MINUTES

December 28, 2020

In attendance: Brian Harris, Chairman, Elliot Benton, Vice Chairman, Stephan Skoufalos, Secretary, Joseph Rogers, Norma Kerlin, Jay Schondorf, Bill Galvin, and alternates Klaus Jander and Peter Linderoth

Also in attendance: Patricia Sesto, Director; Robert Clausi, Senior Wetlands Analyst; Brittney Veniga, Administrative Assistant; Dr. Michael Klemens, Sid Goodfriend

1. Call to Order
   Chairman Brian Harris called the meeting to order at 7:07 PM.

2. Seating of alternates
   No alternates were seated.

Pending Application:
#2020-142 – 148 Glenville Road – Redniss & Mead Inc. for Indian Spring Limited Partnership, Estate of J. Stillman Rockefeller, and Ashton Drive Association Inc. for dredging of a pond. Tax #’s 10-1317/s, 10-9078, 10-9012. (90-day extension 1/25/21)

Patricia Sesto recapped the meeting on 12/14/20, when the agency decided to hold a special meeting to review applicant and intervenor’s testimonies. The agency has two tasks; to decide if the applicant is entitled to the permit and does the intervenor’s testimony alleging unreasonable harm under CEPA hold. Ms. Sesto reiterated the agency has to make a finding on whether or not the intervenor has established there is unreasonable harm to the wetlands and watercourses and if yes, is there a prudent and feasible alternative. If this is the case, the IWWA may not approve the application.
Brian Harris started with questions from an outline created by Ms. Sesto—What is the appropriateness of the pond dredging? Is the activity justified? Is there a means to reduce impact, if any, what might they be?

Mr. Harris stated according to 10.3, the agency must make finding based on the record that no alternative with a lesser or no impact to the wetlands and watercourses exists. He stated hydraulic dredging has less impact compared to mechanical dredging and the activity would be no different than the Town’s recent application to dredge Binney Pond. Binney Pond has since shown improvement and he does not see difference in justification Binney Pond vs. Indian Spring Pond.

Stephan Skoufalos added several other applications have been approved with non-remarkable execution.

Peter Linderoth likewise agreed hydraulic dredging is preferable, as did Bill Galvin and Joseph Rogers. Further discussion stated the dredging was justified and there is a need for an independent consultant to watch over the project so if there are complications this person(s) can make mid-course corrections if necessary. IWWA staff should still be making site visits at critical junctures. The consultant should report to the Agency as opposed to the applicant.

Patricia Sesto stated accommodating a consultant can be done a few different ways; the agency can hire an outsourced consultant or the applicant will be directed to have an agency-approved consultant. In the latter case, the consultant would work for the permittee, with the condition the consultant’s directives would be considered as directives of the permit. A consultant would be responsible for establishing a turbidity baseline, then defined routine inspections for the life of the project. The agency staff would be checking in periodically but the consultant would be supplementing staff for more oversight.

Joseph Rogers replied he wants this independent/outsourced person(s) make a judgement call regarding the excessive mortality of aquatic organisms with the uprooting of pond and the outside person is to make sure this is done as best as possible.

Norma Kerlin questioned if approving the dredging is a forgone conclusion.

The agency gave a resounding “No.”

Ms. Sesto encouraged members to wait to decide favor or not until a full discussion has concluded. She described the three components to the discussion. While there appears to be consensus the dredging is justified, the agency needs to discuss the other pieces of overall project because there may be elements the agency finds unacceptable and may override the favor of dredging. Beyond dredging, the agency needs to consider spoils disposal and access.

The process of decision making was discussed. The size and ancillary components make this dredging project more complex than others the agency has approved.
Elliot Benton questioned why the agency did not ask applicant to further research different ways of dewatering.

Joseph Rogers replied that Jay Fain discussed the differences in dredging and that hydraulic dredge works successfully with no overkill of species living in the pond. Hydraulic dredging has significant pluses.

Stephan Skoufalos disagreed, stating two determinations need to be made. He went on to state that, based on the same evidence and same testimony and considerations, the standard that applies to the applicant and intervenor are slightly different but there will still be debate as to whether there’s substantial evidence or prudent feasible alternatives. The agency needs to evaluate evidence.

Mr. Harris moved on to the second question from outline- Soils disposal: Is there impact to wetlands and watercourses? If yes, what does the record document they are? Are they short term, long term, or both?

Ms. Sesto stated the meadows are outside 100-foot Upland Review Area, with the spoils disposal area accounting for between 1-6% of the vernal pools’ Critical Terrestrial Habitat. The use of meadows was described as suitable due to its topography and vegetative cover. Ms. Sesto continued with the question posed to the applicant of possibly using the Glenville Road side of pond. There is no non-forested area and clearing would be needed to create a spoils disposal area. She went on to state clearing forestry is not necessarily an IWWA concern if using the meadow area is found to have impact to the wetlands and watercourses.

Bill Galvin concurred with the testimony of Redniss & Mead, characterizing the meadow as favorable. He expressed concern with disposing 6,000 cubic yards of material upgrade from the pond and it is the agency’s responsibility to be sure it will not impact the upland review area or the pond itself. He reiterated that dewatering and returning water back makes sense but questioned the potential for alternatives as conceptually suggested by Alex Dick, MDVP, Inc.

Stephan Skoufalos replied that tonight the debate is regarding whether or not there is evidence of lesser impact based on the record. Testimony supports the use of the meadows for spoils disposal has the least impact.

Elliot Benton responded, the impact discussion by Dr. Klemens was that the meadow was being regraded and any change would impact obligate wetland species. The meadow could end up being returned to a different condition, so using meadow as a dewatering point will have impact.

Discussion ensued regarding the lack of information on the more definitive impact to species and wetlands, potential dewatering alternatives, and the speculative testimony from Mr. Dick.

Patricia Sesto cautioned members not to pursue feasible and prudent alternatives unless it has been determined an impact is associated with the proposal. Section 10.2b states it is the applicant’s responsibility to evaluate prudent and feasible alternatives that would cause less or no environmental
impact. The regulatory language infers an impact must be present for feasible and prudent alternatives to be considered.

Elliot Benton stated Dr. Klemens’ verbal testimony indicated disturbance of meadow impacted wood frog habitat. Stephan Skoufalos stated his notes indicated Dr. Klemens’ said depending on time of year the mortality rate of wood frogs could be high. Further, the arguable evidence to consider an alternative from Alex Dick from MDVP, Inc.’s testimony was lacking.

Ms. Sesto reminded the agency to consider short and long term impacts.

Mr. Skoufalos responded that if the agency accepts there is an impact, then the question in 10.2 is, does the agency have evidence there is a prudent and feasible alternative that will cause less impact? He concluded, in relation to soils disposal, he does not find a better alternative.

Brian Harris agreed and asked the agency if anyone disagreed. After some discussion, the agency expressed agreement.

Brian Harris moved on to the third question from the outline- Is there evidence in the record to support the intervenor’s conclusion that the use of Zacchaeus Mead includes unreasonable harm to the vernal pools? If yes, does the record support this? Are there long and/or short term impact? If no, what evidence supports this?

Elliot Benton referred to Dr. Klemens’ statements that there would be impacts but the extent of the impact is unknown, as is if this would be a transient or long term effect.

Bill Galvin replied it is important to recall that the Zacchaeus Mead access point was intended to be temporary six years ago and subsequent court action said it could be a permanent access point. Mr. Galvin stated he understood Dr. Klemens’ point that there should be no interruption in 750ft radius of vernal pools, however this logging road has been in use for at least 100 years and damage has continued to occur depending on weather, etc. He reiterated the Zacchaeus Mead access point is already in use and this project is set for a short period of time to deal with dredging, and then use would revert to strictly forestry use. Mr. Galvin concluded he did not find Dr. Klemens’ testimony to be compelling.

Mr. Benton questioned if the application is potentially incomplete because there is not enough information to define the level of wood frog mortality.

Ms. Sesto answered there is a divergence between CEPA and the merit of application completeness. The intervenor is requesting that aside from CEPA conclusions, they want the application denied because it is incomplete.

Stephan Skoufalos referred back to the applicant’s responsibility in 10.2 and stated Jay Fain argued there is no impact, the intervenor’s dispute is too speculative, and acknowledged there will be incidental mortality. The agency has to weigh the evidence to decide whether the applicant met their burden. He stated, as a separate matter, the intervenor has a burden of showing unreasonable impact. Mr. Skoufalos went on to say Dr. Klemens’ answers were too speculative and he equivocated on
whether or not there is an impact. Mr. Skoufalos concluded the totality in reviewing his testimony did not amount to substantial evidence.

Brian Harris agreed and added any of the alternative accesses have a much greater direct impacts to wetlands and watercourses.

Norma Kerlin stated Dr. Klemens confirmed he had no access to applicant’s property and could not gather further information, although he did canvas colleagues in response to agency questions. His testimony supports possible harm to the vernal pools. She questioned why the applicant did not find an appropriate expert knowing Dr. Klemens has previously testified regarding this property on another application. Ms. Kerlin questioned the expertise of Mr. Fain and his ability to credibly rebut. The information from Dr. Klemens should be relied on as he is the credentialed expert despite not being able to access the site. The record does not have anything to rebut Dr. Klemens’ testimony.

Bill Galvin replied Dr. Klemens’ testimony spoke in general terms and while Mr. Galvin has no debate on Dr. Klemens’ qualifications, his expertise has to be applied to the specific resources of the application.

Ms. Sesto noted the record includes 2013 and 2014 vernal pool studies, studies Dr. Klemens found fault with as they were not current, and the methodology was inadequate. Ms. Sesto continued, there is a strength in the metapopulation and if there was mortality close to one vernal pool, a metapopulation could compensate for that. She stated she was not satisfied with Dr. Klemens’ indirect answers.

Discussion ensued regarding the lack of evidence of impact to the vernal pools by the incremental increase in use of the long-standing wood road. Joseph Rogers concluded that even if more information about the number of frogs using the pools were provided, it is not possible to quantify how many would die due to the proposed activity and consequently, what if any impacts would occur.

Brian Harris asked if there were any more comments. There were none.

Brian Harris posed the question of whether or not the intervenor made his case that there will be unreasonable impacts to vernal pools and if yes, does record show there are prudent and feasible alternatives.

Norma Kerlin replied the prima facie case was made in favor of the intervenor. The applicant failed to successfully rebut. Bill Galvin stated the intervenor failed to make their case. Specifically, Dr. Klemens’ testimony was mostly hypothetical. Mr. Galvin continued it was an impossibility to effectively measure what incremental impacts could be attributed to this project because the road continues to be in use.

Stephan Skoufalos agreed, noting Dr. Klemens had not demonstrated unreasonable impact to the vernal pools, his answers were speculative, and the road is already in use.

Subsequent discussion by members reiterated the points of Messrs. Galvin and Skoufalos and further concluded there is not another feasible and prudent alternative with a lesser impact. Brian Harris stated draft of conditions of approval should consider if the wood road could be used in specific periods of low frog movement.
Elliot Benton made a motion determining the intervenor has not met their burden of establishing unreasonable harm to wetlands and watercourses, second by Joseph Rogers carried 6-1-0, with Ms. Kerlin voting against for reasons previously stated.

Brian Harris made a motion for staff to draft conditions of approval based on testimony and to include a monitor paid for by the applicant and hired by the agency, seconded by Stephan Skoufalos.

Agency members commenced discussion. Points made by individuals include project timing restrictions, project needing to be overseen from Zacchaeus Mead access point to dredging site, spoils area and all related variables, having specific markings on the road for trucking, and a bond requirement.

The motion for a draft resolution of approval with conditions articulated carried 6-1-0, with Ms. Kerlin opposed for reasons previously articulated.

**Executive Session**

Discussion of Pending litigation Saunders vs. IWWA, 249 Valley Road

– At 9:33 pm, Brian Harris made motion to move into executive session to discuss litigation, seconded by Elliot Benton, and passed, 7-0-0.

At 9:51 pm the agency returned from executive session. Due to technical difficulties, the remainder of the meeting was not recorded. No motions were made. No actions were taken.

**Adjourn**

With no further business, the meeting adjourned at 9:52 PM

Patricia Sesto
Director

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