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June 1, 2009

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

Dear Rob, Kate and Steve;

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

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

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

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

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

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

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

PROCEDURAL HISTORY

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

FACTS

1. The project involves a 93 mile State of Vermont owned right-of-way between St. Johnsbury and Swanton, Vermont, known as the Lamoille Valley Rail Trail (LVRT). The trail or route passes through 18 municipalities and three environmental commission districts: District 6 – Franklin County, District 5 – Lamoille County and District 7 – Orleans County.

2. The construction of the rail line started in 1867 and was completed in 1877. In more than 100 years of operation, the rail line has experienced floods, reconstruction, bankruptcy and default.

3. In 1972, the current owner, St. Johnsbury & Lake Champlain Railroad Company petitioned the Interstate Commerce Commission for authorization to abandon the entire line. The State acquired ownership of the St. J & L.C in late 1973. Between 1973 and 1977 the line was operated under lease by a succession of short-line operators. In late 1977, the line was leased to the Lamoille Valley Railroad Company (LVRC). Despite extensive federal and state construction improvements and effort to rehabilitate the line most rail traffic disappeared by the 1980s and rail operations ceased altogether in August 1995 as a result of flood damage.

4. In 1993 the Vermont Legislature created the "Vermont Trails System," codified at 10 V.S.A. §§ 441-449, which recognizes the importance of recreation and alternative transportation resources for the health, welfare and economic benefit of the State and its citizens. Under the Vermont Trails System, the Legislature intends the establishment of a state-wide system of interconnecting trails facilitated, in part, by railroad rights-of-way that have been railbanked for interim trail use.

5. In 2002 the Vermont General Assembly authorized repairs and maintenance to stabilize and prevent further deterioration of the State-owned railroad line between St. Johnsbury and Swanton. The General Assembly further authorized VTrans: (i) to obtain approval from the federal Surface Transportation Board (STB) to railbank the State-owned railroad line between St. Johnsbury and Swanton for interim trail use; (ii) to salvage the rail materials along the line; and (iii) to enter into a long-term lease with the Vermont Association of Snow Travellers (VAST) for preserving the existing rail infrastructure for future rail use.

6. The Vermont General Assembly in Sec. 16 of Act No. 141 of 2002 directed the Vermont Agency of Transportation (VTrans) to cooperate with the Lamoille Valley Railroad Company to obtain approval from the federal Surface Transportation Board for discontinuance of rail service over the segment of railroad between St. Johnsbury and Swanton. The legislation provides that VTrans "shall retain for railbanking . . . all

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

7. The Federal Surface Transportation Board entered an Order on February 13, 2004 regarding railbanking and authorizing negotiation with VTrans for interim trail use pursuant to the National Trails System Act, 16 U.S.C. 1247(d).

8. The State-owned right-of-way has been railbanked for interim trail use under the National Trails System Act, 16 U.S.C.A. § 1247(d). Railbanking, as defined by the National Trails System Act, is a voluntary agreement between a railroad company and a trail agency to use an out-of-service rail corridor as a trail until some railroad might need the corridor again for rail service. Because a railbanked corridor is not considered abandoned, it can be sold, leased or donated to a trail manager without reverting to adjacent landowners, and is subject to reconstruction and reactivation for rail service at any time, in accordance with 49 C.F.R. § 1152.29.

9. On October 2, 2006, VTrans, as authorized by the Vermont General Assembly in Act No. 141 of 2002, entered into a long-term lease agreement with VAST for the purpose of revitalizing the State-owned rail line between St. Johnsbury and Swanton into the LVRT. Pursuant to Article 8.4 of the lease agreement between VAST and VTrans, VAST is obligated to repair and maintain the railroad right-of-way as necessary for its use as a public recreational trail and alternative transportation facility.

10. The record flooding in 1927 caused 160 washouts, 24 landslides and rendered 12 bridges out of service along this rail corridor. With the help of a $300,000 loan from the State, the railroad was repaired to full service again by February of 1928. [Ex. 12 at pages 33-34]

11. The State acquired ownership of the St. J & L.C in late 1973. Between 1973 and 1977 the line was operated under lease by a succession of short-line operators. In late 1977, the line was leased to the Lamoille Valley Railroad Company (LVRC). See, Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R., 512 F. Supp. 1079, 1081 -82 (D.Vt. 1981). During this era, the line was extensively rehabilitated with federal and state funds, toward the goal of making it possible for freight trains to operate the line at over 25 miles per hour. See Act No. 87 of 1977, An Act to Amend 19 V.S.A. § 8(5) and to Provide for the Rehabilitation of the Former St. Johnsbury and Lamoille County Railroad.

12. The track materials were removed in 2005 after the STB order authorizing railbanking and interim trail use. Although the rails, ties, spikes and other track materials have been

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

13. The right-of-way ballast was only minimally maintained after the 1970s. Currently, the ballasted surface is generally compacted, includes accumulated organic/fine materials, and is eroded in places. The longitudinal railroad ditches have similarly been neglected and in places have filled with silt, organics and vegetation rendering them ineffective at holding and conveying runoff. [Management Plan at page 31; Engineering Assessment at page 1]

14. Typical right-of-way width is at least 66 feet. It is wider in areas which required cuts and fills by the railroad. [Management Plan at page 3; See Ex. 21, Joint Jurisdictional Opinion at page 2]

15. VAST has been using portions of the corridor for winter snowmobile use under authorization from the State at least since 1997. [Ex. 6, copy of the 1997 lease]

16. In addition to snowmobile use, sections of the LVRT are also currently used for cross-country skiing, snowshoeing, mushing, biking, walking and hiking.

17. An engineering assessment was completed during 2007 describing the existing right-of-way conditions and which also provides a framework for rehabilitating the railbed and river and stream crossings for year-round, multiuse recreation and transportation purposes. [See generally, Management Plan; Engineering Assessment]

18. Project work will include the repair and installation of culverts where necessary; clearing and grubbing of rail bed; grading and compacting of ballast; restoration of longitudinal railroad ditches; application of fine gravel on top of ballast to form a smooth granular trail surface suitable for accessible (ADA) non-motorized use; installation of signage for safety and mile marking; replacement of bridges or bridge sections; repair of deteriorated bridge decking and installation of guardrail in places; and removal and replacement of fencing along the right-of-way as necessary to eliminate encroachments, as set out and referenced below.

19. Proposed work on the LVRT will occur predominantly along the existing railbed centerline within the existing railroad right of way on premises as described in the October 2, 2006 lease agreement executed between VTrans and VAST. The single possible exception to this concerns alternative plans for bridge replacement in Walden, where the less costly option for bridge replacement would require acquisition of approximately 4,000 square feet (less than 0.10 acres) of land outside the right-of-way due to bridge angle realignment. [Management Plan at page 3]

Bridges (Stream & River Crossings)

20. In general, bridge repair work will include wood stringer, deck and curb replacement, and installation of guardrail or fencing systems. [Management Plan at page 53]

21. Many of the bridges (which include stone cattle passes, arch culverts, box culverts, and concrete structures) require only guardrail or fencing systems such as the chain link fencing on the Missisquoi Trail bridges, but at a height sufficient for safe equestrian use. [Ex. 26; See Ex. 25]

22. Bridge railroad ties and decking will be replaced where necessary due to lack of maintenance and resulting deterioration over the years. Existing railroad ties serve as the underlying structural stringers on many of the bridges. Wood decking will be laid on top of the railroad ties, and will likely consist of rough-cut untreated planking from local Tamarack (heartwood), Hemlock, and Pine. [Management Plan at pages 53-54; Ex. 27]

23. Overall, nine of 54 bridges along the corridor will require replacement or very substantial repair. Specifically, Bridges 13, 17D, A27, 34, 48, and 49 were removed or washed out and need to be replaced; Bridges 68, 77 and 83 are unsafe and will require complete reconstruction or replacement. Plans for bridge replacement have not been finalized. Examples of work to be done are as follows [Engineering Assessment at pages 13-15]:

    - Bridge 17D ("Cahoon Culvert Washout"): This site, at Whiteman Brook in Danville, had a total washout of the rail grade, approximately 82' wide at the top and almost 50' deep. A crane will be used to install a 100-foot span pre-fabricated truss on concrete bearing pads and avoid bridge construction within the existing embankments or streambed. [Management Plan, pages 54, 244-245; Ex. 28].

    - Bridge 49**:** This bridge will be located on the site of the old bridge in Wolcott, utilizing the existing old pad locations on the eastern shore and a pad location designated by the ANR Rivers Management Engineer on the new western shore of the Wild Branch. The crossing location spans the Wild Branch, just above its junction with the Lamoille River. This site is in a flood plain. The bridge that washed out at that location was a 60' span; the new bridge will be 160'. The river makes a sharp left hook just above the site, and previous flood events essentially destroyed the west abutment and, through scouring of the footings, destabilized the east abutment. ANR's Floodplain Restoration Project (FRP) goal is to restore the site to as natural a condition as possible and have the replacement structure's "feet" outboard of, and above, areas prone to flood damage.

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

24. Bridge 45, the "Fisher Bridge," located east of the village in Wolcott, is historically significant as it is the last remaining covered bridge along the corridor. The State and the Lamoille County Development Council have placed steel supports under the bridge to support the train loadings, separate from the bridge façade, which retains its original appearance. A decision was made during the salvage operation to leave the non-original rails having no historic significance in place on the bridge. This historical bridge would not be affected by the LVRT rehabilitation efforts, except that the existing rails on the deck of the bridge will need to be covered or removed. [Management Plan, page 54; Ex.12 at pages 39-47; Ex. 30]

25. There are four granite and ledge stone arch structures of historical significance along the LVRT. Only one of these four structures, Bridge 90, requires rehabilitation work. The arch is in good condition but the northeast wing wall has collapsed. Because of its historic nature and beauty, the bridge will be carefully restored, probably with a project involving the VYCC and a local contractor with equipment heavy enough to lift the one and two ton stones comprising the wing walls. [Management Plan at pages 54-55; Ex. 31]

26. The other historical granite structures that exist along the corridor are noteworthy even though they presently require no repairs. Because these structures were built when the surrounding land was pasture, the arrival of tree roots, left unchecked, will gradually be the un-doing of these remarkable un-mortared stone structures. Rehabilitation of the corridor pursuant to the LVRT project, and the associated increased public use of the trail, will allow greater appreciation of these structures, and help ensure that these historic granite structures are likely to receive pro-active maintenance that will prevent them from deteriorating and eventually failing.

Wash-Out Areas

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

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

28. Washout types I (culvert failure) and II (lateral ditch failure) will be repaired by replacing the culverts and backfilling the embankments. Replacement embankment material will resemble the existing material with respect to the angle of repose to keep embankment widths the same and within the right-of-way. New embankment slopes will be top-soiled, seeded and hayed. Further erosion protection measures may be necessary depending on the slope and soils, such as contour wattling, tree planting, plastic or concrete cellular grids, or hydro seeding with fiber-celluloid mulch. [Engineering Assessment at page 57; Ex. 32]

29. Observation of all Type III washouts (river or stream scour) indicate that all are in an advanced state of natural healing. At these sites additional plantings were introduced on the bare slopes to advance the slope healing process. For the trail at those locations, a 12-foot wide wooden boardwalk will be constructed on the ballast using the lateral ditch area on the opposite side of the washout to replace the missing trail width, still well within the right-of-way. The boardwalk concept will also facilitate the inclusion of guard railing, and be sloped slightly away from the washout to limit further exposure to storm runoff. The outboard lateral ditch at these locations will either be bridged or moved to the edge of the boardwalk at these locations. [Management Plan at pages 40, 57]

30. Type IV washouts (deposits on the ROW) involve the removal of silt and gravel deposited onto the right-of-way from locations above and sometimes many hundreds of feet from the right-of-way. This material will be used for filling other washouts, repairing narrow embankment slopes, and eliminating trail grades that do not meet the maximum ADA trail requirements. [Management Plan at pages 57-58]

31. The Larrabee Washout occurred summer 2008 at Culvert 24D in Danville. Originally, the structure had two-3' x 3' stone box culverts. Proper operation of the culverts had been hindered in previous years by storm events that plugged the culverts with natural debris. VAST, in coordination with ANR, had made previous repairs to the culverts. However, a flood event in August of 2008 – designated as a natural disaster in that area by FEMA – washed away the culverts and demonstrated that the proper "fix" was inadequate. The serious washout at Brown Brook had to be replaced before the coming winter. VAST worked with ANR and obtained approval for a concrete bridge structure in place of the failed culverts. [See Ex. 32]

32. Railbed rehabilitation work will be limited to the ballasted areas (which are inherently the center of the railbed and furthest from the toe of slope where existing fill meets wetlands)

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

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

Steep Slopes

34. All grading will occur within the right-of-way. Grading will not result in a significant change in the existing rail bed.

35. Existing vegetation will serve as a passive control barrier along steep slope areas in order to eliminate as much fencing as possible. [Management Plan at page 71]

36. Ditches will be maintained in their existing locations and will not be moved or widened. [Management Plan at page 47]

37. In accordance with the Vermont Pedestrian and Bicycle Facility Planning and Design Manual, and VTrans Standard A-79 (Typical Rail Trail), the trail will generally have a minimum width of ten feet wide with two-foot grassed shoulders on each side. In isolated instances, the minimum width will be less; for example, Bridge 36, which is in good condition, is only nine feet wide. Another situation of where the width will not be at least ten feet involve some of the embankment fills that were constructed of ledge from the rock cuts and which, while steep, are also stable, with large, old trees growing in them right up to the ballast. Providing the slope angle and covering past the shoulders shown on the state standard (A-79) would be difficult and would remove trees that will serve well as the passive barrier on such slopes. [Management Plan at page 52]

38. No trailheads are proposed as part of this project. There are existing parking areas adjacent to or near the LVRT, such as at Marty's First Stop store in Danville and in the vicinity of Joe's Pond in West Danville. [Ex. 11, Site 3 photo; Ex. 33] Such parking areas are outside the LVRT corridor and exist for multiple purposes.

39. The LVRT will be able to function as year-round, multiuse recreation and alternative transportation facility, just as the existing corridor does now, without the construction of any additional trailheads. Although multiple potential trailhead and parking locations

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

40. Re-establishing lateral ditches involves removal of silt, seeding and mulching the shoulders and vegetative removal where necessary along the upward bank to ensure the proper drainage patterns, and as would be typical along other sections of the LVRT with similar characteristics. [Ex. 36]

41. On-site placement of ditch silt was practiced along one segment of the prototype trail section whereby silt and debris removed from the lateral ditches was placed along and against the rail bed embankment. The on-site placement will only occur along the LVRT in locations where it would not impact environmentally sensitive areas (e.g. wetlands /buffers) that have been identified by the VHB Pioneer assessment or ANR. [Ex. 37]

42. Proposed modes of transportation along the LVRT would include pedestrian, bicycle, equestrian, mushers, snowshoeing, and cross-country skiing. Motorized vehicles are not permitted on the LVRT except for: maintenance purposes; when snow conditions and State or local regulations permit, snowmobiles; motorized wheelchairs; when State or local regulations permit, electric bicycles; and such other circumstances as the Secretary deems appropriate. [23 U.S.C. §217(h)].

ANALYSIS AND CONCLUSIONS

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

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

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

under Act 250[1]. These decisions note that the doctrine of federal preemption originates in the Supremacy Clause of the United States Constitution [U.S. Constitution Article VI, clause 2]

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

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

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

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

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

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

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

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

> d) Interim use of railroad rights-of-way
>
> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.
>
> 16 U.S.C. §1274(d).

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

> From the early 1900's to 1996, the Union Pacific Railroad ("the Railroad") operated trains over a railway line running 83.1 miles between the Idaho towns of Weiser and Rubicon. Historically, such railroad rights-of-way were regulated by the Interstate Commerce Commission, and the ICC's authority over rail abandonments was exclusive and plenary and preempted any contrary state or local law. In 1996, the ICC was abolished and its exclusive authority over railroad rights-of-way passed to the Surface Transportation Board (the "STB"). Thus, the railroad corridor at issue in this proceeding is under STB jurisdiction.
>
> At some point prior to 1995, the Railroad decided to discontinue its use of the Weiser-Rubicon railway. This step reflected a growing trend in a financially weak rail industry, by which railroads sought to consolidate operations and improve profitability by abandoning marginal service areas. While Congress facilitated this process by liberalizing federal rail regulation, it also recognized that permitting abandonments would result in the loss of railroad corridors, not only for current but also for future use. Congress also realized that such rail corridors were national assets which should be maintained, but without imposing the costs of maintenance on carriers who were seeking abandonment. In response to this situation, Congress adopted a number of measures intended to permit abandonment while preserving rail corridors. These measures included: (1) the adoption of 49 U.S.C. § 10905, which required that the rail properties be made available for other public uses, such as highways and mass transportation; (2) the adoption of 49 U.S.C. § 10505, to facilitate state acquisition of abandoned rail lines; and (3) the addition of Section 8(d) to the National Trails System Act ("Trails Act"), 16 U.S.C. §1247(d), to encourage "railbanking" of a right-of-way which would otherwise be abandoned by converting it to use as a public trail, but subject to its future restoration as an active railway.
>
> It was this third option which the Railroad chose when it decided to discontinue the use of the Weiser-Rubicon right-of-way. In electing to railbank the right-of-way, the Railroad ensured that, although a conditional transfer would be made to a trail manager who could demonstrate financial ability and a willingness to accept the right-of-way and commit it to public use as a scenic trail, the interim use of the corridor for such purposes would "not be treated, for purposes of any law or rule of law, as an abandonment of the use of such right-of-way for railroad purposes."

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

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

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

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

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

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

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

> We note, however, that *a trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation.*... This local regulation can address the Landowners' concerns about such issues as vandalism or noise.... Indeed, the State and local agencies in the area are attuned to the specific interests and needs of their communities.... *Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails*.
>
> STB Decision, dated March 20, 1998, p. 10. The STB makes it clear, however, that their "chief concern" is that "the statutory rail banking condition not be compromised, and that *nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service*." *Id.*
>
> In reconciling the federal case law with the STB Decision, the Court is persuaded that *Congress has given the power to control economic, environmental and virtually every other aspect of railroads and their corridors to the STB. The STB has, on the other hand, clearly indicated its intention to cede back to states and local governments the right to impose zoning and safety regulations on the trails so long as those regulations do not interfere with (1) the railroad's right to convert the corridor back into a railway at some point in the future and (2) the trail manager's right and ability to maintain the right-of-way as a recreational trail in the interim.*
>
> (Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Construction of improvements" means any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A). This may include any physical disturbance on a project tract. Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon, #lR0426-2-EB. Findings of Fact, Conclusions of I.aw and Order at 27-28 (Dec. 18. 1997). However, construction of improvements is a deliberately limited terms which cannot be extended to include any activity that initiates any use of the land. Re Aaron & Sons, Inc., DR #359 (FCO at 9 - 11) (10/29/98). For example road work activities that are considered repair or routine maintenance do not constitute construction of improvements. Re: Productions. Ltd., Declaratory Ruling #168 at 4 (April 10, 1985). Repair or routine maintenance does not alter an existing development but "prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear." Re: Vermont

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Does the Project Constitute a "Development"?

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

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

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

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

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

SUMMARY CONCLUSIONS

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

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

Sincerely,

/s/ Ed Stanak	*/s/ Geoffrey Green*	*/s/ Kirsten Sultan*
Ed Stanak, Coordinator District 5 Commission	Geoffrey Green, Coordinator District #6 Commission	Kirsten Sultan, Coordinator District #7 Commission

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