

State of Vermont  
NATURAL RESOURCES BOARD  
DISTRICT 4 ENVIRONMENTAL COMMISSION  
111 West Street • Essex Junction • Vermont 05452

**RE:** Costco Wholesale Corp.  
Margaret McCulla, Corporate  
Counsel  
45940 Horseshoe Drive  
Sterling, VA 20166

Application #4C0288-19C  
**Findings of Fact,**  
**Conclusions of Law and Order**  
10 V.S.A. §§ 6001-6092 (Act 250)

and

Costco Wholesale Corp.  
999 Lake Drive  
Issaquah, WA 98027

and

Lake Champlain Transportation Co.  
King Street Dock  
Burlington, VT 05401

## **I. INTRODUCTION**

On May 3, 2012, Costco Wholesale Corp.; Costco Wholesale (together “Costco”) and Lake Champlain Transportation Co., collectively referred to as “Applicants,” filed an application for an Act 250 land use permit for a Project generally described as the construction of a self-serve gas facility with six fueling dispenser islands with a 75 square-foot (“sf”) controller building; adjustment of a boundary line with the abutting property to realign the private driveway; and construction of a revised stormwater system. The Project description was subsequently amended to replace the previous description with: combining of an undeveloped parcel (Lot #5 of the Meadows Industrial Park); construction of a 14,080 sf expansion of the existing Costco warehouse building (as approved in LUP #4C0288-19B); modification of Conditions #19-#21 of LUP #4C0288-19B; addition of a three-island (12 fueling positions) Costco Gasoline fuel station as an ancillary use to the warehouse with a 75 sf controller building; reconfiguration of the existing parking lot; adjustment of a boundary line with the abutting property to realign the private driveway; and modifications to the existing stormwater management system. The Applicants’ legal interest is ownership in fee simple described in two deeds for land owned by Costco Wholesale Corporation and one deed for land owned by Lake Champlain Transportation Co., all in the land records of the Town of Colchester, Vermont.

The application, submitted on May 3, 2012, was deemed complete.

Under Act 250, projects are reviewed based on the ten criteria of 10 V.S.A. § 6086(a)(1)-(10). Before granting a permit, the District Commission (hereinafter “Commission”) must find that the project complies with these criteria and is not detrimental to the public health, safety or general welfare.

Decisions must be stated in the form of Findings of Fact and Conclusions of Law. The facts that the Commission has relied upon are contained in the documents on file identified as Exhibits #1 through #164, and the evidence received at public hearings held on June 13, 2012 (Prehearing Conference);

August 1, 2012; August 22, 2012; and October 24, 2012. The Commission also conducted a site visit that immediately preceded the first hearing. At the end of the final hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on January 24, 2013 upon receipt of the additional information and held deliberative sessions on June 27, 2012; July 25, 2012; August 8, 2012; October 3, 2012; October 17, 2012; October 31, 2012, January 4, 2013; January 7, 2013 and January 23, 2013.

## II. JURISDICTION

Jurisdiction attaches because the Project is a material change to a development over which the Commission already has jurisdiction and thus constitutes "development" pursuant to 10 V.S.A. § 6081. Accordingly, a land use permit amendment is required pursuant to Act 250 Rule 34.

## III. PARTY STATUS

### A. Preliminary Party Status Determinations

Statutory parties to this application who attended some or all of the hearings are:

1. The **Applicants** were represented at the hearings by Mark Hall, Esq. of Paul Frank + Collins, P.C.; Renee Hanson of Costco Wholesale Corp.; Debra Bell; Shane Mullen, P.E. (August 1, 2012 & October 24, 2012 hearings) & Karina Dailey, PWS (August 22, 2012 hearing) of Trudell Consulting Engineers; Sonia Hennem, PTOE of Kittleson & Associates, Inc. (August 1, 2012 & October 24, 2012 hearings); and John Paul Andrews of Mulvanney G2 Architecture.
2. The **Agency of Transportation** ("VTrans") was represented at the August 1, 2012 and October 24, 2012 hearings by Bill Rice, Esq.; Rajnish Gupta, P.E., PTOE and Joseph Segale, P.E., PTP.
3. The **Town of Colchester** was not represented at any hearing.
4. The **Agency of Natural Resources** ("ANR") was represented at the August 22, 2012 and October 24, 2012 hearings by Elizabeth Lord, Esq.; Kevin Burke, CPSWQ, CPESC and Rich Langdon.
5. The **Chittenden County Regional Planning Commission** ("CCRPC") was represented at the August 1, 2012 and October 24, 2012 hearings by Charlie Baker, Executive Director.

10 V.S.A. 6085(c)(1)(E) provides that persons entitled to party status include "*Any adjoining property owner or other person who has a particularized interest protected by this chapter that may be affected by an act or decision by a district commission.*" The Vermont Supreme Court and the Environmental Division of the Superior Court have yet to provide an interpretation of "particularized interest" in Act 250 proceedings pursuant to 10 V.S.A. § 6085(c)(1)(E). However, the Commission believes that a meaning of "particularized interest" may be interpreted from precedents of the former Water Resources Board wherein terminology comparable to the provisions of 10 V.S.A. 6085(c)(1)(E) was employed:

Mere speculation about the impact of some generalized grievance, however, is not a sufficient basis to find standing. Moreover, the “injury” to the appellant’s interest must be concrete and particularized, not an injury affecting the common rights of all persons. This is why the Board has previously found that the alleged “injury” to an appellant’s interest must be something more than a generalized complaint about the secretary’s favored approach to approving a specific activity or project involving public waters. This is also why individuals who have alleged to be acting on behalf of the public, or who have sought to prevent unnecessary environmental degradation generally, have been found to lack standing. In sum, while the bar for establishing standing is not high, some level of injury greater than harm to the general public must be shown by appellants. *Re CCH Stormwater Discharge Permits WQ-02-11, Memorandum of Decision (Water Resources Board March 21, 2003)*

In evaluating requests for party status, the Commission notes that the standard for party status does not mean that the petitioner must prove that it will likely prevail on the merits of its case. The relevant inquiry is whether the petitioner may be impacted by the project under one or more specific criteria of Act 250.

Costco specifically requested that the Commission grant preliminary party status as requested, with the understanding that the Commission would re-examine party status at the conclusion of the hearing, as required per 10 V.S.A. § 6085(c)(6). Costco did so to avoid the potential for delays that an interlocutory appeal would create.

The Commission granted preliminary party status at the prehearing as requested by **R.L. Vallee** (“Vallee”), **Timberlake Associates, LLP** (“Timberlake”) and **Hampton Inn** allowing the entities listed below to participate pursuant to 10 V.S.A. § 6085(c)(1)(E).

After hearing testimony, reviewing evidence and deliberating, the Commission grants or denies final party status as follows:

6. **Vallee** was represented at the hearings by Jon Anderson, Esq. of Burak, Anderson and Melloni, PLC.; Tom Errico, P.E. of T. Y. Lin International (August 1, 2012 hearing); Maximilian Ferro, FAIA (August 1, 2012 hearing) and Andres Torizzo & Joanie Stultz of Watershed Consulting Associates, LLC. (August 22, 2012 & October 24, 2012 hearings).

#### **Criterion 1(A)**

Vallee requested party status regarding impacts to headwaters under Criterion 1(A). The Applicants have stated that there are no headwaters in the area. 10 V.S.A. 6086(a)(1)(A) states that a “permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are...[sub-criteria thresholds].” The subject area is situated within an existing commercial and industrial park that is immediately adjacent to one of the busiest intersections in the State of

Vermont and thus the ground or surface waters do not flow “through or upon lands which are not devoted to intensive development.” Therefore, the Commission finds that the area is not headwaters and the Commission denies Vallee party status under Criterion 1(A).

#### **Criterion 1(B)**

To obtain party status under Criterion 1(B), a party must demonstrate at least some non-speculative causal connection between the proposed project and the party’s particularized interest. *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9-10 (April 24, 2012). The mere speculation that pollution in the general area may cause a watershed to deteriorate to the point of being listed by ANR as an impaired watershed does not constitute a reasonable possibility on which to grant Vallee party status under Criterion 1(B). Moreover, Vallee has not indicated that any pollutants from the Project will enter its property.

Preliminary party status under this criterion was initially granted at the Applicants’ request noting that Vallee probably did not meet the necessary thresholds for party status. Consistent with this and since no basis for granting party status was provided, the Commission denies Vallee’s request for party status under Criterion 1(B).

#### **Criterion 1(E)**

Vallee requested party status regarding impacts to streams under Criterion 1(E). Vallee does not abut the unnamed tributary of Sunderland Brook (also called Sunnyside Brook) nor has it articulated a particularized interest that is different from that of the general public. No testimony was presented to show that Vallee’s interest in the natural condition of Sunnyside Brook is particularized or that the Project will not maintain the natural condition of the stream or will endanger the health, safety, or welfare of the public or adjoining landowners. The Commission has not been convinced that there is a reasonable possibility that Vallee’s interests are particularized.

Preliminary status under this criterion was granted at the Applicants’ request noting that that Vallee probably did not meet the necessary thresholds for party status. The Commission denies Vallee’s request for party status under Criterion 1(E).

#### **Criterion 1(G)**

Vallee requested party status regarding impacts to wetlands under Criteria 1(G), alleging that the proposed project will impact a wetland adjacent to its property.

Criterion 1(G) protects “significant” wetlands. *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), Findings of Fact, Conclusions of Law and Order at 36 n.2 (Vt. Env. Bd. November 4, 2005, aff’d on other grounds in re appeal of *Times and Seasons, LLC and Hubert K. Benoit*, 2008 Vt. 7 (2008); *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Findings of Fact, Conclusions of Law and Order at 2 (Vt. Env. Bd. May 4, 2004) A “significant wetland” is a Class One or Class

Two wetland. 10 V.S.A. § 902(11) and see *Section 2.03 of the Vermont Wetland Rules*. The wetlands adjacent to the Costco site do not appear on the Vermont Significant Wetland Inventory map, and indeed, the Secretary of ANR has specifically determined the wetland to be a Class Three wetland. The Commission must accept the Secretary's determination that this wetland is Class Three and therefore, Criterion 1(G) does not apply.

Therefore, the Commission denies Vallee's request for party status under Criterion 1(G).

#### **Criterion 4**

The Commission notes that Vallee submitted proposed Findings of Fact under Criterion 4 – soil erosion and claimed that he has demonstrated a particularized interest for party status. However, Vallee had not previously requested party status nor did the Commission grant preliminary party status to Vallee under Criterion 4. Vallee has not articulated any impacts under this Criterion that could affect its property that is different from the generalized public. Therefore, the Commission finds that Vallee does not have party status under Criterion 4.

#### **Criteria 5 and 9(K)**

Vallee owns land at the western terminus of Lower Mountain View Road. Most of the traffic leaving Costco uses this terminus, causing a queue to form that has a tendency to block ingress or egress from Vallee's property.

Because any increase in trip generation may lengthen this queue, the Commission finds that Vallee has a particularized interest in Criteria 5 and 9(K) and therefore it is granted party status under these Criteria.

#### **Criterion 8**

Vallee owns land at the western upper terminus of Lower Mountain View Road and at the Prehearing claimed it would clearly be able to see the proposed gas station from its property (Exhibit #42). The Commission notes that Vallee has not articulated any concerns with regard to the Historic Resources or Rare and Irreplaceable Natural Areas (RINA) subcriteria of Criterion 8. Observations made by the Commission during the site visit that immediately preceded the first hearing, showed that the existing Costco site is not currently visible from this property. The Commission concluded that the proposed gas pumps and the warehouse expansion at Costco would also likely not be visible. Therefore, the Commission finds that Vallee does not have a particularized interest under Criterion 8 and party status under Criterion 8 is denied.

#### **Criterion 10**

Because every town citizen is a 10 V.S.A. § 6085(c)(1)(C)(E) party for Criterion 10, *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of

Decision at 7 (Vt. Env. Bd. October 8, 2003); and *see, McLean Enterprises Corp.*, #2S1147-1-EB, Memorandum of Decision at 7 (Vt. Env. Bd. September 19, 2003), the Commission grants Vallee's request for party status under this criterion.

7. **Timberlake** was represented at the Hearings by David Grayck, Esq. of Cheney, Brock & Saudek, P.C.; Kim Eric Hazarvartian, P.E. PTOE. of Tepp, LLC. (August 1, 2012 & October 24, 2012 hearings); Anthony Stout of Lakeside Environmental Group (August 22, 2012 hearing) and Dr. Miles Waite of Waite Environmental Management, LLC. (August 22, 2012 hearing).

### **Criterion 1**

Timberlake argues that it has a particularized interest under Criterion 1 because (a) an increase in discharge from the Project will reduce the assimilative capacity of the Sunnyside Brook drainage which could lead to the impaired reach extending from Sunderland Brook (of which it is a tributary), upstream to the segment adjacent to Timberlake's property and (b) phosphorus and total suspended sediment ("TSS") loading to Sunnyside Brook will increase and may also experience a chloride shock. The Commission finds that these claims by Timberlake are merely speculative and not concrete. *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, Memorandum of Decision at 7 (Vt. Env. Bd. May 10, 2004). Timberlake also claims that the Project will potentially fill wetland areas. However, no wetlands are proposed for filling. Timberlake also claims that the discharge from the roof of the proposed warehouse expansion is directed via sheet flow to an infiltration swale. But this swale has an overflow discharge which directs runoff, toward Gilbrook Reservoir which is in a watershed different from that of the one in which Timberlake is located.

Furthermore, Timberlake has not shown that it has a reasonable possibility that its property will be affected since it is located uphill and a considerable distance away from the Project.

Preliminary status under this criterion was granted at the Applicants' request noting that that Timberlake probably did not meet the necessary thresholds for party status. Therefore, the Commission denies Timberlake's request for party status under Criteria 1.

### **Criterion 1(B)**

Timberlake requested party status regarding impacts to disposal of waste under Criterion 1(B). However, Timberlake's property is uphill from the proposed Project and no evidence has been presented to demonstrate that potential pollution will have a direct impact on property owned by Timberlake.

Preliminary status under this criterion was granted at the Applicants' request noting that that Timberlake probably did not meet the necessary thresholds for party status.

Therefore, the Commission denies Timberlake's request for party status under Criterion 1(B).

### **Criterion 1(E)**

Timberlake has asked for party status regarding impacts to streams under Criterion 1(E). Timberlake does not abut the Sunnyside Brook and although Timberlake's articulated interest concerned the assimilative capacity of the Sunnyside Brook watershed and an allegation that the water table will be lowered, these are not interests that are particular to Timberlake and different from those of the general public.

Preliminary status under this criterion was granted at the Applicants' request noting that that Timberlake probably did not meet the necessary thresholds for party status.

Therefore, the Commission denies Timberlake's request for Party Status under Criterion 1(E).

### **Criterion 1(G)**

Timberlake presented testimony that the proposed warehouse expansion will impact the adjacent wetland and would have an impact on its property. However, for the same reasons stated in the Commission's denial of party status to Vallee under Criterion 1(G), the Commission denies Timberlake's request for party status under this criterion.

### **Criteria 5 and 9(K)**

Timberlake owns land south of the U.S. Route 2/7 ("US 7") intersection with Interstate 89 ("I-89") (aka the Exit 16 corridor). The Exit 16 corridor is highly congested and previous reviews of proposed projects in the corridor by the Commission have indicated that substantial queuing occurs and, in turn adversely affects intersections in the area. The Commission finds that Timberlake has a particularized interest under Criteria 5 and 9(K) and grants Timberlake party status under those criteria.

### **Criterion 10**

Because every town citizen is a 10 V.S.A. § 6085(c)(1)(C)(E) party for Criterion 10, *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 7 (Vt. Env. Bd. October 8, 2003); and *see, McLean Enterprises Corp.*, #2S1147-1-EB, Memorandum of Decision at 7 (Vt. Env. Bd. September 19, 2003), the Commission grants Timberlake's request for party status under this criterion.

8. **Hampton Inn** did not attend the Prehearing Conference of June 13, 2012. On June 18, 2012 the Coordinator received a letter requesting party status under Criterion 5 and stating that Hampton Inn was unable to attend the Prehearing Conference due to a scheduling error.

Pursuant to 10 V.S.A. § 6085(D)(3), "A petition for party status must be made at or prior to an initial prehearing conference held pursuant to board rule or at the commencement of the hearing, whichever shall occur first, unless the district commission directs otherwise." The statute allows

that the Commission may grant an untimely petition if it finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion and that the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties. There was no opposition to the untimely request for party status by the Hampton Inn and therefore, the Commission granted the Hampton Inn preliminary party status under Criterion 5.

The Hampton Inn is located on the south side of Lower Mountain View Drive. Because vehicles queuing westbound on Lower Mountain View Drive could interfere with customers of the Hampton Inn that are leaving the inn and turning west, the Commission finds that the Hampton Inn has a reasonable possibility that they have a particularized interest under Criterion 5 and therefore grants it party status under this criterion.

#### B. Final Party Status Determinations

Pursuant to Act 250 Rule 14(E), the Commission made preliminary determinations concerning party status following the Prehearing Conference. Prior to the completion of deliberations, the Commission re-examined the preliminary party status determinations and revised the status of several parties as noted above.

#### C. Friend of the Commission

The Commission allowed the following entity to participate as a "Friend of the Commission" pursuant to 10 V.S.A. § 6085(c)(5):

**Sisters and Brothers Investment Group LLP** ("SBIG") was represented at the August 22, 2012 Hearing by Joseph Handy and David Greenberg, Esq. (who also attended the October 24, 2012 Hearing). SBIG filed a request for party status under Criterion 5 on July 30, 2012. Pursuant to 10 V.S.A. § 6085(D)(3), "A petition for party status must be made at or prior to an initial prehearing conference held pursuant to board rule or at the commencement of the hearing, whichever shall occur first, unless the district commission directs otherwise." The request was received 47 days after the Prehearing. However, the statute allows that the Commission may grant an untimely petition if it finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion and that the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties. SBIG did not demonstrate good cause for failure to request party status in a timely manner. The Prehearing was legally noticed in a newspaper of general circulation in the area. Several news articles on the Project have appeared in the Burlington Free Press and on the local television news. In addition, the Project has been subject to a municipal permitting process with hearings. The Applicants objected to the grant of party status and claimed that coming in this late, SBIG could not submit pre-filed direct testimony as required in the Prehearing Conference Report and Order, dated June 26, 2012, nor did the Applicants have adequate opportunity to review and comment on SBIG's testimony. Since SBIG had not shown good cause for the untimely filing and there would be delay in the proceedings for the late submittals, the Commission denied the request for party status under Criterion 5. However, the Commission granted SBIG



participation, pursuant to 10 V.S.A. § 6085(c)(5), as a “Friend of the Commission” under Criterion 5.

#### **IV. OFFICIAL NOTICE**

Under 3 V.S.A. § 810(4) of the Vermont Administrative Procedure Act (“APA”), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A. § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, “[t]he rules of evidence as applied in civil cases...shall be followed” in contested cases. Under the Vermont Rules of Evidence, “(a) judicially noticed fact must be one not subject to reasonable dispute in that it is... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” V.R.E. 201(b); *See In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e).

Official notice is hereby taken of the observations from the August 1, 2012 site visit by the Commission; previously issued state permits; digital versions of the Town Plan from the Town of Colchester’s website; documents from the Chittenden County Regional Planning Commission’s website (Regional Plan & corridor studies); documents on the VTrans website (e.g. LOS Policy, Road classification, list of High Crash Locations); Institute of Traffic Engineers website; and the Highway Capacity Manual from the American Association of State Highway and Transportation Officials (AASHTO) website, all subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

#### **V. PROCEDURAL HISTORY**

On October 5, 1992, the Commission issued LUP #4C0288-19 for the demolition of a 21,000 sf building on Lots #30 and #31 of the Meadows Industrial Park and to construct an 118,491 sf wholesale/retail building on Lots #8 and #27 - #31 of the Meadows Industrial Park.

On June 6, 1998, Costco filed an Act 250 land use permit application to construct a 3,325 sf tire sales addition and a 1,064 sf food service addition to the existing Costco building. On July 24, 1998, the Commission issued the #4C0288-19A permit amendment. Condition #7 of this permit amendment specified that the Project is approved for a maximum of 479 PM peak hour vehicle trips. Condition #8 stated:

The Permittees shall monitor the US 7/Mountain View Drive intersection approximately 6 months after the completion of the building additions approved herein to determine whether the intersection is functioning with an acceptable level of service. The study should consist of a capacity analysis of the intersection based on recent turning movements of the PM peak (3:00-

6:00) and Saturday noon peak hours. The Permittees shall submit the traffic report to the District Commission and to the Vermont Agency of Transportation for review.

Costco did not provide the analysis specified by Condition #8 of LUP #4C0288-19A within the requested time frame.

On October 10, 2008, Costco filed an application for an Act 250 land use permit for the construction of a 14,080 sf expansion to the existing building located on Lots #8, #27 - #31 of the Meadows Industrial Park. On June 23, 2009, the Commission issued LUP #4C0288-19B. That permit found compliance under all Act 250 criteria. However, to assure compliance under Criteria 5 and 9(K) the following conditions were included:

Condition #19: "Costco shall be responsible for their share of any mitigation measures that are made during [to] the US 7 corridor in and around the I-89 Exit 16 Interchange to mitigate the existing adverse conditions (*in re Pilgrim Partnership*, 153 Vt. 594, 596 (1990)). Costco's share would consist of the additional trips generated by Costco in proportion to the total of the additional trips generated by all other new or expanded developments in the area. The proportional share will be based on the Exit 16 Transportation Management Plan (2009) and the Town of Colchester and VTrans shall develop a methodology to determine the proportional share."

Condition #20: "Occupancy of the expansion may not take place until the traffic mitigation required by LUP #4C0288-19A has been fully implemented."

Condition #21: "As part of the mitigation for violations under LUP #4C0288-19A, Costco has agreed to perform the following:

- Costco shall perform a two week test period of the potential reroute. The reroute will convert Costco's Lower Mountain View Drive access into an "entrance only" access during peak time periods and require traffic to exit the site via Hercules Drive.
- The traffic volumes in the *Traffic Impact Study* shall be updated to reflect 2009 average weekday peak hour volumes. This could be achieved by applying a factor to adjust the consultant's January turning movement counts to VTrans' August 2008 turning movement counts and then applying a 1% growth factor. Peak Hour Factors should be used in the analysis. South Park Drive (McDonald's)/US 7; I-89 Exit 16 West/US 7; I-89 Exit 16 [incorrectly stated as Exit 17] East/US 7 and Rathe Road/US 7 intersections will be included in this updated analysis.
- Costco shall have their traffic consultant conduct peak hour turning movement counts towards the end of the two week trial. The consultant shall then update their Synchro<sup>®</sup> model with these volumes, as well as update the model with any signal timing changes that are made for the re-route. The results shall be compared with the "no-build" alternative in terms of queuing, v/c, delay and LOS and submitted to VTrans for review and comment.

- Costco shall implement an Inspection Agreement with VTrans in an amount up to \$5,000 to recover the costs of VTrans resources to monitor the reroute.”

The permit amendment authorizing the warehouse expansion was appealed by Costco and parties Vallee and Timberlake (143-709 Vtec). By agreement of the parties, jurisdiction over the permit was remanded back to this Commission by an order of the Superior Court Environmental Division dated April 5, 2010. No information regarding the extent of the review by the Commission was included in the Remand Order. However, the transcript from the Motions Hearing (Exhibit #55) did state that “the remanded application would be back before the original entities [District Commission]...the remanded application would be back before those respective bodies to incorporate these substantial changes [to the project].”

## VI. MOTIONS

- On June 6, 2012, Vallee requested that the Commission establish a baseline for measuring the impact of Costco’s project before proceeding (Exhibit #42). On June 13, 2012, Timberlake (Exhibit #48) adopted Vallee’s Motion as its own.

Based upon the filings submitted by all Parties the Commission determines that since there have been no physical changes to the proposed warehouse expansion, nothing would be gained by re-opening an analysis of that project’s potential impacts except where Costco has requested modification of its traffic mitigation conditions. Specifically, traffic impacts from the warehouse expansion were to be mitigated by Conditions #19, #20 and #21 of LUP #4C0288-19B. Costco has now presented alternate mitigation. Therefore, the issues of past impacts are moot and only traffic generated by the warehouse expansion is ripe for review.

- On July 11, 2012, Timberlake filed an objection (Exhibit #60) to the June 26, 2012 Prehearing Conference Report and Order. In its Motion, Timberlake argued that it has been denied due process by the Commission granting it party status even when the Commission felt that Timberlake has not met the minimum threshold for a particularized interest. In effect, having been granted the party status it requested, Timberlake now claims that it should be denied such party status because the Commission had some doubts about whether the grant was warranted. If Timberlake wishes to withdraw its request, it is free to do so. But Timberlake is in no position to complain about a judgment it “invited”. *Gill v. McLean* 227 N.C. 201, (1947) and see *Thompson v. Smith* 119 Vt 488 (1957) (a party may not appeal from a decree in his favor for the purpose of obtaining a review of a finding he deems erroneous which is not necessary to support any part of the decree); *Spencer v Casavilla* 44 F. 3d. 74, 78 (2d. Cir 1994) (a party who receives all that he sought generally is not aggrieved by the judgment affording the relief and cannot appeal). The Commission questions whether this motion has been made for the sole purpose of providing Timberlake grounds for an appeal in order to delay the proceedings in this matter. The Motion is denied.
- On July 17, 2012, Vallee filed an objection on the grounds that Costco has not submitted pre-filed direct testimony (Exhibit #88). The Commission considered the application filed by Costco to be

its submittal of direct testimony and that nothing would be gained by re-filing the application in the form of pre-filed testimony. The Motion is denied.

- On August 1, 2012, Vallee requested (Exhibit #100) that the Commission allow, pursuant to 10 V.S.A. § 6027(2), entry upon Costco's land for the purpose of investigating conditions related to this matter. On August 20, 2012, the Applicants filed a Motion Opposing R.L. Vallee, Inc.'s motion for inspection, asserting that there are no legal bases for the Commission to allow inspection. The Commission disagrees; 10 V.S.A. § 6027(a)(2) grants authority to Commissions to: "Allow parties to enter upon lands of other parties for the purposes of inspecting and investigating conditions related to the matter before the panel or commission." Many issues relating to water resources were raised at the August 22, 2012 hearing. On August 30, 2012, the Commission granted the request and allowed experts from Vallee to enter on the Applicants' property to conduct inspections on water resources only for the purpose of preparing testimony for the October 24, 2012 Hearing.
- On August 7, 2012, Timberlake requested (Exhibit #105) that it be allowed to cross examine CCRPC's witness (Exhibit #104). A hearing was scheduled for October 24, 2012, one of the purposes of which was to allow cross examination of the CCRPC, but Timberlake declined to cross examine CCRPC.
- On September 12, 2012 Vallee requested that the Commission presume that the on-site wetland should be designated Class Two (Exhibit #125). The Commission declines to do so, especially since the Secretary of ANR has specifically determined this wetland to be a Class Three wetland and the Commission has no authority to designate wetlands. If Vallee wishes to contest this determination, it must do so with the Secretary.
- October 5, 2012, Vallee filed evidentiary objections (Exhibit #133a), specifically challenging testimony from Karina Dailey and the CCRPC. On October 5, 2012, Timberlake (Exhibit #133) requested that the Commission admit all testimony and evidence, and accord it such weight as the Commission determines is appropriate. At the October 24, 2012 hearing, all Parties agreed to withdraw any evidentiary objections.
- On October 17, 2012 Timberlake requested that that the Commission compel Costco to comply with Rule 34(E) (Exhibit #142). In its filing of November 14, 2012 (Exhibit #155), the Applicants submitted its Rule 34(E) analysis. Act 250 Rule 34(E) is an analysis conducted by the Commission to determine if an application to amend a critical permit condition can go forward. *In re: Mountainside Properties, Inc.* Dkt No. 117-6-05 Vtec (December 13, 2005). The analysis is discussed below.

## **VII. ACT 250 RULE 34(E) - STOWE CLUB HIGHLANDS ANALYSIS**

Under 10 V.S.A. § 6086(c), a permit may contain such requirements and conditions as are allowable within the police power and are appropriate with respect to the Act 250 criteria. "The purpose of permit conditions is to alleviate adverse effects that would otherwise be caused by a project. Those

adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the condition is followed.” *Re: Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Env. Bd. June 20, 1995).

On January 23, 2003, the Environmental Board promulgated Board Rule 34E (now Act 250 Rule 34E) which reads:

- (1) In reviewing any amendment application, the district commission shall first determine whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit. This determination shall be made on a case-by-case basis.
  - (a) If the applicant does not propose to amend a permit condition that was included to resolve an issue critical to the issuance of the permit, the district commission’s inquiry under this rule shall end, and it shall not weigh finality and flexibility pursuant to this rule or prior case precedent.
  - (b) An application which seeks to amend project plans, exhibits, representations by the applicant for the applicable permit, findings, or conclusions which have been incorporated into the permit through a specific or general condition, may constitute an application to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.
- (2) In reviewing an application for an amendment, the district commission or the board should consider whether the permittee is merely seeking to relitigate the permit condition or to undermine its purpose and intent. It must also determine whether the need for flexibility arising from changes or policy considerations outweighs the need for finality in the permitting process.
- (3) If the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of a permit and is not merely seeking to relitigate the permit condition, the district commission shall apply the balancing test set forth in subsection (4) below. If the district commission finds that the need for finality outweighs the need for flexibility, the district commission shall deny the permit amendment application. In the alternative, the district commission may rule in the favor of flexibility.
- (4) In balancing flexibility and finality, the district commission or the board should consider the following, among other relevant factors:
  - (a) changes in facts, law or regulations beyond the permittee's control;
  - (b) changes in technology, construction, or operations which necessitate the need for the amendment;
  - (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;
  - (d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;
  - (e) manifest error on the part of the district commission, the environmental board or the environmental court in the issuance of the permit condition; and

- (f) the degree of reliance by the district commission, the board, or parties on prior permit conditions or material representations of the applicant in prior proceeding(s) by the district commission, the environmental board, the environmental court, parties, or any other person who has a particularized interest protected by 10 V.S.A. Ch. 151 that may be affected by the proposed amendment.

Appropriateness of Stowe Club Highlands Analysis - Critical Conditions

Costco seeks approval for the installation of fuel pumps and a small expansion to its present building located in Colchester, Vermont. The warehouse expansion was previously approved (LUP #4C0288-19B). Costco's existing permit allows Costco's expansion in conjunction with the proposed traffic study and mitigation measures (Conditions #19-#21 of LUP #4C0288-19B). Those mitigation measures have been largely implemented or will happen in connection with the current project. The conditions include Costco making its fair share contribution to comprehensive traffic mitigation; undertaking a post-construction traffic study to satisfy conditions in permit #4C0288-19A and implementing a review of rerouting traffic onto Hercules Drive (including updating traffic studies of the effect of re-routed traffic).

The Applicants requested that its appeal of the #4C0288-19B Permit be remanded back to the District Commission. Based on the Findings of Fact and Permit conditions that compliance under Criteria 5 and 9(K) is not possible without implementation of the conditions, the Commission concludes that Conditions #19, #20 and #21 should be considered Critical Conditions (*In re: Mountainside Properties, Inc.* Dkt No. 117-6-05 Vtec (December 13, 2005)) and that application of Act 250 Rule 34E is appropriate.

With respect to Condition #19, the current application will not only result in Costco paying its fair share contribution, as determined by the Commission, but also will include a loan of additional seed money to complete improvements to the Lower Mountain View/US 7 intersection. The Commission does not find that Costco proposes to amend Condition #19.

Condition #20 has been met by the studies conducted over the course of the last three years, which are part of the evidence for the current proposed Project. The Commission does not find that Condition #20 is proposed to be changed.

Condition #21 has several sub-parts specifically (re-labeled a through d):

- a. Costco shall perform a two week test period of the potential reroute. The reroute will convert Costco's Lower Mountain View Drive access into an "entrance only" access during peak time periods and require traffic to exit the site via Hercules Drive.
- b. The traffic volumes in the *Traffic Impact Study* shall be updated to reflect 2009 average weekday peak hour volumes. This could be achieved by applying a factor to adjust the consultant's January turning movement counts to VTrans' August 2008 turning movement counts and then applying a 1% growth factor. Peak Hour Factors should be used in the analysis. South Park Drive (McDonald's)/US 7; I-89 Exit 16 West/US 7; I-89 Exit 16 East/US 7 and Rathe Road/US 7 intersections will be included in this updated analysis.

- c. Costco shall have their traffic consultant conduct peak hour turning movement counts towards the end of the two week trial. The consultant shall then update their Synchro<sup>®</sup> model with these volumes, as well as update the model with any signal timing changes that are made for the re-route. The results shall be compared with the "no-build" alternative in terms of queuing, v/c, delay and LOS and submitted to VTrans for review and comment.
- d. Costco shall implement an Inspection Agreement with VTrans in an amount up to \$5,000 to recover the costs of VTrans resources to monitor the reroute.

Condition #21a has not been implemented although it only needed to be implemented when the warehouse expansion is occupied. The current application proposes to replace this condition with implementation of an alternative strategy. As this sub-condition is a Critical Condition and it is being changed, a Rule 34(E) analysis must be completed for this sub-condition.

Condition #21b has been met through the updated studies submitted with the current application. The Commission does not find that Costco proposes to amend Condition #21b.

Condition #21c has not been implemented although it only needed to be implemented when the warehouse expansion is occupied. The current application proposes replacing Condition #21a with implementation of an alternative strategy. Therefore, implementation of this sub-condition would be meaningless if the change occurred. This sub-condition is a Critical Condition and it is being changed. However, if the Applicant is permitted to change Condition #21a then implementation of Condition #21c is moot. A Rule 34(E) analysis will not be completed for this sub-criterion.

Condition #21d has not been implemented although it only needed to be implemented when the warehouse expansion is occupied. The current application proposed replacing Condition #21a with implementation of an alternative strategy. Therefore, implementation of this sub-condition would be meaningless if the change occurred. This sub-condition is a Critical Condition and it is being changed. However, if the Applicant is permitted to change Condition #21a then implementation of Condition #21d is moot. A Rule 34(E) analysis will not be completed for this sub-criterion.

#### Are Applicants seeking to Relitigate Condition #21a or to Undermine its Purpose and Intent?

Having found that Condition #21a is a Critical Condition the Commission then looks to see if the Applicants are attempting to relitigate the issue of impacts to traffic. The Applicants have testified that they have developed an alternative strategy to mitigate the traffic impacts of the project. They are not denying the existence of traffic impacts caused by its Project. Because, the Commission agrees and finds that the Applicants are not relitigating Criteria 5 or 9(K), the Commission now moves to the final stage of Act 250 Rule 34(E) and weighs finality against flexibility.

#### Finality

In *Stowe Club Highlands*, the Vermont Supreme Court affirmed the Environmental Board's denial of a permit amendment application for a project that would have developed a lot previously set aside as not to be developed by permit condition under Criteria 8 and 9(B). While the Court overruled the

Board's use of the doctrine of collateral estoppel as the analytical framework, the Court concluded that "the Board addressed certain policy considerations that it considered relevant in deciding whether to grant the permit amendment." *Re: Stowe Club Highlands*, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 38 (Vt. Env. Bd. June 20, 1995). Ultimately, the Court concluded that the Board was "justified in denying" the permit amendment application based upon the balancing of the policies of finality and flexibility. *Id.* at 40. See *Re: Nehemiah Associates, Inc.*, #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law and Order at 4 (Vt. Env. Bd. April 11, 1997), *aff'd*, No. 97-223 at 4 (Vt. September 11, 1998); *Re: Bernard and Suzanne Carrier*, #7R0639-1-EB, Findings of Fact, Conclusions of Law and Order at 16-22 (Vt. Env. Bd. September 23, 1998); *Re: MBL Associates, LLC*, #4C0948-3-EB, Findings of Fact, Conclusions of Law and Order at 4-18 (Vt. Env. Bd. October 20, 1999). As explained by the Board:

The principle of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit has been issued and the applicable appeal period has expired, "the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding... To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process."

*In re Taft Corners Associates*, 160 Vt. 583, 593 (1993).

[In contrast, t]he principle of flexibility is derived from the consequences of the development process. "[O]nce a permit has been issued it is reasonable to expect the permittee to conform to those representations unless circumstances or some intervening factor justify an amendment." *Re: Department of Forests and Parks Knight Point State Park*, Declaratory Ruling #77 at 3 (Sept. 6, 1976)... In a permit amendment application proceeding, the central question is "not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified."

*In re Stowe Club Highlands; Re: MBL Associates* at 15 (citing *Nehemiah* at 21-22).

Similar to the issue in the *Stowe Club Highlands* case, the Commission here must determine whether Condition #21a, that mitigated the impacts of increased vehicle trips generated, can be amended by implementing an alternative strategy. As the Supreme Court explained:

"The [Environmental] Board recognized that parties and other interested persons rely on permit conditions designed to mitigate the impact of proposed developments. In this case, the Board found that purchasers of adjacent residential lots relied upon the permit condition restricting development of the Meadow Lot when they chose to live in the neighborhood. The Board also noted that the District Commission relied upon the representations of Stowe Club Associates, using the permit condition as one aspect of a mitigation plan for the overall development... The reasonable reliance of the District Commission and the neighboring landowners weighs strongly against granting the permit amendment."

*Re: Town of Hinesburg and Stuart and Martha Martin*, #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order at 14 (September 23, 1998) (citing *Stowe Club Highlands* at 335).



The Commission looks at factor (f) in deciding the issue of finality.

(f) the degree of reliance by the district commission, the board, or parties on prior permit conditions or material representations of the applicant in prior proceeding(s)

The Commission established Condition #21a because without this condition there would be undue adverse impacts under Criteria 5 and 9(K) and the project may not have been able to proceed. However, the Commission also recognizes that the Condition is not the only means to mitigate such impacts. Although other alternatives exist, the proposed alternative by itself will not mitigate for the expected traffic impacts and any solutions will be implemented after construction and use of the warehouse expansion and fuel pumps occurs. Since this is counter to the past precedents of Act 250, the Commission finds that this supports the reliance on finality of the decision.

#### Flexibility

In its decision in *Stowe Club Highlands*, the Supreme Court described the flexibility considerations that the Environmental Board weighed against the finality considerations:

The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions. The Board recognized three kinds of changes that would justify altering a permit condition:

“(a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology.”

*Id.*

This methodology was codified as Act 250 Rule 34 (E) and the Commission discusses the factors of flexibility associated with each factor:

- (a. Changes in facts, law or regulations beyond the permittee’s control - The Commission concludes that there have been no changes in facts, law or regulations beyond the permittee’s control.
- (b. Changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued - The Applicants have offered no testimony under this factor and the Commission concludes that there have been no changes in construction or operation of the permittee's project.
- (c. Changes in including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact -The Applicants have proposed an alternate mitigation for improvements to the Exit 16 corridor. Some of the traffic problems with Lower Mountain View Drive are caused by problems with the Exit 16 corridor. Therefore, significant improvements to traffic congestion on Lower Mountain View

Drive cannot be accomplished unless improvements are made to the entire Exit 16 corridor. The Commission concludes that there has been an alternative design which may provide for a more efficient or effective means to mitigate the impact of the permittee's project.

- (d. Other important policy considerations – In the past all traffic mitigation has been done by “the last one in” - the project that was the “last straw” and that thus tipped the scales to require remediation. At the Exit 16 corridor, this would mean that the “last one in” would be required to complete a ~\$5,100,000 traffic improvement project to move its application forward, even though many other projects were built and contributed to the need for traffic mitigation measures. The State has been considering an alternative means to address deficiencies with these types of intersections (where the cost to fix the traffic problem far outweighs the cost of any one project). This is a major policy change by the State.
- (e. Manifest error on the part of the District Commission - No Commission errors that address the flexibility argument of the *Stowe Club Highlands* analysis have been suggested by the Applicants.

Since there has been a change under at least one of the factors above (c & d), the Commission is permitted to consider flexibility.

#### Conclusion

The Commission concludes that Costco has presented alternative traffic designs that may result in a more efficient means by which to address the problems that exist or will be exacerbated along the Exit 16 corridor and that the State's change in policy, as it relates to the “last one in” dilemma, outweigh the reliance that the Commission may have on Condition #21a. The application may thus move forward.

### **VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A Commission is required by 10 VSA 6086(a) to review a project on its own merits, not in comparison to previous proposals, to what could or should be built, or to other factors unrelated to the project. *Re: Chittenden Solid Waste District, #EJ99-0197-WFP*, Findings of Fact, Conclusions of Law and Order at 21 n.4 (Waste Facility Panel October 24, 2003). The Commission's analysis is based only on whether the proposed Project would be in compliance with the Act 250 Criteria. The underlying purpose of Act 250 is to regulate the impacts of development, not the purpose served, nor the parties benefited by the construction. *In re Vermont RSA Ltd. Partnership d/b/a Verizon Wireless*, 2007 VT 23, ¶9 (2007), citing *In re Audet*, 2004 VT 30, ¶14, 176 Vt. 617 (mem.)

Prior to taking evidence with regard to the ten Criteria of 10 V.S.A. § 6086(a), the Commission determined that the Applicants through submittal of the Application materials have met the burden of proof with respect to the following criteria:

1 - Air Pollution

1(C) - Water Conservation

- |                                       |                                       |
|---------------------------------------|---------------------------------------|
| 1(D) - Floodways                      | 9(B) - Agricultural Soils             |
| 1(F) - Shorelines                     | 9(C) - Productive Forest Soils        |
| 2 - Water Supply                      | 9(D) - Earth Resources                |
| 3 - Impact on Existing Water Supplies | 9(E) - Extraction of Earth Resources  |
| 4 - Erosion                           | 9(F) - Energy Conservation            |
| 6 - Educational Services              | 9(G) - Private Utility Services       |
| 7 - Municipal Services                | 9(H) - Costs of Scattered Development |
| 8(A) - Wildlife Habitat               | 9(J) - Public Utility Services        |
| 9(A) - Impact of Growth               | 9(L) - Rural Growth Areas             |

Therefore, the Application shall serve as the Findings of Fact on these criteria.

The Findings of Fact set forth below pertain to the following Criteria:

- |                       |                                      |
|-----------------------|--------------------------------------|
| 1 - Water Pollution   | 5 - Traffic                          |
| 1(A) - Headwaters     | 8 - Aesthetics                       |
| 1(B) - Waste Disposal | 9(K) - Effects on Public Investments |
| 1(E) - Streams        | 10 - Local and Regional Plans        |

Where testimony or other evidence were in actual or apparent conflict, the Commission evaluated the credibility and weight of the competing testimony and evidence, and resolved the conflict in favor of the findings and conclusions below. The Commission incorporates by reference the Findings of Fact from LUP #4C0288-19B regarding the warehouse expansion except the discussions on Criteria 5 and 9(K) which are modified below.

In making the following findings, the Commission has summarized the statutory language of the ten criteria of 10 V.S.A. § 6086(a):

**General Findings:**

1. The existing Costco site is located at the southern terminus of Lower Mountain View Drive, near Hercules Drive, in Colchester, Vermont. The site is currently developed with a 125,748 sf Costco warehouse and associated parking areas. Access to the site is currently provided at three unsignalized locations: the terminus of Lower Mountain View Drive, a driveway on Hercules Drive at the northern end of the site, and a driveway on Hercules Drive just south of the warehouse. In addition to the subject property, Lower Mountain View Drive is developed with a mix of commercial uses (hotel, gas station and convenience store, bowling alley, credit union, restaurants) and Hercules Drive is developed with a mix of commercial and industrial uses. Exhibits #2, #8, #15 and #154.
2. The proposed Planned Unit Development combines an undeveloped parcel with the existing developed parcel, expands the existing Costco warehouse building, adds a three-island (12 fueling position) Costco Gasoline fuel station as an ancillary use to the warehouse, and reconfigures the existing parking lot. The proposed warehouse expansion will result in a net increase of approximately 14,080 sf in warehouse floor area for a total new size of 139,828 sf. The fuel station will be located on the northwestern portion of the site, just south of the existing termination of Lower Mountain View Drive. Exhibits #2, #8, #15, #23, #24 and #154.

### **Criterion 1 - Water Pollution:**

#### Findings of Fact

3. Costco will operate in accordance with its Gasoline Operations Manual. The manual details the steps that should be taken to prevent a spill and what should be done if a spill occurs. Exhibit #113.
4. Sediment has the potential to come from on-site erosion, dripping from cars, stream scour from excess runoff, and floodplain geomorphologic changes from extreme floods. Sediment carries phosphorus to the stream. It also can clog pores in gravel substrate and destroy aquatic habitat. There may be sediment contained in the runoff from the proposed Costco Project discharging toward Sunnyside Brook. Additional sediment may also be produced from streambank scour caused by increases in the peak storm flows from Costco's development. Exhibit #65.
5. Phosphorus has the potential to come from soil and fertilizer used on lawns and in spilled fertilizer products. Phosphorus is a nutrient for plant growth and excess plant growth in the stream can alter the oxygen levels available to aquatic organisms. Exhibit #65.
6. Hydrocarbons come from petroleum products that leak or spill from cars, trucks, filling stations, underground tanks, and the like. Hydrocarbons can be toxic themselves and can carry toxic metals and other chemicals. They can create films on the surface of water reducing oxygen supplies. There may be hydrocarbons contained in the runoff from the proposed Costco Project discharging toward Sunnyside Brook. Exhibit #65.
7. Chloride comes primarily from road salt applied to roadways in developed areas. Chloride readily dissolves in storm water runoff and is difficult to treat. Chloride can be toxic to aquatic organisms by affecting water uptake and as a skin irritant. There may be chloride contained in the runoff from the proposed Costco Project discharging toward Sunnyside Brook. Exhibit #65.
8. Removal efficiencies for Phosphorus ("P") differ from those of sediment. The 2002 Vermont Stormwater Management Manual ("VSMM") recognizes wet ponds as removing 51% P (treatment factor of 0.49). Studies of filter strips'<sup>1</sup> effectiveness in removing P are mixed. If large amounts of area are directed to the filter strip, it could actually lead to export of P offsite. For the purposes of modeling, Costco conservatively estimated the filter strip to remove 20% of P. The proposed stormwater system was estimated to discharge 26% less TSS to the receiving water. Exhibits #113 and #117.
9. The WinSLAMM model, completed by Vallee, estimates that the existing stormwater management system on the site is highly effective for removing pollutants and reducing runoff volumes by infiltrating stormwater to groundwater. For the annual precipitation record modeled, the annual runoff volume was reduced by 92%. Similarly, TSS and total phosphorus ("TP") were reported to be reduced by 99% and 95%, respectively, which surpass the 80% TSS and 40% TP removal efficiency requirement as specified in VSMM under the current stormwater regulations. Exhibit #75.

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<sup>1</sup> A filter strip is a strip of permanent vegetation above ponds, diversions and other structures to slow flow of runoff water, causing deposition of transported material, thereby reducing sediment flow.

10. Costco has proposed a Chloride Reduction Plan to address a concern from a stream biologist regarding the status of the stream relative to the impact of chloride runoff. The Plan analyzes several components of the de-icing plan at Costco. Redundant de-icing by the Town of Colchester and Costco will be reduced if not eliminated. Alternative deicers will be employed. Magnesium chloride will be the primary de-icer of choice but if testing shows that it is not effective then calcium chloride will be used. Rock salt may still be the primary de-icer used for temperatures above 15°F. ANR has reviewed and approved the plan. Exhibits #118, #135, #150, #159, and #160.
11. Vallee has submitted a letter from the Vermont Natural Resources Council (“VNRC”) and the Conservation Law Foundation (“CLF”) urging ANR to consider cumulative impacts and the federally mandated anti-degradation analysis in ANR’s stormwater permitting. The letter was sent in the appeal by Vallee of Costco’s stormwater permit. VNRC and CLF state that the analyses by Vallee are in dispute but urge the State to consider anti-degradation policies in the context of stormwater permitting. Exhibit #162

#### Conclusions of Law

The applicant has the burden of proof on Criterion 1 (water pollution). 10 V.S.A. § 6088(a); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 511 (1975).

We recognize that the facts presented by the opponents with regard to water quality are in dispute. We conclude that with implementation of the above procedures (Findings #3 and #10) together with the Erosion Prevention and Sediment Control Plan (“EPSC”) and operational-phase stormwater management plan, the proposed Project will not result in undue water pollution.

#### **Criterion 1(A) - Headwaters:**

##### Findings of Fact

12. The site is located in an area where the drainage area at the point of discharge is less than 20 square miles. Exhibit #75.
13. The Project site is within the Meadows Industrial Park, established in 1977. The Chittenden County Regional Plan (2006) depicts the area as a Metropolitan Planning Area currently consisting of industrial, shopping, trade and other service uses. Exhibits #8, #19 and #104.

##### Conclusions of Law

The applicant has the burden of proof on meeting Criterion 1(A) - headwaters. 10 V.S.A. § 6088(a).

10 V.S.A. 6086(a)(1)(A) says that a “permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulation regarding reduction of the quality of the ground or surface **waters flowing through or upon lands which are not devoted to intensive development**, and which lands are (i) headwaters of watersheds characterized by steep slopes and shallow soils; or (ii) drainage areas of 20 square miles or less; or (iii) above 1,500 feet elevation; or (iv)

watersheds of public water supplies designated by the agency of natural resources; or (v) areas supplying significant amounts of recharge waters to aquifers.” (Emphasis added) Because the waters at issue in this matter do not flow across lands which are not devoted to intensive development, they are by definition not headwaters, and the Commission finds that the proposed Project is in compliance with Criterion 1(A).

### **Criterion 1(B) - Waste Disposal:**

#### Findings of Fact

14. The Wastewater Management Division has issued Wastewater and Potable Water Supply Permit #WW-4-0556-3 on February 19, 2008. Exhibit #11.
15. Sunnyside Brook is associated with a wetland area. Under section 303(d) of the Federal Clean Water Act (“CWA”) states are required to develop lists of impaired waters known as the 303(d) List, Part A – Impaired Surface Waters in Need of Total Maximum Daily Load (TMDL) for which technology-based regulations and other required controls are not stringent enough to meet state water quality standards. For these waters, the CWA requires that the state develop a TMDL, which is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards. At present, Sunnyside Brook is included in 2012 State of Vermont List of Priority Surface Waters Outside the Scope of Clean Water Act Section 303(d), Part C – Surface Waters in Need of Further Assessment, while a segment of Sunderland Brook is included in Part D – Surface Waters with Completed and Approved TMDLs. Neither are included in the 2012 State of Vermont 303(d) List, Part A and therefore neither are classified as impaired surface waters. Exhibits #117, #118 and #123.
16. Pursuant to Chapter 18 and 22 of the Vermont Environmental Rules, coverage under a state stormwater discharge permit is required for the discharge of stormwater from new development equal to or greater than one acre. In addition, the rules may require coverage under a discharge permit for expansion of or redevelopment of existing impervious surfaces. The VSMM establishes five treatment standards for the control of water quality and quantity. The standards outlined in the VSMM include water quality (WQv), groundwater recharge (Re), channel protection (CPv, 1-year 24-hour event - stormwater runoff control), overbank flood protection (Q10, 10-year 24-hour event – peak discharge/flood control) and extreme flood protection (Q100, 100-year 24-hour event – peak discharge/flood control). Stormwater management design according to these standards must consider both pre-development and post-development runoff conditions, taking into account on-site soils, slopes, receiving waters, existing drainage, and local precipitation data for a range of storm events as defined in the VSMM. In addition to the regulatory requirements, the VSMM provides design guidance (i.e. not required), which includes but is not limited to example depictions of stormwater treatment practices and additional design elements. The VSMM is essentially a design toolbox that allows the designer to select and develop the most appropriate structural and non-structural stormwater management systems in developing an overall stormwater management plan with the intent of meeting the applicable stormwater treatment standards. Exhibits #115 and #117.
17. The Agency of Natural Resources originally issued Stormwater Discharge Permit #1-0934 on April 15, 1993 for the operation phase stormwater runoff associated with the Costco building. That permit assured that the project conformed to the 1987 Stormwater Procedures. On April 15, 2006 coverage under General Permit #3-9010 was issued and on February 18, 2010, the existing stormwater

management system was renewed under General Permit #3-9010 (#4114-9010.R). The basis for the allowed reauthorization was that the stormwater system at the time was providing a level of treatment that met or exceeded the level of treatment required under the original stormwater discharge permit (1987 standards). Exhibits #75 and #115.

18. The current, operational-phase stormwater discharge permit covering the Costco site (#4110-9010.R) incorporates the terms and conditions of the original permit (#1-0934). According to the current permit, there are five discrete discharge points from the site, with the following treatment measures:
  - S/N 001: Overland flow and/or grass line swales to a detention basin (#1)
  - S/N 002a: Detention basin (#2)
  - S/N 002b: Grass swales and overland flow
  - S/N 003: Grass swales and overland flow
  - S/N 004: Infiltration Gallery

Exhibits #75, #113, #115 and #148.
19. The detention basins referred to in the original permit were not designed to the current 2002 VSMM standards given that they were in place prior to 2002. At the time of the original permit, water quality was not regulated at the level it is today, and “overland flow,” “grassed swales,” and “sedimentation basins” did not have the detailed design requirements as currently exist in the VSMM. Therefore, the performance of a previously approved treatment practice such as overland flow would not necessarily have been constructed to provide the same sediment removal efficiency as a current practice such as non-rooftop disconnection credit (the current terminology of ‘overland flow’ for a parking lot). In general, the pre-2002 VSMM treatment methodologies are difficult to assess in comparison to what now applies. Exhibits #46, #117 and #148.
20. Prior to 2002, there were no requirements to limit the amount of area contributing to a filter strip. Current rules recognize that a system with a large area draining to a filter strip may not perform effectively. Therefore, updated rules limit the contributing area to ensure that runoff enters a filter strip in a sheet flow condition, maximizing the removal efficiency of the filter strip. Hearing (October 24, 2012) testimony of Shane Mullen.
21. The 1987 Stormwater Rules (incorporated into permit #1-0934) only required the controlled release of a 10-year storm event. This storm event (3.20 inches) does not account for the vast majority of storm events in a given year. Current standards (2002) regulate to the 0.9-inch storm event, which represents 90% of storm events in a given year. Current standards also require that detention basins have structures such as sediment forebays<sup>2</sup> and wet ponds to enhance sediment removal. Exhibits #46 and #148.
22. The 10-year storm standard of the 1987 Stormwater Rules was intended to result in post-developed peak discharge rates that are equal to pre-developed peak discharge rates. While this provided some reduction in the peak velocities to receiving waters, the newer CPv standard is better suited to minimize streambank scour. This standard requires that runoff be released from a detention basin over the course of 12 (or 24) hours. This results in peak discharge rates that are lower than predevelopment conditions. Exhibit #113.

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<sup>2</sup> A forebay is a storage space located near a stormwater treatment practice inlet that serves to trap incoming coarse sediments before they accumulate in the main treatment area.

23. General Permit 3-9015 which authorizes stormwater discharges from the Project site was issued on September 4, 2003. This permit was issued for new discharges not covered under General Permit 3-9010. Exhibit #44.
24. Stormwater runoff from the expanded portion of the warehouse roof will be via sheet flow to roof drains which flow to a dry swale system. The system discharges to a wet pond with a controlled outlet structure before discharging via a culvert to an existing ditch, located adjacent to I-89, which discharges to the Gilbrook Reservoir and finally to the Winooski River. The ANR Water Quality Division issued coverage under General Permit #3-9015 (Stormwater Discharge General Permit #4114-9015.1) on April 1, 2009 for the warehouse expansion. Exhibit #44.
25. New stormwater discharges were permitted under General Permit 3-9015 (#4114-9015.2) on May 15, 2012 that included construction of the new fuel pumps and associated improvements. Exhibits #44 and #46.
26. The proposed Project is located within the areas draining to discharge points S/N 002a and S/N 002b, redefined as S/N 002 and S/N 005, respectively. The proposed stormwater treatment system replaces overland flow, grass channels, and detention basins with a dry swale/wet pond (for S/N 002) and a wet pond (for S/N 005). These systems accept runoff from proposed, redeveloped, and existing impervious areas. Current rules recognize that treatment systems designed in accordance with the 2002 VSMM will achieve 80% sediment removal efficiency. Exhibits #44 and #113.
27. Runoff draining from discharge point S/N 002 includes the proposed parking area, portions of the existing parking lot on the west side of the Costco building, and the Costco building itself. All of the proposed impervious surface in this drainage area (0.29 acres) and a portion of the existing parking lot (0.78 acres) discharge to a dry swale. This structure reduces the sediment load from the contributing surfaces by 80%. The dry swale discharges to a wet pond (WP2). The wet pond does not have a sediment forebay as pretreatment for the proposed impervious surface but it is provided by the dry swale. Additional surfaces captured by WP2 include the Costco roof and a portion of the existing parking lot (0.32 acres). These areas do not receive full sediment removal treatment, but all of these surfaces (including those discharging to the dry swale) are retained in WP2 and meet the relevant quantity-based treatment standards of the 2002 VSMM (CPv and the overbank flood protection (Qp10) standard). The CPv and Qp10 standards are designed to minimize the risk of streambank erosion by limiting the peak discharge rates from the site. The proposed WP2, which controls flow with a 2.6-inch orifice, is an improvement over the current detention basin which controls flow with a 6-inch orifice, because the reduction in orifice size increases the detention time in the pond from 1.8 hours to 12.2 hours for a 1-year storm event (the design standard for CPv) and reduces the discharge rate from 10.86 cubic feet per second (cfs) to 10.42 cfs for the 10-year storm event (the design standard for Qp10). Exhibits #46, #75, #113 and #117.
28. Runoff draining to discharge point S/N 005 includes runoff from the proposed gas station and the existing parking lot on the north side of the Costco building. All of the proposed impervious surfaces in this drainage area (0.67 acres) and a portion of the existing parking lot and other offsite buildings (3.98 acres) drain to pretreatment measures, including two sediment forebays and a grass channel. These structures discharge to a modified pond that exists on the Spare Time bowling alley (located on an adjacent parcel) site. The pond will be converted to retain water and a new outlet structure will control discharge rates. The redesigned pond will increase the detention time from 6.9 hours to 11.6



hours for a 1-year storm event and the discharge rate will decrease from 12.26 cfs to 6.76 cfs for the 10-year storm event. Exhibits #46, #75, #113 and #117.

29. There are many available methodologies to determine sediment load and they range in complexity. The model that has been identified by ANR as valid (and accepted as relevant and valid by the Water Resources Panel), is called HydroCAD<sup>®3</sup>. For this Project, the subcatchments that have modified conveyance and/or treatment measures were analyzed. This equates to pre-development subcatchments DA5 and DA8 and post-development watersheds DA1B, DA8, DA5A, DA5B and DA3C. Area calculations were taken from the HydroCAD<sup>®</sup> model, and sediment concentration of runoff from the area was conservatively assumed as 100% pavement. A safety factor of 20% was added to the proposed conditions as another conservative measure. Finally, treatment factors were applied to the pre- and post-development scenarios. Recognizing the existing system, while not designed to full compliance with the VSMM, provides some level of treatment and a treatment factor of 0.40 (60% removal efficiency) was applied. For the proposed condition, the ANR's recognized treatment standard for structures designed to the 2002 VSMM was applied, and a treatment factor of 0.20 (80% removal) was applied. Exhibits #113 and #115.
30. The VSMM requires that designers utilize a TR-55 or TR-20 (or approved equivalent such as HydroCAD<sup>®</sup>) based model (VSMM – Page 1-5). While WinSLAMM may be an effective tool in characterizing different types of stormwater pollutant sources and treatment, it cannot be assumed that the treatment or recharge provided in the existing condition, or as presented in the WinSLAMM model meets the VSMM, nor can the removal efficiencies that are incorporated in the WinSLAMM model be compared to the VSMM or directly compared to the Applicants' data as different models were used. Exhibits #115 and #117.
31. The WinSLAMM model was utilized to test the entire portion of the site within the Sunderland Brook watershed so one could calculate the change in TSS and TP for the portion of the Costco site within the Sunnyside Brook watershed. That analysis indicated that TSS will increase by 1,728 pounds/yr. (57%) and TP will increase by 1.5 pounds/yr. (43%) respectively with the new development project in place, as compared to the loading with the existing permitted system in place. The amount of groundwater recharge is predicted to drop by 37,108 cubic feet/yr (-23%) with the Project development. These trends are more pronounced with consideration of the treatment afforded by the Costco wetland, which was not specifically included in the permitted condition model. Factoring in the treatment as provided by the Costco wetland, TSS is predicted to increase by 139% over the existing condition, while TP is predicted to increase by 46%. Groundwater recharge is predicted to drop by 38%. Exhibit #75.
32. Under the originally proposed stormwater system, less runoff would have reached the wetlands than under the current proposed design. Costco's project will increase stormwater volume in Sunderland Brook and Sunnyside Brook, which are the receiving waters. However, redesign of the treatment system is not expected to affect recharge of the wetland system. Exhibits #75 and #113.

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<sup>3</sup> HydroCAD<sup>®</sup> is a computer model that performs both a TR-20 and TR-55 analysis, which is what is required to run per VSMM. The TR-20 program provides hydrologic analyses of a watershed under present conditions. The TR-55 program utilizes the Soil Conservation Service's runoff equation to predict the peak rate of runoff as well as the total volume.

### Conclusions of Law

The applicant has the burden of proof of meeting Criterion 1(B). 10 V.S.A. § 6088(a); *Re: Steven L. Reynolds and Harold and Eleanor Cadreact*, #4C1117-EB, Findings of Fact, Conclusions of Law and Order at 4 (Vt. Env. Bd. May 27, 2004).

The Natural Resources Board is authorized by statute to adopt rules which give presumptive effect to other State agency permits 10 V.S.A. §6086(d). Act 250 Rule 19 grants presumption of compliance to various State and local permits but provides that they may be challenged and rebutted by parties or by the Commission itself. *Sherman Hollow, Inc.*, #4C0422-5R-1-EB (Vt. Env. Bd. June 19, 1992), *aff'd*, *In re Sherman Hollow, Inc.*, 160 Vt. 627 (1993). While ANR permits may be offered as presumptions that specific Act 250 criteria are satisfied, the Commission has independent authority to make findings under all criteria. *Barre Granite Association*, #5W0483-3-EB (Vt. Env. Bd. March 27, 1989); *Sherman Hollow*, #4C0422-5-EB (Revised) (Vt. Env. Bd. February 17, 1989) and a presumption can disappear when credible evidence is introduced that fairly and reasonably indicates that the real facts are not as presumed. *In re Hawk Mountain Corp.*, 149 Vt. 179, 186 (1988).

The ANR Wastewater Management Division permit (#WW-4-0556-3 issued on February 19, 2008) and the Watershed Protection Division permits (#1-0934 and amendments & #4114-9015 and amendments) create a rebuttable presumption of compliance under Criterion 1(B) regarding waste disposal.

When a presumption is rebutted, the burden of proof with respect to the applicable criteria shifts back to the applicant and the permit which created the presumption serves only as evidence that the project complies with the applicable criteria. *Herbert and Patricia Clark*, Application #1R0785-EB (Vt. Env. Bd. April 3, 1997) *Hawk Mountain Corporation*, #3W0347-EB (Vt. Env. Bd. August 21, 1985), *aff'd in part / rev'd in part*, *In re Hawk Mountain Corp.*, 149 Vt. 179 (1988).

There has been no rebuttal of the wastewater permit. Initial comments on the proposed stormwater permits were addressed by redesign. Subsequent comments to rebut the stormwater permit centered on results from the WinSLAMM modeling which predicts ineffective treatment by the stormwater system or a worsening in comparison to the existing treatments. But while it may be effective, the WinSLAMM model has not been used as regularly to assess compliance with the VSMM. Even though the WinSLAMM model is not recognized as readily by the State for use in approving stormwater systems, if the results of a robust model rebut the water quality treatment effectiveness of a permitted system, then under Criterion 1B, the presumption could still be rebutted. However, no testing of the model's effectiveness was presented by the opponents. Therefore, there is no data to corroborate the results of the WinSLAMM modeling with real data. The Commission finds that the opponents have based their rebuttal on the results of the WinSLAMM model but have not presented any evidence to show that the WinSLAMM model is reliable and robust. Therefore, the Commission concludes that the opponents have not met their burden of production to rebut the presumption afforded by the issued state stormwater permits.

Therefore, the Commission finds that the proposed Project will meet the applicable health and environmental conservation department regulations regarding the disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

### **Criterion 1(E) - Streams:**

#### Findings of Fact

33. Sunnyside Brook has been included on the 2012 State of Vermont List of Priority Surface Waters Outside the Scope of Clean Water Act Section 303(d), Part C – List of Waters in Need of Further Assessment. While not on the impaired list, Sunnyside Brook nonetheless requires further assessment to confirm whether there is a violation of one or more criteria of the Vermont Water Quality Standards. Exhibits #113, #115 and #120.
34. Being on the Part C list does not mean that Sunnyside Brook is on the verge of being placed onto the § 303(d) list and classified as an impaired waterway. While concerns have been raised about chloride loading, no testimony was proffered by any party that the additional impervious surfaces are likely to result in the impairment of Sunnyside Brook. Exhibits #113, #115 and #120.
35. The proposed stormwater treatment systems provide better peak flow rate reduction than the current existing system, reducing the effect of streambank scour on Sunnyside Brook. The proposed systems also provide sediment removal better than the current system through the use of pretreatment measures such as sediment forebays and swales. Exhibits #8 and #113.
36. Existing uses in Sunderland Brook and Sunnyside Brook include aquatic biota, aquatic habitat, and wildlife habitat. Exhibit #132.

#### Conclusions of Law

The burden of proof is on the applicant under Criterion 1(E). 10 V.S.A. § 6088(a); *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered)*, Findings of Fact, Conclusions of Law and Order at 35 (Vt. Env. Bd. November 4, 2005).

There is no Project work proposed within the stream channel. The degradation of the Sunnyside Brook asserted by Vallee is comprised only of speculation that the proposed stormwater system is not as effective or less effective than the existing system; that spills from the fuel pumps will discharge into the stream; and that the use of chloride salts in the Costco parking lot will create a chloride shock. Although a stormwater permit is not a rebuttable presumption under Criterion 1(E), the Commission considers it to be evidence that ANR believes that the proposed water quality treatment by the stormwater system is adequate to handle TSS and P. The Chloride Reduction Plan has also been reviewed by ANR and the Agency finds that it will reduce potential Chloride discharge into the watershed. The proposed fuel pumps are located ~195-feet from the Sunnyside Brook stream channel, the Vallee operation is ~128-feet from the channel and the Timberlake operation is ~198-feet from the channel. If the latter (Timberlake and Vallee) operations with its non 2002 VSMM compliant stormwater systems are not violating the natural condition of the stream and thus a federal water quality violation, then it is a reasonable presumption that the Costco system with a 2002 VSMM compliant stormwater system is not expected to violate the natural condition of the stream channel.

For the reasons set forth above, the Commission concludes that the Applicants' Project will maintain the natural condition of any streams to the extent feasible and will not endanger the health, safety or welfare of the public or adjoining landowners.

**Criteria 5 - Traffic & 9(K) - Effects on Public Investments (traffic):**

Findings of Fact

37. The Project's accesses are via Lower Mountain View Drive and Hercules Drive, both of which intersect with US 7 and provide adequate sight distances. The posted speed limit of US 7 south of Lower Mountain View Drive is 30 mph, the posted speed limit north is 40 mph, until the Rathe Road intersection where it increases to 50 mph. The posted speed limit on Lower Mountain View Drive is 25 mph and it is 30 mph on Hercules Drive. Exhibit #15.
38. I-89 and US 7 are federal highways, Mountain View Drive and Hercules Drive are Town (Colchester) highways, and the extension of Lower Mountain View Drive is a private road.
39. The Town of Colchester is advancing a project to provide a sidewalk on the east side of US 7. It will reach from the Winooski city line northward to Mountain View Drive. No sidewalk is proposed for the western side of US 7 south of Mountain View Drive nor is a sidewalk proposed for either side of US 7 north of Mountain View Drive. *Act 250 Application #4C0068-1A/4C0676-13A (pending)*.
40. The 2008 Average Annual Daily Traffic ("AADT") on US 7 between Hercules Drive and Lower Mountain View Drive is 14,760 vehicles, the AADT from Lower Mountain View Drive to the I-89 northbound ramps is 22,090 vehicles, the AADT from the I-89 northbound ramps to the I-89 southbound ramps is 18,425 and the AADT from the I-89 southbound ramps to the City of Winooski municipal line is 16,795 vehicles. Exhibit #15 and Exhibit #42 from LUP #4C0288-19B.
41. The intersection of US 7 and I-89 southbound and the intersection of US 7 and Lower Mountain View Drive are listed by VTrans as High Crash Locations<sup>4</sup> ("HCL"). Since VTrans only recognizes HCL on state roads, the *Exit 16 Circulation Study Final Report* expanded that calculation to non-state roads. According to the Circulation Study, the intersections of both Mountain View Drive and Hercules Drive with US 7 also meet the definition as HCL. Exhibit #82 and *VTrans High Crash Location Report Sections and Intersections 2003-2007*.
42. The Costco Traffic Impact Study ("TIS") states that, "a relatively high number of crashes [were] reported along US 7 in the vicinity of the Shell access [gas station property that is owned by Timberlake] and Whitcomb Street intersection (south of the 1-89 interchange)...Of these, a relatively large proportion are turning movement crashes (70%), the majority of which involved turning movements in and out of Shell accesses (55% of the total crashes reported in this area)." Exhibit #15.
43. The Chittenden County Circumferential Highway ("Circ") was conceived thirty years ago as a 15.8 mile, limited access, two-lane two-way highway. Its purpose was to intercept and redistribute traffic among the arterial routes serving the Burlington area from the north and east, thereby promoting efficient use of existing radial highway capacity. In May 2011, Governor Shumlin announced that the Circ Highway would not be built as planned and a Task Force, to be facilitated by the CCRPC, was

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<sup>4</sup> To be considered HCL a road section (0.3 mile) must have had at least five crashes within a five-year period **and** the Actual Crash Rate must exceed the Critical Crash Rate (roughly equivalent to the average crash rate for a functional classification) for this functional classification.

developed to study short, medium and long range solutions. Several smaller alternatives to the Circ were investigated and five were chosen. VTrans has designated these alternatives as the Phase I list and have placed a priority on their implementation. Improvements to the Exit 16 corridor are on the Phase I list of Circ alternatives at a proposed cost of \$5,100,000. *Circ Task Force from CCRPC website.*

#### Level of Service

44. The proposed Costco warehouse expansion and Costco Gasoline fuel station are estimated to generate approximately 420 new trip ends during the weekday PM peak hour. This estimate is based on a sample of similar expansions and fuel stations at other Costco warehouses. Standard assumptions, by the Institute of Traffic Engineers Manual on Trip Generation (8<sup>th</sup> ed.), of a 41% deduction for pass-by<sup>5</sup> trips and a 32% deduction for internal trips<sup>6</sup> results in an estimate of a net increase of 155 new vehicle peak hour trips by the proposed Project. Diverted trips<sup>7</sup> were not discounted from the estimate. Exhibits #15 and #79.
45. The Applicants' model of the US 7/Hercules Drive intersection shows that the overall intersection operates acceptably during the weekday PM peak hour with a Level of Service (LOS) "C". However, simulations submitted by Vallee, show a LOS "F" for the Hercules Drive Westbound ("WB") and US 7 Southbound ("SB") movements. Exhibits #15, #73 and #83.
46. The intersection of US 7/I-89 Northbound ("NB") Ramps and US 7/I-89 SB Ramps currently operate at an overall LOS "D" and "E," respectively, and are at or over capacity<sup>8</sup> under existing conditions. Exhibits #15, #73 and #83.
47. Based on the Applicants' Synchro<sup>®</sup> model, the ramp intersections at the I-89 interchange are both forecast to operate at LOS "E" and over capacity, even without any additional traffic from the Costco development. Simulations by Vallee showed that I-89 WB will operate at LOS "F". Exhibits #15, #73 and #83.
48. Under the 2018 Background Traffic Conditions scenario, submitted in the Costco TIS, not including the proposed Costco warehouse expansion and fuel station development, the US 7/Hercules Drive

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<sup>5</sup> Pass-by trips are made by traffic already using the adjacent roadway and enter the site as an intermediate stop on the way from another destination. The trip may not necessarily be "generated" by the land use under study, and thus, not a new trip added to the transportation system. This pass-by factor should be taken into account in devising a trip generation estimate. Exhibit #15.

<sup>6</sup> Internal trips occur at multi-use developments. Some of the generated trips are made between on-site shopping areas. These trips are internal to a multi-use site. Because they are captured on-site, a capture rate is used. A capture rate is a percentage reduction in traditionally developed trip forecasts to account for internal trips. The estimate was based on averaging all locations in Costco's consultant's database where trip type surveys had been completed in the past 10 years. Exhibit #15.

<sup>7</sup> Diverted trips are trips that are attracted from the traffic volume on roads in the vicinity of the project but require a diversion from one road to another road to gain access to the site. Exhibit #15.

<sup>8</sup> Capacity of a roadway segment is typically referred to as the v/c ratio. The ratio compares the roadway's vehicle demand (volume) with the roadway's theoretical supply (carrying capacity) that can be serviced during a signal phase. A v/c ratio of less than one generally indicates that an intersection is cleared by a signal phase and is under capacity.

intersection is forecast to operate at LOS “C.” Simulations completed by Vallee showed this intersection to operate at LOS “F”. Exhibits #15, #73 and #83.

49. With or without any additional traffic from the proposed Costco development, the US 7/ I-89 NB Ramps are forecast to operate at LOS “F” and US 7/I-89 SB Ramps are forecast to operate at LOS “E,” with both intersections being over capacity. Exhibits #15, #73 and #83.
50. The Project will add approximately 185 weekday PM peak hour trips (total) to the two interchange ramp intersections combined (115 trips at the NB ramp intersection and 70 trips at the SB ramp intersection). These ramp intersections are projected to carry a total of over 7,800 vehicles during the weekday PM peak hour in the year 2028. Therefore, the Costco Project would represent less than 2.5% of the total future volume at the interchange. Exhibit #15.
51. Under the 2028 Total Traffic Conditions scenario, with the proposed Project in place, the study intersections remain at the same LOS as the 2028 background conditions with the exception of US 7/I-89 SB Ramps, which operates at LOS “E” during the weekday PM peak hour analysis period. Exhibits #15, #73 and #83.

#### Queuing

52. Queue spillback from the US 7/I-89 SB Ramp intersection (in particular the SB left-turn onto I-89) commonly occurs during the peak hour and impacts operations and queuing along the Exit 16 corridor through the I-89 NB Ramps and at the Lower Mountain View Drive intersection. The spillback from the interchange is forecast to continue to impact operations and queuing at the US 7/Lower Mountain View Drive intersection. Exhibits #15 and #73.
53. From the spillback at the US 7/I-89 SB Ramp intersection, there are key intersections and critical movements within the study area that experience congestion during the peak hour periods under existing conditions. In addition to the aforementioned problem with a vehicle traveling south on US 7 that wishes to turn left on to the I-89 SB ramp, congestion occurs with SB through movements along US 7 and the WB approach at the US 7/Mountain View Drive intersection. Exhibit #15.
54. Queues presently already exist on Lower Mountain View Drive from vehicles which are attempting to access US 7, vehicles line up in front of driveways used by other business located on Lower Mountain View Drive including the Credit Union building owned by Sisters & Brothers and the Vallee property. Exhibit #73.
55. Queues from the interstate access/egress ramps currently interfere with access to the Timberlake property on US 7. Exhibit #51.
56. Traffic in the area is currently so congested that the intersections do not operate independently. Rather, traffic from one intersection backs up into another intersection, interfering with the operation of the second intersection. Exhibits #15, #73 and #154.
57. Both the SimTraffic<sup>®</sup> and VisSim<sup>™</sup> modeling programs were used to model the traffic in the area by the Applicants and the CCMPO, respectively. The Synchro<sup>®</sup> modeling program is less accurate and reliable because it assumes the independent operation of each intersection. By contrast SimTraffic<sup>®</sup>

program accounts for impacts from one intersection on other intersections. Exhibits #15, #73 and #154.

### Parking

58. Parking stalls and one access point on the northern portion of the Project site will be modified to minimize cut-through traffic between Lower Mountain View Drive and Hercules Drive. Changes are also proposed to the entrance to the Costco site from Lower Mountain View Drive to provide turn lanes into the Costco fuel station. Exhibit #15.
59. In addition to the parking reconfiguration on the north and west edges of the Project site, parking stalls will be added south of the proposed fuel station, resulting in a net increase of 21 parking spaces on site and a total of 655 parking spaces. Exhibit #15.
60. Historically, the parking lot has been 90% full during the weekend peak period during the critical holiday peak times. Zones 2 and 3, which are located nearest the Costco warehouse entrance average 100% utilization during the peak half-hour period. Parking on the remainder of the site had lower utilization with 65 vacant spaces available overall during the peak half-hour period. Exhibit #15.
61. The Project is expected to increase parking demand by 15 vehicles, resulting in a peak holiday parking demand of 584. With the proposed parking addition to accommodate the warehouse expansion and fuel station, site parking utilization will decrease to 89% (demand of 584, supply of 655) during the peak holiday half-hour period on the weekend. Exhibit #15.

### Proposed Mitigation

62. Costco will construct or fund the construction of dual WB left-turn lanes and an exclusive NB right-turn lane at US 7/Lower Mountain View Drive and a second right-turn lane on the Eastbound (“EB”) approach on Upper Mountain View Drive. It is recommended that the storage length for the WB through/right-turn lane be increased from 170’ to 200’, the storage length for the WB left turn lane will be 175’ and the storage length for the Northbound right turn will be 225’. The dual left-turn lanes on Lower Mountain View Drive for vehicles accessing US 7 will not significantly improve the ability for vehicles to make left turns on to US 7, given that this movement is impacted by queue spillback from the I-89 SB Ramps, but they will improve queue storage on Lower Mountain View Drive for this movement. The cost of these improvements is estimated at \$720,000. Exhibits #15 and #79.
63. The TIS, submitted by Costco, recommended that VTrans and the Town of Colchester should evaluate and implement modified signal timing along the US Route 7 corridor to optimize traffic operations. Exhibit #15.
64. The installation in 2018 of geometric improvements at Lower Mountain View Drive and signal timing modifications along the Exit 16 corridor will improve the operations at the US 7/Lower Mountain View Drive to LOS “C” from “F”. However, specific turn movements namely EB thru, WB thru/right and NB left will operate at LOS “E”. The 95<sup>th</sup> percentile queue<sup>9</sup> at the EB thru movement

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<sup>9</sup> The 95<sup>th</sup> percentile queue length is the length of queue that will not be exceeded for 95% of a given time period. The analysis and queue lengths reported in the TIS were based on a weekday p.m. peak hour analysis. In the

still exceeds available storage but all v/c ratios at this intersection are 0.9 or less. The US 7/I-89 NB Ramp intersection operation worsens to LOS "C" and is under capacity including traffic from the proposed Costco development. However, the Exit 16 corridor will still be constrained by the bottleneck at the US 7/I-89 SB Ramps. Exhibits #15 and #82.

65. With conventional widening mitigations at the interchange and signal timing improvements, US 7/Lower Mountain View Drive improves to LOS "C," the US 7/I-89 NB Ramps improve to LOS "E," and the US 7/I-89 SB Ramps improve to LOS "B." Exhibit #15 and #82
66. Costco will provide a proportional fair-share monetary contribution towards the preferred mitigation and improvement strategy for the Exit 16 corridor. Exhibits #15 and #79.
67. At this time it appears that converting the interchange to a Double Crossover Diamond (DCD) configuration will have the greatest overall benefit for traffic capacity and operations through the interchange area and along the Exit 16 corridor, working within anticipated funding, right-of-way, and other environmental constraints. Exhibits #15 and #83.
68. With the DCD interchange configuration, US 7/Lower Mountain View Drive intersection improves to LOS "C," the US 7/I-89 NB Ramp intersection improves to LOS "D," and the US 7/I-89 SB Ramp intersection improves to LOS "C." Exhibits #15 and #83.
69. Microsimulation (using SimTraffic<sup>®</sup> and VisSim<sup>™</sup>) along the Exit 16 corridor shows excessive delay (LOS "F") at the US 7/Hercules Drive and US 7/Lower Mountain View Drive intersections in the 2013 background, total, and mitigated scenarios due to queue spillback from vehicles attempting to access the I-89 SB ramp. However, the delay is improved at all the intersections with the proposed DCD mitigation. In particular, US 7/I-89 NB Ramps improve from LOS "F" to LOS "C" with the recommended improvements. However, the US 7/South Park Dr. intersection worsens to LOS "E". Exhibits #15 and #83.
70. VTrans has proposed a methodology for calculating Costco's contribution to the full Exit 16 corridor improvements: Costco's proportional share is to be based on a numerator which is the total net of new PM peak hours vehicle trips generated by the Project divided by a denominator which is the total PM peak hour growth of traffic in the Exit 16 corridor that can be accommodated after the improvements to the corridor have been constructed. Exhibit #79.
71. Costco estimates its Project to generate 155 vehicle trips at the PM peak hour. The Exit 16 corridor improvements have been designed to accommodate an increase in PM peak hour traffic of 2,193 vehicles from 2008 to 2028, this increase will include traffic generated by the Project, other development anticipated in the study area, and through traffic. Because the total Exit 16 corridor improvements are estimated to be \$5,100,000 (see Finding #43), VTrans methodology results in a net contribution (proportional fair share) of \$362,100 from Costco (155 divided by 2,193 = 7.1%. x \$5,100,000). Exhibit #79.

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analysis these queues are only expected to occur or be exceeded for less than 5% of the time during the peak hour which is less than 3 minutes of the peak hour and less than 3 minutes of the entire day. Exhibit #163.



72. The Town of Colchester's review of the Costco TIS and its subsequent approval of the Project determined that in its opinion, the Project will have no significant impact at the Exit 16 corridor. Based on the Town's findings, Costco agreed to the Town's project conditions of approval to pay a proportional fair-share (\$190,000) of the planned improvements to the US 7/Lower Mountain View Drive intersection. Costco also agreed to front the cost (\$720,000) of completing all of the intersection improvements at Lower Mountain View and Upper Mountain View Drive, provided that an agreement is put in place to reimburse Costco for any funds it expends above and beyond its proportional fair share (\$362,100) as calculated by the VTrans methodology. Exhibits #15 and #79.
73. As noted above, on July 24, 1998 the Commission issued the #4C0288-19A permit amendment. Condition #7 of this permit amendment specified that the Project is approved for a maximum of 479 PM peak hour vehicle trips. Costco is presently exceeding Condition #7 by 96 PM peak hour trips. Exhibit #15.
74. The fair-share calculation proposed by Costco and VTrans does not include the additional 96 PM peak hour trips that Costco is requesting in this application to keep its Project permits in compliance with prior permit conditions. The improvements identified for the Exit 16 corridor were established by comparing existing conditions to expected future conditions and determining what will be needed to mitigate existing issues, as well as provide sufficient capacity for future growth. Exhibit #129.
75. To address the queuing problem on Lower Mountain View Drive, Costco proposes to post signs asking Costco's customers not to block the driveways of other businesses on Lower Mountain View Drive. Vallee proposed that the road in front of these driveways should be crosshatched and during peak hours and that Costco should be required to employ police officers to prevent drivers from queuing in front of the driveways. Exhibit #15 and Testimony of Tom Errico.
76. The proposed DCD at the Exit 16 corridor would directly impact the Timberlake Property by introducing an unfamiliar and unconventional series of turning movements proximate to the driveways at the Timberlake Property. With the DCD, motorists departing from either of Timberlake's driveways would be forced to use or cross the new DCD's northbound right-turn lane. This lane leads to the I-89 SB on-ramp, which motorists would have to use whether or not they were indeed destined for I-89 south. The potential for traffic conflicts would be heightened for departing Timberlake Property motorists who wanted to go north on US 7. These drivers would have to cross the right-turn lane to get into the proper lane toward the I-89 underpass, presenting awkward driving conditions. Hearing (October 24, 2012) testimony of Kim Eric Hazarvartian.

## Conclusions of Law

### Criterion 5

Prior to granting a permit, the Commission must find that the project "will not cause unreasonable congestion or unsafe conditions with respect to use of the highways..." 10 V.S.A. § 6086(a)(5). Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 5. 10 V.S.A. § 6087(b). The Commission may, however, attach reasonable conditions to alleviate traffic burdens. *Id.*

Criterion 5 concerns the impact a project may have on area highways and the traffic that flows over them, including whether a proposed project may exacerbate an already hazardous traffic situation. Even if a

project is not the sole cause of that effect, it would be unsound to permit a hazardous condition to become more hazardous. *In re Pilgrim Partnership*, 153 Vt. 594, 596–97 (1990). A congested situation can become hazardous if new projects contribute additional vehicles to the traffic volume or the situation is allowed to continue without mitigation. Therefore, although the Commission cannot deny a project under Criterion 5, the Commission is within its authority to impose permit conditions that will alleviate congestion. *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), Findings of Fact, Conclusions of Law and Order at 37 (Vt. Env. Bd. November 4, 2005), *aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC*, 2008 VT 7.

Levels of Service (congestion): Under Criterion 5, the Commission must first ask if the area's affected intersections are congested and then, if so, determine whether the Project exacerbates those conditions. The Commission believes that the Level of Service (LOS) analysis is a reasonable and fair approach to determining the answers to these questions. See, *Re: Okemo Limited Liability Company, et al.*, #2S0351-34-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Env. Bd. September 8, 2005) (Environmental Board considers LOS when evaluating congestion under Criterion 5); and see, *In Re Wal\*Mart Stores, Inc.*, 167 Vt. 75, 86 (1997). It is undisputed that many of the intersections affected by this Project experience congestion at peak hours. It is also not disputed that the trip generation projected from the proposed Costco Project will be a significant number, albeit a small percentage, of the existing traffic.

There is no disagreement that congestion at Exit 16 is present with or without Costco's Project and that the expected trip generation from Costco will exacerbate that condition. Therefore, the imposition of permit conditions by the Commission of traffic mitigation measures to alleviate the traffic problems is appropriate.

Having determined that congestion is occurring and the proposed Project will exacerbate the existing condition, what is left is a determination by the Commission of what appropriate traffic mitigation will offset the exacerbation. Act 250 has always been a balance between competing interests. *In re Village Assocs.*, 2010 VT 42 ¶ 17. Act 250 often imposes a requirement for some construction (i.e. mitigation) that needs to be completed before an operation can begin or be occupied. *Maple Tree Place Associates*, #4C0775-EB, Findings of Fact, Conclusions of Law and Order at 46 (Vt. Env. Bd. June 25, 1998) (if highway improvements (including pedestrian improvements) are in place at the time it opens, mixed use development project will not cause unreasonable congestion or unsafe conditions with respect to use of highways).

This is the process that Act 250 decisions have followed for 40 years. However, the solutions for some of the traffic problems before us far exceed the cost of the projects proposed before Act 250. The Commission believes that the "last one in" approach, which requires the "last" project which puts congestion on a road "over the edge" to pay for the entire cost of needed road improvements, has run its course. Requiring one project to pay for the entire \$5,100,000 cost of improvements at the Exit 16 corridor is unfair and effectively creates a moratorium on new development in this area - and at other places where similar situations exists. Unless the Commission believes that a moratorium is appropriate in the most developed areas of Chittenden County, a new mitigation procedure must be implemented.

The Applicants propose to contribute to the improvements at the congested intersections. This method of mitigation finds support in a past decision of the Environmental Board. See: *Alpen Associates*, #5W0722-2-EB Findings of Fact, Conclusions of Law and Order at 1- 3 (Vt. Env. Bd. January 16, 1985), *aff'd, In re*

*Alpen Associates*, 147 Vt. 647 (1986). (imposition of \$40/dwelling unit contribution to regional planning commission's traffic design study is reasonable exercise of Commission powers to address Criterion 5 concerns).

VTrans, the Applicants and the Town of Colchester have proposed a cost equation to calculate Costco's fair share payment toward the needed improvements at the Exit 16 corridor (See Finding of Fact #70). The Commission agrees in principle with the calculation but disagrees with some of the assumptions. The fair share is calculated by dividing the trips generated by Costco with the added capacity that the DCD will provide to the Exit 16 corridor (2193 trips). The Commission agrees with the denominator but disagrees with the numerator. According to the Applicants, it is expected that the new fuel pumps and warehouse expansion could generate 420 new vehicle trip ends during the weekday PM peak hour (Finding of Fact #44). This number is based on data calculated from other Costco warehouses where similar projects have been completed. The Commission finds this number to be plausible. The Commission also finds that standard assumption of 32% reduction for internal trips is reasonable as many of the users of the gas pumps will also shop, on the same lot, at Costco and that these vehicles will not add to traffic already in the Exit 16 corridor. Thus the new traffic that can be expected to be generated by the proposed Project may be reduced to 245 PM peak hour trips. Furthermore, pass-by trips should also be deducted from the expected trip generation as these vehicle trips will not add to the traffic flow issues in the Exit 16 corridor. This results in an estimate of new vehicle trips for the Project as 155 vehicle trips. The Diverted trips have not been proposed to be deducted from the estimate and we concur with that assumption.

The Commission further finds that the 96 trips that exceed Costco's currently permitted Act 250 allotment must be added to the numerator. This revised calculation results in 251 new trips to be used as the numerator in the VTrans methodology for computing Costco's fair share calculation. The Commission therefore finds that the fair share to be paid by Costco is 11.4%, rather than the 7.1% that results from a calculation before the Commissions revisions.

The Applicants have proposed and the Commission accepts, the following improvements as mitigation of the increased traffic that will be caused by the Project:

1. Costco will complete the improvements needed at the Lower Mountain View Drive / US 7 intersection, namely the construction of dual WB left-turn lanes and an exclusive NB right-turn lane.
2. Costco will construct a second right-turn lane on the EB approach on Upper Mountain View Drive.
3. Costco will increase the storage length for the WB through/right-turn lane on Lower Mountain View Drive from 170-feet to 200-feet.
4. Costco will post signs asking drivers to not block the driveways of other businesses on Lower Mountain View Drive and the road in front of these driveways shall be crosshatched. The Commission does not adopt Vallee's suggestion that police be posted at these driveways.
5. Costco will contribute \$720,000 toward the intersection improvements at Lower Mountain View Drive, Upper Mountain View Drive, and along the Exit 16 corridor, subject to reimbursement for its "fair share" contribution above \$583,721.

The Project is located in the commercial/industrial hub of the Town of Colchester, near a similar area for the neighboring City of Winooski. Encouraging more development in these areas (“infill development”) is consistent with the concept of smart growth. Discouraging expansion of existing uses in this area will lead to sprawl in less developed areas. Therefore in keeping with the tenets of the smart growth initiatives currently being implemented by the state we find that this project is appropriate in this area. Highly developed areas should not be maintained to the same traffic flow conditions for rural areas or transition (between urban and rural) areas. Consequently, the usual transportation policies of maintaining a LOS that is rated as “D” or better may not be the best approach. It is one of the reasons that the Commission considers that the strong intent by the State and VTrans to resolve the transportation issues at the Exit 16 corridor weigh strongly over the uncertainty of when the improvements will be built.

Given the scope of improvements needed the Commission finds that the proposed mitigation will begin the process of solving the Exit 16 corridor situation. The Commission is cognizant that construction of the Costco Project may be delayed by appeals. However given that the problems at the Exit 16 corridor require an extensive redesign of the area, the area has been extensively studied, a solution has been chosen and designed, a funding source has been identified, the project is located in an already highly developed commercial/industrial area, and the state has demonstrated a strong intent to complete the traffic improvement project in the very near future, the Commission has determined that in this case payment of the Applicants’ fair share is adequate mitigation to offset the exacerbation of congestion as a result of the Project.

The Commission understands that construction of the Exit 16 improvements is not within the control of the Applicants. However, Commission is not satisfied with payment of mitigation only. Therefore, the Commission will condition any permit on completion of the Lower and Upper Mountain View Drive improvements and submittal by VTrans of a complete Act 250 application for the proposed Exit 16 improvements before operation of the gas pumps or warehouse expansion can begin. The Commission understands that submission of a complete Act 250 application does not mean that a permit for that project will be issued. However, the Commission does not want to create an incentive for opposition to the Exit 16 permit application by requiring issuance of a permit for the Exit 16 improvements.

In addition, the Commission also concludes that if VTrans has not commenced construction of the DCD and Costco wishes to open either the warehouse expansion or gas fuel pumps then Costco shall also pay for the evaluation and implementation of modified signal timings along the Exit 16 corridor that optimize traffic operations.

The Commission concludes that this Project, with proposed mitigation conditions, will not cause unreasonable congestion or unsafe conditions with respect to transportation and therefore complies with Criterion 5.

#### Criterion 9(K) (traffic)

An inquiry concerning traffic under Criterion 9(K) “involves a higher threshold of material jeopardy or material interference” than an inquiry under Criterion 5. *Re: Swain Development Corp. and Philip Mans, #3W0445-2-EB, Findings of Fact, Conclusions of Law and Order (Vt. Env. Bd. August 10, 1990).* Unlike Criterion 5, the Commission may deny a permit solely under reasons set forth under Criterion 9(K).

The burden of proof under Criterion 9(K) is on the applicant. 10 V.S.A. § 6088(a); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839-2-EB (Altered), Findings of Fact, Conclusions of Law and Order at 56 (November 4, 2005).

Under Criterion 9(K), the Commission must conclude that a proposed project does not unnecessarily or unreasonably endanger public investment in the adjacent public roadways, or materially jeopardize or interfere with the function, efficiency or safety of the roadways, or the public's use or enjoyment of access to the roadways.

Analyses under Criterion 9(K) call for two separate inquiries with respect to public facilities, i.e., public roads. First, the Commission examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Commission examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities or (b) the public's use or enjoyment of or access to such facilities. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB, Findings of Fact, Conclusions of Law and Order at 33 (Vt. Env. Bd. October 11, 1990).

A project will fail Criterion 9(K) where delays caused by the project will interfere with the function and efficiency of an adjacent highway. *Swain Development Corp. and Philip Mans*, #3W0445-2-EB, Findings of Fact, Conclusions of Law and Order at 35 (Vt. Env. Bd. October 11, 1990).

The main concern under Criterion 9(K) in this case is the impact on the Project area's congested intersections. One criterion by which an intersection may be considered hazardous is if it is considered a High Crash Location (HCL). There are two state listed HCLs in the Project area and two non-state road intersections that meet the definition of an HCL. Since Costco is adding a significant number of vehicles to these intersections, the Commission finds that the increase in trip generation unnecessarily or unreasonably interferes with the function, efficiency or safety of the roadways. Therefore, the Commission finds that the imposition of traffic mitigation conditions is appropriate.

The Commission should not permit projects that jeopardize or interfere with the function, efficiency or safety of the road. Regarding safety, the area where the majority of the accidents occur is in the vicinity of the Interstate ramps. The posted speed limit here is 30 mph. It is not unreasonable to assume that these accidents are of the "fender bender" type rather than high speed collisions that could endanger lives. Therefore, although the increase in traffic will exacerbate safety issues, we find that it is not an endangerment of lives. However, it is not disputed that the increase will affect the efficiency of the corridor.

We conclude that the exacerbation caused by the Project's increased trip generation will add to the congestion and queuing and may result in a decrease in speed traveled. Thus the proposed Project will reduce the severity of endangerment (by vehicle collisions) but it will increase traffic congestion. However, the problems at the Exit 16 corridor are unique in that the problems occur over a large area and cannot be resolved with a simple solution. As stated above, the Commission finds that since an extensive redesign of the area is needed, the area has been extensively studied, a solution has been chosen and designed, a funding source has been identified, the project is located in an already highly developed commercial/industrial area, and the state has demonstrated a strong intent to complete the traffic improvement project in the very near future, that mitigation need not resolve the entire problem before operation of the Project, warehouse expansion and gas fuel pumps.

For the reasons discussed above, the Commission concludes that the Project with the required traffic mitigation measures does not unnecessarily or unreasonably endanger public investment in the adjacent public roadways, and does not materially jeopardize or interfere with the function, efficiency or safety of the roadways, or the public's use or enjoyment of access to the roadways. The Commission therefore concludes that the Project complies with Criterion 9(K).

### **Criterion 8 - Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas:**

#### Findings of Fact

77. Pursuant to the Vermont Wetland Rules, the Project site contains a Class Three wetland, a classification that has stood for many years and which was recently confirmed by the Agency of Natural Resources. Exhibit #111.
78. The Project will convert an area adjacent to the wetland currently maintained as lawn into a parking area. Exhibit #111.
79. Other impacts to wet areas will include the construction of the fuel pumps over the man-made stormwater pond. However, this area is not considered to be a wetland. Exhibit #111.
80. There are no historic sites or rare and irreplaceable natural areas within the Project site. Exhibit #8.
81. The new parking and gas station will be located close to I-89. Costco proposes to cut trees between I-89 and its parking lot and gas station in order to construct a portion of its stormwater treatment facility. The changes will be partially visible from I-89. Exhibits #8, #22, and #23.

#### Conclusions of Law

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A. § 6086(a)(8). This Project involves concerns under the aesthetics subpart of Criterion 8.

#### A. Aesthetics

The Commission uses a two-part test to determine whether a project meets the portion of Criterion 8 relating to aesthetics. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *Re: Quechee Lakes Corporation*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-20 (Vt. Env. Bd. November 4, 1985).

The burden of proof under Criterion 8 is on the opponent to a project, 10 V.S.A. §6088(b), but the applicant must provide sufficient information for the Board to make affirmative findings. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, Findings of Fact, Conclusions of Law and Order at 13 (Vt. Env. Bd. April 9, 2002); *Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law and Order at 28 (Vt. Env. Bd. February 22, 2001); *Re: Black River*

*Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law and Order at 19 (Vt. Env. Bd. June 17, 1997).

#### 1. Adverse Effect

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Commission looks first to whether a proposed project will be in harmony with its surroundings and to determine whether the project will “fit” the context of the area where it will be located. The Commission first must determine what that context is. *Re: Susan Dollenmaier and Martha Dollenmaier Spoor*, #3W0125-5-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Vt. Env. Bd. February 7, 2005), citing *Re: Hannaford Brothers Co.* at 14.

In making this evaluation, the Commission examines a number of specific factors, including: the nature of the project’s surroundings; the compatibility of the project’s designs with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp. et al.* #3W0411-EB and #3W0439-EB Findings of Fact, Conclusions of Law and Order at 18 (Vt. Env. Bd. November 4, 1985); *Re: Okemo Mountain Inc.*, #2S0351-8-EBR, Findings of Fact, Conclusions of Law and Order at 9 (Vt. Env. Bd. December 18, 1986); *Re: Horizon Development Corp.*, #4C0841-EBR, Findings of Fact and Conclusions of Law and Order at 20 (Vt. Env. Bd. August 21, 1992).

The determination of the project's context is one that is crucial to the Criterion 8 analysis; if the project “fits” its context, then the project, by definition, is not adverse, and the inquiry under Criterion 8 ends. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Findings of Fact, Conclusions of Law and Order at 24 n. 6 (May 4, 2004); *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, Findings of Fact, Conclusions of Law, and Order at 14 (April 9, 2002); Only if a project does not fit its context and is therefore “adverse,” does the Commission’s inquiry move to the determination of whether such adverse impacts are “undue”.

The Project adds gas fuel pumps to a lot within an industrial park. At least two other gas stations are located in the immediate area; both of these are located on Route 7/2 rather than within the industrial park. The addition of parking and a warehouse expansion are both compatible uses within the park and the contextual area. These uses are difficult if not impossible to see from Route 7/2 and may be only partially visible from I-89.

The Commission concludes that the Project fits the context in which it will be constructed and therefore does not have an adverse impact on aesthetics.

The Project complies with Criterion 8.

### **Criterion 10 - Local and Regional Plans:**

#### Findings of Fact

82. It is the intent and purpose of the [Vermont Planning and Development] Act to “...encourage the appropriate development of all lands in this state...in a manner which will promote the public health, safety against fire, floods, explosions and other dangers...and to provide means and methods for the

municipalities and regions of this state to plan for the prevention, minimization and future elimination of such land development problems as may presently exist or which may be foreseen and to implement those plans when and where appropriate...The Plan is meant to lay out a long-term vision for the Town with updates and clarifications provided every five years but with the long term vision for the Town remaining intact.” *Colchester Town Plan (2007) Prologue at 1.*

83. “Exit 16 currently lacks many of the gateway distinctions necessary for a business center that also serves as a primary entrance to the community. The Town is currently working to curb infrastructure deficiencies in the area that include a lack of pedestrian and bicycle facilities as well as streetscape....These improvements will be important to the area’s continued growth as a commercial and industrial center. New developments and redevelopments should positively contribute to these planned infrastructure improvements.” *Colchester's Town Plan (2007) at 13*
84. Policy 3 of the Colchester Town Plan states “Infrastructure improvements necessary for pedestrian, bicycle, and traffic circulation as well as streetscape improvements is a priority to ensuring the continued economic viability of this area.” *Colchester's Town Plan (2007) at 13.*
85. Policy 6 of the Colchester Town Plan states that “The Town may impose development impact assessments where private projects are anticipated to necessitate transportation improvements. The Town should evaluate methods for fairly distributing the cost of road improvements and maintenance associated with new development or redevelopment.” *Colchester's Town Plan (2007) at 89.*
86. Policy 11 of the Colchester Town Plan states that “New subdivisions and other developments should provide for and encourage bicycle access, circulation and parking. Bicycle paths may be required to be built as part of subdivisions. Easements may be required to be dedicated to the Town for future bicycle paths.” *Colchester's Town Plan (2007) at 89.*
87. Policy 13 of the Colchester Town Plan states “Sidewalks should be implemented along all streets and roadways. The need for sidewalks is particularly important on roads carrying heavy traffic volumes through developed areas including Prim Road, Lakeshore Drive, Malletts Bay Avenue, and Blakely Road.” *Colchester's Town Plan (2007) at 89.*
88. The 2006 Regional Plan (with 2008 revisions) defines the Project’s area as a Metropolitan Planning Area. Metropolitan Planning Areas contain the County’s highest-density and largest-scale developments and have an urbanized character. Employment, commercial, institutional, recreational, educational, and cultural facilities serve regional and local needs. Exhibit #104 and 2006 Regional Plan at 2.4.
89. According to the CCRPC *Developments serving the general needs of residents and employers within a Metropolitan Planning Area should be located in a Metropolitan Planning Area.* The CCRPC has found that the proposed Project is in conformance with the Metropolitan Planning Area of the 2006 Chittenden County Regional Plan. Exhibit #104.

#### Conclusions of Law

Before issuing a permit, the Commission must find that the Project is in conformance with the Town Plan and Regional Plan. 10 V.S.A. § 6086(a)(10). The burden of proof is on the Applicant. 10 V.S.A. 6088(a);



*Re: Pike Industries, Inc. and Inez M. Lemieux, #5R1415-EB, Findings of Fact, Conclusions of Law and Order at 51 (Vt. Env. Bd. June 7, 2005).*

“In proceedings under 10 V.S.A. Chapter 151, in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue in those proceedings:

- (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;
- (2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration in the proceedings would have a substantial regional impact. 24 V.S.A. § 4348(h).”

*Maple Tree Place Associates LUP #4C0775-EB, Findings of Fact, Conclusions of Law and Order at 53 (Vt. Env. Bd. June 25, 1998).*

There are then two inquiries that the Commission must make in its evaluation of whether a project conforms to a Town Plan. The Commission asks two separate questions: Is the language in the town plan mandatory or does it merely provide guidance? And, are the town plan's provisions specific or ambiguous? *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB (Altered), Findings of Fact, Conclusions of Law and Order at 58 (Vt. Env. Bd. November 4, 2005), aff'd in part, rev'd in part, In re Appeal of Times & Seasons, LLC, 2008 VT 7 (Vt. S. Ct.).*

The Commission finds that the use of terms; “should positively;” “may impose;” and “developments should provide” are not mandatory but provide guidance. *see The Van Sicklen Limited Partnership, #4C1013R-EB, Findings of Fact, Conclusions of Law and Order at 55 (Vt. Env. Bd. March 8, 2002).* Only language that “is clear and unqualified, and creates no ambiguity,” (e.g. “shall not,” “must,” and “prohibited”) can be read to create specific restrictions. *In re JLD Properties of St. Albans, LLC, #116-6-08 Vtec, Decision on the Merits at 45, 47 (January 20, 2010).*

The Commission has reviewed the relevant Town Plan (2007) and in the absence of any opposition to the contrary, the Commission has determined that the Town Plan is sufficiently specific. *Re: The Mirkwood Group #1R0780-EB, Findings of Fact, Conclusions of Law and Order at 19 (Vt. Env. Bd. August 19, 1996).* Because the Commission reaches the conclusion that the Town Plan is clear and unambiguous it is unnecessary for us to review the zoning bylaws. *See In re Frank A. Molgano Jr. 163 Vt. 25 (1994).*

Since the Plan acts as guidance and does not specify mandatory acts the Commission concludes that the proposed Project is not in conflict with the Town Plan.

The Commission concludes that the pertinent provisions of the Town and Regional Plans are not in conflict in regards to the proposed Project.

The Commission also finds that the proposed Project is in conformance with the Regional Plan.

Accordingly, the Commission concludes that this Project conforms to the local and regional plans.

## VIII. SUMMARY CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, it is the conclusion of this District Environmental Commission that the Project if completed and maintained in conformance with all of the terms and conditions of that application, and of Land Use Permit #4C0288-19C, will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A. § 6086(a).

## X. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #4C0288-19C is hereby issued.

Dated at Essex Junction, Vermont, this 24<sup>th</sup> day of January, 2013.

By /s/Marcy Harding, Vice Chair  
District #4 Environmental Commission

Commissioners participating in this decision:  
Krista Reinhart  
Jim McNamara\*

\* Commissioner McNamara dissenting opinion

This Project has similarities with the *Swain* case. In *Swain* the Environmental Board stated:

“...there is no feasible permit condition or set of permit conditions which can alleviate the traffic impact of the proposed project at its current scale...”

The mitigation process in this, Costco permit case, is overall, ineffective with respect to the Exit 16 corridor and fails the requirements of Criterion 9(K).

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Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Board Rule 31(A). Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220.

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50 as of January 2011.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05 620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.