

**CONSERVATION COMMISSION
FAIRFIELD, CONNECTICUT
MINUTES OF CONSERVATION MEETING
February 21, 2013**

The Conservation Commission of the Town of Fairfield held a meeting in Meeting Room II, Second Floor Conference Room, John J. Sullivan Independence Hall, 725 Old Post Road, Fairfield, CT scheduled for 7:30 p.m. on Thursday, February 21, 2013.

MEMBERS PRESENT: Kate Maxham, Vice-Chairman; Catherine O'Donnell, Secretary; Frank Rice; Elizabeth Jones; Letitia Ferguson and Richard Santalesa. **ALTERNATES:** Sam Boyarsky. Also Present: Thomas Steinke, Conservation Director; Annette Jacobson, Conservation Administrator; Edward Jones, Open Space Manager/Wetlands Compliance Officer; and members of the public and press.

MEMBERS ABSENT: Kevin Gumper, Chairman and Felicia B. Watson,

CALL TO ORDER: The meeting was called to order at 7:35 p.m. by Kate Maxham.

APPOINTMENT OF ALTERNATES: Sam Boyarsky

The Chair entertained a motion; Letitia Ferguson *moved* to add an item, "185 Thorpe Street - Open Space Encroachment", to the end of the Agenda; Catherine O'Donnell *seconded* the motion. *Motion passed unanimously*

I. CONSERVATION

A. Bills and Communications

1. Approval of Conservation Commission Meeting Minutes January 17, 2013

Catherine O'Donnell *moved*, and Sam Boyarsky *seconded* to approve the Conservation Commission Meeting Minutes of January 17, 2013. *Motion passed unanimously.*

2. H. Smith Richardson Conservation Fund Trust - Bank of New York Mellon

Kate Maxim reviewed the letters concerning the Trust Fund and Thomas Steinke confirmed that the new Trustee is in place and the fund is now accessible to the commission. Kate Maxim confirmed that any allocations must be approved by the Board of Selectmen, and that previous commitments not dispersed could be submitted for payment or if outstanding approval by the Board of Selectmen.

Thomas Steinke confirmed previous commitments possibly to the Aspetuck Land Trust and the Nature Conservancy. These will be placed on a future agenda for review by the Commission prior to disbursement.

II. OLD BUSINESS

A. Proposed Mill River Remediation at the former Exide Battery Site, 2190 Post Road, Fairfield

1. Railroad Stormwater Drainage System Concerns.

2. January 10, 2013 Public Forum for the Proposed Mill River Remediation at the former Exide Battery Site, 2190 Post Road, Fairfield, CT--Proposed Exide SedRAP for Mill River and Southport Harbor (**Comment Period Ends 2/28/2013**).
3. CT DEEP Tentative Determination to issue a National Pollutant Discharge Elimination System (NPDES) to the Exide Group, Inc. for the Discharge Into The Waters of the State Of Connecticut at 2190 Post Road Fairfield, CT 06824 (**Comment Period Ended 2/20/2013- Note: Shellfish Commission Petitioned for Public Hearing**)

Thomas Steinke made reference to the Conservation Commission's draft comments of February 21, 2013 to Commissioner Daniel C. Esty, DEEP; copies of which were distributed to the Commissioners.

He stated that there were perhaps four main items to be addressed.

The Sediment Remediation Action Plan (SedRAP) submitted to the DEP has a response deadline of Feb28; this SedRAP was predicated on a 2008 Consent Order that only included one of the two drainage systems Exide was required to investigate in the year 2000; the Post Road DOT storm drain and the Railroad storm drain. Exide failed to clean the Railroad drain prior to investigation and was unable to investigate the pipe. Of the seven entries attempted at manholes and pipe outflows for the Post Road and Railroad drains none were successful. The DEP required only the one system on the Post Road to be cleaned for investigation and remediated. It would appear that Exide's Consent Order response is incomplete (2000). Under section A par 25 (SRD-193) the DEP Commissioner has the authority to take what action is necessary to insure a complete review of all variables pertaining to the project.

Of the four items:

The Consent Order needs an addendum to include cleaning and video inspection of the Railroad Drain, comments previously sent to the DEP were received; DEP and Exide indicated that they thought the matter had been addressed. Tom Steinke had contacted DEP staff and they had indicated they would like to meet to go over the information we had that could aid in their understanding, but a meeting has not been scheduled and additional comments have been sent to meet the deadline.

Final comprehensive comments and questions need to be compiled and submitted prior to the deadline. DEP needs to address the incomplete nature of the 2008 Consent Order and also the incomplete nature of the proposed SedRAP submitted by Exide; the incomplete nature and premature submittal of the NDPEs permit application, and the Office of Long Island Program's (OLISP) Tidal Wetlands Structures, Dredging and Fill Permit Application.

Tom Steinke is currently getting down into the details of the applications to compose a final draft of the comments. The commission should consider having a special meeting on Monday, Tuesday, or Wednesday to approve the comments; there is a meeting scheduled with the State Reps and DEEP on Thursday morning.

Kate Maxham suggested, as a commission, telling Tom Steinke to keep going in the direction he is going to finalize the letters and endorse them and considering the deadlines and time constraints to give Tom Steinke some latitude to include the detail to organize his review for

submission by the deadline. Any further Commission comments can be made Monday or Tuesday for inclusion in the submission before February 28, 2013.

A meeting on the entire matter in Hartford will include Senator McKinney's office, Representative's Kupchick, Hwang, and Fawcett, First Selectman Tetreau, Chairmen of Conservation, Harbor Management and Shellfish Commissions, and DEEP. Perhaps Exide representatives will be attending. Comments will be presented at the meeting and hopefully received in advance via email by all concerned parties.

The Final Report for the 28th will draw on:

Shellfish Commission comments on the NPDES, Committee comments will be the basis for specific comments on the SedRAP, the Commission has received general comments on the SedRAP. The Commission hasn't received anything from Tom on the OLISP General Permit which is being piggy backed on the SedRAP.

Prior to any formal motions the Commission asked to hear from members of the public:

William Coleman, 11 Overhill Road, Fairfield, CT

Mr. Coleman recounted his understanding of the history of the Exide factory from its beginning as an aluminum foundry in 1928 to its purchase by Exide in 1948, through its manufacturing period until 1981, and early sediment remediation efforts in 1983. Mr. Coleman read a letter from INCo, Exide's parent company, that INCo inherited a problem that was not of their making when it acquired the Exide Company.

Joy Shaw submitted a letter to the Commission and she also referred to the comments from the Shellfish Commission. She disagrees that if someone buys property that has been polluted that they don't assume responsibility to the community to clean up the contamination.

She felt that the Exide Sediment Remediation Plan is totally incomplete, it's an outline, as it's called a conceptual presentation. She urged the Conservation Commission to be heard in the administrative office -you've got to get the Town Attorney and the First Selectman involved.

Kate Maxham stated that the First Selectman has been approached and will be going to Hartford with the Commissions Thursday the 28th. There is a very active group of people going to Hartford. The Exide Corporation is responsible to do the cleanup when they buy the property.

Kathy Braun, Esq & RTM-8 presented a brief outline and overarching theme of a two-pronged approach. The objectives are a series of recommendations done in any way possible; whether by political means, legal means or whatever means. The recommendations should be those of Mr. Steinke and the different commissions have come up with. The legal means are several options; the Shellfish Commission and the Fairfielders Protecting Land and Neighborhoods have filed petitions with the DEEP; she received a notice today that there is a Public Hearing process being started up in Hartford, there's a status conference scheduled for some time in March. That's the Public Hearing process and the Town Attorney has been copied on that. She believes the DEEP has received a petition with 114 signatures from FairPlan and the Shellfish Commission has submitted their own petition. The Conservation Commission could join these other groups in this process. Once there is a Public Hearing anyone can intervene but the subject matter must be confined to what the DEEP is qualified to handle. This Public Hearing is limited to the discharge permit (NPDES) application.

Unfortunately the SedRAP can't be forced to a Public Hearing as it isn't a formal permit. The OLISP permit is a general permit and can't be forced to a Public Hearing, but does have a public comment period which expires on the 28th.

The other two areas of the legal approach are a potential *mandamus* lawsuit that anybody can pursue; if the DEP is not following its own Consent Decree which is a legally binding document that has been recorded on the Land Records, then they should be forced to follow it. This needs more study from a legal perspective but she has drafted a letter that two-thirds of the RTM Members have signed as individuals from both parties. People are very upset and there aren't two sides to this story – there's one side that we have a responsible party with deep pockets who are supposed to do the right thing, let's make them do it so we don't pay a bigger price down the road. That's the ultimate goal. That's a possibility that the Town or a private party could pursue.

Then there is the Inland Wetland Agency, which the Commission is not sitting as tonight. It would appear that by the time you receive enough information to make a determination then you may be in a very bad position of stopping a whole project that has momentum and is moving along. If there is a way at the coming meeting they can be put on notice that they may need a wetlands permit it would be beneficial. It is not known what conditions will be created on the site once the SedRAP gets underway and they should provide the information now for a determination.

The political end is the other process, Michael Tetreau was going to meet with the DEEP and then the blizzard happened and now they're meeting on the 28th. Many RTM members from both parties are extremely upset – you either do it now and make the private party pay or the residents will be paying later. The fact that they won't do the testing of the railroad drain raises a red-flag. The same thing with not using cofferdams; this would solve the spawning problem and the re-suspension problem; they may be afraid this will trigger an Inland Wetlands Permit and they don't want to go through that whole process.

Both legal and political ends need to be pushed very forcefully; otherwise we will be in the position of just accepting whatever conditions DEEP puts on it. So far it hasn't looked good and that pressure that has been put on has to stay on.

Joy Shaw referred to the 15 page letter that states there's a likelihood or evidence that an Inland Wetlands Permit would be necessary. It would seem to be something the Commission could hang their authority on – Kate Maxham agreed that Tom Steinke tried to address that in the letter that they should be applying for a Inland Wetlands Permit or a Declaratory Ruling.

Kate Maxham asked Tom Steinke what the Shellfish Commission did – did they intervene? Tom Steinke wasn't at the Shellfish Commission meeting but Annette said there was a petition with about 40 signatures, and that was on the NPDES; they sent NPDES comments and SedRAP comments. They also had a motion to have members meet with the First Selectman.

Catherine O'Donnell had a question for Tom Steinke, in the past is there a precedent that the commission itself would be authorized to endorse a plan or is it inherent in the fact that you're sending that letter. This is the first time that this has come up; Tom Steinke was out sick for most of February and he was trying to meet a deadline; that was why a Special

Meeting was suggested. Would a letter of endorsement that we all signed as the Conservation Commissioners help or add emphasis – has it been done in the past? Tom said that if it's predicated on a vote that's in the minutes as an action of the board it suffices. She asked whom will the letter be shared with beyond the people from the state; will it be sent out to the EPA, Washington the regional? The letter will be mailed Certified - Return Receipt Requested to the DEEP Commissioner, emailed to the different units of the DEEP and other parties. Can we go broader to the EPA? Tom said not at this time, you have the DEEP administering the program from the EPA. Not unless you receive an unfavorable decision that comes out of the immediate process; then you can look at the alternatives.

Letitia Ferguson understood that if the DEEP fails to live up to the terms of its own Consent Order then the EPA may have the right to intervene. At this point you don't want to have the Region 1 Administrator come down to look at this - you don't want to alienate them (DEEP) but at the same time wouldn't it be worthwhile making it known it is something we are considering?

Tom Steinke wondered if the DEEP Commissioner has read the Consent Order or has just read the SedRAP. The DEEP is trying to streamline the process under budget constraints. In Exide's SedRAP they acknowledge the sequential post approval permitting process set down in the Consent Order.

Kate Maxham felt that the Commission would defer to the political route but wanted to convey to the DEEP they were willing to go to the next level. It may be premature but since you have had no feedback from them at this point we should allow them to talk after receiving our documents and then if they are not listening we are taking it to the next level. How best to convey that she would leave in Tom's hands.

Richard Santalesa asked if the DEEP had been out to look at the tidemill gates and Tom Steinke responded he was not aware of an inspection, but has been out for a while. Annette said that at the Public Information Meeting that Tonia Selmeski stated that if the tidegates were in bad shape than they could enforce the permit and require maintenance. Tom stated that the tidegates are privately owned and if the owner was unwilling to maintain the gates he could surrender the permit and just give it back to the DEEP.

Richard Santalesa asked if the Harbor Management Commission (HMC) had submitted comments; Annette Jacobson responded that HMC had met earlier in the day and was submitting comments concerning the tidegates and that there was insufficient information in the SedRAP, maybe 16 points were questioned. DEEP seemed to feel these activities were outside the HMC's jurisdiction

Richard Santalesa would like to see the HMC comments, Annette Jacobson had a previous draft from the HMC consultant with notes in the margin from today's HMC meeting; Geoff Steadman was revising the draft to produce a final set of comments to be sent to the DEEP office.

Thomas Steinke referred to the state statutes that govern the HMC that include a provision that applications such as Exide's must be submitted to HMC, as well as TP&Z and Inland Wetlands for review within the Harbor area. Any action that they (HMC) take, if it is negative, requires subsequent specific action by the referral agency to approve it with a super majority. And if it reverses the recommendation it must explain why it did so. HMC believes that since the Exide activities were referred to them then the DEEP must comply

with that referral and receive the HMC recommendations and comply or override with explanation.

Kate Maxham summarized as it applies to the Conservation Commission (CC) and the Inland Wetlands Agency (IWA), the thing they are missing is an Inland Wetlands Permit. Tom Steinke interjected not necessarily; they clearly stated in a meeting with the First Selectman that the Municipal Agency had no jurisdiction in the matter. They said that, after the Chairmen asked Tom Steinke if they would need a permit, and Tom Steinke replied that there wasn't a plan with enough information to make that determination. The procedure is to request a Declaratory Ruling from the IWA by submitting plans showing Regulated Areas and Proposed Activities and ask if they need an IWA Permit, but you can't make them do that; and you would think if they were going to comply with the Consent Order they would have to demonstrate that they are applying for an IWA Permit. They received a referral from the Commissioner that you must apply for Tidal Wetlands, Inland Wetlands, Diversion, NPDES, all of these and they did not indicate whether or not they needed any of those, other than they had filed applications for NPDES and OLISP. But for those permits which they contend they do not need, they didn't submit any reason or Declaratory Ruling. If Exide continues and doesn't submit detailed plans until a successful bid contractor is hired then they are tied to a contractual schedule and every day is a dollar. If they were to create a condition that requires an IWA Permit then that may create an embarrassing situation.

Catherine O'Donnell had one question for Tom Steinke, on Thursday they'll be given all this in advance and they'll have a conversation and you'll be given an indication Thursday as to what their response - how long do you think it will be. Tom Steinke's sense is that the DEEP representatives will listen and get back to you. Catherine O'Donnell asked how long do you think that will be since they were very straight forward about the comment period. Tom Steinke felt within a few weeks. Annette Jacobson asked if we should be asking for any time extensions to reply to the DEEP comments. Tom Steinke felt that the comments that have been made have apprised the DEEP of what the feelings are on these boards, and that a time extension would not add to that; if the SedRAP is incomplete and the Consent Order is incomplete they need to address those before they get down to the applications that are also incomplete. You would need to start back at the beginning in 2008.

Kate Maxham asked for motion from the Commission

Catherine O'Donnell *moved*, and Elizabeth Jones *seconded* that the Conservation Commission agrees in principle with all that has been discussed at past Conservation Commission meetings, that we endorse the fine tuning of those reports by Thomas Steinke, Conservation Director and the inclusion of comments that the Shellfish Commission has articulated, and sending it to the Connecticut DEEP in advance of the meeting that will be held on Thursday, February 28th when it will be reviewed and discussed with the DEEP in person by representatives of the Town and our State Representatives.

Any additional comments can be communicated to Thomas Steinke for inclusion by Wednesday.

Motion passed unanimously

- B.** Superior Plating Co. DEEP Stipulated Judgment No. CV-89-0355556 S, for Remediation of Chromium (Conditional Approval of January 31, 2013)

The item was informational and there were no comments

- C.** Board of Finance 2014 Budget Hearing Schedule

Thomas Steinke stated that the hearing would be held in the Board of Education Building and that the departments are taken in order and that Conservation would probably be discussed between 8:00 and 9:30.

Kate Maxham encouraged all Commission Members to attend.

III. NEW BUSINESS

- A.** Council on Environmental Quality – Recommendations for Legislation

The item was informational and there were no comments

- B.** CT General Assembly Proposed Bill No. 5846 An Act Concerning the Harbor Master Program

The item was informational and there were no comments

- C.** Connecticut Land Conservation Council request to become a 2012-2013 organizational member

Kate Maxham acknowledged that this ties in with the Richardson Fund.

- D.** Southwest Conservation District request for Annual Contribution (see attached).

Kings Mark, etc.

Bring back the approved contributions that weren't disbursed when the Fund was in transition

- E.** 185 Thorpe Street - added to the Agenda by unanimous vote of the Commission

Annette Jacobson explained that this was the proposal for 65 condominium units at the end of Thorpe Street and on the edge of Pine Creek salt marshes. This was reviewed as an Inland Wetland Permit Application and then was reviewed as the Conservation Commission for encroachment on Town Open Space and contamination of this town property. When the Commission reviewed the matter this past year a letter was sent to the Town Attorney requesting that he look into the matter. We have received notice that the TP&Z has scheduled a Public Hearing on the proposal. We have the applicant's document that proves they have chemicals exceeding state standards on Town Property where they have encroached. We would like to offer comments to the TP&Z and oppose the project in the sense that they have not proposed to restore the open space land.

Kate Maxham stated that some of the Commissioners were familiar with the project and that the Commission should offer comments tonight in case the TP&Z hearing goes forward next week.

Thomas Steinke explained that in 2009 the developer came in with a plan that identified the town property that the developer's predecessor had filled on open space marsh property on Pine Creek. And they submitted a plan for remediation of the contamination on their property as well as the town property. It's a few years later and now the developer has notified the Commission he will not restore the town property it's the town's problem - deal with it and they were going to proceed with an application for a zone change for development. The Commission asked Town Council to look into it and last month Stan Lesser was reviewing it,

but the developer has continued to pursue the project over the Commission's objections – failing to resolve this encroachment and contamination beforehand. The area is about an acre, filled, paved with a chain link fence around it. The only access to the encroachment is through the condominium property; there is no other way of getting to the fill if the project is built out. The goal is to have Town Counsel review the matter and motivate the developer to remediate and restore the town's open space property.

Kate Maxham summarized that they were going to remediate the land within their boundaries and stop short of the St Thomas property line and the Town property.

Sam Boyarsky *moved*, and Letitia Ferguson seconded to send comments to the Town Plan & Zoning Commission that the Conservation Commission opposes this project and they should oppose this project until such time that the developer proposes a remediation plan for the town owned property and that plan has been accepted by the town commissions.

Motion passed unanimously

IV. ADJOURNMENT: There being no further business to come before the Commission, Catherine O'Donnell *moved*, and Elizabeth Jones *seconded* to adjourn at 8:48 p.m. *Motion passed unanimously*

Respectfully submitted;

Edward H. Jones