the individual submit a restoration plan to be approved by the Conservation Commission, Barbara Prato seconded and it was so voted, 4-0.***

***Barbara Prato moved that based on the facts adduced at this hearing, the Commission finds that Aqua King Fishery, LLC, F/V Sentinel, has dredged a resource area, i.e. land under the ocean and near-shore area, by use of a hydraulic dredge resulting in an alteration of the resource area. The Commission finds that the resource area is significant to the protection of marine fisheries, the protection of wildlife habitat, storm damage prevention and flood control***

*and that the performance standards of 310 CMR 10.25 have not been met. The work has been done without the proper filing and approval of the Conservation Commission in violation of Article 8 of the Town's Wetland Protection Regulations, the Town's Wetland Protection By-Law, the Commonwealth's Wetlands Protection Act and the DEP Wetlands Protection Regulations. More specifically, the violation occurred twice on December 14<sup>th</sup>. Based on these findings the Commission orders that the activity cease and desist and that the individual submit a restoration plan to be approved by the Conservation Commission, Mark Irving seconded and it was so voted, 4-0.*

*Dennis Minsky moved that based on the facts adduced at this hearing, the Commission finds that Patricio Palacios, David Kelly and Mark Smith, as owners of the F/V Aimee Mariel, has dredged a resource area, i.e. land under the ocean and near-shore area, by use of a hydraulic dredge resulting in an alteration of the resource area. The Commission finds that the resource area is significant to the protection of marine fisheries, the protection of wildlife habitat, storm damage prevention and flood control and that the performance standards of 310 CMR 10.25 have not been met. The work has been done without the proper filing and approval of the Conservation Commission in violation of Article 8 of the Town's Wetland Protection Regulations, the Town's Wetland Protection By-Law, the Commonwealth's Wetlands Protection Act and the DEP Wetlands Protection Regulations. More specifically, the violation occurred on December 28<sup>th</sup>. Based on these findings the Commission orders that the activity cease and desist and that the individuals submit a restoration plan to be approved by the Conservation Commission, Barbara Prato seconded and it was so voted, 4-0.*

*Mark Irving moved that based on the facts adduced at this hearing, the Commission finds that F/V Maude Platt, Inc. F/V Sea Fox, has dredged a resource area, i.e. land under the ocean and near-shore area, by use of a hydraulic dredge resulting in an alteration of the resource area. The Commission finds that the resource area is significant to the protection of marine fisheries, the protection of wildlife habitat, storm damage prevention and flood control and that the performance standards of 310 CMR 10.25 have not been met. The work has been done without the proper filing and approval of the Conservation Commission in violation of Article 8 of the Town's Wetland Protection Regulations, the Town's Wetland Protection By-Law, the Commonwealth's Wetlands Protection Act and the DEP Wetlands Regulations. More specifically, the violation occurred three times on December 28<sup>th</sup> and on the 29<sup>th</sup> and 30<sup>th</sup>. Based on these findings the Commission orders that the activity cease and desist and that the individual submit a restoration plan to be approved by the Conservation Commission, Barbara Prato seconded and it was so voted, 4-0.*

Dennis thanked staff for their hard work and diligence in the matter. He also thanked those present for a civil discussion of the issues.

**ADJOURNMENT:** *Barbara Prato moved to adjourn at 8:36 P.M. and it was so voted unanimously.*

Respectfully submitted,  
Ellen C. Battaglini

Approved by \_\_\_\_\_ on \_\_\_\_\_, 2015  
Dennis Minsky, Chair