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Via U.S. Mail

April 4, 2017

Ms. Rachel Campbell
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

(SUB - NO. 2)

RE: Docket No. AB-444 (Sub-NO. IX)

Petition for Declaratory Order – Vermont Association of Snow Travelers

ENTERED
Office of Proceedings
April 6, 2017
Part of
Public Record

Dear Ms. Campbell:

Enclosed please find an original and 10 copies of the Vermont Association of Snow Travelers, Inc.'s Petition for Declaratory Order, plus a CD containing the entire Petition. Also enclosed is the \$1,400 filing fee made out to the Surface Transportation Board. The Petitioner has simultaneously sought a waiver of the filing fee pursuant to 49 C.F.R. § 1002(e)(2), as Petitioner is a quasi-state entity acting on behalf of a party for whom the fee would be waived as a matter of course, but is submitting the fee nonetheless to avoid any unnecessary delay in the Board's consideration of the Petition.

As set forth in the attached Certificate of Service, the Petition, the Declaration of Cindy Locke, and this letter have been served on the parties of record in this proceeding.

Please return a date-stamped copy of this letter and the cover page of the Petition and Declaration in the enclosed self-addressed, postage-paid envelope.

Thank you.

Sincerely,

Hans G. Huessy, Esq.
hhuessy@mskvt.com

FEE RECEIVED
April 6, 2017
SURFACE

Enclosures

TRANSPORTATION BOARD

FILED
April 6, 2017
SURFACE
TRANSPORTATION BOARD

cc: Cindy Locke, VAST

RE: ²
Docket No. AB-444 (Sub-NO. IX)
Petition for Declaratory Order – Vermont Association of Snow Travelers

FEE WAIVER REQUEST

The Vermont Association of Snow Travelers (“VAST”) seeks a Fee Waiver pursuant to 49 CFR § 1002.2(e). VAST has simultaneously filed a Petition for Declaratory Order seeking a ruling that work on the Lamoille Valley Rail Trail is exempt from Act 250, Vermont’s land use statute. VAST advances two bases for the waiver. First, VAST is acting in the stead of Vermont Department of Transportation (“VTrans”), a State entity that would be exempt if filing this Petition itself pursuant to subpart (e)(1). In the alternative, VAST seeks a hardship waiver pursuant to subpart (e)(2).

On February 13, 2004, the STB approved Lamoille Valley Railroad Company’s (“LVRC”) abandonment of certain trackage rights in Caledonia, Washington, Orleans, Lamoille, and Franklin Counties in Vermont. *Lamoille County Railroad Company-Abandonment and Discontinuance of Trackage Rights Exemption- In Caledonia, Washington, Orleans, Lamoille and Franklin Counties*, VT, STB Docket No. AB-444 (Sub-NO. IX). The line is owned by the State of Vermont by and through the VTrans. *Id.* The order also granted VTrans’ request for the issuance of a notice of interim trail use (“NITU”) to allow VTrans to negotiate a trail use agreement with LVRC. *Id.* On February 23, 2004, VTrans and LVRC informed the STB that an interim trail use agreement had been reached. *Exhibit A to the Petition, Letter dated February 23, 2004 from T. Spear to Sec. Williams.* The trail is known as the Lamoille Valley Rail Trail (the “Trail”).

VTrans leased the Trail to the VAST (the “Lease”), a quasi-state agency established by Vermont statute and contracted with VAST to restore and maintain the Trail. *Exhibit B, Lease*

between VTrans and VAST and Exhibit C, Cooperative Agreement No. 4 (both submitted in support of the Petition). VTrans remains a party to the Trail Agreement.

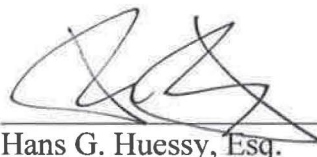
VAST seeks a waiver of the \$1,400 filing fee for its Petition for Declaratory Judgment filed simultaneously herewith. VAST is a quasi-state agency to whom the Trail has been leased and to whom the State has contracted with to repair and maintain the Trail.

VAST is a private non-profit organization qualified as a charitable organization. It is made up of 14 county snowmobile clubs and 151 local clubs. *Exhibit H to the Petition, Affidavit of Cindy Locke.* VAST is a member of the Governor's Snowmobile Council pursuant to 23 V.S.A. § 3216(a)(1)(A). 23 V.S.A. § 3214 authorizes VAST to retain a portion of all snowmobile registration fees for the purpose of developing and maintaining a Statewide Snowmobile Trail Program ("SSTP"), insuring the trail system, and contracting with law enforcement for the enforcement of laws and regulations related to trail use. Pursuant to Title 23, VAST acts as agent of the State for the purpose of collecting registration fees and trail maintenance fees. 23 V.S.A. § 3201 *et seq.* VAST also receives a small percentage of state gasoline tax. VAST is organized for a public purpose and the trail system exists for a public purpose. *Vermont Environmental Board, Re: Vermont Association of Snow Travelers (VAST)*, DR #430, FCO at 9 (March, 11, 2005)(copy attached to Petition). VAST also is involved the Vermont Trail System. 10 V.S.A. § 441 *et seq.*, see also 10 V.S.A. § 446(3). The Vermont Trail Systems Act expressly contemplates the State's purchase of discontinued railroad right-of-ways for the purpose of creating trails. 10 V.S.A. §§ 441(e) and 447(b). Accordingly, Vermont has delegated certain aspects of the management of its snowmobile and recreational trails to VAST and VAST acts a quasi-state agency in this respect. Accordingly, VAST stands in VTrans' shoes and should be entitled to a fee waiver pursuant to subpart (e)(1).

In the alternative, VAST seeks a fee waiver pursuant to subpart (e)(2). Under the Lease, VAST is responsible for the entire cost of repairing and maintaining the Trail to the extent that State and federal funds are not available. VAST will have to pay a minimum of 20% of the costs regardless of the availability of State or federal funding. VAST is a non-profit charitable organization and will have to raise these funds through charitable donations as it has no source of revenue adequate to pay for the necessary work¹. The projected total cost of completing the work on the Trail is in excess of fifteen million dollars. Therefore, the imposition of the filing fee will work a hardship on VAST and a fee waiver would be in the public interest.

Dated on the 4th day of April, 2017 at Burlington, Vermont.

MURPHY SULLIVAN KRONK

A handwritten signature in black ink, appearing to read 'H. Huessy', is written over a horizontal line.

Hans G. Huessy, Esq.
Attorneys for Vermont Association of Snow
Travelers

¹ While VAST does receive revenues from the State, by law these revenues are not available for use for the purpose of repairing and maintaining the Trail.

BEFORE THE
SURFACE TRANSPORTATION BOARD

(Sub-No. 2X)

Docket No. AB-444 (~~Sub-No. IX~~)

*Lamoille County Railroad Company-Abandonment and Discontinuance of Trackage
Rights Exemption- In Caledonia, Washington, Orleans, Lamoille and Franklin
Counties, VT*

VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.
PETITION FOR DECLARATORY ORDER

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April 4, 2017

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I. INTRODUCTION

The Vermont Association of Snow Travelers, Inc. (“VAST”) files this Petition seeking a Declaratory Judgment that its work on the Lamoille Valley Rail Trail (the “Trail”) is exempt from regulation under Vermont’s land use planning statute, known as Act 250. Vt. Stat. Ann. Tit. 10, Ch. 151 (2015) (“Act 250”). VAST contends that Act 250 jurisdiction over the Trail is preempted by the National Trail Systems Act, 16 U.S.C. § 1241 *et seq.*, and the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (the “Termination Act”). As shown below, the Act 250 process has caused substantial delay, significantly increased project costs, and has frustrated the development of the Trail.

Act 250 requires permit amendments for any material work done within, or in some cases, adjoining the 93-mile-long Trail. When a major permit amendment is required, notice must be given to close to 1,000 adjoining land owners. Less than two years into the construction process, VAST has already had to obtain five separate permit amendments. In addition, the State itself has undertaken work within the right-of-way for which amendments arguably should have been obtained, but were not, putting VAST in violation of its Act 250 permit. The State has also issued Trail access and crossing agreements that arguably should have been memorialized in Act 250 permit amendments, but also were not.

VAST is a relatively small organization with no full-time charitable fundraising apparatus. All funds for work on the Trail must be raised through donations. The additional legal and engineering expenses associated with Act 250 have placed a great strain on VAST’s ability to fund the project while at the same time diverting VAST employees from their normal duties. With respect to rail trails, Act 250’s district environmental administrators (the persons who administer Act 250) have enforced and interpreted Act 250 inconsistently, first determining the trail was

exempt from Act 250, then reversing themselves, despite the fact that the four other major rail trails in the State remain exempt.¹

The Surface Transportation Board (the “STB”) has ruled that overly burdensome state regulations that frustrate the development of rail trails are preempted under the Termination and National Trails Acts. As explained in detail below, Act 250 is overly burdensome and has frustrated the development of the Trail and, therefore, it should be preempted.

II. FACTUAL BACKGROUND

On February 13, 2004, the STB approved the Lamoille Valley Railroad Company’s (“LVRC”) abandonment of certain trackage rights in Caledonia, Washington, Orleans, Lamoille, and Franklin Counties in Vermont. *Lamoille County Railroad Company-Abandonment and Discontinuance of Trackage Rights Exemption In Caledonia, Washington, Orleans, Lamoille and Franklin Counties*, VT, STB Docket No. AB-444 (Sub-NO. IX). The line is owned by the State of Vermont by and through the Vermont Agency of Transportation (“VTrans”). *Id.* The order also granted VTrans’ request for the issuance of a notice of interim trail use (“NITU”) to allow VTrans to negotiate a trail use agreement with LVRC. *Id.* On February 23, 2004, VTrans and LVRC informed the STB that an interim trail use agreement had been reached. *Exhibit A, Letter dated February 23, 2004 from T. Spear to Sec. Williams.*

VTrans leased the Trail to the Vermont Association of Snow Travelers (“VAST” and the “Lease”), a quasi-state agency established by Vermont statute, and contracted with VAST² to

¹ The other Vermont lines rail-banked under the Trails Act are (a) the former North Burlington Branch of Vermont Railway, Inc. (“VTR”), (b) the St. Albans-Sheldon segment of the former Central Vermont Railway, Inc. Richford Subdivision, (c) the Sheldon-Richford segment of the former Central Vermont Railway, Inc. Richford Subdivision, and (d) the Newport-Derby segment of the Canadian Pacific Railway Beebe Subdivision.

restore and maintain the trail. *Exhibit B, Lease between VTrans and VAST and Exhibit C, Construction-Funding and Lease-Renewal Agreement*. The trail is known as the Lamoille Valley Rail Trail (the “Trail”).

VAST is a private non-profit organization qualified as a charitable organization. It is made up of 14 county snowmobile clubs and 125 local clubs. VAST is a member of the Governor’s Snowmobile Council pursuant to 23 V.S.A. § 3216(a)(1)(A). VAST receives a portion of all snowmobile registration fees for the purpose of developing and maintaining a Statewide Snowmobile Trail Program (“SSTP”)³, insuring the trail system, and contracting with law enforcement for the enforcement of laws and regulations related to trail use. 23 V.S.A. § 3214. Pursuant to Title 23, VAST acts as agent of the State for the purpose of collecting registration fees and trail maintenance fees. 23 V.S.A. § 3201 *et seq.* VAST also receives a small percentage of state gasoline tax. VAST is organized for a public purpose and the trail system exists for a public purpose. *Exhibit D, Vermont Environmental Board, Re: Vermont Association of Snow Travelers (VAST)*, DR #430, FCO at 9 (March, 11, 2005). VAST also is involved with the Vermont Trail System. 10 V.S.A. § 441 *et seq.*; see also 10 V.S.A. § 446(3). The Vermont Trail Systems Act⁴ expressly contemplates the State’s purchase of discontinued railroad right-of-ways for the purpose of creating trails. 10 V.S.A. §§ 441(e) and 447(b). Accordingly, Vermont has delegated certain

² In the event that the STB determines that the Lease constitutes a termination of use by VTrans, VAST will file the documents required by 49 CFR § 1152.29(f) to support this Petition. Importantly, the Lease itself incorporates all the necessary terms required by 49 CFR § 1152.29(f). VAST does not believe this is necessary, as VTrans has merely leased the Trail to VAST and contracted with VAST for the construction and maintenance of the trail. VTrans remains the owner of the Trail and remains a party to the NITU.

³ The Trail is part of the SSTP, but only with respect to its use by snowmobiles, its year-round, non-motorized use is treated differently.

⁴ The Trail and the SSTP are both part of the Vermont Trail System.

aspects of the management of its snowmobile and recreational trails to VAST and VAST acts as a quasi-state agency in this respect.

After the execution of the Lease, VAST began work on the Trail, which when completed will be 93 miles long. In 2006, Congress authorized a significant federal grant, enough to cover 80% of the estimated cost at that time. Congress identified the Trail as “high priority.” *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)*, Pub. L. No. 109-59, § 1702, 119 Stat. 1144, 1355 (2005). Nine bridges had been damaged and required replacement, and in 2005, the cost of the project was estimated to be about \$7,200,000. VAST must raise all of its share of the repair and maintenance expense through charitable donations. VAST has not engaged in extensive fund-raising in the past and has had to solicit additional help to organize a fundraising campaign. Raising large amounts of money in a small state like Vermont is extremely difficult.

As one of its initial steps, VAST sought and obtained a Jurisdictional Opinion⁵ (“JO”) from the three District Environmental Coordinators for the districts in which the Trail was located with respect to Act 250⁶ jurisdiction. The JO considered the issue of preemption, but concluded that Act 250 was not preempted in this case. However, the JO held that the project did not require an Act 250 permit because it did not constitute “development,” as the work consisted of maintenance and repair. *Exhibit E, Jurisdictional Opinion #5-06, #6-005 (2009), #7-267, Lamoille Valley Rail Trail*, June 1, 2009). Two adjoining landowners filed a Motion for Reconsideration and on September 30, 2009, the District Coordinators issued a further JO, reversing their prior decision and determining

⁵ Under Act 250, a party may seek a JO prior to beginning work in order to establish whether the project is subject to Act 250.

⁶ Act 250 is Vermont’s broad and all-encompassing land use law. 10 V.S.A. Chapter 151.

that an Act 250 permit was required because the work was not solely maintenance and repair.

Exhibit F, Revised JO.

That JO was appealed, but the appeal was eventually withdrawn and VAST applied for and obtained an Act 250 permit. *Exhibit G, the "Act 250 Permit."* The Permit covers the development of the first third of the Trail. The Permit does not cover the balance of the Trail, although certain findings will carry forward if the Trail is completed within five years of the issuance of the original Permit (very unlikely at this time).

The Act 250 permitting process was both expensive and time consuming. VAST estimates it incurred \$460,000 in legal fees, engineering fees, and other costs related to the Act 250 process. *Exhibit H, Affidavit of Cindy Locke.* This translates to 7% of the total federal grant or \$14,000 per mile of Trail. *Id.* This is exclusive of the time and expense associated with having VAST employees dedicated to this project for long periods of time. *Id.* The budgeted Act 250 expense for the balance of the Trail is another \$450,000. That number assumes there will be no significant opposition and no appeals of the permits. *Id.*

Not only did Act 250 significantly increase the project's permitting expense, it also delayed the project's start by four years. *Id.* This delay has resulted in a substantial increase in the estimated cost of completing the Trail, which now stands at close to \$16 million, more than double the original estimate (in total it is estimated Act 250 will add seven to eight years to the timeline). *Id.* In addition, obtaining the requisite Act 250 permits for Phase II and III of the Project could result in additional significant delay. A single landowner whose land abuts any portion of the 93-mile Trail and who objects to the Trail going through their backyard can delay the issuance of a final permit by appealing the permit to the Environmental Division of the Vermont Superior Court ("Environmental Court") and from there to the Vermont Supreme Court, a process which could

easily take as long as four years and the total expense to the adjoining landowner could be as little as \$1,000, while costing VAST hundreds of thousands of dollars.

In previous litigation, Vermont claimed that the Act 250 process does not cause undue delay in the construction of a project. However, in the *Green Mountain* case, which also involved the preemption of Act 250, the Second Circuit noted that Vermont's own statistics show that the issuance of a permit for a major project such as the Trail can take almost a year and, if appealed to the Environmental Court, on average this delays the project for another nine months. *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 640, fn 1 (2d Cir. 2005). If that decision is appealed to the Vermont Supreme Court, a final decision can easily take another two years. Accordingly, a single project opponent can delay the Trail by close to four years for the cost of two minor filing fees (less than \$300 each).

Importantly, much of the Act 250 review process is duplicative of other federal and state permit proceedings. For example, the Act 250 review addresses stormwater issues even where the applicant has previously obtained a stormwater permit. In point of fact, prior to having to obtain its Act 250 permit, VAST had applied for and received a Stormwater Discharge permit, a Wetlands permit, and an Endangered and Threatened Species Taking permit, yet had to address all these issues a second time during the Act 250 process. *Exhibit G, Act 250 Permit*. In addition to these permits, VAST obtained an Individual Construction Stormwater Discharge permit, a Streams Alteration/Flood Hazard permit, and Programmatic Agreement re Historical Structures. *Exhibit H, Affidavit of Cindy Locke*. VAST does not object to having to obtain such permits. These permits for the most part are issued in accordance with well-defined objective criteria. They do not impose a similar notice burden and future work along the Trail unrelated to these permits will not trigger the need to amend them.

Another example of how the Act 250 process slows work and increases costs is a recent effort by the Town of Hyde Park, Vermont to do some stormwater-related work, a small portion of which was located in the Trail right-of-way. The proposed work included the installation of a 15" culvert under the Trail. The Town was all ready to do the work and contacted VAST for permission to do the work in the right-of-way. However, no such work can be done without first obtaining an amendment to the 250 Permit or a formal opinion from the District Coordinator that an amendment is not required. The District Coordinator can decide that a full amendment is required, that a minor amendment is required, or that no amendment is required. A full amendment can take as long to process as an initial application. A permittee takes substantial risk by allowing any work to take place on land subject to an Act 250 permit without first obtaining a ruling from the District Coordinator and a violation can result in significant fines (\$10,000 or more) even when the violation is self-reported. The upshot of this requirement, and the inability to get the District Coordinator to sign off that no amendment was needed without first receiving a formal project review sheet, was that the Town abandoned the project and the work did not get done. The failure to complete this project poses a significant threat of a rail bed washout in this area. There has been a prior washout in this location that required costly repair. The inability to timely address this type of problem frustrates the intent of the National Trails System Act and may impose substantial unnecessary repair costs on VAST. *Exhibit H, Affidavit of Cindy Locke.*

Examples of other minor projects that mandated an amendment, and one that did not, are attached as *Exhibit I*. These six amendments and the one decision that no amendment was needed document how minor the work can be and still trigger the need for review and how inconsistent the process can be for making this determination. These six amendments have been required after less than two years of operating only a third of the Trail. It is not hard to imagine the countless number

of amendments that will be required every year once the full 93 miles is in use. Every time an adjoining landowner wishes to install or improve a crossing an amendment may be needed, every time trees are cleared to open views of the river an amendment may be needed, every time a parking area is modified an amendment may be needed, and the list goes on. In ten years there could easily be over 150 amendments. One of the most frustrating aspects of this process is that these individual administrative amendments are almost exclusively bureaucratic red tape. No additional environmental protection, public safety or other important public policies are served by this review. None of these amendments impose any additional conditions, they just memorialize the fact that VAST has jumped through the requisite bureaucratic hoops in a timely fashion.

In addition, the State itself has undertaken activity within the right-of-way for which an amendment arguably should have been obtained, but which was not. An example of this is the State's replacement of a failing highway bridge over the Trail with a tunnel in St. Johnsbury. *Exhibit H, Affidavit of Cindy Locke*. So the State itself leaves VAST in a regulatory haze. In addition, the State has authorized multiple Trail crossings and issued Trail access permits without obtaining an amendment, each one of which arguably should have been the subject of an amendment. *Id.* These examples demonstrate that remaining in compliance with the Act 250 permit will be virtually impossible, as VAST cannot hope to document every improvement made along the Trail by a town or adjoining landowner with an amendment when the State itself does not always investigate the need for a Permit amendment.

Similar delays could be experienced every time a town along the Trail wants to place a picnic table, connecting trail, or bench along the Trail. An opinion will have to be obtained that no amendment is required, a minor amendment is required, or a major amendment is necessary. If a major amendment is required, VAST could be required to notify every adjoining landowner along

the entire 93-mile length of the Trail, a total of 655 landowners of 765 different parcels of land at last count, in addition to a slew of other parties that must be notified per the statute. One person who adjoins the Trail at the far western end of the Trail objecting to a proposed modification at the far eastern end of the Trail could appeal the amendment even though they live almost 100 miles away from the work site.⁷ As explained above, such an appeal could tie the project up for several years.

Further complicating matters, Vermont has enforced Act 250 in a completely inconsistent matter both with respect to the Trail itself and with respect to similar Vermont rail trails. As noted above, the District Coordinators first found no jurisdiction over the Trail, then changed their minds. In a highly unusual step, one of the District Coordinators submitted a lengthy dissenting opinion, the only such dissenting opinion of which VAST counsel is aware. Recently, a District Coordinator determined that work on the Burlington Bike Path, a 20-plus mile trail with both rail-trail and rail-with-trail segments, did not trigger Act 250 jurisdiction even though the work contemplated in that instance is virtually the same as that proposed on the Trail. *Exhibit J, Burlington Bike Path JO*. The Beebe Spur Trail, a five-mile-long rail trail was also found not to require an Act 250 permit. *Exhibit K, VT Environmental Board Beebe Spur Rails to Trails Project Declaratory Ruling Request #338, Findings of Fact, Conclusions of Law, and Dismissal Order, March 19, 1998*. The 20-mile Delaware & Hudson Rail Trail was not required to obtain an Act 250 permit, nor was the 26-mile long Missisquoi Valley Rail Trail. Importantly, under existing Act 250 precedent, the Missisquoi Valley Rail Trail should be subject to Act 250 jurisdiction now, as it is also owned by the State and the express long-term plan is to connect the two trails. Under Act 250, once a developer has a clearly defined work plan for a project, the entire project area is subject to Act 250, not just the area

⁷ Under Act 250, any adjoining landowner is a statutory party to the permit application process and any subsequent amendments.

where the initial phases of the project occur. *Act 250 Rule 2(C)(5)(a)(definition of involved land)*. Yet the agency that oversees Act 250, the Natural Resources Board, has not extended jurisdiction over the Missisquoi Valley Rail Trail as of yet. Once that happens, the list of adjoining landowners will likely exceed 1,000, all of whom are entitled to statutory notice of any proposed amendment.

III. JURISDICTION

The STB has jurisdiction over this matter pursuant to 5 U.S.C. § 554(c) and 49 U.S.C. § 721.

IV. ISSUE PRESENTED

Do the National Trail Systems Act, 16 U.S.C. § 1241 *et seq.*, and the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (the “Termination Act”) preempt 10 V.S.A., Chapter 151 (“Act 250”)?

V. LEGAL AUTHORITY IN SUPPORT OF PETITION

The Termination Act preempts state law and places exclusive jurisdiction with the STB with respect to the construction, maintenance and abandonment of railroad facilities. 49 U.S.C. § 10501(b) and *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). This precise issue, whether the Termination Act preempts Act 250, was previously resolved in favor of preemption. *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). The *Green Mountain* case involved the construction of facilities for trans-loading freight. *Id.* at 639. Like the Trail, the facilities in *Green Mountain* were already subject to an existing Act 250 permit when the issue was litigated. *Id.* at 641. The Second Circuit found that Act 250 was expressly preempted by the Termination Act.

The Termination Act Section 10501 vests the Transportation Board with exclusive jurisdiction over “transportation by rail carriers” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.”

Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 641–42 (2d Cir. 2005) (citation omitted). This is consistent with other federal precedent in which courts have consistently held that the “Termination Act preempts most pre-construction permit requirements imposed by states and localities.” *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005). The Second Circuit noted that the STB has also found such statutes to be preempted. “State and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.” *Joint Petition for and Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), *aff’d*, *Boston & Maine Corp. v. Town of Ayer*, 191 F.Supp.2d 257 (D.Mass.2002).

Like the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. Act 250's pre-construction permit requirement is preempted for two reasons: (i) it “unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations”; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely.

Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005)(citations omitted). Even if the body issuing the permit recognizes, as it did with the Trail, that it cannot deny the permit, Act 250 is nonetheless preempted because it includes highly subjective matters like aesthetics for which there are not “settled and defined” standards and because the process allows for “extended” and “open-ended delays.” *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). The Second Circuit concluded that what was preempted was the Act 250 process itself and it did not matter how

long it may take for a particular permit to issue. *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005).

We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.

Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

The Trail is being constructed on a former railroad line and the purpose of allowing VAST to construct the Trail on the line is to “bank” the line in case it is needed for future railroad transportation. In the absence of a banking program that ensures the continued maintenance of the right-of-way, the line would quickly fall into a state of disrepair that could preclude the resumption of railroad activity on the line.

Congress adopted section 1247(d) of the [National Trail Systems] Act to implement its policy of preserving railroad rights-of-way for future reactivation to rail service and to promote the public interest in recreational trails. *Preseault v. I.C.C.*, 494 U.S. 1, 6–8, 110 S.Ct. 914, 919, 108 L.Ed.2d 1 (1990). The Act provides that dedication of rail lines to interim trail use “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” 16 U.S.C. § 1247(d).

Schneider v. Union P. R. Co., 864 F. Supp. 120, 123 (D. Neb. 1994). Here, as required by federal regulation, the former operator of the line entered into an interim use agreement that expressly states that the Trail is subject to the future restoration of rail service. 40 CFR § 1152. While precedent related to rail-banking activity has somewhat narrowed the scope of the preemption afforded to railroad operations per the *Green Mountain* holding, the cases do not eliminate it altogether. Courts have found that exclusive jurisdiction was granted to the STB and that with respect to rail-banking, the STB has ceded some, but not all, authority back to the states.

Importantly, federal courts and the STB have both held that land use regulations that frustrate the

development of a trail are preempted. This frustration could take the form of increased or significant delay, both of which are present here. *Friends of East Lake Sammamish Trail, et al. v. City of Sammamish*, et al., 361 F. Supp2d 1260, 1274 (2005) and *Idaho N. & Pacific R.R. Co., Exemption-Abandonment in Pottawattamie, Mills, Fremont and Page Counties*, IA 1989 WL 239065, 5 I.C.C. 2d 496, 505. In addition, regulations that impose burdensome costs have been found to be preempted. *Miami County Bd. of Com'rs v. Kanza Rail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1201 (Kan. 2011).

The Hyde Park project discussed above is an example of how Act 250 frustrates the development and use of the Trail. In that instance, the relevant State agency, the Agency of Natural Resources, had determined no permit was necessary, but this was not sufficient on its own for the District Coordinator to determine that no Act 250 Amendment was required. In other words, even where the agency with the relevant expertise, *e.g.* wetlands, says a project does not need a permit, a secondary sign-off from the District Coordinator must still be obtained.

The need for endless amendments, the difficulty in tracking all improvements along the 93-mile Trail (119 miles once the Trail is connected to the Missisquoi Valley Rail Trail), the burden of giving notice to all adjoining landowners, the resulting delays, and the associated cost provide grounds for preemption as these needless bureaucratic hurdles frustrate the development of and use of the Trail, and are unduly burdensome. Compliance with Act 250 diverts substantial amounts of funds that must be raised through charitable donations and which are then not available to maintain and preserve the rail bed, undercutting and frustrating the primary purpose of the rail-banking aspect of the National Trails Act and making it less likely that the rail bed will be fully restored in the near future.

VII. CONCLUSION

While Act 250 has proven itself over time to be a valuable land use planning statute, it is simply not designed to deal with a project like the Trail. Complying with Act 250 has cost VAST substantial amounts of funds and caused significant delay in the development of the Trail, a high priority project, while delivering little or no environmental or public benefits. As compliance with Act 250 has been proven to be unduly burdensome and expensive, Act 250 jurisdiction over the Trail is preempted by the National Trails and Termination Acts.

Dated on the 4th day of April, 2017 at Burlington, Vermont.

MURPHY SULLIVAN KRONK



Hans G. Huessy, Esq.
Attorneys for Vermont Association of Snow
Travelers

RE: Docket No. AB-444 (Sub-NO. IX)
Petition for Declaratory Order – Vermont Association of Snow Travelers

EXHIBIT LIST

Exhibit A, Letter dated February 23, 2004 from T. Spear to Sec. Williams.

Exhibit B, Lease between VTrans and VAST.

Exhibit C, Construction-Funding and Lease-Renewal Agreement between VTrans and VAST.

Exhibit D, Vermont Environmental Board, Re: Vermont Association of Snow Travelers (VAST), DR #430, FCO at 9 (March, 11, 2005).

Exhibit E, Jurisdictional Opinion #5-06, #6-005 (2009), #7-267, Lamoille Valley Rail Trail, June 1, 2009.

Exhibit F, Jurisdictional Opinion #5-06, #6-005 (2009), #7-267, Lamoille Valley Rail Trail, September 30, 2009, Revised.

Exhibit G, the "Act 250 Permit."

Exhibit H, Affidavit of Cindy Locke.

Exhibit I, Permit Amendments and Decision finding no amendment required.

Exhibit J, Burlington Bike Path JO.

Exhibit K, VT Environmental Board Beebe Spur Rails to Trails Project Declaratory Ruling Request #338, Findings of Fact, Conclusions of Law, and Dismissal Order, March 19, 1998.

RE: Docket No. AB-444 (Sub-NO. IX)
Petition for Declaratory Order – Vermont Association of Snow Travelers

CERTIFICATE OF SERVICE

I, Hans G. Huessy, Esq., hereby certify that I have this day served copies of the following documents upon all parties of record in this proceeding with this document by United States mail, certified:

1. Letter and Filing Fee Waiver Request;
2. Petition for Declaratory Order;
3. Declaration of Cindy Locke in Support of Petition for Declaratory Order with attachments;
4. Textual submission submitted on compact disc(s).

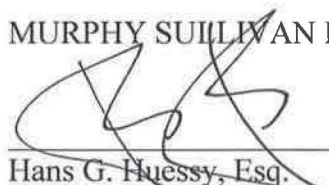
Rachel Campbell
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Joshua R. Diamond, Esq.
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

I certify under penalty of perjury under the laws of the State of Vermont that the foregoing is true and correct.

Executed on the 4th day of April, 2017 at Burlington, Vermont.

MURPHY SULLIVAN KRONK



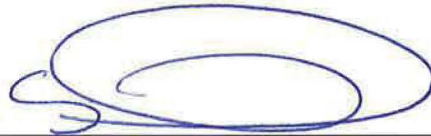
Hans G. Huessy, Esq.
Attorneys for Vermont Association of Snow
Travelers, Inc.

RE: Docket No. AB-444 (Sub-NO. IX)
Petition for Declaratory Order – Vermont Association of Snow Travelers

DECLARATION OF CINDY LOCKE

I, Cindy Locke, Executive Director of Vermont Association of Snow Travelers, declare under penalty of perjury that the foregoing Petition for Declaratory Judgment is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on the 15 day of March, 2017 at Barre, Vermont.



Cindy Locke
Vermont Association of Snow Travelers

Exhibit A

***Letter Dated February 23, 2004 from T. Spear
to Sec. Williams***

Kirkpatrick & Lockhart LLP

1800 Massachusetts Avenue, NW
Suite 200
Washington, DC 20036-1221
202.778.9000
www.kl.com

February 23, 2004

ENTERED
Office of Proceedings

FEB 23 2004

Part of
Public Record

2/10/33
Tracie D. Spear
202.778.9390
Fax: 202.778.9133
tspear@kl.com

**VIA HAND DELIVERY**

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: Lamoille Valley Railroad Company – Abandonment and
Discontinuance of Trackage Rights Exemption – In Caledonia,
Washington, Orleans, Lamoille and Franklin Counties, VT,
STB Docket No. AB-444 (Sub-No. 1X)**

Dear Secretary Williams:

In this proceeding, Lamoille Valley Railroad Company ("LVRC"), in cooperation with the State of Vermont, by and through its Department of Transportation ("VTrans"), filed a Verified Notice of Exemption ("Notice") pursuant to 49 C.F.R. § 1152.50 in connection with, among other things, the abandonment of approximately 96.78 route miles of rail line in Caledonia, Washington, Orleans, Lamoille and Franklin Counties, Vermont (the "Subject Line"). On January 26, 2004, VTrans filed a request for the issuance of a notice of interim trail use ("NITU") for the Subject Line under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. By letter filed on February 12, 2004, LVRC indicated its willingness to enter into an interim trail use

Kirkpatrick & Lockhart LLP

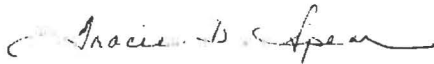
Mr. Vernon A. Williams
February 23, 2004
Page 2

arrangement with VTrans. By decision served February 13, 2004, the Surface Transportation Board ("Board") authorized LVRC and VTrans to negotiate an interim trail use agreement.

The purpose of this letter is to notify the Board that LVRC and VTrans have entered into an arrangement to convert the Subject Line into a rail-trail pursuant to 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.

Please contact me if you have any questions regarding this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tracie D. Spear".

Tracie D. Spear
Attorney for Lamoille Valley Railroad Company

Exhibit B
Lease Between VTrans and VAST

**AMENDMENT NO. 5 TO
OCTOBER 2, 2006 LEASE AGREEMENT
BETWEEN
STATE OF VERMONT, AGENCY OF TRANSPORTATION
AND
VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.**

THIS AMENDMENT, entered into as of this 30th day of ~~February~~ ^{March}, 2017, by and between the STATE OF VERMONT, a sovereign state, acting by and through its Agency of Transportation, with its principal offices at National Life Building, One National Life Drive, Montpelier, VT 05633-5001 ("STATE"), and the Vermont Association of Snow Travelers, Inc., a Vermont non-profit corporation with its principal office at 26 VAST Lane, Barre Vermont 05641-5366 ("VAST," "USER," or "Party").

WITNESSETH:

WHEREAS, on or about October 2, 2006, the STATE and VAST entered into Lease Agreement ("Lease"), under which VAST is responsible for managing the Lamoille Valley Rail Trail (LVRT); and

WHEREAS, the STATE and VAST have entered into the following amendments to the Lease, thereby extending the initial term of the Lease and adjusting the dates of the renewal terms commensurately:

Amendment #	Amendment Date	Adjusted Expiration Date of Initial Term
1	June 29, 2016	Oct. 31, 2016
2	Oct. 28, 2016	Dec. 31, 2016
3	Dec. 19, 2016	Jan. 31, 2017
4	Jan. 20, 2017	Feb. 28, 2017

and

WHEREAS, VAST, contemporaneously with this amendment, has exercised its option to renew the Lease for a first renewal term extending from March 1, 2017 through February 28, 2027; and

WHEREAS, the parties wish to make certain changes to the Lease;

NOW, THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

1. Article XI (Indemnity and Liability). Article XI (Indemnity and Liability) is deleted in its entirety and the following is substituted in its place:

ARTICLE XI INDEPENDENCE, DEFENSE AND INDEMNITY

11.1. Independence: The Party will act in an independent capacity and not as officers or employees of the State.

11.2. Defense and Indemnity: The Party shall defend the State and its officers and employees against all third party claims or suits arising in whole or in part from any act or omission of the Party or of any agent of the Party in connection with the performance of this Agreement. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit. The State retains the right to participate at its own expense in the defense of any claim. The State shall have the right to approve all proposed settlements of such claims or suits. In the event the State withholds approval to settle any such claim, then the Party shall proceed with the defense of the claim but under those circumstances, the Party's indemnification obligations shall be limited to the amount of the proposed settlement initially rejected by the State.

After a final judgment or settlement, the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense of any claim arising from an act or omission of the Party in connection with the performance of this Agreement.

The Party shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any act or omission of the Party or an agent of the Party in connection with the performance of this Agreement.

The Party agrees that in no event shall the terms of this Agreement or any document required by the Party in connection with its performance under this Agreement obligate the State to defend or indemnify the Party or otherwise be liable for the expenses or reimbursement, including attorneys' fees, collection costs or other costs of the Party except to the extent awarded by a court of competent jurisdiction.

11.3. Pre-existing Hazardous Waste. Notwithstanding the forgoing, the USER shall not be liable for the clean-up and removal of hazardous waste or substances present on the Premises on or before October 1, 2006, provided USER complies with any reporting requirement set forth in any Clean Up Law pursuant to Article XXIII and provided further that USER promptly notified STATE of any pre-existing hazardous waste that USER discovers.

2. Article XII (Insurance). Article XII (Insurance) is deleted in its entirety and the following is substituted in its place:

ARTICLE XII INSURANCE

12.1. Insurance: Before exercising its rights under this Agreement, the Party must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Party to maintain current certificates of insurance on file with the State through the term of the Agreement. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Party for the Party's operations. These are solely minimums that have been established to protect the interests of the State.

Workers Compensation: With respect to all operations performed, the Party shall carry workers' compensation insurance in accordance with the laws of the State of Vermont. Vermont will accept an out-of-state employer's workers' compensation coverage while operating in Vermont provided that the insurance carrier is licensed to write insurance in Vermont and an amendatory endorsement is added to the policy adding Vermont for coverage purposes. Otherwise, the party shall secure a Vermont workers' compensation policy, if necessary to comply with Vermont law.

General Liability and Property Damage: With respect to all operations performed under this Agreement, the Party shall carry general liability insurance having all major divisions of coverage including, but not limited to:

Premises - Operations
Products and Completed Operations
Personal Injury Liability
Contractual Liability

The policy shall be on an occurrence form and limits shall not be less than:

\$1,000,000 Each Occurrence
\$2,000,000 General Aggregate
\$1,000,000 Products/Completed Operations Aggregate
\$1,000,000 Personal & Advertising Injury

Automotive Liability: The Party shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the Agreement. Limits of coverage shall not be less than \$500,000 combined single limit. If performance of this Agreement involves construction, or the transport of persons or hazardous materials, limits of coverage shall not be less than \$1,000,000 combined single limit.

Additional Insured: The General Liability and Property Damage coverages required for performance of this Agreement shall include the State of Vermont and its agencies, departments, officers and employees as Additional Insureds. If performance of this Agreement involves construction, or the transport of persons or

LVRT - Amendment #5 to VAST Lease

V50/2 - V50/96

Page 3 of 6

hazardous materials, then the required Automotive Liability coverage shall include the State of Vermont and its agencies, departments, officers and employees as Additional Insureds. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

Notice of Cancellation or Change: There shall be no cancellation, change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written prior written notice to the State.

3. Article XII (Third-Party Agreements). Article XII (Third-Party Agreements) is amended by adding the following:

13.5. Advance Consultation. The STATE shall consult with USER before the STATE enters into any agreement allowing any third party to cross or use the trail to ensure that any such agreement includes terms and conditions that may be appropriate to address damages, signage, maintenance, or other costs or liabilities that USER may incur as a result of the agreement. The STATE shall document such consultation in writing. The USER shall not enter into any third-party agreements without the written concurrence of the STATE.

4. Article XX (Force Majeure). Article XX (Force Majeure) is amended by adding the following:

20.3. Repair of Catastrophic Damage. If USER constructs and maintains all improvements to relevant federal and state standards, there shall be a presumption that USER could not reasonably have avoided any damage caused by an uncontrollable force.

5. Relationship to Lease and Previous Amendments. Except as amended by this and previous amendments, the Lease remains in full force and effect.

[Signature blocks appear on following pages.]

IN WITNESS WHEREOF, the STATE OF VERMONT has caused this instrument to be subscribed, this 30th day of March, 2017, by Joe Flynn, its Secretary of Transportation and duly authorized agent.

STATE OF VERMONT
("STATE")

By: Joe Flynn
Joe Flynn, Its Secretary of Transportation
and Duly Authorized Agent

STATE OF VERMONT)
WASHINGTON COUNTY, ss.)

At Montpelier, this 30th day of March, 2017, personally appeared Joe Flynn and acknowledged the foregoing instrument, by him/her as Secretary of Transportation and duly authorized agent of the **STATE OF VERMONT** subscribed, to be his/her free act and deed and the free act and deed of the **STATE OF VERMONT**.

Before me,

Jo Ann Maguire
Notary Public
(My commission expires Feb. 10, 2019)

APPROVED AS TO FORM:

DATED: 3/24/2017
[Signature]
ASSISTANT ATTORNEY GENERAL

February, 2017, by Cindy Locke, its Executive Director and duly authorized agent.
march

(“VAST” or “USER”)

Cindy Locke, Its Executive Director and
Duly Authorized Agent

STATE OF VERMONT)
WASHINGTON COUNTY, ss.)

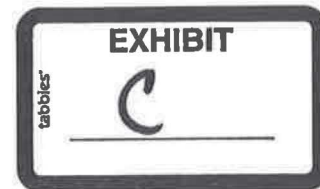
At Montpelier, this 28th day of February 2017, personally appeared Cindy Locke and acknowledged the foregoing instrument, by him/her as Executive Director of the **VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.** subscribed, to be his/her free act and deed and the free act and deed of the **VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.**

Before me,

Jo Ann Maguire
Notary Public
(My commission expires Feb. 10, 2019)

Exhibit C

***Construction-Funding and Lease-Renewal
Agreement between VTrans and VAST***



**CONSTRUCTION-FUNDING AND LEASE-RENEWAL AGREEMENT
BETWEEN
THE STATE OF VERMONT, AGENCY OF TRANSPORTATION
AND
THE VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.
RELATING
THE LAMOILLE VALLEY RAIL TRAIL**

THIS AGREEMENT, entered into by and between the State of Vermont, a sovereign state, acting by and through its Agency of Transportation, with its principal offices at National Life Building, One National Life Drive, Montpelier, VT 05633-5001 (STATE), and the Vermont Association of Snow Travelers, Inc., a Vermont non-profit corporation with its principal offices at 26 VAST Lane, Barre VT 05641-5366 (VAST) (sometimes collectively referred to herein as the Parties).

W I T N E S S E T H :

WHEREAS, on or about October 2, 2006, the STATE and VAST entered into Lease Agreement under which VAST is responsible for managing the Lamoille Valley Rail Trail (LVRT); and

WHEREAS, on or about June 18, 2007, the STATE and VAST entered into Cooperative Agreement for Advancement of Project Swanton – St. Johnsbury STP LRV(1) also known as Lamoille Valley Rail Trail LRV(1) 001 – 100, 200, 300 CFDA 20.205 Contract #CA197 (Cooperative Agreement), under which VAST is responsible for constructing and maintaining the LVRT; and

WHEREAS, the STATE and VAST entered into Cooperative Agreement Amendments #1, #2, and #3 on or about March 13, 2009, March 3, 2011, and September 29, 2014, respectively, to update project costs and phases and certain customary state contract provisions; and

WHEREAS, the STATE and VAST entered into Cooperative Agreement Amendment #4 on or about the same date the Parties executed this Agreement to delink project funding from project phases to afford VAST greater flexibility in the application of existing project funds and to update certain customary state contract provisions; and

WHEREAS, the Cooperative Agreement, which references the Lease and relieves VAST of certain responsibilities while the Lease is in effect, does not have a definite term; and

WHEREAS, the Lease's initial term was to expire June 30, 2016, and the Lease provides VAST with the right, subject to certain conditions, to renew the Lease for two additional terms of ten (10) years each; and

WHEREAS, the STATE and VAST have entered into the following amendments to the Lease, thereby extending the initial term of the Lease and adjusting the dates of the renewal terms commensurately:

Amendment #	Amendment Date	Adjusted Expiration Date of Initial Term
1	June 29, 2016	Oct. 31, 2016
2	Oct. 28, 2016	Dec. 31, 2016
3	Dec. 19, 2016	Jan. 31, 2017
4	Jan. 20, 2017	Feb. 28, 2017

and

WHEREAS, both the STATE and VAST desire the LVRT to be fully constructed and properly maintained and managed; and

WHEREAS, VAST desires the STATE's assistance with the financial burdens associated with VAST's responsibilities for constructing the LVRT under the amended Lease and the amended Cooperative Agreement, and the STATE desires to provide VAST with assistance, subject to legislative appropriation of funds, the terms and conditions of the amended Cooperative Agreement and the amended Lease, and the terms and conditions of any new grant agreements between the STATE and VAST for LVRT projects that the Legislature may approve; and

WHEREAS, VAST, in consideration of the STATE's intentions to seek future legislative appropriation for projects that will assist VAST with its responsibilities for constructing the LVRT under the amended Lease and the amended Cooperative Agreement, desires to renew the amended Lease for an additional term, beginning March 1, 2017 and ending February 28, 2027.

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree to the following terms and conditions:

1. Requests for Funding and Approval and Project Approval. The STATE agrees to work in good faith and with reasonable diligence, beginning with the 2017 legislative session, to secure the Vermont Legislature's appropriation of funding and approval for projects that will help VAST complete construction of the LVRT. Funding for these projects, if legislatively appropriated, shall require VAST to pay a twenty-percent match on the project costs. Any funding shall be on a project-by-project/segment-by-segment basis, and will not extend to projects or segments which VAST has commenced constructing with other state or federal funds prior to the date this Agreement is fully executed. The STATE shall award any funds that the Legislature makes available to VAST for a particular legislatively approved project through a grant agreement containing the STATE's most current customary terms and conditions. This Agreement does not obligate the STATE to negotiate the terms of any future grant agreement with VAST, and the STATE may, in its sole discretion, decline to award any grant to VAST in the event that VAST refuses to enter a grant agreement on terms acceptable to the STATE.

2. Lease Renewal. This Agreement, once signed by both parties, constitutes VAST's renewal of the amended Lease for an additional term, beginning March 1, 2017 and ending February 28, 2027, and the STATE's approval of such renewal. In the event this Agreement is not fully executed until after the expiration of the amended Lease's current term, the amended Lease shall thereupon renew retroactively from the beginning of the first renewal term (March 1, 2017) with no change to the end of the first renewal term (February 28, 2027).

3. Relationship to Other Agreements. This Agreement does not modify or have any effect on the amended Cooperative Agreement or the amended Lease, which remain in full force and effect unless and until modified by one or more future written agreements between the Parties.

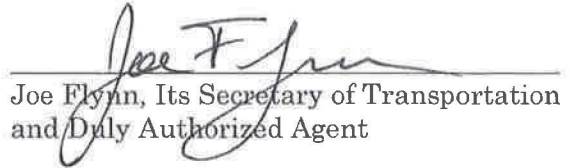
WE THE UNDERSIGNED PARTIES, BY OUR DULY AUTHORIZED AGENTS, AGREE TO BE BOUND BY THIS AGREEMENT:

[Signature blocks appear on following pages.]

IN WITNESS WHEREOF, the **STATE OF VERMONT** has caused this instrument to be subscribed, this 30th day of ~~February~~ ^{March}, 2017, by Joe Flynn, its Secretary of Transportation and duly authorized agent.

STATE OF VERMONT
("STATE")

By:


Joe Flynn, Its Secretary of Transportation
and Duly Authorized Agent

STATE OF VERMONT)
WASHINGTON COUNTY, ss.)

At Montpelier, this 30th day of ~~February~~ ^{March}, 2017, personally appeared Joe Flynn and acknowledged the foregoing instrument, by him/her as Secretary of Transportation and duly authorized agent of the **STATE OF VERMONT** subscribed, to be his/her free act and deed and the free act and deed of the **STATE OF VERMONT**.

Before me,


Notary Public
(My commission expires Feb. 10, 2019)

APPROVED AS TO FORM:

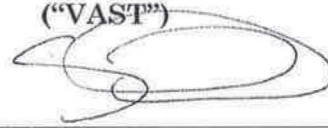
DATED: 2/24/2017


ASSISTANT ATTORNEY GENERAL

WITNESS WHEREOF, the VERMONT ASSOCIATION OF SNOW
TRAVELERS, INC. has caused this instrument to be subscribed, this 28 day of
~~February~~, 2017, by Cindy Locke, its Executive Director and duly authorized agent.
March (CL)

VERMONT ASSOCIATION OF SNOW
TRAVELERS, INC.

("VAST")



By:

Cindy Locke, Its Executive Director and
Duly Authorized Agent

STATE OF VERMONT)
WASHINGTON COUNTY, ss.)

At Montpelier, this 28th day of March, 2017, personally
appeared Cindy Locke and acknowledged the foregoing instrument, by him/her as
Executive Director of the VERMONT ASSOCIATION OF SNOW TRAVELERS, INC.
subscribed, to be his/her free act and deed and the free act and deed of the VERMONT
ASSOCIATION OF SNOW TRAVELERS, INC.

Before me,


Notary Public
(My commission expires Feb. 10, 2019)

Exhibit D

***VT Environmental Board, Re: VAST, DR
#430, FCO at 9 (March 11, 2005)***

**VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151**

EXHIBIT

tabbles

D

Re: *Vermont Association of Snow
Travelers (VAST)*

Declaratory Ruling #430

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Vermont Association of Snow Travelers (VAST) has requested a declaratory ruling on whether an Act 250 land use permit is required for approximately two snowmobile trail segments, together approximately 8 miles in length, in the towns of Fayston, Duxbury and Huntington, Vermont (Project). As discussed below, a permit amendment is required for the Project, as VAST conceded during the hearing. Also, the Board concludes that the Project does not trigger original Act 250 jurisdiction because it exists for a state purpose and because each trail segment is a separate project which physically disturbs less than ten acres of land. In addition, the Board declines to apply its rule on Act 250 jurisdiction on lands over 2,500 feet in elevation because the plain language of Act 250 expressly limits such jurisdiction to commercial, industrial or residential uses. In so holding, the Board denies the motion for summary decision filed by the Vermont Natural Resources Council (VNRC).

I. PROCEDURAL HISTORY

On October 21, 1986, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W0905 to New England Land Associates d/b/a Ward Lumber (NELA/Ward Lumber Permit) for the subdivision of a 3,425-acre tract of land in the Town of Fayston. The Vermont Department of Forests, Parks and Recreation acquired title to 2,695 acres of the original project tract in 1995, which includes Phen Basin and the current Project site.

On October 31, 2000, the District 5 Environmental Commission Coordinator (Coordinator) issued a Project Review Sheet (PRS) to the Department of Forests, Parks and Recreation (Department) indicating that an amended land use permit was required for physical actions both undertaken and proposed by the Department and other parties within Phen Basin. These physical actions incorporated various recreational trails including VAST trails. The PRS was not appealed to the Environmental Board. The Department subsequently filed applications 5W0905-6 and -7 for the review of the District Commission. The VAST Trails were purposely excluded from those applications due to an independent jurisdictional determination requested by VAST (Jurisdictional Opinion 5-04-1).

On January 29, 2001, the Coordinator issued a PRS in which he determined that a land use permit was required pursuant to 10 V.S.A. Ch. 151 (Act 250) for the Project. A timely request to reconsider the PRS was filed on February 27, 2001.

On January 7, 2004, after several meetings, continuances, and the issuance of a related land use permit amendment, #5W0905-7, the Coordinator issued

3/11/05

Jurisdictional Opinion 5-04-1 (JO) in which he again determined that a land use permit was required for the Project.

On February 6, 2004, VAST filed a Petition for Declaratory Ruling with the Environmental Board (Board), pursuant to 10 V.S.A. § 6007 and Environmental Board Rule (EBR) 3, appealing the JO. VAST contends that the Project does not require an Act 250 permit. This appeal was suspended pending the Coordinator's resolution of a second request to reconsider, which VAST filed on February 6, 2004. On March 5, 2004, the Coordinator issued a decision denying VAST's Second Request to Reconsider the JO.

On May 7, 2004, Board Chair Patricia Moulton Powden convened a prehearing conference with the following participants:

VAST, by L. Brooke Dingledine, Esq., with Bryant Watson
Agency of Natural Resources (ANR), by Elizabeth Lord, Esq.
James & Clair Lathrop, by George Vince, Esq.
Vermont Natural Resources Council (VNRC), by Kelly Lowry, Esq. and Jamey Fidel, Esq.
Vermont ATV Sportsman's Association (VASA), by Todd Sheinfeld

The Lathrops and VNRC filed petitions for party status at the prehearing conference. VASA does not seek party status. No other person notified the Board that he or she has an interest in participating as a party in this case.

The Board deliberated on the party status issues on June 23, 2004. On July 9, 2004, the Board issued a Memorandum of Decision on Party Status, granting the Lathrops party status pursuant to EBR 14(A)(2) and VNRC party status pursuant to EBR 14(A)(6).

On June 4, 2004, VAST and VNRC each filed a Motion for Summary Decision. The Board deliberated on these motions on July 21, 2004. On July 30, 2004, the Board issued a Memorandum of Decision consolidating VNRC's motion with the merits, and granting VAST's motion in part and denying it in part.

A hearing was held in this case on October 6, 2004. The parties were given an opportunity to file supplemental proposed findings and conclusions, and reply briefs. The Board deliberated on December 15, 2004, February 2, 2005, and February 23, 2005. Based upon a thorough review of the record and related argument, the Board declared the record complete and adjourned.

II. OFFICIAL NOTICE

The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); see also, 3 V.S.A. § 801(b)(2)(contested cases). According to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); see also, 3 V.S.A. § 810(1)(rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be taken at any stage of the proceeding, 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201[©]) and (f)). In this case, the Board has taken official notice of the Ward Lumber/NELA Permit, Land Use Permit #5W0905 (as amended).

III. ISSUE

The issue on appeal is whether the Project requires a land use permit pursuant to Act 250.

IV. FINDINGS OF FACT

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Topic headings are only for organizational purposes. Facts stated and terms defined in the procedural summary are incorporated herein.

The Project

1. This case involves two sections of snowmobile trail: the "Six-Mile Trail" on VAST Trail 17, in Fayston, Huntington and Duxbury, Vermont, and the "Loop Trail," also known as VAST Trail 17A, in Fayston.
2. The Six-Mile Trail was built in 1989 to connect a snowmobile corridor known as "corridor 125" over the Huntington Gap, and underwent several improvements in 1991. The construction of improvements on the Six-Mile Trail included clearing, bulldozing, making culverts and water bars, seeding, mulching, and putting up some signage for very difficult terrain.
3. The Six-Mile Trail is approximately 6 miles in length.

4. The Loop Trail was constructed in 1993, to allow snowmobile and groomer operators on the Six-Mile Trail to access a beaver pond, wetland, and an existing picnic area, and to allow groomer operators to avoid a steep hill on the Six-Mile Trail. The Loop Trail improvements involved upgrading and widening a cross-country ski trail, clearing an old log road, installing culverts for two intermittent streams, providing drainage, and grading in places.
5. The Loop Trail is approximately 1.8 miles long.
6. The Loop Trail and the Six-Mile Trail intersect each other but do not overlap.
7. The width of the area physically disturbed by the Project is approximately twelve feet.
8. Portions of the Six-Mile Trail are located above 2,500 feet in elevation.
9. The Loop Trail and most of the Six-Mile Trail are on land that is subject to Land Use Permit #5W0905 (as amended).
10. Portions of the Six-Mile Trail are on land that is not subject to Land Use Permit #5W0905 (as amended).
11. On October 21, 1986, the Commission issued Land Use Permit #5W0905, authorizing the subdivision of a 3,425-acre tract into 4 lots, including a 2,780-acre lot called "Lot G," which includes the land involved in this case.
12. On April 26, 1988, the Commission issued Land Use Permit Amendment #5W0905-1, authorizing the further subdivision of Lot G into a 112-acre parcel ("Lots 14G/B-H") and a 2,668-acre parcel ("Lots 14G/F") and the construction of a single-family home on each lot. Condition 5 of this permit amendment states in part that "the land use of each lot is restricted to the construction of a single-family residence and related driveway access."
13. On April 2, 2001, the Commission issued Land Use Permit Amendment #5W0905-6, which authorizes certain as-built physical actions taken to disallow access into the Phen Basin area by ATV and mountain bike users as well as subsequent corrective work to mitigate associated impacts, on part of the Project tract off Route 17. Condition 6 of this permit amendment "explicitly does not authorize the construction or use of" certain unpermitted VAST and cross-country ski trails on that land, as depicted on the site plan submitted in that matter.

14. On July 15, 2003, the Commission issued Land Use Permit Amendment #5W0905-7, which authorized an as-built recreational trail system in the Phen Basin area, plus 200 feet of mountain bike trail, 1,000 feet of cross-country ski trail, and three ski bridges, and required relocation of the trail on part of what is referred to herein as the Loop Trail, along the western and southern edges of the wetland, to ensure that project's compliance with Criterion 8(A)(necessary wildlife habitat). The Commission noted that:

two snowmobile trail corridors have also been created through the project tract without benefit of issuance of an amendment to land use permit 5W0905. The snowmobile trails, which are under the control of the Vermont Association of Snowmobile Travelers ("VAST"), are the subject of an independent jurisdictional opinion which was pending during the District Commission's review of this present application. Although the Commission prefers not to take a piecemeal approach, the Commission determined that the questions and issues raised by the Application (as amended) could be resolved without VAST's inclusion. The Commission also notes that a portion of VAST trail 17 is shared with Catamount Trail Association and that other trail systems which are part of this application connect to or through the VAST trails. To the extent that the trail is shared, the Commission has considered the impacts of the non-VAST uses in evaluating the impacts under the 10 criteria.

Re: Department of Forests, Parks and Recreation, #5W0905-7, Findings of Fact, Conclusions of Law, and Order at 1 (District 5 Environmental Commission Jul. 15, 2003). The condition requiring relocation of trail portions near the wetland has been appealed to the Board. A site visit in that appeal is scheduled for June 1, 2005.

15. VAST submitted a map, marked and admitted as Exhibit V-3, which depicts the VAST trails in question with numbered dots along the trails denoting significant points and landmarks along the trails.
16. The Six-Mile Project appears on Exhibit V-3 from Points 8 B 42, and Points 63 B 73.
17. Part of the Six-Mile Trail is in the Huntington Gap Wildlife Management area, and is below 2,500 feet in elevation (Points 8 B 15.25, approximately).
18. Part of the Six-Mile Trail is on land owned by the Big Basin Corporation (Forest Trust), and is above 2,500 feet in elevation (Points 15.25 B 18, approximately).

19. Part of the Six-Mile Trail is on land owned by James Lathrop (Points 18 B 28, approximately, and a small portion of land between Points 69 and 70, approximately). Some of this trail is above 2,500 feet in elevation. VAST has obtained an easement from James Lathrop for use of his property for parts of the Six-Mile Trail. The Six-Mile Trail improvements on the Lathrop property include a stream crossing and waterbars.
20. The rest of the Six-Mile Trail is located in the Phen Basin block of Camel's Hump State Park, with the segment from Point 28 B 33 located above 2,500 feet in elevation. This land is subject to Land Use Permit #5W0905 (as amended).
21. The Loop Trail appears on Exhibit V-3 from Points 42- 63.

Vermont Trails System and Statewide Snowmobile Trails Program

22. The Statewide Snowmobile Trails Program is a cooperative program between the State of Vermont and VAST. Under this program, VAST and ANR's Department of Forests, Parks and Recreation operate a network of snowmobile trails throughout Vermont known as the Statewide Snowmobile Trail System (SSTS). This is accomplished through a Cooperative Grant Agreement and Memorandum of Understanding that outline the responsibilities of both parties and that generally is renewed annually.
23. The Statewide Snowmobile Trails Program provides funding to local snowmobile clubs for constructing, improving, maintaining or grooming sections of the snowmobile trail system, and is wholly financed by snowmobile registration fees.
24. The SSTS is located on state, federal, municipal and privately owned lands. Approximately 85% of the trail system is on private land. There are some rights-of-way that have been purchased by VAST, such as the one over James Lathrop's land in this matter due to a mistake in location of the trail, but VAST generally obtains rights-of-way by agreement rather than by purchase.
25. The network of VAST trails, including the Six-Mile Trail and the Loop Trail, was recognized by ANR's Department of Forests, Parks and Recreation and the Greenways Council as part of the Vermont Trails System in 1995, pursuant to the Vermont Trails Act, 10 V.S.A. §§ 441-449.
26. VAST is authorized to develop and maintain these trails, pursuant to the Vermont Trails Act.

27. The current Cooperative Agreement was executed in 2004.
28. During the 2003-2004 snowmobiling season, there were 39,000 individuals who purchased "Trail Maintenance Assessments" or "TMAs." The cost of each TMA was \$65 for residents and \$95 for non-residents.
29. Trails in some areas, such as wetlands, can be used in winter when frozen but are not suitable for access in other seasons.
30. Snowmobiles are registered by the state. VAST is authorized by the Vermont Department of Motor Vehicles to register snowmobiles. Some town clerks can renew registrations. Two snowmobile clubs have registration agents.
31. Of the 27 snow-belt states, Vermont is the only state in which a non-profit organization administers the statewide snowmobile trails program. The other 26 snow-belt state systems are run by the states themselves.
32. No person may operate a snowmobile on VAST trails unless he or she has paid a TMA and dues to a local VAST-affiliated snowmobile club, or unless he or she obtains written permission from the owner of the land over which he or she wishes to operate a snowmobile.

VAST

33. VAST is a private, non-profit corporation qualified as a charitable organization by the IRS under Section 501(c)(3) of the Internal Revenue Code. It has six employees.
34. VAST is the only statewide organization of snowmobile operators, and includes 14 county clubs and 151 affiliate local clubs.
35. VAST receives 85% of all snowmobile registration fees each year and a small percentage of the state gasoline tax via the Vermont Trails Fund. VAST also receives grants from the state and federal government.
36. VAST spends \$100,000 to \$150,000 annually on law enforcement services to police the trails. No funding is provided by the state for this purpose. VAST has a cooperative agreement with the Department of Public Safety (State Police), the Vermont Department of Fish and Wildlife and the Vermont Sheriff's Association to provide law enforcement on the trails. The State Police, the Department of Fish and Wildlife and the Sheriffs' Department patrol the trails on snowmobiles and issue tickets to violators.

V. CONCLUSIONS OF LAW

The Board must determine whether Act 250 jurisdiction attaches to two segments of VAST trails in Duxbury, Fayston and Huntington. At the hearing VAST conceded that the Project requires a permit amendment because it constitutes a substantial and material change to the project authorized by Land Use Permit #5W0905 (as amended), also referred to as the Ward Lumber/NELA Permit, which includes most of the Project. As discussed below, the Board also concludes that original Act 250 jurisdiction¹ is not triggered by the Project because it exists for a state purpose and does not disturb more than 10 acres of land.

A. Development based on acreage

Construction of improvements for commercial purposes constitutes development for purposes of Act 250 if it occurs "on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles" in a town with zoning and subdivision. 10 V.S.A. § 6001(3)(A)(I). Construction of improvements for municipal, county or state purposes constitutes development for purposes of Act 250 if 10 or more acres of land will be physically disturbed, including land incident to the use of the project. EBR 2(F)(2). Thus, the first question is whether these VAST trails exist for a commercial purpose or a state purpose.

1. Commercial Purpose or State Purpose?

¹ There are two types of Act 250 jurisdiction: original jurisdiction and amendment jurisdiction. Original jurisdiction is triggered by any project that constitutes a development or subdivision under Act 250 and Board rules. See 10 V.S.A. § 6081(a)(permit required for development or subdivision); *id.* § 6001(3)(defining "development"); EBR 2(A)(defining "development"). Amendment jurisdiction applies when there is a substantial or material change to any permitted project. See EBR 34(A)(amendment required for any substantial or material change to permitted project). Both types of jurisdictional issues are involved in this case.

VAST argues that the VAST trail network exists for a state purpose rather than a commercial purpose. The Vermont Trails Act (Act) provides in part that "[t]he development, operation, and maintenance of the Vermont trails system is declared to be a public purpose." 10 V.S.A. § 441(c). The Act authorizes the Agency of Natural Resources (ANR) to acquire rights to land to develop and maintain the trails system, 10 V.S.A. § 444(1)-(2), and to "[a]ssign responsibilities for any trail . . . to another governmental entity or not-for-profit agency upon agreement by such entity or agency to maintain and manage it for purposes consistent with this chapter," *id.* § 441(3). The Act also provides that "[t]he Vermont trails system shall consist of those individual trails recognized by the agency of natural resources with the advice of the greenways council." 10 V.S.A. § 443.

The Board is persuaded that the VAST trails in question are part of the Vermont Trails System, and that these trails exist for a public purpose by operation of the statute, 10 V.S.A. § 441(c). VNRC argues that this does not mean that the trails exist for a "state purpose" under Act 250. VNRC is correct that the Vermont Trails Act did not use the word "state" in describing the trails' purpose. However, a "public purpose" in the context of a state legislative act is particularly one called the "Vermont Trails System Act" -- is tantamount to a state purpose where Act 250 jurisdiction is concerned. To rule otherwise would leave the VAST trails in a separate, "public purpose" category, not addressed by Act 250. The Board declines to interpret the law in this manner.

The facts that VAST and its local clubs collect fees and dues, respectively, and that only persons who have paid those dues and fees or obtained written permission from the landowner may operate snowmobiles on these trails, do not persuade the Board that VAST trails exist for a commercial purpose. "Commercial purpose" is defined as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value." EBR 2(L); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995), affirming *Spring Brook Farm Foundation, Inc.*, Declaratory Ruling #290 (May 20, 1994) (not-for-profit foundation can engage in an exchange of services within the meaning of "commercial purpose"). Although it is clear that VAST and its clubs are providing facilities such as trails and services such as maintenance of those trails, in exchange for payment of a fee, the rule expressly excludes provision of facilities in exchange for payment for a state purpose. EBR 2(L). As set forth above, the Project exists for a state purpose because it is part of the Vermont Trails System. 10 V.S.A. § 441(c)(maintenance of Vermont Trails System deemed to be a public purpose). This conclusion is also consistent with the definition of "[s]tate, county or municipal purposes" in Board rules, which includes projects "undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public." EBR 2(E).

Vermont has a unique mechanism for the registration of snowmobiles and the development and maintenance of its statewide network of snowmobile trails pursuant to the Vermont Trails System. But the fact that the state has delegated authority to this private, non-profit corporation pursuant to the Vermont Trails Act does not change the public purpose of this Project.

Because the Project exists for a state purpose, the question of original Act 250 jurisdiction turns on the area of land that has been physically disturbed.

2. Land

A state project such as this one requires an Act 250 permit if it physically alters or disturbs more than 10 acres of land. EBR 2(A)(1)(d); EBR 2(F)(2). Where a state project is "incidental to or a part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction." EBR 2(A)(1)(d).

The trail segments in question disturbed an area of land approximately 12 feet in width. With 43,560 square feet in one acre, and 5,280 feet in one mile, 6.875 miles of trail would amount to 10 acres of disturbed area. The Six-Mile Trail is approximately six miles long, and the Loop Trail is approximately 1.8 miles long. Together, these trail segments disturb over ten acres of land, but separately, neither segment does.

On the question of whether the trail segments should be considered separately or together, Board rules provide, in relevant part, that:

In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction.

EBR 2(A)(1)(d).

There is no indication that VAST had any sort of master plan to complete the trail improvements in stages, and the Board concludes that the Loop Trail is not incidental to, or part of, the larger Six-Mile Trail project. Accordingly, the area of disturbed land involved in each trail is considered separately. EBR 2(A)(1)(d). On this point the record is clear: Neither the Loop Trail nor the Six-Mile Trail has sufficient disturbed land to trigger Act 250 jurisdiction. The Project, therefore, does not constitute a development based on the area of disturbed land.

B. Development based on Elevation/VNRC's Motion for Summary Decision

There is no dispute that certain portions of the Six-Mile Trail are at elevations above 2,500 feet, and VNRC argues that this is sufficient to establish jurisdiction over the Project. VNRC's motion was consolidated with the merits hearing, to allow further examination of this important policy question. As discussed below, the Board denies VNRC's motion based on the plain language of the statute.

Board rules define "development" to include the "construction of improvements, for any purpose, above the elevation of 2,500 feet." EBR 2(A)(1)(a). However, the statute defines "development" more narrowly, to include only the "construction of improvements for commercial, industrial or residential use above the elevation of 2500 feet." 10 V.S.A. § 6001(3). The Board rule at issue, EBR 2(A)(1)(a), is more broad than the statute because the rule effectively requires a permit for construction of improvements over 2,500 feet for any purpose, whereas the statute, 10 V.S.A. § 6001(3), expressly limits this requirement to commercial, industrial or residential purposes.

"An administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legislature." In re Agency of Admin., 141 Vt. 68, 76 (1982) (cited in In re Vermont Verde Antique International, Inc., 174 Vt. 208, 210-211 (2002) ("It is, of course, axiomatic that an administrative body may promulgate only those rules within the scope of its legislative grant of authority.")). This is not a case in which an administrative agency has promulgated a rule to clarify and complement its enabling legislation. Instead, this is a case in which the rule conflicts with the plain language of the statute and, in doing so, impermissibly exceeds the statutory grant of authority. In this way, EBR 2(A)(1)(a) is very different from the rules upheld by the Court in prior cases, such as In re Spencer, 152 Vt. 330 (1989) and In re Barlow, 160 Vt. 513 (1993).

Although the Board indicated early on that it intended to regulate development above 2,500' in elevation for any purpose, see, e.g., Declaratory Ruling M (Jul. 13, 1971)(Act 250 permit required for Green Mountain Club trails above 2,500 feet in elevation), and although Board rules have reflected this intent for many years, the statute is undeniably clear. It may be prudent policy to require an Act 250 permit for any construction at these elevations, however, the Board declines to do so from this point forward unless and until the legislature adds this requirement to the statute by eliminating the words, "for commercial, industrial or residential use." The Board cannot expand its authority beyond the plain language of the statute.

VNRC's Motion for Summary Decision is denied.

C. Amendment Jurisdiction: Substantial or Material Change

A permit amendment is required for "any material or substantial change in a permitted project." EBR 34. A substantial change is "any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. ' 6086(a)(1) through (10)." EBR 2(G). A "material change" is "any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act." EBR 2(P).

To determine whether there has been a substantial or material change, the Board must first determine whether there has been a cognizable physical change to the permitted project. Second, the Board must determine whether the change has the potential for significant impact under one or more of the ten Act 250 criteria (substantial change), or has a significant impact on any finding, conclusion, term or condition of the permit with an impact under one or more criteria (material change). *Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 2, 1996)(citing *Re: L.W. Haynes*, Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 5, 1987), *aff'd*, *In re Haynes*, 150 Vt. 572 (1988)); *see also*, *Re: Stonybrook Condominium Owners Ass'n*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (May 18, 2001)(citing *Re: Hiddenwood Subdivision*, Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 12, 2000)).

The permitted project in this case is the subdivision of the original 3,425-acre tract into 4 lots (Permit #5W0905, issued October 21, 1986), including a 2,780-acre lot called "Lot G," which includes the land involved in this case, and the further subdivision of Lot G into a 112-acre parcel ("Lots 14G/B-H") and a 2688-acre parcel ("Lots 14G/F") for the construction of a single-family home on each lot. (Land Use Permit Amendment 5W0905-1, issued April 26, 1988.) This permit expressly provides that "the land use of each lot is restricted to the construction of a single-family residence and related driveway access." Condition 5, #5W0905-1. On April 2, 2001, the Commission issued Land Use Permit Amendment 5W0905-6, which authorizes certain as-built physical actions taken to disallow access into the Phen Basin area by ATV and mountain bike users as well as subsequent corrective work to mitigate associated impacts, on part of the Project tract off Route 17. This permit amendment "explicitly does not authorize the construction or use of" certain unpermitted VAST and cross-country ski trails on that land, as identified in the site plan in that case. Condition 6, #5W0905-6.

It is undisputed that a permit amendment is required for the construction and use of the snowmobile trail segments on the land subject to Permit #5W0905 as amended. Some of the Loop Trail is in close proximity to a beaver pond and wetland, and some of the Six-Mile Trail involves stream crossings, culverts and/or waterbars. The Project clearly constitutes a substantial and material change to the permitted projects because the trail improvements involved physical changes with real potential for significant Act 250 impacts as well as significant impact on the permit conditions that expressly do not authorize the use of the land for VAST trails.

A permit amendment is required because the Project constitutes a substantial and material change to the permitted project.

VI. ORDER

1. The Project requires an amendment to Land Use Permit #5W0905 (as amended) because it constitutes a substantial and material change to the permitted project.
2. The Project does not trigger original Act 250 jurisdiction because it does not constitute development.
3. VNRC's Motion for Summary Decision is DENIED.
4. The Board takes official notice of Land Use Permit #5W0905 (as amended).

DATED at Montpelier, Vermont this 11th day of March, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd*
William Martinez
Alice Olenick*
Richard C. Pembroke, Sr.
Jean Richardson*†

* Members Olenick, Richardson and Lloyd CONCUR in part and DISSENT in part, as follows:

We respectfully dissent from the Board's conclusion that the Project does not disturb ten or more acres of land. While there is no indication that VAST had a master plan to complete the trail improvements in stages, it is evident under the circumstances that the 1993 Loop Trail is incidental to, and part of, the improvements to the Six-Mile-Trail, which first took place in 1989 and then in 1991. There was credible testimony that the Loop Trail was added to allow VAST groomers to avoid a hill on the Six-Mile Trail, and to provide access to snowmobile operators to the trail around the beaver pond and wetland.

This is not a case where an extension is made at some distance away - the Loop Trail is contiguous to and for the immediate benefit of users and groomers of the Six-Mile Trail. The Loop Trail is not a separate project, but because of the implied dependency for safety issues, it is incidental to and part of the Six-Mile Trail. See Re: Village of Waterbury Water Commissioners, Declaratory Ruling #227, Findings of Fact, Conclusions of Law, and Order at 14-15 (Feb. 5, 1991).

Applying EBR 2(A)(1)(d), "if it is evident under the circumstances that a project is incidental to or a part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction," the disturbed area involved in both trails must be considered in determining whether jurisdiction attaches. This language "incidental to or part of a larger undertaking" is critical to striking the appropriate balance of Act 250 jurisdiction related to VAST trails. It is in the few instances when, after carrying out a master plan, it is found that later changes or additions are required, these incidentals would have the most potential to affect criteria that Act 250 was established to protect. Even in those few instances, jurisdiction would attach only if the total area of disturbed land reached the requisite acreage, in this case a corridor almost seven miles long.

Because the total area of disturbed land exceeds ten acres, we would hold that the Project constitutes a development and requires an Act 250 permit. Because the Project exists for a state purpose, however, this jurisdiction is limited to the area of land that has been physically disturbed. Therefore, jurisdiction does not extend to all of the Lathrop property, but only to the portion within the trail corridor or otherwise physically disturbed

[†] Board member Jean Richardson was unable to attend deliberations on February 23, 2005 but joins in the Board's decision.

Exhibit E

***Jurisdictional Opinion #5-06, #6-005 (2009),
#7-267, Lamoille Valley Rail Trail, June 1,
2009***



Natural Resources Board
District #5 Commission
5 Perry Street, Suite 60
Barre, Vermont 05641
(802) 476-0186

Natural Resources Board
District #6 Commission
111 West Street
Essex Junction, Vermont 05452
(802) 879-5657

Natural Resources Board
District #7 Commission
1229 Portland Street, Suite 201
St. Johnsbury, Vermont 05819
(802) 751-0126

EXHIBIT

E

June 1, 2009

Rob MacLeod and Kate Scarlott
3881 Ward Hill Road
East Hardwick, VT 05836

Stephen A. Reynes, Esq.
100 East State Street
PO Box 1309
Montpelier, VT 05601-1309

RE: Lamoille Valley Rail Trail
Jurisdictional Opinion #5- 06
Jurisdictional Opinion #6-005(2009)
Jurisdictional Opinion #7-267

Dear Rob, Kate and Steve;

This is a jurisdictional opinion in response to a request dated February 5, 2006 from Rob MacLeod and Kate Scarlott, adjoiners to the project route in East Hardwick , and Stephen Reynes' December 18, 2008 response on behalf of the Vermont Association of Snow Travelers, Inc (VAST) to determine the applicability of 10 V.S.A., Chapter 151 (Act 250) to the proposed Lamoille Valley Rail Trail project.

In summary, it is the opinion of District Coordinators 5, 6 & 7 that: 1) the Supremacy Clause of the United States Constitution does not mandate federal preemption of Act 250 and 2) the project does not constitute a "development", pursuant to 10 V.S.A. §6001 (3) (A)(v).

This opinion is hereby issued to the persons and entities identified on the attached certificate of service.

10 V.S.A §6007(c) provides, in pertinent part, that: *If a requestor wishes a final determination to be rendered on the question, the district coordinator, at the expense of the requestor and in accordance with rules of the board shall publish notice of the issuance of the opinion in a local newspaper generally circulating in the area where the land which is the subject of the opinion is located, and shall serve the opinion on all persons listed in subdivision 6085(c)(1)(A) through (D) of this title. In addition, the requestor who is seeking a final determination shall consult with the district coordinator and obtain approval of a subdivision 6085(c)(1)(E) list of persons who shall be notified by the district coordinator because they are adjoining property owners or other*



persons who would be likely to be able to demonstrate a particularized interest protected by this chapter that may be affected by an act or decision by a district commission.

In consideration of the above provisions, the Coordinators are hereby providing notice of their opinion, in response to Steve's December 30, 2008 position, that a final determination must include notice to all adjoining property owners because such persons or entities would be likely to be able to demonstrate a particularized interest. The December 30, 2008 request to obtain a final determination without notice to adjoining property owners is not accepted. Therefore, this opinion is not a "final determination" pursuant to the provisions of 10 VSA 6007 (C) and Act 250 Rule 3, due to lack of distribution to these adjoining property owners. Upon receipt of the adjoining property owner information, we would re-issue this determination as a "final determination" as requested.

The following are the facts relied upon in this opinion and were obtained from VAST's proposed findings of fact dated December 17, 2008 and its accompanying attachments, and review of documents by VHB Pioneer received on October 14, 2008. In addition, the District Coordinators relied upon the content of the LVRT Revised Interim Management Plan dated October 22, 2007 (obtained from the LVRT website) and the engineering / construction information and details attached to the May 27, 2008 Management, Development & Maintenance Plan (obtained from the Friends of the LVRT website) and referred to hereafter as the Engineering Assessment. Consideration was also given to the position dated March 23, 2009 from adjainers MacLeod and Scarlott.

PROCEDURAL HISTORY

On June 29, 2004, a tri-district jurisdictional opinion was issued for the Lamoille Valley Railroad salvage project. This 2004 opinion did not reach a conclusion with respect to the future use of the corridor by VAST or for other purposes. In February 2006 neighboring property owners Rob MacLeod and Kate Scarlott requested a jurisdictional opinion for the post-salvage phase conversion to a recreation trail. A letter dated August 11, 2008 from the District Coordinators to VTrans summarized efforts after 2006 to determine jurisdiction and proposed a course of action. On December 18, 2008, VAST submitted project information along with its analysis of Act 250 jurisdiction. The December 18, 2008 jurisdictional analysis submitted by VAST includes an analysis of federal preemption. The Coordinators responsible for issuing a jurisdictional opinion then requested guidance on the federal preemption aspect from NRB general counsel, and final guidance on this topic was obtained on May 12, 2009. The analysis herein includes both the federal preemption component and an analysis of jurisdiction under Vermont's Act 250 statutory provisions.

FACTS

1. The project involves a 93 mile State of Vermont owned right-of-way between St. Johnsbury and Swanton, Vermont, known as the Lamoille Valley Rail Trail (LVRT). The trail or route passes through 18 municipalities and three environmental commission districts: District 6 – Franklin County, District 5 – Lamoille County and District 7 – Orleans County.
2. The construction of the rail line started in 1867 and was completed in 1877. In more than 100 years of operation, the rail line has experienced floods, reconstruction, bankruptcy and default.
3. In 1972, the current owner, St. Johnsbury & Lake Champlain Railroad Company petitioned the Interstate Commerce Commission for authorization to abandon the entire line. The State acquired ownership of the St. J & L.C in late 1973. Between 1973 and 1977 the line was operated under lease by a succession of short-line operators. In late 1977, the line was leased to the Lamoille Valley Railroad Company (LVRC). Despite extensive federal and state construction improvements and effort to rehabilitate the line most rail traffic disappeared by the 1980s and rail operations ceased altogether in August 1995 as a result of flood damage.
4. In 1993 the Vermont Legislature created the “Vermont Trails System,” codified at 10 V.S.A. §§ 441-449, which recognizes the importance of recreation and alternative transportation resources for the health, welfare and economic benefit of the State and its citizens. Under the Vermont Trails System, the Legislature intends the establishment of a state-wide system of interconnecting trails facilitated, in part, by railroad rights-of-way that have been railbanked for interim trail use.
5. In 2002 the Vermont General Assembly authorized repairs and maintenance to stabilize and prevent further deterioration of the State-owned railroad line between St. Johnsbury and Swanton. The General Assembly further authorized VTrans: (i) to obtain approval from the federal Surface Transportation Board (STB) to railbank the State-owned railroad line between St. Johnsbury and Swanton for interim trail use; (ii) to salvage the rail materials along the line; and (iii) to enter into a long-term lease with the Vermont Association of Snow Travellers (VAST) for preserving the existing rail infrastructure for future rail use.
6. The Vermont General Assembly in Sec. 16 of Act No. 141 of 2002 directed the Vermont Agency of Transportation (VTrans) to cooperate with the Lamoille Valley Railroad Company to obtain approval from the federal Surface Transportation Board for discontinuance of rail service over the segment of railroad between St. Johnsbury and Swanton. The legislation provides that VTrans “shall retain for railbanking . . . all

portions of the Lamoille Valley Railroad that the federal Surface Transportation Board authorizes for discontinuance of service.” The Act also authorizes “[r]epairs and maintenance to stabilize and prevent further deterioration of the corridor.”

7. The Federal Surface Transportation Board entered an Order on February 13, 2004 regarding railbanking and authorizing negotiation with VTrans for interim trail use pursuant to the National Trails System Act, 16 U.S.C. 1247(d).
8. The State-owned right-of-way has been railbanked for interim trail use under the National Trails System Act, 16 U.S.C.A. § 1247(d). Railbanking, as defined by the National Trails System Act, is a voluntary agreement between a railroad company and a trail agency to use an out-of-service rail corridor as a trail until some railroad might need the corridor again for rail service. Because a railbanked corridor is not considered abandoned, it can be sold, leased or donated to a trail manager without reverting to adjacent landowners, and is subject to reconstruction and reactivation for rail service at any time, in accordance with 49 C.F.R. § 1152.29.
9. On October 2, 2006, VTrans, as authorized by the Vermont General Assembly in Act No. 141 of 2002, entered into a long-term lease agreement with VAST for the purpose of revitalizing the State-owned rail line between St. Johnsbury and Swanton into the LVRT. Pursuant to Article 8.4 of the lease agreement between VAST and VTrans, VAST is obligated to repair and maintain the railroad right-of-way as necessary for its use as a public recreational trail and alternative transportation facility.
10. The record flooding in 1927 caused 160 washouts, 24 landslides and rendered 12 bridges out of service along this rail corridor. With the help of a \$300,000 loan from the State, the railroad was repaired to full service again by February of 1928. [Ex. 12 at pages 33-34]
11. The State acquired ownership of the St. J & L.C in late 1973. Between 1973 and 1977 the line was operated under lease by a succession of short-line operators. In late 1977, the line was leased to the Lamoille Valley Railroad Company (LVRC). See, *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R.*, 512 F. Supp. 1079, 1081 -82 (D.Vt. 1981). During this era, the line was extensively rehabilitated with federal and state funds, toward the goal of making it possible for freight trains to operate the line at over 25 miles per hour. See Act No. 87 of 1977, An Act to Amend 19 V.S.A. § 8(5) and to Provide for the Rehabilitation of the Former St. Johnsbury and Lamoille County Railroad.
12. The track materials were removed in 2005 after the STB order authorizing railbanking and interim trail use. Although the rails, ties, spikes and other track materials have been

removed, Article 2.2 of the LVRT lease agreement provides that the use of right-of-way is subject to possible reconstruction and reactivation of the right-of way for rail service in accordance with federal rail-banking procedures. [Ex. 6 at page 3]

13. The right-of-way ballast was only minimally maintained after the 1970s. Currently, the ballasted surface is generally compacted, includes accumulated organic/fine materials, and is eroded in places. The longitudinal railroad ditches have similarly been neglected and in places have filled with silt, organics and vegetation rendering them ineffective at holding and conveying runoff. [Management Plan at page 31; Engineering Assessment at page 1]
14. Typical right-of-way width is at least 66 feet. It is wider in areas which required cuts and fills by the railroad. [Management Plan at page 3; See Ex. 21, Joint Jurisdictional Opinion at page 2]
15. VAST has been using portions of the corridor for winter snowmobile use under authorization from the State at least since 1997. [Ex. 6, copy of the 1997 lease]
16. In addition to snowmobile use, sections of the LVRT are also currently used for cross-country skiing, snowshoeing, mushing, biking, walking and hiking.
17. An engineering assessment was completed during 2007 describing the existing right-of-way conditions and which also provides a framework for rehabilitating the railbed and river and stream crossings for year-round, multiuse recreation and transportation purposes. [See generally, Management Plan; Engineering Assessment]
18. Project work will include the repair and installation of culverts where necessary; clearing and grubbing of rail bed; grading and compacting of ballast; restoration of longitudinal railroad ditches; application of fine gravel on top of ballast to form a smooth granular trail surface suitable for accessible (ADA) non-motorized use; installation of signage for safety and mile marking; replacement of bridges or bridge sections; repair of deteriorated bridge decking and installation of guardrail in places; and removal and replacement of fencing along the right-of-way as necessary to eliminate encroachments, as set out and referenced below.
19. Proposed work on the LVRT will occur predominantly along the existing railbed centerline within the existing railroad right of way on premises as described in the October 2, 2006 lease agreement executed between VTrans and VAST. The single possible exception to this concerns alternative plans for bridge replacement in Walden, where the less costly option for bridge replacement would require acquisition of approximately 4,000 square feet (less than 0.10 acres) of land outside the right-of-way due to bridge angle realignment. [Management Plan at page 3]

Bridges (Stream & River Crossings)

20. In general, bridge repair work will include wood stringer, deck and curb replacement, and installation of guardrail or fencing systems. [Management Plan at page 53]
21. Many of the bridges (which include stone cattle passes, arch culverts, box culverts, and concrete structures) require only guardrail or fencing systems such as the chain link fencing on the Missisquoi Trail bridges, but at a height sufficient for safe equestrian use. [Ex. 26; See Ex. 25]
22. Bridge railroad ties and decking will be replaced where necessary due to lack of maintenance and resulting deterioration over the years. Existing railroad ties serve as the underlying structural stringers on many of the bridges. Wood decking will be laid on top of the railroad ties, and will likely consist of rough-cut untreated planking from local Tamarack (heartwood), Hemlock, and Pine. [Management Plan at pages 53-54; Ex. 27]
23. Overall, nine of 54 bridges along the corridor will require replacement or very substantial repair. Specifically, Bridges 13, 17D, A27, 34, 48, and 49 were removed or washed out and need to be replaced; Bridges 68, 77 and 83 are unsafe and will require complete reconstruction or replacement. Plans for bridge replacement have not been finalized. Examples of work to be done are as follows [Engineering Assessment at pages 13-15]:
 - Bridge 17D ("Cahoon Culvert Washout"): This site, at Whiteman Brook in Danville, had a total washout of the rail grade, approximately 82' wide at the top and almost 50' deep. A crane will be used to install a 100-foot span pre-fabricated truss on concrete bearing pads and avoid bridge construction within the existing embankments or streambed. [Management Plan, pages 54, 244-245; Ex. 28].
 - Bridge 49: This bridge will be located on the site of the old bridge in Wolcott, utilizing the existing old pad locations on the eastern shore and a pad location designated by the ANR Rivers Management Engineer on the new western shore of the Wild Branch. The crossing location spans the Wild Branch, just above its junction with the Lamoille River. This site is in a flood plain. The bridge that washed out at that location was a 60' span; the new bridge will be 160'. The river makes a sharp left hook just above the site, and previous flood events essentially destroyed the west abutment and, through scouring of the footings, destabilized the east abutment. ANR's Floodplain Restoration Project (FRP) goal is to restore the site to as natural a condition as possible and have the replacement structure's "feet" outboard of, and above, areas prone to flood damage.

This will require one simple span of approximately 160', with the east end approximately twelve feet behind where the former east abutment was located and the west end on a concrete pad in a circular "cell" of sheet piling on the new river bank, well beyond the location of the original west abutment. [Management Plan, page 247; Ex. 29]

24. Bridge 45, the "Fisher Bridge," located east of the village in Wolcott, is historically significant as it is the last remaining covered bridge along the corridor. The State and the Lamoille County Development Council have placed steel supports under the bridge to support the train loadings, separate from the bridge façade, which retains its original appearance. A decision was made during the salvage operation to leave the non-original rails having no historic significance in place on the bridge. This historical bridge would not be affected by the LVRT rehabilitation efforts, except that the existing rails on the deck of the bridge will need to be covered or removed. [Management Plan, page 54; Ex.12 at pages 39-47; Ex. 30]
25. There are four granite and ledge stone arch structures of historical significance along the LVRT. Only one of these four structures, Bridge 90, requires rehabilitation work. The arch is in good condition but the northeast wing wall has collapsed. Because of its historic nature and beauty, the bridge will be carefully restored, probably with a project involving the VYCC and a local contractor with equipment heavy enough to lift the one and two ton stones comprising the wing walls. [Management Plan at pages 54-55; Ex. 31]
26. The other historical granite structures that exist along the corridor are noteworthy even though they presently require no repairs. Because these structures were built when the surrounding land was pasture, the arrival of tree roots, left unchecked, will gradually be the un-doing of these remarkable un-mortared stone structures. Rehabilitation of the corridor pursuant to the LVRT project, and the associated increased public use of the trail, will allow greater appreciation of these structures, and help ensure that these historic granite structures are likely to receive pro-active maintenance that will prevent them from deteriorating and eventually failing.

Wash-Out Areas

27. The number of washouts on the LVRT is small and the vast majority of the infrastructure is functional. Existing washouts on the right-of-way are of varying condition and origin. Causes include culvert failure (type I), lateral ditch failure (type II), river or stream scour (type III), and washout deposits on the ROW (type IV). Culvert failures, almost all of which are stone boxes, appear to be caused either through a failure of the stonework, or debris (many times from beaver) blocking culvert entrances, causing an impoundment and eventual overflow over the rail bed embankment. Lateral ditch failures refer to a ditch filled with silt, causing the water to travel down the rail bed until it can find escape,

which then becomes a washout. River or stream scour washouts refer to locations where the rail bed is directly adjacent to the river or stream. The river can scour away material along the bank ultimately removing portions or all of the rail bed. [Management Plan at pages 39-40 and appendix H]

28. Washout types I (culvert failure) and II (lateral ditch failure) will be repaired by replacing the culverts and backfilling the embankments. Replacement embankment material will resemble the existing material with respect to the angle of repose to keep embankment widths the same and within the right-of-way. New embankment slopes will be top-soiled, seeded and hayed. Further erosion protection measures may be necessary depending on the slope and soils, such as contour wattling, tree planting, plastic or concrete cellular grids, or hydro seeding with fiber-celluloid mulch. [Engineering Assessment at page 57; Ex. 32]
29. Observation of all Type III washouts (river or stream scour) indicate that all are in an advanced state of natural healing. At these sites additional plantings were introduced on the bare slopes to advance the slope healing process. For the trail at those locations, a 12-foot wide wooden boardwalk will be constructed on the ballast using the lateral ditch area on the opposite side of the washout to replace the missing trail width, still well within the right-of-way. The boardwalk concept will also facilitate the inclusion of guard railing, and be sloped slightly away from the washout to limit further exposure to storm runoff. The outboard lateral ditch at these locations will either be bridged or moved to the edge of the boardwalk at these locations. [Management Plan at pages 40, 57]
30. Type IV washouts (deposits on the ROW) involve the removal of silt and gravel deposited onto the right-of-way from locations above and sometimes many hundreds of feet from the right-of-way. This material will be used for filling other washouts, repairing narrow embankment slopes, and eliminating trail grades that do not meet the maximum ADA trail requirements. [Management Plan at pages 57-58]
31. The Larrabee Washout occurred summer 2008 at Culvert 24D in Danville. Originally, the structure had two-3' x 3' stone box culverts. Proper operation of the culverts had been hindered in previous years by storm events that plugged the culverts with natural debris. VAST, in coordination with ANR, had made previous repairs to the culverts. However, a flood event in August of 2008 – designated as a natural disaster in that area by FEMA – washed away the culverts and demonstrated that the proper “fix” was inadequate. The serious washout at Brown Brook had to be replaced before the coming winter. VAST worked with ANR and obtained approval for a concrete bridge structure in place of the failed culverts. [See Ex. 32]
32. Railbed rehabilitation work will be limited to the ballasted areas (which are inherently the center of the railbed and furthest from the toe of slope where existing fill meets wetlands)

and to the existing locations of the lateral ditches. No work, other than superficial clearing is contemplated beyond the lateral ditches. Work on the ditches and the ballasted area will not alter the flow of water into or out of adjacent wetlands, nor will any draining, dredging, filling, or grading occur past the edge of the lateral ditch. [Management Plan at page 53]

33. All repair and replacement activities associated with LVRT culverts will be accomplished in accordance with VTrans Culvert and Ditch Maintenance Procedures, and designed to avoid invert elevation changes that would affect water tables, wetlands, or stream gradients. [Management Plan at page 51]

Steep Slopes

34. All grading will occur within the right-of-way. Grading will not result in a significant change in the existing rail bed.
35. Existing vegetation will serve as a passive control barrier along steep slope areas in order to eliminate as much fencing as possible. [Management Plan at page 71]
36. Ditches will be maintained in their existing locations and will not be moved or widened. [Management Plan at page 47]
37. In accordance with the Vermont Pedestrian and Bicycle Facility Planning and Design Manual, and VTrans Standard A-79 (Typical Rail Trail), the trail will generally have a minimum width of ten feet wide with two-foot grassed shoulders on each side. In isolated instances, the minimum width will be less; for example, Bridge 36, which is in good condition, is only nine feet wide. Another situation of where the width will not be at least ten feet involve some of the embankment fills that were constructed of ledge from the rock cuts and which, while steep, are also stable, with large, old trees growing in them right up to the ballast. Providing the slope angle and covering past the shoulders shown on the state standard (A-79) would be difficult and would remove trees that will serve well as the passive barrier on such slopes. [Management Plan at page 52]
38. No trailheads are proposed as part of this project. There are existing parking areas adjacent to or near the LVRT, such as at Marty's First Stop store in Danville and in the vicinity of Joe's Pond in West Danville. [Ex. 11, Site 3 photo; Ex. 33] Such parking areas are outside the LVRT corridor and exist for multiple purposes.
39. The LVRT will be able to function as year-round, multiuse recreation and alternative transportation facility, just as the existing corridor does now, without the construction of any additional trailheads. Although multiple potential trailhead and parking locations

have been identified along the LVRT corridor, none of them are part of this project. The proposed LVRT project does not involve the acquisition of any land outside of the existing right-of-way for trailheads and parking. [Management Plan at pages 3, 59-60; Ex. 34]

40. Re-establishing lateral ditches involves removal of silt, seeding and mulching the shoulders and vegetative removal where necessary along the upward bank to ensure the proper drainage patterns, and as would be typical along other sections of the LVRT with similar characteristics. [Ex. 36]
41. On-site placement of ditch silt was practiced along one segment of the prototype trail section whereby silt and debris removed from the lateral ditches was placed along and against the rail bed embankment. The on-site placement will only occur along the LVRT in locations where it would not impact environmentally sensitive areas (e.g. wetlands /buffers) that have been identified by the VHB Pioneer assessment or ANR. [Ex. 37]
42. Proposed modes of transportation along the LVRT would include pedestrian, bicycle, equestrian, mushers, snowshoeing, and cross-country skiing. Motorized vehicles are not permitted on the LVRT except for: maintenance purposes; when snow conditions and State or local regulations permit, snowmobiles; motorized wheelchairs; when State or local regulations permit, electric bicycles; and such other circumstances as the Secretary deems appropriate. [23 U.S.C. §217(h)].

ANALYSIS AND CONCLUSIONS

I. Does the LVRT Qualify for Federal Preemption from Act 250 Jurisdiction ?

Counsel for VAST asserts a claim of federal preemption over Act 250 jurisdiction with respect to the proposed Lamoille Valley Rail Trail (LVRT) construction of improvements pursuant to the provisions of the National Trails System Act (Trails Act), as codified in 16 USC Chapter 27. VTrans, the owner of the lands over which the recreational trail will be constructed, did not take any position as to whether federal law preempts Act 250 with regard to railbanked corridors (See February 2, 2009 position from VTrans rail program manager Rober D. Ide). As will be explained below, it has been concluded that the LVRT is entitled to partial preemption from jurisdiction under Act 250.

Over the course of more than 35 years of the administration of Act 250, the former Environmental Board, the Vermont Supreme Court, the United States District Court in Vermont and the United States Court of Appeal for the Second Circuit have had cause to consider claims of federal preemption over proposed developments that may have been subject to jurisdiction

under Act 250¹. These decisions note that the doctrine of federal preemption originates in the Supremacy Clause of the United States Constitution [U.S. Constitution Article VI, clause 2]

The former Environmental Board held, in general, that it had no authority to decide constitutional issues [See, eg, Maple Tree Place Associates 4C0775-EB March 25, 1998 and Spring Brook Farm Foundation, Inc. 2W0985-EB July 18, 1995). However, the Board made an exception to this view in addressing jurisdictional questions arising under the Supremacy Clause concluding that it was "obliged" to address federal preemption claims within the context of the provisions of 3 V.S.A. 808 and comparable Environmental Board rules then in effect governing issuance of jurisdictional declaratory rulings [Town of Springfield, *supra*, at page 3 and Green Mountain Power Corp. (Declaratory Ruling 120: November 14, 1980, at page 3). Thus, as a threshold matter, this Jurisdictional Opinion concludes that there is an obligation to state a conclusion on the VAST claim for federal preemption even though the district coordinators may have deemed it prudent to decline stating a position on constitutional issues.

In evaluating a claim that the regulations of the Federal Aviation Administration preempted Act 250 permitting of a commercial airfield, the Vermont Supreme Court explained the essential analysis to be employed:

...there are four ways in which federal law can preempt state law: explicit or implicit statutory language, actual conflict, or occupation of the field [In re Commercial Airfield 170 Vt 595 (2000) at page

The federal Second Circuit Court of Appeals, in Green Mountain Railroad Corporation v Vermont 404 F.3d 638 (2005), a decision cited by counsel for VAST, specifically addressed an assertion of Act 250 jurisdiction over a proposed railroad project which was subject to the terms of 49 USC 10 501 (b)(2) and the authority of the federal Surface Transportation Board (STB).² While that decision addressed Act 250 jurisdiction over a proposal involving the exclusive jurisdiction of the STB, the facts of that case involved a railroad corporation proposing construction of improvements for railroad transloading facilities on lands owned by the railroad corporation. The facts of that case are distinguishable from the LVRT facts involving proposed construction of improvements by an entity which is not a railroad and not involving any proposed railroad facilities. The LVRT non-railroad related development is merely proposed to be situated within a railroad right-of-way that has not been adjudged abandoned by the STB. It is not a proposal by a rail carrier and does not involve construction of any rail carrier facility. VAST also

¹ See e.g. the former Environmental Board's decisions commencing in 1981 with Town of Springfield Hydroelectric Project (Declaratory Ruling 111: January 19, 1982) and running through Commercial Airfield, Cornwall, Vermont (Declaratory Ruling 368: January 28, 1999) and Burlington Broadcasters, Inc. (4C01004R-EB: August 8, 2003).

² The provisions of 49 USC 10 501 (b)(2) read: The jurisdiction of the Board over...the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located, entirely in one state....is exclusive.

cited the United States Supreme Court's decision Preseault v. ICC 494 US 1 (1990) in support of its argument for preemption under the statutory provisions governing the functions of the federal STB. As a case originating in Vermont, this case would have profound precedential impact if its facts and the applicable law squared with the LVRT facts and applicable law. However, Preseault is primarily a decision on an action to quiet title and perhaps also described as "takings" case. While the decision includes references to some provisions of the National Trails System Act, they are passing references perhaps best classified as dicta.

Many railway lines have been abandoned over the past several years, and in the mid-1990s, Congress determined that it needed to take steps to ensure that these corridors remained intact should railroads some day make a comeback, as there were concerns that should the corridors be abandoned and broken into segments or otherwise put to other uses, a reversion to railroad use would become impossible. Congress also determined, however, that, in the interim, such corridors could be put to beneficial uses in the form of recreational trails. Thus, in the National Trails System legislation (16 USC Chapter 27), Congress provided that:

d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. §1274(d).

Under this provision, the Surface Transportation Board (STB) retains jurisdiction over the rail corridor, but public and private interests are allowed and encouraged to develop recreational trails on the corridors. A summary of the state of the law appears in the initial paragraphs of the case of *Blendu v. Friends of the Weiser River Trail, Inc.*, No. Civ. 98-0311-S-BLW. (D. Idaho., June 10, 1999), 1999 WL 33944266:

From the early 1900's to 1996, the Union Pacific Railroad ("the Railroad") operated trains over a railway line running 83.1 miles between the Idaho towns of Weiser and Rubicon. Historically, such railroad rights-of-way were regulated by the Interstate Commerce Commission, and the ICC's authority over rail abandonments was exclusive and plenary and preempted any contrary state or local law. In 1996, the ICC was abolished and its exclusive authority over railroad rights-of-way passed to the Surface Transportation Board (the "STB"). Thus, the railroad corridor at issue in this proceeding is under STB jurisdiction.

At some point prior to 1995, the Railroad decided to discontinue its use of the Weiser-Rubicon railway. This step reflected a growing trend in a financially weak rail industry, by which railroads sought to consolidate operations and improve profitability by abandoning marginal service areas. While Congress facilitated this process by liberalizing federal rail regulation, it also recognized that permitting abandonments would result in the loss of railroad corridors, not only for current but also for future use. Congress also realized that such rail corridors were national assets which should be maintained, but without imposing the costs of maintenance on carriers who were seeking abandonment. In response to this situation, Congress adopted a number of measures intended to permit abandonment while preserving rail corridors. These measures included: (1) the adoption of 49 U.S.C. § 10905, which required that the rail properties be made available for other public uses, such as highways and mass transportation; (2) the adoption of 49 U.S.C. § 10505, to facilitate state acquisition of abandoned rail lines; and (3) the addition of Section 8(d) to the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247(d), to encourage "railbanking" of a right-of-way which would otherwise be abandoned by converting it to use as a public trail, but subject to its future restoration as an active railway.

It was this third option which the Railroad chose when it decided to discontinue the use of the Weiser-Rubicon right-of-way. In electing to railbank the right-of-way, the Railroad ensured that, although a conditional transfer would be made to a trail manager who could demonstrate financial ability and a willingness to accept the right-of-way and commit it to public use as a scenic trail, the interim use of the corridor for such purposes would "not be treated, for purposes of any law or rule of law, as an abandonment of the use of such right-of-way for railroad purposes."

16 U.S.C. §1247(d). Such a step preserves the right-of-way for potential future use as a railway, and has been held constitutional under both the Takings Clause and the Interstate Commerce Clause. Presault v. Interstate Commerce Com'n., 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990)

It is clear from the statute and the case law that Congress was concerned mostly with what may be described as the *physical aspects* of the rail corridor. Congress wanted to ensure that those corridors would remain available for renewed railroad use, should that circumstance ever arise. In the Blendu case noted above, the section of the railway corridor at issue ran through property owned by the Blendus. In addition to takings and other claims, the Blendus contended that state law was applicable to the railbanked corridor in two ways. First, they sought to apply Washington County and Idaho state zoning laws and ordinances to the corridor. Second, they sought to regulate, via state law, the nature and extent of the trail that the trail developers (the Friends) could establish along the corridor.

The Court first found that relevant federal law, as confirmed by court precedent, grants jurisdiction to the STB over railroad operations. The Court concluded that the Blendus' desire to have the Washington County zoning ordinance applied to the right-of-way "would interfere with or completely bar Friends' operation of the recreational trail." Because "such determinations would clearly extend beyond reasonable regulation of the right-of-way by the County and would preclude Friends' operation of the recreational trail as trail manager," the Court held the Blendus' claim, based on the assertion of local regulations, to be preempted by federal law:

Based on the foregoing, the Court concludes that the Blendus' zoning claims must be dismissed. To the extent that the Complaint may be characterized as an attempt *to prohibit* Friends' use of the right-of-way because of a failure to comply with state and local zoning ordinances, such a claim must be dismissed because it is preempted by the railbanking statute and the STB's approval of Friends' operation of the corridor as a recreational trail under that statute.

The Court recognized, however, that the railbanking provisions were not the same as railroad *operations*, and it further noted that the STB itself agreed that some local regulation could be allowed.

That being said, the STB has said that states and local governments may exercise some control over railbanked rights-of-way. Its March 20, 1998 Decision states:

In addition to maintaining the integrity of rail banking, Friends is obligated to use the right-of-way so that it does not become a public nuisance. However, that is a state or local requirement, not a Board requirement. *Federal preemption does not extend to the legitimate exercise of police power by states and localities.* In Iowa Southern R., Co. the ICC said,

We note, however, that *a trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation....* This local regulation can address the Landowners' concerns about such issues as vandalism or noise.... Indeed, the State and local agencies in the area are attuned to the specific interests and needs of their communities.... *Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails.*

STB Decision, dated March 20, 1998, p. 10. The STB makes it clear, however, that their "chief concern" is that "the statutory rail banking condition not be compromised, and that *nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service.*" *Id.*

In reconciling the federal case law with the STB Decision, the Court is persuaded that *Congress has given the power to control economic, environmental and virtually every other aspect of railroads and their corridors to the STB. The STB has, on the other hand, clearly indicated its intention to cede back to states and local governments the right to impose zoning and safety regulations on the trails so long as those regulations do not interfere with (1) the railroad's right to convert the corridor back into a railway at some point in the future and (2) the trail manager's right and ability to maintain the right-of-way as a recreational trail in the interim.*

(Emphasis added)

The Court's ultimate holding, therefore, can be summed up in one sentence from the decision: "The trail must ... comply with any reasonable zoning restrictions imposed by Washington County which do not prevent Friends from operating the trail."

Similar language can be found in *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260 (D. Wash. 2005):

While all parties agree that *state and local governments have the right "to impose appropriate safety, land use, and zoning regulation on recreational trails,"* see *Iowa Southern R.R. Co.*, [5 I.C.C.2d 496, 505 1989 WL 239065 (I.C.C. 1989)], Plaintiffs argue that *these regulations apply only to the extent that they do not frustrate development of a trail on the railbanked right of way.* This Court agrees. The purpose of the Rails to Trails Act is not to encourage the development of recreational trails near inactive railroad rights of way - - it is to encourage the

transition of the railbeds into recreational trails, and to preserve the right-of-way for possible future railroad reactivation.

And in its Iowa Southern R.R. Co. decision, the STB wrote:

We note, however, that *a trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation.* (Citation omitted). This local regulation can address the Landowners' concerns about such issues as vandalism or noise. Indeed, the State and local agencies in the area are attuned to the specific interests and needs of their communities. Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulation on recreational trails.
(Emphasis added)

In summary, therefore, the facts surrounding the LVRT proposal, viewed in light of the statutory provisions and caselaw cited above, is not entirely preempted from jurisdiction under Act 250 by the pertinent terms of the National Trails System Act - 16 USC 1247(d) because the federal law does not meet the four tests established by the Vermont Supreme Court in In re Commercial Airfield, *supra*.

It is important to note that the terms of the federal law establish limits on the extent of Act 250 jurisdiction: the development of the recreational trail cannot be prohibited or denied a land use permit. Likewise, the final decision of the District Commission is barred by federal law from including any terms that may require the railroad corridor to be altered in such a way that would make it difficult or impossible for it to revert to railroad use in the future. Conversely, Act 250 may regulate the development of the trail and its use within the scope of the state's traditional "police powers". In this regard, the regulation of impacts under Act 250 criteria applicable to impacts such as noise, burdens on habitat functions, safety, visual effects, water quality and conformance with town and regional plans is squarely before the District Commission for review - under the provisions of 10 V.S.A. Chapter 151 and Act 250 rules.

II. Does the Project Constitute a "Pre-existing Development"?

In determining whether a development built before June 1, 1970 is "pre-existing", an analysis is performed to determine whether, if the entire development were built today, would it meet the jurisdictional prerequisites for the definition of development. Re: Robert and Barbara Barlow, DR #222 (12/26/90). In other words, would the construction of the 93 mile railroad right-of-way, if proposed and constructed today, constitute a development pursuant to 10 VSA §6001 (3)(A)(v)? Congress' intention to exempt railroads from antitrust laws and all other laws, including state and municipal laws, is clear, broad and unqualified. Chicago and N.W. Tr.Co. v

Kalo Brick and Tile Co. 450 US 311, 318 (1981); Green Mountain Railroad Corp., supra; ICC Termination Act of 1995 - 49 USC 10101 et seq.

Today, the construction of a 93 mile railroad right-of-way, would be subject to federal regulation and exempt from State law under the Supremacy Clause of the United States Constitution and Vermont State laws would not apply. Federal regulation of railroad rights-of-way is extensive and broad. The construction of the railroad right-of-way would not constitute a "development", pursuant to 10 VSA §6001 (3)(A)(v) and therefore would not constitute a "pre-existing development" pursuant to Act 250 Rule 2(C)(8).

III. Does the Project Include Activity that Constitutes the "Construction of Improvements"?

Act 250 provides that "[n]o person shall commence construction on a subdivision or development without a permit." 10 VSA 6081(a) "Development" is defined, in pertinent part, as the "construction of improvements" for commercial or municipal, county or state purposes that exceeds a specified acreage.³ Jurisdiction attaches at the point in time when there is "commencement of construction" as defined in Act 250 Rule 2(C)2. That rule defines "commencement of construction" as,

the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

"Construction of improvements" means any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A). This may include any physical disturbance on a project tract. Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon, #1R0426-2-EB. Findings of Fact, Conclusions of Law and Order at 27-28 (Dec. 18. 1997). However, construction of improvements is a deliberately limited terms which cannot be extended to include any activity that initiates any use of the land. Re Aaron & Sons, Inc., DR #359 (FCO at 9 - 11) (10/29/98). For example road work activities that are considered repair or routine maintenance do not constitute construction of improvements. Re: Productions, Ltd., Declaratory Ruling #168 at 4 (April 10, 1985). Repair or routine maintenance does not alter an existing development but "prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear." Re: Vermont

³ The specified acreage to constitute a "development" for a commercial purpose is ten acres within a municipality that has adopted permanent zoning and subdivision bylaws [10 VSA, §6001 (3)(A)(i)] and one acre in municipalities without zoning and subdivision bylaws [10 VSA, §6001 (3)(A)(ii)]. The specified acreage to constitute a "development" for municipal, county or state purposes involves more than 10 acres [10 VSA, §6001 (3)(A)(v)]

Agency of Transportation (rock ledges), Declaratory Ruling #296, (3d Rev.) at 10 (March 28, 1997).

Other activities that are considered repair, replacement or maintenance include restoring a washed out road caused by a previous flood to its original pre-flood condition including; tilling a washed out area with a bulldozer; backblading the road to create a clear travel surface; installing drainage ditches and culverts, and the addition of rock gravel to stabilize a washed out roadbed. Re: Productions, Ltd. Declaratory Ruling #168, Findings of Fact, Conclusions of Law, and Order at 3 (April 10, 1985). Examples of types of construction activity that are not repair or routine maintenance include upgrades over an historic roadway condition like substantial widening of the roadway, substantial utility and pole relocation, and significant tree cutting. Re: Agency of Transportation, Route 7, Leicester, Declaratory Ruling #153 at 4 (June 20, 1984).

Determining whether the proposed activity constitutes construction of improvements or repair, replacement or routine maintenance is a highly fact specific inquiry and analysis. It entails an understanding of the historic condition of the railroad right-of-way to determine whether the proposed alterations result in an upgrade or expansion over its historic use. If it does, then the activity is construction of improvements and not repair and routine maintenance and a permit may be needed. On the other hand, if the alterations do not constitute construction of improvements, and are repair and replacement, then a permit is not needed.

Two historic railroad activities highlight the difference between construction activity that constitutes the construction of improvements and actions that constitute repair, replacement and maintenance. The first event occurred after the record flood of 1927 that saw 160 washouts, 24 landslides and rendered 12 bridges out of service. Activity was taken to immediately repair and replace the necessary infrastructure and within a year the railroad corridor was returned to full service (i.e., an example of repair and replacement). A second major activity took place in the late 1970's saw an extensive federal and state effort to upgrade the corridor with new ties and ballasts to allow freight trains to operate at a higher speed (i.e., construction of improvement). This effort went beyond repairing the existing railroad corridor to upgrading the railroad right-of-way to a new standard that would allow freight trains to move faster through the corridor. These examples are illustrative only, but provide perspective into determining whether the modifications constitute repair and maintenance or construction of improvements.

In summary, the scope of the project work includes: repair and installation of culverts; clearing and grubbing of rail bed; grading and compacting of ballast; restoration of longitudinal railroad ditches; application of fine gravel on top of ballast to form a smooth granular trail surface suitable for accessible (ADA) non-motorized use; installation of signage for safety and mile marking; replacement of bridges or bridge sections; repair of deteriorated bridge decking and installation of guardrail in places; and removal and replacement of fencing along the right-of-way. These activities are common and consistent with the railroad's historic infrastructure and

physical. They do not represent an expansion or upgrade to the corridor beyond the railroad's historic condition. Therefore, these construction activities fall within the boundaries of repair, replacement and routine maintenance and do not constitute the construction of improvements pursuant to Act 250 Rule 2(c)(3).⁴

While the project work scope is predominantly repair / maintenance, as outlined above, the project scope also includes some items that exceed the historical condition; specifically, the portion of the project which exceeds the historical condition consists of the following items: installation of new guardrail in limited areas, and re-alignment of one bridge. These discrete items do not qualify as repair and maintenance. However, the inclusion of these items as a component of the larger project does not by itself establish that the project disqualifies for maintenance / repair status; the project generally and predominantly consists of repair / maintenance; as noted, the project also includes a relatively small portion of upgrades / improvements beyond the historical condition. These nominal upgrades / improvements beyond the historical condition are construction of improvements, and not maintenance / repair.⁵

The limited portion of the project that does not qualify as repair / maintenance, and that constitutes construction of improvements, will be further evaluated to determine if these limited portions of the project constitute regulated "development".

IV. Is the Project for a Municipal, County or State (Public) Purpose?

The project will be evaluated to determine if it qualifies for "commercial" status or "municipal, county or state (public)" status for purpose of determining Act 250 jurisdiction.

⁴. The District 5 Coordinator notes that the Environmental Board's "repair and maintenance" cases originated in evaluations of whether or not proposed physical actions on or to "pre-existing developments" qualified for the "repair and maintenance" exemption rather than being viewed as "construction of improvements". In those cases (eg DR 296, DR 279/283 and DR 272), the Board's analyses suggested that the proposed physical actions needed to be considered in terms of the continuing land use and that changes to the character of the existing development would not result. For example, "repair and maintenance" to a pre-existing road would not change the use of the roadway. In the matter of the LVRT, it is noted that the former railroad use has been discontinued and that the commencement of a new use proposed within the 93 mile long corridor will be dependent upon the substantial work cited above in the findings and having a total estimated cost of more than \$7 million. The Coordinator further observes that while VAST distances itself from future construction of improvements for trailheads and related parking areas along the corridor, these improvements are nonetheless discussed in several portions of the exhibits on file and are presumed by VAST to be pursued by other entities and not being later phases of a larger comprehensive recreational corridor undertaking.

⁵. The District 6 Coordinator finds the fencing/guardrail and re-alignment activity to be within the historic context of the railroad right-of-way and therefore finds further analysis unwarranted to reach a conclusion of no Act 250 jurisdiction.

"*State, county or municipal purposes*" means the construction of improvements which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public [Act 250 Rule 2C(15)].

"*Commercial purpose*" means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value (Act 250 Rule 2C(4)).

VAST collects user dues and is therefore a *commercial purpose* entity for purpose of Act 250 jurisdiction. DR#430 (Vermont Association of Snow Travelers), issued June 7, 2005, established that, if a specific trail is part of the Vermont Trails System, then the specific trail project is a *state purpose* project for which the corresponding 10 acres of *involved land* jurisdictional threshold would apply. 10 V.S.A. Sec. 443 indicates that "*The Vermont trails system shall consist of those individual trails recognized by the agency of natural resources with the advice of the greenways council. The agency, with the advice of the council, shall establish criteria for recognition of single use and shared use trails*".

For background purposes, the following information was obtained from the Vermont Trails and Greenways website:

In 1994, the Vermont Legislature formally recognized the value of trails for recreation and transportation by passing the Vermont Trails System Act. In addition to making funds available for development and maintenance of trails, the legislation also established the Vermont Trails System. "In order to provide access to the use and enjoyment of outdoor areas of Vermont, to conserve and use the natural resources of this state for healthful and recreational purposes, and to provide transportation from one place to another, it is declared to be the policy of this state to provide the means for maintaining and improving a network of trails to be known as the Vermont Trails System. The Vermont Trail System shall consist of those individual trails recognized by the Agency of Natural Resources with the advice of the Vermont Trails and Greenways Council."

Based on information provided by a Vermont Trails and Greenways Council representative, the LVRT is not officially included in the Vermont Trails System as of May 13, 2009.

The former Environmental Board's Declaratory Ruling #430 establishes that if a specific trail is part of the Vermont Trails System, then the specific trail project is a *state purpose* project. However, DR#430 does not preclude the possibility that some trail projects not listed on the Vermont Trails System may in fact qualify for *state purpose* status.

The 2007 LVRT Revised Interim Management Plan (page 9) identifies that:

We envision a rural rail trail facility which will provide an environment so all users can enjoy the recreational benefits, nature, and the scenic Vermont landscape to its fullest. Recreation

activities like the following will take place: Walking; Hiking; Biking; Equestrian; Cross country Skiing; Dog Sledding; Sleigh Rides; Snowmobiling and many other compatible forms of recreation including competitive events for the preceding uses. The State of Vermont shall decide on any ATV use on the trail on a case by case basis through a public decision making process that includes public hearings conducted by the State; guided by pending policy and standards to be developed by the STATE that comply with federal statutes, regulations and guidance, governing transportation enhancement activities and pedestrian and bicycle accommodations on federal-aid projects

Regarding funding, the 2007 Revised Interim Management Plan (pages 28-29) identifies that:

It is anticipated that the total cost to rehabilitate and convert the former LVRR railbed into a four-season multi-use and ATF will range between \$7,260,000 and \$8,500,000. Congressman Bernie Sanders has been an ardent supporter of this project for many years and was successful in obtaining a Federal Transportation earmark in the amount of \$5,800,000+ included within the renewal of the Federal Highway Transportation Bill in the summer of 2005. The re-authorization of the Federal Highway Bill is a part of the five-year re-authorization of the Federal Highway Bill.

The amount approved by Congress is 20% less than had been hoped for; however, it will more than likely fund the majority of the project. The Federal Grant requires that VAST generate a 20% match for the project. This means that the LVRTC will have to generate approximately \$1,450,000 in matching funds, either cash, or by other allowed means such as donations, in-kind services and volunteer labor. In addition, the LVRTC will be responsible for raising any additional funds that may be necessary above and beyond the original projected cost of \$7,260,000. This original estimate was developed in 1999 and those figures, more than likely, do not represent today's cost of construction.

The LVRTC will work with the involved Planning and Development Councils in an effort to find any and all available options for grants, from private foundations and/or other entities that may have the potential to help achieve the requirement for 20% matching funds for this important project.

They will also have to investigate ways to raise any additional funds needed to complete the project. Other options that will be investigated include Transportation Enhancement Program funds. If interim working capital is required, or if money has to be borrowed, VAST will obtain sources for funding short term and/or long term financing for this project.

Based on the above excerpts from the Interim Management Plan, and based on findings 1, 5, 8 and 9 above, the predominantly publicly funded project is undertaken by or for the state and will

be used by members of the general public. Therefore, the project is a "state, county or municipal purpose" project pursuant to Act 250 Rule 2C(15).

V. Does the Project Constitute a "Development"?

Under 10 V.S.A. Chapter 151 §6001 Definition (3)(A)(i), regulated "*Development*" means the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws. Act 250 jurisdiction attaches to "construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land.....for commercial or industrial purposes..." (§6001 (3) (A) (i)) and "construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes"(§6001 (3) (A) (v)).

The *involved land* requires evaluation. Under Act 250 Rule 2(c)(5) *involved land* is defined as *Those portions of any tract or tracts of land to be physically altered and upon which construction of improvements will occur for state, county, or municipal purposes including land which is incidental to the use such as lawns, parking lots, driveways, leach fields, and accessory buildings, bearing some relationship to the land which is actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that the project is incidental to or a part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.*

Pursuant to 10 V.S.A. §6001 (3) (A) *development* means (v) *the construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.*

As previously outlined, the project predominantly constitutes repair / maintenance; these repair / maintenance activities do not constitute improvements that would be subject to Act 250 jurisdiction. The minor portions of the "municipal county or state purpose" project that constitute improvements in excess of the historical condition may constitute "development" pursuant to 10 V.S.A. §6001 (3) (A) if the involved land exceeds 10 acres. Based on the Coordinators' understanding of the current project plans and information, the involved land associated with the nominal improvements is substantially less than 10 acres and therefore does not constitute "development".

If the plans are modified or expanded to encompass improvements involving more than 10 acres of land, the project would require re-evaluation with respect to potential Act 250 jurisdiction.

SUMMARY CONCLUSIONS

Based upon the above referenced analyses and conclusions, the construction and use of the Lamoille Valley Rail Trail does not require a land use permit under the provisions of 10 VSA Chapter 151 (Act 250).

Please feel free to call if you have any questions or require additional information.

Sincerely,

/s/ Ed Stanak

/s/ Geoffrey Green

/s/ Kirsten Sultan

Ed Stanak, Coordinator
District 5 Commission

Geoffrey Green, Coordinator
District #6 Commission

Kirsten Sultan, Coordinator
District #7 Commission

This is a jurisdictional opinion issued pursuant to 10 V.S.A. §6007(c) and Natural Resources Board Rule 3. Reconsideration requests are governed by Natural Resources Board Rule 3 and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660).

Exhibit F

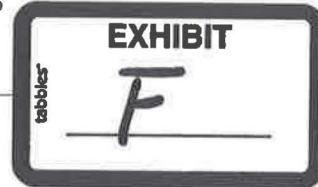
***Jurisdictional Opinion #5-06, #6-005 (2009),
#7-267, Lamoille Valley Rail Trail, September
30, 2009, Revised***



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September 30, 2009

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RE: Lamoille Valley Rail Trail
Jurisdictional Opinion #5-06, #6-005(2009), #7-267 (Reconsideration)
Motion for Reconsideration by Kate Scarlott and Rob McLeod

Dear Stephanie and Stephen:

On June 1, 2009, the Coordinators for Act 250 Districts 5, 6 and 7 issued the above-referenced joint Jurisdictional Opinion and concluded that the proposed multi-season recreational Lamoille Valley Rail Trail (LVRT) did not require a land use permit because the proposed improvements along the 93 mile corridor between St. Johnsbury and Swanton qualified for the "repair and maintenance" exemption from jurisdiction under Act 250. On July 1, 2009, a motion for reconsideration was filed on behalf of Kate Scarlott, Rob McLeod and others by means of electronic transmission. In summary, the petitioners contended in their motion that the conclusion stated in the Jurisdictional Opinion that the proposed physical action within the 93 mile right-of-way qualified as "repair and maintenance" work was incorrect and that the physical action will constitute "construction of improvements", which is "development" requiring a land use permit. Response positions were then filed on July 22, 2009 by landowner Vermont Agency of Transportation (VTRANS) and developer Vermont Association of Snow Travelers (VAST). In summary, VAST contended that the motion was untimely and procedurally flawed. VAST also urged that the conclusions stated in the Jurisdictional Opinion be affirmed. The three District Coordinators discussed the filings on August 28, September 2, 18, 22 and 29, 2009.

As explained below, this decision on the motion for reconsideration reverses the original Jurisdictional Opinion and concludes that a land use permit is required for the development of the LVRT.



Procedural Issues Involving the Motion to Alter

VAST contended that the petitioners' motion should be dismissed as being untimely and that the motion was not properly served upon all parties. In addition, VAST argued that the motion should be dismissed because the petitioners failed to request party status and would not be able to demonstrate any potential impacts to a particularized interest.

Timeliness of the Motion

Act 250 Rule 3(B) states that:

Persons who qualify as parties pursuant to 10 V.S.A. Section 6085(c)(1)(A) through (E) may request reconsideration from the district coordinator within 30 days of the mailing of the opinion.

Counsel for the petitioners submitted the motion for reconsideration by means of electronic transmission to the three district coordinators on the afternoon of July 1, 2009. The Jurisdictional Opinion had been issued on June 1, 2009. A "hard copy" of the motion was then received via US mail by the three district coordinators on July 2, 2009.

Until July 10, 2009, when the Natural Resources Board promulgated amended rules, Rule 10(E), which governs the filing of applications with District Commissions, was silent on the electronic filing of submittals. However, the Natural Resources Board was encouraging the increased use of electronic submittals for some time prior to the formal adoption of an amended Rule 10(E) and it had been the practice of district offices to accept electronic filings of submittals such as replies to hearing recess orders and proposed findings of fact. In addition, District Commission offices had likewise been encouraged by the Natural Resources Board to issue Commission decisions and other documents by means of electronic distribution. It is noted that the LVRT Jurisdictional Opinion itself was issued by electronic transmission to several parties and persons (See Certificate of Service dated June 1, 2009). Amended Rule 10(E) now requires electronic filings. While counsel for VAST is correct that the prior version of Rule 10(E) was silent on electronic filings, the rule did not prohibit use of this form of communication with district offices.

Even though the motion to alter arrived in the district offices on July 1, 2009 by electronic transmission rather than by US mail, it was a tangible filing received in each office in a timely manner by the deadline set out in Rule 3(B).

Service of the Motion for Reconsideration

Counsel for VAST argued that the petitioners failed to properly serve the motion in accordance with the Act 250 rules. Rule 12(H) specifies the serving of all documents upon the attorneys or representatives of record and all parties, and that they shall be accompanied with a certificate of

service. In the matter at hand, counsel for the petitioners indicated on the certificate of service accompanying the motion copy filed on July 2nd that it was provided only to the district coordinators and VAST's attorney. In addition, a memorandum of law submitted on July 6th separately from the motion was unaccompanied with a certificate of service. The district coordinators provided statutory parties with copies of the motion as an enclosure to their July 6th memorandum announcing receipt of the motion and indicating that copies of the memorandum of law were available upon request.

As concluded above, the motion was timely filed. The purpose of service is to provide persons with notice of the document which was done in this matter, albeit by the district coordinators. At a minimum, counsel for the petitioners did serve the motion on counsel for VAST. It is also noted that, in the prior transactions and communications concerning the issuance of the Jurisdictional Opinion itself, no statutory party filed positions or otherwise demonstrated an interest in participation.

Party Status and Particularized Interest

As stated above, Rule 3(B) allows "persons who qualify as parties pursuant to 10 V.S.A. 6085(c)(1)(A) through (E)" to request reconsideration of a Jurisdictional Opinion. Section 6085(c)(1)(E) includes adjoining property owners as potential parties.

The facts in the overall submittals in this matter demonstrate that Kate Scarlott and Rob McLeod are adjoining property owners to the LVRT corridor. A plain reading of the Scarlott and McLeod submittals shows that their concerns about the proposed project fall within the subject of aesthetics, at a minimum. "Particularized interest" has been held by the Environmental Court as involving an adequate showing of a potential impact on one's interest that is more than an impact on the general public. It is reasonable to infer that Kate Scarlott and Rob McLeod would qualify for a grant of party status by a district commission under at least criterion 8 due to potential impacts from noise. Because two of the petitioners would qualify as parties, it is not necessary to address the potential for party status by the other petitioners.

In conclusion, the motion for reconsideration was timely filed by persons who would qualify as parties under 10 V.S.A. 6085(c)(1)(E).

"Repair and Maintenance" or "Construction of Improvements"

As explained in the Jurisdictional Opinion, a threshold consideration for whether a project requires a land use permit under Act 250 is whether it will involve "construction of improvements" as defined in Rule 2(A). If a project will involve "construction of improvements" for a commercial or industrial purpose on a sufficiently large tract, or if the project is for a state purpose and will disturb more than 10 acres, then a land use permit is required for the development unless adequate proof is shown for an exemption from jurisdiction. [See Western Island Ventures Declaratory Ruling 169 (1985)].

Over time, the former Environmental Board recognized that “repair and maintenance” of existing development is not “construction of improvements” and, therefore, is not subject to jurisdiction. Petitioners Scarlott *et al* point out in their motion that most projects reviewed by the Environmental Board had not been excluded from jurisdiction under the “repair and maintenance” exemption and that the narrow exemption should not apply to the VAST proposal.

The facts presented by the proposed LVRT project are difficult to interpret under the jurisdictional provisions of Act 250 due to the interface with applicable federal statutory provisions, as was discussed in the Jurisdictional Opinion. Those circumstances resulted in a conclusion, which stands, that the railroad project did not meet the statutory standard of “development” under Act 250 for purposes of analyzing “substantial change to a pre-existing development”. With that conclusion in mind, it is nevertheless necessary to utilize the term “development” below in discussing the Board’s tests for evaluating the applicability of the “repair and maintenance” exemption.

The Board held that the following principles are pertinent to a “repair and maintenance” analysis:

1. “In-kind replacement” can fall within the parameters of the “repair and maintenance” exemption [Windsor Correctional Facility Declaratory Ruling 151 (1984) at page 5]
2. Work that does not “upgrade” an existing development “beyond its historic condition” is “repair and maintenance” (Productions Ltd. Declaratory Ruling 168 (April 10, 1985) at page 4 and See Town of Wilmington Declaratory Ruling 258 (June 30, 1992) at page 13].
3. Applying new pavement, placement of guardrails and the elimination or decrease in pull-offs on a state highway is not “repair and maintenance” [Agency of Transportation - Route 73 Declaratory Ruling 298 (May 19, 1995) at page 4].
4. “Repair and maintenance... does not alter the existing development. Rather, it prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear...”. “Repair and maintenance” is not “designed to change” the underlying existing development and is “focused on the original condition, character or make-up” of the existing development [Vermont Agency of Transportation (Preliminary Planned Projects) Declaratory Ruling 296 (also citing from the Rock Ledges Third Revision Decision) (November 2, 1998) at pages 8 and 9].
5. Consideration of “the *purpose* (emphasis in original) of a proposed development is appropriate when determining whether development falls within the repair and routine maintenance exemption”. [Nextel Communications Declaratory Ruling 362 (November 18, 1998) at page 21].

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The record in the present matter demonstrates that substantial infrastructure was put in place approximately 130 years ago for purposes of supporting the operation of a railroad. By 1972, two years following the enactment of Act 250, the railroad had effectively ceased operation and ownership was assumed by the State. Lessees then operated the railroad with infrequent use. Most rail traffic ended by the 1980's and operations ceased completely in 1995.

While much railroad infrastructure remains in place, substantial portions of infrastructure have been destroyed by floods or washouts. All rails and ties were removed in 2005. The "existing development" that had supported operation of a railroad has, over time, ceased.

A re-examination of the salient facts associated with the proposed construction for the LVRT indicates the following physical actions will be undertaken:

1. repair and installation of culverts
2. clearing and grubbing of the corridor
3. grading and compaction of ballast
4. restoration of drainage ditches
5. application of fine gravel atop the ballast to form a suitable trail surface
6. signage and mile marking
7. installation of 9 bridges or bridge sections
8. replacement of bridge decking
9. installation of guardrail
10. replacement of right-of-way fencing

If one assumes that an "existing development" is in place along the corridor, then the Board's tests of "upgrade" and change of "purpose" need to be applied. It is reasonable to conclude that the proposed construction is an upgrade of a defunct railroad infrastructure corridor into a four season, multi purpose recreational trail. Likewise, the purpose of the corridor will be different under VAST's control, even though as concluded in the Jurisdictional Opinion, the potential for future restoration of an operating railroad remains intact under federal law. The physical action proposed to create the LVRT exceeds the narrow "repair and maintenance" exemption established by the Environmental Board. Therefore, the physical action constitutes "construction of improvements" under Rule 2(A).

10 V.S.A. §6001(3)(A)(v) provides that "development" includes "*construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings*".

In the original Jurisdictional Opinion (at pages 19-22), an evaluation was made as to whether the LVRT project qualified as a "state purpose" under the provisions of Act 250. The conclusion was reached that the LVRT will be for a "state purpose". The Jurisdictional Opinion then considered whether the proposed physical actions within the LVRT corridor would physically

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involve more than 10 acres of land. The Jurisdictional Opinion concluded that less than 10 acres would be involved because the majority of the proposed improvements had been backed-out of the jurisdictional analysis as "repair and maintenance" work. Based upon the conclusions stated above with respect to "repair and maintenance", it is necessary to re-assess the facts relevant to the calculation of involved acreage.

The Environmental Board considered how to identify the scope of "involved land" for a state / municipal purpose project in Declaratory Ruling #220, issued July 19, 1990, for a linear transportation project located in the City of Montpelier. The Board held, in pertinent part that

"Consistent with Resource Recovery [Re: City of Burlington. Resource Recovery Project, Declaratory Ruling #125 (March 11, 1981)], the Board rules that land is-not 'incident to the use' of a state, county or municipal project unless it will somehow be changed because of the project. The Board believes this result is necessary because government entities often own a great deal of land which could be considered 'incident to the use' under a broader interpretation of that phrase, leading to unmanageable extensions".

The LVRT project includes construction of physical changes along the 93 mile corridor. The construction work will involve a varying width of disturbance along the length of the corridor, ranging in width up to a maximum of 66 feet (full width of the available right of way, in limited areas where rail embankment slope erosion repair is needed). The exact average disturbance width is not known, however it can reasonably be expected that the average width of disturbance will not be less than 10 feet. Applying an estimated 10 feet average disturbance width yields a computed area of physical disturbance of 112 acres (93 miles x 5,280 feet x 10 feet ÷ 43,560 square feet). The computed "involved land" area is in the order of 100 acres, (i.e. exceeds the 10 acre jurisdictional standard.) In conclusion, the construction of improvements for the LVRT state purpose project will physically involve more than 10 acres.

SUMMARY CONCLUSIONS

Based upon the above referenced analyses and conclusions, the construction and use of the Lamoille Valley Rail Trail will require a land use permit under the provisions of 10 VSA Chapter 151 (Act 250). This jurisdictional conclusion must be read in the context of the jurisdictional limitations imposed by federal law and related caselaw, as was discussed on pages 14-16 of the Jurisdictional Opinion.

Please feel free to call if you have any questions or require additional information.

Sincerely,

/s/ Ed Stanak

*/s/ Geoffrey Green**

/s/ Kirsten Sultan

Ed Stanak, Coordinator
District 5 Commission

Geoffrey Green, Coordinator
District #6 Commission

Kirsten Sultan, Coordinator
District #7 Commission

Dissenting Opinion

*The process to determine whether proposed physical changes or actions constitute repair or maintenance or construction of improvements is done by comparing the work proposed by LVRT as listed above as items 1-10 to the Board's principles enumerated above. The terms "repair" and "maintenance" are never specifically defined by the Board and therefore assume their accepted and common meaning. The term "repair" means "to restore to sound condition after damage or injury". Webster's II New Riverside University Dictionary at 996. The term "maintenance" means "the work of keeping something in suitable condition". Id at 717.

In comparing the ten broad physical-action categories proposed by VAST with the principles laid down by the Board, it is my jurisdictional opinion that all the proposed physical changes constitute repair, replacement or maintenance and therefore the project does not constitute a development. The change of use or purpose analysis discussed in Nextel is a factor, not the exclusive factor in determining whether the physical changes constitute repair and maintenance or construction of improvements. At best it is a consideration, or factor that should be considered. The meaning of "purpose" and "use" are not synonymous and therefore are not interchangeable. The "purpose" of a proposed development is its goal or its existence. Its "use" is how the purpose is effectuated or implemented. In this case, the purpose or goal of the transportation corridor is to convey something from one place to another. Historically, that goal was achieved by railroad use, and in the future that may change to trail use – but the purpose remains the same, namely to offer a transportation corridor for transit of goods, services or people.

Other factors that should be evaluated in the repair-maintenance exemption analysis include the following:

1. Are the changes an in-kind replacement?
2. Will the changes maintain the historic condition of the transportation corridor?
3. Will the changes "prevent or eradicate alteration to the transportation corridor which has occurred or would otherwise occur overtime through normal wear and tear"?
4. Are the changes consistent with the overall purpose of the transportation corridor?

In reviewing the ten enumerated physical actions in this case, it is my opinion that they all satisfy the repair and maintenance exemption.

1) The repair and installation of culverts is an in-kind replacement that does not result in an up-grade, will prevent changes that would otherwise occur over time through wear and tear and does not result in a change of purpose. The installation of new culverts may also be considered repair and maintenance because from time to time drainage patterns may change as a result of upstream land use changes and appropriate action is needed to prevent damage or deterioration to the corridor.

2) Clearing and grubbing of the corridor must take place in order to keep the corridor in suitable condition for any use. If these activities did not take place the corridor would soon be overtaken.

3) The grading and compaction of ballast is a maintenance practice that is not new to the corridor and caused by normal wear and tear from its use. The grading and compaction of ballast has only minimally been maintained since the 1970's. Although generally compacted, the ballast has eroded in places. Grading and compacting are necessary to return it to its properly functioning condition. Such work will not result in an upgrade over its historic condition, and will continue to deteriorate over time if action is not taken.

4) The restoration of drainage ditches has deteriorated over time from normal wear and tear and is a practice that must occur to maintain the corridors use and function.

5) The application of fine gravel atop the ballast to form a suitable surface for accessible (ADA) non-motorized use has not historically occurred in the past. However, the application of coarse gravel to maintain the rail bed has occurred regularly throughout the history of the transportation corridor. The addition of a finer material to provide a surface for ADA accessible use is consistent with the purpose of the transportation corridor.

6) Signage and mile marking has always been a part of the transportation corridor and over time needs to be replaced in order to protect the corridor and general public from any hazardous conditions that may occur.

7) The installation of nine bridges is a significant and costly undertaking. Many of these bridges were previously removed or washed out and need to be replaced. Several of the bridges are unsafe and will require complete reconstruction or replacement. Primarily these bridges will be replaced within their existing alignment within the transportation right-of-way, except for the bridge replacement in Walden. The less costly option, although not required, for the Walden Bridge would be to acquire an additional 0.10 acres of land outside the right-of-way in order to achieve a better bridge alignment. These bridges are in-kind replacement of bridges that have historically been located along the transportation corridor. I note that the replacement bridges do

Stephanie J. Kaplan, Esq.

Stephen A. Reynes, Esq.

LVRT, Jurisdictional Opinion #5-06, #6-005(2009), #7-267 (Reconsideration)

Page 9 of 9

not have the weight capacity for train usage, and therefore do not represent an upgrade over the corridor's historic condition but rather replace what has deteriorated through wear and tear over time.

8) Bridge decking deteriorates over time and must be replaced in order to keep the corridor in working condition.

9) The installation of guardrails or fencing systems, such as chain link fencing, will occur at a height sufficient for safe equestrian use across many of the bridges, cattle passes, culverts, and concrete structures. This is necessary to provide a safe crossing for many of the corridors users. This is not a new use as similar measures have been historically taken along the corridor to protect rail use from hazardous conditions.

10) The replacement of right-of-way fencing is necessary because much of the old fencing has not been maintained over the last several decades and remains necessary to maintain the safety of the users.

In summary, the change from rail to trail is an adaptive re-use of something that already exists. The preponderance of the evidence shows that the proposed changes will not alter the purpose of the transportation corridor but is undertaken to maintain the historic condition and character of the corridor for trail use. It is for these reasons that I conclude the proposed physical changes constitute repair and maintenance.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. §6007(c) and Natural Resources Board Rule 3. Reconsideration requests are governed by Natural Resources Board Rule 3 and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660).

Exhibit G
Act 250 Permit



State of Vermont



LAND USE PERMIT

CASE NO 7C1321
APPLICANT Vermont Agency of Transportation
ADDRESS One National Life Drive
Montpelier, VT 05633-5001

LAWS/REGULATIONS INVOLVED
10 V.S.A., §§ 6001 - 6093 (Act 250)

and

Vermont Association of Snow Travelers, Inc.
c/o Stephen A. Reynes, Esq.
Primmer Piper Eggleston & Cramer PC
1000 East State Street PO Box 1309
Montpelier, VT 05601-1309

District Environmental Commission #7 hereby issues Land Use Permit Amendment #7C1321, pursuant to the authority vested in it by 10 V.S.A., §§ 6001-6093. This permit applies to $\pm$ 44 miles of railroad corridor, consisting of three non-contiguous segments (Phase 1 of the Lamoille Valley Rail Trail project) and identified in:

Book 148 Pages 11-13 of the land records of the Town of St. Johnsbury, Vermont;
Book 51 Pages 521-523 of the land records of the Town of Danville, Vermont;
Book 67 Pages 340-342 of the land records of the Town of Morristown, Vermont;
Book 41 Pages 396-398 of the land records of the Town of Hyde Park, Vermont;
Book 43 Page 465 of the land records of the Town of Johnson, Vermont;
Book 46 Pages 342-343 of the land records of the Town of Cambridge, Vermont;
Book 32 Pages 90-91 of the land records of the Town of Sheldon, Vermont;
Book 53 Pages 393-394 of the land records of the Town of Highgate, Vermont;
and Book 81 Pages 368-369 of the land records of the Town of Swanton, Vermont.

as the subject of deeds to the Vermont Transportation Authority, and as the subject of a lease agreement with Co-Permittee the Vermont Association of Snow Travelers, Inc.

This permit specifically authorizes construction of improvement to establish the $\pm$ 44 mile long Phase 1 portion of the Lamoille Valley Rail Trail (LVRT), a year-round multi-use recreation and alternative transportation path / trail.

The project is subject to Act 250 jurisdiction pursuant to Jurisdiction Opinion #5-06, #6-005(2009), #7-267 (Reconsideration) issued on September 30, 2009.

The Permittees and their assigns and successors in interest, are obligated by this permit to complete, operate and maintain the project as approved by the District Commission in accordance with the following conditions:

1. Representatives of the State of Vermont shall have access to the property covered by the permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
2. The project shall be completed, operated and maintained in accordance with: (a) Findings of Fact and Conclusions of Law #7C1321, (b) the plans and exhibits on file with the Commission, and (c) the conditions of this permit.
3. No changes shall be made in the design or use of this project without a jurisdictional opinion from the District Coordinator or a permit amendment from the Commission.
4. The Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require that the permit holder file an affidavit certifying that the project is being completed, operated and maintained in accordance with the terms of the permit, as provided by 10 V.S.A., Chapter 151 and the Act 250 Rules.
5. By acceptance of the conditions of this permit without appeal, the Permittees confirm and agree that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the Permittees and all assigns and successors in interest.
6. This permit hereby incorporates all of the conditions of the following permits and authorizations issued by the Agency of Natural Resources: Authorization to Discharge Permit No. 6852-9015 dated August 30, 2012, Individual Wetland Permit ID # WY12-0004 dated August 30, 2012, and Endangered & Threatened Species Takings Permit Authorization # EH-2012-21 dated August 24, 2012. Any subsequent nonmaterial changes shall be incorporated herein automatically.
7. Permittees shall develop and implement a plan to monitor the overall effectiveness of its policing and enforcement systems, including snowmobile traffic volume (usage) and complaints, and shall submit the monitoring results to the Commission one year from completion of construction of the Phase 1 project, and within 30 days of a written request from the Commission, as outlined in the Commission's Findings. The Commission reserves the right to convene a hearing, and to evaluate and impose additional conditions with respect to Criterion 8 noise emissions. The District Commission reserves this right for a period of time expiring October 25, 2022.
8. Snowmobile operation shall occur only between 6:00 AM to 11:00 PM daily, and seasonally between December 16 and April 15 inclusive. These hours and dates may be exceeded only by amendment to this permit or to meet temporary emergency needs.
9. Usage of All Terrain Vehicles (ATV's) on the Lamoille Valley Rail Trail (excepting at limited existing State-approved crossing locations, or as needed to provide reasonable accommodation under the Americans with Disabilities Act (ADA), or as needed to respond to emergency transportation needs) is strictly prohibited.

10. Permittees shall maintain varying width undisturbed, naturally vegetated buffer zones, measured from top of bank, along the watercourses on the project site, as detailed in the application, in which no cutting, clearing, mowing, vehicle operation or other disturbance is allowed excepting the limited select cutting of small trees as detailed in the application.
11. Each prospective purchaser of the development shall be shown a copy of the approved plans and the Land Use Permit before any written contract of sale is entered into.
12. The Permittees shall reference the requirements of conditions imposed by Land Use Permit #7C1321 in all deeds to said project.
13. Pursuant to 10 V.S.A. § 6090(b), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.
14. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the Permittees have not commenced construction and made substantial progress toward completion within the three year period in accordance with 10 V.S.A. § 6090(c).
15. All site work and construction shall be completed in accordance with the approved plans by October 15, 2022, unless an extension of this date is approved in writing by the District Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without public hearing.
16. Failure to comply with all of the above conditions may be grounds for permit revocation pursuant to 10 V.S.A., § 6027(g).

Dated at St. Johnsbury, Vermont, this 25th day of October, 2012.

By /s/ Eugene Reid
Eugene Reid, Chair
District #7 Environmental Commission

Members participating in this decision:

Keith Johnson, Laura Wilson

Any party may file a **motion to alter** with the District commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A). Any **appeal** of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50 as of January 2001. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal. See 10 V.S.A. § 8504(k). For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802)8281660. The Court's mailing address is: Superior Court, Environmental Division, 2418 Airport Road, Suite 1, Barre, VT 05641-8701.

Exhibit H
Affidavit of Cindy Locke



BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. AB-444 (Sub.-No. IX)
*Lamoille County Railroad Company-Abandonment and Discontinuance of Trackage Rights
Exemption- In Caledonia, Washington, Orleans, Lamoille and Franklin Counties, VT*

VERMONT ASSOCIATION OF SNOW TRAVELERS
PETITION FOR DECLARATORY ORDER

AFFIDAVIT OF CINDY LOCKE

I, Cindy Locke, Executive Director of Vermont Association of Snow Travelers
("VAST"), being more than eighteen years old, first duly sworn, depose and say as follows,
based on my personal knowledge:

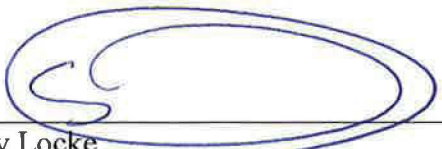
1. VAST estimates it incurred \$460,000 in legal fees, engineering fees, and other costs related to the Act 250 process. This translates to 7% of the original federal grant, or \$14,000 per mile of trail.
2. The budgeted Act 250 expense for the balance of the Trail is another \$450,000. That number assumes there will be no significant opposition and no appeals of any permits.
3. Not only did Act 250 significantly increase the project's permitting expense, it also delayed the project's start by four years.
4. This delay has resulted in a substantial increase in the estimated cost of completing the Trail, which now stands at close to \$16 million, more than double the original estimate (in total it is estimated Act 250 will add seven to eight years to the timeline).
5. In addition to the Act 250 permit, VAST obtained a Stormwater Discharge permit, a Wetlands permit, an Endangered and Threatened Species Taking permit, an Individual

Construction Stormwater Discharge permit, a Streams Alteration/Flood Hazard permit, and Programmatic Agreement re Historical Structures.

6. An example of how the Act 250 process slows work and increases costs is a recent effort by the Town of Hyde Park, Vermont to do some stormwater-related work, a small portion of which was located in the Trail right-of-way. The proposed work included the installation of a 15" culvert under the Trail. The Town was all ready to do the work and contacted VAST for permission to do the work in the right-of-way. However, no such work can be done without first obtaining an amendment to the 250 Permit or a formal opinion from the District Coordinator that an amendment is not required. The District Coordinator can decide that a full amendment is required, that a minor amendment is required, or that no amendment is required. A full amendment can take as long to process as an initial application. The upshot of this requirement, and the inability to get the District Coordinator to sign off that no amendment was needed without first receiving a formal project review sheet, was that the Town abandoned the project and the work did not get done. The failure to complete this project poses a significant threat of a rail bed washout in this area. The inability to timely address minor local problems may impose substantial unnecessary repair costs on VAST.
7. The State of Vermont itself has undertaken activity within the right-of-way for which an Act 250 amendment should have been obtained, but which was not, e.g., the State's replacement of a failing bridge with a tunnel in St. Johnsbury.
8. In addition, the State has authorized multiple Trail crossings and issued Trail access permits without obtaining an Act 250 amendment, each one of which should have been the subject of an amendment.

9. In 2011, there were 655 adjoining landowners along the entire 93-mile length of the Trail and 765 different parcels of land.

Dated at Barre, Vermont this 15 day of March, 2017.


Cindy Locke
Vermont Association of Snow Travelers

STATE OF VERMONT
Washington COUNTY, SS

At Berlin in said County and State, on this 15 day of March, 2017, personally appeared Cindy Locke, a person known or properly identified to me, and she acknowledged this instrument to be her free act and deed, and the free act and deed of Vermont Association of Snow Travelers.

Before me,


Notary Public
My Commission Expires: 2-10-19

Exhibit I

***Permit Amendments and Decision Finding
No Amendment Required***

Project Review Sheet


THIS IS NOT A PERMIT

Date Initiated ANR PIN# WW Project# Pre-application Review ☒

Project Information

General Information

PROJECT NAME (if applicable)	PROJECT TOWN Morristown
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PROJECT LOCATION (911 address if available)
Lamoille Valley Rail Trail & Vermont Route 15A

Contact(s)

CONTACT TYPE Applicant	NAME Jeff Ramsey	ORGANIZATION NAME (if applicable) Vermont Agency of Transportation
ADDRESS 1 National Life Dr.	TOWN Montpelier	STATE VT
PHONE 802-828-1278	CELL PHONE	ZIP 05633
	EMAIL jeff.ramsey@vermont.gov	

Project Description

ENTERED BY Peter Kopsco	INFORMATION SOURCE Individual	DATE ENTERED 9/22/2016 2:14 PM
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PROJECT DESCRIPTION
Raise the rail trail at the intersection of the trail and Vermont Route 15A to meet the new elevation of the road. The road is being raised to accommodate a new bridge spanning the Lamoille River.

DEC Prior Permits

PERMIT TYPE Act 250	PERMIT NUMBER 7C1321
PERMIT TYPE Stormwater Construction Permit	PERMIT NUMBER 6852-INDC
PERMIT TYPE Stormwater Discharge Permit	PERMIT NUMBER 6852-9015

*Jurisdictional Opinion(s) for permits that may be needed from the District Environmental Office **PRIOR TO COMMENCEMENT OF CONSTRUCTION***

Act 250 Jurisdictional Opinion

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Effective May 31, 2016, any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431, which is \$295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, Dewey Building, 1 National Life Drive, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

PERSON REQUESTING JURISDICTIONAL OPINION Jeff Ramsey	REQUESTOR TYPE Landowner/Agent	ACT 250 PERMIT NUMBER (if any)	HAS THE LANDOWNER SUBDIVIDED BEFORE? ☐ Yes ☐ No
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TYPE OF PROJECT (check all that apply)

☒ Commercial ☐ Residential ☐ Agricultural ☒ Municipal ☒ State ☒ Federal

IS AN ACT 250 PERMIT REQUIRED?

☐ Yes ☒ No

COPIES SENT TO STATUTORY PARTIES?

☐ Yes ☐ No

BASIS FOR DECISION

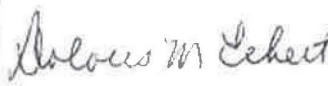
Project does not constitute a material change pursuant to Act 250 Rules 2(C)(6) and 34.

DISTRICT COORDINATOR SIGNATURE  2016.09.22 12:07:19 -04'00'	 VERMONT Clancy DeSmet, Coordinator [phone] 802-476-0186 [email] clancy.desmet@vermont.gov Natural Resources Board District 5 Environmental Commission 5 Perry Street, Suite 60, Barre, VT 05641-4267
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Wastewater System & Potable Water Supply Permit Jurisdictional Opinion

IS A WASTEWATER SYSTEM & POTABLE WATER SUPPLY PERMIT/APPROVAL REQUIRED? ☐ Yes ☐ Permit application currently under review ☒ No ☐ Permit issued on _____	PERMIT NOT REQUIRED? ☐ Boundary Line Adjustment ☐ Home Occupation ☐ Clean Slate ☐ Notice of Permit Requirement
--	--

BASIS FOR DECISION
 Project as described does not propose any construction of, or modification to, water and/or wastewater systems.

REGIONAL OFFICE STAFF SIGNATURE  2016.09.16 07:44:11 -04'00'	 VERMONT Dolores M. Eckert, Assistant Regional Engineer [phone] 802-557-7532 [email] dolores.eckert@vermont.gov Department of Environmental Conservation Drinking Water & Groundwater Protection Division - Montpelier Regional Office 1 National Life Drive, Davis 1, Montpelier, VT 05620-3703
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The following are preliminary, non-binding determinations made by DEC Permit Specialists identifying other permits that may be needed
PRIOR TO COMMENCEMENT OF CONSTRUCTION

Preliminary, Non-binding Determination of the Applicability of Other State Permits

Note: Fact Sheet numbers below refer to permit fact sheets available at: <http://dec.vermont.gov/permits/handbook/info-sheets>

Agency of Natural Resources - Department of Environmental Conservation

WATERSHED MANAGEMENT DIVISION

☒ Stormwater: Developments [Fact Sheets #6.2 & 6.3]

Local Permits

☒ See your Town Clerk, Zoning Administrator, Planning Commission or Public Works

Other

☒ Other approvals or comments

Please contact Kevin Burke (kevin.burke@vermont.gov 802-490-6168) if you have any questions about stormwater permitting.

PERMIT SPECIALIST SIGNATURE  2016.09.15 08:41:26 -04'00'	 VERMONT Peter Kopsco, Permit Specialist [phone] 802-505-5367 [email] pete.kopsco@vermont.gov Department of Environmental Conservation Environmental Assistance Office 1 National Life Drive, Main 2, Montpelier, VT 05620-3804
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Natural Resources Board

Act 250 Application Form

NOTE: Please review the Application Guide at <http://www.nrb.state.vt.us/lup/publications.htm> before completing this form.

SELECT FORM TYPE

- ☐ Application
 ☐ Completion Date Extension
 ☒ Administrative Amendment *(Discuss with District Coordinator before completing this type of form)*

Contact Information

Applicant(s)

NAME

Lamoille County Planning Commission

MAILING ADDRESS

PO Box 1637

TOWN

Morrisville

STATE

VT

ZIP

05661

PHONE

802-888-4548

CELL PHONE

EMAIL

rob@lcpvt.org

APPLICANT LEGAL INTEREST IN LAND

- ☐ Ownership in simple fee
 ☐ Lease agreement
 ☐ Contract to purchase
 ☒ Other (describe below)

OTHER LEGAL INTEREST DESCRIPTION

LCPC is project manager for Town of Cambridge project on VT Agency of Transportation Land.

APPLICANT LEGAL FORM

- ☐ Individuals
 ☐ Partnership (list partners)
 ☐ Corporation (provide details)
 ☐ Municipal Govt
 ☐ State Govt
 ☒ Other

PLEASE DESCRIBE OTHER APPLICANT LEGAL FORM

Regional Planning Commission

Landowner(s)

NAME

Vermont Agency of Transportation c/o Michele Boomhower PPAID Division

MAILING ADDRESS

1 National Life Drive

TOWN

Montpelier

STATE

VT

ZIP

05633

PHONE

802-828-5753

CELL PHONE

EMAIL

Michele.Boomhower@vermont.gov

Others With Significant Interest(s) in Property

☐ Check if not applicable

NAME

Town of Cambridge Vermont

MAILING ADDRESS

PO Box 127

TOWN

Jeffersonville

STATE

VT

ZIP

05464

PHONE

802-644-2251

CELL PHONE

FAX NUMBER

EMAIL

mark@cambridgevt.org

DESCRIPTION OF INTEREST

Leaseholder with VT Agency of Transportation

NAME

Smugglers Notch Resort c/o Mark Delaney

MAILING ADDRESS

4323 VT 108 South

TOWN

Jeffersonville

STATE

VT

ZIP

05464-9537

PHONE 644-1113	CELL PHONE	FAX NUMBER	EMAIL mdelaney@smuggs.com
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DESCRIPTION OF INTEREST

Smugglers Notch also holds a lease in this vicinity for their snowmaking pumphouse.

Primary Contact Person for Application

NAME

Robert Moore

MAILING ADDRESS

PO Box 1637

TOWN

Morrisville

STATE

VT

ZIP

05661

PHONE

802-888-4548

CELL PHONE

FAX NUMBER

EMAIL

rob@lpcvt.org

Project Information

PROJECT TYPE

- ☐ No previous Act 250 jurisdiction
- ☒ Amendment of existing Act 250 permit or permit condition

EXISTING ACT 250 PERMIT NUMBER(S)

5L0706-31E; 7C1321

Please Note: If you are applying to amend a permit condition which was included to resolve an issue critical to the district commission's or the board's issuance of a prior permit, please contact the District Coordinator to determine whether you need to address the "Stowe Club Highlands" analysis. Also see Act 250 Rule 34(E) <http://www.nrb.state.vt.us/lup/rules.htm>.

GENERAL DESCRIPTION OF THE PROJECT (Include number and size of buildings/lots, use of buildings, number of lots, length of roads, etc.)

The Town of Cambridge plans to operate a trailhead to the Lamoille Valley Rail Trail. The area is already used as an informal trailhead. The project will include adding fill material, landscaping, adding up to 18 parking spaces, installing scale replica train cars, picnic tables and bike racks. A trailhead map and signage will be located on the Smuggler's Notch Resort pumphouse (5L0706-31E), which is in the same location (the site is 22,560 square feet minus 2620 square feet that is already leased to Smugglers' Notch Resort). There will be security light with a motion sensor (10 watt, fully shielded) located under the pumphouse vestibule. There are no bathroom facilities proposed.

CONSTRUCTION DURATION (Months to complete)

April 15 to September 15, 2016 (5 months)

DURATION OF PERMIT REQUEST IN YEARS (If project is for earth extraction, solid waste disposal, or logging above 2,500 feet.)

one year from date of issuance

Property Information

PROPERTY LAND ACREAGE

ACRES OWNED/CONTROLLED BY APPLICANT/LANDOWNER

16+/-

ADDITIONAL ACRES IN EASEMENTS OR RIGHTS-OF-WAY

PROPERTY LOCATION

TOWN (Primary)

Cambridge

TOWN (Secondary, if applicable)

STREET OR ROAD LOCATION (Provide E911 address if available.)

Cambridge Junction Road

NEARBY LANDMARK

Cambridge Junction Covered Bridge

PROPERTY LATITUDE AND LONGITUDE COORDINATES (Using GPS set for NAD83 or as derived from NAD83-based map. Coordinates should be in decimal degrees to 4 decimal places.)

N - LATITUDE

44.650

W - LONGITUDE

-72.814

PROPERTY DEEDS

GRANTEE'S NAME Vermont Agency of Transportation				
COUNTY Lamoille	TOWN Cambridge	BOOK 45	PAGE(S) 493	DATE RECORDED 03-19-1969
PROPERTY SPAN NUMBER SPAN NUMBER (From property tax bill)				

Additional Information

CHECK BELOW IF YOU ARE CONCURRENTLY APPLYING FOR ANY OF THE FOLLOWING PERMITS FROM THE AGENCY OF NATURAL RESOURCES:

- | | | |
|--|--|--|
| ☐ Wastewater System & Potable Water Supply Permit | ☐ Construction General Permit | ☐ Air Pollution Control Permit |
| ☐ Public Water System Permit to Construct | ☐ Stormwater Discharge Permit | ☐ Wetland Permit ☐ Other |

HAVE YOU RECEIVED LOCAL ZONING AND/OR SUBDIVISION APPROVAL?

- ☐ Yes (attach copy) ☐ Pending ☒ None Needed

ATTACH THE FOLLOWING UNLESS WAIVED BY THE DISTRICT COORDINATOR:

- ☒ Schedule A - Fee Information ☒ Schedule E - Project Adjoiner Information
☐ Act 250 fee (payable to "State of Vermont")

Signatures

I hereby swear that the information provided above or attached to this application is true and accurate to the best of my/our knowledge.

	Robert Moore	5/6/2016
SIGNATURE OF APPLICANT (Required for paper copies only)	CLEARLY PRINT NAME	DATE

I hereby certify that I understand that I must not commence construction, demolition, remodeling or commercial use of the property as described in Act 250 Rule 2(C) until I have received an Act 250 Land Use Permit as required by 10 V.S.A. § 6081.

	Robert Moore	5/6/2016
SIGNATURE OF APPLICANT (Required for paper copies only)	CLEARLY PRINT NAME	DATE

I hereby authorize the processing of this application for the above project on land(s) that I/we own, control, or have significant property interest in (attach letter if easier).

	Dan Delabruere as agent of VTrans	05/04/2016
SIGNATURE OF LANDOWNER (Required for paper copies only)	CLEARLY PRINT NAME	DATE

Submission Instructions

For Applications and Completion Date Extensions:

Submit the original, three paper copies, and one electronic copy (see instructions) to the Act 250 District Office. For District 2 applications, see Paperless Act 250 Application Procedures for special filing requirements.

Submit one copy each to the municipality, municipal planning commission, regional planning commission, and to any adjoining municipalities and planning commissions if the property is located on a town line.

Submit one copy only to the Vermont Agency of Natural Resources at:

Agency of Natural Resources
Office of Planning & Legal Affairs
One National Life Drive, Davis 2
Montpelier, VT 05620-3901

For Administrative Amendments:

Submit one original and one electronic copy (see instructions) to the Act 250 District Office. Do not submit the additional copies as specified above. For District 2 applications, see Paperless Act 250 Applications Procedure for special filing requirements.

Schedule A - Fee Information

Submit with the application a check payable to the "State of Vermont". **Municipal and state agency projects are exempt from fees but should still report construction costs on this form.** Not-for-profit organizations are **not** exempt. Calculate the fee using the table below.

Note: All lines on the schedule must be filled out. If a line does not apply, or if there is no associated cost, enter 0. An incomplete schedule will result in a delay in application processing.

1) Number of lots being created	# of Lots 0	x \$125.00	\$	0.00
2) Earth Extraction (Gravel/Sand Pits and Quarries)	Total Extraction Proposed in yd ³ 0	x \$0.02/yd ³ for 1st million yd ³ extraction proposed for life of the permit x \$0.01/yd ³ for yd ³ above 1st million proposed for life of the permit	\$	0.00
3) Estimated Construction Costs:*	Building ft ² 0	Building \$/ft ²	\$	0.00
Buildings			\$	0.00
Site preparation			\$	
Roads and parking			\$	
Utilities			\$	
Off-site improvements			\$	
Landscaping			\$	
Other			\$	
Describe Other				
Construction Subtotal			\$	0.00
Construction Cost <=\$15M		\$ 0.00	x 0.00665	\$ 0.00
Construction Cost <=\$15M (ANR Fee)**		\$ 0.00	x 0.00075	\$ 0.00
Construction Cost >\$15M		\$ 0.00	x 0.00312	\$ 0.00
4) Total Fee***			\$	62.50

*For residential subdivisions, include the estimated construction cost of all improvements proposed to be constructed by the applicant or a related person or entity, including common facilities, infrastructure, dwellings, and other. For more information, see the definition of "person" at 10 V.S.A. § 6001(14), on the web at <http://www.nrb.state.vt.us/lup/statute.htm>.

**As of July 1, 2015, the first \$15,000,000 of construction costs is subject to a base fee of \$6.65 per \$1,000 of construction costs (0.00665) and an additional fee of \$0.75 per \$1,000 of construction costs (0.00075) to account for review of Act 250 applications by the Agency of Natural Resources (ANR). See 10 V.S.A. § 6083a, on the web at <http://www.nrb.state.vt.us/lup/statute.htm> for the complete schedule of fees.

***Submit one check for the total amount payable to "State of Vermont"

State and Municipal Projects are exempt from fees
Minimum fee of \$187.50 for new applications
Minimum fee of \$62.50 for amendment applications
Maximum total application fee is \$165,000.00
(Treat expansions of approved projects as new applications)

MUNICIPAL PROJECT : NO FEE
PER DISTRICT 5 STAFF

I attest by my signature that the above is true to the best of my knowledge.


SIGNATURE OF APPLICANT

Robert Moore
CLEARLY PRINT NAME

5/6/2016
DATE

Schedule E - Adjoiner Information

Submit with the application a list of all adjoining landowners with mailing addresses. An "adjoiner" is a person or organization which owns or controls land or easements on lands which physically abut the tract or tracts of land on which your project is located. Be certain to include landowners on the opposite sides of highways, railways, and rivers. Also include homeowner associations, utility companies, and others with significant legal interest in the project land. It is very helpful if you indicate the location of each adjoiner on your site plan.

If you do not provide a list which is thorough and up-to-date, your application could be delayed because of improper notice distribution!

Please note: For lists which include more than 20 adjoining landowners, our administrative staff appreciates receiving the list on mailing labels to facilitate the notification process. Thank you.

ADJOINER NAME	ADDRESS	TOWN	STATE	ZIP
Jack F. Corse, Inc.	PO Box 300	Cambridge	VT	05444
ADJOINER NAME	ADDRESS	TOWN	STATE	ZIP
Gordon Paris	38 Nolan Road	Jeffersonville	VT	05464
ADJOINER NAME	ADDRESS	TOWN	STATE	ZIP
Douglas Flagg	116 Cambridge Jct Road	Jeffersonville	VT	05464

LIMITED ADJOINER NOTIFICATION
PER DISTRICT STAFF

Natural Resources Board

Act 250 Application Form

NOTE: Please review the Application Guide at <http://www.nrb.state.vt.us/lup/publications.htm> before completing this form.

SELECT FORM TYPE

- ☐ Application
 ☐ Completion Date Extension
 ☒ Administrative Amendment *(Discuss with District Coordinator before completing this type of form)*

Contact Information

Applicant(s)

NAME

Lamoille County Planning Commission

MAILING ADDRESS

PO Box 1637

TOWN

Morrisville

STATE

VT

ZIP

05661

PHONE

802-888-4548

CELL PHONE

EMAIL

rob@lcpv.org

APPLICANT LEGAL INTEREST IN LAND

- ☐ Ownership in simple fee
 ☐ Lease agreement
 ☐ Contract to purchase
 ☒ Other (describe below)

OTHER LEGAL INTEREST DESCRIPTION

LCPC is project manager for Town of Cambridge project on Cambridge Community Center LLC Land.

APPLICANT LEGAL FORM

- ☐ Individuals
 ☐ Partnership (list partners)
 ☐ Corporation (provide details)
 ☐ Municipal Govt
 ☐ State Govt
 ☒ Other

PLEASE DESCRIBE OTHER APPLICANT LEGAL FORM

Regional Planning Commission

Landowner(s)

NAME

Cambridge Community Center, LLC

MAILING ADDRESS

221 Mill St

TOWN

Jeffersonville

STATE

VT

ZIP

05464

PHONE

644-8466

CELL PHONE

EMAIL

jmatthewdunn@gmail.com

Others With Significant Interest(s) in Property

☐ Check if not applicable

NAME

Town of Cambridge Vermont

MAILING ADDRESS

PO Box 127

TOWN

Jeffersonville

STATE

VT

ZIP

05464

PHONE

802-644-2251

CELL PHONE

FAX NUMBER

EMAIL

DESCRIPTION OF INTEREST

Easement Holder for Trailhead area

Primary Contact Person for Application

NAME

Robert Moore

MAILING ADDRESS PO Box 1637			TOWN Morrisville	STATE VT	ZIP 05661
PHONE 802-888-4548	CELL PHONE	FAX NUMBER	EMAIL rob@lpcvt.org		

Project Information

PROJECT TYPE

- ☐ No previous Act 250 jurisdiction
- ☒ Amendment of existing Act 250 permit or permit condition

EXISTING ACT 250 PERMIT NUMBER(S)

5L0871 series; 7C1321

Please Note: If you are applying to amend a permit condition which was included to resolve an issue critical to the district commission's or the board's issuance of a prior permit, please contact the District Coordinator to determine whether you need to address the "Stowe Club Highlands" analysis. Also see Act 250 Rule 34(E) <http://www.nrb.state.vt.us/lup/rules.htm>.

GENERAL DESCRIPTION OF THE PROJECT (Include number and size of buildings/lots, use of buildings, number of lots, length of roads, etc.)

The Town of Cambridge plans to construct improvements for a remote trailhead to the Lamoille Valley Rail Trail on the site of the Cambridge Community Center. The project will include construction of up to 18 parking spaces (included in the parking spaces count planned for the center), driveway improvements, landscaping, picnic tables, bike racks, and rehabilitation of the exterior of an existing cabin to serve as an information and education kiosk display (as approved in permit #5L0871-2). The project may also include a BBQ grill and a security light with a motion sensor (10 watt, fully shielded). The Town is in the process of obtaining an 0.8 acre easement from the Community Center for the trailhead.

CONSTRUCTION DURATION (Months to complete)

May 1 to October 1, 2016 (5 months)

DURATION OF PERMIT REQUEST IN YEARS (If project is for earth extraction, solid waste disposal, or logging above 2,500 feet.)

one year from date of issuance

Property Information

PROPERTY LAND ACREAGE

ACRES OWNED/CONTROLLED BY APPLICANT/LANDOWNER	ADDITIONAL ACRES IN EASEMENTS OR RIGHTS-OF-WAY
7.4+/-	

PROPERTY LOCATION

TOWN (Primary)	TOWN (Secondary, if applicable)
Cambridge	

STREET OR ROAD LOCATION (Provide E911 address if available.)

22 Old Main Street, Jeffersonville

NEARBY LANDMARK

site of the former Windridge Tennis Camp

PROPERTY LATITUDE AND LONGITUDE COORDINATES (Using GPS set for NAD83 or as derived from NAD83-based map. Coordinates should be in decimal degrees to 4 decimal places.)

N - LATITUDE	W - LONGITUDE
44.646	-72.827

PROPERTY DEEDS

GRANTEE'S NAME

Cambridge Community Center, LLC

COUNTY	TOWN	BOOK	PAGE(S)	DATE RECORDED
Lamoille	Cambridge	397	356-9	January 29, 2014

PROPERTY SPAN NUMBER

SPAN NUMBER (From property tax bill)

123-038-10211

Additional Information

CHECK BELOW IF YOU ARE CONCURRENTLY APPLYING FOR ANY OF THE FOLLOWING PERMITS FROM THE AGENCY OF NATURAL RESOURCES:

- | | | |
|--|--|--|
| ☐ Wastewater System & Potable Water Supply Permit | ☐ Construction General Permit | ☐ Air Pollution Control Permit |
| ☐ Public Water System Permit to Construct | ☐ Stormwater Discharge Permit | ☐ Wetland Permit ☐ Other |

HAVE YOU RECEIVED LOCAL ZONING AND/OR SUBDIVISION APPROVAL?

- ☐ Yes (attach copy) ☐ Pending ☒ None Needed

ATTACH THE FOLLOWING UNLESS WAIVED BY THE DISTRICT COORDINATOR:

- ☒ Schedule A - Fee Information ☒ Schedule E - Project Adjoiner Information
- ☐ Act 250 fee (payable to "State of Vermont")

Signatures

I hereby swear that the information provided above or attached to this application is true and accurate to the best of my/our knowledge.


SIGNATURE OF APPLICANT (Required for paper copies only)

Robert Moore
CLEARLY PRINT NAME

5/6/2016
DATE

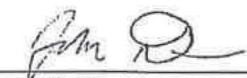
I hereby certify that I understand that I must not commence construction, demolition, remodeling or commercial use of the property as described in Act 250 Rule 2(C) until I have received an Act 250 Land Use Permit as required by 10 V.S.A. § 6081.


SIGNATURE OF APPLICANT (Required for paper copies only)

Robert Moore
CLEARLY PRINT NAME

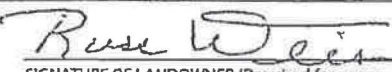
5/6/2016
DATE

I hereby authorize the processing of this application for the above project on land(s) that I/we own, control, or have significant property interest in (attach letter if easier).


SIGNATURE OF LANDOWNER (Required for paper copies only)

John Dunn
CLEARLY PRINT NAME

4/20/16
DATE


SIGNATURE OF LANDOWNER (Required for paper copies only)

Russ Weis
CLEARLY PRINT NAME

4-19-16
DATE

Submission Instructions

For Applications and Completion Date Extensions:

Submit the original, three paper copies, and one electronic copy (see instructions) to the Act 250 District Office. For District 2 applications, see Paperless Act 250 Application Procedures for special filing requirements.

Submit one copy each to the municipality, municipal planning commission, regional planning commission, and to any adjoining municipalities and planning commissions if the property is located on a town line.

Submit one copy only to the Vermont Agency of Natural Resources at:

Agency of Natural Resources
Office of Planning & Legal Affairs
One National Life Drive, Davis 2
Montpelier, VT 05620-3901

For Administrative Amendments:

Submit one original and one electronic copy (see instructions) to the Act 250 District Office. Do not submit the additional copies as specified above. For District 2 applications, see Paperless Act 250 Applications Procedure for special filing requirements.

Schedule A - Fee Information

Submit with the application a check payable to the "State of Vermont". **Municipal and state agency projects are exempt from fees but should still report construction costs on this form.** Not-for-profit organizations are **not** exempt. Calculate the fee using the table below.

Note: All lines on the schedule must be filled out. If a line does not apply, or if there is no associated cost, enter 0. An incomplete schedule will result in a delay in application processing.

1) Number of lots being created	# of Lots 0	x \$125.00	\$	0.00
2) Earth Extraction (Gravel/Sand Pits and Quarries)	Total Extraction Proposed in yd ³ 0	x \$0.02/yd ³ for 1st million yd ³ extraction proposed for life of the permit x \$0.01/yd ³ for yd ³ above 1st million proposed for life of the permit	\$	0.00
3) Estimated Construction Costs:	Building ft ²	Building \$/ft ²		
Buildings	0		\$	0.00
Site preparation			\$	
Roads and parking			\$	
Utilities			\$	
Off-site improvements			\$	
Landscaping			\$	
Other			\$	
Describe Other				
Construction Subtotal			\$	0.00
Construction Cost <=\$15M			\$	0.00 x 0.00665 \$ 0.00
Construction Cost <=\$15M (ANR Fee)**			\$	0.00 x 0.00075 \$ 0.00
Construction Cost >\$15M			\$	0.00 x 0.00312 \$ 0.00
4) Total Fee***			\$	62.50

*For residential subdivisions, include the estimated construction cost of all improvements proposed to be constructed by the applicant or a related person or entity, including common facilities, infrastructure, dwellings, and other. For more information, see the definition of "person" at 10 V.S.A. § 6001(14), on the web at <http://www.nrb.state.vt.us/lup/statute.htm>.

**As of July 1, 2015, the first \$15,000,000 of construction costs is subject to a base fee of \$6.65 per \$1,000 of construction costs (0.00665) and an additional fee of \$0.75 per \$1,000 of construction costs (0.00075) to account for review of Act 250 applications by the Agency of Natural Resources (ANR). See 10 V.S.A. § 6083a, on the web at <http://www.nrb.state.vt.us/lup/statute.htm> for the complete schedule of fees.

***Submit one check for the total amount payable to "State of Vermont"

State and Municipal Projects are exempt from fees
Minimum fee of \$187.50 for new applications
Minimum fee of \$62.50 for amendment applications
Maximum total application fee is \$165,000.00
(Treat expansions of approved projects as new applications)

MUNICIPAL PROJECT : NO FEE
PER DISTRICT 5 STAFF

I attest by my signature that the above is true to the best of my knowledge.


SIGNATURE OF APPLICANT

Robert Moore
CLEARLY PRINT NAME

5/6/2016
DATE

Schedule E - Adjoiner Information

Submit with the application a list of all adjoining landowners with mailing addresses. An "adjoiner" is a person or organization which owns or controls land or easements on lands which physically abut the tract or tracts of land on which your project is located. Be certain to include landowners on the opposite sides of highways, railways, and rivers. Also include homeowner associations, utility companies, and others with significant legal interest in the project land. It is very helpful if you indicate the location of each adjoiner on your site plan.

If you do not provide a list which is thorough and up-to-date, your application could be delayed because of improper notice distribution!

Please note: For lists which include more than 20 adjoining landowners, our administrative staff appreciates receiving the list on mailing labels to facilitate the notification process. Thank you.

ADJOINER NAME Windridge Farms LLC	ADDRESS 1243 Junction Hill Rd/PO Box 39	TOWN Jeffersonville	STATE VT	ZIP 05464
ADJOINER NAME Sweet House: Cambridge Historical Society/Attention: Crystal Porter	ADDRESS 49 School Street/PO Box 16	TOWN Jeffersonville	STATE VT	ZIP 05464
ADJOINER NAME Jean Jenkauskas and Shaun Phillips	ADDRESS PO Box 162	TOWN Jeffersonville	STATE VT	ZIP 05464

LIMITED ADJOINER NOTIFICATION
PER DISTRICT 5 STAFF

Project Review Sheet

Date Initiated ANR PIN# WW Project# Pre-application Review ☒

Project Information

General Information

PROJECT NAME (if applicable) Cambridge Community Center Trailhead, Lamoille County Rail Trail (Jeffersonville)	PROJECT TOWN Cambridge
PROJECT LOCATION (911 address if available) 22 Old Main St.	

Contact(s)

CONTACT TYPE Other	NAME Rob Moore, Transportation Planner	ORGANIZATION NAME (if applicable) Lamoille County Planning Commission		
ADDRESS P.O. Box 1637		TOWN Morrisville	STATE VT	ZIP 05661
PHONE 802-888-4548 ext. 109	CELL PHONE	EMAIL rob@lcpvt.org		
CONTACT TYPE Landowner	NAME John Dunn	ORGANIZATION NAME (if applicable) Sisyphus, LLC/Cambridge Community Center		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL jmatthewdunn@gmail.com		
CONTACT TYPE Landowner	NAME Russ Weis	ORGANIZATION NAME (if applicable) Sisyphus, LLC/Cambridge Community Center		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL Russell.Weis@jsc.edu		
CONTACT TYPE Other	NAME Jane Porter, Town Clerk	ORGANIZATION NAME (if applicable) Town of Cambridge		
ADDRESS		TOWN	STATE VT	ZIP
PHONE	CELL PHONE	EMAIL jane.cto@myfairpoint.net		

Project Description

ENTERED BY Peter Kopsco	INFORMATION SOURCE Individual	DATE ENTERED 12/14/2015 12:17 PM
----------------------------	----------------------------------	-------------------------------------

PROJECT DESCRIPTION

The Town of Cambridge plans to construct improvements for a trailhead and connector trail to the Lamoille County Rail Trail on the site of the Cambridge Community Center. The project will include construction of up to 16 parking spaces (in addition to the parking spaces planned for the center), driveway improvements, landscaping, picnic tables, bike racks, rehabilitation of an existing cabin to serve as an information kiosk and a drinking fountain on the exterior of one of the center's buildings. The project may also include a BBQ grill and a security light with a motion sensor (10 watt, fully shielded). The town plans to obtain an .8 acre easement from the center for the trailhead improvements.

DEC Prior Permits

PERMIT TYPE Act 250	PERMIT NUMBER 5L0871 series; 7C1321
PERMIT TYPE Wastewater System & Potable Water Supply	PERMIT NUMBER WW-5-6845 series

*Jurisdictional Opinion(s) for permits that may be needed from the District Environmental Office **PRIOR TO COMMENCEMENT OF CONSTRUCTION***

Act 250 Jurisdictional Opinion

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A). A request for reconsideration by the district coordinator, pursuant to Act 250 Rule 3(B), must be sent to the district coordinator at the address below within 30 days of the mailing of this opinion. Effective July 1, 2013, no appeal may be taken from a jurisdictional opinion or coordinator's decision on reconsideration without reconsideration by the Natural Resources Board. Requests for reconsideration by the Board must be submitted to the Board within 30 days of the mailing of this decision or a coordinator's decision on reconsideration.

PERSON REQUESTING JURISDICTIONAL OPINION Rob Moore	REQUESTOR TYPE Other	ACT 250 PERMIT NUMBER (if any) 7C1321	HAS THE LANDOWNER SUBDIVIDED BEFORE? ☐ Yes ☐ No
---	-------------------------	--	--

TYPE OF PROJECT (check all that apply)

☐ Commercial ☐ Residential ☐ Agricultural ☐ Municipal ☒ State ☐ Federal

IS AN ACT 250 PERMIT REQUIRED?

☒ Yes ☐ No

COPIES SENT TO STATUTORY PARTIES?

☐ Yes ☐ No

BASIS FOR DECISION

The trail head project and the WW/PWS permit shall be incorporated as an Administrative Amendment pursuant to Act 250 Rule 34(D) for record-keeping purposes. The trail head project is related to and will connect with the Lamoille Valley Rail Trail (LVRT) and is discussed in the Findings of Fact and Conclusions of Law; and Land Use Permit #7C1321.

DISTRICT COORDINATOR SIGNATURE



2015.12.17
10:50:25 -05'00'

Clancy DeSmet, Coordinator

 VERMONT

[phone] 802-476-0186 [email] clancy.desmet@vermont.gov

Natural Resources Board

District 5 Environmental Commission
5 Perry Street, Suite 60, Barre, VT 05641-4267

Wastewater System & Potable Water Supply Permit Jurisdictional Opinion

IS A WASTEWATER SYSTEM & POTABLE WATER SUPPLY PERMIT/APPROVAL REQUIRED?

☒ Yes ☐ Permit application currently under review
☐ No ☐ Permit issued on _____

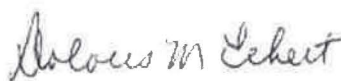
PERMIT NOT REQUIRED?

☐ Boundary Line Adjustment ☐ Home Occupation
☐ Clean Slate ☐ Notice of Permit Requirement

BASIS FOR DECISION

Addition of a drinking water fountain to community center requires a permit.

REGIONAL OFFICE STAFF SIGNATURE



2015.12.17
07:05:31 -05'00'

Dolores M. Eckert, Assistant Regional Engineer

 VERMONT

[phone] 802-557-7532 [email] dolores.eckert@vermont.gov

Department of Environmental Conservation

Drinking Water & Groundwater Protection Division - Montpelier Regional Office
1 National Life Drive, Davis 1, Montpelier, VT 05620-3703

The following are preliminary, non-binding determinations made by DEC Permit Specialists identifying other permits that may be needed
PRIOR TO COMMENCEMENT OF CONSTRUCTION

Preliminary, Non-binding Determination of the Applicability of Other State Permits

Note: Fact Sheet numbers below refer to permit fact sheets available at: http://www.anr.state.vt.us/dec/permit_hb/tableofcontents.htm

Agency of Natural Resources - Department of Environmental Conservation

WATERSHED MANAGEMENT DIVISION

☒ Flood Plains

☒ Northern Region

Contact: Rebecca Pfeiffer, CFM

Email: rebecca.pfeiffer@vermont.gov

Phone: 802-490-6157

☒ Stormwater: Developments [Fact Sheets #6.2 & 6.3]

☒ Contact: Christina Hutchinson Clark

Email: christina.clark@vermont.gov

Phone: 802-490-6167

Department of Public Safety

☒ Construction Permit Fire Prevention, Electrical, Plumbing, Accessibility (ADA) [Fact Sheets #49, 50, 50.1, & 50.2]☒ Barre: 802-479-4434**Local Permits**☒ See your Town Clerk, Zoning Administrator, Planning Commission or Public Works

PERMIT SPECIALIST SIGNATURE



2015.12.14

12:16:33 -05'00'

Peter Kopsco, Permit Specialist VERMONT[phone] 802-505-5367 [email] pete.kopsco@vermont.gov**Department of Environmental Conservation**

Environmental Assistance Office

1 National Life Drive, Main 2, Montpelier, VT 05620-3804

Project Review Sheet

Date Initiated ANR PIN# WW Project# Pre-application Review ☒

Project Information

General Information

PROJECT NAME (if applicable) Hyde Park Trailhead, Lamoille County Rail Trail	PROJECT TOWN Hyde Park
PROJECT LOCATION (911 address if available) Morey Rd. & Depot St. Extension	

Contact(s)

CONTACT TYPE Other	NAME Rob Moore, Transportation Planner	ORGANIZATION NAME (if applicable) Lamoille County Planning Commission		
ADDRESS P.O. Box 1637		TOWN Morrisville	STATE VT	ZIP 05661
PHONE 802-888-4548 ext. 109	CELL PHONE	EMAIL rob@lpcvt.org		
CONTACT TYPE Representative	NAME Ronald Rodjenski, Town Administrator	ORGANIZATION NAME (if applicable) Town of Hyde Park		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL ron@hydepark.com		
CONTACT TYPE Landowner	NAME Michele Boomhower, PPAID Director	ORGANIZATION NAME (if applicable) VTrans		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL michele.boomhower@vermont.gov		

Project Description

ENTERED BY Peter Kopsco	INFORMATION SOURCE Individual	DATE ENTERED 12/11/2015 5:01 PM
----------------------------	----------------------------------	------------------------------------

PROJECT DESCRIPTION
The Town of Hyde Park plans to lease this property from VTrans for a trailhead to the Lamoille County Rail Trail. The project will include adding fill material, planting grass, adding up to 15 parking spaces and erecting an open 10'x14' kiosk with roof that will be mounted on "skids" for no earth disturbance and mobility on a former rail yard. There will be no lighting. No bathroom facilities will be provided on site. The site is approximately 6000 square feet.

DEC Prior Permits

PERMIT TYPE	PERMIT NUMBER
-------------	---------------

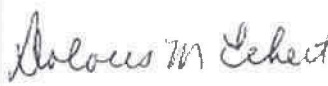
*Jurisdictional Opinion(s) for permits that may be needed from the District Environmental Office **PRIOR TO COMMENCEMENT OF CONSTRUCTION***

Act 250 Jurisdictional Opinion

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A). A request for reconsideration by the district coordinator, pursuant to Act 250 Rule 3(B), must be sent to the district coordinator at the address below within 30 days of the mailing of this opinion. Effective July 1, 2013, no appeal may be taken from a jurisdictional opinion or coordinator's decision on reconsideration without reconsideration by the Natural Resources Board. Requests for reconsideration by the Board must be submitted to the Board within 30 days of the mailing of this decision or a coordinator's decision on reconsideration.

PERSON REQUESTING JURISDICTIONAL OPINION Rob Moore	REQUESTOR TYPE Other	ACT 250 PERMIT NUMBER (if any) 7C1321	HAS THE LANDOWNER SUBDIVIDED BEFORE? ☐ Yes ☐ No
TYPE OF PROJECT (check all that apply) ☐ Commercial ☐ Residential ☐ Agricultural ☐ Municipal ☒ State ☐ Federal			
IS AN ACT 250 PERMIT REQUIRED? ☒ Yes ☐ No		COPIES SENT TO STATUTORY PARTIES? ☐ Yes ☐ No	
BASIS FOR DECISION The trail head project shall be incorporated as an Administrative Amendment pursuant to Act 250 Rule 34(D) for record-keeping purposes. The trail head project is related to and will connect with the Lamoille Valley Rail Trail (LVRT) and is discussed in the Findings of Fact and Conclusions of Law; and Land Use Permit #7C1321.			
DISTRICT COORDINATOR SIGNATURE 		Clancy DeSmet, Coordinator  [phone] 802-476-0186 [email] clancy.desmet@vermont.gov Natural Resources Board District 5 Environmental Commission 5 Perry Street, Suite 60, Barre, VT 05641-4267	
2015.12.17 10:54:08 -05'00'			

Wastewater System & Potable Water Supply Permit Jurisdictional Opinion

IS A WASTEWATER SYSTEM & POTABLE WATER SUPPLY PERMIT/APPROVAL REQUIRED? ☐ Yes ☐ Permit application currently under review ☒ No ☐ Permit issued on _____		PERMIT NOT REQUIRED? ☐ Boundary Line Adjustment ☐ Home Occupation ☐ Clean Slate ☐ Notice of Permit Requirement	
BASIS FOR DECISION No proposed construction or operational change of water and/or wastewater for a building/structure.			
REGIONAL OFFICE STAFF SIGNATURE 		Dolores M. Eckert, Assistant Regional Engineer  [phone] 802-557-7532 [email] dolores.eckert@vermont.gov Department of Environmental Conservation Drinking Water & Groundwater Protection Division - Montpelier Regional Office 1 National Life Drive, Davis 1, Montpelier, VT 05620-3703	
2015.12.17 07:10:39 -05'00'			

The following are preliminary, non-binding determinations made by DEC Permit Specialists identifying other permits that may be needed
PRIOR TO COMMENCEMENT OF CONSTRUCTION

Preliminary, Non-binding Determination of the Applicability of Other State Permits

Note: Fact Sheet numbers below refer to permit fact sheets available at: http://www.anr.state.vt.us/dec/permit_hb/tableofcontents.htm

Agency of Natural Resources - Department of Environmental Conservation			
WASTE MANAGEMENT & PREVENTION DIVISION ☒ Brownfields [Fact Sheet #46.2] Contact: Trish Coppolino Email: patricia.coppolino@vermont.gov Phone: 802-249-5822			
Local Permits ☒ See your Town Clerk, Zoning Administrator, Planning Commission or Public Works			
PERMIT SPECIALIST SIGNATURE 		Peter Kopsco, Permit Specialist  [phone] 802-505-5367 [email] pete.kopsco@vermont.gov Department of Environmental Conservation Environmental Assistance Office 1 National Life Drive, Main 2, Montpelier, VT 05620-3804	
2015.12.11 16:58:50 -05'00'			

Project Review Sheet

Date Initiated ANR PIN# WW Project# Pre-application Review ☒

Project Information

General Information

PROJECT NAME (if applicable) Cambridge Junction Trailhead, Lamoille County Rail Trail	PROJECT TOWN Cambridge
PROJECT LOCATION (911 address if available) Cambridge Junction Rd. (near Poland Covered Bridge)	

Contact(s)

CONTACT TYPE Other	NAME Rob Moore, Transportation Planner	ORGANIZATION NAME (if applicable) Lamoille County Planning Commission		
ADDRESS P.O. Box 1637		TOWN Morrisville	STATE VT	ZIP 05661
PHONE 802-888-4548 ext. 109	CELL PHONE	EMAIL rob@lcpvt.org		
CONTACT TYPE Other	NAME Mark Delaney	ORGANIZATION NAME (if applicable) Smugglers' Notch Resort		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL mdelaney@smuggs.com		
CONTACT TYPE Landowner	NAME Michele Boomhower, PPAID Director	ORGANIZATION NAME (if applicable) VTrans		
ADDRESS		TOWN	STATE VT	ZIP
PHONE	CELL PHONE	EMAIL michele.boomhower@vermont.gov		
CONTACT TYPE Other	NAME Jane Porter, Town Clerk	ORGANIZATION NAME (if applicable) Town of Cambridge		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL jane.cto@myfairpoint.net		
CONTACT TYPE Other	NAME Zeke Zucker, Community Volunteer	ORGANIZATION NAME (if applicable)		
ADDRESS		TOWN	STATE	ZIP
PHONE	CELL PHONE	EMAIL zekezucker@yahoo.com		

Project Description

ENTERED BY Peter Kopsco	INFORMATION SOURCE Individual	DATE ENTERED 12/14/2015 12:18 PM
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PROJECT DESCRIPTION

The Town of Cambridge plans to operate a trailhead to the Lamoille County Rail Trail. The area is already used as an informal trailhead. The project will include adding fill material, landscaping, adding up to 15 parking spaces, installing scale replica train cars, picnic tables and bike racks. A trailhead map and signage will be located on the Smuggler's Notch Resort pump house (5L0706-31E), which is in the same location (the site is 22,560 square feet minus 2620 square feet that is already leased to Smugglers' Notch Resort). There will be no additional lighting and no bathroom facilities.

DEC Prior Permits

PERMIT TYPE Act 250	PERMIT NUMBER 5L0706-31E; 7C1321
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*Jurisdictional Opinion(s) for permits that may be needed from the District Environmental Office **PRIOR TO COMMENCEMENT OF CONSTRUCTION***

Act 250 Jurisdictional Opinion

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A). A request for reconsideration by the district coordinator, pursuant to Act 250 Rule 3(B), must be sent to the district coordinator at the address below within 30 days of the mailing of this opinion. Effective July 1, 2013, no appeal may be taken from a jurisdictional opinion or coordinator's decision on reconsideration without reconsideration by the Natural Resources Board. Requests for reconsideration by the Board must be submitted to the Board within 30 days of the mailing of this decision or a coordinator's decision on reconsideration.

PERSON REQUESTING JURISDICTIONAL OPINION Rob Moore	REQUESTOR TYPE Other	ACT 250 PERMIT NUMBER (if any) 7C1321	HAS THE LANDOWNER SUBDIVIDED BEFORE? ☐ Yes ☐ No
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TYPE OF PROJECT (check all that apply)

☐ Commercial ☐ Residential ☐ Agricultural ☐ Municipal ☒ State ☐ Federal

IS AN ACT 250 PERMIT REQUIRED?

☒ Yes ☐ No

COPIES SENT TO STATUTORY PARTIES?

☐ Yes ☐ No

BASIS FOR DECISION

The trail head project shall be incorporated as an Administrative Amendment pursuant to Act 250 Rule 34(D) for record-keeping purposes. The trail head project is related to and will connect with the Lamoille Valley Rail Trail (LVRT) and is discussed in the Findings of Fact and Conclusions of Law; and Land Use Permit #7C1321.

DISTRICT COORDINATOR SIGNATURE



2015.12.17
10:52:41 -05'00'

Clancy DeSmet, Coordinator

[phone] 802-476-0186 [email] clancy.desmet@vermont.gov

Natural Resources Board

District 5 Environmental Commission
5 Perry Street, Suite 60, Barre, VT 05641-4267



Wastewater System & Potable Water Supply Permit Jurisdictional Opinion

IS A WASTEWATER SYSTEM & POTABLE WATER SUPPLY PERMIT/APPROVAL REQUIRED?

☐ Yes ☐ Permit application currently under review
☒ No ☐ Permit issued on _____

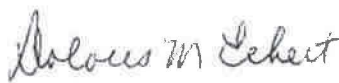
PERMIT NOT REQUIRED?

☐ Boundary Line Adjustment ☐ Home Occupation
☐ Clean Slate ☐ Notice of Permit Requirement

BASIS FOR DECISION

No proposed construction or operational change of water and/or wastewater for a building/structure.

REGIONAL OFFICE STAFF SIGNATURE



2015.12.17
07:09:09 -05'00'

Dolores M. Eckert, Assistant Regional Engineer

[phone] 802-557-7532 [email] dolores.eckert@vermont.gov

Department of Environmental Conservation

Drinking Water & Groundwater Protection Division - Montpelier Regional Office
1 National Life Drive, Davis 1, Montpelier, VT 05620-3703



The following are preliminary, non-binding determinations made by DEC Permit Specialists identifying other permits that may be needed
PRIOR TO COMMENCEMENT OF CONSTRUCTION

Preliminary, Non-binding Determination of the Applicability of Other State Permits

Note: Fact Sheet numbers below refer to permit fact sheets available at: http://www.anr.state.vt.us/dec/permit_hb/tableofcontents.htm

Agency of Natural Resources - Department of Environmental Conservation

WASTE MANAGEMENT & PREVENTION DIVISION

☒ Brownfields [Fact Sheet #46.2]

Contact: Trish Coppolino

Email: patricia.coppolino@vermont.gov

Phone: 802-249-5822

WATERSHED MANAGEMENT DIVISION

☒ Flood Plains☒ Northern Region

Contact: Rebecca Pfeiffer, CFM

Email: rebecca.pfeiffer@vermont.gov

Phone: 802-490-6157

Department of Public Safety

☒ Construction Permit Fire Prevention, Electrical, Plumbing, Accessibility (ADA) [Fact Sheets #49, 50, 50.1, & 50.2]☒ Barre: 802-479-4434

Division for Historic Preservation

☒ Historic Buildings & Archeological Sites [Fact Sheets #47.1 & 101]

Buildings:

Contact: Devin Colman

Email: devin.colman@vermont.gov

Phone: 802-828-3043

Archeology:

Contact: Scott Dillon

Email: scott.dillon@vermont.gov

Phone: 802-828-3048

Local Permits

☒ See your Town Clerk, Zoning Administrator, Planning Commission or Public Works

PERMIT SPECIALIST SIGNATURE



2015.12.14

11:22:00 -05'00'

Peter Kopsco, Permit Specialist VERMONT[phone] 802-505-5367 [email] pete.kopsco@vermont.gov**Department of Environmental Conservation**

Environmental Assistance Office

1 National Life Drive, Main 2, Montpelier, VT 05620-3804



State of Vermont
Natural Resources Board
National Life Dewey Building
Montpelier, VT 05620-3201
www.nrb.state.vt.us

Re: Town of Wolcott Proposed Trailhead
Jurisdictional Opinion 5-28

Reconsideration Decision

I. Introduction

The Town of Wolcott proposes to construct improvements to a trailhead to the Lamoille Valley Rail Trail (LVRT). The LVRT is a 93-mile trail which is subject to an Act 250 master plan approval issued to applicants the Vermont Agency of Transportation (VTrans) and the Vermont Association of Snow Travelers (VAST). Approximately 44 miles of the LVRT have received a permit for construction. The proposed Wolcott Trailhead Project (Wolcott Trailhead Project) includes improvements to an existing parking area and may include some work on an existing segment of town highway to connect to an adjacent section of the LVRT that has not yet been specifically permitted.

On October 8, 2013, the District 5 Coordinator issued a Project Review Sheet (PRS) concluding that an Act 250 permit was required for the Wolcott Trailhead Project. On November 7, 2013, the Lamoille County Planning Commission requested that the coordinator reconsider that PRS. On February 7, 2014, the District 5 Assistant Coordinator (the Coordinator) issued Jurisdictional Opinion 5-28 (JO). The JO reconsidered the PRS, and also concluded that the Trailhead Project improvements require an Act 250 permit amendment.

The Town of Wolcott, through the Lamoille County Planning Commission, filed a timely request asking the Natural Resources Board to reconsider the JO. Philip Teale responded to the request on behalf of himself and several other neighboring landowners (Donna Westover, Tammy Westover, Roy Westover Sr., Steve Bishop, Michael O'Driscoll, Kelly Draper, Steven Wolf, Mark McCollough, Mary McCollough, Eric Mandigo, Brad Barup, Phil Ryder and Patricia E. Harvey), arguing in support of jurisdiction. Mr. Teale also requested a hearing. The Secretary of the Vermont Agency of Transportation (VTrans), Brian Searles, filed a letter in support of the Town's request.

The Board convened a hearing on May 13, 2014, in response to Mr. Teale's request. Melinda Scott and Robert Moore from the Lamoille County Planning Commission spoke on behalf of the Town, and Mr. Teale spoke on behalf of himself and the group of neighbors. Also participating at the hearing were Belinda Clegg (Wolcott Selectboard Chair) and neighboring landowner Mark McCollough.

For the reasons set forth below, the Board concludes that the Wolcott Trailhead Project does not require an Act 250 permit amendment.

II. Supplemental Filings

The Board's reconsideration decision is based on the record, which consists of the Coordinator's Record, as supplemented on reconsideration with the request and replies. In addition, the Interim Procedure on jurisdictional opinions authorizes the Board to supplement the record with such additional materials as it deems appropriate. *See*, Interim Procedure, Section (C)(3) and (4). In this case, both the Town and Mr. Teale submitted additional materials to the Board. The Board has supplemented the record with the materials specified below.

- A. The Lamoille County Planning Commission on behalf of the Town of Wolcott submitted the following documents with its reconsideration request:
1. JO 5-28 (Exhibit A to Motion to Reconsider).
 2. 2008 Management, Development, & Maintenance Plan for the LVRT (2008 LVRT Management Plan) (Exhibit B to Motion to Reconsider).
 3. VTrans/VAST Lease Agreement (Exhibit C to Motion to Reconsider).
 4. 2009 Management, Development, & Maintenance Plan for the LVRT (2009 LVRT Management Plan) (excerpts) (Exhibit D to Motion to Reconsider).
 5. Johnson Trailhead Project Review Sheet and Act 250 Permit (Exhibit E to Motion to Reconsider).
 6. Swanton Recreation Trail Project Review Sheet (Exhibit G to Motion to Reconsider).
 7. Wolcott Trailhead Design Alternatives and Descriptions (Exhibit H to Motion to Reconsider).

Some of these documents, such as the JO on reconsideration, are already part of the record. The other documents submitted with the reconsideration request are added to the record.

- B. On March 11, 2014, Philip Teale, a neighbor on behalf of himself and other neighbors to the Trailhead Project, filed a response to the request to reconsider and enclosed a copy of The Town of Wolcott 2013 Municipal Development Plan. By letter dated April 1, 2014, Mr. Teale (and the other neighbors to the Trailhead Project), filed a letter with the Natural Resources Board requesting a hearing. The April 1, 2014 letter included as additional evidence the following documents:

1. Wolcott Planning Commission Report
2. Wolcott Planning Commission 2013 Municipal Development Plan
3. Mr. Teale's previously filed letter.

The Board supplements the record with these documents.

- C. Finally, the Town and Mr. Teale each submitted maps of the project area at the hearing. The documents and materials submitted by the Town and Mr. Teale all relate to the Wolcott Trailhead Project, similar jurisdictional determinations, the LVRT, or the Town of Wolcott's planning work. There were no objections to any of the supplemental materials. Accordingly, the Board will supplement the record with these documents.

III. Jurisdictional Analysis

This JO reconsideration concerns the Wolcott Trailhead Project, which consists of improvements to an existing parking area on 0.16 acres of land connected by a short segment of Town highway to an existing access to the LVRT. The Trailhead will provide parking for up to 14 vehicles, with storm water infrastructure, a trailhead kiosk, outdoor benches, picnic tables, bike racks, shielded lighting, stockade fencing, landscaping, and gravel improvement to the Town highway that connects to the LVRT.

The LVRT is subject to Act 250 Permit 7C1321 (Permit), which was issued to the Vermont Agency of Transportation (VTrans) and to the Vermont Association of Snow Travelers (VAST), authorizing the "construction of improvement to establish the ±44 mile long Phase 1 portion of the Lamoille Valley Rail Trail (LVRT), a year-round multi-use recreation and alternative transportation path / trail." Permit at 1. Phase 1 does not include any development within the Town of Wolcott, so no improvements to the LVRT in Wolcott are currently permitted, though Act 250 jurisdiction has been established and master plan approval granted for the entire length of the LVRT.

The issue is whether the Wolcott Trailhead Project requires Act 250 review. An Act 250 permit is required for any subdivision, or development, or any substantial change to a grandfathered project. A permit amendment is required for any material change to a permitted project. In this case, the Trailhead Project is neither a subdivision nor a grandfathered (preexisting) development. Thus, the question is whether the Wolcott Trailhead constitutes a "development," or whether it constitutes a "material change" to the permitted LVRT project.

The record includes other Project Review Sheet JOs concluding that municipal projects connecting to the LVRT do not require an Act 250 permit. The record may thus reflect some inconsistency across the state in determining whether a trailhead independently proposed by a municipality, which connects to the LVRT, requires Act 250 review. This decision will help ensure statewide consistency in such decisions on similar municipal projects going forward.

A. Development Jurisdiction

The Wolcott Trailhead Project is a municipal project. To constitute development requiring an Act 250 permit, a municipal project must physically disturb ten or more acres of land. 10 V.S.A. § 6001(3)(A)(v); Act 250 Rule 2(C)(5)(b)(defining involved land for state, county or municipal projects). Nothing in the record indicates that the Wolcott Trailhead

Project will physically disturb ten or more acres of land. The record instead indicates that the Project will be located on only 0.16 acres of land, and will physically disturb even less land. These facts are not disputed. In addition, it is important to note that Act 250 handles jurisdiction differently for municipal projects. The former Environmental Board observed that "the legislature intended Act 250 jurisdiction to attach to government projects in more limited circumstances than commercial or industrial ones." *Re: Town of Williston Road Improvements*, Declaratory Ruling #381, Findings of Fact, Conclusions of Law, and Order at 6-7 (Vt. Env'tl. Bd. Jan. 13, 2000) (citing *City of Montpelier*, Declaratory Ruling 220, at 5-7 (Vt. Env'tl. Bd. Jul. 13, 1990); *Agency of Administration*, 141 Vt. 68, 75 (1982)).

Therefore, the Wolcott Trailhead is a municipal project that does not constitute development requiring an Act 250 permit.

The remaining question is whether the Wolcott Trailhead constitutes a material change to the permitted LVRT project.

B. Amendment Jurisdiction (material change)

Act 250 Rule 34(A) requires a permit amendment for any material change to a permitted development or subdivision. Material change is defined as:

any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).

Act 250 Rule 2(C)(6).

The permitted development in this case is the LVRT project.

Mr. Teale and the other neighbors provided evidence of their concerns that the adjoining Trailhead Project will have significant adverse impacts on their neighborhood. Specifically, they are very concerned about an increase in traffic and secondary development resulting from the Trailhead Project. They are also concerned about the Town of Wolcott's plans, which appear to call for more development in the immediate area. The Board finds the neighbors' testimony compelling, but is mindful that this proceeding is limited to Act 250 jurisdiction, not municipal planning.

1. Involved Land with the LVRT Project

If the Wolcott Trailhead was part of the involved land for the original LVRT Project, its development could constitute a material change to that permitted development. The LVRT permit, findings and exhibits do not indicate that this is the case. The Wolcott Trailhead Project is not the same project and not part of a common endeavor. It is undisputed that the Wolcott Trailhead is not expressly provided for in the LVRT master plan. The master plan

approval applies to lands that are owned by the Vermont Transportation Authority, and leased to the Vermont Association of Snow Travelers (VAST). The Wolcott Trailhead is on land owned by the Town of Wolcott.

With regard to trailheads, the LVRT applicants provided a table of 26 existing trailheads. However, this table did not imply that any of the existing trailheads were part of the LVRT; this table was submitted to demonstrate that adequate parking existed for the LVRT. The Wolcott Trailhead was not part of the LVRT Project.

Moreover, the Wolcott Trailhead cannot be part of the LVRT development unless the Town and is the same "person" as VAST and VTrans (the LVRT Permittees). As set forth below, that is not the case.

2. Person Requirement

Act 250 jurisdiction generally applies to the entire tract or tracts of land owned or controlled by a "person." *See, e.g.*, 10 V.S.A. § 6001(3)(A)(i). For purposes of development in Act 250, "person" is defined to include:

an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership . . . and, individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the "development" of land.

Act 250 Rule 2(C)(1); *see also*, 10 V.S.A. 6001(14)(defining "person" for purposes of subdivisions). The Wolcott Trailhead improvements cannot be a change to the permitted LVRT project unless the Town is the same "person" as the LVRT Permittees.

In other words, unless the Town of Wolcott and the LVRT Permittees are the same "person" under Act 250, amendment jurisdiction cannot apply. To apply amendment jurisdiction without this nexus – a nexus required in the definition of development itself – would be inappropriate. It would allow the Town to require VAST and VTrans to amend the LVRT permit without VAST and VTrans being involved in the Trailhead Project. Such a ruling could allow an amendment to be required without the original permittee's knowledge or consent, much less control.

Thus, prior to conducting a material change analysis, it is necessary to determine whether the Town and the LVRT Permittees are actually the same person as defined in Act 250 Rule 2(C)(1). The definition of "person" includes many different options, several of which can be easily eliminated from this analysis. Specifically, there is no evidence in the record that the Town and the LVRT Permittees together constitute "an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity," or that they are a joint venture or affiliated ownership. "A joint venture is a relationship between parties 'to engage in and carry out a single business venture for joint

profit without any actual partnership or corporate designation.” *Vermont Environmental Board v. Chickering*, 155 Vt. 308, 317 (1990); *Re: Green Mountain Habitat for Humanity, Inc., and Burlington Housing Authority*, Declaratory Ruling 406, Findings of Fact, Conclusions of Law, and Order at 8 (Vt. Env'tl. Bd. Dec. 31, 2002). That is not the case here.

The question is whether the Town and the LVRT Permittees are “affiliated with each other for profit, consideration, or any other beneficial interest derived from the ‘development’ of land.” Nothing in the record indicates that the Town of Wolcott has proposed the Trailhead Project in affiliation with the LVRT Permittees to secure a profit or obtain other consideration. Mr. Teale argued that the Town would benefit through businesses bolstered by the LVRT. This is speculative and any such benefits to businesses are too attenuated and indirect to be considered an affiliation for a beneficial interest derived from the Wolcott Trailhead.

A beneficial interest is defined as: “Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.” *Black’s Law Dictionary*, p.156 (6th ed. 1990). An example of a beneficial interest is found in the *Shenandoah* decision, in which the Vermont Supreme Court held that a developer and the irrevocable trust he set up to benefit his children constituted the same person because they were affiliated for an “other beneficial interest derived from the development of land,” when the trust proposed a project. *In re Shenandoah, LLC*, 2001 VT 68 ¶ 15. The Court reasoned that “[t]his is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support.” *Id.* Even assuming that the Town and the LVRT Permittees may benefit from the development of the Wolcott Trailhead Project, nothing in the record indicates that financial benefit to one constitutes a financial advantage to the other. It is clear from the present record that they are not affiliated for financial advantage in any manner contemplated by the rule. Therefore, the Town and LVRT Permittees are not the same “person.”

Faced with a similar issue in the *Re: City of Montpelier*, the former Environmental Board held that the road project in the city of Montpelier on its own did not require an Act 250 permit simply because it connected to a road in Berlin which was already under Act 250 jurisdiction. In holding that there was no jurisdiction over the Montpelier road, the former Environmental Board found that:

the City of Montpelier owns and controls Berlin Street while the Town of Berlin owns and controls Paine Turnpike and Fisher Road. The City of Montpelier and the Town of Berlin did not proceed jointly on the planning, approval or funding of their separate projects. Furthermore, there was no evidence to establish that the road improvements are being done pursuant to a common plan.

City of Montpelier, supra, at 12.

While Act 250 law has evolved considerably in 24 years since the *City of Montpelier* decision (for instance, "substantial change" no longer applies to determine jurisdiction over changes to or expansions of permitted projects), some of the principles that guided the former Environmental Board in the *City of Montpelier* provide guidance today. Specifically, this case established a number of factors when considering the relationship of two projects with regard to Act 250 jurisdiction: common ownership, control, funding and planning.

The record in this matter does not suggest that town of Wolcott and the LVRT Permittees share common ownership, control, management, funding or planning with regard to the Trailhead Project. To the contrary, the LVRT Permittees will have no control or management of the Trailhead, the LVRT Permittees will not share common funding for the Wolcott Trailhead Project, the trailhead improvements in question were not part of the LVRT master plan, so there was no common plan, and the Wolcott Trailhead Project will be on Town land not owned or controlled by the LVRT Permittees. This was supported by the credible testimony of Ms. Scott on behalf of the Town. Mr. Teale agreed with these facts.

Indeed, similar to a public highway project, the LVRT acknowledges that municipalities will likely connect municipal trails to the LVRT and that trailheads will be created, but that these connections are separate projects undertaken by separate government entities under their own auspices. There is no indication that the Town of Wolcott and the LVRT Permittees were acting together as the same "person."

The 2008 LVRT Management Plan supports this conclusion. It provides for some trailhead construction in Phase V, but states that:

- Candidate sites that are already informal trailheads, or have parking already available (see listing in the Trailhead Section Appendix "N") can be done much sooner, depending on ROW actions and local agreements, because they are not a part of the [LVRT] project.

2008 LVRT Management Plan, page 65. Appendix N to the 2008 LVRT Management Plan includes a town/state-owned existing trailhead at milepost 39.4 in Wolcott, described as: "small-ROW only. Area adjacent to town garage, School Street; photo 622." This appears to be the same site as the Wolcott Trailhead Project. The same existing trailhead is also listed in Appendix N to the 2009 LVRT Management Plan, which states in relevant part that: "As a completed LVRT matures, more trailheads will be added, or subtracted, by the local communities, and the will of the public."

The 2008 LVRT Management Plan also states that:

The LVRT Valuation Plans also show several parcels along the route, owned by the state, which may be good candidates for conversion to a trailhead. Also, the LVRT crosses a number of other trails, towns, and business properties that already have either trailheads or adjacent parking lots that could be used as trailheads. VAST has compiled a list of prospective trailheads from such

candidate sites for the LVRT, and is presently seeking confirmation from VTrans, Rail Section, Property Management, and VTrans ROW to confirm public ownership, and availability of the LVRT parcels, **although they are not a part of this project**. VAST will continue to research the private properties listed to determine owner willingness to accommodate a trailhead, **although they are not a part of this project**.

2008 LVRT Management Plan, pages 59-60 (emphasis in original). The LVRT Permittees were not working with the Town of Wolcott to develop the Wolcott Trailhead Project as part of the LVRT. To the contrary, the LVRT Permittees contemplated that improvements to such trailheads like this would be left to the individual municipalities.

The former Environmental Board decided that a proposed project does not require a permit or become part of a permitted development where the developer is not the same person as the permittee: "solely because the Project may create an effect on the Permit Site . . . an adjoining property owner cannot be required to seek an amendment to a neighbor's permit by virtue of construction on the adjoiner's, non-permitted, property." *Pizzagalli Properties (Burger King)*, Declaratory Ruling 361, Chair's Preliminary Ruling at 6-7 (Jun. 8, 1998), confirmed by Board's Order (Vt. Env'tl. Bd. Jun. 15, 1998). This is true even when, as noted by the former Environmental Board: "[c]onstruction and operation of a Burger King on the Project Site may well impact the traffic on South Park Drive [the permitted project]." *Id.* Another factor in the *Pizzagalli* decision was the former Environmental Board's reluctance "to place administrative burdens on towns." This is consistent with the policy direction given by the Legislature, as discussed above.

In the present case, the Trailhead Project is entirely on Town land, and the permitted LVRT Project is on land owned and leased by VTrans and VAST. In that regard it is similar to the project in *Pizzagalli*. In addition, as in *Pizzagalli*, the Town and LVRT Permittees are not the same person for Act 250 purposes. Therefore, the Town's project in and of itself is not subject to Act 250 jurisdiction nor can the Town's independent actions force third parties (in this case, the LVRT Permittees) to amend their permit.

However, this does not mean that a project can avoid Act 250 jurisdiction simply because it is undertaken by someone other than a named permittee. The definition of "person" is much broader than that. Also, it is well-established that permits run with the land and bind successors in interest. *In re Estate of Swinington*, 169 Vt. 583, 585 (1999)(mem.); *NRB v. Donald Dorr, et al.*, No. 49-4-13 Vtec, slip op. at 9 – 10 (May 27, 2013).

The Board stresses that this is a narrow holding limited to a municipal endeavor connected to a state-sponsored linear transportation project, and for which the evidence indicates that the permitted project and the proposed project were developed and planned by different entities and do not share common funding, management or control. In short, the Wolcott Trailhead Project is being undertaken by a "person" independent of and not affiliated with the LVRT Permittees. Accordingly, it cannot be a change to that permitted project.

IV. Conclusion

The Trailhead Project does not require an Act 250 permit because it does not constitute a "development." Furthermore, because the LVRT Permittees and the Town of Wolcott are not the same "person" for the purposes of Act 250 jurisdiction, the Trailhead Project does not constitute a "material change" requiring an amendment to the LVRT permit.

DATED in Montpelier, Vermont, this 12th day of June, 2014.

NATURAL RESOURCES BOARD



Ronald A. Shems, Chair
William Boyd Davies
Martha Illick
Donald Sargent
Gail Fallar

Any appeal of this decision must be filed within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220, with the Superior Court, Environmental Division, 2418 Airport Road, Barre, VT, 05641.

The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (V.R.E.C.P.). The entry fee (\$265.00 as of July 1, 2014) must be filed with the Notice of Appeal. A copy of the Notice of Appeal must be sent to the Natural Resources Board, National Life Dewey Building, Montpelier, VT, 05620-3201, and to all other parties in accordance with V.R.E.C.P. 5(b)(4)(B).

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Certificate of Service
Page 2

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Michael O'Driscoll
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Phil Ryder
161 School Street
Wolcott, VT 05680

Eric Mandigo
197 School Street
Wolcott, VT 05680

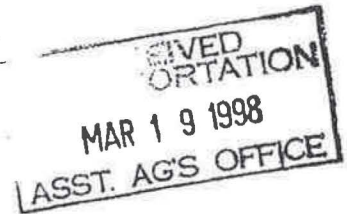
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matt@ylvast.org

03/19/1998

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092



RE: Beebe Spur Rails to Trails Project
Declaratory Ruling Request #338

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISMISSAL ORDER

On February 25, 1998, the Vermont Environmental Board ("Board") convened deliberations on a series of preliminary issues outlined in Board Chair Marcy Harding's Status Conference Report and Order issued on January 26, 1998. As set forth in more detail below, the Board has concluded that the Beebe Spur Landowner's Association has failed to demonstrate that it has standing to bring its petition for declaratory ruling ("Petition"). Accordingly, the Board dismisses the Petition with prejudice.

I. BACKGROUND

On October 23, 1996, District #7 Environmental Commission Coordinator Charles J. Gallagher issued Jurisdictional Opinion #7-183 ("Opinion") in which he opined that jurisdiction under 10 V.S.A. §§ 6001-6092 ("Act 250") does not attach to the Beebe Spur Rails to Trails project ("Project") proposed by the Derby Recreational Committee on land owned by the Agency of Transportation ("AOT") in Derby, VT. Mr. Gallagher declined requests to reconsider the Opinion in a Response to Petition for Reconsideration issued November 27, 1996.

On December 26, 1996, the Beebe Spur Landowner's Association "for and on behalf of 31 abutters" ("Petitioner") filed the Petition with the Board appealing the determination made by the Opinion. Petitioner contends that there is Act 250 jurisdiction over the Project or, alternatively, that there is insufficient information upon which to base a jurisdictional opinion.

On January 15, 1997, Board staff issued a Notice of Petition for Declaratory Ruling and Prehearing Conference ("Notice") which, among other things, instructed nonstatutory parties wishing to participate in the proceeding to file a written petition for party status on or before January 28, 1997. The Notice was served by United States mail on all individuals and entities listed on its attached certificate of service and was published in the Newport Daily Express on January 18, 1997.

On January 28, 1997, then Environmental Board Chair John T. Ewing convened a prehearing conference with the following individuals and entities participating:

Petitioner, by Gordon T. Alexander, Arne Amalixsen, and
Duncan F. Kilmartin, Esq.,
AOT, by Scott A. Whitted, Esq., Assistant Attorney General
Lakemont Beach Association ("Lakemont"), by Attorney Kilmartin

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Chester and Sharron Greenwood, pro se
Robert Orr, pro se (by telephone)
Lindyl Palin, pro se (by telephone)

At the prehearing conference, Attorney Kilmartin filed a Petition for Party Status on behalf of Petitioner, an Entry of Appearance and Request for Party Status on behalf of Lakemont, Appellants' Requests for Preliminary Ruling on Appellant Party Status on behalf of Petitioner and Lakemont, and other documents.

On January 29, 1997, Chair Ewing issued a Chair's Preliminary Ruling requiring AOT to respond to the preliminary issue of whether the Project was sufficiently specific for purposes of determining Act 250 jurisdiction.

On February 27, 1997, AOT filed a letter with the Board stating that its plans regarding the Project were not so "settled in intention and purpose that it can be called ready to commence." In re Agency of Administration, 141 Vt. 68, 82 (1982). AOT suggested that the Board dismiss the Petition without prejudice.

On March 7, 1997, Petitioner and Lakemont filed a letter requesting that the Board (i) vacate the Opinion, (ii) dismiss AOT's application for the Opinion, and (iii) require AOT to serve all adjoining property owners with a copy of all materials when it files an application for an Act 250 Permit or a jurisdictional opinion in the future.

On March 11, 1997, Chair Ewing convened a status conference by telephone with the following individuals and entities participating:

Petitioner and Lakemont, by Attorney Kilmartin
AOT, by Attorney Whitted and Curt McCormack

On April 1, 1997, Chair Ewing issued a Preliminary Ruling continuing the Petition for a period of six months because the Project was not yet ripe for jurisdictional analysis.

On October 1, 1997, AOT filed a Status Report concerning the Project.

On October 6, 1997, Chair Ewing issued an Order which is incorporated herein by reference.

On November 18, 1997, AOT filed plans and descriptions regarding the Project.

On December 2, 1997, Petitioner and Lakemont filed a Motion that the Board Schedule a Status Conference, the Declaratory Ruling Request Proceed, and the Board Take Other Action Authorized by Statute. Specifically, the motion requested that the Board (i) vacate the Opinion, (ii) dismiss the AOT's original application for the Opinion and its Request for a Final Determination dated September 20, 1996, or (iii) find that the Project is subject to Act 250 jurisdiction.

On December 17, 1997, Chair Ewing issued an Order scheduling a status conference on Friday, January 16, 1998.

On December 30, 1997, Petitioner and Lakemont filed a Motion for Modification of Procedural Order.

On January 1, 1998, Marcy Harding became the Board's Chair and assumed the responsibilities of Chair for this proceeding.

On January 7, 1998, AOT filed a Response to the Motion for Modification.

On January 8, 1998, Chair Harding issued an Order which is incorporated herein by reference.

On January 12, 1997, Petitioner and Lakemont filed a Motion requesting that Chair Harding reschedule the status conference. On January 13, 1998, Attorney Whitted verbally concurred with this request on behalf of AOT.

On January 13, 1998, Chair Harding issued an Order re-scheduling the status conference for January 21, 1998.

On January 14, 1998, Robert and Janet Orr filed a request for postponement of the January 16, 1998 status conference.

On January 21, 1998, Chair Harding convened a status conference in the above-referenced matter with the following organizations and individuals participating:

Petitioner, by Attorney Kilmartin, Arne and Trinket Amalixsen, and Ruth Lowenstein
AOT, by Attorney Whitted, Samuel Lewis, Chris Magnan, and Nick Marro
Lakemont, by Attorney Kilmartin
Toni-Jo Wikar, pro se (by telephone; joined status conference in progress)
Gordon Alexander, pro se (by telephone)

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Robert Orr, pro se (by telephone)
Lindyl Palin, pro se (by telephone)
Northeastern Vermont Development Association, by Richard T. Dabiri

Also in attendance was Ed Rossi, a newspaper reporter.

On January 26, 1998, Chair Harding issued a Status Conference Report and Order ("Order"), which is incorporated herein by reference.

On February 10, 1998, in accordance with the terms of the Order, Petitioner filed a Contesting Statement and a Petition for Party Status ("Petitioner's Statement"); AOT filed a Response to Status Conference Report and Order ("AOT's Statement"); and Lakemont filed a Petition for Party Status and a Statement regarding the issues of pre-existing development and the identity of Lakemont ("Lakemont's Statement").

On February 17, 1998, AOT filed a Response to Petitioner's Statement and Lakemont's Statement ("AOT's Response").

On February 25, 1998 and March 18, 1998, the Board deliberated on the issues identified in the Order and addressed by Petitioner, Lakemont, and AOT in the memoranda filed February 10 and February 17, 1998.

II. ISSUES

The Order set forth a number of preliminary issues to be addressed by parties and individuals and entities asserting standing or party status. The required responses, as well as the lack of timely objections, have resolved many of these matters. As a result, the Board must now address the following issues:

1. Whether changes to the Project that is before the Board have made it so different from the proposal reviewed by the District Coordinator that the Board must dismiss the Petition and AOT must seek a new jurisdictional opinion.
2. If the answer to #1 above is in the negative, whether Petitioner has demonstrated that it has standing to file the Petition.
3. If the answer to #2 above is in the affirmative, whether Lakemont or any other non-statutory party has demonstrated party status to participate in the

proceeding.¹

III. FINDINGS OF FACT

1. On October 23, 1996, District #7 Environmental Commission Coordinator Charles J. Gallagher issued the Opinion in which he opined that Act 250 jurisdiction does not attach to the Project. Mr. Gallagher declined requests to reconsider the Opinion in a Response to Petition for Reconsideration issued November 27, 1996.
2. On December 26, 1996, Petitioner filed the Petition with the Board appealing the determination made by the Opinion.
3. Petitioner identifies itself as filing the Petition "for and on behalf of 31 abutters" ("31 Abutters")
4. The 31 Abutters own parcels of real property adjoining the Project site at non-contiguous points along the proposed trail.
5. Petitioner's Statement states that Petitioner has standing to file the Petition because the 31 Abutters are adjoining property owners and because the Project may affect the interests of the 31 Abutters under one or more of the following Act 250 criteria: Criteria 1 (undue water pollution), 1(A) (headwaters), 1(B) (waste disposal), 1(D) (flood plains), 1(E) (streams), 1(F) (shorelines), 1(G) (wetlands), 2

¹ There is one other preliminary issue left unresolved by the Statements filed in response to the Order. The Order stated that if Petitioner had standing to file the Petition, then the Board would address two substantive issues: whether the Project constituted "development" and whether the Project constituted a "substantial change" to a pre-existing development ("Issue #2"). In order to narrow the scope of the parties' evidence and arguments in connection with Issue #2, the Order instructed AOT, Petitioner, Lakemont, and any individual requesting party status to file a statement conceding or contesting the proposition that the rail line was a "pre-existing development." In the interest of efficiency and because no dispute was anticipated, the Order stated that no memorandum of law needed to be filed in support of the stated belief. In their respective Statements, however, both Petitioner and Lakemont asserted that the rail line was *not* a "pre-existing development." In light of today's ruling that Petitioner has failed to demonstrate standing, the Board does not reach the issue of "pre-existing development."

(insufficient water supply), 3 (unreasonable burden on existing water supply), 4 (soil erosion / reduction in capacity of land to hold water), 5 (traffic), 7 (unreasonable burden on municipal services), 8 (scenic and natural beauty / aesthetics), 9(A) (impact of growth), and 10 (town plan).

IV. CONCLUSIONS OF LAW

The Board may dismiss any matter before it, in whole or in part, at the request of any party or on its own motion for reasons provided by the Board rules, by statute, or by law. EBR 18(D). See also, e.g., Agency of Transportation (Bennington Bypass), Declaratory Ruling #349, Findings of Fact, Conclusions of Law, and Dismissal Order (Nov. 12, 1997); Re: Putney Paper Company, Inc., Declaratory Ruling #335, Findings of Fact, Conclusions of Law, and Order (May 29, 1997). The Board decides all matters before it in a declaratory ruling proceeding on a de novo basis.

A. Changes to Project

If changes to the Project have created a different project from that which was before the District Coordinator, then the Board would have no authority to review the Project. In that event, the Board would be required to dismiss this declaratory ruling proceeding and AOT would need to seek a jurisdictional opinion regarding the new proposal. In response to the Order, AOT filed its Statement detailing the changes made to the Project. No individual or entity that had requested standing or party status availed itself of the opportunity, set forth in the Order, to respond to AOT's Statement.

Upon review of AOT's Statement and the plans and description filed with the Board on November 18, 1997, the Board concludes that the Project's essential elements -- such as the width of the trail and shoulders -- remain the same as those elements in the proposal submitted to the District Coordinator. In fact, the most "substantial" changes are those which omit elements of the Project and thereby diminish the scope of the Project. For example, the current Project calls for the surface to be covered with crushed gravel rather than pavement, no snowmobiles will be allowed, and no privacy fencing and shrubs will be planted. Therefore, the Board concludes that the Project that is at issue in this proceeding is not substantially different from that which was presented to the District Coordinator. It therefore can proceed to determine whether Petitioner has demonstrated standing to file the Petition.

B. Petitioner's Standing

A district coordinator's jurisdictional opinion may be appealed to the Board by "the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties entitled to receive notice under [10 V.S.A. §] 6084, if jurisdiction were determined to exist." 10 V.S.A. § 6007(c). EBR 3(C)(3) states that a jurisdictional opinion may be appealed to the Board "by any person who qualifies as a party under Rule 14(A) or who may be affected by the outcome of the opinion." Because Petitioner is not the applicant, there are three ways in which it could attempt to demonstrate that it has standing to file the Petition. Petitioner could demonstrate (i) that it is a "statutory" party entitled to notice under § 6084, (ii) that it may be affected by the outcome of the opinion,² or (iii) that it qualifies as a party under EBR 14(A)(5). Putney Paper, *supra* at 6. Therefore, it is incumbent upon Petitioner to demonstrate that it has standing in order for this declaratory ruling request to proceed. Whether or not Petitioner has demonstrated standing is solely within the Board's discretion. 10 V.S.A. § 6007(c). *See also, e.g., Putney Paper*, *supra* at 7 and citations provided therein. The Board may dismiss a proceeding based on its determination that the petitioner lacks standing to file the action. Agency of Transportation, *supra*; Re: Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 3 (Aug. 14, 1997)[EB #669]; Putney Paper, *supra*; Re Chittenden Recycling Services, Interim Certification #CH954-WFP and Land Use Permit #4C0400-4-WFP, Memorandum of Decision at 5 (Aug. 5, 1993), *aff'd* 162 Vt. 84 (1994).

The Petition for Declaratory Ruling created significant confusion regarding the basis on which Petitioner claims standing to file the action. For example, the Petition is signed by Petitioner "for and on behalf of 31 abutters and statutory parties." Petition at 1 (emphasis supplied). In addition, the first sentence of the Petition implies, erroneously, that EBR 14(A)(5) parties are "statutory parties." Petitioner's subsequent pleadings, including its Petition for Party Status³ filed on January 28, 1997, increased the confusion

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The standard by which the Board determines whether a person is "affected by the outcome" pursuant to § 6007(c) is identical to the standard by which it determines whether to grant party status to a person under EBR 14(B)(1). Re: Wesco, Inc. and Jacob & Harmke Verburg, Declaratory Ruling #304, Memorandum of Decision at 4-5 (June 30, 1995); Re: Hiddenwood Subdivision, Declaratory Ruling #324, Memorandum of Decision and Dismissal Order at 4 (Aug. 29, 1996).

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An individual or entity seeking to initiate a declaratory ruling proceeding need not
(continued...)

of whether the Petitioner represents individuals who own the Project site, and who therefore are "parties entitled to notice under § 6084" (i.e. statutory parties), or whether they are adjoiners, who must demonstrate that their interests may be affected by the Project or that they would qualify as a party under Rule 14(A)(5). Petitioner's Petition for Party Status did not provide sufficient information on which to determine whether Petitioner has standing to initiate this declaratory ruling proceeding (nor, indeed, if party status had been at issue would there have been sufficient information on which to make a party status determination). Petitioner failed to clarify the basis on which it claims standing at any of the prehearing or status conferences. Accordingly, the Chair's Order instructed Petitioner to file a statement establishing its standing to file the Petition. In response to the Order, Petitioner filed Petitioner's Statement, in which it addressed the issue under the heading "Petition for Party Status."⁴

1. Entitled to Notice Under 10 V.S.A. § 6084

Several of Petitioner's filings imply that it (or some or all of the 31 Abutters) possesses an ownership interest in the Project site. As indicated above, these implications were a confusion of contradictions. As of the date on which the Chair issued the Order, Petitioner had failed to provide any information, written or verbal, on which the Board could determine whether there was any factual basis underlying Petitioner's claim of ownership. Indeed, Petitioner failed to provide even a clear recitation of precisely what it was attempting to assert.

In order to provide Petitioner an additional opportunity to establish standing as a "statutory party" entitled to notice under 10 V.S.A. § 6084, the Order instructed Petitioner

³(...continued)

seek *party status*. Rather, the question is whether the petitioner has *standing* to file the petition for declaratory ruling pursuant to 10 V.S.A. § 6007(c) and EBR 3(C)(3). Petitioner appears to have filed the Petition for Party Status in response to the Board's Notice issued on January 17, 1997, which instructed any nonstatutory party to file a written petition for party status on or before January 28, 1997, the date of the first prehearing conference in this matter.

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See footnote #3, supra. The Board analyzes issues of party status and standing in a similar, but not identical, manner. E.g., Putney Paper, supra at 5-11. Therefore, the Board will treat the Petition for Party Status contained within Petitioner's Statement as though it were the requested memorandum demonstrating that Petitioner has *standing* to file the Petition for Declaratory Ruling.

to demonstrate that it, as an entity, or that each of the 31 Abutters is an owner of the land, or a portion thereof, on which the Project will be situated. Petitioner's Statement declined to attempt this demonstration. Petitioner stated that "[f]or purposes of invoking jurisdiction, [Petitioner] will not attempt to qualify under 10 V.S.A. § 6084 as an owner of the land. [Petitioner] seek[s] qualification solely as adjoining owners who will be 'affected by the outcome' of the jurisdictional opinion." Petitioner's Statement at 1 n.1.

The Board has no basis on which it can conclude that Petitioner, or all or any of the 31 Abutters, is entitled to notice under 10 V.S.A. § 6084. Furthermore, Petitioner has formally asserted that it does not seek to demonstrate that it has standing on this basis. Accordingly, the Board concludes that neither Petitioner, as an entity, nor the 31 Abutters are statutory parties. Therefore, they do not have standing to file the Petition pursuant to the "entitled to notice" method of analysis.

2. "Affected by the Outcome" and "Direct Effect"

The Order also instructed the Petitioner to either (i) demonstrate that it will be "affected by the outcome" of the opinion because the Project may affect its interests under one or more of the 10 Act 250 criteria (EBR 14(B)(1))⁵ or (ii) demonstrate that it is comprised of individuals whose property adjoins the Project site and on whose interests the Project may have a direct effect under one or more of the 10 Act 250 criteria (EBR 14(A)(5)). Petitioner asserts that it, "for and on behalf of 31 adjoining property owners, [is] petition[ing] for party status pursuant to EBR 14(A)(5)." Petitioner's Statement at 1. AOT argues that Petitioner cannot claim standing under EBR 14(A)(5) because analysis under that rule "is limited to individual owners, not groups of owners." AOT's Response at 3. It is unnecessary for the Board to determine the merit of AOT's assertion. The demonstration to be made under the "affected by the outcome" and the "direct effect" tests is strikingly similar, except that a petitioner claiming standing under the latter analysis must also demonstrate ownership of adjoining property. Read broadly, once the adjoining status is demonstrated, petitioners under both tests must show that the Project may affect the *petitioner's* interests under one or more of the Act 250 criteria. Therefore, it is immaterial whether "a group of owners" may assert standing under the EBR 14(A)(5) "direct effect" test, because the Board can review the Petitioner's assertions of potential effect under the "affected by the outcome" (EBR 14(B)(1)) analysis.

In order to have standing, Petitioner must demonstrate how the Project may affect

its interests under the Act 250 criteria, not what effect the Project may have *in general*. E.g., Agency of Transportation, *supra* at 7; Putney Paper, *supra* at 8; and cases cited therein. Generalized statements that Petitioner is entitled to standing are not sufficient. Cf., Re: Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 7 (Aug. 21, 1995) [EB #627]; Re: Spring Brook Farm Foundation, Inc., Declaratory Ruling Request #290, Prehearing Conference Report and Order and Memorandum of Decision at 4 (Jan. 6, 1994). Similarly, [m]ere allegations, unsupported by sufficient detail, cannot sustain the burden of proof" to demonstrate a potential effect on Petitioner's interests. Putney Paper, *supra* at 11. Rather, it is incumbent upon the Petitioner to establish a "meaningful nexus" between the Project and an asserted injury to a specific interest. See, e.g., Agency of Transportation, *supra* at 7; Springfield Hospital, *supra* at 5-6.

Petitioner has claimed potential effect under 15 separate criteria and subcriteria of Act 250. Although the deficiencies of Petitioner's demonstration are nearly identical under each criteria, the Board will address each alleged potential effect separately:

a. Criterion 1 (undue water pollution)

Petitioner states that runoff from waste deposited on the Project site may affect the 31 Abutters who "obtain their water from driven wells, springs and Lake Memphremagog." Petitioner has not indicated whether all or any of the 31 Abutters' properties are up- or down-gradient from the Project site, the distance of the water supplies from the Project, or the direction in which the groundwater flows. See, e.g., Putney Paper, *supra* at 7. In addition, Petitioner provides no support for the contention that the Project will result in disposal of wastes of a quality or quantity that will negatively affect water. Petitioner has provided no support for its assertion that Project wastes will directly affect the 31 Abutters' water supply.

b. Criterion 1(A) (headwaters)

Petitioner states that the Project "may affect the quality of the ground and surface waters flowing through and upon wet lands and other lands not devoted to intensive development." See discussion at IV.B.2.a. above.

c. Criterion 1(B) (waste disposal)

Petitioner states that the Project "may involve the injection of waste materials and harmful and toxic substances into the ground water, adjacent wells and public waters." See discussion at IV.B.2.a. above. In addition, Petitioner describes the potential wastes

generated by the Project as "harmful and toxic substances" but provides no information regarding the identity of these substances or the likelihood that they will be "injected" into the groundwater, wells, and public waters. Because demonstrations of standing concern only the potential effect on the Petitioner, the Board cannot consider alleged potential effects on property not owned by the 31 Abutters, except to the extent that the effect on that property affects the 31 Abutters' interests.

d. Criterion 1(D) (flood plains)

Under Criterion 1(D), Petitioner simply states that "[w]hile it does not appear that the [Project] is in a flood plain, it is definitely within a flood way fringe." Petitioner has provided no argument or information that in any way suggests that the Project may cause a potential effect to the 31 Abutters under this subcriterion.

e. Criterion 1(E) (streams)

Petitioner states that several of the 31 Abutters "share a common border with a stream or water course with the [Project]," and that other adjoiners live near the John's River. Petitioner alleges that the Project's effect on streams may endanger the "health, safety and welfare" of the 31 Abutters and the public at large. See discussion at IV.B.2.a. above. The Board does not consider the Project's potential effect on the public at large when analyzing whether Petitioner has demonstrated standing; it is solely concerned with the potential effect on Petitioner's interests under the Act 250 criteria. Petitioner also states that James and Billie Maas are riparian owners of a stream and bog in the vicinity of the Project. Not only does Petitioner fail to document this ownership, but it also has specifically declined to demonstrate that the 31 Abutters have an ownership interest in the Project site. Petitioner's Statement at 1 n.1. Therefore, Petitioner cannot raise the alleged riparian ownership for any purpose other than as support for its allegation that the Maas family owns adjoining property and may be affected by the Project.

f. Criterion 1(F) (shorelines)

Petitioner states that several of the 31 Abutters "own on the shoreline" and others, although "separated by the right-of-way, [] have legal access to the shorelines." Petitioner questions whether the Project "will stabilize the shore banks from erosion because of the anticipated use of the shoreline by users of the path and users of the lake or a combination of said users." Petitioner provides no argument that the Project may affect the 31 Abutters under this subcriterion. It fails to explain why the Project is any more likely to de-stabilize the shoreline than was the train which formerly ran along the Project

site or how any such de-stabilization might directly affect the interests of the 31 Abutters.

g. Criterion 1(G) (wetlands)

Petitioner states that several of the 31 Abutters "actually abut wetlands" and the Project goes through wetlands. See discussion at IV.B.2.a., c., e., and f. above.

h. Criterion 2 (insufficient water supply)

Petitioner states that the 31 Abutters may have insufficient potable water due to waste generated by the Project. Criterion 2 is solely concerned with whether a proposed project will have sufficient water for the project's needs. The Project does not make use of a water source. Criterion 2 is therefore not applicable in any way.

It is possible that Petitioner may be confusing Criterion 2 with Criterion 3, which addresses the "impact[] on the ability to meet demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring." Re: MBL Associates, #4C0948-EB(Altered) at 38 (May 2, 1995) [EB #610R]. As stated above, the Project will not use water. Accordingly, it will have no impact on the volume of water that will be available to the 31 Abutters. Furthermore, it is not appropriate to consider contamination of wells under this criterion. Id.

i. Criterion 3 (unreasonable burden on existing water supply)

Petitioner states that the 31 Abutters "may be affected by a determination whether a water supply is needed, and if needed, what will its affect be upon the current sources of water for the" 31 Abutters. The Project will not utilize an existing water supply. AOT will need to request a jurisdictional opinion if it determines in the future that such use is necessary. Should that occur, Petitioner will have the opportunity, at that time, to demonstrate that it has standing.

j. Criterion 4 (soil erosion / reduction in capacity of land to hold water)

Petitioner states that "several thousand feet of the [Project site] is [sic] elevated on either side [and s]everal thousand feet also border Lake Memphremagog and wetlands." As a result, Petitioner alleges that the Project may cause erosion or a reduction in the capacity of the land to hold water. Petitioner fails to explain why the Project is any more likely to de-stabilize the shoreline than was the train which formerly ran along the Project

site or how any such de-stabilization might directly affect the interests of the 31 Abutters.

k. Criterion 5 (traffic)

Petitioner states that the Project may cause unreasonable congestion and unsafe conditions because (i) the Project crosses public highways, (ii) the Project crosses several water courses, (iii) the Project may be used "on a daily basis by several hundred or several thousand people, without adequate parking and without adequate access from highways," (iv) "the use of adjacent waterways may cause both congestion and unsafe conditions by users of" the Project, and (v) "leaving the bike path in an area of a private crossing and going through a private driveway onto a public road to gain access to a public highway." Petitioner does not explain the basis for these allegations nor does it relate the alleged potential effects to its own interests or the interests of the 31 Abutters. Furthermore, as AOT points out, Petitioner does not acknowledge that, unlike trains, persons using a recreation trail do not have a right of way at highway intersections. AOT's Response at 7.

l. Criterion 7 (unreasonable burden on municipal services)

Petitioner states that the Project may place an unreasonable burden on the town to provide police services, water, sewage disposal, and garbage disposal. Petitioner provides absolutely no ingenuous explanation how the Project -- a recreation trail -- could possibly cause an effect on the 31 Abutters under this criteria.

m. Criterion 8 (scenic and natural beauty / aesthetics)

Petitioner states that the Project traverses wetlands "in which loons and herons nest" and streams that empty into Lake Memphremagog and it adjoins the Lake's shoreline. Petitioner contends that use of the Project and waste generated by users will unduly affect the natural beauty of the area. Petitioner fails to describe in what manner the Project will genuinely affect the beauty of the area or how likely it is that such an effect will occur. Petitioner presents no evidence that any or all of the 31 Abutters would be able to observe the effect from their residences. Furthermore, there is no other evidence that suggests how the 31 Abutters' specific interests will be affected by the Project under Criterion 8. See, e.g., Springfield Hospital, *supra* at 6.

n. Criterion 9(A) (impact of growth)

Petitioner states that the municipality, of which the 31 Abutters are taxpayers,

"may considerably increase the cost for highway access and maintenance (Derby may have to redesign or relocate its roads), police services and other factors relating to the public health, safety and welfare." Like Petitioner's contentions under Criteria 1(D), 3 and 7, Petitioner provides neither an argument nor evidence that the Project may have any possible effect under Criterion 9(A), much less that the Project would affect the interests of the 31 Abutters under that criterion.

o. Criterion 10 (town plan)

Petitioner states that the Project "is not authorized, nor is it in conformance with, the Derby Town Plan [and] the adjoiners will be directly affected." Petitioner does not attempt to state in what manner the Project fails to conform to the town plan nor does it explain how the interests of the 31 Abutters will be affected.

The Board is generally reluctant to deny standing to a petitioner who makes a demonstration that an effect is even remotely likely. The Board has provided Petitioner with repeated opportunities to demonstrate, both verbally and in writing, that it has standing to file this Petition. Petitioner has failed to provide a thoughtful, thorough explanation of the one or two criteria under which it might reasonably be able to demonstrate a potential effect. As a result, Petitioner has failed to make a single, genuine demonstration of the Project's potential effect on the interests of the 31 Abutters. Accordingly, the Board concludes that Petitioner has failed to demonstrate that it has standing under either the "affected by the outcome" or the "direct effect" methods of analysis.

C. Party Status of Lakemont

Because the Board has determined that Petitioner lacks standing to file the Petition, and the Petition must therefore be dismissed, the Board does not reach the question of whether Petitioner has demonstrated party status to participate in this appeal. The Board notes, however, that even if Petitioner had demonstrated standing, it is unlikely that the Board would have been able to grant Lakemont party status to participate in the proceeding because Lakemont employed an approach to proving party status that was similar to Petitioner's approach to its demonstration of standing.

D. Party Status of Individual Landowners

Because the Board has determined that Petitioner lacks standing to file the

Petition, and the Petition must therefore be dismissed, the Board does not need to address the question of whether any individual landowner has demonstrated party status to participate in this appeal. The Board notes, however, that despite repeated opportunities to do so, no individual landowner filed a petition for party status. Therefore, even if Petitioner had demonstrated standing to file the Petition, no individual landowner would have been granted party status to participate as an individual in this proceeding.

V. ORDER

1. There has been no change made to the Project from that which was presented to the District Coordinator that would require the Board to dismiss the Petition.

2. Petitioner has not demonstrated that it is an owner of the Project site or any portion thereof. Petitioner lacks standing to file its Petition for Declaratory Ruling under the "entitled to notice" standard.

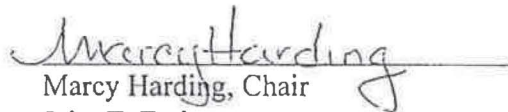
3. Petitioner failed to demonstrate that it has standing to file its Petition for Declaratory Ruling under the "affected by the outcome" standard.

4. Petitioner failed to demonstrate that it has standing to file its Petition for Declaratory Ruling under the "direct effect" standard.

5. The Petition is dismissed with prejudice pursuant to EBR 18(D).

Dated at Montpelier, Vermont this 19th day of March, 1998.

ENVIRONMENTAL BOARD



Marcy Harding, Chair

John T. Ewing

Arthur Gibb

George Holland

Samuel Lloyd

William Martinez

Rebecca M. Nawrath

Robert H. Opel

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1998, the foregoing Findings of Fact, Conclusions of Law, and Dismissal Order regarding Beebe Spur Rails to Trails Project, Declaratory Ruling Request #338, was sent first class mail, postage prepaid to the following:

Derby Board of Selectmen and
Planning Commission
c/o Town Clerk
P.O. Box 25
Derby, VT 05829

Newport Board of Selectmen
and Planning Commission
c/o Town Clerk
74 Main Street
Newport, VT 05855

Northeastern Vermont Development
Association
P.O. Box 640
44 Main Street
St. Johnsbury, VT 05819

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Assistant Attorney General
Agency of Transportation
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FOR INFORMATION ONLY

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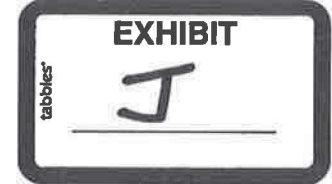
Chester and Sharron Greenwood
76 Lindsay Road
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Lakemont Beach Association
c/o Duncan Kilmartin, Esq.
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Newport, VT 05855

Gregory and Billie Howe
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Newport, VT 05855

David Edson
P.O. Box 225
Underhill Center, VT 05490

Exhibit J
Burlington Bike Path JO



Natural Resources Board
District #4 Environmental Commission
111 West Street
Essex Jct., Vermont 05452

August 18, 2014

Elizabeth Caitlin, Esq.
Dunkiel Saunders
91 College Street
P.O. Box 545
Burlington, VT 05402-0545

RE: Jurisdictional Opinion #4-236
Burlington Bike Path upgrade, Burlington Vermont

Dear Betsy:

This jurisdictional opinion is written pursuant to your written request of August 7, 2014, regarding the applicability of Act 250 jurisdiction over the upgrade to the existing Burlington Bike Path in Burlington along Lake Champlain.

I have based my determinations on your August 7, 2014 submittal as well as our May 15, 2014 meeting. For the reasons set forth below, I have determined that an Act 250 permit amendment is not required for the proposed scope of work.

Facts

1. The Burlington Bike Path ("Bike Path") was originally constructed in the 1980s and 1990s. Today, the total Bike Path consists of an 8-mile stretch of paved path, with a total area of approximately 7.10 acres, located generally near the Lake Champlain waterfront of Burlington, Vermont. The southernmost point of the Bike Path is located at Queen City Park Road and the northernmost point is located at the mouth of the Winooski River.
2. The planned rehabilitation of the Bike Path grew out of the City's recently completed feasibility study of the Path, which examined the Path's past and present use, its conditions, and its contributions to the City. The City determined that a full rehabilitation is needed to maintain the Path in a usable condition; enhance the Path to both accommodate current levels of use and allow the Path to continue to draw visitors to the area; and upgrade areas of the Path, where feasible, to meet current standards/best practices for bicycle and pedestrian paths. In the near future, the City plans to perform rehabilitation work from approximately the Perkins Pier area to North Beach during the fall 2014 and the spring and fall 2015 construction seasons.
3. Bike Path rehabilitation will include three main categories of construction activity: maintenance of the existing Path; Path widening; and new construction. Path maintenance will consist of work in the existing footprint of the Bike Path, and will involve activities such as new pavement markings, surface paving, and drainage enhancements where needed. Path widening will occur in areas where the existing path is narrower than current bicycle and pedestrian path guidelines and best practices recommend. Widening activities will consist of bringing the Bike Path to a width of eleven feet of paved surface with two-foot-wide gravel shoulders on either side of the paved surface. New Path construction will occur where there is a new alignment of the Bike Path, and thus the project will involve installation of new subgrade and surfaces matching the eleven-foot-wide paved surface and the two-foot-wide gravel shoulders.



4. The existing Bike Path crosses Waterfront Park which is under Act 250 jurisdiction, LUP #4C0863-4.
5. Work on the existing Bike Path footprint includes path maintenance which consists of a) worn and/or unsafe surface conditions; and/or b) subgrade deficiencies or failures that have resulted in damage to the paved surface and/or inhibited cross drainage under the Bike Path. Actions may include, paint markings, paving atop the existing surface; cold planing or pavement removal followed by paving; replacement of subgrade with suitable materials to a maximum depth of approximately 18" followed by paving; and drainage enhancements (culvert maintenance, replacement, or installation). The total area calculated for this work is 6.29 acres.
6. The total area for path widening or new alignment construction is 5.76 acres.
7. At all times of consideration, the City of Burlington has duly adopted Subdivision and Zoning Regulations and is thus considered a "10-acre Town" for the purposes of Act 250.

Issues

Does the proposed upgrade to the existing Bike Path need an Act 250 permit as Development (original jurisdiction) pursuant to 10 V.S.A. § 6001(3)(A)(v) or as a Material Change, pursuant to Act 250 Rule 2(C)(6)?

Analysis

Development (original jurisdiction)

A proposed project requires an Act 250 permit if it is either "development" or "subdivision" – 10 V.S.A. § 6081(a). No subdivision is proposed, so the question is whether the project constitutes "development." Development is defined, in part, as "The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws." - 10 V.S.A. § 6001(3)(A)(i).

However, for municipal or state projects, which the Bike Path upgrade is, the trigger is the "construction of improvements on a tract of land involving more than 10 acres...", pursuant to 10 V.S.A. § 6001(3)(A)(v). There is no dispute now the upgrade will disturb 12.05 acres which is more than 10 acres. However 6.29 acres of that work is considered normal or routine maintenance. Normal and routine maintenance does not count in the calculation for the trigger as a municipal project. "Routine repair and maintenance of a pre-existing facility does not constitute a change..." *Agency of Transportation, Declaratory Ruling #153 @ 4* (Vt. Env'tl. Bd. June 28, 1984). Therefore the construction of improvements is only 5.76 acres and the trigger for an Act 250 permit as a municipal project is not met.

Material Change (Amendment Jurisdiction)

We must also determine if the proposed project constitutes a Material Change (Act 250 Rule 2(C)(6)) to the jurisdictional parcels in the area. Material Change is defined as "any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §§ 6086(a)(1) through (a)(10)."

The Environmental Board adopted a two-prong test when applying Act 250 Rule 34(A) (material change to a permitted development): (a) whether alteration (physical change or change in use) has or will take place; and (b) whether alteration has a significant impact on any finding, conclusion, term or condition of the project's permit, and the alteration may affect one or more of the values Act 250 protects. *McDonald's Corporation, #1R0477-5-EB, Memorandum of Decision at 9-10* (Vt. Env'tl. Bd. May 3,

2000); *Hiddenwood Subdivision, Declaratory Ruling #378*, Findings of Fact, Conclusions of Law and Order at 9-10 (Vt. Env'tl. Bd. Jan. 12, 2000).

The Bike Path traverses Waterfront Park, which is subject to LUP #4C0863. The proposed relocation of the path is a material change, pursuant to Act 250 Rule 2(C)(6). This aspect of the Bike Path upgrade has been reviewed as part of LUP #4C0863-4 which was issued on July 15, 2014. No other parts of the proposed Bike Path upgrade cross properties subject to Act 250 jurisdiction.

Conclusions

I conclude that the proposed upgrade of the Burlington Bike Path does not trigger the requirement for an Act 250 permit as original jurisdiction for construction of improvements on a tract of land involving more than 10 acres for a municipal purpose.

The proposed changes to the Bike Path through Waterfront Park are a material change under LUP #4C0863. That work was reviewed and permitted under LUP #4C0863-4. No further amendment is needed for these changes.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., Drawer 20, Montpelier, VT, 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

If you have any questions regarding this jurisdictional determination, please call me at (802) 879-5658.

Sincerely,

/s/Peter E. Keibel

Peter E. Keibel

District #4 Coordinator

cc: Jesse Bridges, Burlington Parks and Recreation
Lou Borie, Executive Director, NRB
Melanie Kehne, Esq., Associate Counsel, NRB

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CERTIFICATE OF SERVICE

I hereby certify on this 19th day of August, 2014 a copy of the foregoing Jurisdictional Opinion #4-236 to Elizabeth Caitlin, Esq., Dunkiel Saunders Elliott Raubvogel and Hand, re Burlington Bike Path Upgrade, Burlington, VT, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to nrb-act250essex@state.vt.us

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FOR YOUR INFORMATION

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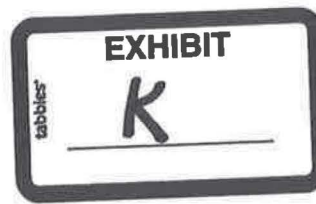
Dated at Essex Junction, Vermont, this 19th day of August, 2014.

Christine A. Commo

Natural Resources Board Technician
879-5614
christine.commo@state.vt.us

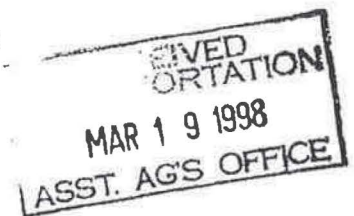
Exhibit K

***VT Environmental Board Beebe Spur Rails to
Trails Project Declaratory Ruling Request
#338, Findings of Fact, Conclusions of Law,
and Dismissal Order, March 19, 1998***



03/19/1998

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092



RE: Beebe Spur Rails to Trails Project
Declaratory Ruling Request #338

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISMISSAL ORDER

On February 25, 1998, the Vermont Environmental Board ("Board") convened deliberations on a series of preliminary issues outlined in Board Chair Marcy Harding's Status Conference Report and Order issued on January 26, 1998. As set forth in more detail below, the Board has concluded that the Beebe Spur Landowner's Association has failed to demonstrate that it has standing to bring its petition for declaratory ruling ("Petition"). Accordingly, the Board dismisses the Petition with prejudice.

I. BACKGROUND

On October 23, 1996, District #7 Environmental Commission Coordinator Charles J. Gallagher issued Jurisdictional Opinion #7-183 ("Opinion") in which he opined that jurisdiction under 10 V.S.A. §§ 6001-6092 ("Act 250") does not attach to the Beebe Spur Rails to Trails project ("Project") proposed by the Derby Recreational Committee on land owned by the Agency of Transportation ("AOT") in Derby, VT. Mr. Gallagher declined requests to reconsider the Opinion in a Response to Petition for Reconsideration issued November 27, 1996.

On December 26, 1996, the Beebe Spur Landowner's Association "for and on behalf of 31 abutters" ("Petitioner") filed the Petition with the Board appealing the determination made by the Opinion. Petitioner contends that there is Act 250 jurisdiction over the Project or, alternatively, that there is insufficient information upon which to base a jurisdictional opinion.

On January 15, 1997, Board staff issued a Notice of Petition for Declaratory Ruling and Prehearing Conference ("Notice") which, among other things, instructed nonstatutory parties wishing to participate in the proceeding to file a written petition for party status on or before January 28, 1997. The Notice was served by United States mail on all individuals and entities listed on its attached certificate of service and was published in the Newport Daily Express on January 18, 1997.

On January 28, 1997, then Environmental Board Chair John T. Ewing convened a prehearing conference with the following individuals and entities participating:

Petitioner, by Gordon T. Alexander, Arne Amalixsen, and
Duncan F. Kilmartin, Esq.,
AOT, by Scott A. Whitted, Esq., Assistant Attorney General
Lakemont Beach Association ("Lakemont"), by Attorney Kilmartin

RE: Beebe Spur Rails to Trails Project
Declaratory Ruling Request #338
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 2

Chester and Sharron Greenwood, pro se
Robert Orr, pro se (by telephone)
Lindyl Palin, pro se (by telephone)

At the prehearing conference, Attorney Kilmartin filed a Petition for Party Status on behalf of Petitioner, an Entry of Appearance and Request for Party Status on behalf of Lakemont, Appellants' Requests for Preliminary Ruling on Appellant Party Status on behalf of Petitioner and Lakemont, and other documents.

On January 29, 1997, Chair Ewing issued a Chair's Preliminary Ruling requiring AOT to respond to the preliminary issue of whether the Project was sufficiently specific for purposes of determining Act 250 jurisdiction.

On February 27, 1997, AOT filed a letter with the Board stating that its plans regarding the Project were not so "settled in intention and purpose that it can be called ready to commence." In re Agency of Administration, 141 Vt. 68, 82 (1982). AOT suggested that the Board dismiss the Petition without prejudice.

On March 7, 1997, Petitioner and Lakemont filed a letter requesting that the Board (i) vacate the Opinion, (ii) dismiss AOT's application for the Opinion, and (iii) require AOT to serve all adjoining property owners with a copy of all materials when it files an application for an Act 250 Permit or a jurisdictional opinion in the future.

On March 11, 1997, Chair Ewing convened a status conference by telephone with the following individuals and entities participating:

Petitioner and Lakemont, by Attorney Kilmartin
AOT, by Attorney Whitted and Curt McCormack

On April 1, 1997, Chair Ewing issued a Preliminary Ruling continuing the Petition for a period of six months because the Project was not yet ripe for jurisdictional analysis.

On October 1, 1997, AOT filed a Status Report concerning the Project.

On October 6, 1997, Chair Ewing issued an Order which is incorporated herein by reference.

On November 18, 1997, AOT filed plans and descriptions regarding the Project.

On December 2, 1997, Petitioner and Lakemont filed a Motion that the Board Schedule a Status Conference, the Declaratory Ruling Request Proceed, and the Board Take Other Action Authorized by Statute. Specifically, the motion requested that the Board (i) vacate the Opinion, (ii) dismiss the AOT's original application for the Opinion and its Request for a Final Determination dated September 20, 1996, or (iii) find that the Project is subject to Act 250 jurisdiction.

On December 17, 1997, Chair Ewing issued an Order scheduling a status conference on Friday, January 16, 1998.

On December 30, 1997, Petitioner and Lakemont filed a Motion for Modification of Procedural Order.

On January 1, 1998, Marcy Harding became the Board's Chair and assumed the responsibilities of Chair for this proceeding.

On January 7, 1998, AOT filed a Response to the Motion for Modification.

On January 8, 1998, Chair Harding issued an Order which is incorporated herein by reference.

On January 12, 1997, Petitioner and Lakemont filed a Motion requesting that Chair Harding reschedule the status conference. On January 13, 1998, Attorney Whitted verbally concurred with this request on behalf of AOT.

On January 13, 1998, Chair Harding issued an Order re-scheduling the status conference for January 21, 1998.

On January 14, 1998, Robert and Janet Orr filed a request for postponement of the January 16, 1998 status conference.

On January 21, 1998, Chair Harding convened a status conference in the above-referenced matter with the following organizations and individuals participating:

Petitioner, by Attorney Kilmartin, Arne and Trinket Amalixsen, and Ruth Lowenstein

AOT, by Attorney Whitted, Samuel Lewis, Chris Magnan, and Nick Marro

Lakemont, by Attorney Kilmartin

Toni-Jo Wikar, pro se (by telephone; joined status conference in progress)

Gordon Alexander, pro se (by telephone)

Robert Orr, pro se (by telephone)
Lindyl Palin, pro se (by telephone)
Northeastern Vermont Development Association, by Richard T. Dabiri

Also in attendance was Ed Rossi, a newspaper reporter.

On January 26, 1998, Chair Harding issued a Status Conference Report and Order ("Order"), which is incorporated herein by reference.

On February 10, 1998, in accordance with the terms of the Order, Petitioner filed a Contesting Statement and a Petition for Party Status ("Petitioner's Statement"); AOT filed a Response to Status Conference Report and Order ("AOT's Statement"); and Lakemont filed a Petition for Party Status and a Statement regarding the issues of pre-existing development and the identity of Lakemont ("Lakemont's Statement").

On February 17, 1998, AOT filed a Response to Petitioner's Statement and Lakemont's Statement ("AOT's Response").

On February 25, 1998 and March 18, 1998, the Board deliberated on the issues identified in the Order and addressed by Petitioner, Lakemont, and AOT in the memoranda filed February 10 and February 17, 1998.

II. ISSUES

The Order set forth a number of preliminary issues to be addressed by parties and individuals and entities asserting standing or party status. The required responses, as well as the lack of timely objections, have resolved many of these matters. As a result, the Board must now address the following issues:

1. Whether changes to the Project that is before the Board have made it so different from the proposal reviewed by the District Coordinator that the Board must dismiss the Petition and AOT must seek a new jurisdictional opinion.
2. If the answer to #1 above is in the negative, whether Petitioner has demonstrated that it has standing to file the Petition.
3. If the answer to #2 above is in the affirmative, whether Lakemont or any other non-statutory party has demonstrated party status to participate in the

proceeding.¹

III. FINDINGS OF FACT

1. On October 23, 1996, District #7 Environmental Commission Coordinator Charles J. Gallagher issued the Opinion in which he opined that Act 250 jurisdiction does not attach to the Project. Mr. Gallagher declined requests to reconsider the Opinion in a Response to Petition for Reconsideration issued November 27, 1996.
2. On December 26, 1996, Petitioner filed the Petition with the Board appealing the determination made by the Opinion.
3. Petitioner identifies itself as filing the Petition "for and on behalf of 31 abutters" ("31 Abutters")
4. The 31 Abutters own parcels of real property adjoining the Project site at non-contiguous points along the proposed trail.
5. Petitioner's Statement states that Petitioner has standing to file the Petition because the 31 Abutters are adjoining property owners and because the Project may affect the interests of the 31 Abutters under one or more of the following Act 250 criteria: Criteria 1 (undue water pollution), 1(A) (headwaters), 1(B) (waste disposal), 1(D) (flood plains), 1(E) (streams), 1(F) (shorelines), 1(G) (wetlands), 2

¹ There is one other preliminary issue left unresolved by the Statements filed in response to the Order. The Order stated that if Petitioner had standing to file the Petition, then the Board would address two substantive issues : whether the Project constituted "development" and whether the Project constituted a "substantial change" to a pre-existing development ("Issue #2"). In order to narrow the scope of the parties' evidence and arguments in connection with Issue #2, the Order instructed AOT, Petitioner, Lakemont, and any individual requesting party status to file a statement conceding or contesting the proposition that the rail line was a "pre-existing development." In the interest of efficiency and because no dispute was anticipated, the Order stated that no memorandum of law needed to be filed in support of the stated belief. In their respective Statements, however, both Petitioner and Lakemont asserted that the rail line was *not* a "pre-existing development." In light of today's ruling that Petitioner has failed to demonstrate standing, the Board does not reach the issue of "pre-existing development."

(insufficient water supply), 3 (unreasonable burden on existing water supply), 4 (soil erosion / reduction in capacity of land to hold water), 5 (traffic), 7 (unreasonable burden on municipal services), 8 (scenic and natural beauty / aesthetics), 9(A) (impact of growth), and 10 (town plan).

IV. CONCLUSIONS OF LAW

The Board may dismiss any matter before it, in whole or in part, at the request of any party or on its own motion for reasons provided by the Board rules, by statute, or by law. EBR 18(D). See also, e.g., Agency of Transportation (Bennington Bypass), Declaratory Ruling #349, Findings of Fact, Conclusions of Law, and Dismissal Order (Nov. 12, 1997); Re: Putney Paper Company, Inc., Declaratory Ruling #335, Findings of Fact, Conclusions of Law, and Order (May 29, 1997). The Board decides all matters before it in a declaratory ruling proceeding on a de novo basis.

A. Changes to Project

If changes to the Project have created a different project from that which was before the District Coordinator, then the Board would have no authority to review the Project. In that event, the Board would be required to dismiss this declaratory ruling proceeding and AOT would need to seek a jurisdictional opinion regarding the new proposal. In response to the Order, AOT filed its Statement detailing the changes made to the Project. No individual or entity that had requested standing or party status availed itself of the opportunity, set forth in the Order, to respond to AOT's Statement.

Upon review of AOT's Statement and the plans and description filed with the Board on November 18, 1997, the Board concludes that the Project's essential elements -- such as the width of the trail and shoulders -- remain the same as those elements in the proposal submitted to the District Coordinator. In fact, the most "substantial" changes are those which omit elements of the Project and thereby diminish the scope of the Project. For example, the current Project calls for the surface to be covered with crushed gravel rather than pavement, no snowmobiles will be allowed, and no privacy fencing and shrubs will be planted. Therefore, the Board concludes that the Project that is at issue in this proceeding is not substantially different from that which was presented to the District Coordinator. It therefore can proceed to determine whether Petitioner has demonstrated standing to file the Petition.

B. Petitioner's Standing

A district coordinator's jurisdictional opinion may be appealed to the Board by "the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties entitled to receive notice under [10 V.S.A. §] 6084, if jurisdiction were determined to exist." 10 V.S.A. § 6007(c). EBR 3(C)(3) states that a jurisdictional opinion may be appealed to the Board "by any person who qualifies as a party under Rule 14(A) or who may be affected by the outcome of the opinion." Because Petitioner is not the applicant, there are three ways in which it could attempt to demonstrate that it has standing to file the Petition. Petitioner could demonstrate (i) that it is a "statutory" party entitled to notice under § 6084, (ii) that it may be affected by the outcome of the opinion,² or (iii) that it qualifies as a party under EBR 14(A)(5). Putney Paper, *supra* at 6. Therefore, it is incumbent upon Petitioner to demonstrate that it has standing in order for this declaratory ruling request to proceed. Whether or not Petitioner has demonstrated standing is solely within the Board's discretion. 10 V.S.A. § 6007(c). *See also, e.g., Putney Paper*, *supra* at 7 and citations provided therein. The Board may dismiss a proceeding based on its determination that the petitioner lacks standing to file the action. Agency of Transportation, *supra*; Re: Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 3 (Aug. 14, 1997)[EB #669]; Putney Paper, *supra*; Re Chittenden Recycling Services, Interim Certification #CH954-WFP and Land Use Permit #4C0400-4-WFP, Memorandum of Decision at 5 (Aug. 5, 1993), *aff'd* 162 Vt. 84 (1994).

The Petition for Declaratory Ruling created significant confusion regarding the basis on which Petitioner claims standing to file the action. For example, the Petition is signed by Petitioner "for and on behalf of 31 abutters and statutory parties." Petition at 1 (emphasis supplied). In addition, the first sentence of the Petition implies, erroneously, that EBR 14(A)(5) parties are "statutory parties." Petitioner's subsequent pleadings, including its Petition for Party Status³ filed on January 28, 1997, increased the confusion

2

The standard by which the Board determines whether a person is "affected by the outcome" pursuant to § 6007(c) is identical to the standard by which it determines whether to grant party status to a person under EBR 14(B)(1). Re: Wesco, Inc. and Jacob & Harmke Verburg, Declaratory Ruling #304, Memorandum of Decision at 4-5 (June 30, 1995); Re: Hiddenwood Subdivision, Declaratory Ruling #324, Memorandum of Decision and Dismissal Order at 4 (Aug. 29, 1996).

3

An individual or entity seeking to initiate a declaratory ruling proceeding need not
(continued...)

of whether the Petitioner represents individuals who own the Project site, and who therefore are "parties entitled to notice under § 6084" (i.e. statutory parties), or whether they are adjoiners, who must demonstrate that their interests may be affected by the Project or that they would qualify as a party under Rule 14(A)(5). Petitioner's Petition for Party Status did not provide sufficient information on which to determine whether Petitioner has standing to initiate this declaratory ruling proceeding (nor, indeed, if party status had been at issue would there have been sufficient information on which to make a party status determination). Petitioner failed to clarify the basis on which it claims standing at any of the prehearing or status conferences. Accordingly, the Chair's Order instructed Petitioner to file a statement establishing its standing to file the Petition. In response to the Order, Petitioner filed Petitioner's Statement, in which it addressed the issue under the heading "Petition for Party Status."⁴

1. Entitled to Notice Under 10 V.S.A. § 6084

Several of Petitioner's filings imply that it (or some or all of the 31 Abutters) possesses an ownership interest in the Project site. As indicated above, these implications were a confusion of contradictions. As of the date on which the Chair issued the Order, Petitioner had failed to provide any information, written or verbal, on which the Board could determine whether there was any factual basis underlying Petitioner's claim of ownership. Indeed, Petitioner failed to provide even a clear recitation of precisely what it was attempting to assert.

In order to provide Petitioner an additional opportunity to establish standing as a "statutory party" entitled to notice under 10 V.S.A. § 6084, the Order instructed Petitioner

³(...continued)

seek *party status*. Rather, the question is whether the petitioner has *standing* to file the petition for declaratory ruling pursuant to 10 V.S.A. § 6007(c) and EBR 3(C)(3). Petitioner appears to have filed the Petition for Party Status in response to the Board's Notice issued on January 17, 1997, which instructed any nonstatutory party to file a written petition for party status on or before January 28, 1997, the date of the first prehearing conference in this matter.

4

See footnote #3, *supra*. The Board analyzes issues of party status and standing in a similar, but not identical, manner. *E.g.*, Putney Paper, *supra* at 5-11. Therefore, the Board will treat the Petition for Party Status contained within Petitioner's Statement as though it were the requested memorandum demonstrating that Petitioner has *standing* to file the Petition for Declaratory Ruling.

to demonstrate that it, as an entity, or that each of the 31 Abutters is an owner of the land, or a portion thereof, on which the Project will be situated. Petitioner's Statement declined to attempt this demonstration. Petitioner stated that "[f]or purposes of invoking jurisdiction, [Petitioner] will not attempt to qualify under 10 V.S.A. § 6084 as an owner of the land. [Petitioner] seek[s] qualification solely as adjoining owners who will be 'affected by the outcome' of the jurisdictional opinion." Petitioner's Statement at 1 n.1.

The Board has no basis on which it can conclude that Petitioner, or all or any of the 31 Abutters, is entitled to notice under 10 V.S.A. § 6084. Furthermore, Petitioner has formally asserted that it does not seek to demonstrate that it has standing on this basis. Accordingly, the Board concludes that neither Petitioner, as an entity, nor the 31 Abutters are statutory parties. Therefore, they do not have standing to file the Petition pursuant to the "entitled to notice" method of analysis.

2. "Affected by the Outcome" and "Direct Effect"

The Order also instructed the Petitioner to either (i) demonstrate that it will be "affected by the outcome" of the opinion because the Project may affect its interests under one or more of the 10 Act 250 criteria (EBR 14(B)(1))⁵ or (ii) demonstrate that it is comprised of individuals whose property adjoins the Project site and on whose interests the Project may have a direct effect under one or more of the 10 Act 250 criteria (EBR 14(A)(5)). Petitioner asserts that it, "for and on behalf of 31 adjoining property owners, [is] petition[ing] for party status pursuant to EBR 14(A)(5)." Petitioner's Statement at 1. AOT argues that Petitioner cannot claim standing under EBR 14(A)(5) because analysis under that rule "is limited to individual owners, not groups of owners." AOT's Response at 3. It is unnecessary for the Board to determine the merit of AOT's assertion. The demonstration to be made under the "affected by the outcome" and the "direct effect" tests is strikingly similar, except that a petitioner claiming standing under the latter analysis must also demonstrate ownership of adjoining property. Read broadly, once the adjoining status is demonstrated, petitioners under both tests must show that the Project may affect the *petitioner's* interests under one or more of the Act 250 criteria. Therefore, it is immaterial whether "a group of owners" may assert standing under the EBR 14(A)(5) "direct effect" test, because the Board can review the Petitioner's assertions of potential effect under the "affected by the outcome" (EBR 14(B)(1)) analysis.

In order to have standing, Petitioner must demonstrate how the Project may affect

its interests under the Act 250 criteria, not what effect the Project may have *in general*. E.g., Agency of Transportation, *supra* at 7; Putney Paper, *supra* at 8; and cases cited therein. Generalized statements that Petitioner is entitled to standing are not sufficient. Cf., Re: Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 7 (Aug. 21, 1995) [EB #627]; Re: Spring Brook Farm Foundation, Inc., Declaratory Ruling Request #290, Prehearing Conference Report and Order and Memorandum of Decision at 4 (Jan. 6, 1994). Similarly, [m]ere allegations, unsupported by sufficient detail, cannot sustain the burden of proof" to demonstrate a potential effect on Petitioner's interests. Putney Paper, *supra* at 11. Rather, it is incumbent upon the Petitioner to establish a "meaningful nexus" between the Project and an asserted injury to a specific interest. See, e.g., Agency of Transportation, *supra* at 7; Springfield Hospital, *supra* at 5-6.

Petitioner has claimed potential effect under 15 separate criteria and subcriteria of Act 250. Although the deficiencies of Petitioner's demonstration are nearly identical under each criteria, the Board will address each alleged potential effect separately:

a. Criterion 1 (undue water pollution)

Petitioner states that runoff from waste deposited on the Project site may affect the 31 Abutters who "obtain their water from driven wells, springs and Lake Memphremagog." Petitioner has not indicated whether all or any of the 31 Abutters' properties are up- or down-gradient from the Project site, the distance of the water supplies from the Project, or the direction in which the groundwater flows. See, e.g., Putney Paper, *supra* at 7. In addition, Petitioner provides no support for the contention that the Project will result in disposal of wastes of a quality or quantity that will negatively affect water. Petitioner has provided no support for its assertion that Project wastes will directly affect the 31 Abutters' water supply.

b. Criterion 1(A) (headwaters)

Petitioner states that the Project "may affect the quality of the ground and surface waters flowing through and upon wet lands and other lands not devoted to intensive development." See discussion at IV.B.2.a. above.

c. Criterion 1(B) (waste disposal)

Petitioner states that the Project "may involve the injection of waste materials and harmful and toxic substances into the ground water, adjacent wells and public waters." See discussion at IV.B.2.a. above. In addition, Petitioner describes the potential wastes

generated by the Project as "harmful and toxic substances" but provides no information regarding the identity of these substances or the likelihood that they will be "injected" into the groundwater, wells, and public waters. Because demonstrations of standing concern only the potential effect on the Petitioner, the Board cannot consider alleged potential effects on property not owned by the 31 Abutters, except to the extent that the effect on that property affects the 31 Abutters' interests.

d. Criterion 1(D) (flood plains)

Under Criterion 1(D), Petitioner simply states that "[w]hile it does not appear that the [Project] is in a flood plain, it is definitely within a flood way fringe." Petitioner has provided no argument or information that in any way suggests that the Project may cause a potential effect to the 31 Abutters under this subcriterion.

e. Criterion 1(E) (streams)

Petitioner states that several of the 31 Abutters "share a common border with a stream or water course with the [Project]," and that other adjoining owners live near the John's River. Petitioner alleges that the Project's effect on streams may endanger the "health, safety and welfare" of the 31 Abutters and the public at large. See discussion at IV.B.2.a. above. The Board does not consider the Project's potential effect on the public at large when analyzing whether Petitioner has demonstrated standing; it is solely concerned with the potential effect on Petitioner's interests under the Act 250 criteria. Petitioner also states that James and Billie Maas are riparian owners of a stream and bog in the vicinity of the Project. Not only does Petitioner fail to document this ownership, but it also has specifically declined to demonstrate that the 31 Abutters have an ownership interest in the Project site. Petitioner's Statement at 1 n.1. Therefore, Petitioner cannot raise the alleged riparian ownership for any purpose other than as support for its allegation that the Maas family owns adjoining property and may be affected by the Project.

f. Criterion 1(F) (shorelines)

Petitioner states that several of the 31 Abutters "own on the shoreline" and others, although "separated by the right-of-way, [] have legal access to the shorelines." Petitioner questions whether the Project "will stabilize the shore banks from erosion because of the anticipated use of the shoreline by users of the path and users of the lake or a combination of said users." Petitioner provides no argument that the Project may affect the 31 Abutters under this subcriterion. It fails to explain why the Project is any more likely to de-stabilize the shoreline than was the train which formerly ran along the Project

site or how any such de-stabilization might directly affect the interests of the 31 Abutters.

g. Criterion 1(G) (wetlands)

Petitioner states that several of the 31 Abutters "actually abut wetlands" and the Project goes through wetlands. See discussion at IV.B.2.a., c., e., and f. above.

h. Criterion 2 (insufficient water supply)

Petitioner states that the 31 Abutters may have insufficient potable water due to waste generated by the Project. Criterion 2 is solely concerned with whether a proposed project will have sufficient water for the project's needs. The Project does not make use of a water source. Criterion 2 is therefore not applicable in any way.

It is possible that Petitioner may be confusing Criterion 2 with Criterion 3, which addresses the "impact[] on the ability to meet demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring." Re: MBL Associates, #4C0948-EB(Altered) at 38 (May 2, 1995) [EB #610R]. As stated above, the Project will not use water. Accordingly, it will have no impact on the volume of water that will be available to the 31 Abutters. Furthermore, it is not appropriate to consider contamination of wells under this criterion. Id.

i. Criterion 3 (unreasonable burden on existing water supply)

Petitioner states that the 31 Abutters "may be affected by a determination whether a water supply is needed, and if needed, what will its affect be upon the current sources of water for the" 31 Abutters. The Project will not utilize an existing water supply. AOT will need to request a jurisdictional opinion if it determines in the future that such use is necessary. Should that occur, Petitioner will have the opportunity, at that time, to demonstrate that it has standing.

j. Criterion 4 (soil erosion / reduction in capacity of land to hold water)

Petitioner states that "several thousand feet of the [Project site] is [sic] elevated on either side [and s]everal thousand feet also border Lake Memphremagog and wetlands." As a result, Petitioner alleges that the Project may cause erosion or a reduction in the capacity of the land to hold water. Petitioner fails to explain why the Project is any more likely to de-stabilize the shoreline than was the train which formerly ran along the Project

site or how any such de-stabilization might directly affect the interests of the 31 Abutters.

k. Criterion 5 (traffic)

Petitioner states that the Project may cause unreasonable congestion and unsafe conditions because (i) the Project crosses public highways, (ii) the Project crosses several water courses, (iii) the Project may be used "on a daily basis by several hundred or several thousand people, without adequate parking and without adequate access from highways," (iv) "the use of adjacent waterways may cause both congestion and unsafe conditions by users of" the Project, and (v) "leaving the bike path in an area of a private crossing and going through a private driveway onto a public road to gain access to a public highway." Petitioner does not explain the basis for these allegations nor does it relate the alleged potential effects to its own interests or the interests of the 31 Abutters. Furthermore, as AOT points out, Petitioner does not acknowledge that, unlike trains, persons using a recreation trail do not have a right of way at highway intersections. AOT's Response at 7.

l. Criterion 7 (unreasonable burden on municipal services)

Petitioner states that the Project may place an unreasonable burden on the town to provide police services, water, sewage disposal, and garbage disposal. Petitioner provides absolutely no ingenuous explanation how the Project -- a recreation trail -- could possibly cause an effect on the 31 Abutters under this criteria.

m. Criterion 8 (scenic and natural beauty / aesthetics)

Petitioner states that the Project traverses wetlands "in which loons and herons nest" and streams that empty into Lake Memphremagog and it adjoins the Lake's shoreline. Petitioner contends that use of the Project and waste generated by users will unduly affect the natural beauty of the area. Petitioner fails to describe in what manner the Project will genuinely affect the beauty of the area or how likely it is that such an effect will occur. Petitioner presents no evidence that any or all of the 31 Abutters would be able to observe the effect from their residences. Furthermore, there is no other evidence that suggests how the 31 Abutters' specific interests will be affected by the Project under Criterion 8. See, e.g., Springfield Hospital, supra at 6.

n. Criterion 9(A) (impact of growth)

Petitioner states that the municipality, of which the 31 Abutters are taxpayers,

"may considerably increase the cost for highway access and maintenance (Derby may have to redesign or relocate its roads), police services and other factors relating to the public health, safety and welfare." Like Petitioner's contentions under Criteria 1(D), 3 and 7, Petitioner provides neither an argument nor evidence that the Project may have any possible effect under Criterion 9(A), much less that the Project would affect the interests of the 31 Abutters under that criterion.

o. Criterion 10 (town plan)

Petitioner states that the Project "is not authorized, nor is it in conformance with, the Derby Town Plan [and] the adjoiners will be directly affected." Petitioner does not attempt to state in what manner the Project fails to conform to the town plan nor does it explain how the interests of the 31 Abutters will be affected.

The Board is generally reluctant to deny standing to a petitioner who makes a demonstration that an effect is even remotely likely. The Board has provided Petitioner with repeated opportunities to demonstrate, both verbally and in writing, that it has standing to file this Petition. Petitioner has failed to provide a thoughtful, thorough explanation of the one or two criteria under which it might reasonably be able to demonstrate a potential effect. As a result, Petitioner has failed to make a single, genuine demonstration of the Project's potential effect on the interests of the 31 Abutters. Accordingly, the Board concludes that Petitioner has failed to demonstrate that it has standing under either the "affected by the outcome" or the "direct effect" methods of analysis.

C. Party Status of Lakemont

Because the Board has determined that Petitioner lacks standing to file the Petition, and the Petition must therefore be dismissed, the Board does not reach the question of whether Petitioner has demonstrated party status to participate in this appeal. The Board notes, however, that even if Petitioner had demonstrated standing, it is unlikely that the Board would have been able to grant Lakemont party status to participate in the proceeding because Lakemont employed an approach to proving party status that was similar to Petitioner's approach to its demonstration of standing.

D. Party Status of Individual Landowners

Because the Board has determined that Petitioner lacks standing to file the

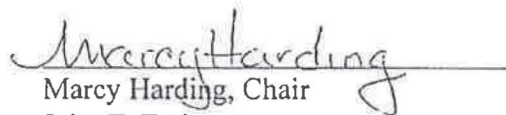
Petition, and the Petition must therefore be dismissed, the Board does not need to address the question of whether any individual landowner has demonstrated party status to participate in this appeal. The Board notes, however, that despite repeated opportunities to do so, no individual landowner filed a petition for party status. Therefore, even if Petitioner had demonstrated standing to file the Petition, no individual landowner would have been granted party status to participate as an individual in this proceeding.

V. ORDER

1. There has been no change made to the Project from that which was presented to the District Coordinator that would require the Board to dismiss the Petition.
2. Petitioner has not demonstrated that it is an owner of the Project site or any portion thereof. Petitioner lacks standing to file its Petition for Declaratory Ruling under the "entitled to notice" standard.
3. Petitioner failed to demonstrate that it has standing to file its Petition for Declaratory Ruling under the "affected by the outcome" standard.
4. Petitioner failed to demonstrate that it has standing to file its Petition for Declaratory Ruling under the "direct effect" standard.
5. The Petition is dismissed with prejudice pursuant to EBR 18(D).

Dated at Montpelier, Vermont this 19th day of March, 1998.

ENVIRONMENTAL BOARD



Marcy Harding, Chair
John T. Ewing
Arthur Gibb
George Holland
Samuel Lloyd
William Martinez
Rebecca M. Nawrath
Robert H. Opel

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1998, the foregoing Findings of Fact, Conclusions of Law, and Dismissal Order regarding Beebe Spur Rails to Trails Project, Declaratory Ruling Request #338, was sent first class mail, postage prepaid to the following:

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