

WETLANDS COUNCIL

MINUTES

December 11, 2018

The Wetlands Council met on Tuesday, December 11, 2018 in Rooms 112, 113, 114 at the Department of Environmental Services, 29 Hazen Drive, Concord, NH

Attendees: Chairman Chip Kimball, Councilors: Lee Carbonneau, Jim Gove, Carol Henderson, Michael Klass, Deborah Lievens, Richard Mellor, Russ St. Pierre, Wendy Weisiger and Gretchen Young

Absentee: Councilors: Seth Prescott and Robert Wolff

Also present was: Carolyn Guerdet, Council Clerk and Paula Scott, Appeal Clerk

The regular Wetlands Council meeting was called to order by Chairman Kimball 9:10 a.m. with introductions and a quorum present.

1. **Approval of Minutes**

- ***Councilor Lievens made a motion to approve the November 13, 2018 meeting minutes as amended, second by Councilor St. Pierre. Motion passed unanimously.***

2. **Public Input:** None

5. **Old Business**

a. ARM Fund Update

Lori Sommer distributed the letter from the Army Corp of Engineers. In the Salmon Falls-Piscataqua Service Area additional fund raising was raised for New Durham and it opened funding for Epping and Fremont. There was a request for reallocation so that all three projects would be completed. The Site Selection review team unanimously supported the request. All three packages are ready to go before Governor and Council as soon as possible. Discussion was held and questions addressed.

- ***Councilor Mellor made a motion to approve the funding revisions for the Birch Ridge Community Forest in Durham from \$350,000 to \$207,870, for Governor's Run/Lamprey River in Epping from \$100,000 to \$200,000 for Mullen-Brown Brook Conservation Initiative in Fremont from \$80,000 to \$122,130 the total initial awards of \$530,000 to \$530,000. All three projects being Southeast Land Trust projects, second by Councilor Carbonneau. Motion passed unanimously with Councilor Gove recusing himself.***

4. **New Business**

b. Nancy Smith, Esquire, introduced the new Council attorney, J.D. Lavallee. He then shared his background.

3. **Status of Appeals**

I. New Appeals

Docket No. 18-13 WtC – William R. Davis Appeal

Subject: 9/5/18 Approval of Wetlands Permit #2018-01848 issued to Kimberly A. Wesson Revocable Trust
Hearing Officer: Not assigned

Status: October 5, 2018 received Petition for Appeal. 10/9/18 issued Insufficient Appeal letter. November 8, 2018 received Supplemental to Petition for Appeal. 11/9/18 issued Receipt of Revised Appeal letter. Council to accept or dismiss Appeal at today's meeting. Discussion was held.

- ***Councilor St. Pierre made a motion to deny because no rule or statutory provision has been cited as required by Env-WtC 203.02a(10), second by Councilor Gove. Motion passed unanimously.***

Docket No. 18-15 WtC – Nancy Hall and Edward Benway, Trustee Appeal

Subject: 9/18/18 Administrative Order No. 18-015 WD

Hearing Officer:

Status: October 18, 2018 received Petition for Appeal. 10/19/18 issued Receipt of Appeal Letter. Council to accept or dismiss Appeal at today's meeting.

- ***Councilor Lievens made a motion to accept 18-15 Appeal, second by Councilor Mellor. Motion passed unanimously.***

II. Decisions that need to be written/finalized and issued.

Docket No. 18-05 WtC – David and Beth Boucher, Trustees Appeal

Subject: 2/15/18 Administrative Order No. 18-004 WD

Hearing Officer: May 14, 2018 David Conley was appointed by AG.

Status: February 26, 2018 received Petition for Appeal and issued Insufficient Appeal letter. March 22, 2018 received Revised Petition for Appeal. 3/26/18 issued receipt of revised Appeal letter. Council accepted Appeal May 8, 2018. 5/11/18 issued Appeal accepted letter. 5/22/18 issued notice of Pre-hearing Conference scheduled for June 13, 2018 at 1 p.m. 5/22/18 received Appearance of Joshua Harrison for the department. 5/31/18 received insufficiently filed Motion to Extend Pre-hearing Conference. 6/4/18 issued letter denying Motion to Extend PHC. June 13, 2018 issued Pre-hearing Order scheduling hearing for October 9, 2018 at 9 a.m. September 7, 2018 received Appellant's Witness an Exhibit List. 9/10/18 received State's Motion to Strike Exhibit and State's Witness and Exhibit List. September 14, 2018 issued Notice of Change in Hearing Start Time from 9 a.m. to 10 a.m. September 17, 2018 received Appellant's Modified Exhibit List. Hearing was held October 9, 2018. Order to be issued by Hearing Officer. November 27, 2018 issued Decision and Order denying Petition for Appeal.

III. Hearings or PHCs Pending

Docket No. 17-10 WtC – Patricia A. Rose Appeal

Subject: 06/15/17 approval of Wetlands Permit #2015-03134 issued to Frank and Laurie Leichthammer

Hearing Officer: Not Assigned

Status: July 14, 2017 received Petition for Appeal. 7/17/17 sent Insufficient Appeal letter. August 16, 2017 received Revised Petition for Appeal. 8/17/17 issued Receipt of revised Appeal letter. 8/30/17 received Appearance of Abigail Karoutas and Christopher Wyskiel for permittee and Motion for Summary Dismissal. October 6, 2017 received Response to Motion for Summary Dismissal. Council to accept or deny Appeal at their October 10, 2017 meeting. 10/10/17 Appeal accepted and denied the Motion for Summary Dismissal. 10/11/17 issue ruling accepting Appeal and Denying Motion for Summary Dismissal. 10/25/17 issued Notice of Pre-Hearing Conference scheduled for November 13, 2017 at 9 a.m. 11/7/17 received withdrawal of Abigail Karoutas and Christopher Wyskiel. 1/13/17 issued Pre-hearing Order scheduling Hearing for January 9, 2018 at 9 a.m. 11/20/17 issued Order on permittees' Motion for Summary Dismissal. December 1, 2017 received permittees' response on the Permittees' Response on the Permittee's Motion for Summary Dismissal and Request for Summary Judgment. 12/11/17 issued Order on Permittees' Response on Permittee's Motion for Summary Dismissal and Request for Summary Judgment. 12/13/17 received Permittee's Witness and Exhibit List. 12/18/17 received Appellant's Witness and Exhibit List. January 9, 2018 received Appearance from Mary Ann Tilton for the Department. Hearing was held on January 9, 2018 and continued until March 13, 2018 at 9 a.m. January 18, 2018 received Appellant's Witness and Exhibit List. Motion to Remand received on 1/23/18. 1/30/18 issued Ruling on Motion to Remand, which was granted. Appeal is stayed and continued hearing scheduled for March 13, 2018 is cancelled. February 8, 2018 received Motion for Reconsideration. February 20, 2018 received Response to Motion for Reconsideration. 2/21/18 issued letter denying Motion for Reconsideration. Appeal is stayed. Request for status update to be sent. August 14, 2018 received a copy of letter from Appellant to Collis Adams. 8/23/18 issued letter giving Appellant 30 days to file a revised appeal. Discussion was held. September 20, 2018 received Revised Petition for Appeal. October 3, 2018 received motion for Summary Dismissal.

Chairman Kimball noted that a Hearing Officer has already been named so he will handle the motion. November 6, 2018 issued rule granting in part and denying in part Permittees' Motion for Summary Dismissal. 11/8/18 issued Notice of Pre-hearing Conference scheduled for December 7, 2018 at 9 a.m. 11/8/18 issued revised Rulings Denying Permittees' Motion for Summary Dismissal. December 7, 2018 issued Pre-hearing Order scheduling hearing for April 9, 2019 at 9 a.m.

Docket No. 18-03 WtC – New Castle Conservation Commission Appeal

Subject: 1/16/18 approval of Wetlands Permit No. 2017-00487 issued to Marion Clough
Hearing Officer: May 14, 2018 David Conley was appointed by AG.

Status: February 15, 2018 received Notice of Appeal. 2/20/18 issued Insufficient Appeal letter. March 21, 2018 received revised Petition for Appeal. 3/22/18 issued receipt of revised Appeal letter. April 10, 2018 received Appearance of Jonathan Springer for the permittee and a Motion for Summary Dismissal. 4/13/18 received Appearance of Nathaniel Morse for the appellant. 4/16/18 received Appellant's Objection to Motion for Summary Dismissal. Council accepted Appeal May 8, 2018. 5/11/18 issued Ruling on Acceptance of Appeal and Motion to Summarily Dismiss. 5/22/18 issued notice of Pre-hearing Conference scheduled for June 13, 2018 at 3 p.m. June 13, 2018 issued Pre-hearing Order scheduling hearing for January 8, 2019 at 9 a.m. October 29, 2018 received Appellant's Motion for Summary Judgment. 11/2/18 received Partially-Assented to Motion for extension of Time to Respond. November 5, 2018 received Permittee's Motion for Summary Judgment and Motion to Extend Time for Filing Objection. 11/6/18 issued rulings Granting Applicant's Motion to extend Time for Filing Objection and Appellant's Partially-Assented to Motion for Extension of time to Respond to Applicant's Motion for Summary Judgment. 11/14/18 received Objection to Motion for Summary Judgment. 11/14/18 received Certification of service for Town of New Castle's Select board's 11/7/18 Request to Intervene. 11/20/18 issued letter granting Motion to Intervene. 11/29/18 received Partially Assented-to Motion Modify Pre-Hearing Order. December 3, 2018 received Appellant's Witness and Exhibit List. 12/5/18 issued letter granting Partially Assented-to Motion to Modify Pre-hearing Order and Issued Hearing Notice rescheduling Hearing for February 12, 2019 at 9 a.m. 12/7/18 issued Order denying Appellant's Motion for Summary Judgment.

Docket No. 18-11 WtC – Stephen Silk Family Trust Appeal

Subject 07/10/18 Denial of Wetlands Permit, File #2018-01276

Hearing Officer: November 21, 2018 David Conley was appointed by AG.

Status: August 6, 2018 received Petition for Appeal. 8/8/18 issued Insufficient Appeal letter. 8/22/18 received Revised Petition for Appeal. 8/24/18 issued Receipt of Revised Appeal letter. Appeal is still insufficient. Council denied Appeal at September 11, 2018 meeting. 9/12/18 issued ruling dismissing Acceptance of Appeal. October 4, 2018 received Request for Reconsideration. Council to act on Request for Reconsideration at November meeting. November 11, 2018 Council accepted the Request for Reconsideration. 11/15/18 issued Ruling granting Motion for Reconsideration. December 7, 2018 issued Notice of Pre-hearing Conference scheduled for January 22, 2019 at 12:30 p.m.

IV. Inactive/Status Letter or Pending Settlement/Withdrawal

V. Misc.

Docket No. 18-07 WtC – Kreisler Family II, LLC Appeal

Subject: 3/7/18 Approval of Wetlands Permit #2017-03657 issued to David Brewster

Hearing Officer: September 10, 2018 David Conley was appointed by AG.

Status: April 4, 2018 received Preliminary Notice of Appeal and offer to enter into settlement discussions. May 16, 2018 received Petition for Appeal. 5/17/18 issued Insufficient Appeal letter. June 13, 2018 received Revised Petition for Appeal. 6/26/18 received Appearance of Stephen Nix for the Permittee. July 3, 2018 received Motion to Summarily Dismiss. 7/9/2018 received Appellant's Objection to Motion to Summarily Dismiss. Council accepted Appeal at August 14, 2018 meeting. 8/16/18 issued Ruling granting Acceptance of appeal and denying Motion to Summarily Dismiss. September 18, 2018 issued Notice of Pre-hearing Conference scheduled for October 22, 2018 at 9 a.m. October 3, 2018 received Motion to Consolidate. 10/15/18 received Motion to Require Information. 10/16/18 received Appellant's Motion for Summary Judgment. 10/19/18 received Appellant's Objection to Motion to Require Information and Cross-Motion to Exclude Evidence. 10/22/18 received Objection to Appellant's Motion for Summary Judgment. 10/22/18 issued Pre-hearing Order granting Motion to Consolidate Dockets No. 18-07 WtC and 18-08 WtC. 10/24/18 issued Decision and Order granting Appellant's Motion for Summary Judgment.

Docket No. 18-08 WtC – Kreisler Family II, LLC Appeal

Subject: 3/7/18 Approval of Wetlands Permit #2017-03659 issued to David Brewster

Hearing Officer: September 10, 2018 David Conley was appointed by AG.

Status: April 4, 2018 received Preliminary Notice of Appeal and offer to enter into settlement discussions. May 16, 2018 received Petition for Appeal. 5/17/18 issued Insufficient Appeal letter. June 13, 2018 received Revised Petition for Appeal. 6/26/18 received Appearance of Stephen Nix for the Permittee. July 3, 2018 received Motion to Summarily Dismiss. 7/9/2018 received Appellant's Objection to Motion to Summarily Dismiss. Council accepted Appeal at August 14, 2018 meeting. 8/16/18 issued Ruling granting Acceptance of appeal and denying Motion to Summarily Dismiss. September 18, 2018 issued Notice of Pre-hearing Conference scheduled for October 22, 2018 at 9:30 a.m. October 3, 2018 received Motion to Consolidate. 10/15/18 received Motion to Require Information. 10/16/18 received Appellant's Motion for Summary Judgment. 10/19/18 received Appellant's Objection to Motion to Require Information and Cross-Motion to Exclude Evidence. 10/22/18 received Objection to Appellant's Motion for Summary Judgment. 10/22/18 issued Pre-hearing Order granting Motion to Consolidate Dockets No. 18-07 WtC and 18-08 WtC. 10/24/18 issued Decision and Order granting Appellant's Motion for Summary Judgment.

Docket No. 17-16 WtC – Bryan and Linda Corr Appeal

Subject: 11/03/17 Administrative Order No. 17-028 WD

Hearing Officer: January 18, 2018 David Conley was appointed by AG

Status: November 30, 2017 received Petition for Appeal and Appearance of John Cronin. December 4, 2017 issued receipt of Appeal letter. 12/29/17 received the Appearance of Joshua Harrison for the Department. Council to accept or deny Appeal at their January 9th meeting. January 10, 2018 issued Appeal accepted letter. 1/25/18 issued Notice of Pre-hearing Conference scheduled for February 14, 2018 at 11 a.m. 2/14/18 issued Pre-hearing Order scheduling hearing for April 10, 2018 at 9 a.m. 2/22/18 received State's Motion to Dismiss. March 14, 2018 received Petitioner's Objection to Motion to Dismiss. 3/22/18 issued Notice of Rescheduled Hearing moving hearing to May 8th at 9 a.m. 3/28/18 received Assented-To Motion to Continue Deadlines. April 2, 2018 issued letter granting Assented-To Motion to Continue Deadlines. 4/11/18 issued Order granting in part and denying in part State's Motion to Dismiss. 4/30/18 received State's Witness and Exhibit List. May 2, 2018 received Appellants' Witness and Exhibit List. 5/8/18 Hearing was held and Deliberations are scheduled for today, June 12, 2018. 5/25/18 received State's Proposed Findings of Fact and Conclusions of Law. 5/29/18 received Appellant's Requests for Finding and Rulings. Deliberations were held June 12, 2018. August 6, 2018 issued Decision and Order granting Petition for Appeal. September 4, 2018 received State's Motion for Reconsideration. 9/10/18 received Objection to State's Motion for Reconsideration. October 9, 2018 Council deliberated on State's Motion for Reconsideration. 10/23/18 issued Ruling Denying Motion for Reconsideration. November 21, 2018 received DES' filing of Appeal from Administrative Agency (Wetlands Council) with the NH Supreme Court. December 4, 2018 received Corrs' cross Appeal to the NH Supreme Court.

Chairman Kimball noted regarding a past appeal, that a permit was issued to Cook. It now has to go through the Corp. of Engineers.

4. New Business

c. Council Members RSA 15-A Filings

Secretary of State Office has not prepared the 2019 form yet. It will be sent out as soon as it is available. It will then be sent to the Council Clerk who will submit it to the Secretary of State.

5. Old Business

b. Proposed LSR Progress

Chairman Kimball met with Commissioner Scott after the last meeting. He was in agreement with the LSRs proposed and they were then sent to the Legal Counsel.

Also discussed were:

- 1) Certified application professional - to make it clear those permits would also come before Wetlands Council for appeal.
- 2) 482-A:10 sections 6,7 & 8 currently say 'may'. They will be changed to 'shall'. They are now remanded to the Commissioner so that he is aware of them. The Commissioner can appoint an ombudsman to handle these.
- 3) Change 90 to 100 days for the written decisions to be completed.

4) Duplicate annual reports changed.

5) RSA 21:05-A – Council shall consult with the DES Commissioner on a continuing basis. Have added the words – ‘or his designee’.

Senator Bradley has filed with the Legislative Services people. The LSR number is unknown yet.

4. New Business

a. Orientation Training/ Council Rules Review

Start with the set up a subcommittee of the rules then go over this at the next meeting. It's 37 pages.

Statutes listed:

21:05-A – creates the Council. Discussion on III – receive administrative support from the Department. Administrative vs legal - appellants say appeals are filed on rules created by the department. Have the Council attorney review and comment on the rules.

Consulting with and advising the Commissioner of the Department. In the past we got a monthly report from the department regarding the Wetlands Bureau, mostly from the Bureau Administrator. We used to get a financial report as it is self-funded from the fees.

Hearing Appeals – the hearing procedure are now handled by hearing officer, which has been a big improvement.

Regarding recusals – decided by if a) have outside information that hasn't been shared with everyone b) know the individual personally c) if client of agency or company, even if not directly working with person d) conflict of interest – is a pecuniary interest to you or your immediate family e) or feel you have prejudged or cannot judge impartially. If a question you can ask executive branch officials for an advisory opinion or councilors are free to talk to DOJ. Quorum of the Council less the recusals is the quorum for that appeal.

Ex parte contact – applies to adjudicated procedures, deciding the rights of parties. Includes 1) while taking a break – it is ok to talk during the break, just can't talk about the subject matter; 2) anyone calls personally at home, report it at the Hearing; 3) in the sending organizations, executive person cannot talk a with member about a vote 4) If you're having the difficulty of being spoken with, you should go to the Council Attorney. Regarding Rules - you can talk with and listen to the public.

Break taken from 10:30 - 10:42

It was suggested a list or reference book of all statutes that the Council works be developed.

Paula handed out a flow sheet of her appeal process to show what happens when an appeal comes into her office. Timeliness and sufficiency were discussed, items that are not addressed in the rules. It was agreed there need to be more guidelines for the applications along with a checklist applicants can use. These need to be addressed in rules. Discussion was held.

Discussion regarding a possible change a Motion for Summary Dismissal to a Motion to Deny Acceptance. The Ezx rules will distinguish the Council rules from the Department rules which use 2014 rules. No changes Env. will take our rules will start in 2014.

Motion to form a committee to review the rules

Paula to resend two sets of rules - January 2014 and revised draft April 2017, pages 1-37.

Another issue regarding process – when someone denied because incomplete and then they ask for reconsideration is not covered at this time. They must have a statute or rule number when appealing. Discussed WtC - 204.03 in current rules and reconsideration. Refresh our role as appellant body.

At Training and Orientation give RSA, rules, should attend next AG's training, expected to show for meetings, and all must do a yearly financial disclosure form, even state designees. The Appeals Clerk should have a clear line of obligations/rules. There are some Supreme Court decisions/opinions that involve the Council. Include the link to the Supreme Court as part of the orientation packet. General principles of law to look at. Long discussion was held regarding viewing properties and use of Google Earth. Applicant needs to bring the file here – not expect it

to be provided here during a hearing. The Hearing Officer makes it very clear there is access to their file at the PIP office at the Pre-hearing Conference. Ask the Hearing Officer if they can distribute the exhibits before the Hearing.

Working meeting next month with the purpose to sit down with the rules and work it over.

- ***Councilor St. Pierre made a motion to form a rules committee to review the rules next month, second by Councilor Klass. Motion passed unanimously.***

Next month is a regular meeting with a meeting of the rules subcommittee next month.

Work is to continue on a draft orientation package. Councilor St. Pierre to circulate application checklist/form and Paula to circulate the 2014 rules.

6. Next Meeting –

The next meeting is January 8, 2019 at 9 a.m.

7. Adjournment

- ***Councilor Henderson made a motion to adjourn, second by Councilor Lievens. Motion passed unanimously.***

Meeting adjourned at 11:48 p.m.