

STATE OF VERMONT

DISTRICT #6 ENVIRONMENTAL COMMISSION

Re: JLD Properties of St. Albans, LLC and)
St. Albans Group)
)

Application #6F0583

**VERMONT NATURAL RESOURCES COUNCIL'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Vermont Natural Resources Council (VNRC), Northwest Citizens for Responsible Growth (NWCRG) and Marie Frey and Richard Hudak (collectively the "Coalition") respectfully submits the following Findings of Fact and Conclusions of Law in the above matter.

I. Criteria 1 – Water Pollution, 1B – Stormwater, 1(E) – Streams and 4 – Erosion Control

Introduction

The stormwater discharge from the proposed Wal-Mart is to a tributary of Stevens Brook. Stevens Brook does not meet the bare minimum Vermont Water Quality Standards (VWQS). There is no dispute about this fact. Stevens Brook is impaired (polluted) by pollutants that include sediment and nutrients. This means that Stevens Brook has no capacity to absorb or assimilate any more sediment and nutrients. The proposed Wal-Mart will discharge several tons of sediment and hundreds of pounds of nutrients annually to Stevens Brook. There is no dispute about these facts. There is also no dispute that polluted tributaries like Stevens Brook contribute to the phosphorous problems in Lake Champlain.

The Agency of Natural Resources (ANR) has determined that the cause of the excessive sediment and nutrients in Stevens Brook is agricultural runoff – not urban stormwater runoff.

This is because, currently, the area where the Wal-Mart is proposed includes a significant component of farmland. As a result of this determination, ANR does not consider the Wal-Mart stormwater discharge to be a discharge to a “stormwater impaired” water. Consequently, ANR has not applied the more stringent requirements in Vermont law that addresses stormwater discharges to “stormwater impaired” waters to the proposed Wal-Mart discharge. If ANR determines that land use is more urban than agricultural, it would likely consider the cause of sediment to be stormwater runoff rather than agricultural runoff. These more stringent legal requirements require that a project not increase stormwater loading to a “stormwater impaired” water by constructing on-site retrofits or pollution offsets to yield net zero new pollutant loading to the impaired water. 10 V.S.A. § 1264 (f).

The proposed Wal-Mart involves disturbing more than 50 acres, and converting to impervious surface (pavement) more than 40 acres of existing farmland. The proposed stormwater discharge from this development, by ANR’s own estimation, will result in 4.9 tons of sediment and more than 267 pounds of nutrients being added to Stevens Brook every year, with the proposed stormwater controls required by the ANR permit in place. These numbers do not include discharges of sediment and nutrients that occur during the construction phase of the project.

The Coalition believes that adding this amount of sediment and nutrients to a water body that is already polluted by sediment and nutrient violates the VWQS, the Clean Water Act (CWA), Act 250 criteria 1, 1(B), 1(E) and 4. We also believe that ANR has erred badly in how it has analyzed the proposed conversion of farmland to developed land that will contribute pollutants to the impaired water, Stevens Brook.

Perhaps the sediment and nutrients polluting this section of Stevens Brook today can be characterized as agricultural runoff. However, this characterization will no longer hold true if the Wal-Mart is built. If the Wal-Mart is developed, the area will undoubtedly become a retail center and commercial zone, not an agricultural area. Accordingly, developments that follow the proposed Wal-Mart would likely be considered by ANR as discharging stormwater to “stormwater impaired” waters. If this occurs, these subsequent developments will be required by ANR to meet the more stringent stormwater discharge requirements in Vermont law, while the proposed Wal-Mart does not.

Moreover, a segment of Stevens Brook that is directly upstream of the project is designated by ANR as impaired by stormwater runoff. The Coalition vigorously disagrees that ANR can draw a bright line in a stream to say that on one side of the line the sediment and nutrient problems are the result of stormwater runoff, and on the other side of this imaginary line the sediment and nutrient problem is the result of agricultural runoff. The distinction, in addition to being irrational, is inconsequential because it does not matter where the sediment and nutrients are coming from if a stream is polluted and cannot assimilate any additional loads of sediment and nutrients.

Wal-Mart has argued that it meets the more stringent stormwater requirements in Vermont law because it will decrease the sediment and nutrient load coming from the existing farm by paving it. This argument is both wrong and dangerous. It is wrong because, as set forth below, neither state nor federal law allows a developer to claim credit for paving over water quality problems at farms. It is also wrong because acre for acre developed land creates more pollutant loading to streams, rivers lakes and ponds than farmland. It is dangerous because if Wal-Mart’s argument is adopted, it will create incentives to pave farms in order to address water quality

problems. Under Wal-Mart and ANR's view, no retrofit or offset is required to convert farmland that is adjacent to a sediment or nutrient impaired water. All that is required is that the developer pave over the farm that is causing the problem. In addition to being illegal, this is terrible policy. Simply put, Vermont does not need, and should not adopt, policies like this that put its already vulnerable farms at further risk.

Findings of Fact

1. The operational stormwater discharge from the proposed Wal-Mart will result in 4.9 tons of sediment, 222.2 pounds of nitrogen and 45 pounds of phosphorous being deposited in Stevens Brook annually. (Wal-Mart Exhibit AH-3).
2. Nitrogen and phosphorous are nutrients. (Coalition Cross Examination of Andrew Hoak).
3. The Applicant has obtained a stormwater permit for the operational phase of the project. The estimated sediment and nutrient loading assumes all the stormwater controls proposed by the Applicant and required in the ANR operational stormwater permit are in place. The permit has been appealed to the Environmental Court. (Coalition Cross Examination of Andrew Hoak).
4. The proposed Wal-Mart involves disturbing more than 50 acres and converting to impervious surface (paving) more than 40 acres of existing farmland. (Wal-Mart Exhibit AH-3).
5. There will also be a discharge of sediment and nutrients during the construction phase of the project when more than 50 acres of on-site earth disturbance occurs. Construction sites contribute many times more sediment and nutrients than developed areas, even with erosion prevention and sediment control measures in place at the construction site. (VNRC Exhibit #20).

6. The Applicant's erosion control plan is flawed and will not be effective in mitigating the discharge of sediment and nutrients, in particular during wet weather events when the project is under construction. (VNRC Exhibit #20).
7. The Applicant is required to obtain a construction stormwater permit from ANR to address discharges from the construction phase of the project. This permit has not been issued by ANR. (Coalition Cross Examination of Andrew Hoak).
8. The CWA requires that every state adopt water quality standards that must be met to ensure that designated uses are maintained. These designated uses are sometimes referred to as the "fishable/swimmable" goals of the CWA. In other words, all waters of the United States must be healthy enough to support fishing and swimming or wading, among other things. (VNRC Exhibit #20).
9. The CWA also requires that each state evaluate its waters every two years to determine if they meet these minimum water quality standards. The list of waters that do not meet the water quality standards is known as the 303(d) list of impaired waters because this requirement comes from section 303(d) of the CWA. (VNRC Exhibit #20).
10. Stevens Brook is on the 303(d) list (VNRC Exhibit #1 and #20).
11. According to the 303(d) list, the segment of Stevens Brook that will receive the stormwater discharge from the proposed Wal-Mart does not meet minimum the Vermont Water Quality Standards (VWQS) - the fishable/swimmable standard - due to excessive amounts of sediment and nutrients in the stream caused by agricultural runoff. (VNRC Exhibit #4 and #20).

12. Directly upstream of this impaired reach is another impaired reach of Stevens Brook. This upstream reach is listed on the 303(d) list as impaired from stormwater runoff, erosion, sedimentation, and morphological instability. (VNRC Exhibit #4).
13. In reality, there is no bright line between the reach of Stevens Brook listed as impaired by sediment from stormwater and the reach that will receive the Wal-Mart stormwater discharge that is listed as impaired by sediment and nutrients as a result of agricultural runoff. (VNRC Exhibit #4).
14. Some of the sediment and nutrients discharged into Stevens Brook by the proposed Wal-Mart will make their way into Lake Champlain. (Coalition Cross Examination of Andrew Hoak).
15. Lake Champlain has been designated by ANR as impaired by phosphorous. (VNRC Exhibit #20).
16. Phosphorous is a nutrient. (VNRC Exhibit #20).
17. The Applicant's expert testified that the post development load of sediment and nutrients from the proposed Wal-Mart will be less than the sediment load currently coming off of the property. (Prefiled Testimony and Prefiled Rebuttal of Andrew Hoak).
18. The existing use of the land where the Wal-Mart is proposed is a farm – specifically a cornfield. (Coalition Cross Examination of Andrew Hoak).
19. Accordingly, the Applicant's testimony is that paving the existing farm will result in less loading of sediment and nutrients than leaving the farm as is. (Coalition Cross Examination of Andrew Hoak).
20. One acre of developed land - with roads, parking lots, office parks, and lawns - typically sends three times as much phosphorous to Lake Champlain as one acre of agricultural land. (VNRC Exhibit #4 – Citing the 2005 Lake Champlain Basin “State of the Lake” Report).

21. The sediment and nutrient loading currently coming of the farm has not been designated as a discharge by ANR. (VNRC Exhibit #20).
22. All farms must comply with the Accepted Agricultural Practices (AAP). (Coalition Cross Examination of Andrew Hoak).
23. The AAPs provide a presumption of compliance with the VWQS. (VNRC Exhibit #3).
24. If water quality violations are tied to farm pollution, any presumption of compliance with VWQS is eliminated, and more must be done to control farm pollution. (VNRC Exhibit #3).
25. It is unclear whether the AAPs are being implemented at the farm that is the site of the proposed Wal-Mart. (Coalition Cross Examination of Andrew Hoak).
26. The Applicant's model that demonstrates post construction sediment and nutrient loading will be less than the loading currently occurring at the farm assumes that the farm is implementing only one AAP – a filter strip. (VNRC Exhibit #20 and Coalition Cross Examination of Andrew Hoak).
27. There are more than one AAP. In fact the AAPs are a group of farmland management activities, which will conserve and protect natural resources. (VNRC Exhibit #20 and Coalition Cross Examination of Andrew Hoak).
28. The model that the Applicant utilized to quantify pre- and post-construction sediment and nutrient loads is incapable of factoring in more than one AAP. (VNRC Exhibit #20).
29. The Applicant did not consult with the Vermont Agency of Agriculture (AOA) or ANR to determine whether an agriculture discharge is occurring at the site and, if it is occurring, what measures are required to abate the discharge. (Coalition Cross Examination of Andrew Hoak).

30. The Applicant did not consider the existing sediment and nutrient loading conditions if a discharge is occurring at the farm and if that discharge was being addressed by ANR and AOA. (Coalition Cross Examination of Andrew Hoak).
31. The proposed Wal-Mart will likely increase the rate, type and level of growth in the area surrounding the project. (VNRC Exhibit #11 and #24).
32. The Applicant has underestimated the secondary growth that will be catalyzed by the proposed Wal-Mart in its fiscal and economic studies provided to the District Commission. (VNRC Exhibit #11 and #24).
33. The Applicant's analysis of pre- and post-construction sediment and nutrient loading does not include an analysis of the loading from secondary growth. (VNRC Exhibit #20 and Coalition Cross Examination of Andrew Hoak).
34. The Applicant's consultant who designed the proposed stormwater system is not an engineer, and he has never designed a stormwater system for a project as large as the proposed Wal-Mart. (Coalition Cross Examination of Andrew Hoak and District Commission Questions for Andrew Hoak).

Conclusions of Law

The Act 250 criteria related to water quality that are most at issue in this proceeding are criteria 1, 1(B), 1(E) and 4. To obtain a permit, Wal-Mart must prove that its project will not cause undue water pollution under criterion 1, that a project meets applicable regulations regarding waste disposal under criterion 1(B), that a project will maintain the natural condition of streams under criterion 1(E), and that a project will not result in unreasonable soil erosion under criterion 4. 10 V.S.A. § 6086(a)(1), (a)(1)(B), (a)(1)(E) and (a)(4).

The burden of proof to demonstrate that these criteria are met is on Wal-Mart. 10 V.S.A. § 6088. The burden of proof consists of the burden of producing the evidence and the burden of persuading the District Commission that a project meets the applicable Act 250 criteria. *Re: Vermont RSA Limited Partnership*, DR #441, FCO at 5 (10/20/05).

To prove that criterion 1 is met, an applicant must do more than prove that it has obtained applicable ANR permits related to water quality. *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988). In *Hawk Mountain* the Vermont Supreme Court recognized and affirmed the authority of District Commissions to look beyond whether a project complies with ANR regulations, and clarified that District Commissions may consider whether a project more broadly complies with the VWQS when evaluating a project under criterion 1 and its sub-criteria. *Id.*

There are several examples of District Commissions and the Environmental Board (Board) looking beyond ANR permit compliance when evaluating the impact of a project on water quality.¹ Perhaps the best and most relevant example to the project at hand is in the Board's *Stratton Master Plan* decision. *Re: Stratton Corporation Master Plan Application*, #2W0519-EB, FCO (5/8/01).

In *Stratton*, the Board upheld the District Commission decision that more than obtaining ANR stormwater permits was required to ensure that development at Stratton Mountain Resort did not to contribute to and exacerbate pollution in streams that did not meet minimum VWQS due to sedimentation. *Id.* Like in *Stratton*, in this case, the Applicant seeks to discharge pollutants to waters that have no assimilative capacity to absorb these the pollutants. *Id.* In

¹ See also *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, FCO (Altered) at 13 (7/20/00); *Re: Unifirst Corporation and Williamstown School District*, #5R0072-2-EB, MOD at 3 (9/16/98); and *Mark and Pauline Kiesel*, #5W1270-EB (8/7/98), rev'd on other grounds, *In re Kiesel*, 172 Vt. 124 (2000); and the District Commission decisions in *Unified Buddhist Church* and *Okemo Mountain Inc.*, Application #2S0351-30 (3/9/00).

Stratton the issue was the discharge of sediment contained in stormwater to sediment impaired streams. *Id.* In this case the issue is the discharge of sediment and nutrients to a water body that is impaired for sediment and nutrients. Consistent with *Stratton*, the Commission finds that the Applicant in this case must do more than prove it has obtained ANR stormwater permits to comply with criterion 1 given its proposal to increase pollutant loading to an impaired water, Stevens Brook.

The Commission's decision is driven by the clear provisions in state and federal law that prohibit the discharge of pollutants that cause and contribute to existing violations of VWQS. For example, in *Stratton*, the Commission based its positive findings under criterion 1 on requirements that the applicant ensure that new development that is contributing sediment to sediment impaired waters be addressed to assure compliance with the VWQS in order to obtain Act 250 approval for individual projects. *Id.* at 23. More specifically, in *Re: Hannaford Brothers. Co. and Lowes Home Centers, Inc.*, the Water Resources Board held that:

Vermont law prohibits a new or increased discharge of measurable and detectable pollutants of concern into impaired waters for which there is not an adequate wasteload allocation. Permits can be issued for new or increased discharges of pollutants of concern into impaired waters if a wasteload allocation shows that the assimilative capacity of the receiving waters can accommodate the discharge and if other dischargers into that segment are subject to compliance schedules. In the absence of a wasteload allocation, discharges into impaired waters may be permitted under Vermont law only if the proposed discharge will not increase the chemical, physical, or biological load of pollutants for which the receiving waters are impaired.

Re: Hannaford Brothers. Co. and Lowes Home Centers, Inc., Docket No. WQ-01-01, MOD (6/29/01). Because no wasteload allocation of nutrients or sediment has been adopted for Stevens Brook, Wal-Mart's proposed new and increased discharge of sediment and nutrients violates the WRB ruling in *Hannaford* and the VWQS. *Id.* (See discussion in *Hannaford* regarding the VWQS prohibiting new and increased discharges of waste to impaired waters). In

addition, the CWA regulations preclude new discharges to waters that do not comply with state water quality standards. 40 CFR 122.4(i).

In light of these prohibitions against causing and contributing to existing violations of the VWQS, the Commission is perplexed as to why ANR has not applied the more stringent discharge requirements in Vermont law for stormwater discharges to stormwater impaired waters in order to ensure that the proposed Wal-Mart does not add sediment and nutrients to Stevens Brook. See 10 V.S.A. § 1264(f). The Commission also notes the irrationality of ANR's decision not to apply the more stringent stormwater standards in 10 V.S.A. § 1264(f) to the Wal-Mart project. The Commission agrees with the Coalition that if Wal-Mart is built as proposed the area in question would likely no longer be considered agricultural. It makes no sense to the District Commission that future applicants will likely be required by ANR to prove that it will not increase their loading of sediment and nutrients to Stevens Brook but Wal-Mart is allowed to discharge these pollutants without having to offset the impact to an impaired water.

The Commission also fails to understand how ANR can require applicants for stormwater permits upstream of the discharge to offset their impact, but Wal-Mart is not required to do so. Where does ANR draw the line where stormwater offsets must be obtained? One hundred feet from the proposed Wal-Mart? Ten feet? In light of the fact that streams and pollutants are fluid, such distinctions seem illogical.

The Applicant has argued that despite the fact it will discharge tons of sediment and hundreds of pounds of nutrients to a sediment and nutrient impaired water, it will actually improve the existing water quality of Stevens Brook. The Applicant's argument hinges on the Commission accepting that developing perhaps the largest free standing retail store in Vermont with over 40 acres of impervious surface will be better for the water quality of Stevens Brook

and Lake Champlain than a working Vermont farm. The Commission cannot accept this argument.

If the Applicant is correct, and the existing farm is discharging more sediment and nutrients than the proposed Wal-Mart would, then there must be serious water quality problems at the farm. As the Coalition points out, all farms must comply with the Vermont AAPs. The AAPs provide a presumption of compliance with the VWQS. However, if the farm is contributing as much pollutants to Stevens Brook as the Applicant claims, either the farm is not applying all the AAPs or the presumption of compliance with the VWQS provided by the AAPs is rebutted.

In addition, the Commission finds that if the Applicant is correct about the pollution-loading coming from the farm, the farm may be discharging sediment and nutrients, as the term discharge is defined in the CWA, to Stevens Brook. There is no testimony in the record from ANR or AOA regarding whether a discharge is occurring at the farm and, if so, what actions must be taken to abate the discharge. Without this information, the Commission cannot accept the Applicant's proposition that post-construction discharges of sediment and nutrients will be less than pre-construction discharges from the farm. It is simply impossible to determine what pre-construction discharges should be without knowing what water quality laws are and are not being followed currently by the farm. Accordingly, the Commission rejects the Applicant's argument that post-construction discharges will be less than pre-construction discharges from the farm.

In rendering its decision, the Commission rejects any presumption of compliance with criterion 1(B) provided by Environmental Board Rule (EBR) Rule 19. First, as discussed above, any presumption of compliance only addresses criterion 1(B) and not criterion 1. The Commission has an independent authority and obligation to review the broad water quality

impacts of a project under criterion 1, regardless of any ANR permitted submitted by an applicant to meet criterion 1(B).

Second, the Environmental Board has held that unless a stormwater system results in or substantially increases the risk of undue water pollution, the presumption provided by an operational stormwater permit is not rebutted. *Re: John J. Flynn and Keystone Development Corp. #4C0790-2-EB, FCO at 19 (5/4/04)*. The Commission concludes that by discharging significant amounts of sediment and nutrients to a sediment and nutrient impaired water, the proposed project “substantially increases the risk of undue water pollution.” *Id.* Accordingly, the Commission concludes that any presumption of compliance with criterion 1(B) – stormwater, provided by the operational stormwater permit is rebutted.

The Commission notes that the Applicant has not yet obtained a construction stormwater permit from ANR for the proposed Wal-Mart. Accordingly, the construction stormwater permit does not serve as a presumption of compliance with criterion 1(B). Moreover, the Commission finds that additional discharges of sediment and nutrients to Stevens Brook during the construction phase of the project will exacerbate the undue water pollution caused by the proposed Wal-Mart.

The Commission also notes that it recognizes the link between discharges to tributaries like Stevens Brook and the pollution problems in Lake Champlain. Until the impacts of significant discharges like the one proposed by the Applicant in this case can be offset, it will be virtually impossible to realize the goal of restoring water quality in Lake Champlain.

The Commission also finds that the undue water pollution that the project will cause violates criteria 1(E) and 4. The natural condition of the stream will not be maintained with the significant addition of sediment and nutrients to Stevens Brook. Moreover, the construction

discharges from such a large site to Stevens Brook will result in unreasonable erosion under criterion 4. This is especially true in light of the flaws in the erosion control plan pointed out by Kim Greenwood, the Coalition's water quality witness and former erosion control expert for ANR.

In sum, for all the reasons set forth above, the Commission finds that the project does not meet Act 250 criteria 1, 1(B), 1(E) and 4.

II. Criteria 5 - Traffic, 9(K) - Public Investments in Highways and 1 - Air Pollution

Introduction

The proposed project will contribute a significant amount of traffic to roadways that are already congested and have an unacceptable level of service. The Applicant's traffic study is flawed in that it does not account for queuing - the cumulative effect of traffic backing up at intersections along Route 7. The true impacts under criteria 5 and 9(K) cannot be assessed or addressed until the Applicant factors the queuing impacts of the project into its analysis.

Findings of Fact

1. Any Wal-Mart store is a huge traffic generator. The proposed Wal-Mart under review by the District Commission is one of the largest Wal-Mart prototypes. While the traffic engineers who testified in this proceeding have disagreed about exactly how much traffic it will add and precisely where, the minimum projection is that the proposed Wal-Mart by itself will increase peak hour trips by 778 trips or about 91%. (CA Exhibit #11).
2. The Applicant's traffic analysis is based on trips generated by the proposed Wal-Mart and the 120,000 sq. ft. build-out of the so-called Planned Unit Development (PUD). (Exhibit K to the Act 250 Permit Application).

3. The Applicant's own fiscal and economic impact analysis indicates that the area where secondary growth generated by the proposed Wal-Mart will occur is in the build-out of the PUD. (See Transparencies on Page 87 of Exhibit M to the Act 250 Permit Application).
4. The proposed Wal-Mart will likely increase the rate, type and level of growth in the area surrounding the project. (VNRC Exhibit #11 and #24).
5. The Applicant has underestimated the secondary growth that will be catalyzed by the proposed Wal-Mart in its fiscal and economic studies provided to the District Commission. (VNRC Exhibit #11 and #24).
6. If Wal-Mart's fiscal and economic experts are wrong, and the secondary growth generated by the proposed Wal-Mart includes at least the 120,000 sq. ft. build-out of the PUD, the Applicant's traffic study would not have accurately assessed the traffic impacts of the project, and it would not be a conservative estimate as the Applicant claims. (Coalition Cross Examination of Roger Dickinson).
7. The Applicant's traffic expert testified that the project engineer revised his estimates to project 90,000 sq. ft. of potential build-out for the PUD, not a 120,000 sq. ft. (June 9, 2006 Recess Memo Testimony of Roger Dickinson).
8. The Applicant's traffic expert testified that he is not aware of any legal requirement that would limit the build-out of the PUD to only 90,000 sq. ft. (Coalition Cross Examination of Roger Dickinson).
9. The traffic study submitted by the Applicant's consultant, Lamoureux & Dickinson (L&D), has several major deficiencies that significantly affect the conclusions as to whether the project will result in unreasonable traffic congestion. These deficiencies include both errors in their technical analyses, and misleading reporting of the results of their analyses. When the

errors are corrected, the revised analysis indicates severe traffic congestion and safety problems on US Route 7, Vermont Route 207, and the I-89 Exit 20 interchange will result from the project. (VNRC Exhibit #5).

10. L&D's reporting of their results is highly biased in a way to make the overall effect of the project appear favorable. This is due to their assumption that no road improvements in the entire affected area will occur unless the project is constructed. Accordingly the level of service estimates provided by the Applicant are inaccurate. (VNRC Exhibit #5).
11. The traffic analysis procedure used by L&D, which relies on the Highway Capacity Manual (HCM) is not appropriate for the US 7/Vt 207 corridor, which consists of a complex series of closely spaced, coordinated traffic signals. L&D used a methodology that analyzes each intersection in isolation, assuming that there is no interference from nearby signals. In fact, with such closely spaced signals and high traffic volumes, there will often be backing up, or queuing of vehicles from the next intersection impeding traffic flow. This effect will greatly affect the level of congestion and delay experienced by motorists at these signalized intersections, and is not considered in the L&D analysis. (VNRC Exhibit #5).
12. The Applicant's analysis used "Synchro" software, which is among the most widely used traffic analysis software tools. It can be used to develop coordinated signal timing plans, however, it does not address the potential of traffic backing up into nearby intersections, or any type of interference between signalized intersections. (VNRC Exhibit #7).
13. A recent publication by the Federal Highway Administration (FHWA) states: *"For many applications, HCM is the most widely used and accepted traffic analysis technique in the United States. The HCM procedures are good for analyzing the performance of isolated facilities with relatively moderate congestion problems. These procedures are quick and*

reliable for predicting whether a facility will be operating above or below capacity, and they have been well tested through significant field-validation efforts. However, the HCM procedures are generally limited in their ability to evaluate system effects. Most of the HCM methods and models assume that the operation of one intersection or road segment is not adversely affected by conditions on the adjacent roadway. Long queues at one location that interfere with another location would violate this assumption. The HCM procedures are of limited value in analyzing queues and the effects of the queues. There are also several gaps in the HCM procedures. HCM is a constantly evolving and expanding set of analytical tools and, consequently, there are still many real-world situations for which HCM does not yet have a recommended analytical procedure. The following list identifies some of these gaps:

- Multi-lane or two-lane rural roads where traffic signals or stop signs significantly impact capacity and/or operations.*
- Climbing lanes for trucks.*
- Short through-lane is added or dropped at a signal.*
- Two-way left-turn lanes.*
- Roundabouts of more than a single lane.*
- Tight diamond interchanges.” (VNRC Exhibit #7).*

14. The US 7/VT 207 corridor in the area of the project has several of the specific features that are cited by FHWA as “gaps” that are inadequately treated by HCM methods: Traffic signals along US 7 significantly affect capacity. The proposed improvements by JLD at the Price Chopper/Franklin Park intersection include a short additional through-traffic lane, which ends just south of the intersection, and will greatly reduce efficient lane utilization, and therefore capacity, at the signalized intersection. The I-89 Exit 20 interchange is a tight diamond, and as proposed, will have two closely spaced signals with great potential for queuing interference. (VNRC Exhibit #7).

15. Traffic simulation is the leading tool to analyze the types of effects described above. The Coalition's expert conducted an analysis of the US 7/VT 207 corridor system to assess the potential of these effects using Sim Traffic software, which is the most widely used traffic simulation program in the United States. Sim Traffic is a companion software program to Synchro, which was used by the applicant to conduct the HCM analysis, and allows for seamless transition between the two analysis methods. (VNRC Exhibit #7).
16. The Sim Traffic Analysis depicts a level of service if the Wal-Mart and the PUD is developed in 2016 that goes from B to F at the Highgate Commons/Route 7 intersection, C to E at the Franklin Park/Route 7 intersection and C to E at the Route 7/Route 105 Approach. (VNRC Exhibit #7).
17. Traffic experts, Michael Oman and Thomas Errico testified that given the nature of the Route 7 corridor the HCM/Synchro analysis utilized by the Applicant is inadequate to examine the impacts of traffic queuing that will be caused by the project. These experts agreed with traffic expert Lucy Gibson that a Sim Traffic analysis must be conducted based on several scenarios to understand and address the traffic impacts of the proposed project. (Coalition Cross Examination of Mr. Oman and Mr. Errico).
18. The L&D study recognizes that after the Construction of Wal-Mart and the Wal-Mart PUD, several intersections will have a level of service D. (Exhibit K to the Act 250 Permit Application).
19. The traffic impact assessment submitted by the Applicant focused almost exclusively on signalized intersections that would be affected, and not on unsignalized intersections. While the applicant's traffic distribution projections show a significant increase in traffic volumes on US 7 due to the development, no analysis is provided on the impact of this increase on the

ability of traffic to enter US 7 from unsignalized side streets and intersections (including businesses with driveways/parking areas directly off Route 7). Preliminary estimates are that such impacts may be severe. (VNRC Exhibit #7).

20. The Applicant's traffic study assumes that 50% of the total site-generated traffic arrives from US 7 south from VT 207. This assumption is particularly dubious when considering the high levels of traffic congestion on the two-lane portion of US 7 south of the Franklin Park. Congestion on this portion will be so severe that it is highly likely that many Wal-Mart shoppers will come to Wal-Mart from the I-89 exit 20 northbound instead of US 7, even if they are coming from Saint Albans City area. In addition, many shoppers will arrive from points south, where many Saint Albans residents work. (VNRC Exhibit #7).
21. If the trip distribution is altered based on the Applicant's own economic impact assessment, a continuous, extensive back-up on the I-89 Exit 20 northbound exit ramp is depicted. The interchange area experiences extreme delays because, even though the signal timings are optimized for coordination, they still cannot accommodate the volumes. This creates a highly unsafe situation, similar to the current situation at I-89 Exit 12 in Williston, where long queues extend into the high-speed portions of the interstate. (VNRC Exhibit #7).
22. Another location of continued concern is the intersection of Seymour Farm Rd (Route 105 Approach) with US 7. The volumes on US 7 are so close to the total capacity of the roadway that any interruption, such as the proposed signal at Route 105, creates severe congestion. (VNRC Exhibit #7).
23. The additional traffic from the Wal-Mart has a significant adverse effect on air pollutant emissions, as it will dramatically increase traffic congestion, delays, stopping, and idling time. This will have a pronounced, negative effect on air pollution levels. Table 6 below

shows other related measure of performance, comparing the build and no build scenarios. (VNRC Exhibit #7).

Conclusions of Law

Under Criterion 5, the burden of proof is on a party opposing an application, but an applicant has the burden of producing sufficient evidence for the Commission to make positive findings. 10 V.S.A. § 6088; and *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), FCO (11/4/05). In addition, 10 V.S.A. § 6086(a)(9)(K) requires that before issuing a permit, the Commission must find that the proposed project will not “materially jeopardize or interfere with the function, efficiency, or safety of, or the public’s use or enjoyment of or access to,” any public facilities, services or lands. *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, FCO (12/23/94). Criterion 9(K) states that such facilities or lands include highways and the Board has held that traffic impacts may be considered under criterion 9(K) and that an application may be denied for traffic impacts under criterion 9(K) if they rise to the level of “material jeopardy or interference.” *Id* at 56. The Applicant has the burden of proof under criterion 9(K). 10 V.S.A. § 6088(b).

Based on the evidence in the record, the Commission concludes that the Applicant has failed to meet its burden of production under criterion 5 and its burden of proof and production under criterion 9(K). There is no dispute that existing traffic problems exist along the Route 7 corridor in the vicinity of the project. The only dispute has been the extent of these problems and the level of impact that the proposed project will have on these existing adverse traffic conditions.

The stakes are high. An approximately 160,000 sq. ft. Wal-Mart store, by any account, is a tremendous traffic generator. The Commission is aware of the traffic problems in the Tafts Corners Williston area that were created by the development of big box stores and is very

concerned about perpetuating those types of problems in this case. Accordingly, it is imperative that information that the Commission bases its traffic findings on be accurate, thorough and as reliable as possible.

With that said, the Commission is persuaded that there are still significant flaws in the Applicant's traffic study. The biggest flaw in the Commission's view is the Applicant's failure to analyze the impacts of traffic queuing. Until and unless a thorough analysis of traffic queuing is completed, the Commission cannot conclude that there is accurate, thorough and reliable information upon which to base positive findings under criterion 5 and 9(K).

The Commission also notes its concern about the discrepancies in the amount of I-89 exit 20 traffic that will be generated by the project, and the potential impact on the I-89/Route 7 intersection if more people use I-89 exit 20 to access the proposed Wal-Mart. Given the difficulty in rectifying traffic problems associated with the over use of interstate exits (the Commission again notes the problems that have been experienced at exit 12 in Williston at Tafts Corners) it is vital to accurately assess the traffic impacts at I-89 exit 20 and address them. The record in this case does not allow the Commission to conclude that the I-89 exit 20 traffic issues have been addressed by the Applicant.

The L&D report itself recognizes that several intersections will be level of service (LOS) D if the Wal-Mart is constructed in 2006 and the Wal-Mart PUD is constructed in 2016. Other traffic experts have projected LOS F and E at several intersections when the effects of traffic queuing are factored into the traffic analysis. The Board has held that LOS C is generally inconsistent with criterion 5 at intersections that are not in compact, urban areas. *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, FCO (9/8/05); *In Re Wal-Mart Stores, Inc.*, 167 Vt. 75 (1997). In 1994, with regard to the St. Albans Wal-Mart application, the Board rejected Wal-

Mart's contention that LOS D was acceptable within the area of the proposed project stating that the area of the project "is not an urban area in the manner of downtown Burlington or St. Albans City." *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, FCO at 56 (12/23/94). The Board further held that in the area surrounding the project "commercial growth is planned to be spread out along the highways. In such an area, LOS C should be the standard. To rule otherwise would be to encourage the spread of urban congestion levels along the highways of rural Vermont." *Id* at 56-57. Consistent with the above precedent, the Commission finds that the LOS projected by the traffic experts will create unreasonable congestion under criterion 5 and materially jeopardize or interfere with the function, efficiency and safety of the highways in the vicinity of the project, and the public's ability to use and enjoy these highways under criterion 9(K).

Throughout the proceeding, the parties have disagreed about whether the appropriate measure of traffic should be based on traffic from the Wal-Mart alone or traffic from Wal-Mart and the so-called PUD. The Board in the 1994 Wal-Mart decision found that the proposed Wal-Mart will generate secondary growth. *Id* at 18-19. While the experts have disagreed in this proceeding about the location and extent of secondary growth, there is no dispute that some secondary growth will be generated by the project, consistent with the Board's 1994 decision. Moreover, even the Applicant's economic experts admit that the area of the so-called PUD is where secondary growth could occur.

The Commission concludes that the credible evidence indicates that the secondary growth that will be generated by the Wal-Mart t, at a minimum, will encompass 120,000 sq. ft. of development. Accordingly, the Applicant's traffic study that factors in traffic from the Wal-Mart and 120,000 sq. ft. of commercial development in the PUD is not conservative as the Applicant

claims. It is at best the baseline amount of traffic that will be generated by the project (Wal-Mart plus the secondary growth that Wal-Mart will generate) for determining traffic impacts and any credible LOS calculation.

Finally, the Commission concludes that the congestion from the project will increase air pollution. The Applicant has submitted no evidence to address the impacts of the traffic congestion air pollution. Accordingly, the project does not meet the requirements of criterion 1, air pollution. 10 V.S.A. § 6086(a)(1).

III. Criteria 6, 7, 9(A), 9(H) and 9(K) – Growth Criteria

Introduction

The Applicant's fiscal and economic impact study does not adequately address the impact of the proposed project under criteria 6, 7, 9(A), 9(H) and 9(K). The Applicant has underestimated the secondary growth that will be generated by the project. In addition, the Applicant cannot clearly explain how they derived the supply and demand estimates for Wal-Mart products in Franklin County that is the basis for their conclusion that the project will not have an undue adverse economic impact. The credible evidence submitted in the proceeding indicates that the proposed Wal-Mart will have an undue adverse effect on the significant public investment that has been made in St. Albans City. The Applicant has submitted no evidence in this proceeding to address the impact of the proposed Wal-Mart on the public investment in St. Albans City under criterion 9(K). For all of the reasons, the application does not meet criteria 6, 7, 9(A), 9(H) and 9(K).

Findings of Fact

1. The Applicant has proposed to construct a 160,000 sq. ft. Wal-Mart store north of St. Albans City adjacent to I-89 exit 20. (Exhibit M to the Act 250 permit application).

2. The potential impacts of Wal-Mart on existing retail establishments, local and regional wages, secondary growth patterns, and municipal and state budgets have been well studied and documented. (VNRC Exhibit #11).
3. In 1994, the Environmental Board found that a proposed 100,000 sq. ft. Wal-Mart at the exact same site as the 160,000 sq. ft. Wal-Mart that is the subject of this proceeding did not meet criteria 6, 7, 9(A), and 9(H), the fiscal and economic impact criteria of Act 250. (Exhibit M to the Act 250 permit application).
4. The Applicant prepared an “Analysis of the Economic and Fiscal Impacts of Wal-Mart Stores – Saint Albans, Vermont” as part of its Act 250 application to address the impacts of the proposed Wal-Mart on criteria 6,7, 9(A) and 9(H). (Exhibit M to the Act 250 permit application).
5. A University of Vermont (UVM) Gund Institute/Center for Rural Studies Report (UVM Report) and the City of St. Albans economic expert testified that there are significant flaws in the Applicant’s economic analysis. (VNRC Exhibit #9, #11,#22, #24 and CSA Exhibit #'s 2,3,24 and 25).
6. Some of the most significant issues with the Applicant’s economic analysis are that a regional model, that includes the center of Chittenden County, was utilized to determine the economic impacts on the Town of St. Albans and the surrounding communities; the Primary Trade Area that was used to determine the demand for retail goods (where people who purchase goods from the proposed St. Albans Wal-Mart live) includes the Chittenden County Towns of Burlington, South Burlington, Winooski, Shelburne and Jericho; the sales per square foot estimate (that is important in determining the demand for Wal-Mart’s products) used by the Applicant is less than the national average of Wal-Mart sales per square foot (the

Applicant uses a figure of \$350 PSF while the Wal-Mart average is \$412 PSF); and the Applicant has underestimated the secondary growth that will be generated by the proposed Wal-Mart. (VNRC Exhibit #9, #11,#22, #24).

7. The projected Franklin County demand for the products that Wal-Mart sells is key to the Applicant's conclusion that the project will not have an undue adverse impact under criteria 6,7,9(A) and 9(H). The Applicant's basic theory is that if the retail demand for Wal-Mart's products exceeds the demand for such products in Franklin County, then there will be no adverse economic impact on the Franklin County Towns in the vicinity of the proposed Wal-Mart because Wal-Mart will not replace any existing retail stores; it will simply meet the excess demand. (Coalition Cross Examination of Larry Copp and Jeff Carr).
8. Because the Applicant found that retail demand exceeded retail supply in Franklin County with the proposed Wal-Mart sales factored in, the Applicant did not analyze the economic impacts of the proposed Wal-Mart because it assumed that there would be no impacts. (VNRC Exhibit #11 and Coalition Cross Examination of Larry Copp and Jeff Carr).
9. The UVM Report found that it is incorrect to equate excessive retail demand with no adverse economic impact from a large Wal-Mart retail store locating in a rural area outside of a downtown commercial area. (VNRC Exhibit #11)
10. The Applicant's experts were not able to adequately and clearly explain how they derived the retail demand estimates for Franklin County in their economic impact analysis. Several of the tables in the Applicant's economic impact analysis revealed conflicting information about the Franklin demand that did not add up when the tables were scrutinized. (VNRC Exhibit #22 and #24 and Coalition Cross Examination of Larry Copp and Jeff Carr).

11. For example, the per capita demand for products that Wal-Mart sells in Franklin County on Table 13 of the Applicant's economic analysis is \$6,750, while the per capita demand for such products is listed on Table 9 as \$4,740. In addition, if all the Franklin County towns demand for like products sold by Wal-Mart listed on Table 12 are added together, the demand is approximately 162,422,808 – almost half of the approximately 324,000,000 projected retail demand for Franklin County on Table 13. While Table 12 does include all Franklin County Towns, it includes all the Franklin County retail trade centers, and adding the demand from smaller Franklin County Towns would not resolve this discrepancy. (Coalition Cross Examination of Larry Copp and Jeff Carr, CSA Cross Examination of Professor Kolodinsky, Recess Memo Testimony of Larry Copp and Jeff Carr)
12. When the UVM Gund Institute and the Center for Rural Studies revised the Applicant's Table 13 using an adjusted Franklin County demand estimate, 15 out of 16 categories of retail goods are shown to be saturated, meaning that there will be no excess demand for most products sold by Wal-Mart. If Applicant's theory that if there is *excess demand* Wal-Mart will have *no* impact is correct, conversely the *lack of demand* demonstrated by the UVM table shows that Wal-Mart *will have* an adverse economic impact. (VNRC Exhibit #11)
13. The Applicant's economic impact analysis was extremely difficult to follow and understand. It was not clear, concise or transparent. (VNRC Exhibit #22 and #24 and District Commission Questioning of Professor Kolodinsky).
14. The goal of an economic impact study should be to clearly and transparently present the analysis and conclusion, not to create a convoluted report that even a professional economist cannot easily understand. (CSA Cross Examination of Professor Kolodinsky)

15. For a complex study such as the evaluation of the economic impacts of a proposed Wal-Mart on a region, a sensitivity analysis must be conducted. Conducting a sensitivity analysis is especially important when the conclusions of a study are not transparent. It is also crucial to have a range of analysis from worst to best case in order to ensure that the results of the study are meaningful and have integrity. (VNRC Exhibit #9, #11, #22, #24 and Commission Questioning of Professor Kolodinsky).
16. Following the issuance of a Recess Memo that cited significant flaws and omissions in the Applicant's economic impact study that called for a range of impact scenarios to be prepared by the Applicant, the Applicant submitted a revised scenario that projected the loss of 200 jobs and 40 businesses in St. Albans City as a result of the proposed Wal-Mart. The Applicant did not prepare a range of scenarios as requested by the District Commission. (Recess Memo Testimony of Larry Copp and Jeff Carr).
17. If 40 businesses closed and 200 jobs were lost in St. Albans City it would have a devastating economic and psychological impact on St. Albans City. St. Albans City has been approved by the State of Vermont as a "downtown development district" under Vermont's Downtown Development Act. \$28 million in taxpayer funds have been invested in St. Albans City. Closings of the magnitude projected by Wal-Mart would have a serious negative impact on how people perceive the designated downtown and on the downtown experience and on the public's ability to use and enjoy the designated downtown area. (CSA Exhibit #1, #29 and CSA Cross Examination of Professor Kolodinsky).
18. With the makeup of downtown St. Albans City, the closure of even 4-12 small stores would have a significant fiscal impact on the City. The City's over extended budget could not absorb the impact of 4-12 retail stores. In addition to the direct fiscal impact of store

closings, the closings would affect property values of the remaining stores in the City. (CSA Exhibit #26, VNRC Exhibit #24 and CSA Cross Examination of Professor Kolodinsky).

19. The UVM Gund Institute and Center for Rural Studies prepared a table based on the adjusted retail Franklin County demand that indicated 297 jobs would be lost in the City of St. Albans. This confirms that the loss of 200 jobs and 40 business lost as a result of Wal-Mart is within a reasonable range of potential impacts. (VNRC Exhibit #26 and CSA Cross Examination of Professor Kolodinsky.)
20. The Applicant's evidence under criterion 9(K) does not address the potential impacts on the public investment in the St. Albans City downtown development district. In addition, Wal-Mart's economic consultant testified that its report does not address the impact on the St. Albans City downtown development district under criterion 9(K). (Wal-Mart Exhibit SHR-1 and 2 and CSA Cross Examination of Larry Copp and Jeff Carr).
21. The City of St. Albans testified that the proposed Wal-Mart would increase the demand for police and emergency services, and the potential adverse fiscal impact on the City's budget caused by the proposed Wal-Mart will strain the City's ability to pay for these increased services. (CSA Exhibit #1, #13, #14 and #29).
22. The Applicant's economic impact analysis projected that the proposed Wal-Mart would generate only 30,000 sq. ft. of secondary growth and none of that growth would be big box stores. The Applicant's secondary growth analysis did not include the full build-out of the PUD, the potential for the build-out of the St. Albans drive in movie theater across the road from the project, the development of Hudak Farms or any of the properties in St. Albans and Swanton that are in the vicinity of the project, or any upgrade of the existing retail

development south of the project. (Exhibit M to the Act 250 permit application and Coalition Cross Examination of Larry Copp and Jeff Carr).

23. The Wal-Mart case studies and economic theory indicate that Wal-Mart does generate secondary growth and big box stores base their decision to locate in areas, in part, on retail traffic generated by existing big box stores. (VNRC Exhibit #11).
24. Criterion 9(H) provides that scattered development is development that is not “physically contiguous to an existing settlement.” The statute does not define the phrase “existing settlement.” However, in the 1994 decision denying the St. Albans Wal-Mart, the Board stated that the phrase existing settlement means “an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other.” The Board also found that phrase existing settlement specifically excludes areas of commercial, highway-oriented uses commonly referred to as ‘strip development.’ (VNRC Exhibit #15).
25. In a land use planning context, strip development has been defined in a variety of very similar ways. These definitions relate to linear commercial development along an arterial highway leading from an urban or village center or connecting two centers. Definitions typically include many of the following characteristics, although not all characteristics must be present to constitute strip development: lack of connections between individual projects, except for the highway connection; use of individual curb cuts for each project along the highway; predominance of one-story buildings containing a single type of use; little to no pedestrian circulation between projects; separation of structures and uses by parking areas; a

lack of coordination between projects concerning individual project design, signage, lighting, parking, and landscaping, causing cluttered appearance; and narrow depth and broad street frontage of project parcels designed to take advantage of exposure on the arterial highway. (VNRC Exhibit #15).

26. Strip development by its nature occurs in an incremental manner in which projects leap-frog along a well traveled highway further and further from the historic city or village center.

What has been occurring on Route 7 north of St. Albans City is a classic example of encroaching strip development, and the proposed Wal-Mart reflects both a continuation and intensification of that trend. (VNRC Exhibit #15).

27. The proposed area for development is not a community center. It is not compact in size. It does not include a mix of uses in walking distance of each other. It is an area that includes highway oriented development – people must drive rather than walk from use to use – and as discussed above it is strip development that is specifically excluded from the definition of existing settlement. Nothing has changed from 1994 when the Board found that the project was not proposed in an existing settlement and the nearest existing settlement under criterion 9(H) is the City of St. Albans, which is more than two miles away. Accordingly, the project is not an existing settlement nor is it contiguous to an existing settlement. (VNRC Exhibit #15).

Conclusions of Law

In broad terms, criteria 6,7, 9(A), and 9(H) all address the impact of the proposed Wal-Mart on local governments. *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, FCO at 26 (12/23/94). Accordingly, the Commission will evaluate these criteria first, and then address the impact of the project on downtown St. Albans City under criterion 9(K).

In its 1994 Wal-Mart decision, the Board recognized that the impact of Wal-Mart on existing businesses is relevant to criteria 6,7,9(A) and 9(H) to the extent that stores that go out of business affect the tax base of a municipality and the financial ability of a municipality to provide increased services as a result of a proposed Wal-Mart and the secondary growth the store will generate. *Id* at 27, 31-32. The District Commission finds that the Applicant has not met its burden of production under criteria 6 and 7, and its burden of proof under criteria 9(A) and 9(H) to demonstrate that the project will not have undue adverse economic impacts on existing businesses, the tax base of municipalities and the ability of municipalities to provide services. 10 V.S.A. § 6088.

At the end of the day, the Commission finds that Applicant's economic analysis has significant errors and omissions that Wal-Mart's consultants could not adequately explain. The Commission recognizes the significant impact that a 160,000 sq. ft. retail store may have on the land use and economy of the municipalities in the region. Accordingly, it is imperative that the Applicant clearly and thoroughly address the questions, concerns and discrepancies in its economic analysis that have been identified in order to meet its burden of production under criteria 6, 7, 9(A) and 9(H). Simply stated, the record of the proceeding does not include satisfactory answers to the questions raised about the economic analysis that are cited in the Findings of Fact above.

In particular the District Commission is troubled by the Applicant's inability to answer questions about its supply and demand analysis, which is the lynch pin of its no undue adverse impact conclusion. The Commission is also surprised that the Applicant would base its economic analysis on a sales per square foot estimate that is less than the Wal-Mart national

average, when this was one of the reasons cited by the Board in 1994 for rejecting Wal-Mart's economic impact study. *Id* at 44.

The Commission also finds that it is not credible for the Applicant to conclude that the project will result in only 30,000 sq. ft. of secondary growth, and that no new big box stores will be built in the area. The Town of St. Albans has zoned the area around the proposed Wal-Mart for growth. The Commission believes that area that includes the so-called PUD, the drive inn movie theater, and Hudak Farm are all areas that are likely to see enhanced and more rapid growth if the proposed Wal-Mart is constructed.

Criterion 9(A) requires that an Applicant address both the extent and rate of growth that is caused by a project. The Applicant has introduced no evidence that addresses the rate of growth that is likely to be increased by the proposed Wal-Mart.

Moreover, the Commission agrees with the UVM report that other big box stores are more likely to move into the area if the Wal-Mart store is constructed. The impacts of this increased secondary growth must be accounted for in order for the Applicant to obtain positive findings under criteria 6, 7, 9(A) and 9(H).

The Commission also is unable to understand why the Applicant has chosen to include a number of Chittenden County towns in its analysis of the economic impact of the proposed Wal-Mart. It is a counter intuitive at best to conclude that people in municipalities like Shelburne and South Burlington will make up a significant portion of Wal-Mart sales at a St. Albans store.

The District Commission concludes that the UVM Report and the economic experts for the City of St. Albans have demonstrated that the Wal-Mart may have a significant adverse impact on St. Albans City under 6, 7, 9(A) and 9(H). If 40 businesses close and 200 jobs are lost in St.

Albans City the direct impact on the tax base from lost revenue combined with the effect of boarded up businesses on the appraised value of the remaining businesses is simply chilling.

Finally, the Commission rejects the Applicant's assertion that its project does not constitute scattered development under criterion 9(H). Nothing has changed since the Board's 1994 decision to alter the Board's conclusion that the project is scattered development. Moreover, the Applicant's argument that the project is located in a compact community center that is not strip development is not credible. It is not sensible to compare the strip of development along Route 7 that the Applicant seeks to extend north toward Swanton to the compact, traditional Vermont Center of St. Albans City.

Criterion 9(K) asks (a) whether project will unnecessarily or unreasonably endanger the public investment in public facilities, services, and lands that are adjacent to the project and (b) whether project will materially jeopardize or interfere with (1) the function, efficiency or safety of such facilities, or (2) the public's use or enjoyment of or access to such facilities. 10 V.S.A. §6086(a)(9)(K).

The Board has held that the term "adjacent" per criterion 9(K) is a relative term that must be considered in the context of the scale of the project. *L & S Associates, #2W0434-8-EB*, FCO (6/2/93). The Board has recognized that an adjacent public facility or lands can be more than a mile away from the project, if the impacts of the project can extend to affect the public investment in question. See *Colchester Hotel Group and Ray Pecor, Jr., #4C0288*, FCO (4/21/88); and *Wake Robin Associates, #4C0814-EB*, FCO (8/14/91).

There are numerous examples of public facilities, lands and services listed under criterion 9(K). These examples include facilities such as office and maintenance buildings, schools, police and fire stations parks and hiking trails. 10 V.S.A. §6086(a)(9)(K). In addition, the Board

has extended the application of 9(K) to facilities, lands and services not listed in the statute. *Id.* For example the Board has ruled that a bike path and Lake Champlain are Criterion 9(K) public lands. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, FCO at 22 (5/4/04); *Northshore Development, Inc.*, #4C0626-5EB, FCO at 12 (12/29/88). That lands along the Lamoille River, Kenfield Brook, and Terrill Gorge, used extensively by the public for fishing, canoeing, and swimming, are a public investment. *H.A. Manosh*, #5L0918-EB, FCO (8/8/88). And that an “irreplaceable natural area” qualifies as “public investment.” *Paul & Dale Percy*, #5L0799-EB, FCO (3/20/86).

The District Commission concludes that the St. Albans City downtown development district constitutes a governmental and public facility and lands under criterion 9(K). Like a park or an irreplaceable natural area, the St. Albans City downtown development district is an area that has been set aside and recognized by the State of Vermont as an area that deserves enhanced and special protection. The policy of the State of Vermont is clearly to identify, protect and enhance designated downtown development district. See 24 V.S.A. § 2790 (b) and § 2793. Consistent with this policy the Commission finds that the land, buildings and services within a downtown development district fall within the scope of protection of criterion 9(K).

The Commission also concludes that because impacts of the project will extend to St. Albans City, the St. Albans City downtown development district qualifies as being adjacent to the project. The Commission’s decision is consistent with Board precedent that has found downtown streets to be public investments adjacent to development miles away that will contribute to downtown traffic, recognizing that the adjacency under criterion 9(K) must be examined under the context of the impacts of a project on the public investments. *L & S Associates*, #2W0434-8-EB, FCO (6/2/93). It is also consistent with Board precedent that

provides aesthetic impacts on public facilities may be miles away from a project. See *Colchester Hotel Group and Ray Pecor, Jr.*, #4C0288, FCO (4/21/88); and *Wake Robin Associates*, #4C0814-EB, FCO (8/14/91). In these decisions the Board correctly recognized that the meaning of adjacent under criterion 9(K) depends on the extent and the reach of the impacts of a project. There is no question that the impacts of the proposed project will extend to downtown St. Albans City. The Commission also notes that in discussing the impacts of the 1994 Wal-Mart under criterion 9(K), the Board did not dispute that St. Albans City was adjacent to the proposed Wal-Mart, at the same site. *St. Albans Group and Wal-Mart Stores, Inc.*, #6F0471-EB, FCO at 56 (12/23/94).

There is no dispute that there has been over \$28 million dollars invested in the St. Albans City downtown development district, and the City and State are continuing to invest money and energy into ensuring that the St. Albans City downtown remains vital. The UVM Report, the City's economic experts and even Wal-Mart's economic consultants acknowledge that there may be severe economic impacts on the St. Albans City downtown area. Witnesses for the City and the Coalition have testified that the potential loss of businesses in the City would undermine the tremendous public investment that has been made in the St. Albans City downtown by creating a blighted area with boarded up store fronts. It is clear to the Commission that the proposed Wal-Mart has the potential to severely interfere with the ability of the public to use and enjoy the St. Albans City downtown area that so much public money and effort has been invested in.

The Applicant by its own admission has introduced no evidence to address these potential impacts on the public investment in the St. Albans City downtown area, despite the fact that the Applicant has the burden of proof and production under criterion 9(K). 10 V.S.A. § 6088(b).

Accordingly, the Commission finds that the Applicant has not met its burdens under this criterion.

IV. Criterion 9B – Primary Agricultural Soils

Introduction

The proposed project will significantly reduce the potential of 51.68 acres of primary agricultural soils. The Applicant proposes to mitigate the impact of the elimination of primary agricultural soils through an off-site mitigation agreement. There is no legal authority to mitigate impacts to primary agricultural soils through off-site mitigation agreements. Assuming, *arguendo*, that the Commission follows Board precedent allowing the off-site mitigation of impacts to primary agricultural soils, the project violates Board precedent on this criteria. *Re: Allen Brook Investments, LLC and Raymond Beaudry, #4C1110-EB, FCO (1/27/04).*

Findings of Fact

1. The Applicant admits in Exhibit Y attached to its application that the project will “significantly reduce the potential of 51.68 acres of primary agricultural soils on the Parcel.” (Exhibit Y to the Act 250 Application).
2. The primary agricultural soils are some of the best soils in the state that the previous owner of the property farmed with great success for decades. (Commission Questions for Marie Frey).
3. The project is not clustered and new community planning was not utilized to economize on the costs of roads, utilities and land use. The project is a single, extremely large retail store – approximately 160,000 sq. ft. according to the Applicant’s economic impact consultants. The project would be the largest single retail store in the entire state of Vermont. Placing one immensely large retail store in the middle of an existing cornfield does not constitute

cluster planning and development. Clustering typically involves placing multiple uses or structures close together on a site to minimize the impact on the land, especially areas with identified resource values – in this case primary agricultural soils – and to maximize the amount of protected open space. Clustering is also intended to achieve the efficient use of infrastructure by limiting the extension of utilities to a minor portion of a parcel, and to integrate different structures and uses through thoughtful design, landscaping and transportation connections, especially pedestrian circulation. Finally, clustering is intended to maintain the pre-development character of a parcel to the extent possible through careful site design, including designing the scale of buildings and related site improvements (e.g., parking) to blend into, and not dominate, the site. As presently designed, this project in no way exhibits any of the characteristics of clustering or any other innovative community planning or design techniques – it is simply a large, single story retail building and expansive parking placed in the middle of a farm field that is a classic example of strip development. (VNRC Exhibit #15).

4. The project includes an expansive parking area to accommodate 737 cars that will sit in front of a very large retail store. This does not reflect the “reasonable population densities” called for in the sub-criteria of Act 250, and is not a clustered development that minimizes the impact on primary agricultural land. It does not integrate the use with other uses on this or adjoining parcels. And, it does not create a pedestrian friendly environment or create any sense of community or neighborhood. (VNRC Exhibit #15).
5. It is highly unlikely that any adjoining farms, or active farms in the vicinity of the project, will remain in agriculture if the project is developed as proposed. Wal-Mart stores built in rural, agricultural areas serve as a magnet for other major retail development and related

commercial development (e.g., fast food restaurants). Accordingly, the development pressure on farms in the vicinity of the Wal-Mart will increase, especially those fronting on Route 7. The Hudak Farm, which is approximately 3/10 of a mile from the proposed Wal-Mart, is a perfect example of a farm that is jeopardized by the Wal-Mart. If the project is built, the Hudak Farm will feel the pressure of continued strip development along Route 7, including increased traffic volumes, making it very difficult for the Hudaks to remain in agriculture if this project is built. (VNRC Exhibit #15).

6. Adjacent or in the near vicinity of the proposed Wal-Mart are several working dairy farms and one vegetable farm that will be put in jeopardy by Wal-Mart's impact on property values and traffic in the vicinity of the project that will interfere with farming. (VNRC Exhibit #17).

Conclusions of Law

10 V.S.A. §6086(a)(9)(B) (Criterion 9(B)) reads:

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the project "will not significantly reduce the agricultural potential of the primary agricultural soils," or that (i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and (ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and (iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and (iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

Under the terms of the statute, therefore, an applicant can satisfy Criterion 9(B) by showing that (a) there are no primary agricultural soils on the project site, or (b) the project will not reduce the potential of the primary agricultural soils, or (c) the project meets criterion 9(B)(i) - (iv) (the subcriteria). *Re: Allen Brook Investments, LLC and Raymond*

Beaudry, #4C1110-EB, FCO (1/27/04). The Applicant has the burden of proof under criterion 9(B). 10 V.S.A. §6088.

There is no dispute that the proposed project will significantly reduce the potential of 51.68 acres of primary agricultural soils. The Commission is persuaded that the project will not meet the subcriteria of 9(B). The project clearly does not meet subcriteria (iii) that requires the development be planned to minimize the reduction of the agricultural potential of the soils. The project is not clustered. It constitutes a 160,000 sq. ft. retail store and acres of parking lots. While the Applicant has the right to attempt to obtain a permit for such a development it may not credibly claim that such a development is clustered or constitutes new community planning and clustering as required by subcriteria (iii). In addition, the proposed 160,000 sq. ft. Wal-Mart is clearly incompatible with farming and both the traffic from the project and the impact of Wal-Mart on property values will interfere with adjacent farms violating subcriteria (iv). Because the proposed project will destroy over 50 acres of primary agricultural soils and the subcriteria have not been met, the Application must be denied under criterion 9(B).

There is no legal authority to allow for the off-site mitigation of impacts to primary agricultural soils under criterion 9(B). The statute is clear, criterion 9(B) requires that an applicant prove it will not reduce the potential of the primary agricultural soils on-site. 10 V.S.A. §6086(a)(9)(B). Off site mitigation does nothing to address impacts to the potential of primary agricultural soils that a project will destroy.

As the Board has recognized, off-site mitigation is a creature of Board precedent. *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 7(1/27/04). However, the Board may not grant itself authority through case precedent that exceeds the

limits of authority granted to the Board in statute. The Vermont Supreme Court has consistently held that an “agency must operate for the purposes and within the bounds authorized by its enabling legislation.” *Vincent v. Vermont State Retirement Bd.*, 148 Vt. 531, 535, 536 A.2d 925, 928 (1987); and *In re Agency of Administration, State Buildings Division*, 141 Vt. 68, 75, 444 A.2d 1349, 1352 (1982)). The Board has violated this legal tenet by granting itself the authority to allow off-site mitigation to address impacts to primary agricultural soils on-site when the Act 250 statute is clear that such impacts are prohibited if the subcriteria of 9(B) are not met.

In recognition of the Board’s lack of authority to allow off-site mitigation to address impacts to primary agricultural soils the Vermont Legislature passed Act 183 of 2006. Act 183 for the first time authorizes the Board to allow off-site mitigation in certain delineated circumstances. Because the Wal-Mart application was filed prior to the enactment of Act 183, the off-site mitigation authority does not apply to its project. It is settled law in Vermont that the laws in effect at the time an application is filed apply to a project. *Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 181-82, 436 A.2d 760, 761 (1981). Accordingly, the Applicant cannot rely on off-site mitigation to meet criterion 9(B).

Even if the Commission relies on the most recent Board precedent that erroneously allows for off-site mitigation, the proposed Wal-Mart violates criterion 9(B). The Board has held that before a Mitigation Agreement will be accepted by the Board, an applicant must also design its project to meet the subcriteria (ii), (iii) and (iv) of criterion 9(B). *Re: Allen Brook Investments, LLC and Raymond Beaudry*, #4C1110-EB, FCO at 8 (1/27/04). As noted above, the project is not clustered and designed to minimize impacts on primary agricultural

soils and it will interfere with farming in violation of subcriteria (iii) and (iv). Accordingly, the Applicant does not qualify for off-site mitigation under Board precedent.

V. Criterion 10 – Town and Regional Plan

Introduction

The only evidence submitted by the Applicant to demonstrate compliance with the town plan are the local zoning approvals issued by the Town of St. Albans and the minutes of the Development Review Board hearings on the local zoning application. The local zoning approval for the project has been withdrawn. Accordingly, there is no evidence in the record that the project meets criterion 10 – town plans. In addition, the project violates the regional plan. The attempt of the Northwest Regional Planning Commission (NWRPC) to convene an ad hoc committee to overturn its initial determination that the project violates the regional plan does nothing to change the fact that project does not comply with the plan and the Commission is the final arbiter of whether the project complies with criterion 10.

Findings of Fact

1. The evidence submitted by the Applicant to demonstrate compliance with the town plan is the local zoning approvals issued by the Town of St. Albans and the minutes of the Development Review Board hearings on the local zoning application. (Exhibit CC to the Applicant's Act 250 Application).
2. The local zoning approvals have been withdrawn by the Town of St. Albans and are no longer valid. (CA Cross Examination of Roger Dickenson).
3. The proposed project is in conflict with several goals of the Town Plan. The following are specific provisions of the Town Plan that the project violates: Under *Section II – Town Plan Summary*, the project violates Goal 2(A)(3) – discourage strip development along highways

on the Town of Saint Albans. Objective 2(A)(b) - promote regional economy and efficiency, while retaining the identity and character of the character of the Town of St. Albans, by coordinating planning for the Town, adjoining towns and the Northwest Regional Planning Commission. This project will alter, not retain, the character of the Town of St. Albans by constructing the largest single retail store in the State of Vermont at the edge of town in a manner that will result in the end of viable working farms in the vicinity of the project and threaten the viability of existing businesses in town. Objective 2(A)(c) and (d) – encourage preservation of areas that contain primary agricultural soils and protect and encourage the continuation of agriculture. Objective 2(B)(d) - discourage strip commercial development along the highway. Objective 2(B)(f) - ensure that development does not have an undue adverse affect on air or water quality, or traffic in the Town of St. Albans. (VNRC Exhibit #15).

4. The project review committee (PRC) of the NWRPC found that the proposed Wal-Mart does not conform with the NWRPC duly adopted regional plan. (VNRC Exhibit #19).

5. The PRC's charge is to review Act 250 Applications for compliance with the regional plan. Accordingly, the PRC has developed expertise in reviewing Act 250 Applications for compliance with the regional plan. (Coalition Cross Examination of Catherine Dimitruk).

6. The PRC's determination that the proposed Wal-Mart did not meet the regional plan was controversial. In response to the controversy, the NWRPC convened an ad hoc committee to review the PRC's conclusion. The NWRPC had never before convened an ad hoc committee to review a PRC decision. . (Coalition Cross Examination of Catherine Dimitruk).

7. The ad hoc committee was comprised of 10 members. Two of the members were representatives from St. Albans Town who have publicly expressed their support for the proposed Wal-Mart. (Coalition Cross Examination of Catherine Dimitruk).
8. The ad hoc committee voted to over turn the PRC's conclusion. The vote was not unanimous. There was and is disagreement about whether unanimous vote was required to over turn a recommendation of the PRC. (Coalition Cross Examination of Catherine Dimitruk).
9. The PRC found that the proposed Wal-Mart violated the regional plan because: a significant portion of the building is outside the Regional Growth Center; the proposed Wal-Mart is out of scale with regional market needs; specialty retail uses such as the auto, pharmacy, lawn and garden and eye care centers exceeds the region's needs for a retail department store and is redundant to existing businesses; cumulative impacts of the project have not been adequately addressed; significant land area within the growth center remains with no immediate proposal for development; without a build-out, it is unclear that the project will meet the high density mixed use goal of the growth center; and the project violates several provisions of the regional plan related to transportation including the project does not adequately address public transportation services to the proposed Wal-Mart and the absence of an external network of sidewalks going into/out of the development. (VNRC Exhibit #19).
10. The ad hoc committee vote to overturn the PRC conclusion did not address the substantive reasons that the PRC found that Wal-Mart did not comply with the regional plan in the first place. (VNRC Exhibit #15).
11. The proposed Wal-Mart violates the following provisions of the regional plan that

were not identified by the PRC: *With regard to water quality section of the regional plan*, the project violates goal 3.8, which in part states that the goal is to protect the quality of surface water and steadily improve degraded water resources

With regard to scenic and aesthetic resources section of the regional plan, the project does not conform to goal 3.15 that states that the goal is to “encourage land uses that enhance the image of a working, sustainably managed, natural resource based economy balanced with settled towns and wildlands.”

With regard to the land use section of the regional plan, the project does not conform to goal 7.2 – to sustain and support the region’s working landscape of farmland and forest land and encourage development that works with the natural and cultural features of the landscape and 7.4 - public investments in infrastructure should encourage growth in designated growth centers and should not encourage the development and/or fragmentation of farmlands or other resource areas. The project violates policy 7.6 – clustered developments should be designed to work with the landscape in terms of energy efficiency, protection of ecologically sensitive areas, and the conservation of farmland. The project violates policy 7.7 – clustered developments should be designed to encourage a sense of community. The project violates policy 7.8 – commercial strip development is discouraged in favor of development in growth centers and villages. The project violates policy 7.10 – cumulative impacts of development and the scale and context of existing development will be considered when reviewing project proposals. The cumulative impacts of the development cannot be evaluated unless the Applicant provides details of the future phases of the proposed development and applies for approval for these phases of development.

Conclusions of Law

To obtain an Act 250 permit, an applicant must comply with both duly adopted town and regional plans. 10 V.S.A. § 6086(a)(10). The applicant has the burden of proof under criterion 10. 10 V.S.A. § 6088.

With regard to the Town Plan the only evidence submitted by the Applicant to demonstrate compliance with the town plan is the local zoning approvals issued by the Town of St. Albans and the minutes of the Development Review Board hearings on the local zoning application. The local zoning approval for the project has been withdrawn. Accordingly, there is no evidence in the record that the project meets criterion 10 – town plans. Moreover, as set forth in the Findings of Fact above, the Coalition has pointed to numerous provisions of the Town Plan that the project violates.

With regard to the regional plan, the Applicant has urged the Commission to give deference to the decision of the ad committee of the NWRPC that overturned the NWRPC's Project Review Committee determination that the proposed Wal-Mart violates the regional plan. The Commission has the sole authority and responsibility to determine whether a project meets criterion 10 and provides no deference to the decision of a town or regional planning commission that a project complies with their plan. *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, FCO at 40 (11/24/04); *Re: Peter S. Tsimortos*, #2W1127-EB, FCO at 20 (4/13/04); *Re: Fred and Laura Viens*, #5W1410-EB, MOD at 7 (9/3/03). Accordingly, the ad hoc committee decision does not control the Commission's decision under criterion 10, and the Commission provides no deference to their action.

The Commission does, however, take note of the unorthodox practice implemented by the NWRPC to overturn the initial decision of the PRC that the proposed Wal-Mart violates the

regional plan. Clearly, the PRC has the expertise and objectivity to review Act 250 projects for the NWRPC to determine compliance with criterion 10. It is obvious to the Commission that the ad hoc committee was assembled to strike a compromise on the proposed Wal-Mart among the member NWRPC towns. Compliance with a regional plan is not an exercise in compromise. It is straightforward analysis of whether the project meets the particular provisions of the regional plan.

To that end, having reviewed the record of this case, the Commission agrees with the PRC's conclusion that the proposed Wal-Mart violates the regional plan because: a significant portion of the building is outside the Regional Growth Center; the proposed Wal-Mart is out of scale with regional market needs; specialty retail uses such as the auto, pharmacy, lawn and garden and eye care centers exceeds the region's needs for a retail department store and is redundant to existing businesses; cumulative impacts of the project have not been adequately addressed; significant land area within the growth center remains with no immediate proposal for development; without a build-out, it is unclear that the project will meet the high density mixed use goal of the growth center; and the project violates several provisions of the regional plan related to transportation including the project does not adequately address public transportation services to the proposed Wal-Mart and the absence of an external network of sidewalks going into/out of the development.

The Commission also concludes that the project violates numerous provisions of the regional plan not identified by the PRC. In particular, the Commission concludes that the project does not conform to goal 3.15 that states that the goal is to "encourage land uses that enhance the image of a working, sustainably managed, natural resource based economy balanced with settled towns and wildlands." As previously discussed, this project will not

only take the active farm where the development is proposed out of production, it will likely result in the surrounding farms being developed.

The project does not conform to goal 7.2 – to sustain and support the region’s working landscape of farmland and forest land. As the Commission has previously concluded, this project will destroy the landscape of working farms in the vicinity of the project. For the same reasons the project violates policy 7.2 – encourage development that works with the natural and cultural features of the landscape and 7.4 - public investments in infrastructure should encourage growth in designated growth centers and should not encourage the development and/or fragmentation of farmlands or other resource areas. The project violates policy 7.6 – clustered developments should be designed to work with the landscape in terms of energy efficiency, protection of ecologically sensitive areas, and the conservation of farmland. The project violates policy 7.7 – clustered developments should be designed to encourage a sense of community. A 160,000 sq. ft. Wal-Mart store surrounded by asphalt – even if future development occurs surrounding the site – will foster transportation oriented strip development, not a sense of community. The project violates policy 7.8 – commercial strip development is discouraged in favor of development in growth centers and villages. The project violates policy 7.10 – cumulative impacts of development and the scale and context of existing development will be considered when reviewing project proposals. The cumulative impacts of the development cannot be evaluated unless the Applicant provides details of the future phases of the proposed development and applies for approval for these phases of development.

VI. Criterion 8(A) – Wildlife and Endangered Species

Introduction

The proposed Wal-Mart site includes habitat for many common species as well as more unusual or rare species such as the endangered Western Chorus Frog, which was historically located in close proximity to the project site. The Applicant and the Nongame and Natural Heritage Program (NNHP) did not survey the property for threatened or endangered species. The NNHP did report to the Applicant that there are no known occurrences of threatened and endangered species in their database. This report alone is not sufficient evidence for the Applicant to meet the burden of production under Criterion 8(A) for threatened and endangered species.

Findings of Fact

1. Class two and three wetlands, a drainage ditch and a stream are known from the proposed development site in conjunction with adjacent forested woodlands. Such a combination of wetlands and forest lands in the Champlain basin of Franklin County would be expected to support many common species of amphibians as well as more unusual species. (VNRC Exhibit #12).
2. State heritage ranks for species range from S5 (very common), to S1 (very rare). Any species with a rank of S3 is considered to be unusual and requires specialized habitat in Vermont. S1 and S2 species are even more unusual and may be listed as a threatened or endangered species. Many S1 and S2 species are considered special concern species in this state. (VNRC Exhibit #12).
3. Given the location of the proposed development site and the combination of the general habitat types that are known on the site, it could potentially sustain Blue-spotted

Salamander (*Ambystoma laterale*, S3, SC), Four-toed Salamander (*Hemidactylum scutatum*, S2, SC), Wood Turtle (*Glyptemys insculpta*, S3, SC), Eastern Ribbonsnake (*Thamnophis sauritus*, S2, SC) and Western Chorus Frogs (*Pseudacris triseriata*, S1, state-endangered). (VNRC Exhibit #12).

4. The combination of shallow temporary wetlands, ditches, and deciduous woodlands in the Champlain basin at the project site is an appropriate habitat combination for the Western Chorus Frog, Blue-spotted Salamander, Four-toed Salamander, and Eastern Ribbonsnake. Furthermore, the combination of river and mixed forested and open uplands is appropriate habitat for the Wood Turtle, Eastern Ribbonsnake, and with the beaver ponds could also provide habitat for the Blue-spotted Salamander.
5. The Vermont Reptile and Amphibian Atlas Project collects and disseminates data needed to make informed recommendations regarding the state status, state rank, and conservation of Vermont's reptiles and amphibians. The Atlas includes an historic record of the Western Chorus Frog (*Pseudacris triseriata*, State Heritage rank S1, state endangered) within the vicinity of the project area along Highway 7, 6.2 miles south of Swanton green and one mile north of the junction with Route 105. (VNRC Exhibit #12).
6. In the 1970's, the Chorus frog was distributed widely in Franklin and Grand Isle Counties. In the last ten years it has been reliably reported from only one site in this state but surveys have concentrated on northern Grand Isle County. (VNRC Exhibit #12).
7. William Crenshaw and John Austin, game oriented wildlife biologists for the Vermont Department of Fish and Wildlife performed site visits in 1992 and 2004 and made general recommendations to the Applicant regarding buffer areas for mapped wetlands and forested lands along Stevens's Brook, which represents a diverse wildlife area and

- important travel corridor. (Exhibit W and X to the Applicant's Act 250 Application).
8. The Vermont Department of Fish and Wildlife Non-Game and Natural Heritage Program (NNHP) was contacted specifically regarding impacts to threatened and endangered species. Everett Marshall, Biologists/Information Manager, issued a letter stating that a search of the Nongame and Natural Heritage Program database reveals no known occurrences in the project vicinity for threatened and endangered species and natural communities. (Exhibit V to the Applicant's Act 250 Application).
 9. The Nongame and Natural Heritage Program did not conduct a site visit to look for threatened and endangered species. (Coalition Cross Examination of Sam Ruggiano).
 10. The lack of a record of a species from any given site in the NNHP database usually is a result of a lack of adequate survey work for those species on the site. (VNRC Exhibit #12).
 11. The Nongame and Natural Heritage Program does not have the resources or personnel to have surveyed the entire state of Vermont for all taxonomic groups. Survey work is spotty at best and most areas have not been surveyed. (VNRC Exhibit #12).
 12. If site visits are made by the NNHP, it is highly unlikely that they would target specific reptiles or amphibians unless they were brought to their attention in advance. (VNRC Exhibit #12).
 13. The Vermont Natural Resources Council requested permission in February of 2006 to visit the proposed Wal-Mart store site with an expert herpetologist retained by VNRC, and accompanied by one or more individuals from the Agency of Natural Resources, to investigate whether the site contains suitable habitat for the Western Chorus Frog, and to conduct follow-up investigations during Spring mating season to determine if any

evidence of the frog's presence can be detected. (Letter from Stewart McConaughy to Jamey Fidel dated Feb. 24, 2006).

14. The Applicant refused to grant VNRC's requested permission to conduct site visits with a herpetologist or qualified biologist for threatened and endangered species and reptile and amphibian species. (Letter from Stewart McConaughy to Jamey Fidel dated Feb. 24, 2006).
15. The Applicant did not perform any surveys for threatened and endangered species or reptile and amphibian species at the project area. (Coalition Cross Examination of Sam Ruggiano).
16. The filling of the class three wetlands and the drainage ditches will destroy habitat for many common species of amphibians and may well destroy habitat for some unusual species as well. In addition, busy roads will create a large source of mortality for any reptiles and amphibians remaining after construction. (VNRC Exhibit #12).
17. Best development practices for conserving amphibian habitat in commercial development includes no disturbance of any breeding pools and no development within 100 ft. of an amphibian breeding pool. Within a 750 ft. critical terrestrial habitat zone, no more than 25% of the open land should be developed. (VNRC Exhibit #12).

Conclusions of Law

10 V.S.A § 6086(a)(8)(A), otherwise known as Criterion 8(A), states the following:

A permit will not be granted if it is demonstrated by a party opposing the applicant that a development will destroy or significantly imperil necessary wildlife habitat or any endangered species, and (i) the economic, social, cultural, recreational, or other benefit to the public from the development will not outweigh the economic, environmental, or recreational loss to the public from the destruction, or (ii) all feasible and reasonable mean of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or (iii) a reasonably acceptable alternative site is owned or controlled by the

applicant which would allow the development or subdivision to fulfill its intended purpose.”

As the statute indicates, issues involving Criterion 8(A) involve a three-stage inquiry with regards to necessary wildlife habitat. *Re: Mark and Pauline Kiesel, # 5W1270-EB, Findings of Fact, Conclusions, of Law, and Order (Altered), Docket #695 at 37 (Aug. 7, 1998).* First, opponents must show that the area constitutes “necessary wildlife habitat.” Second, they must show whether the project will destroy or significantly imperil such habitat. Finally, the opponents must satisfy the conditions of the three subcriteria. *Id.*

When determining what constitutes “necessary wildlife habitat,” the Environmental Board has previously looked to the term as it is defined in Act 250. *Re: Southview Associates, #2W0634-EB, Findings of Facts, Conclusions of Law, and Order at 7 (June 30, 1987).* Act 250 defines “necessary wildlife habitat” as “concentrated habitat which is identifiable and is demonstrated as being necessary for the survival of the species of wildlife at any period in its life including breeding and migratory periods.” 10 V.S.A §6001(12). Moreover, the Board has stated that a necessary wildlife habitat “need not be decisive to the survival of the entire population of a species of wildlife, but only to the survival of a portion of the population which is dependant upon the identified habitat.” *Re: Southview Associates, # 2W0634-EB at 7, citing Re: White Sands Realty Company, Land Use Permit Amendment #3W0360-1-EB, Motion to Reconsider, Findings of Fact and Conclusions of Law, Docket #171 (Feb. 25, 1982) , affirmed in In re Southview Associates, 153 Vt. 171, 176 (1989).*

In Act 250 proceedings, the burden of proof is generally considered to include both the burden of production and the burden of persuasion. *Re: Killington, Ltd. and International Paper Realty Corp., Findings of Fact, Conclusions of Law, and Order #1R0584-EB-1 at 21 (Sep. 21, 1990).* According to the Environmental Board, “the burden of production means the burden of

producing sufficient evidence on which to make positive findings under the criteria, and the Board has previously determined that the burden of production is always on the applicant.” *Id. citing Re: Pratt’s Propane*, Findings of Fact and Conclusions of Law # 3R0486-EB at 4-6 (Jan. 27, 1987); *Re: Imported Cars of Vermont*, Findings of Fact and Conclusions of Law #1R0156-2-EB at 2-3 (Oct. 12 1982); *see also Re: Alpine Stone Corporation*, Findings of Fact, Conclusions of Law, and Order #2S1103-EB at 33 (Feb. 4, 2002). The Vermont Supreme Court has affirmed this interpretation of the burden of proof. *See In re Denio*, 158 Vt. 230, 237-238, 508 A.2d 1166, 1170 (1992) (noting that Act 250 requires the Board to make a positive finding on each factor, irrespective of the burden of proof, and stating that a party will fail to carry their burden “if there had been no substantial evidence before the Board on the issue . . . or if it had been unable to conclude one way or the other based on the evidence before it”).

If a determination is made that the applicant has produced sufficient evidence, the burden shifts to the parties opposing the project to persuade the Board or decision maker, by a preponderance of the evidence, that the applicant’s position is not correct. *Re: Killington, Ltd. and International Paper Realty Corp.* at 21. However, in making its findings and conclusions, the decision maker may consider all the evidence presented, regardless of which party introduced it. *Id. citing In re Quechee Lakes Corp.*, No. 87-108, slip op. at 10-11.

The Applicant has the burden of providing sufficient evidence that the development will not destroy or significantly imperil necessary wildlife habitat or any endangered species. In its Act 250 application, the Applicant provided information from game oriented wildlife biologists with the Vermont Department of Fish and Wildlife regarding buffer areas for mapped wetlands and forested lands along Stevens’s Brook, which represents a diverse wildlife area and important travel corridor. The Applicant also provided limited information regarding threatened and

endangered species. In its Act 250 application, the Applicant provided the following information regarding whether any significant wildlife or endangered species habitat exists on or near the project site:

The Vermont Department of Fish and Wildlife Non-Game and Natural Heritage Program was contacted regarding this project. Everett Marshall, Biologists/Information Manager, issued a letter that 'The spiny soft-shell turtle, a state threatened species, has been observed downstream in the area where Jewett and Stevens Brook meet.' He did not anticipate any impacts from this project if erosion from the construction site is controlled and well-designed. Refer to the letter from the Non-Game and Natural Heritage Program in the Appendix as Exhibit 'V'.

The letter from the Non-Game and Natural Heritage Program (NNHP) indicates that the only review performed by the Non-Game and Natural Heritage Program was limited to a search of its database, which revealed “no known occurrences in the project vicinity for threatened and endangered species and natural communities.” The NNHP did not perform a site visit of the project area nor did the Applicant. The Applicant also refused to allow Vermont Natural Resources Council the opportunity to conduct a site visit of the project with the assistance of a retained expert.

The Commission finds that the letter from the NNHP only answers the question of whether the NNHP database had any known occurrences at the project site. The letter does not definitively determine the extent to which significant nongame wildlife or endangered species habitat actually exists on or near the project site. The Nongame and Natural Heritage Program does not have the resources or personnel to have surveyed the entire state of Vermont for all taxonomic groups. Survey work is spotty at best and most areas have not been surveyed. It is possible that significant wildlife or endangered species habitat is present at the project site, yet it has not been recorded because a qualified expert did not perform a survey at the site. William Crenshaw and John Austin of the Vermont Department of Fish and Wildlife did perform site

visits in 1992 and 2004, but they are game oriented wildlife biologists and they do not have the expertise to identify habitat for threatened and endangered species like specialized nongame biologists or personnel in the NNHP.

The Coalition submitted evidence in the form of testimony from James Andrews, one of the state's leading herpetologists, that the project area is located within the vicinity of a historical record for the endangered Western Chorus Frog. The Coalition also presented testimony from Mr. Andrews that the combination of shallow temporary wetlands, ditches, and deciduous woodlands in the Champlain basin at the project site is an appropriate habitat combination for the Western Chorus Frog, Blue-spotted Salamander, Four-toed Salamander, and Eastern Ribbonsnake. Furthermore, the combination of river and mixed forested and open uplands is appropriate habitat for the Wood Turtle, Eastern Ribbonsnake, and with the beaver ponds could also provide habitat for the Blue-spotted Salamander. The Commission finds that this evidence suggests that the habitat at the project site is important for nongame and possibly rare wildlife species that were not identified in the Applicant's Act 250 application. See *In Re: Mt. Mansfield Co., Inc.*, Findings of Fact, Conclusions of Law, and Order (Altered) #5L1125-10 and 10R-EB at 5-6 (Mar. 27, 1996) (The Board accepted a finding that a fragile arctic-alpine tundra environment supported habitat for both known and suspected animal species).

The Applicant concludes that there are no threatened and endangered species at the project site based on a general statement from the NNHP that there are no known occurrences there. The Commission finds that this statement is not sufficient evidence to demonstrate that threatened and endangered species are not utilizing the project site. A site visit and survey by biologists within the Nongame and Natural Heritage Program or with expertise in nongame and threatened and endangered species would serve as more sufficient evidence to meet the initial burden of

production under Criterion 8(A). *See generally Re: New England Land Associates*, Findings of Fact, Conclusions of Law, and Order #5W1046-EB-R (Jan. 7, 1992) (The Board found that the Applicant did not perform field studies to determine the presence of any endangered species or rare and irreplaceable natural areas and failed to identify all the necessary wildlife habitat on its property. The Applicant failed to meet its burden of production as a matter of law). *Id.* at 8, 10.

The Commission finds that the requirement of a survey for nongame and threatened and endangered species is akin to the preservation of historic sites under Criterion 8, where the Environmental Board has required Applicants and lot owners to survey their properties in more detail to determine whether any archaeological sites must be preserved. *See Re: John A. Russell Corporation*, Findings of Fact, Conclusions of Law, and Order #1R0849-EB at 53 (Jul. 10, 2001); *New England Land Associates*, Findings of Fact, Conclusions of Law, and Order #5W1046-EB-R at 24 (Jan. 7, 1992). These orders were based on findings (through computer modeling or testimony) that the proposed sites were likely to contain prehistoric remnants.

The Commission finds that the Applicant has not met its burden of producing sufficient evidence under Criterion 8(A). The Commission believes this to be so in light of the fact that the Applicant refused to allow VNRC permission to conduct a site visit with their own expert biologist, with the accompaniment of the Agency of Natural Resources, at the project site. If the burden of proof shifted to opponents of the project, the Coalition would be put in the untenable position of refuting the limited information provided by the Applicant without having access to the project site. This would set up a dangerous precedent where an Applicant could merely report that the NNHP has no information for the project site regarding threatened and endangered species, refuse access to the site, and shift the burden of proof to a party opponent to prove them wrong.

Where the presence of necessary wildlife habitat is a disputed issue in the proceeding, the standard NNHP letter (stating that there are no known occurrences of endangered or threatened species or significant natural communities) will not be sufficient evidence to meet the burden of production under Criterion 8(A). See *Re: Killington, Ltd. and International Paper Realty Corp.*, Findings of Fact, Conclusions of Law, and Order #1R0584-EB-1 at 28 (Sep. 21, 1990). (In evaluating compliance of a project with Criterion 8(A), the Board needs sufficient information in order to fairly evaluate the proposed development. Particularly when dealing with a natural resource as important to the State as critical wildlife habitat, it is incumbent upon the applicant to support its contentions with credible evidence and provide the underlying supporting data or details necessary for the Board to make positive findings). The Commission holds that the Applicant has failed to provide sufficient evidence on which to make positive findings under Criterion 8(A).

VII. Conclusion

For the all of the reasons set forth above, the application is denied under criteria 1, 1(B), 1(E), 4, 5, 6, 7, 8(A), 9(A), 9(B), 9(H), 9(K) and 10.

DATED at Montpelier, Vermont this 4th day of January, 2007.

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