Conservation Law Foundation • Friends of the Earth • Vermont Sierra Club
Vermont Natural Resources Council • Vermont Public Interest Research Group
Smart Growth Vermont • Vermont Smart Growth Collaborative

COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE CIRC-WILLISTON TRANSPORTATION PROJECT

November 20, 2007

I. Introduction

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) offer the following comments on the Draft Environmental Impact Statement (DEIS) and U.S. Department of Army Individual Permit Application (404 Permit) for the Circ-Williston Transportation Project.

Based on our review we find:

- The DEIS violates crucial provisions of the National Environmental Policy Act (NEPA)
- A 404 Permit cannot be issued for the project as presented
- The DEIS fails to perform the requisite analyses or implement the proper procedures pursuant to federal law, including illegally segmenting review of the overall Circ-Williston project

In light of the following comments, the identified deficiencies in the environmental analysis should be corrected before issuing a final Environmental Impact Statement (FEIS) and selecting a preferred alternative.

Based on the analysis in the DEIS, none of the Circ A/B alternatives should be selected as the preferred alternative.

- The DEIS improperly excluded alternatives, including increased transit and transportation demand management (TDM) as well as rail projects that would be able to meet Chittenden County's needs to move people and goods safely and efficiently at a lower cost and with less pollution and fewer environmental impacts than the alternatives considered.
- The DEIS improperly changed the purpose and need after eliminating alternatives from consideration.
- The analysis in the DEIS demonstrates that alternatives other than building within the Circ A/B Corridor would meet Chittenden County's transportation needs at a lower cost and with fewer environmental impacts.

A public comment period should be provided after a preferred alternative is selected.

- The public process has frustrated attempts to provide substantive input on the DEIS. As a result, necessary public input on this project is missing.
- Public comment on a preferred alternative can be more focused and provide valuable input that cannot be provided when 11 alternatives are being considered.

The following Reports and Attachments accompany these comments and should be incorporated as part of these comments:

1. Appendix A:
   Report on Review of the Draft Environmental Impact Statement for the Circ-Williston Transportation Project by Norman Marshall & Lucy Gibson, Smart Mobility, Inc. and Michael Oman, Oman Analytics (November 1, 2007).

2. Appendix B:
   Memo from Kim Greenwood, CPESC to Brian Dunkiel re: U.S. Army Corps of Engineers Section 404 Authorization and the Chittenden County Circumferential Highway Draft Environmental Impact Statement (November 5, 2007).

3. Attachment 1:
   Email correspondence between Kenneth Robie and Sandra Levine re: May 2007 Circ DEIS presentation, Sept. 2007.

4. Attachment 2:
   Correspondence between VTrans, FHWA and Sandra Levine regarding information requested and refusal to provide requested information free of charge, Sept. – Oct. 2007.

5. Attachment 3:
   Memo to Williston Selectboard from Lee Nellis, Town Planner, Oct. 3, 2007.

II. Comments

1. The Public Process is Inadequate

The public process provided to obtain input and comments on the DEIS and the overall project and environmental review is flawed. First, the DEIS itself is an encyclopedic morass. Its length, structure, presentation and availability failed to enable most citizens to provide meaningful comment. While over $7 million and 2 years of time was spent on the environmental review, the result is a mostly incomprehensible DEIS.

a. Average Citizen Denied Meaningful Access

The DEIS itself precluded the average citizen's access to the analysis presented. Information that would have been helpful for public comment was left out of the DEIS. The presentations made during the public information sessions held in May of 2007 were not included in the DEIS. These presentations were represented as a summary of the analysis to assist the public. When a

request was made to have this presentation available to the public, that request was refused and the following response was provided:

> The material that was distributed during the May meetings had been posted to the website, this included a PDF version of the PowerPoint presentation. This presentation contained a summary of the preliminary results of some of the work performed during the Circ-Williston EIS. Since that time, the DEIS has been published and it is the DEIS document upon which we are seeking comments. Accordingly, we do not intend to repost the May materials on the website.

See Email correspondence re May 2007 Circ DEIS presentation, Sept. 2007 (Attachment 1).

While the May 2007 meetings were offered to provide information and answer questions, they did not allow any comment to be provided and become part of the evaluation and environmental review. This effectively shut the public out of the process. Also, requests to provide the data underlying the summary results presented at the May meetings were also denied. These meetings presented only selected conclusions and failed to provide an opportunity for comment or input that would be part of the evaluation.

The Public Hearings on October 4, 2007 were inadequate to obtain public input. First, there were only two hearings at two locations. Both hearings were on the same day. By contrast, other public meetings, hearings and information sessions on this project were held on multiple days and each at 3 locations. DEIS at 22-4 to 22-9. The limited time and location for the public hearings demonstrate a failure to provide a public process that obtains meaningful public input on the final DEIS.

b. Input from Public Officials Frustrated

The size, scope and complexity of the DEIS has frustrated attempts by local governments to provide substantive input on the project or the DEIS. Important input from local officials and local governmental bodies is missing.

c. Access to Technical Information Denied

While some technical experts may have the ability to wade through the voluminous document and provide comments on the DEIS, access to additional information was denied. See Correspondence between VTrans, FHWA and Sandra Levine regarding information requested and refusal to provide free of charge (included in Attachment 2).

On September 4, 2007, a request was made on behalf of Friends of the Earth, Conservation Law Foundation and the Vermont Smart Growth Collaborative for specific information pertaining to the DEIS. As stated in the request, "obtaining this information in a timely manner is essential for these organizations to review and prepare comments on the DEIS." See Letter to Kenneth Robie and Kenneth Sikora from Sandra Levine re: DEIS Circ-Williston Project dated 9/4/07 (included in Attachment 2). Despite clear rules requiring that documents underlying an environmental impact statement should be provided free of charge, a reply was first delayed by more than a month, and the information was only offered to be available upon payment of a $3000 fee for the time spent to collect the information. See Letter to Sandra Levine from Judith Dillon dated 10/15/07 (included in Attachment 2). To date the information has still not been provided free of

charge. The failure to have access to this information limits the ability of our organizations to review and prepare comments on the DEIS.

At a minimum, to correct the above deficiencies in the public process:

1. *The requested information to enable comments should be provided immediately and free of charge.*
2. *Additional or amended comments based on the information provided should be accepted within 30 days after the information is provided.*
3. *An additional public comment period should be provided after a preferred alternative is selected.*
4. *All the identified deficiencies in the public process should be corrected and the corrections incorporated in the FEIS and its process for review.*

2. The DEIS Provides Unequal Comparison of Costs and Impacts

In evaluating costs, benefits and environmental impacts, the DEIS fails to provide an "apples to apples" comparison between the alternatives that would build within the Circ right-of-way (ROW) and those that would not. In particular, no cost was attributed to acquiring the Circ ROW. Nor was any benefit or opportunity cost considered for not using the Circ ROW. The DEIS is asserted to be a new environmental review that fairly considers the costs and impacts of the proposed project anew, without regard to previous actions. DEIS at 1-10. In fact, this is what NEPA requires. 42 U.S.C. § 4332 (2006). By failing to consider impacts and costs regarding the existing Circ ROW, the DEIS has tipped the scales and does not fairly consider impacts. In essence, the DEIS treats the Circ as partly built, but then claims it is a new environmental review. For example, for the 2A alternatives, it considers the cost of acquiring additional land for a ROW. However, for the alternatives that would build within the Circ ROW there is no cost associated with acquiring the ROW. Similarly, for alternatives that would not use the Circ ROW, no cost savings are associated with either selling the Circ ROW or using it for other purposes. Clearly, acquiring the Circ ROW is a cost associated with that project – whether it is a cost incurred now or in the past. Similarly, not using that ROW is a potential asset that could be sold and reduce the cost of other alternatives. Thus, for each of the comparisons, the DEIS unfairly and unreasonably favors the alternatives that would build within the Circ ROW. First, by diminishing the cost associated with those alternatives, and second by diminishing the benefits of other alternatives in comparison. See Report by Smart Mobility & Oman Analytics (Appendix A at 26).

The FEIS should provide equal comparisons of costs and benefits that include the cost of the Circ ROW and savings associated with not using the Circ ROW for this project.

3. Future Circ Segments are Included in the "No Build" Alternative

The baseline for comparison for all alternatives is the "no build" alternative. In this DEIS, the "no build" includes the building of other segments of the Circ Highway. As with the cost figures, this fails to provide information allowing a hard look at the effect and impacts of this segment of the Circ Highway. In this regard, the analysis completed is like evaluating the effect of a college education on earning potential but then assuming as background that a law degree is

already acquired. How can one determine the effect of a college degree on earning potential for someone who already has a law degree? Yet that is what this DEIS does for the Circ. It evaluates the costs and impacts of this limited segment assuming all other segments will be built. Whether this segment of the Circ is built has an effect on additional segments – just as whether one has a college degree affects whether one acquires a law degree. An honest evaluation of impacts cannot assume the building of other segments of the Circ Highway as background for evaluating this project. See Report by Smart Mobility & Oman Analytics (Appendix A at 6, 9).

As a result of this skewed evaluation, the actual impacts of other segments are not evaluated or considered. Similarly, the effect of this segment on the building of other segments is neither evaluated nor considered. The effect of this evaluation is an illegal segmentation of this Circ Highway Project for purposes of the EIS. The Circ-Williston Transportation Project is simply one portion of a bigger project. This is recognized by including the "future" portions as part of the "no build" analysis. The Circ-Williston Transportation Project should not be separated from the remaining portions for purposes of the EIS.

The FEIS should include an evaluation of impacts without future sections of the Circ being built.

4. Key Growth, Sprawl and Cumulative Impacts are not considered

Significant growth, cumulative and indirect impacts, including sprawl, are not considered in the DEIS. The evaluation misrepresents these impacts. The effect of the misrepresentation biases the evaluation and favors the Circ A/B Corridor alternatives. The evaluation understates negative impacts regarding growth and sprawl of some of the proposed alternatives. As a result, significant growth, sprawl and cumulative impacts are not considered.

More detail regarding the failure to consider the growth, cumulative and indirect impacts is provided in the Report by Smart Mobility & Oman Analytics (Appendix A at 6). Negative impacts are understated based on the "no build" alternative including future sections of the Circ Highway as well as all future transportation projects in any planning stage. The growth, cumulative and indirect impacts from other sections of the Circ are considered as "background" conditions. This has the effect of minimizing the impacts of this project. Also, utilization of goals as actual action items for transit and transportation demand management (see comment 5 below) results in understating negative impacts.

In evaluating growth, sprawl and cumulative impacts, the DEIS essentially assumes "full buildout" of the entire area over the next 20 years. The additional impact of the Circ A/B Corridor project then becomes minimal. It does not add to sprawl because sprawl has already occurred. In fact, the Circ-Williston Transportation Project can either accelerate sprawl or help hinder it. As shown in Appendix A, this evaluation is missing because future segments of the Circ are included as part of the "no build" and because information on travel patterns failed to distinguish locations for employment and commercial development and housing. See Report by Smart Mobility & Oman Analytics (Appendix A at 10-12).

The FEIS should consider significant growth, sprawl, cumulative and indirect impacts in a manner that does not bias or favor the Circ A/B alternatives.

5. Transit and TDM Alternatives were eliminated and not considered

The DEIS fails to consider a comprehensive approach to addressing mobility and congestion issues in Chittenden County. The purpose and need was narrowed to consider only transportation in a small part of Chittenden County. In fact the roadways and transportation networks are interconnected. The narrow purpose and need unfairly prejudges and favors road projects when transit and TDM alternatives would better manage mobility and congestion in the region.

Alternative 1 was included in the initial screening process. It was an alternative developed with input from the CCTA and designed as "a robust and extensive package of transit improvements and transportation demand management measures to reduce trips in the VT 2A corridor." DEIS at 3-21. As an alternative this would have addressed transportation more broadly in the County and region rather than in a small corridor. As it would reduce auto dependency and provide a wider range of transportation alternatives allowing people to travel to and from work and shopping and school throughout the region, it has regional transportation and environmental benefits beyond congestion and safety within the VT 2A corridor. By reducing vehicle miles traveled (VMT), it also would reduce global warming emissions. By supporting growth in targeted areas, it also better supports a broader range of the state's and region's land use, energy, transportation and development goals.

Consideration of more limited transit and TDM improvements based on broad "goals" in the CCMPO plan and as background included in all alternatives fails to provide fair consideration of these alternatives. See Report by Smart Mobility & Oman Analytics (Appendix A at 4-5); DEIS at 4-22 . First, as "goals" they cannot simply be accepted as actions that will be taken. To do so would be similar to treating a goal that all roadways will have a level of service (LOS) of C or better within 5 years as actually happening. Or, it would be like treating one's "goal" to lose 20 pounds by the New Year as actually happening. In reality, goals are what we strive for. As anyone who has tried to lose weight knows, we don't always achieve them. Goals can only be accepted as actual action if there is activity moving toward that goal. Here, there is not the funding for transit and TDM to support considering the "goal" any more than an aspiration. It is a disservice and unfair and prejudicial evaluation to treat the "goal" of transit and TDM as a reality while at the same time eliminating transit and TDM from being part of the alternatives considered for this project.

By eliminating Alternative 1 or otherwise failing to consider alternatives that include a greater reliance on transit and TDM, the DEIS prejudges and unfairly favors a roadway alternative. This denies transportation choices and cleaner, safer and less polluting travel opportunities.

The FEIS should consider more robust transit and TDM as potential clean and affordable solutions for moving goods and people through Chittenden County.

6. Rail Alternatives are not considered

The purpose and need was changed after the initial screening and after rail alternatives had been eliminated. Rail has the potential to move freight as it does elsewhere in the state. The

Middlebury Rail Spur will be responsible for taking 70,000 truck trips per year off of Route 7. If one of the purposes and needs for this project is to take trucks off of local roads, then rail is the most logical and reasonable alternative. The failure to consider rail as part of an alternative to take trucks off of local roads unfairly favors new road construction and fails to consider alternatives that would have a lower cost and lower environmental impact. See Report by Smart Mobility & Oman Analytics (Appendix A at 2-3). Moving goods by rail has a lower cost and less air and water pollution compared to moving goods by roads.

> The U.S. Environmental Protection Agency (EPA) estimates that for every ton-mile, a typical truck emits roughly three times more nitrogen oxides and particulates than a locomotive. Other studies suggest trucks emit six to 12 times more pollutants per ton-mile than do railroads, depending on the pollutant measured. Railroads also have a clear advantage in terms of greenhouse gas emissions. According to the EPA, railroads account for just 9 percent of total transportation-related NOx emissions and 4 percent of transportation-related particulate emissions, even though they account for 42 percent of the nation's intercity freight ton-miles.

The Public Benefits of Freight Railroads, Overview of U.S. Freight Railroads, http://nationalatlas.gov/articles/transportation/a_freightrr.html (last visited Nov. 15, 2007)..

The FEIS should include an evaluation of rail to meet the purpose and need of removing trucks from local roads.

7. Positive Impacts to Veterans Park Facility are not considered

Four of the Alternatives will affect the Veteran's Park in Essex Junction. The reconfiguration to construct a roundabout would add land to the park and improve its usability. Increasing acreage affects a park in a positive way and should not be misinterpreted as a negative impact. DEIS at 21-47 to 21-48.

The FEIS should recognize the addition of land to the Veterans Park as a positive impact.

8. The Circ A/B Limited Access Highway does not meet the needs of Williston

The Williston Planning Commission reviewed the Circ-Williston Transportation Project and how the alternatives would best meet the needs of the Town. As a result of its review, the Williston Planning Commission on October 3, 2007 proposed an amendment to the Town Plan and a comment on the DEIS stating that "a landscaped boulevard or parkway will have fewer adverse impacts and be more consistent with Williston's evolving character than a higher speed, limited access highway." See Memo to Williston Selectboard from Lee Nellis, Town Planner, 10/3/07 (Attachment 3). The Planning Commission determined a limited access highway in the Circ A/B Corridor no longer meets the needs of Williston. As the host town for the project, the Planning Commission's recognition that a limited access highway through its town is no longer an appropriate solution provides clear direction that these alternatives should not be the preferred alternative.

The FEIS should not include a limited access highway in the Circ ROW as a preferred alternative.

9. DEIS fails to consider Reasonable Mitigation for Noise Impacts and fails to consider Air Pollution Impacts.

The evaluation of noise impacts in the DEIS shows that building the Circ A/B alternatives would move impacts. Areas along the Circ ROW that currently do not experience noise impacts from the undeveloped ROW would see increases in noise impacts. This includes the Allen Brook School. Traffic that currently travels along Route 2A would be moved to the Circ A/B if these sections of roadway are built. An empty meadow and wetlands would turn into a noisy roadway. This would turn relatively quiet neighborhoods into noisy ones.

Despite increasing noise impacts on properties along the Circ ROW, the DEIS does not recommend mitigation of any of the noise impacts. DEIS at 9-37 to 9-38. Three barriers were considered feasible to mitigate noise impacts, but none are considered to meet the reasonable cost criterion. DEIS at 9-38.

The mitigation measures are discussed in section 9.5, pages 9-37 to 9-50. The DEIS analyzed noise abatement along Circ Corridor A/B for alternatives 16a, 16b & 16c at locations where 2030 noise levels would have an impact, including residential areas. The results are shown in tables 9-24 to 9-35. Although the DEIS states several methods for mitigating noise, the tables show the results of using a barrier only and no other methods such as traffic management, highway alignment alterations, or establishing barrier zones. The DEIS concludes the use of barriers is not worth the cost. The DEIS shows that noise impacts would be moved to areas along the Circ A/B Corridor if these alternatives are built, but that these impacts would not be mitigated.

The noise analysis in the DEIS unfairly favors the Circ A/B alternatives. It fails to consider reasonable costs on those alternatives that would mitigate noise impacts.

The DEIS shows that air pollution impacts would be reduced as a result of the Circ A/B alternatives. DEIS 8-27 to 8-31. This is a result of the "no build" including future segments of the Circ Highway as well as all the development that would follow. The DEIS fails to consider air pollution impacts because it builds these impacts into the background conditions. This biases the evaluation in favor of the Circ A/B alternatives and fails to consider significant air pollution impacts.

The FEIS should include mitigation of noise impacts and should evaluate air pollution impacts as a result of the Circ A/B without future segments of the highway built.

10. Water Quality Impacts are not considered

The comments below on the Section 404 Wetlands permit, demonstrate that significant wetlands impacts were not evaluated. See Report of Kim Greenwood, CPESC re: Section 404 authorization & Circ-Williston DEIS, 11/5/07 (Appendix B).

Regarding surface water impacts, the DEIS acknowledges that the waterways affected by the Circ-Williston Transportation Project are impaired and fail to meet water quality standards. DEIS at 11-14 to 11-15. The DEIS fails to provide an evaluation of how future development as a result of the project would avoid adding pollution to these already polluted waterways. The

analysis of surface water impacts shows significant increases in sediment and phosphorus pollution as a result of some of the Circ-Williston alternatives. The DEIS fails to show how these will be addressed to avoid the legal requirement that they not increase pollution into already polluted waterways. The DEIS also fails to evaluate construction impacts on waterways that would result in increasing sediment and phosphorus to polluted waterways in violation of Vermont's Water Quality Standards. Without these evaluations, the impacts of the project on water quality have not been considered. In light of the significant problems of pollution in Lake Champlain caused by stormwater runoff and the fact that the waterways affected by this project are now impaired and fail to meet water quality standards, the DEIS fails to provide an evaluation of significant water quality impacts.

The FEIS should evaluate water quality impacts and demonstrate how these will be addressed in light of the fact that some alternatives will add significant levels of pollution to waterways that do not meet water quality standards.

11. Impacts on Indiana Bats should be evaluated

The DEIS did not evaluate the effect of the project on an endangered species, the Indiana bat. The DEIS indicates that occurrences of Indiana Bat have been documented within thirteen miles of the proposed action. The DEIS fails to provide more information about those occurrences, including the gender and age. Based on the project sheets contained in Appendix H, it appears the U.S. Fish and Wildlife Service survey guidelines for Indiana Bat mist netting were not followed.

The FEIS should evaluate impacts on the endangered species, the Indiana bat.

12. New State Permits are required

The DEIS is unclear about what new state permits will be required. As noted in the Federal Register, this is a new project and new state permits will be needed regardless of the alternative selected. Notice of Intent, 69 Fed. Reg. 69,027 (Nov. 26, 2004). This includes a new Act 250 permit, a new stormwater permit and a state wetlands permit.

The FEIS should note that all state permits will need to be newly issued and should identify how each of the alternatives meets the requirements of the new state permits.

13. DEIS Analysis Demonstrates Bias favoring Circ A/B Alternatives

In a number of areas the DEIS analysis is biased in favor of the Circ A/B alternatives. The analysis adds costs and impacts, not based on reality to some alternatives, while minimizing costs and impacts for the Circ A/B alternatives. As these evaluations are not based on reality or widely accepted evaluation methods their use is suspect, especially when as a result, the Circ A/B alternatives appear to perform better while other alternatives perform less well. Despite these distortions, overall the Route 2A alternatives fairly meet the projects purpose and need – either better than the Circ A/B alternatives, or well within similar margins to the Circ A/B alternatives. Given the similar performance of all the alternatives, the fact that analysis was skewed in a manner that results in the Circ A/B alternatives appearing to be better than they actually are demonstrates bias and a failure to consider impacts and benefits of the alternatives.

a. Overstates Congestion on Local Roadways

As explained more fully in the Report by Smart Mobility & Oman Analytics (Appendix A at 14-18), the congestion analysis overstates the congestion on local roads by failing to use widely accepted congestion methods from the Highway Capacity Manual. It also evaluates travel time savings in a manner that is biased in favor of the Circ A/B alternatives. See Report by Smart Mobility & Oman Analytics (Appendix A at 14-18).

b. Truck Traffic Volumes not Based on Reality

Similarly, truck traffic volumes in the DEIS are grossly exaggerated and fail to correspond with actual truck traffic numbers. The DEIS has a responsibility to evaluate impacts based on reality. It cannot be based on data figures that fail to reflect reality. See Report by Smart Mobility & Oman Analytics (Appendix A at 18-24).

c. Smart Growth Alternatives Distorted

The DEIS distorted the analysis of alternatives put forward by the Vermont Smart Growth Collaborative. It added costs and impacts to these alternatives, such as additional ROW width and an extra lane on a bridge crossing the Winooski. These are not needed for performance of these alternatives. At the same time, the DEIS failed to include costs and impacts that would be part of the Circ A/B alternatives, such as improvements to intersections. See Report by Smart Mobility & Oman Analytics (Appendix A at 7-8 and 26). As a result, the DEIS distorts the alternatives presented by the Vermont Smart Growth Collaborative in a way that biases the evaluation in favor of the Circ A/B alternatives and fails to consider significant environmental impacts and benefits.

d. Safety Impacts not Evaluated

Significant safety impacts were not evaluated in the DEIS. Different and conflicting methodologies were used in different portions of the DEIS. These show very divergent results. In one analysis, only a new roadway could possibly address the safety issues. This analysis is biased in favor of the Circ A/B alternatives. At the same time, the effect of safety improvements on existing roads is ignored. As a result, these safety impacts were not evaluated. The safety analysis either fails to account for accidents that would occur on the Circ A/B roadway or these accidents are allocated to local roadways. See Report by Smart Mobility & Oman Analytics (Appendix A at 25-26).

The FEIS should correct the deficiencies identified that bias the evaluation and fail to provide consideration of significant environmental benefits and impacts.

14. Climate Change Impacts should be evaluated

The DEIS fails to consider climate change impacts of the Circ-Williston Transportation Project. Climate change is the most important environmental issue this generation faces. In Vermont, nearly 50 percent of the greenhouse gas emissions that contribute to climate change are the result of transportation. The vast majority of these originate in the burning of fossil fuels for automobiles and trucks. Despite an ostensibly thorough DEIS that fills thousands of pages, climate change impacts are ignored.

The deficiencies in the DEIS that fail to account for sprawl impacts exaggerate the failure to evaluate climate change impacts. Increases in vehicle miles traveled (VMT) as a result of the project are ignored. Alternatives that would reduce VMT, such as transit and rail have not been considered. Overall, the DEIS treats climate change as either non-existent or as an impact that has nothing to do with VMT. Either way, climate change is a very significant environmental impact that is not evaluated in this DEIS. See Report by Smart Mobility & Oman Analytics (Appendix A at 12-14).

Specific global warming impacts of the Circ A/B alternatives are not addressed.

- Cars are the biggest source of global warming pollution in Vermont. Noted author and climate change expert, Bill McKibben has called the Circ a "global warming machine." This derives from the more cars and trucks on the road, the more sprawl, the more global warming pollution.
- Using rail to move freight was not considered as an alternative that would get trucks off of residential roads. As noted earlier, moving freight by rail produces less global warming pollution than trucks.
- A new highway through Williston reduces opportunities for travel by bicycle, bus or walking, all of which are better for global warming than travel by car. A new road means a new transit route is needed or transit service is reduced. Both would increase global warming as a result of more vehicles on the road and more VMT. New development around or near the Circ, as we have seen at Taft's Corners, would be accessed by cars and lead to more driving and more global warming.
- Development around the Circ would lead to commutes from farther away and increase global warming pollution as a result of longer commutes.
- Residential areas near the Circ would be less desirable. They would be neighboring a highway with no barriers for noise or pollution. Many residents would move farther out and need to drive more and cause more global warming pollution.
- Farmland in and around the Circ and in outlying areas would be paved for new sprawl development as has occurred Taft's Corners and in Essex. Sprawl development that is only accessed by cars produces more global warming pollution.

The FEIS should evaluate climate change impacts. It should recognize and evaluate the increase in vehicle miles traveled as a result of a new roadway and address the impact of this on greenhouse gas emissions and climate change. The FEIS should not include a roadway within the Circ ROW as a preferred alternative.

15. None of the alternatives that would build within the Circ A/B Corridor should be selected as the preferred alternative.

a. The Circ A/B Corridor Alternatives destroy farmland, wildlife habitat and fragile wetlands.

The Circ A/B corridor is presently mostly farmland. The corridor now supports wildlife as well as farming. Undeveloped areas near and around the Circ A/B corridor are also farmland and areas used by wildlife. Large undeveloped areas remain near and around the Circ A/B corridor.

Building a roadway in the Circ A/B corridor will likely result in these areas being paved and losing farmland and having fewer local areas to grow food and crops.

Building the Circ Highway will result in the loss of over 30 acres of good quality wetlands in the Circ corridor. Alternatives that improve existing roads instead of building the Circ would affect less than one acre of wetlands. As noted earlier, wetlands serve an important function to protect water quality. Many streams and waterways near the Circ are polluted and do not meet water quality standards. Keeping wetlands in tact, instead of destroying them would help improve water quality in Chittenden County. Protecting the wetlands in the area of the Circ where development causes water pollution is important and can avoid the need to clean up polluted waterways in the future.

Building the Circ Highway will result in the loss of 35 acres of wildlife wintering habitat. Alternatives that improve existing roads instead of building the Circ affect 0 acres of habitat. The Circ Highway will create a barrier that blocks wildlife movement and will reduce wildlife populations in areas near the Circ Highway.

b. The Circ A/B Corridor Alternatives are bad for the local economy and won't alleviate traffic.

A roadway in the Circ A/B corridor will not help the economy or traffic. The DEIS shows that the greatest relief from traffic congestion comes from improving existing roads. Construction of the Circ A/B alternatives also includes improvements to existing roads. The added benefits from the new highway itself are minimal. Of the eleven alternatives, all except doing nothing will reduce traffic, improve safety and make it easier to get around. The cost for the different alternatives vary from about $50 million to nearly $90 million. The cost of the alternatives that would build within the Circ A/B corridor are the most expensive and range from $70 to $90 million.

For nearly every benefit, the differences among the alternatives are negligible.

- Saving two minutes or four minutes of driving time between Essex and Williston.
- Nearly identical safety improvement for all the alternatives.
- Nearly identical improvements in traffic congestion among most of the alternatives.

While the information provided in the DEIS is telling, it fails to provide a cost benefit analysis. Is saving two minutes of driving time between Essex and Williston worth an additional $20 million? And if $80 million is spent on this road project, what other transportation projects lose out? Will the money needed for the Circ mean there is less money for our schools, and they will suffer?

The DEIS shows that building the Circ A/B alternatives will result in less job growth in Chittenden County. The Circ A/B alternatives cannot be good for jobs or good for the economy if building them causes Chittenden County to lose jobs. There are no funds specifically dedicated to building the Circ-Williston project. Not building one of the more expensive alternatives that use the Circ A/B corridor, and instead choosing an effective, lower cost solution, such as the Route 2A alternatives, means more money is available to fix crumbling roads and bridges in Chittenden County and throughout Vermont. Meaningful economic development will

use transportation dollars to help people get to work, school and shopping. It won't waste limited tax dollars on an outdated superhighway when lower cost solutions will address the need. Fixing existing roads reduces traffic congestion while keeping jobs and economic development within our communities.

The FEIS should not include any of the Circ A/B alternatives or any alternatives that would build within the Circ ROW as a preferred alternative.

The following are comments submitted to the United States Army Corps of Engineers on the Section 404 Permit Application for the Circ-Williston Transportation Project. They are included here as well as comments on the environmental review of these impacts for preparation of an Environmental Impact Statement.

16. A Section 404 Permit cannot be issued

A. The application fails to present a project that can be permitted.

FHWA and VTrans have failed to submit an application that would allow the United States Army Corps of Engineers (Corps) 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 § 404 permit application seeks approval for construction of any one of the 10 proposed alternatives, even though each will have very different impacts on wetlands. The impacts vary from affecting less than 2 acres of wetlands (Alternative 3) to affecting over 36 acres of wetlands (Alternative 16b). See Report of Kim Greenwood, CPESC re: Section 404 authorization & Circ-Williston DEIS, 11/5/07 (Appendix B).

The application presents one "project" consisting of 10 alternatives. It then requests that a permit be issued for all of these alternatives. As presented, the Corps does not have an application on which it can evaluate or judge compliance with any of the § 404 criteria. It is a "project" that encompasses 10 divergent alternatives each with disparate impacts to wetlands. Until a specific alternative is selected, and the Corps knows which of the 10 possibilities the applicant plans to move forward with, a § 404 permit cannot be issued.

By way of example, the application precludes the Corps from adequately conducting the required practicable alternative analysis under § 404 and the applicable EPA guidelines. 33 U.S.C. §1344(b)(1) (2007); 40 C.F .R. § 230.10(a) (2007). The project application states that "[d]epending on the LEDPA [Least Environmentally Damaging Practicable Alternative], the transportation improvements could vary . . . ." Section 404 Permit Application at III-1. A LEDPA determination is not the applicant's to make *after* permitting, but is the responsibility of the Corps to assure prior to issuing a § 404 permit. The Corps may not issue a permit unless the applicant provides 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). Here, in light of the fact that the application puts forward 10 alternatives, no LEDPA determination can be made, nor can any evaluation of compliance with the other criteria be made.

"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 project application presented here fails to provide a project on which the Corps can evaluate the wetland impacts. Instead, approval is sought for wetland impacts to many different construction activities. The application precludes the Corps from exercising its responsibility to evaluate the impacts and avoid discharges into wetlands and other special aquatic sites. As the project is presented in the application, no § 404 permit can be issued.

B. Any building within the Circ ROW is prohibited.

If the Corps determines that the application is sufficient to issue a permit, no permit can be issued for the alternatives that would construct within the Circ ROW. These alternatives are not the least environmentally damaging practicable alternatives. As the § 404 permit seeks approval to build any of the 10 alternatives, the Corps must treat all of these alternatives as practicable. All have been 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 alternatives that require construction in the Circ ROW (Alternatives 16a, 16b, 16c,17, 18, 19, 23). According to the DEIS, the Route 2A alternatives affect less than 2 acres of wetlands and the Circ ROW alternatives cause impacts to between 24.82 and 36.61 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 Alternatives 16a, 16b, 16c, 17, 18, 19, and 23, the alternatives that would build within the Circ ROW are not the least environmentally damaging practicable alternative. As a result, a § 404 permit cannot be issued for any of these alternatives. See Report of Kim Greenwood, CPESC re: Section 404 authorization & Circ-Williston DEIS, 11/5/07 (Appendix B at 3-5).

First, the applicant has failed to meet its burden of clear and convincing evidence that no practicable alternatives exist to the Circ ROW corridor alternatives 40 C.F.R. § 230.10(a)(3) (2007). Second, the application fails to provide any information or analysis on which alternative is most practicable "taking into consideration costs, existing technology, and logistics in light of overall project purposes" 40 C.F.R. § 230.10(a)(2) (2007). Third, the information provided in the application shows that the alternatives which would improve the existing VT 2A roadway are far less environmentally damaging than either the Circ ROW corridor or Hybrid alternatives. As a result, no permit that would allow construction within the Circ ROW corridor can 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).

With regard to any of the alternatives within the Circ ROW, this demonstration has not been made. The application provides information on the environmental impacts of each alternative, most notably the wetland acreage affected by each alternative, but then fails to show how any of the Circ ROW alternatives could possibly be the LEDPA. Instead of providing such analysis, the application simply states that "depending on the preferred alternative identified during the Final Environmental Impact Process, the quantity and nature of impacts to environmental resources will vary." Section 404 Permit Application at III-124.

While an EIS review under NEPA and a Clean Water Act § 404 permit application can be considered together for purposes of inter-governmental efficiency, this cooperative process cannot be conflated beyond the limits of the Clean Water Act. Unlike NEPA, which does not mandate any particular decision, but requires evaluation and analysis of impacts, the CWA and applicable regulations create substantive restrictions governing when the Corps can issue a § 404 permit for an individual project. It is beyond these limits of the Clean Water Act for an applicant for a § 404 non-water dependant project permit to meet its legal burden by referring to a "preferred alternative" to be identified sometime in the future without any analysis of the practicability of the various alternatives. The application fails to provide information on the practicality of each alternative based on cost, existing technology, or project purpose as required by 40 C.F.R. § 230.10(a)(2) (2007). No analysis of the LEDPA can be made without this information.

The only analysis that can be made based on the information provided in the § 404 application is, that of the alternatives presented, the ones that make improvements to the Route 2A roadway are the least environmentally damaging (Alternatives 3, 22, & 2, respectively). See Report of Kim

Greenwood, CPESC re: Section 404 authorization & Circ-Williston DEIS, 11/5/07 (Appendix B at 4-5). The application clearly shows that these three alternatives have a much smaller impact on wetlands. These alternatives would permanently impact between .93 and 1.39 acres of wetlands, while the Circ ROW alternatives would permanently impact between 24.82 and 36.61 acres of wetlands and the Hybrid alternatives would impact between 21.18 and 21.64 acres. As to other environmental impacts beyond wetlands, as shown on Table 13, the application demonstrates that the Route 2A alternatives are the least environmentally damaging. Section 404 Permit Application at III-125 to 126.

None of the alternatives that would build within the Circ ROW can be permitted in accordance with the requirements of § 404. These are not the least environmentally damaging alternatives, and other, less damaging alternatives are practicable. See Report of Kim Greenwood, CPESC re: Section 404 authorization & Circ-Williston DEIS, 11/5/07 (Appendix B at 4-5).

C. Construction within the Circ ROW is contrary to the public interest.

Even if the Corps finds that the permit application provides sufficient information and a LEDPA, the Corps cannot grant the § 404 permit for any of the alternatives that would build within the Circ ROW. Issuance of a permit for any of these alternatives would be 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.

Based on the information provided in the application, none of the alternatives that would construct within the Circ ROW (Alternatives 16a, 16b, 16c, 17, 18, 19, 23) can be found to be in the public interest. While the cumulative benefits for all the alternatives are very similar, 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 (Alternatives 2, 3, and 22) pose less of a negative impact on these resources, in particular to the wetlands than the Circ ROW alternatives

(Alternatives 16a, 16b, 16c, 17, 18, 19, 23). As a result, none of the Circ ROW alternatives can be found to be in the public interest.