



LAND USE PERMIT [AMENDMENT]

State of Vermont
Natural Resources Board
District 7 Environmental Commission
374 Emerson Falls Road, Suite 4
St Johnsbury, VT 05819
<https://nrb.vermont.gov/>

[phone] 802-751-0120

CASE NO: 7R1377-2

Boardwalk, LLC c/o J. Hutchins, Inc.
88 Rogers Road
Richmond, Vt 05477

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

District Environmental Commission #7 hereby issues Land Use Permit #7R1377-2, pursuant to the authority vested in it by 10 V.S.A., §§ 6001-6093. This permit applies to a ± 147 acre tract of land identified in Book 59, Pages 279-280 of the land records of the Town of Irasburg, Vermont, as the subject of a deed to Boardwalk, LLC.

This permit specifically authorizes installation and operation of an asphalt plant with “blue smoke” air pollution control and an Air Pollution Control Permit issued by the ANR Air Quality & Climate Division, to replace the asphalt plant previously approved via Land Use Permit 7R1377. The project includes additional exterior lighting and landscaping.

The project is located at 928 VT Route 58E in Irasburg, Vermont.

Jurisdiction attaches because the Project is a material change to a permitted development and thus requires a permit amendment pursuant to Act 250 Rule 34, as determined by the Coordinator in Jurisdictional Opinion (JO) #7-294, issued on January 17, 2020 (which has been appealed to the Vermont Superior Court, Environmental Division).

1. The Permittee, and its assigns and successors in interest, are obligated by this permit to complete, operate and maintain the project as approved by the District 7 Environmental Commission (the “Commission”) in accordance with the following conditions.
2. The project shall be completed, operated and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law #7R1377-2, and (c) the permit application, plans, and exhibits on file with the Commission and other material representations. In the event of any conflict, the terms and conditions of this permit shall supersede the approved plans and exhibits.

3. All conditions of Land Use Permit 7R1377 and amendments are in full force and effect except as further amended herein. Facility operating hours are unchanged.
4. The Permittee shall comply with all of the conditions of the following Agency of Natural Resources (ANR) Permit:
 - Air Pollution Control Permit #AOP-19-045 issued on March 17, 2020, by the ANR Air Quality & Climate Division.
5. Any nonmaterial changes to the permit listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
6. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
7. A copy of this permit and plans shall be on the site at all times throughout the construction process.
8. No change shall be made to the design, operation or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
9. Pursuant to 10 V.S.A. § 8005(c), the Commission or the Natural Resources Board may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.
10. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittee and its successors and assigns.
11. The installation of additional exterior light fixtures is limited to those approved in Exhibits 003 and 005 and shall be mounted no higher than 30 feet above grade level. All exterior lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated. The additional exterior lighting shall be turned off when not required to support facility operations.
12. The Permittee and all assigns and successors in interest shall continually maintain the additional landscaping as approved (see Finding 3) by replacing any dead or diseased plantings within the season or as soon as possible after the ground thaws, whichever is sooner.
13. The Permittee shall not erect additional exterior signage without prior written approval from the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules. Signage includes banners, flags, and other advertising displays, excepting temporary real estate marketing signs and temporary Grand Opening signs.
14. The Permittee shall reference the requirements and conditions imposed by Land Use Permit 7R1377-2 in all deeds of conveyance and leases.

15. The Permittee shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit Amendment before any written contract of sale is entered into.
16. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.
17. All site work and construction shall be completed in accordance with the approved plans by November 1, 2021, unless an extension of this date is approved in writing by the Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without a public hearing.
18. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 3rd day of June, 2021.

/s/ Eugene Reid
By _____
Eugene Reid, Chair
District 7 Commission

Members participating in this decision:

Keith Johnson, Nicole Davignon

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

CERTIFICATE OF SERVICE

I hereby certify that I, Gina St Sauveur, Natural Resources Board Technician, District #7 Environmental Commission, sent a copy of the foregoing document Act 250 Findings of Fact and Conclusions of Law and Order and Land Use Permit #7R1377-2 for Boardwalk, LLC c/o Jeff Hutchins, Inc., Irasburg VT by U.S. Mail, postage prepaid to the following individuals without e-mail addresses and by e-mail to the individuals with e-mail addresses listed, on this 3rd day of June, 2021.

Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or e-mail below. If you have elected to receive notices and other documents by e-mail, it is your responsibility to notify our office of any e-mail address changes.

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A handwritten signature in black ink, appearing to read "Gina St Sauveur". The signature is written in a cursive style with a horizontal line underneath the name.

Gina St Sauveur
Natural Resources Board Technician



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

I. INTRODUCTION

On March 27, 2020, Boardwalk, LLC filed application #7R1377-2 for a project described as a replacement asphalt plant with “blue smoke” air pollution controls, and addition of Air Pollution Control Permit to Construct and Operate, issued by the Air Quality & Climate Division of the Agency of Natural Resources. The Project is located at 928 Vermont Route 58E in Irasburg, VT.

The Commission warned a prehearing for May 1, 2020 which was cancelled on April 30 due to notice delivery issues. The Commission convened a prehearing conference for this application on May 29, 2020, for the purpose of identifying contested facts and legal issues, discussing party status, and determining a hearing schedule. Pursuant to Executive Order 01-20 and associated Addenda and Directives issued by Governor Scott based upon the coronavirus (COVID-19) emergency, the prehearing conference was conducted remotely via Microsoft Teams video conferencing software. The prehearing conference was conducted pursuant to Act 250 Rule 16, with Chair Eugene Reid presiding. At the prehearing conference, the possibility of a remote hearing, in lieu of an “in-person” hearing, due to the COVID-19 pandemic was discussed.

Following issuance of a prehearing conference report and order (dated September 18, 2020), the Commission held a site visit on October 8, 2020. Since the replacement asphalt plant had already been installed, a main purpose of the site visit was to observe the plant operating to produce hot mix asphalt, and loading trucks with asphalt, and this had been arranged with the Applicant (aligned with off-site paving work) as a component of site visit planning. However, on October 8, 2020, the asphalt plant was not fully operational, due to an unforeseen equipment malfunction, and the site visit was continued after completion of equipment repair, on a second site visit date, October 17, 2020, when fully operational conditions and truck loading were

observed, at the subject replacement asphalt plant. Site visit participants viewed these operations at the project site, and also travelled to points of interest identified by those in attendance. It is noted that site visit participants provided written notice of their intent to attend the site visit, in advance, and also provided written verification that they would abide by a protocol for site visits adopted by the Natural Resources Board, due to the COVID-19 pandemic; pursuant to the instructions from the Natural Resources Board, not more than 25 people attended the site visit.

The Commission provided written questions for the Applicant and the Agency of Natural Resources, within the prehearing conference report and order, and also requested that all parties pre-file any supplemental evidence by November 6, 2021, to allow the Commission and parties to review the supplemental evidence prior to the hearing.

The Commission held a hearing on this application under Criterion 1, 5, 8, and 10, on November 19, 2021. The hearing was conducted remotely using MS Teams software for which participants were provided instructions and an opportunity to test the software with the Coordinator in advance of the hearing; the MS Teams software also supported participation via telephone which some participants selected.

The Commission adjourned the hearing on May 21, 2021 upon the completion of Commission deliberations.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

II. JURISDICTION

Jurisdiction attaches because the Project is a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34, as determined by the Coordinator in Jurisdictional Opinion (JO) #7-294, issued on January 17, 2020, which has been appealed to the Vermont Superior Court, Environmental Division (Exhibit 001).

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the 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). The Commission takes official notice of Exhibit 42 of Permit 7R1377, the previously approved landscaping plan, which the Commission has included as Exhibit 64 of the subject 7R1377-2 application.

Accordingly, official notice is hereby taken of Exhibit 64 subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

IV. AMENDMENT APPLICATION – RULE 34(E)

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

In this application, the applicant does not seek to amend such a critical permit condition, so the Commission may consider the merits of the amendment application without conducting the rest of the Rule 34(E) analysis.

V. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) who attended the hearing are:

- i. The **Applicant**, by Jeff Hutchins, Liam Murphy, John Hinckly, and Michael Buscher, who attended the hearing.
- ii. The **Vermont Agency of Natural Resources**, by Aaron Kisicki and Doug Elliott, who attended the hearing.
- iii. The regional planning commission, **Northeastern Vermont Development Association**, by David Snedeker and Doug Morton, who attended the hearing.
- iv. The **Town of Irasburg Planning Commission (Town PC)**, by Judith Jackson and Michael Sanville, who attended the prehearing and filed written comments under Criterion 10 (Exhibits 009, 062).
- v. The **Town of Irasburg**, by David Lahar and Mike Booth, who attended the prehearing, and did not attend the hearing nor submit written comments.

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E).

Preliminary Party Status Determinations

Pursuant to Act 250 Rule 14(E), the District Commission made preliminary determinations concerning party status at the commencement of the hearing on this application, as outlined in the prehearing conference report and order. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

- vi. **Sean and Stephanie Harper** (525 Holy Moly Heights, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8. Attended the hearing.
- vii. **Cindy Sanville** (1792 Vermont Route 58, W Irasburg): Granted preliminary party status under Criteria 1 and 8. Denied party status under Criteria 5 and 6 (failure to demonstrate a sufficiently particularized interest). Denied party status under Criterion 9(D) and 9(E) (scope of application does not encompass the quarry or earth extraction to which these criteria are relevant). Attended the hearing.
- viii. **Ashley Cleveland** (2224 Back Coventry Road, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8. Did not attend the hearing.
- ix. **Patricia Lackie** (22 Walnut Drive, Irasburg): Granted preliminary party status under Criteria 1 and 8. Denied party status under Criteria 5 (failure to demonstrate a sufficiently particularized interest). Did not attend the hearing.
- x. **Katharine M. Ellis Feuti and Mark A. Feuti** (84 Route 58 East, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8. Attended the hearing.
- xi. **Louis and Mona Piette** (590 Holy Moly Heights, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8. Attended the hearing. It is noted that Louis and Mona Piette were represented by L. Brooke Dingledine, Esq. at the prehearing, however Ms. Dingledine later withdrew her appearance (Exhibit 048).
- xii. **Charles and Jane Fisher** (5810 Burton Hill Road, Irasburg): Granted preliminary party status under Criteria 1 and 8. Did not attend the hearing.
- xiii. **Justin Veysey** (201 Royer Drive, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8 as it relates to potential for impact on Justin Veysey's three minor children who attend the Irasburg Village School. Attended the hearing.

- xiv. **Evan Gentler** (336 Scott Lane, Barton): Granted preliminary party status under Criteria 1 and 8 as it relates to potential for impact on Evan Gentler’s minor daughter who attends the Irasburg Village School. Denied preliminary party status for his wife who is a teacher at the school and did not request party status. Did not attend the hearing.
- xv. **Teresa Piette** (2419 Route 14, Irasburg): Denied preliminary party status under Criteria 1 and 8 (failure to demonstrate a sufficiently particularized interest, noting that Ms. Piette did not demonstrate a current relationship to the Irasburg Village School, for example Ms. Piette does not have family members who work or attend school at that location). Did not attend the hearing.
- xvi. **Lake Region Union Elementary-School District**, by Joe Houston, Facilities Director. Attended the hearing. Granted preliminary party status under Criteria 1 and 8 as it relates to potential for impact on student and staff health due to air pollution emissions from the project, corresponding to the District’s Irasburg Village School property. It is noted that the District’s petition for party status (Exhibit 021) was untimely, was not objected to by the Applicant, and the Commission found cause to grant late preliminary party status, for the specific circumstances identified by the District, and in consideration of the current status of application review.

Final Party Status Determinations

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant has met the burden of proving compliance with the following criteria through submittal of the application:

- | | |
|---------------------------------------|--|
| 1 - Water Pollution | 5(B) – Transportation Demand Management |
| 1(A) - Headwaters | 7 - Municipal Services |
| 1(B) - Waste Disposal | 8 – Natural Areas |
| 1(C) - Water Conservation | 8 – Historic Sites |
| 1(D) - Floodways | 8(A) - Wildlife Habitat & Endangered Species |
| 1(E) - Streams | 9(A) - Impact of Growth |
| 1(F) - Shorelines | 9(B) – Primary Agricultural Soils |
| 1(G) - Wetlands | 9(C) - Productive Forest Soils |
| 2 - Water Supply | 9(D) - Earth Resources |
| 3 - Impact on Existing Water Supplies | |
| 4 - Soil Erosion | |

9(E) - Extraction of Earth Resources
9(F) - Energy Conservation
9(G) - Private Utility Services
9(H) - Costs of Scattered Development

9(J) - Public Utility Services
9(K) - Effects on Public Investments
9(L) - Settlement Patterns

Therefore, the application shall serve as the Findings of Fact on the above criteria.

The findings of fact are based on the application, Exhibits 001 - 064, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear, and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and the burden is on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

General Findings

1. The Project consists of removal of portable asphalt plant equipment (the "Original Plant") and replacing this asphalt plant equipment with a different asphalt plant model with a new "blue smoke" air pollution control (the "Replacement Plant").
2. The Original Plant, subject to Act 250 permit #7R1377, issued in 2017, can be seen in the photographs provided as the first two pages of Exhibit 004 (with labels Exhibit 8A and 8B, "Original Plant"). The Replacement Plant, that is the subject of the present application, can be seen in the photographs provided as the last two pages of Exhibit 004 (with labels Exhibit 8C and 8D, "Replacement Plant"). Also the Original Plant and Replacement Plant are identified in photo views within the Aesthetic Analysis (Exhibit 049a, page 4). The photographs of the "Original Plant" and the "Replacement Plant" were taken from different locations and angles, and ground elevations, and thus do not provide a "correct" direct visual comparison, but provide a helpful general character representation. It appears that the "Original Plant" photos were taken from a lower elevation (and closer to the plant in some cases), in comparison to the "Replacement Plant" photos which were taken from a higher elevation (and further from the plant, in some cases) and the difference in elevation and distance likely create an appearance of reduced or distorted relative size. The trucks within all of the photos help the viewer to interpret the appearance and relative size of the "Original Plant" versus the

“Replacement Plant”. The “Blue Smoke” equipment can be seen in the photos provided as “Exhibit E”, within Exhibit 050a.

3. The Project includes landscaping at two different areas, consisting of (i) 10 additional pine trees to be of similar height to the existing previously approved (permit 7R1377, Exhibit 42) canadian hemlock and white pine trees located on the earthen berm adjacent to Vermont Route 58, 6’-7’ at the time of planting (Exhibits 001, 064), and (ii) landscaping as identified in the landscaping mitigation plan (Exhibit 049a, Appendix D) which includes 15 norway spruce trees and 14 white pine trees, 8’ tall at the time of planting, which are expected to reach 25-feet tall 10 years after planting.
4. The Project includes ten (10) down-shielded cut-off exterior light fixtures where identified on Exhibit 003, and as further depicted in Exhibit 005.

Criterion 1 - Air Pollution:

Findings of Fact

5. The Air Permit application for the Project was prepared by Applicant’s expert John Hinckley who has a Master’s degree in Civil Engineering and has been certified by the Institute for Professional Environmental Practice (IPEP) as a Qualified Environmental Professional (QEP) in the field of air pollution control since 2003. John Hinckley has worked in the field of air quality for approximately 22 years. This work involves estimating air emissions, preparing permit applications, conducting air pollution control technology assessments, and performing air emissions dispersion modeling of facilities. John Hinckley has worked on asphalt plant projects in Vermont and New Hampshire for approximately ten years. John Hinckley has worked on four facilities in Vermont and two in New Hampshire. John Hinckley’s work on the Project included evaluation of the effectiveness of the blue smoke control system, observation of the Original and Replacement plants, and review of air emission testing reports from the Original and Replacement plants. (Exhibit 050).
6. As identified by John Hinckley, the Act 250 permit application for the Original Plant identified that this plant would have a drum and baghouse. It further stated that *“Air emissions from the project will be controlled from mobile dust collectors during drilling operations, water spray nozzles for dust suppression at the portable asphalt plant [...]. Air purifiers and/or bag houses will be installed on the portable asphalt plant and/or any crushing and processing equipment as required by any supporting air pollution control permits. There is no planned permanent equipment that would require a site specific air pollution control permit. [...] all machinery will be required to provide all necessary air quality treatments”* and that the Plant was *“expected to produce 100,000 tons of asphalt annually using crushed rock from the quarry and sand from offsite. Operator and plant will meet all State permits. All trucks exiting the plant with asphalt will be covered to minimize odor.* This application further identified

that an Air Permit was not required. According to John Hinckley, this was because the engineers who prepared the application believed that such a permit was not required because the plant was intended for portable operation and Air Quality Permits are typically issued for stationary sources. However, an Air Permit was subsequently obtained for the Original Plant (Exhibit 006, 050, and Exhibit C within Exhibit 050a, the original Air Permit, issued on April 24, 2019).

7. The Original Plant was a drum-mix plant (drum plant), which is a plant that continuously produces hot mix asphalt (HMA), versus a batch-mix plant, which produces HMA in discrete batches. At the Original Plant, aggregates and recycled asphalt pavement (RAP) were added into the drum mixer of plant where it dried the aggregates and RAP and mixed them with liquid asphalt cement using heat supplied by a No. 2 fuel oil-fired burner. The subsequently produced HMA was stored in two silos. Trucks were loaded underneath the silos. Dust from the drum mixer was controlled with a fabric filter baghouse. Liquid asphalt storage tanks were equipped with condensers to control asphalt tank vapors. (Exhibit 050).
8. The Air Permit for the Original Plant required air emission testing. Testing was completed with test reports dated October 2018, August 2019, September 2019 and October 2019. The Air Permit required air emission testing of carbon monoxide (CO) and particulate matter (PM) emissions from the drum mixer. To comply with this requirement, the Applicant completed testing for these emissions in October 2018. The results of this test showed that the plant was in compliance with the CO limit in the Air Permit, however the plant was not meeting the relevant standards for PM. Following work on the plant to improve the baghouse (which controls PM emissions), the October 2019 stack test report indicates the Original Plant was in compliance with its PM emissions limits (Exhibit 050).
9. The Original Plant went offline and ceased producing asphalt at the end of the 2019 operating season. (Exhibit 050).
10. The subject Replacement Plant was operational starting May 19, 2020. (Exhibit 052).
11. As identified by John Hinckley, the Replacement Plant is similar to the Original Plant in that it is a drum-mix plant, but differs in that the asphalt production rate is higher, with a potential production rate of up to 300 tons per hour (tph) versus the Original Plant's rate of 154 tph. Unlike the Original Plant, the Replacement Plant is equipped with a Blue Smoke Control system, which, additionally, controls emissions from silo loading and truck loadout under the silos. The Blue Smoke Control system is unique; the Replacement Asphalt Plant is the only asphalt plant in Vermont that is equipped with a "state-of-the-art" Blue Smoke Control system. (Exhibit 050).

12. The Replacement Plant is subject to an Air Pollution Control Permit to Construct and Operate, issued on March 17, 2020 by the Air Quality and Climate Division of the Agency of Natural Resources (the “2020 Air Permit”, Exhibit 006, and Exhibit F within Exhibit 050a). The Applicant is relying on the 2020 Air Permit as a rebuttable presumption of compliance.
13. The 2019 Air Permit issued for the Original Plant (Exhibit C within Exhibit 050a) and the 2020 Air Permit for the Replacement Plant (Exhibit 006) are similar with respect to the allowable emissions. Both permits regulate the same air pollutants; contain the same annual emissions limits; have the same CO emissions limits of 0.13 pounds per ton of hot mix asphalt produced for the drum exhaust; have the same filterable particulate matter emission limit of 0.02 grains per dry standard cubic feet for the drum exhaust; and have the same total particulate matter (total PM) emissions limit (the sum of filterable and condensable PM) of 0.04 grains per dry standard cubic feet for the drum exhaust. (Exhibit 050).
14. There are three general categories of significant emissions sources that are regulated by the 2020 Air Permit: (i) dust emissions produced within the drum mixer, (ii) gaseous and particular emissions produced by the drum mixer’s oil-fired burner, and (iii) emissions produced by silo loading of hot mix asphalt (HMA) and loadout of HMA from silos into trucks. Generally, and in Vermont, air permits address the first two emission sources. The Replacement Plant and its 2020 Air Permit address all three of these categories of emission sources; the emissions from silo loading and loadout, through the Blue Smoke Control system, is also addressed in the 2020 Air Permit. (Exhibit 050)
15. Air emission testing of the Replacement Plant was performed on October 1, 2020 in accordance with the requirements of its 2020 Air Permit. This testing measured emissions of CO and PM from two processes (emissions related to the drying and mixing of aggregates, RAP and liquid asphalt and emissions from the drum mixer’s oil-fired burner). CO and PM are measured because in addition to being pollutants regulated by U.S. EPA, they are considered surrogates of the gaseous and particulate emissions that could be emitted. Emissions from silo and truck loading were not measured by the testing. The testing showed that the Replacement Plant conformed with the emissions limits for PM and CO, as established in the 2020 Air Permit. (Exhibit 050)
16. The Replacement Plant was in compliance with authorized emissions as identified in the 2020 Air Permit, as confirmed by the October 2020 emission testing.
17. The October 2020 testing demonstrated that the Replacement Plant emitted less total PM and CO per ton of hot mix produced than the Original Plant. At the time of testing, the Replacement Plant produced more than twice the quantity of HMA than the Original

Plant (i.e., 240 tph versus 102 tph), however the Replacement Plant emitted less CO and less total PM in the same timeframe (i.e., during the course of the three, 1-hour tests that were performed). The additional emissions reductions attributable to the Blue Smoke system were not measured as a component of the October 2020 testing. Despite having a larger production capacity, the Replacement Plant appears to produce lower emissions per ton of HMA produced. The October 2020 testing shows that the measured emissions decreased by approximately 58% and 73% for total PM and CO on a pounds emitted per ton of HMA produced basis. In addition to these reductions, the Blue Smoke Control system is expected to further reduce emissions from silo filling and truck loadout by approximately 80% and 16% respectively. Approximately 90% of the emissions from the drum, silo loading, and truck loadout are from the drum. (Exhibit 050)

18. In addition to the testing required under the 2020 Air Permit, John Hinckley conducted ambient air pollution monitoring using lab-certified canisters (which have also been referred to as “bowling balls”). The canisters test for volatile organic compounds (VOCs). Four canisters were deployed around the Replacement Plant facility at ground level: two were located downwind of the facility north of Vermont Route 58, and two were located upwind of the southern end of the facility. The locations were determined by a meteorologist who evaluated the forecasted wind direction on the testing day. The canisters were outfitted with a fixed-rate flow controller which allows air into the canisters at a relatively constant rate over a six to seven-hour sampling period. The sample collection and analysis followed U.S. EPA’s “Compendium Method TO-15(a)” which sets 66 VOCs as a target list. The canister testing results indicate that, of the four sample locations, concentrations were below parts per billion (ppb) detection limits for 60 of the 64 VOCs. The VOCs above detection limits were not over relevant limits. There were measurable levels both upwind and downwind of the Replacement Plant. Of the VOCs for which there were measurable levels, there was not a pattern of higher levels (concentrations) downwind of the Plant, than upwind of the Plant. The testing showed that it is unlikely that the VOCs were solely from the Plant and more likely to attributable to background conditions. (Exhibit 050)

19. The weather data reviewed as a component of the testing showed that the prevailing winds are not typically from East to West, or in the direction of the Irasburg Village School. The “Wind Rose” data was created by software that takes weather data measured at an airport and take the wind speed and direction measured for each hour of the year and summarizes it in the form of the “pie wedges”. The “Wind Rose” shows that there is a large proportion of the year when the wind is blowing from the south to the north. The Wind Rose provided (Exhibit J within Exhibit 050a) is from 2008 to 2013 (not 2018) and corresponds to a 5-year time prior to asphalt plant installation, measured at the nearest airport (the Northeast Kingdom International Airport in Coventry), and is felt by John Hinckly to be a good general representation of general wind direction - though a little bit stale it is from a nearby location and remains fairly representative of

the prevailing winds; in 2013 the airport stopped recording data in a format that could be used by John Hinckley. On the day of testing the weather was warm, the forecast was examined, it indicated that the wind would be from the south, and that is why the canisters were placed southerly and northerly. On site observations to verify wind direction also occurred, for example the flag at the facility indicated the wind was blowing generally to the north which confirmed that the winds were from the south, consistent with the forecast.

20. As identified by the Agency of Natural Resources air quality expert, Douglas Elliott, Air Permitting & Engineering Section Chief:

- The allowed hourly emissions under the Air Permit are proportional to the tons of HMA produced and thus allowed to be greater for the new plant since it has a higher hourly capacity; while the lower actual emissions during the stack test is a good indicator of continued compliance with the respective Air Permit emission limits, actual emissions may vary over time and the Air Permit itself allows emissions up to the respective limits; the allowed annual emissions from both plants (Original, Replacement) are equal since the annual production limit of HMA remained unchanged at 150,000 tons per year for both.
- Most of the emission estimates for HMA plants are based on generic estimates common to all HMA plants. There are some minor differences in emission estimates between a “batch” plant and a “drum” plant due to the design of how the mixing occurs. Both the Original and Replacement Plans are of the “drum” design.
- The most notable difference between the Original and Replacement Plant are the more extensive “blue smoke” odorous organic emission controls on the new plant, the first plant in the state to be equipped with such emission controls. The Replacement Plant will capture these emissions from the drum mixer, the covered/sealed conveyors to the silos and the silos themselves. These emissions are ducted back to the rotary dryer burner to be burned up. The Plant also has emission capture of the organic emissions from the loadout, also the first such plant in the state equipped with these controls. The effectiveness of the capture and control system for the loadout emissions is not readily quantifiable so no credit was given in the permit for these controls. However, the facility is still required to operate and maintain these control systems per the permit even though no credit in emission reductions was given for them.
- Since the Replacement Plant has a higher production capacity, there is the potential for increased emissions per hour. Since most of the emission estimates are in pounds of emission per ton of HMA produced, a higher production rate

will result in higher potential emissions during operation. The Original Plant had a maximum capacity of 154 tons per hour and the new plant has a maximum capacity of 300 tons per hour. However, any increase in hourly production rate would result in fewer hours of operation since the annual allowed amount of HMA production remains at 150,000 tons per year. The total allowed air emissions per year remain the same for both plants (Original, Replacement). Recent testing of the actual emissions from the Plant showed that the emission rates of the Replacement Plant were lower than the Original Plant at that point in time despite the higher operating rate. It is important to note that actual emission rates may vary and the Replacement Plant is allowed higher short term emissions than the Original Plant.

- Odors from HMA plants are caused by the volatilization of organic compounds from the hot liquid asphalt cement as it is mixed with the hot aggregates and exposed to the air. The asphalt cement comprises approximately 5% of the total HMA mix, the bulk of the mix being the sand and stone aggregates. The aggregates need to be dried of moisture and heated to ensure thorough mixing when the heated liquid asphalt cement binder is added. The moisture driven from the aggregates before mixing with the asphalt cement results in a white steam plume from the stack. The more moisture in the aggregates, such as after a rain, or the colder the morning, the more the white steam plume is visible. The white steam plume is not an indicator of emissions or odors, although organic emissions from the asphalt cement may be present in the plume as evident by a blue haze that persists after the steam plume dissipates.
- The greatest potential for odor emissions is when the hot liquid asphalt first mixes with the dried, hot aggregates. This combination of the hot materials and the tumbling mixing volatilizes organic odorous emissions. In the more common plants, this odorous air is captured and sent to the fabric filter dust control device where the odors are minimally controlled. In the case of the J. Hutchins facility, these emissions are captured and ducted to the rotary dryer burner to be burned up, before the air eventually is ducted to the fabric filter dust control device and emitted out the stack. Odorous emissions continue to volatilize from the HMA after the mixing chamber when the material is transported by the conveyors to the storage silos. Further, as the silos fill up, the air inside the silo is displaced and typically vented out the top. In the case of the J. Hutchins facility, the conveyors and silos are covered and sealed, and the air ducted back to the rotary dryer burner to be burned up.
- An additional source of odors is the filling of the trucks from the silos. As the hot HMA is dropped into the trucks it is exposed to the air and turbulence resulting in more emissions. In the case of the J. Hutchins facility, this puff of odors is

attempted to be captured and ducted to a specially coated fabric filter to control the organic odor emissions before venting out its own stack. The volume of air necessary to ensure good capture of this puff of emissions is too great to be sent to the burner and still ensure good combustion so it is ducted to its own emission control device. Once loaded, the trucks are typically tarped to reduce odor emissions and keep the HMA hot during transport to the job site. Some odors continue to be emitted from these trucks as they drive offsite and to the job site.

- The reports and testimony submitted by the Applicant's air quality expert have been reviewed by the Agency of Natural Resources (by Douglas Elliott, Air Permitting & Engineering Section Chief) and the characterization of the plant and emissions are accurate, with the one clarification in that, since the Replacement Plant has a higher production capacity, it has the potential for increased emissions per hour, and the October 2020 emissions testing represents a point in time.
- In reply to a question from the School District about the basis of emission limits in air permits (based on land use? based on population nearby?) the emission standards imposed on asphalt plants are based on both a combination of long-established regulatory limits, and also on a more case by case review of what is the best that can be achieved with current technology. If one compares asphalt plant permits in Vermont to those issued in other states, one would see that this Plant is held to a much stricter standard for emission limits for CO, particulates (PM), and other organics. The emission limits established in the 2020 Air Permit for the Replacement Plant were not impacted by the proximity of the Plant to the Irasburg Village School.

Exhibit 057, Testimony of Douglas Elliott.

So finds the Commission.

21. The Blue Smoke Control system controls emissions of gaseous and particulate air pollutants, including pollutants that are likely to be odorous. Odors are also controlled by the vapor condensing control equipment on the liquid asphalt tanks. (Exhibit 050)
22. Concerned neighbors have testified that they smell diesel fumes from the Replacement Plant at their homes. John Hinckley is of the expert opinion that it is not likely neighbors are smelling diesel fumes from the Replacement Plant. The 2020 Air Permit requires periodic combustion efficiency testing of the drum mix burner, which has been established at 99.9% efficient, meaning that the burner is achieving 99.9% degree of combustion completeness, which is calculated by the ratio of the CO concentration in the drum mixer exhaust divided by the sum of the CO and carbon dioxide (CO₂)

concentrations in the drum mixer exhaust, multiplied by a value of 100. It appears unlikely that diesel fumes from the Plant would be detected at neighboring properties given their distance from the Plant. There are other potential diesel emission sources in the vicinity, including existing diesel truck traffic on VT Route 58, a trucking terminal across the street from the Plant on Route 58, the Irasburg town garage near the Irasburg Village School, and farms with diesel equipment that burn diesel fuel. (Exhibit 050)

23. The baghouse which controls dust from the drum mixer is periodically emptied. Normally, the dust that is emptied is mixed with water to prevent the dust from becoming airborne. The dust shown in one of the Exhibit 29 may reflect an operator error when the water was not turned on while the baghouse dust was being emptied. (Exhibit 050)
24. Neighbors Sean and Stephanie Harper reportedly experience adverse odors that they attribute to the Original and/or Replacement Plant, at their home which is located approximately 4,000 feet from the Plant, and are concerned about air conditions at the Irasburg Village School which their son attends. Other neighbors and Town residents (including Mona & Louis Piette, Katharine Ellis Feuti & Mark Feuti, Evan Gentler, Ashley Cleveland, and Justin Veysey) have expressed concern about odors or reduced air quality expected or reportedly already experienced (that they attribute to the Original and/or Replacement Plant) by themselves or by their minor children who attend the nearby Irasburg Village School. Stated concerns include potential for adverse health effects from reduced air quality. Some neighbors have kept a log of odor concerns with a numeric score, using an "Odor Scale" reportedly provided by the Agency of Natural Resources via John Wakefield, AQCD Compliance Section Chief.
25. Sean and Stephanie Harper purchased and have employed air quality testing equipment and don't understand why they are reportedly impacted, given Applicant's favorable test results. Harper's equipment tests for VOCs and high vapor pressure and PM (solid and liquid particulates); on a number of occasions their equipment has recorded readings of "moderate" to "unhealthy" to "very unhealthy", and report that the only time their equipment recorded readings of "unhealthy" occurs when the asphalt Plant is running or has just simultaneously shut down. The Harpers believe that the plume from the Plant dissipates over their property, and asked if any testing had been considered at their property when the Plant was running. John Hinckley reportedly spent about 45 minutes on Holy Moly Heights road, which is the road leading to the Harper's home, including about ½ hour at the end of the road which leads to the Harper's driveway, and also spent the better part of the day walking around Hutchins property making observations for example wind speed and direction, and reported that when present on Holy Moly Heights road there was no asphalt or diesel fume detected by him, on the October 2020 day of testing. John Hinckley observed that the plume from the 33 feet tall Plant stack appeared to dissipate very quickly and traveled up vertically carried by the

wind and dispersed further, and was observed to have climbed at least 60 feet by the time it reached the property boundary and continued to rise and disperse; he further indicated that he would not expect canisters to capture or measure part of the plume as it travels upward; canisters might capture diesel emissions from trucks or asphalt loadout or combustion emissions, sources that aren't expected to rise high in the sky. Sean Harper countered these observations with his own experience of odors and fumes that he attributes to the Plant, and that Sean Harper reports have once been verified by a state representative when present at his property. Testimony of Sean Harper and John Hinckley.

26. The Agency of Natural Resources does not have the resources to provide air quality testing at the Harper property. The specific test equipment reportedly procured and operated by the Harpers is not known to Doug Elliott. There are four (4) air monitoring stations in the entire state of Vermont. Continuous emission testing for this Plant is not something that the State of Vermont can provide. Testimony of Douglas Elliott.
27. As identified by the Lake Region Elementary-Middle School District, the Irasburg Village School property abuts the Project site, and the distance from the Plant to the school is approximately 2,100 feet. Air intakes for the Irasburg Village School are located on all four walls. The School District submits that, because of the proximity of the Project to the Irasburg Village School, the volume of air required to properly ventilate the school, and the vulnerable nature of the school's population, there is potential for an adverse impact on air quality at the Irasburg Village School, whereby it is requested that the Commission require either an Air Quality Impact Evaluation or sufficient proof of compliance with the Air Pollution Control Permit issued by the Agency of Natural Resources.
28. Concerning the "canister" testing, neighbors Kate and Mark Feuti have reportedly experienced adverse air emissions from the Original and/or Replacement Plants and question the locations selected for placement of the "canister" tests, it is felt they are not representative and are not sufficiently close to the activity location; not at the correct elevation in that they reportedly experience odors at higher elevations than the elevations and locations selected for canister placement. Mark Feuti feels that continuous monitoring of air quality should occur. Testimony of Mark and Kate Feuti.
29. The goal of the canister testing is to determine what emissions are transported by the wind from the facility, and not to evaluate the emissions at the facility, noting that there is a difference between emissions and concentrations (emissions are what comes out of the stack, or tailpipes; once these emissions are in the air they are referred to as a concentration e.g. parts per million). The goal of canister testing was to try to understand the potential for emissions to be transported off-site. The goal of the canister testing was not to try to quantify concentrations on site. Ambient air is air that any

person can walk through and breathe; neighbors can't walk onto the Project site, and the facility air is not "public air" it is not "ambient air". One of the canister sites was on the highway directly opposite the facility; the canister tests were done on the day of the stack test when the Plant was operating at 240 tons per hour, with initial deployment around 6:30 AM and shut down around 1 or 1:30 PM that day, pulling air into the canisters for about 6-1/2 hours. Testimony of John Hinckley.

30. The canister testing was not required by the State of Vermont under the Air Permit. The Air Permit requires testing of the stack emissions where the pollution is most concentrated and where detectable levels are most likely to be found from sampling. The stack testing is not the ambient air testing corresponding to the canister testing. The stack testing required under the Air Permit consists of three (3) one-hour runs while the plant is running at close to full capacity. The design of an ambient air testing program can get complicated, ideally one would want more than one day, the State of Vermont was not involved in the design or collection of the ambient air canister testing. The State of Vermont follows EPA guidelines. The initial review of the stack test results is quite favorable in that the Replacement Plant, even though running at twice the capacity of the Original Plant, is running cleaner. This isn't a guarantee that it will always run cleaner, but this is a good indicator that it is capable of running very well. Periodic testing is required under the Air Permit, every five (5) years the stack testing is repeated; most plants don't require periodic testing but the Agency of Natural Resources (ANR) requires periodic testing for this category of source (asphalt plants). In addition, ANR completes an inspection of the Plant, typically every year (though not guaranteed to occur annually), these are typically unannounced; these annual inspections don't include stack testing but one can learn a lot from these inspections. Major sources emit 50 tons per year of any one pollutant, the Replacement Plant is not a large source or considered a "Major" source, it is considered a "Minor" source because it is well below the 50 ton limit for a "Major" sources; the Replacement plant is in the order of 10 tons per year of CO (and less for the other pollutants), but is still a concern to ANR and is thus regulated, including periodic testing. Testimony of Douglas Elliott.
31. Concerning odor emissions, under the 2020 Air Permit, in relevant part, operations at the facility are subject to the following state and federal laws and regulations, the requirements of which are embodied in the conditions of the Permit [...] Section 5-241 – Prohibition of Nuisance and Odor. In addition, condition 37 of the 2020 Air Permit (Exhibit 006) establishes as follows, which explicitly addresses Odor emissions:

(37) Nuisance and Odor: the Permittee shall not discharge, cause, suffer, allow, or permit from any source whatsoever such quantities of air contaminants, or odors beyond the property line of a premises, which will cause injury, detriment, nuisance or annoyance to any considerable number of people or to the public or which endangers the comfort, repose, health or safety of any such persons or the

public or which causes or has a natural tendency to cause injury or damage to business or property. [10 V.S.A. §§556(c) and 556a(d)][§5-241 of the *Regulations*].

32. ANR staff training has included odor detection. Qualified ANR staff investigate and respond to reports of concerns about air quality including adverse odors.

Conclusions of Law

The ANR Air Pollution Control Permit #AOP-19-045 issued on March 17, 2020 creates a rebuttable presumption pursuant to Act 250 Rule 19 that this Project will not result in undue air pollution. In addition, the technical determinations ANR made in issuing the permit are entitled to substantial deference. 10 V.S.A § 6086(d). Sufficient evidence was not presented to rebut the presumption or challenge the technical determinations made by ANR.

Although neighbors and the School District are concerned with potential for adverse air impacts, with some persons reporting odor concerns that they attribute to the Original and/or Replacement Plant, these concerns are insufficient to rebut the technical determinations made by ANR in issuing its 2020 Air Permit for the subject Replacement Plant, which is based on specific equipment and allowed emissions, and includes specific standards for pollutants, which is to be given substantial deference. Stack testing has been completed and is favorable, qualified ANR staff will be completing inspections on a typical annual basis, and periodic testing will occur every 5 years, under the terms of the 2020 Air Permit.

The Commission concludes that this Project complies with Criterion 1 (Air Pollution).

Criterion 5 - Transportation:

Findings of Fact

33. The Project is not located in a Transportation Improvement District (TID).
34. The Project does not encompass any modification to the existing facility access drive from Vermont Route 58, which is a low volume state highway.
35. The Act 250 application for the Original Plant identified and proposed total 80 trips per day, or 160 one-way trips, with 60 AM peak hour trips and 30 PM peak hour trips, which is the traffic volume authorized under Act 250 Permit 7R1377, to remain in effect.
36. The application materials and Act 250 Permit 7R1377 for the Original Plant did not establish a specific AM or PM peak hour period. Applicant Jeff Hutchins offers that typical AM “peak hour” is from 7:00 AM to 9:00 AM and typical PM “peak hour” is 4:00 PM to 6:00 PM, however in the interest of being overinclusive Applicant offers that AM peak hour period is 6:00 AM to 9:00 AM and PM peak hour period is 3:00 PM to 6:00 PM. (Exhibit 052)

37. Permit 7R1377 and amendment do not specify required truck routes. Typically, the off-site location of the paving project that the truck is delivering asphalt to dictates the truck travel route. For example, if a project is located near Richmond, Vermont, the most efficient route requires travel through the Irasburg town center. If the truck were to turn right to Interstate 91, the truck would be on the road for significantly longer. However, it is generally the guideline that if taking Interstate 91 as opposed to traveling through the town center would result in only a negligible increase in travel time (under 10 minutes) and the work schedule allows for the increased travel time that it is preferred for trucks to take that route. (Exhibit 052).
38. Act 250 Permit 7R1377 establishes specific hours of operation for the facility including the Original Plant. The Applicant is not requesting to modify the hours of operation of the facility or Plant; these operating hours will remain unchanged.
39. Based on a review of a sample of 2019 load data, that was reportedly representative of operations, with the Original Plant operating, the reported maximum number of loads or truck trips during the 6:00 AM to 9:00 AM peak hour was maximum 13 loads or truck trips, and the reported average was 5 loads or truck trips; and during the 3:00 PM to 6:00 PM peak period the reported maximum was 12 loads or truck trips, and the reported average was ± 2 loads or truck trips (Exhibit 052).
40. Based on a review of a sample of 2020 load data, that was reportedly representative of operations, with the Replacement Plant operating, the reported maximum number of loads or truck trips during the 6:00 AM to 9:00 AM peak hour was maximum 31 loads or truck trips, and the reported average was ± 10 loads or truck trips; and during the 3:00 PM to 6:00 PM peak period the reported maximum was 14 loads or truck trips, and the reported average was ± 1 loads or truck trips (Exhibit 052).
41. The Applicant is not requesting any increase to the previously established traffic of total 80 trips per day, or 160 one-way trips, with 60 AM peak hour trips, and 30 PM peak hour trips. The reported traffic volumes were at or below the noted predicted and permitted traffic levels, from the sample data analyzed for 2019 (Original Plant) and 2020 (Replacement Plant).
42. The Replacement Plant increased the AM peak hour traffic, on average from 5 loads to 10 loads, in 2020, and largely eliminated the need for operation between 3:00 PM and 6:00 PM, whereby traffic during that period decreased. In general, the most active hour during the AM peak period is from 6:30 AM to 7:30 AM. The Applicant expects that the traffic associated with the Village of Irasburg School occurs mostly between 7:30 AM and 8:30 AM, whereby the increase in AM truck traffic will be out of the area by the time AM school traffic occurs. (Exhibit 052).

43. At the hearing a participant expressed concern about some trucks traveling at a high rate of speed through the Village of Irasburg. This is a policing and traffic law enforcement issue.

Conclusions of Law

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

The Project does not encompass any requested increase to the traffic volumes previously identified within application 7R1377 for the Original Plant, nor any changes to the access drive, or established operating hours. The Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports, and other existing or proposed means of transportation.

The Project complies with Criterion 5(A).

Criteria 6 - Educational Services:

Findings of Fact

44. No school-age children will be added to the local school system as a result of this Project.
45. The Project does not cause the need for physical improvements to local schools for which capital costs would be incurred.
46. Based on the understanding of Act 250 Criterion 6, with respect to addition of new students, the Project does not result in impacts under Criterion 6. Testimony of Joe Houston, Facilities Director, Lake Region Union Elementary-Middle School District.

Conclusions of Law

Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criteria 6. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate the burdens created. *Id.*

As long as per-pupil spending does not change, a change in the Grand List will not change school tax bills after the first year, because under Vermont's school financing system (Act 60), the cost of additional students is financed entirely by the state education fund and by funds which the town has elected to spend above and beyond the state's block grant. Therefore, the inquiry under Criterion 6 is whether the Project will necessitate any physical improvement to

local schools that would cause new capital costs to be incurred. If so, the question is whether such a burden is reasonable.

The Commission concludes that the Project will not impose an unreasonable burden on the municipality's ability to provide educational services. The Project complies with Criterion 6.

The burden of proof is on the opponents under Criteria 6, but the burden of production is on the Applicants. No evidence was presented to contend that the proposed Project will cause an unreasonable burden on the municipality.

Therefore, the Commission concludes that this Project will not place an unreasonable burden on the ability of the municipality to provide educational services. The Project complies with Criterion 6.

FINDINGS OF FACT

Findings of Fact: Aesthetics, Scenic or Natural Beauty

47. The General Findings and the Findings under Criterion 1 are incorporated herein.
48. The present site is an asphalt plant as authorized via Act 250 permit 7R1377.
49. The Project does not encompass any tree removal or additional or modified exterior signage.
50. Condition 28 of Act 250 Permit 7R1377 requires maintenance of landscaping, as follows, and will be included (and updated) to reference the additional Project landscaping, i.e. the tree plantings in two areas, with additional earthen berm, as identified in Finding 3:

28. The Permittee and all assigns and successors in interest shall continually maintain the landscaping as approved in Exhibit # 42 by replacing any dead or diseased plantings within the season or as soon as possible after the ground thaws, whichever is sooner.
51. Exterior lighting will be expanded to include ten (10) down-shielded cut-off exterior light fixtures where identified on Exhibit 003, and as further depicted in Exhibit 005. All fixtures will be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated. Condition 10 of Act 250 Permit 7R1377 establishes as follows, and this condition will be included (and updated) for the additional exterior lighting:

10. The installation of exterior light fixtures is limited to those identified in the application (down-shielded fixtures at the storage building); the exterior lighting shall be mounted no higher than 24 feet above grade level. All exterior lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated.

52. The Town of Irasburg has adopted a 2019 Town Plan with specific aesthetic standards for Act 250 developments. At the time of the Original Plant, this aesthetic standard did not exist. The Irasburg Vermont Town Plan, 2019, establishes that, in relevant part:

This plan designates the Visual Impact Assessment process as outlined in this chapter to serve as a “clear written community standards to preserve the aesthetic or scenic beauty” or Irasburg’s landscape.

All development projects that trigger Act 250 review and permitting, any Section 248 proceeding related to a Certificate of Public Good, and all construction projects occurring in the Mountain, Hills, and Ridgelines Area (see map in Appendix A) that change the visual character and quality of Irasburg must be evaluated by a Visual Impact Assessment, carried out according to best professional practice as described in the “Aesthetics” section on pages 18 and 19.

Proposed projects that trigger an Act 250 review or a Section 248 proceeding require a Visual Impact Assessment.

53. Pages 18 and 19 of the 2019 Town Plan summarize the methodology to assess the visual impact of a proposed project under a Visual Impact Assessment, which includes assessment of visual character and visual quality, viewer response, and establishing that Visual Impacts are determined by assessing changes to the visual resources and predicting viewer response to those changes: Resources change + Viewer Response = Visual Impact, with level of visual impact ranging from Low to High. (Appendix 049a)
54. The Applicant provided an Aesthetic Analysis Report, dated November 6, 2020, prepared by a qualified consultant (Exhibit 049a), including an evaluation under the Act 250 Criterion 8 Quechee Analysis, which the Commission accepts as a Visual Impact Assessment within the meaning of the 2019 Town Plan.
55. Because the Replacement Plant had already been constructed at the time of the Commission’s October 2020 site visit, and at the time the Aesthetic Analysis Report was finalized (November 2020), these conditions allowed an opportunity to view the as-built Project, on site, and from various points of interest.
56. During the Commissions’ site visit, while the Plant was operating, the Commission and interested persons viewed the Project site, watched the plant in operation and trucks queuing, being loaded and traveling; and also traveled off-site while the plant and trucks remained operational to (i) the exterior of the home of Sean and Stephanie Harper; (ii) Vermont Route 58 north and south of the Project site; (iii) the Village of Irasburg green, including a location at the rear of the library at the green, from where the nearby backyard of Mark and Kate Feuti’s home was pointed out by another person

in attendance; and (iv) the Village of Irasburg School, where the site was viewed from the parking lot, and also from an exterior location between the side of the school building nearest to the Project and the school playground.

57. Pursuant to the Aesthetic Analysis Report (Exhibit 049a), and as observed by the Commission during its site visit or otherwise gleaned from the Application:

- Land use within the immediate Project area includes the existing Northeast Sand & Gravel quarry, the existing asphalt plant, and predominantly undeveloped areas. Vermont Route 58 is immediately north of the Project site and a metal sided, high bay garage building is along the north side of the road, adjacent to the Project. Route 58 provides access to several town roads which access low or rural density residential properties. To the west of the Project, land use diversifies as VT Route 58 approaches the Irasburg Village Center. Within a mile to the west there is a mix of residential, commercial, and municipal uses.
- Topographically, the area consists of gently rolling hills along the east side of the Green Mountains. The Village Center is on a small knoll, and the landform drops to the east before rising again to the Project site.
- The surroundings which are immediately proximate to the Project are the existing asphalt plant, the gravel quarry, and associated facilities with the Northeast Sand & Gravel site. The existing conditions can be characterized as industrial in nature.
- The Replacement Plant is similar in appearance to the Original Plant. It is similar in size, although slightly larger and incorporates similar components as the original plant. The most apparent visual differences are a third vertical silo and a pyramidal dust filter tube. There are difference in colors, and the Replacement Plant silos are reportedly 10.5' higher than the original silos.
- Project visibility from Vermont Route 58 and surrounding areas (including through the Irasburg Village Center), from Burton Hill Road, and from Vermont Route 14 were evaluated.
- In review and consideration of potential adverse impacts to the aesthetics and scenic or natural beauty of the surrounding area, the Project is visible from the surrounding area. In particular, the Project is visible from locations within the Village Center, including VT Route 58, the Irasburg Village School, and the Common. However, visibility of the Original Plant already existed from these locations. The aesthetic analysis evaluated the change in impact between the Original and Replacement Plants. While there are changes to the overall

dimensions and appearance of the Asphalt Plant, these changes are incremental and do not significantly increase the overall appearance or visual magnitude of the Asphalt Plant or facility, as viewed from the identified off-site points of interest. The mostly neutral colors, predominantly gray, help the Project (the change from the Original Plant to the Replacement Plant) to blend with the surrounding landscape.

- Viewer location is described under Evaluation of Visibility. Users will be mostly residents of Irasburg and travelers on VT Route 58. User duration differs based on activity. The majority of users will have views when traveling on two small stretches of Route 58. Travelers passing adjacent to the Project at 50 miles per hour will roughly have views for 14 seconds. Travelers proceeding east on Route 58, beginning at Route 14, will have views towards the Project for roughly 40 seconds when traveling 30 miles per hour. Other viewers, including visibility from the school, would have extended duration of views based on activity.
- The Town Plan does not specifically identify the Project site as a scenic resource. It does note several ridgelines that should be protected, as well as several scenic roads. Burton Hill Road is noted for views to Lowell Mountain, Jay Peak, Kidder Ridge, Irasburg village and valley, and Mt. Washington, but not of the Project site.

58. The regional planning commission, the Northeastern Vermont Development Association reviewed the Project relative to its regional plans, based upon the goals and strategies within the “NVDA Regional Plan for the Northeast Kingdom – 2015-2023. Adopted 8/27/2015 and Amended 4/26/2018”, and its review (Exhibit 060) included the following:

The project does not meet NVDA’s definition of a project having a substantial regional impact. The project, however, should support the following goals and strategies from the regional plan:

Future Land Use and Development Goals:

New development will be compatible with existing land uses, and consistent with local plans.

The project should therefore be in conformance with the Irasburg Town Plan that was adopted in 2019 before the project was completed. This would include their requirement for a visual impact assessment.

In consideration of NVDA's analysis, the Commission finds that the subject Project is to be "compatible with existing land uses, and consistent with local plans", to the extent that a local plan is in effect and contains a relevant and clear written standard.

59. The Project includes tree plantings in two areas, as identified in Finding 3. The context map and cross sections, the view from Irasburg Square, and the Landscaping Mitigation Plan (appendices C and D within Exhibit 049a) illustrate that the additional 15 Norway spruce trees and 14 white pine tree plantings on the new mitigation berm should significantly soften the aesthetic impact of the Project, to the extent visible from the Irasburg Square area, ten (10) years following the initial planting, when the trees are expected to reach the expected height of 25 feet. The species selected provide year-round visual buffering. While these plantings will result in limited screening at the time of initial planting, these plants were chosen for their durability, fast growth rate, and year-round screening potential. In time, this row of plantings will significantly screen and soften views from the west, and are expected to substantially buffer the bottom half of the Replacement Plant area, where trucks and equipment circulates, thereby eliminating or substantially reducing some of the industrial movement and activity as viewed from the west.

In addition, the ten additional pine trees to be planted on the existing planted berm along Vermont Route 58 will increase the density and strengthen the effectiveness of this existing visual buffer.

60. New exterior lighting will be down-shielded full cut-off fixtures.
61. The Replacement Plant is located within an existing permitted industrial site.
62. Noise emissions from the Replacement Plant and Original Plant operations are similar or identical, and include noise from trucking and from heavy equipment operations at the Plant.

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 Criterion 8 related to aesthetics and odors.

Conclusions of Law: Aesthetics and Scenic or Natural Beauty

The Commission uses a two-part test to determine whether a project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is

undue. *In re Rinkers, Inc., No. 302-12-08 Vtec, Decision and Order at 12 (Vt. Env'tl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Env'tl. Bd. Nov. 4, 1985); In re Halnon, 174 Vt. 514 (mem.)* (applying Quechee test in Section 248 context).

The burden of proof under Criterion 8 is on any party opposing the project, 10 V.S.A § 6088(b), but the applicant must provide sufficient information for the Commission to make affirmative findings. *In re Rinkers, No. 302-12-08 Vtec, Decision and Order at 10-11 (Vt. Env'tl. Ct. May 17, 2010)* (citing *Re: Susan Dollenmaier, #3W0125-5-EB, Findings, Conclusions and Order at 8 (Vt. Env'tl. Bd. Feb. 7, 2005); In re Eastview at Middlebury, Inc., No. 256-11-06 Vtec, slip op. at 5 (Vt. Env'tl. Ct. Feb. 15, 2008), aff'd, 2009 VT 98*. "Either party's burden, however, may be satisfied by evidence introduced by any of the parties or witnesses . . ." *In re McShinsky, 153 Vt. 586, 589 (1990)* (quoting *In re Quechee Lakes Corp., 154 Vt. 543, 553-54 (1990)*).

1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design 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'tl. Bd., Nov. 4, 1985)* (cited in *Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13*).

The Project is located at an existing industrial site and consists of replacing an existing permitted asphalt plant with a different model in the same general location. The Replacement Plant incorporates similar aesthetic components as the Original Plant. We conclude that the Project is compatible with its surroundings and will have no adverse aesthetic impact in terms of its immediate setting. However, the Replacement Plant is slightly larger than the Original Plant and is not identical. The most apparent visual differences are a third vertical silo and a pyramidal dust filter tube. There are difference in colors, and the Replacement Plant silos are reportedly 10.5' higher than the original silos, which is not insignificant. We therefore conclude that the Project may have an adverse impact, corresponding to the scope of these differences, to the extent they create greater visual impact from off-site viewpoint. Since the Project may have an adverse aesthetic impact, we must determine whether that visual impact is undue.

In addition, in consideration of the testimony from Applicant's and ANRs air quality experts, the various information about air quality and potential odors, and the presumption of the 2020 Air Permit and the condition therein concerning odors, as further detailed under the Criterion 1 Findings, the Commission concludes that the Original Plant and the Replacement Plant are aesthetically similar with respect to odor concerns and thus the Project appears to have no (additional) adverse effect with respect to odors. The Commission will nonetheless evaluate if

any adverse odor effect possibly created by the Replacement Plant could be undue, as a component of its evaluation of aesthetics.

2. Undue Adverse Effect

An adverse aesthetic impact is undue if any of the following is true: (1) the project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area; (2) the project offends the sensibilities of the average person, or is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or (3) the Applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings. *In re Rinkers*, 302-12-08 Vtec, *Decision and Order at 15 (May 22, 2010)* (citing *In re: Times & Seasons, LLC*, 2008 VT 7, ¶ 8; *In re McShinsky*, 153 Vt. at 592).

(a) Clear, Written Community Standard

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, *Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Envtl. Bd. 4/9/02)*. A clear, written community standard must be intended to preserve the aesthetics or scenic beauty of the area where the project is located. *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2WO694-I-EB, *Findings of Fact, Conclusions of Law, and Order at 36 (Vt. Envtl. Bd. 12/21/00)*.

A plan which states "consideration should be made . . ." is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079(Revised)-EB, *Findings of Fact, Conclusions of Law, and Order at 81 (Vt. Envtl. Bd. Dec. 8, 2000)*. Although the proposed Project does not meet the specific goals or objectives cited above, there are no clear community standards relevant to the proposed Project's impacts on aesthetics.

The Commission has reviewed relevant portions of the 2019 Irasburg Plan. This Plan identified specific standard relating to the aesthetics of Act 250 developments, for which a visual impact analysis is required under the 2019 Irasburg Plan, which creates a clearly written community standard, as identified in Findings 52 and 53, and as supported by Finding 58 which pertains to the NVDA regional plan. The clearly written community standard which requires preparation of a visual impact assessment has been met, as found in Findings 54 to 56. The visual impact assessment has been provided as an aesthetic report (Append 049a). No relevant and clear written community standard pertaining to odors as it relates to aesthetics has been identified. Therefore, the proposed Project does not violate a clear community standard.

(b) Offensive or Shocking Character

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc. #2S0351-S-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1986).*

Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order at 11-12; Horizon Development Corp., #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env'tl. Bd. Aug. 21, 1992).*

The Replacement Plant is in the same general location as the Original Plant, at an existing industrial site, and is similar in appearance to the Original Plant, though moderately larger. Given that the Project is a similar replacement to similar permitted development, and in consideration of the aesthetic analysis, and the Commission's observations during the site visit, and in consideration of the testimony receive from some parties, the Commission finds that the Project may shock or offend some people who view it in the contest of the larger permitted industrial site, however the subject Project (replacement of the Original Plant with the subject Replacement Plant), is not offensive or shocking. Concerning odors, the Commission understands that the Original Plant and Replacement Plant are similar in terms of odor risk, as such the Project does not create an offensive or shocking odor.

Given all of these considerations and conditions, we find that the Project is not offensive or shocking.

(c) Generally Available Mitigating Steps

The question under this factor of the aesthetics analysis is whether the Applicant has "failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings." *In re Times & Seasons, 2008 VT 7, ¶ 8.* If a project does have an adverse aesthetic effect, the applicant must "take generally available mitigating steps to reduce the negative aesthetic impact of a particular project," otherwise, "[f]ailure to take advantage of available alternatives may render an aesthetic impact unduly adverse." *In re Stokes Communications Corp., 164 Vt. 30, 39 (1995)* (quoted in *In re Rinkers, 302-12-08 Vtec, Decision and Order at 19 (May 22, 2010)*). A generally available mitigating step "is one that is reasonably feasible and does not frustrate [either] the project's purpose or Act 250's goals."

To mitigate the aesthetic impacts of the Project, the Applicant has provided a landscaping mitigation plan which will both strengthen the visual buffering and screening along Vermont Route 58, and also significantly screen and soften views from the west over time as tree plantings grow to effective heights. With respect to potential for odors, there is no known generally available odor mitigation that has been omitted from the Project design.

Given all of these considerations, we find that the Applicant has taken the available mitigating steps to minimize the adverse impacts of the proposed Project on the scenic or natural beauty of the area.

(d) Conclusion

Based on the above, the Commission concludes that the Project will not have an undue adverse effect on the aesthetics or natural and scenic beauty of the area.

SUMMARY CONCLUSIONS OF LAW: Aesthetics

The Commission concludes that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, or aesthetics.

Criterion 10 – Town and Regional Plans:

Findings of Fact

63. Finding of Fact 52 to 54, 57, and 58 are incorporated by reference.

Conclusions of Law

Before issuing a permit, the District Commission must find that the Project is in conformance with any duly adopted local or regional plan or capital program. 10 V.S.A § 6086(a)(10).

The Commission has reviewed the Town Plan and 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. Envtl. Bd. August 19, 1996)*. Because the Town Plan is clear and unambiguous it is unnecessary to review the zoning bylaws. See *In re Frank A. Molgano Jr. 163 Vt. 25 (1994)*.

In Act 250 proceedings in which the provisions of a regional plan or a municipal plan are relevant to the determination of any issue:

- (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, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 53 (Vt. Envtl. Bd. June 25, 1998).

No conflict between the NVDA Regional Plan and the Town Plan has been identified. The NVDA Regional Plan supports the Town Plan and no non-conformance with either the Regional or Town Plan has been found. The preparation of a visual impact assessment (aesthetic report) conforms with the clearly written community standard which requires such an assessment for development regulated by Act 250.

The Project complies with Criterion 10.

VII. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicants, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit 7R1377-2, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VIII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 7R1377-2 is hereby issued.

DATED this 3rd day of June, 2021.

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

Commissioners participating in this decision: Nicole Davignon, Keith Johnson

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

Street, 2nd Floor, Suite 303, Burlington, VT 05401.