



Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

www.merrimacknh.gov

Planning - Zoning - Economic Development - Conservation

MERRIMACK CONSERVATION COMMISSION

FEBRUARY 29, 2016

MEETING MINUTES

A meeting of the Merrimack Conservation Commission was held on Monday, February 29, 2016 at 6:40 p.m. in the Merrimack Memorial Conference Room.

Chairman Tim Tenhave presided:

Members of the Commission Present: Matt Caron, Vice Chairman
Michael Boisvert
Cynthia Glenn
Gage Perry
Gina Rosati, Alternate Member
Councilor Jody Vaillancourt

Members of the Commission Absent:

Also in Attendance: Carolyn Elefant, Esq. (participated electronically)

PUBLIC COMMENT - None

NEW BUSINESS

1. **Commission to interview Attorney Carolyn Elefant**

Commission to hold a conference call interview with Attorney Carolyn Elefant of Washington, D.C.
Commission to determine if it wishes to hire and consult with Attorney Elefant in proceedings related to the proposed NED pipeline.

Chairman Tenhave stated the interview process would be conducted in public session. At the conclusion of the interview, should the Commission vote to hire Attorney Elefant, a non-meeting would follow.

Chairman Tenhave noted the Commission has filed for intervener status, although official notification has not been received. Attorney Elefant explained if the intervener status request is unopposed after 15 days, it is automatically granted by operation of law. There will be no formal notification. She commented she has not seen Kinder Morgan opposing anyone's timely request for intervener status.

When asked how the relationship would work given her physical location, Attorney Elefant stated she works with clients all over the country. With the Federal Energy Regulatory Commission (FERC) located in D.C. and her work on pipeline projects, she is accustomed to working with clients in other locations. The relationship depends on the level of activity the organization wishes to have in a proceeding. Many times her clients are interested in being involved at a couple of different junctures; intervention stage, when the Environmental Impact Study (EIS) is released, and rehearing. It is typical for interactions to be over the telephone or via email. Attorney Elefant commented there are times when it is helpful for her to visit the location of a potential project, and there are occasions when her clients will come to D.C. She

added, even with many of her local clients, the majority of the work is coordinated over the phone and email.

Chairman Tenhave questioned if attorney/client privilege could be preserved over email. Attorney Elefant stated it can. Emails would contain subject matter for discussion, but would not detail strategy, etc. More detailed discussions could take place over the telephone. Standard practice in her firm is to denote emails are privileged and confidential. For those desiring an added level of confidentiality, she can provide other portals where the user can log in and upload/download documents, etc. She has found the level of security she has on email combined with privileged information, and also a caution to clients to not forward the emails to other people, tends to adequately preserve privilege.

When asked if she has other clients in Southern New Hampshire, Attorney Elefant stated she is representing the Town of Mason. Although she is not representing individuals, she has provided individual homeowners with resources she has available to her as well as some consultation. She represents the Franklin Regional Council of Government (FRCOG). That representation is more a consultation relationship. The group provides resources to a number of municipalities within Franklin County. She advises the FRCOG, and they take that advice and pass it on to the counties or will do the filings themselves. Their filings in the Commission Docket are under their name, but she has reviewed some of the documents or provided them with information. She reiterated she considers it more of a consultation type arrangement rather than representation.

Councilor Vaillancourt questioned if she represents other conservation commissions from other impacted states. Attorney Elefant responded she is not working with any in this case. She has represented a conservation trust and a family holding property in trust for purposes of preservation. She is familiar with some of the issues that are faced, but does not represent any of the others in the NED proceeding.

Chairman Tenhave stated his understanding the next step in the process is that the FERC will come back with a draft EIS. Attorney Elefant stated, prior to that, the FERC will send out requests for additional information. She remarked she is unaware of the level of detail included in comments the Commission may have filed with its Motion to Intervene. She spoke of the importance of having more expansive comments on the application on record before the FERC issues the draft EIS. Many believe when the agency issues the draft EIS they can file comments, identify deficiencies, and ask the FERC to make amendments. Unfortunately, the way the process seems to work is if you don't raise an issue before the draft EIS comes out it will not be considered. If you raise it afterwards it will be ignored or rationalized away, etc. Issues viewed as critical, which appear to have not been given appropriate attention by the FERC through the information requests, etc., or if they were not included in the motion to intervene, are the kinds of things that should be brought to their attention before the draft comes out. Once the draft comes out, that opens up an opportunity to comment. That is a very important part of the process because if you don't file comments, and you try to raise the issues later on you would have lost the opportunity. The further down the road the process gets the opportunities for being able to raise issues and receive responses narrows.

Chairman Tenhave stated the Commission provided some comments along with the Motion to Intervene. However, the greatest amount of comment was provided during the scoping period. Attorney Elefant recommended the Commission re-file those comments to ensure they are being considered here. She remarked she is unsure if the same people who work on the pre-filing work on the application itself. She suggested re-filing the scoping comments noting they have been filed previously without response, and that the Commission would like to ensure they are made part of the record.

Chairman Tenhave commented what makes it more difficult is there are a number of alternative routes through Town, and it has been unclear until very recently, which one is the preferred route.

Chairman Tenhave questioned if the period for comment after the draft EIS is released is where Attorney Elefant could play a role and provide a review of her own looking at things the Commission might not normally consider or see. Attorney Elefant responded, as an attorney, she feels the value she brings to the comment process is to first help to identify any legal deficiencies that may be present in the EIS; to preserve them for appeal as they are almost never changed during the process. She provided the example of a situation where the FERC would be required to wait until a water quality certificate issues and sometimes in the EIS they will suggest that they are going to go ahead and issue a certificate before that happens. The EIS also tends to address issues like whether the statement is consistent with the

various FERC regulations and guidelines pertaining to mitigation and remediation. Even though they are not that robust, sometimes the EIS falls short on those grounds. Those are the kinds of things she can usually identify and help with commenting on. Certainly on issues like impact to the lands the Commission is holding would be something the Commission would be more adept at identifying. It is also possible she might be able to help back up the Commission's factual position with a legal argument as well.

Chairman Tenhave questioned if the preference would be that a scope of work and cost estimate be provided when reaching the point of the release of the draft EIS. Attorney Elefant commented because she represents 2 other clients, and given the likelihood there would be different sections within the draft EIS that would be common to all parties, time expended in those areas could be divided, whereas time expended on areas specific to Commission lands would be allocated to the Commission. Cost would also be impacted by the size of the draft EIS. She stated it would be easier to provide a scope and associated cost once the report is released and the size and commonalities are understood.

When asked, Attorney Elefant stated the FERC will usually allow a period of 30-45 days for a response. When the notice issues that the draft EIS will be released, it will include a deadline for responses. She added the FERC no longer responds to comments received past the deadline. Chairman Tenhave commented where the Commission is a public body and meets periodically, there may be the need to conduct a special meeting to facilitate moving this forward. Attorney Elefant commented the FERC typically issues a schedule to provide at least a rough idea of when a draft EIS will issue. Chairman Tenhave remarked assuming the FERC decides it meets the public needs and goes to issue a certificate, the Commission would probably wish for her to review that to identify if there are opportunities for appeal. Attorney Elefant stated the first step would be to file a rehearing request. It used to be that you could file a rehearing request and the FERC might sometimes change its position. Otherwise you are looking at the rehearing, in most cases, to preserve issues for taking to court. She stated she would be able to help the Commission assess the likelihood of success and evaluate whether it is something worth moving forward with when it gets to that point. She stated, notwithstanding what the applicant has stated as their own schedule, but simply her guess based on her experience, it is her opinion it would be 6-8 months before a certificate would be issued.

Chairman Tenhave questioned if the rehearing itself would be done just through submittals or if something would be done at the FERC office. Attorney Elefant stated a rehearing request is filed 30 days after the certificate is issued and it is basically something that is just on paper. It is a document that is somewhat specific in structure; listing the issues up front and then drawing to the arguments. It is all done electronically just like all of the other submittals.

Chairman Tenhave questioned, if the process moves forward, rehearing does not provide the sought after relief, and it comes down to Kinder Morgan starting to seek easements, etc., is that process mostly a State dictated activity where the Commission would need someone local to file on its behalf. Attorney Elefant stated if it becomes contentious and they file a suit against the Commission, they have the option of going to Federal or State court to initiate an eminent domain action. In her experience, the majority of pipelines have gone to Federal court just because the process is a little more favorable to a corporation than in a State court. She has practiced in Federal courts in different parts of the country either with local counsel or someone moves her in Pro Hac Vice meaning she would be granted special permission to participate in a particular case, even though she is not licensed to practice in the State. If it is something that is filed in State court she sometimes will stay on to consult or advise the local attorney with issues specific to the FERC, but she is not as comfortable practicing in state courts particularly in eminent domain proceedings as the procedural issues differ greatly.

In terms of negotiating easements, she has helped clients negotiate easement agreements in different states. There have been times when she has consulted with a local attorney to see if there are issues unique to filing in that state. She remarked the value she brings to working with parties on the easements is familiarity with the company's rights to eminent domain, which are bounded and defined by the FERC certificate, e.g., the company would be restricted from putting in two pipelines, expanding the size, etc. The company could look to do those things in the future, but would have to go back and pay more. When a company negotiates for an easement they want to get the rights upfront to put in two pipelines, etc. Those types of issues she can identify as she is familiar with the types of things that come up in a FERC easement process. She could also assist with issues such as remediation, having an understanding that

many times it takes these companies a very long time to mitigate or even clean up the site. There are things you would want put into an easement agreement to protect yourself in those situations.

Chairman Tenhave stated his belief, in the short term, the Commission would look to consult with legal counsel until reaching the point in the process where the draft EIS is issued. At that time, the Commission would look for a very particular arrangement to be in place.

**MOTION BY COMMISSIONER GLENN TO HIRE CAROLYN ELEFANT, ESQ. TO REPRESENT THE COMMISSION IN ITS LEGAL PROCEEDINGS RELATIVE TO THE PROPOSED NED PIPELINE PROJECT. FUNDS ARE AVAILABLE IN FUND 53
MOTION SECONDED BY COMMISSIONER PERRY
MOTION CARRIED
7-0-0**

PUBLIC COMMENT - None

COMMISSIONER COMMENTS

Vice Chairman Caron thanked Commissioner Glenn for doing the necessary research, and bringing forth the recommendation for Attorney Elefant.

On behalf of the Commission, Chairman Tenhave extended deepest condolences and prayers to the family of Officer Ashley Guindon.

The Commission observed a moment of silence in memory of Officer Ashley Guindon.

ADJOURNMENT

**MOTION BY COMMISSIONER GLENN TO ADJOURN
MOTION SECONDED BY COMMISSIONER CARON
MOTION CARRIED
7-0-0**

The February 29, 2016 meeting of the Merrimack Conservation Commission was adjourned at 7:12 p.m.

Submitted by Dawn MacMillan