

Conservation Law Foundation • Vermont Sierra Club
Vermont Natural Resources Council • Vermont Public Interest Research Group
Smart Growth Vermont • Vermont Smart Growth Collaborative
Vermont League of Conservation Voters

September 9, 2010

By Federal Express and Email

Marty Abair
US Army Corps of Engineers
New England District
696 Virginia Road
Concord, MA 01742-2751
Martha.a.abair@usace.army.mil

Re: File Number NAE-2004-2762
Comments on permit application to conduct work in waters of the United States for the
Circ-Williston Transportation Project.

Dear Ms. Abair:

Conservation Law Foundation (CLF), Vermont Sierra Club (Sierra), Vermont Natural Resources Council (VNRC), Vermont Public Interest Research Group (VPIRG), Smart Growth Vermont (SGV), the Vermont Smart Growth Collaborative (VSGC) and the Vermont League of Conservation Voters (VLCV) offer the following comments on the U.S. Department of Army Individual Permit Application (404 Permit) for the Circ-Williston Transportation Project, File Number NAE-2004-2762.

A 404 Permit cannot be issued for the Circ-Williston Transportation Project as presented.

- The public has been denied a reasonable opportunity to comment on the proposed project.
- The project is not the least environmentally damaging practicable alternative.
- The proposed mitigation is inadequate.
- The proposed project is contrary to the public interest.
- U.S. EPA concerns have not been addressed.

Extensive comments on the 404 Permit were previously submitted on November 20, 2007 by Conservation Law Foundation (CLF), Friends of the Earth (FOE), Vermont Sierra Club (Sierra), Vermont Natural Resources Council (VNRC), Vermont Public Interest Research Group (VPIRG), Smart Growth Vermont (SGV), and the Vermont Smart Growth Collaborative (VSGC). The comments submitted now supplement the previous comments, which are specifically incorporated into these comments.

A Section 404 Permit cannot be issued

A. Public Comment Denied

The public has been denied a reasonable opportunity for comment on the unreasonable and unnecessary destruction of wetlands and damage to water quality that will result from this project. As noted in our previous comments, the application requests Section 404 approval for ten diverse alternatives. The Army Corps of Engineers (ACOE or Corps) provided no additional notice and opportunity for comment once the applicant chose to advance a specific project, in a specific location.

The Army Corps of Engineers provided wholly inadequate public notice. The ACOE evidently issued a “Revised Public Notice” around August 10, 2010 (see Attachment 1 - U.S. Army Corps of Engineers News Release “Vermont Agency of Transportation seeks corps of Engineers permit to place fill for Circ-Williston corridor” Aug. 10, 2010).¹ The news release states:

The Corps public notice, with more detailed information on the proposed project and the proposed mitigation, can be reviewed online at the Corps website <http://www.nae.usace.army.mil>. Select Regulatory/Permitting and then weekly public notices and search by file number or state.

Unfortunately, as of September 7, 2010, neither the weekly public notices, nor the notices for Vermont, include any reference to the apparent revised public notice or that public comment is being sought. (see Attachment 2 – printout of U.S. Army Corps of Engineers New England District website, Regulatory / Permitting, Public Notices, Weekly Listing as found on Sept 7, 2010² and Attachment 3 – printout of U.S. Army Corps of Engineers New England District website, Regulatory / Permitting, Public Notices, Vermont Listing as found on Sept 7, 2010³).

The ACOE is thwarting public input. The public has a right to comment and to know about projects moving forward. Failing to notify interested persons and failing to make information publicly available is contrary to the ACOE’s legal obligations and hinders the ACOE’s ability to protect natural resources. The public is precluded from providing comment and providing useful information to the ACOE on the public resources the ACOE is obligated to protect.

The ACOE should not issue any 404 Permit for this project until the public has notice and an opportunity to comment on the proposed project. A new or revised public notice should be provided to all who submitted comments previously. All information pertaining to this project should be available and accessible from the ACOE website.

¹ <http://www.nae.usace.army.mil/news/10/2010-081.pdf> (Sept. 7, 2010)

² <http://www.nae.usace.army.mil/reg/pubnot2.asp> (Sept 7, 2010)

³ <http://www.nae.usace.army.mil/reg/pubnot4.asp?mystate=VT> (Sept 7, 2010)

B. Request for Public Hearing

We request the ACOE to hold a public hearing to accept comment on this proposal. This project continues to be controversial. It is a major road building project that will impact the communities and environment of Vermont for many years. There continues to be strong opposition to the project as proposed. A previous proposal for this project resulted in a federal court lawsuit that halted the project. News about the project continues to appear in media reports. The strong public interest in this project shows the need to provide the public with an opportunity for comment.

A public hearing is particularly important where the ACOE has failed to provide notice of changes or the opportunity for comment. While a public hearing will not replace the need to provide adequate notice, it will assist the public in providing input on this project.

A public hearing on this permit application is requested.

C. The project is not the least environmentally damaging practicable alternative.

FHWA and VTrans have failed to submit an application that would allow the United States Army Corps of Engineers to approve a permit for the discharge of dredged or fill material. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344 (2006). The original application sought approval for construction of any one of the 10 proposed alternatives, even though each will have very different impacts on wetlands. The ACOE now apparently seeks comment only on mitigation for one alternative.

The ACOE cannot issue a permit because the applicant has failed to provide clear and convincing evidence that there are no practicable alternatives to the project. This burden lies with the permit applicant. The role of the Corps is only to determine whether the applicant has borne its burden. John Schutz, *The Steepest Hurdle in Obtaining a Clean Water Act Section 404 Permit: Complying With EPA's 404(B)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 24 UCLA J. ENVTL. L. & POL'Y 235, 250 (2006) (construing 45 Fed. Reg. 85336, 85339 (Dec. 24, 1980); U.S. Army Corps of Engineers, Plantation Landing Permit Elevation Decision (April 21, 1989) at 9, 12, 13-14; Department of the Army, South Pacific Division, Corps of Engineers, Review of Sundance Plaza Project Permit Denial (Feb. 5, 2001) at 1, 8).

"From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered" by the Guidelines. 40 C.F.R. § 230.1(d) (2007). As a result, for non-water dependent projects, practicable alternatives are presumed to exist. 40 C.F.R. § 230.10(a)(3) (2007); 45 Fed. Reg. 85339 (1980). This presumption leads the Corps to approving permits for environmentally preferable sites and discourages discharges into special aquatic sites, including wetlands. See Schutz, *supra*, at 249-250 (construing U.S. Army Corps of Engineers, HQUSACE Review and

Findings, Old Cutler Bay Permit 404(q) Elevation (1990) at 5). It also provides an incentive to avoid constructing in wetlands. In several permitting decisions, the Corps has stated that (1) it is serious about protecting waters of the United States, including wetlands, from unnecessary and avoidable loss, (2) special aquatic sites are not preferred sites for development, and (3) non-water dependent dredge and fill activities are discouraged in accordance with the Corps' guidelines. Schutz, *supra*, at 250 (construing U.S. Army Corps of Engineers, Permit Elevation, Hartz Mountain Development Corporation (1989) at 11; Plantation Landing *supra*, at 14).

The proposed project is not the least environmentally damaging practicable alternative (LEDPA). The application sought approval of ten alternatives and all must be treated as practicable, since all were put forward for approval. All satisfy the purpose and need of the project, as it has been defined by VTrans and FHWA. Each satisfies needs of safety, mobility, reduced congestion and truck traffic. The alternatives that involve improvements to Route 2A (Alternatives 2, 3, and 22) cause significantly less impact to wetland and water resources than the proposed project (Alternative 17). According to the DEIS, the Route 2A alternatives affect less than 2 acres of wetlands and the proposed project affects over 20 acres of wetlands.

Due to the significant difference in the total wetland impacts by acres, as well as the quality of wetland that would need to be adversely affected to create a new crossing of the Winooski River for the proposed project it cannot be the least environmentally damaging practicable alternative. As a result, a § 404 permit cannot be issued.

Because the proposed activity does not need to be located on a "special aquatic site" in order to fulfill its purpose, "practicable alternatives are presumed to be available unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3) (2007). In addition, "where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3) (2007).

As demonstrated in the comments submitted on the FEIS for this project, FHWA and VTrans failed to evaluate impacts to historic resources. (see Attachment 4 – Comments on Circ-Williston FEIS from CLF, Sierra Club et al 8/27/10 at 10-11).⁴ The FEIS identifies historic resources that will be affected by the various Circ alternatives and then reaches conclusions about the effects. The FEIS fails to evaluate the impact of the effect on the historic features. The analysis treats all impacts equally rather than assess whether the impact has any negative effect on the eligibility of the property for the Natural Register of Historic Places. The FEIS also fails to consider possible mitigation of impacts.

The result of these failures is that impacts to historic resources for the Route 2A Alternatives are significantly overstated. The impact of taking a portion of a front lawn that will not impact the historic features of the property is treated equal to an impact that does affect historic features. Similarly, impacts to non-historic features, such as the new porch on the Lincoln Inn, are erroneously treated as a negative impact. In fact there is no substantive evaluation of impacts.

⁴<http://www.clf.org/work/HCEJ/thecirc/docs/Circ%20Williston%20FEIS%20comments%20CLF%20Sierra%20et%20al%208-27-10.pdf>

While mitigation of other impacts are considered, simple mitigation such as burying power lines, narrowing the lane and shoulder widths as allowed in the Vermont State Standards⁵, or realigning the ROW are not considered at all. Clearly, if a ROW can be moved to reduce impacts to wetlands, a power line can be buried, or road alignment can be changed to minimize impacts to historic resources. These are common practices. For example they were used by FHWA and VTrans in modifying Main Street into Burlington and modifying Route 7.

Clean Water Act Section 404(b)(1) Guidelines require that only the least environmentally damaging practicable alternative (LEPDA) to a discharge of dredge or fill material into wetlands be permitted.⁶ Executive Order 11,990 further provides that an agency should avoid wetlands construction unless “there is no practicable alternative to such construction” and “the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.”⁷ In spite of EPA’s observation that “the VT 2A alternatives group appears to contain the least environmentally damaging practicable alternative” and its “recommendation that the Corps [of Engineers] not issue a Section 404 permit for any new alignment build alternative identified in the DEIS,”⁸ the FEIS proposes to move forward with this massive road-building project and summarily dismisses improving VT 2A alternatives as “not practicable.”⁹ FHWA’s rationale is specious. As noted above, the FEIS overstates the significance of the impact of VT 2A alternatives’ on historic properties.¹⁰

As a result of the lack of evaluation of historic impacts, these cannot be used to justify the destruction of valuable wetlands. Further, the loss of wetlands is being understated. Avoidance of wetland impacts is of chief concern under the Clean Water Act because wetland functions play a key role in filtering and uptaking pollutants that would otherwise enter and impair Lake Champlain. Wetlands have an increased importance in maintaining water quality and water supply in the face of climate change impacts. As such, the stress on avoidance of wetland impacts, the difficulty in replacing wetland function, the polluted state of Lake Champlain and climate change impacts all outweigh the minor impacts to historical structures that would occur from advancing other solutions that have far less impact on aquatic resources. The far more damaging impacts to aquatic resources are not allowed. The applicant has not demonstrated that the proposed project is the least environmentally damaging practicable alternative. The ACOE cannot issue a § 404 Permit. A less damaging, practicable alternative is available.

C. The proposed mitigation is inadequate

The proposed mitigation is not adequate. Clean Water Act Section 404(b)(1) and informal Corps guidelines set up a hierarchy, known as “sequencing,” in considering Section 404 Permit

⁵ Vermont State Design Standards, October 22, 1997, <http://www.aot.state.vt.us/progdev/standards/statabta.htm>

⁶ 40 C.F.R. § 230.10(a)

⁷ Exec. Order No. 11,990 42 Fed. Reg. 26,961 (May 24, 1977).

⁸ DEIS Comment Letter from EPA, Region I, to Kenneth R. Sikora, Jr. Federal Highway Administration, Region I, and Robert Desista, Regulatory Division, Operations Directorate, U.S. Army Corps of Engineers (Nov. 16, 2007) (FEIS, Appendix Q-Vol. I at Q-14).

⁹ FEIS at 11-70.

¹⁰ FEIS at ch. 21.

applications.¹¹ Sequencing requires the Corps to first avoid impacts, then to minimize impacts, and finally, if impacts cannot be avoided or minimized, to compensate.¹² Accordingly, mitigation is a last resort. Here, avoidance or minimization was not considered in the manner required by law. To the contrary, practicable alternatives (Alternatives 2, 3, and 22) that avoid and minimize wetland impacts exist. Moreover, the FHWA and VTrans failed to conduct any cumulative impact assessment to determine the loss of cumulative wetland functions as a result of this project. These impacts are not evaluated and are not mitigated, much less avoided or minimized.

The proposed project will destroy vast areas of fragile wetlands. According to the FEIS, the preferred alternative will permanently fill and eliminate wetland functions and services on 21.81 acres of wetlands and have permanent secondary impacts on an additional 29.56 acres of wetlands.¹³ The FEIS fails to address the temporary secondary impacts of the preferred alternative altogether.¹⁴ Project alternatives to improve VT 2A, which meet the purpose and need of the project,¹⁵ would directly impact less than 1.4 acres.¹⁶ The FEIS notes that secondary impacts of improving VT 2A “would be minor because no fragmentation impacts would occur and the affected systems are already adjacent to a roadway.”¹⁷

The proposed wetland mitigation goals for the preferred alternative are inadequate. EPA has already expressed concern that the project’s compensatory mitigation scheme “is unlikely to be successful” because it is “technically difficult to restore or create these habitats successfully, let alone replicate the unusual juxtaposition of habitats present in the study area” and because of the “myriad risks inherent in wetland restoration and especially creation that make these already difficult ventures more challenging.”¹⁸ VTrans and FHWA acknowledge that their emergent and forested wetland enhancement goals are “at the low end of the recommended range.”¹⁹ VTrans and FHWA’s compensatory mitigation plan will not replace the ecological values of the lost wetlands under the preferred alternative.

The proposed project contemplates providing mitigation when destruction of wetlands could either be avoided altogether or significantly minimized by advancing the Route 2A alternatives.

¹¹ U.S. Envtl. Protec. Agency & Dept. of the Army, *Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines*, Section II(C) (Feb. 6, 1990) (signed Feb. 6 1990) (available at <http://www.usace.army.mil/cw/cecwo/reg/mou/mitigate.htm>) (stating that “The Corps, except as indicated below, first makes a determination that potential impact have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts, and, finally, compensate for aquatic resources values.”)).

¹² *Id.*

¹³ FEIS at 11-58.

¹⁴ FEIS at 11-47.

¹⁵ FEIS at 3-20.

¹⁶ FEIS at 11-54

¹⁷ FEIS at 11-54.

¹⁸ DEIS Comment Letter from EPA, Region I, to Kenneth R. Sikora, Jr. Federal Highway Administration, Region I, and Robert Desista, Regulatory Division, Operations Directorate, U.S. Army Corps of Engineers (Nov. 16, 2007) (FEIS, Appendix Q-Vol. I at Q-22).

¹⁹ FEIS at 11-61.

The proposed mitigation will not replace the wetland functions of the wetlands that will be destroyed. The proposed mitigation sites are all upstream of the development site. Any water quality benefits of the current wetlands will not be replaced by the mitigation projects.

The protection of currently undeveloped land is not mitigation. It will not replace wetland functions that do not currently exist. It simply continues a function that already exists.

The wetland functions will not be preserved. The mitigation proposed is inadequate. The proposed project will unnecessarily destroy valuable wetlands and the water quality protections they provide.

D. The proposed project is contrary to the public interest.

Issuance of a permit for the proposed project is contrary to the public interest. As a final step in the permit process, the Corps must evaluate whether the “issuance [of the permit] would be contrary to the public interest.” 33 C.F.R. § 323.6(a) (2007). In making this evaluation, the Corps must find that the discharge itself is in the public interest and in doing so must also consider the impacts of the project as a whole. The regulation provides a long list of potential factors and many are relevant to the proposed Circ-Williston Project including: economics, conservation, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, energy needs, safety, and, in general, the needs and welfare of the people. 33 C.F.R. § 320.4(a)(1) (2007). The Corps must carefully weigh the cumulative “benefits which reasonably may be expected to accrue from the proposal ... balanced against its reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1) (2007). Based on the outcome of the balancing test, the Corps determines whether to grant the permit, and if so, under what conditions.

The proposed project cannot be found to be in the public interest. The cumulative benefits for the proposed project are similar to other alternatives while the foreseeable detriments vary greatly. According to the permit application, there are eight benefits: a reduction in traffic congestion; preparing for increased population growth; create additional employment opportunities; reduce journey to work time; reduce roadway congestion; decrease safety issues, including the high crash frequency; and, increase overall mobility.

There are an equal number of environmental concerns, however, associated with the project, many of which are identified and discussed in the permit application. These include surface water, ground water, vegetation, wildlife and habitat, wetlands, and cultural resources. As has already been pointed out the Route 2A alternatives, which meet the purpose and need, pose less of a negative impact on these resources, in particular to the wetlands, than the proposed project. As a result, the proposed project cannot be found to be in the public interest.

E. EPA Concerns have not been addressed

In comments on the FEIS, the U.S. EPA raised a number of concerns and stated that the proposed project “does not qualify for a Section 404 permit.” (Attachment 5 – Letter from Curtis Spalding U.S. EPA Regional Administrator to Kenneth Robie regarding Circ-Williston Transportation Project FEIS dated Aug. 24, 2010).

As stated in U.S. EPA’s comments on the FEIS:

EPA’s fundamental concerns about the FEIS and objections to Alternative 17, FHWA/Vtrans’ preferred alternative, are as follows:

- The FEIS understates and mischaracterizes the value of the aquatic resources that would be harmed by Alternative 17.
- The FEIS underestimates the severity of impacts from Alternative 17 to aquatic resources and describes mitigation that will not adequately compensate for the functions and values of the wetlands and streams lost or diminished as a result of Alternative 17.
- We continue to disagree with the Army Corps determination that Alternative 17 is the Least Environmentally Damaging Practicable Alternative.
- We continue to disagree with the FEIS’s assertions that upgrades to 2A do not meet the basic project purpose and that they are not practicable.

Attachment 5 – Letter from Curtis Spalding U.S. EPA Regional Administrator to Kenneth Robie regarding Circ-Williston Transportation Project FEIS at pg. 2 (Aug. 24, 2010).

The concerns raised by U.S. EPA must be addressed before any Section 404 permit is issued.

Conclusion

The ACOE cannot issue a Clean Water Act § 404 Permit for the proposed Circ-Williston Transportation Project. The public has been denied a reasonable opportunity to comment on the proposed project. The project is not the least environmentally damaging practicable alternative. The proposed mitigation is inadequate. The proposed project is contrary to the public interest. The U.S. EPA’s concerns about impacts to water quality and wetlands have not been addressed.

Sincerely,
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Attachments:

1. U.S. Army Corps of Engineers News Release “Vermont Agency of Transportation seeks corps of Engineers permit to place fill for Circ-Williston corridor.” Aug. 10, 2010.
2. U.S. Army Corps of Engineers New England District, Regulatory / Permitting, Public Notices Weekly Listing as found on Sept 7, 2010.
3. U.S. Army Corps of Engineers New England District, Regulatory / Permitting, Public Notices, Vermont Listing as found on Sept 7, 2010.
4. Comments on Circ-Williston FEIS from CLF, Sierra Club et al submitted Aug. 27, 2010.
5. Letter from Curtis Spalding, U.S. EPA Regional Administrator to Kenneth Robie regarding Circ-Williston Transportation Project FEIS dated Aug. 24, 2010.