



# CONSERVATION COMMISSION

## SPECIAL PUBLIC MEETING

2 Bathing Beach Road  
Nantucket, Massachusetts 02554  
[www.nantucket-ma.gov](http://www.nantucket-ma.gov)  
Thursday, April 2, 2020

*This meeting was held via remote participation using ZOOM and YouTube,  
Pursuant to Governor Baker’s March 12, 2020 Order Regarding Open Meeting Law*

**Commissioners:** Ashley Erisman (Chair), Ian Golding (Vice Chair), David LaFleur, Joe Topham,  
Seth Engelbourg, Maureen Phillips, and Mark Beale

Called to order at 5:00 p.m. by Ms. Erisman

Staff in attendance: Jeff Carlson, Natural Resources Coordinator; Joanne Dodd, Natural Resources Office Administrator

Attending Members: Erisman, Golding, LaFleur, Topham, Engelbourg, Phillips, Beale

Town Counsel: George Pucci, K&P Law (audio only)

Agenda adopted by unanimous consent

### I. PUBLIC MEETING

#### A. Announcements

#### B. Enforcement Action

1. \*Sconset Beach Preservation Fund (SBPF) – 87-105 Baxter Road (48-various) Area SE48-2824

Sitting: Erisman, Golding, LaFleur, Topham, Engelbourg, Phillips, Beale

Recused: None

Documentation: Supporting documents, plans, correspondence, and photos. DNR Inspection Report.

Applicant: Steven Cohen, Cohen & Cohen LP

Representatives: Jamie Feeley, Cottage and Castle  
Dwight Dunk, Epsilon Associates Inc.

Discussion: **Carlson** – Two matters: first is the continuation of discussion related to fill that triggered the enforcement and chemical testing and material and second is the SBPF request for waiver from the construction order Nr. 1. For continuity, start with the sand report; it’s the longer on-going issue.

**Cohen** – Gave a brief overview of what led to the enforcement order regarding the mitigation sand and the ensuing sampling reports. Asked the commission to lift restrictions regarding pushing the sand onto the face of the template.

**Dunk** – Reviewed his cover letter presented at the March 4 meeting; that time coliform counts ranged from 3 grams to 90 grams. Counts at Hoicks Hollow ramp which is heavily used were high. South of the installation with natural dunes had among the highest counts up to the 90 range and highest count of fecal coliform. The count on the template has declined since the template has dried.

**Cohen** – Another thing in the report is the information about the debris that was collected; the amount collected would fit into a large wheelbarrow.

**Erisman** – There is some material that is still buried and won’t come out until the sand is pushed over and it comes to the surface.

**Cohen** – The protocols in place now ensure further debris will be gathered.

**Dunk** – The weekly inspections through January and February yielded about a half cubic yard of debris; that was debris that was easily reached. None has been collected for the past several weeks. On Friday, mostly brick was removed from the sand on top of the template.

**Erisman** – Asked about the delivery dates and sizes of loads; the listed sources are vague.

**Feeley** – That is the trucking invoice, which is separate from the analysis.

**Erisman** – Going forward it would be helpful to state where each load comes from.

**Feeley** – We were collecting available sand various sites and it was analyzed at a stockpile location.

**Engelbourg** – There could be a delivery ticket from the source lot to the stockpile lot then another from the stockpile site to the project site.

**Dunk** – Up until now, we’ve been submitting documentation on material delivered to the template.

**Golding** – People new to this might not understand how contaminated the sand was initially; read from an earlier summary. There was a reason for the Enforcement Order due to high contamination.

**Cohen** – The use of the word contamination is highly prejudicial and inflammatory. The coliforms were that which is found in nature; just because it was present doesn’t mean it was dangerous and the right things were done.

**Erisman** – Tests have shown low-levels of contamination. However, what was put on the beach was inappropriate and not compatible material.

**Cohen** – The commission can now put in place any requirements to ensure clean and compatible sand. Asked for a vote on maintenance of the template.

**Erisman** – Wants to wait till all issues are fully discussed. Asked Mr. Carlson to discuss what occurred last week.

**Carlson** – At the end of last week, SBPF applied for a waiver to the Town’s Emergency Order Nr. 1 to do the work should the restrictions be lifted. Some work occurred in rebuilding the Hoicks Hollow ramp and some regrading on top of the template took place and sand was distributed at the top of the tubes; he and Mr. Dunk spoke about that. The Cease and Desist from the Enforcement Order is still in place.

**Dunk** – Without the ramp in place, no work can be done. Explained the results of the first round of sand sampling from March 18. The work on the template did not involve maintenance to cover the tubes; it was spreading the sand to expose and remove man-made materials; sand sloughed off from vibration of equipment. No new sand was brought in. However, there was sand brought to Hoicks Hollow for the ramp, about 100 feet of material.

**Erisman** – Her concern is the submitted information during a week during a national and state emergency; not hearing from the commission is not justification to do work. Both entities should have spoken and responded.

**Cohen** – There wasn’t an assumption that permission was granted by lack of response. The work done was limited to repair of the ramp and preparing the site for debris removal, both of which have no restrictions.

**Erisman** – Asked Mr. Carlson about the wording regarding inspection and removal of debris.

**Carlson** – He will post the exact language on the screen but believes it was visual inspection and removal by hand unless the debris was too large.

**Dunk** – On December 16, 2019 there was discussion which is part of the Enforcement Order; they submitted a protocol for debris removal from the sand.

**Phillips** – She shares Ms. Erisman; it was premature to think it was okay to do this work. The actions being taken are not yet warranted by what the commission has decided thus far. This is a very important project and we need to be able to rely on procedures established in advance.

**Engelbourg** – Asked what the purpose for grading the top of the template and removing the debris and asked about the timing and using machinery.

**Dunk** – The early March storm took out about 6 to 8 feet of the ramp and exposed two layers of geo-tubes as well as the northern end return. We’ve tried to work with staff to ensure the tubes are not exposed for a long period and ensure the sand is free of contamination. We were trying to get the template shovel-ready to be covered in the hopes we would get approval. No sand was intentionally pushed over.

**Engelbourg** – He wants to go on the record saying that sounds like site preparation not maintenance.

**Dunk** – In terms of managing the template, this past winter since December there had been gullying and washout of sand from the template down the face because the template had not been pitched to minimize gullying and erosion of the top. We should have asked for maintenance grading back in December.

**Topham** – Asked if it makes sense that up to 24 hours in advance the SBPF crew send staff an email stating what work is to be performed. He was not aware a machine would be on site.

**Carlson** – The approved Enforcement Action states that there will be daily inspection and man-made debris will be removed by hand; an inspection log is to be completed each day; photos of debris would be attached to the inspection report.

**Erisman** – She is very concerned with SBPF’s ability to follow outlined conditions; we are on a potential 3<sup>rd</sup> enforcement order in six months; that’s “crazy” for a project this size and potential environmental issues.

**Phillips** – On one level this project is fragile; it’s supposed to be maintained to last for years. Looking at the site inspection photos from after the storm to March 20, there’s a constant need for shoring this up and needing more materials and equipment. She had thought this would be a more substantial construction and she’s worried about the problems cropping up. She’s concerned about how this maintenance will be accomplished in the future. She doesn’t feel SBPF and ConCom are always working together.

**Erisman** – Opened the discussion to public comments (via YouTube chat).

**Golding** – Read a letter from R.J. Turcotte, Nantucket Land Council (NLC) regarding continued violations and meeting two failure criteria by SBPF; all data provided by SBPF is called into question. Requested the Commission official acknowledge each violation, determine necessary correction actions, and revisit and further deliberate failure criteria.

**Carlson** – Two questions from Burton Balkind: why the waiver was sought through the Emergency Operations Center and if the applicants has admitted they broke the December Cease and Desist Order.

**Cohen** – The Emergency Operations Team (EOT) request was for any work to be done meeting the emergency protocols; if the maintenance is done, the tubes could be damaged from scour resulting in failure such as a destabilization or breach of the road.

**Dunk** – We had identified that now that material is clear, we requested a response form the Commission through staff if there was further information required prior to resumption of maintenance. Reiterated the reason for work on top of the template.

**Erisman** – What work occurred was not in the clearly defined guidelines.

**Carlson** – From Nantucket Coastal Conservancy: curious what work was requested under Emergency Order Nr. 1, we discussed that already; asked if SBPF discussed the work with anyone on ConCom or staff; asked if Police Chief William Pittman and EOT have the authority to override the Commission; what will the ConCom will do in response to SBPF pushing grey sand onto the beach and thus into the littoral system.

The decision from EOT does not supersede ConCom permits; it's granted against the construction moratorium. Clarified that he is not on the team but is consulted in relation to Natural Resources issues.

**Cohen** – Mr. Carlson was consulted by the EOT; we didn't get permission until after that consultation.

**Golding** – Asked if in the letter to the bldg. Comm and appeal to Chief Pittman, was the Enforcement Order mentioned.

**Dunk** – We provided a bunch of information; doesn't know if the Enforcement Order was mentioned. The request was solely against the moratorium to do maintenance in anticipation of work continuing with the second round of sampling being clear.

**Erisman** – Asked how they assumed the Cease and Desist would be lifted and they wouldn't have to continue the ConCom process. In the background information of the letter provided to Chief Pittman, there was no mention of the December Cease and Desist resulting in the level of maintenance. She doesn't think the EOT would have granted permission if they had been aware of the Cease and Desist and Enforcement Order.

**Cohen** – He doesn't know if its relevant to the moratorium; we were giving them information about a present situation that needed addressing regardless of the ConCom issue.

**Engelbourg** – In his opinion it doesn't matter what the EOT did. The question is whether SBPF violated the conditions of the Cease and Desist. We don't need to get bogged down in the Town's moratorium.

**Carlson** – Clarified that he doesn't have the ability to lift the Cease and Desist without the Commission's approval.

David Iverson expressed concern about the ConCom continuing an agreement with a party that refuses to abide with conditions of the permit. Asked if there will be consequences and if not, what will stop this in the future.

**Phillips** – What bothers her is that it appears to be a way for SBPF to get around the requirements of the established permits. It's not difficult to contact the ConCom and doesn't understand why the SBPF representatives didn't seek ConCom's support for what they wanted to do. ConCom should have known about the waiver request; these actions are not those of a working-together relationship. SBPF didn't even try to formally appeal to the Commission; she sees no reason for that failure.

**Erisman** – Going back to the NLC letter and getting a motion on their point. Also wants Mr. Pucci's opinion about potential fining.

Closed public comment portion

**Erisman** – Asked for a motion.

**Engelbourg** – Thinks the separate violations should be voted upon individually.

**Pucci** – Strongly recommends the separate votes. As follow up, it is important to have a roll-call vote during any meeting by alternate means.

**Carlson** – As far as the first three reporting goes, we've issued enforcement actions and acknowledging them; he doesn't want that to get lost in a new motion.

**Pucci** – He recommends limiting the amount of new things being voted on and leave anything established in the record as is.

**Phillips** – The prior violations are "whereas" clauses that lead to the new violation of the Cease and Desist order. We recognize they are already in the record and it would be simpler to go with the new concern.

**Engelbourg** – Regarding issues with interpolating the negative 5 MLW referenced in NCL letter, it is true it hasn't been done in the way it was conditioned. He wants to discuss that further.

Motion

**Motion to acknowledge SBPF has failed to adhere to a ConCom Enforcement Order and violated the Cease and Desist.** (made by: Golding) (seconded)

Roll-call Vote

Carried unanimously: Beale - aye; Engelbourg - aye; Erisman - aye; Golding - aye; LeFleur - aye; Phillips - aye; Topham - aye.

**Erisman** – Asked about the potential for fining.

**Pucci** – If you're going to impose a fine, it has to be based upon existing provable facts and regulatory authority; you have to clear about what is being fined under State and Local regulations.

**Carlson** – If fining is what you want to pursue, he should draft up the order and the amount based upon current statute; he could have that ready for the next meeting.

**Beale** – We need to make a finding that the work done is in excess of identifying and removing debris and that there was work on the site itself: work on top of the site with equipment moving sand.

**Erisman** – That is covered in the failure to adhere to the Enforcement Order which didn't allow equipment.

**Golding** – At what point do we decide there have been so many failure criteria that we should pull the permit and how long will this go on. It's a pretty continuous history at this point.

**Erisman** – It would be important to formally contact the property owner before we allow anything else to move forward; we should have something from the property owner ensuring there will be no further violations.

**Carlson** – Asked Mr. Pucci's thought on that.

**Pucci** – Right now you have a logistical nightmare in getting some consideration from the property owner, which is represented by 5 Select Board members meeting under the same conditions as ConCom and dealing with the State of Emergency. Like any project where you have potential violations and concern over the future, you would want to consult with the property owner and reach an understanding. You don't want to defer what you think you need to do immediately.

**Carlson** – The Select Board agenda is pretty limited due to the format; it will take longer.

**Erisman** – We are in a State of Emergency, but she still thinks its important to reach out to the Select Board before allowing SBPF to proceed.

**Pucci** – He recommends taking a vote on that. Before he leaves, in addition to any enforcement action, suggested ConCom address any concerns with SBPF if there are any situations of immediate concerns. This is a separate issue from the waivers the EOT issued; the Chief Pittman stated that was solely related to COVID-19 restrictions. If you have a compelling environmental concern, that should be addressed at this time.

**Golding** – He takes Mr. Pucci’s point but this is a problem of SBPF’s making and not something ConCom wants to deal with.

**Pucci** – If there is something compelling that needs to be done to protect interests, you can allow limited work to go forward without prejudice to ConCom’s enforcement rights.

**Erisman** – Now because of the multiple enforcement issues and failure criteria, asked at what point ConCom should say this has failed and should be removed and stopped. Without the property owner weighing in on their perspective, we are at the point she believes they shouldn’t be moving forward.

**Pucci** – You have to be careful and precise about the basis for removal of the project; that is a serious remedy to achieve and requires substantial evidentiary basis to go forward. Expect that order to be challenged.

**Phillips** – We are looking at what’s happening right now and the fact we wouldn’t be talking about this if they hadn’t violated the Cease and Desist. Asked where that puts ConCom in what the next steps should be. Asked about past practices concerning violated orders. She thinks we would want to make a motion to go the property owner as soon as possible and share the current situation and talk about fines and explain that we are looking at ways to ameliorate things.

**Cohen** – (audio cut out)... the most important thing they’ve heard is putting the sand down, keeping the tubes covered, and protect the returns. He doesn’t feel there was a violation of the order but if the ConCom feels there is, there is no reason to put down mitigation sand. Talking to the Town should be a separate issue from what is being discussed here. Asked that the ConCom allow SBPF to push the sand over onto the template. There is no regulatory reason not to allow the contribution sand to be put into place. Aske that each issue be handled separately and proportionately.

**Erisman** – We would have appreciated if they SBPF had sought ConCom permission and not violated the Cease and Desist.

**Pucci** – Stated he had to leave the meeting, and Mr. Carlson can follow up with additional questions.

**Erisman** – We made a motion and voted unanimously the SBPF violated the Cease and Desist. Asked for a motion to speak to the property owner.

**Carlson** – If we are going to draft what fines will look like, Staff could draft something to issue to the property owner in keeping with handling of other enforcement orders. In the past we’ve documented the violations that occurred on the property for the property owner and parties involved. We invited them to participate in how that would be remedied; we can put that into a easy-to-review narrative.

**Engelbourg** – That’s a good strategy.

**Phillips** – She’s concerned because when we issued the Cease and Desist, we knew we were balancing potential damage to the array and turning it into hard armoring; we were concerned about environmental damage and unclean fill. The contamination issue has been addressed but we haven’t had a chance to decide it has been sufficiently dealt with; secondly the question is how much more critical a time are we in now than we were earlier in the year. Feels we’ve gotten of our path determining what steps have been met and if the worry over contamination is truly off our plate. She wants us to go to the Town but doesn’t know what else we need to do regarding fines and enforcement actions.

Discussion about the live-streaming ending; the meeting is still being recorded.

**Dunk** – Following the March 17, 2020 letter providing supplemental sand information, there has been ample time for the ConCom to review the second round of contributory sand; we also requested resumption of the maintenance to protect the tubes from damage. We are asking to be allowed to recover the tubes now so that we can get back to maintaining the array.

**Cohen** – There is no environmental reason not to allow the sand template to cover the tubes. The Commission has the ability to rule on that. Now that we know the sand is clean, it is irresponsible to hold up maintenance.

**LeFleur** – He agrees with Ms. Phillips. It took a lot of work to issue the Cease and Desist with rightful concerns. We should consider taking a vote on whether or not the Cease and Desist should continue.

**Erisman** – Asked for a motion o lift the Cease and Desist and that the fill is proper for use.

**Beale** – Asked if the motion would allow ConCom to proceed with fines against violation of the Cease and Desist. He wouldn’t feel quite right not allowing them to do some work on the site; the permit is hanging by a thread at this time.

**Carlson** – You already made a vote finding the Cease and Desist was violated so aren’t giving up your rights to fine. This is a finding that after the second round of testing showed the sand to be clean.

**Phillips** – In terms of being irresponsible to decide to do what SBPF did in breaking the Cease and Desist, we are doing our best to make a decision in a timely manner. Assuming that we vote to use the existing template sand for the sole purposes for protecting the existing structure, that is in spite of the fact the applicant has failed to meet past requirements.

**Topham** – He agrees with Mr. Beale, this project is hanging by a thread; if the motorized vehicle hadn't been there, we would have had small concerns. They need to protect the array; if it falls apart, that could be very damaging.

**Engelbourg** – If we are going to make a motion to resolve to lift the Cease and Desist, we need to be very clear about what we are allowing and what we are not allowing. He doesn't believe we ever officially accepted SBPF's protocol. We also haven't accepted that the existing material is not hazardous.

**Feeley** – There is enough sand on site to keep the array covered and protect the northern return.

**Golding** – He agrees with Mr. Engelbourg that they use the existing sand; we haven't formalized a protocol for future sand delivery.

**LeFleur** – Should monitor any debris coming out of the sand going over the edge.

**Erisman** – We have lost the connection with Ms. Phillips.

Motion **Motion to Lift the Cease and Desist to protect the structure using material currently on the template enough to keep the array safe and no further material is to be brought in until such time as ConCom speaks with the property owner.** (made by: Engelbourg) (seconded)

Roll-call Vote Carried 5-1: Beale - aye; Engelbourg - aye; Erisman - nay; Golding - aye; LeFleur - aye; Phillips – no vote; Topham – aye

**Dunk** – Agrees with Mr. Carlson's description of the work covered; the question is future maintenance after future storms to protect the geo-tubes. We will notify Mr. Carlson before prior work.

**Erisman** – This allows them to cover it once; if there is a storm in the meantime, they will submit a report.

**Carlson** – The motion doesn't preclude them from requesting work to repair any storm damage.

**Cohen** – Asked for clarification whether they are limited to using it once or limited to using only what is on the template at this time.

**Carlson** – Let's get this covered once; then SBPF is to report back once that is done.

**Topham** – Asked how soon the information can get to the Select Board.

**Carlson** – He can have that in the Commissions hand before the next meeting, two weeks from today.

**Cohen** – We are allowed to use once the sand on the template and to contact Staff to request further work.

**Erisman** – Asked for a motion on the Select Board letter.

Motion **Motion to Issue a letter to the property owner detailing what's going on.** (made by: Beale) (seconded)

Roll-call Vote Carried unanimously: Beale - aye; Engelbourg - aye; Erisman - aye; Golding - aye; LeFleur - aye; Phillips – aye; Topham - aye

**Carlson** – He will put the vote on the work in a narrative to memorialize it. All conditions in place will remain in place. The conditions of SE48-2824 have been in place the entire time; they are subject to all of those as well as additional monitoring.

**Feeley** – It sounds like we can cover with what's on the template at this time. If we need to do work following a storm, asked if they go to Mr. Carlson or the commission.

**Carlson** – Send correspondence to everyone; we will then take action.

**Feeley** – Regarding the on-going monitoring, which was part of the prior Enforcement Order, we stopped that when the moratorium was imposed.

**Carlson** – The daily reporting for the condition of the geo-tubes has to continue; as far as removal of debris, that also has to be documented.

**Feeley** – When we go to the Town for the work waiver, we will explain that ConCom is requiring the monitoring reports.

**Erisman** – It would be appropriate for them to ensure the debris is being removed.

**Cohen** – We only have permission to do maintenance, not the debris check.

**Phillips** – It's more important to have the daily photo documentation so we can see how things have progressed, especially in the case of an emergency.

**Cohen** – We can commit to doing the photos and debris removal during the maintenance; after that, however, we would have to seek additional permission from the EOT for a daily check.

**Erisman** – Her feeling is they should apply for the permit to do the inspection and remove the debris as it becomes exposed.

**Engelbourg** – If a different regulatory authority prohibits meeting our regulatory requirements, that is how it is; however, SBPF should pursue that permission.

**Cohen** – Clarified that he did not suggest he ConCom was being irresponsible, just that not putting down sand would be irresponsible.

**Motion to Adjourn at 7:26 p.m.** (made by: Golding) (seconded)

Roll-call Vote Carried unanimously: Beale - aye; Engelbourg - aye; Erisman - aye; Golding - aye; LeFleur - aye; Phillips - aye; Topham - aye

Submitted by:  
Terry L. Norton