

The High Cost Of Dredge Permitting In Oyster Creek

[by William F. Galvin](#)

HARWICH – The state Supreme Judicial Court ended a four-year battle between the town and Oyster Creek Preservation, Inc. when rendering a decision the local conservation commission did not issue its denial of a proposed dredge project in a timely manner.

The court issued its ruling in favor of the 13-member neighborhood association last week in what turned out to be a costly legal battle for both the town and the association. The association spent \$100,000 and the town \$54,000 through the end of September.

“The financial price was very high, but we had to stand by the environment in this case,” Board of Selectmen Chairman Robin Wilkin said this week. “This was about boats and having them right up to their property. It was not about the environment and shellfishing.”

The SJC took less than two months to digest the arguments of Yarmouth Port attorney James H. Quirk, Jr., on behalf of the association and attorney Mary J. Giorgio of Kopelman & Paige, P.C., the town’s legal counsel.

In its finding, the SJC cited as a principle issue the conservation commission’s failure to provide its decision denying an order of conditions for the dredge project within the statutorily prescribed time period. The court said the decision was issued 23 days after the close of the hearing and not 21 days as required by law.

While the commission approved a written decision on the 21st day, the court cited state Department of Environmental Protection wetlands protection regulations defining the date that an order is issued as “the date an order is mailed, as evidenced by the postmark.” That document was mailed 23 days after the close of the hearing.

“We were saddened by the fact it went to the Supreme Judicial Court, however, all along we felt the facts would speak for themselves and if heard in a fair and impartial manner we would win,” Jeff Dunn, an officer with the association, said after the opinion was rendered.

“Every court in the state agreed with Oyster Creek Preservation that

we have the right to dredge for the health of the creek and to restore the health of the marine environment. We feel gratified by the decision.”

Dunn said the association spent \$100,000 in legal fees in the battle to win dredging rights in the channel that connects the lagoon to Allen Harbor. He said the association’s position was affirmed in Barnstable Superior Court, the state Appeals Court and the Supreme Judicial Court.

“We only had the best interest of the community in mind and hopefully we now put this behind us,” Dunn said.

Wilkins said the court decision focused on the timeliness of the issuance of the decision and not on the environmental issues. The board chairman said what directed him in pursuing this case was the need to protect the shellfish grounds, and he relied on the position of Natural Resources Director Thomas Leach.

Leach said he was disappointed with the decision. He said dredging would destroy the shellfish habitat and the deeper channel would keep people from shellfishing there. He disagreed with the position of association members that increased water flow would improve conditions for shellfishing.

“Despite attempts to portray this case to the contrary, the Oyster Creek case was never a shellfishing versus property owner’s issue. As a homeowner in the area for the last five years, I can tell you that Oyster Creek was once a healthy habitat for shellfish, but after a bulkhead was built in 1993, the natural flushing of the area was changed,” association member Peter Smyth wrote in a letter to the editor this week.

“As a result, the shellfish habitat has been severely damaged. For a time, the town of Harwich seeded the area, but Oyster Creek now hasn’t been seeded for over two years. The area is even closed for the summer months because of high water temperature and poor conditions.”

“I still think it was a good effort on the town’s part to protect its natural resources,” Conservation Administrator John Chatham said of the outcome. “We’ll see if it will have an impact on shellfishing in the area.”

Chatham said he was surprised the court ruled on the one particular issue relative to timely issuance of the denial. He said the town was looking for a decision based on the environment and shellfishing.

The SJC was asked to look at two addition issues in its review. One centered on a potential state Open Meeting Law violation and was brushed aside by the court. The other focused on whether the town’s wetland bylaw or a DEP superseding order reducing the scope of the project should be the governing order of conditions for the project.

“But the timing provisions in the act are obligatory, and a local

community is not free to expand or ignore them. Thus, where a conservation commission issues its decision after the statutory deadline, it is appropriate that it should lose the right to insist on the provisions of its local bylaw, and that any superseding order issued by the DEP should apply in its stead,” the ruling states.

“Accordingly, in this case, the superseding order of conditions issued by the DEP on Jan. 7, 2005 governs OCP’s (Oyster Creek Preservation’s) proposed dredge project, and the OCP is entitled to proceed in accordance with the terms of that order.”

The ruling cited lengthy discussion in the Superior and Appeals Courts over whether the town bylaw is more stringent than the state Wetland Protection Act, a standard required under law for the local bylaw to prevail.

“We express no opinion on this point. However, we do agree with the Appeals Court’s concern about the commission’s vague and general reference to the town bylaw, and that court’s observation that ‘if a town conservation commission simply refers to a bylaw without providing any indication that it actually relied on it or how it did so, any comparison of the statute and the bylaw to determine which is more protective is rendered difficult to impossible,” the ruling stated.

Under the DEP superseding order of condition, the dredge project was reduced from 2,831 to 470 cubic yards of material, the dredged channel width cut from 40 to 28 feet and a toe wall intended for marsh replication eliminated. That is the project the association will seek to accomplish.

Chatham said there were some changes in the superseding order of conditions that were not sought in the initial request for an order of conditions, specifically for dredging around piers and dock in the lagoon. The association will have to come back to the commission for an order of conditions, Chatham said. He also said they will have to seek a Chapter 91 tideland license from the state and approval from the Army Corps of Engineers.

“At this point I don’t think the town has any more interest in appealing permitting decisions,” Chatham said.

In fact, the conservation commission voted not to appeal the Appeals Court decision to the SJC. That was a decision made by selectmen, absent the knowledge of the commission’s vote and acting on the advice of town counsel, Wilkins said this week.

It was an example of a misstep, Wilkins said, adding he has begun examining “where we fumbled the ball.” He emphasized the need for improved communications between town boards and a timely sharing of meeting minutes.

“I am conscious of the cost and for that I apologize,” Wilkins said.

“Was the price tag high, absolutely, but when it comes to environmental issues, when do we back down or pursue a course of action?”

Wilkins said he agrees with the SJC decision and it was a lesson learned for the town that there are responsibilities to comply with regulations and to meet certain dates.

As for the dredge project, Dunn said they will begin pursuing remaining permits and are most likely looking to fall 2008 to begin dredging.

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