



LAND USE PERMIT AMENDMENT

State of Vermont

Natural Resources Board

District 2 Environmental Commission

100 Mineral Street, Suite 305

Springfield, VT 05156-3168

<https://nrb.vermont.gov/>

[phone] (802) 289-0603

CASE NO: 2W0394-4

Hitchcock's Firewood, LLC
43 Taylor Hill
Athens, VT 05143

and

John and Dianna McKay
10 Honey Brim Road
Vernon, VT 05354

LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

The District 2 Environmental Commission hereby issues Land Use Permit Amendment 2W0394-4, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit amendment applies to the lands identified in Book 50, Page 593, of the land records of the Town of Grafton, Vermont, as the subject of a deed to John and Dianna McKay.

This permit specifically authorizes the use of an existing permitted commercial/industrial property for an outdoor firewood processing business. Processing shall occur on an existing paved parking lot, and does not involve the use of existing buildings on site. Logs shall be cut and split into firewood using portable equipment. The project is located at 3992 Route 121 East in the village of Cambridgeport, in the Town of Grafton, Vermont.

Jurisdiction attaches because the Project constitutes a material change to a permitted development, and thus requires a permit amendment pursuant to Act 250 Rule 34.

1. The Permittees, and their assigns and successors in interest, are obligated by this permit to complete, operate, and maintain the project as approved by the District 2 Environmental Commission (the "Commission") in accordance with the following conditions.

2. The project shall be completed, operated, and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 2W0394-4, and (c) the permit application, plans, and exhibits on file with the Commission and other material representations. In the event of any conflict, the terms and conditions of this permit and the conclusions in the findings shall supersede the approved plans and exhibits.

The approved plans are:

“Distances from Equipment Location,” received 8/17/21 (Exhibit 008);

“Impervious Surfaces Map,” received 8/17/21 (Exhibit 009);

“Business Locations,” received 8/17/21 (Exhibit 013);

“Class II Wetland Map A,” received 8/17/21 (Exhibit 014);

“Class II Wetland Map B,” received 8/17/21 (Exhibit 015);

“Transportation,” received 8/17/21 (Exhibit 016);

“Prime Agricultural Soils,” received 8/17/21 (Exhibit 022);

“Site Map with National Flood Hazard Layer FIRMette,” received 1/20/22 (Exhibit 035);

3. All conditions of Land Use Permit 2W0394 and amendments are in full force and effect except as further amended herein.
4. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
5. No change shall be made to the design, operation, or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
6. No further subdivision, alteration, or development on the tract of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
7. Pursuant to 10 V.S.A. § 8005(c), the Commission or the Natural Resources Board may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.
8. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittees and their successors and assigns.

9. Hours of operation shall be limited to Monday through Friday from 9:00 AM to 5:00 PM, and Saturdays from 9:00 AM to 2:00 PM. There shall be no operations on Sundays or federal holidays.
10. In addition to conformance with all erosion prevention and sediment control conditions, the Permittees shall not cause, permit, or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittees from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
11. The Permittees shall maintain an undisturbed, naturally vegetated riparian zone on the Project Tract along the Saxtons River, which shall begin at the water's edge at base flow conditions, and shall further extend 50 feet measured inland from, perpendicular to, and horizontally from the top-of-bank. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials, tree trimming or canopy removal, tree, shrub, or groundcover removal; plowing or disposal of snow, grazing or mowing.
12. The riparian zone shall be permanently marked with signs. The signs shall be 8.5 inches by 11 inches, mounted on posts at 30-yard intervals, and shall state, "Riparian Buffer – DO NOT DISTURB." Upon prior written approval by the Commission, an alternative sign design and message may be allowed.
13. The Permittees shall maintain an undisturbed, naturally vegetated Class II wetland and 50-foot wetland buffer zone on the Project Tract. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials, tree trimming or canopy removal, tree, shrub, or groundcover removal; plowing or disposal of snow, grazing or mowing.
14. The Permittees shall install and maintain jersey barriers around sawdust and debris storage areas within the River Corridor as described and depicted on Exhibits 029, 033, 035, and 036 to prevent floatable materials from being transported downstream during the occurrence of the base flood.
15. Sawdust, wood debris, logs, and firewood shall be stockpiled, maintained, and contained onsite in accordance with the volume limits outlined in Exhibit 033.
16. The Permittees shall comply with the vegetation removal and debris placement remediation requirements (Violation 2) described in Exhibit 027.
17. The Permittees shall comply with the drainage channel and stormwater remediation requirements (Violation 3) described in Exhibit 027.

18. Signage shall be limited to the riparian zone signage described in condition 12 and the sign depicted on Exhibits 013 and 020. The Permittees shall not erect additional exterior signage without prior written approval from the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules. Signage includes banners, flags, and other advertising displays, excepting temporary real estate marketing signs and temporary Grand Opening signs.
19. The Permittees shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit Amendment before any written contract of sale is entered into.
20. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.
21. The Permittees shall file a Certificate of Actual Construction Costs, on forms available from the Natural Resources Board, pursuant to 10 V.S.A. § 6083a(g) within one month after construction has been substantially completed. If actual construction costs exceed the original estimate, a supplemental fee based on actual construction costs must be paid at the time of certification in accordance with the fee schedule in effect at the time of application. Upon request, the Permittees shall provide all documents or other information necessary to substantiate the certification. Pursuant to existing law, failure to file the certification or pay any supplemental fee due constitutes grounds for permit revocation. The certificate of actual construction costs and any supplemental fee (by check payable to the "State of Vermont") shall be mailed to: Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201; Attention: Certification.
22. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 7th day of February 2022.

By 
Thomas Fitzgerald, Chair
District 2 Commission

Members participating in this decision:

Abbie Corse

Cheryl Cox

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Land Use Permit 2W0394-4

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

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

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

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

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

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

E-Notification CERTIFICATE OF SERVICE # 2W0394-4

I hereby certify that I, the undersigned, sent a copy of the foregoing Land Use Permit and Exhibit List on February 7, 2022 by U.S. Mail, postage prepaid, to the individuals without email addresses, and by electronic mail to the following with email addresses. All email replies should be sent to NRB.Act250Springfield@vermont.gov. **Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the NRB District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify the District Office of any email address changes.**

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By: 

Natural Resource Board Technician



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

State of Vermont

Natural Resources Board

District 2 Environmental Commission

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LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

I. INTRODUCTION

On August 17, 2021, Hitchcock's Firewood, LLC submitted an application for an Act 250 land use permit amendment for a project (the "Project") generally described as the use of an existing permitted commercial/industrial property for an outdoor firewood processing business. Processing was proposed for an existing paved parking lot, and would not involve the use of existing buildings on site. Logs were proposed to be cut and split into firewood using portable equipment. The Project is located at **3992 Route 121 East in the village of Cambridgeport, Town of Grafton, Vermont**. The tract of land consists of 8.92 acres (the "Project Tract"). The Applicant's legal interest is a rental agreement. The landowner's legal interest is ownership in fee simple described in a deed recorded on November 14, 2008, in Book 50, Page 593 in the land records of the Town of Grafton, Vermont.

The application was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in a letter from the State Coordinator to the Applicant dated September 24, 2021. The application was resubmitted with the required supplemental information on October 5, 2021, and deemed complete on October 6, 2021.

The Commission convened a prehearing conference for Application 2W0394-4 on November 8, 2021, for the purpose of identifying contested facts and legal issues, discussing party status, and determining a hearing schedule. The prehearing conference was conducted pursuant to Act 250 Rule 16, with Chair Thomas Fitzgerald presiding. During the prehearing conference, the

Commission requested that the Applicant conduct a demonstration of the proposed portable firewood cutting equipment. The Commission observed the equipment in operation as it cut and split logs into firewood, both in the immediate vicinity of the equipment, and also from the roadside in front of various neighboring properties including 3924 Route 121 East, 16 Parker Hill Road, and 90 Athens Road. During the demonstration, the Commission made note of the aesthetic impacts of the Project from various locations, including visual and noise impacts.

On December 3, 2021, the District 2 Commission held a public hearing for the application. Pursuant to Act 250 Rule 13(B), the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on February 3, 2022, after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

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

II. JURISDICTION

Jurisdiction attaches because the Project is a material change to a permitted development, and thus requires a permit amendment pursuant to Act 250 Rule 34.

III. OFFICIAL NOTICE

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

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Accordingly, official notice is hereby taken of the *Grafton Vermont Town Plan(2020-2028)*, subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

IV. AMENDMENT APPLICATION - RULE 34(E)

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

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

V. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

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

- A. The **Applicant**, by Scott Hitchcock, Heather Chaudoir, and George T. McNaughton, Esq.
- B. The **Vermont Agency of Natural Resources**, through an Entry of Appearance dated November 5, 2021, and comments dated December 2, 2021, by Jennifer Mojo, Senior Planner.
- C. The **Town of Grafton**, by Joe Pollio, Cathy Siano-Goodwin, Suzanne Welch, and John Gregory, Selectboard Members.
- D. The **Vermont Agency of Transportation**, via comments submitted by Transportation Engineer Christopher Clow, in an email to the Applicant submitted on November 1, 2021.
- E. The **Windham Regional Commission**, via comments submitted by Senior Planner Alyssa Sabetto on December 14, 2021.
- F. The **Landowners** John and Diana McKay did not attend the hearing.

B. Interested Parties

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

i. Preliminary Party Status Determinations

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

- A. **Patrick Spurlock and Pamela Johnson-Spurlock** (90 Athens Road, Chester, VT 05143): Preliminarily admitted under Criteria 1 (Air Pollution) and 8 (Aesthetics).
- B. **James Roberts** (35 Sleepy Valley Road, Athens, Vermont 05143): Preliminarily admitted under Criteria 1(D) (Floodways), 1(E) (Streams), and 4 (Soil Erosion).

ii. Final Party Status Determinations

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and revised the status of the following parties:

James Roberts (35 Sleepy Valley Road, Athens, Vermont 05143): Admitted under Criteria 1(D) (Floodways); Denied under 1(E) (Streams), and 4 (Soil Erosion).

Mr. Roberts voiced concerns at the prehearing conference and hearing that focused on the potential for the Project to impact his downstream property during flooding, particularly the potential for debris from the Project to end up on his property as a result of flooding. Mr. Roberts has a particularized interest in ensuring that the Project does not exacerbate flooding issues or impact his property during flooding (Criterion 1(D)). The Commission grants his party status request under this criterion, and has addressed his concerns in this decision.

However, at no point during the proceeding did Mr. Roberts voice concerns about the potential for the Project to impact the natural condition of the Saxtons River (Criterion 1(E)), separately from the aforementioned flood concern. Likewise, at no point during the proceeding did Mr. Roberts voice concerns about the potential for the Project to cause unreasonable soil erosion or a reduction in the capacity of the Project Tract to hold water so that a dangerous or unhealthy condition might result (Criterion 4). Mr. Roberts has not demonstrated a particularized interest under Criteria 1(E) and 4. Therefore, the Commission must deny his request for party status under those criteria.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

- | | |
|---------------------------------------|---|
| 1 – Water Pollution | 5(A) – Transportation Congestion & Safety |
| 1(A) - Headwaters | 5(B) – Transportation Demand Management |
| 1(B) - Waste Disposal | 6 - Educational Services |
| 1(C) - Water Conservation | 7 - Municipal Services |
| 1(F) - Shorelines | 8 – Natural Areas |
| 2 - Water Supply | |
| 3 - Impact on Existing Water Supplies | |

8 – Historic Sites	9(F) - Energy Conservation
8(A) - Wildlife Habitat & Endangered Species	9(G) - Private Utility Services
9(A) - Impact of Growth	9(H) - Costs of Scattered Development
9(B) – Primary Agricultural Soils	9(J) - Public Utility Services
9(C) - Productive Forest Soils	9(K) - Effects on Public Investments
9(D) - Earth Resources	9(L) – Settlement Patterns
9(E) - Extraction of Earth Resources	10 - Local and Regional Plans

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

The findings of fact are based on the application, Exhibits 001 - 036, and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear, and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

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

Criterion 1 - Air Pollution:

Findings of Fact

1. There will be no air pollutant emissions or noxious odors from operation of the Project. Exhibit 001
2. There will be noise pollution from operation of the Project. Exhibit 001
3. Hours of operation shall be limited to Monday through Friday from 9:00 AM to 5:00 PM, and Saturdays from 9:00 AM to 2:00 PM. There shall be no operations on Sundays or federal holidays. Exhibit 001
4. The Commission observed the operation of the wood splitting equipment during the prehearing conference on November 8, 2021. At that time, the Commission was able to listen to the Cord King wood processor in full operation, including the sounds of logs being cut and split, and the sound of uncut logs being loaded onto the Cord King deck. The Commission made these observations from various points along Routes 121 and 35, including from the Spurlock property. Commission observations during prehearing conference, 11/8/21

5. The Applicants have been operating the Project without an Act 250 land use permit amendment since at least 2020. Exhibit 017
6. The Applicants have taken noise measurements of the Cord King wood processor using the NIOSH SLM app for iPhone. With the processor running, this app recorded noise levels of 47.8 dBA (LAeq - 15 seconds) and 52.5 dBA LAmax at the property boundary of the Spurlock residence. Exhibit 023
7. The Applicants' noise measurements at the property boundaries of 3 adjoining properties ranged from 39.0 dBA (LAeq - 15 seconds) to 56.5 dBA (LAeq - 15 seconds) with the processor running. Exhibit 023
8. The Applicants' noise measurements at the property boundaries of 3 adjoining properties ranged from 58.8 dBA LAmax to 60.5 dBA LAmax with the processor running. Exhibit 023
9. Using a digital decibel meter to read the decibel levels, the Spurlocks got readings of 45 when the machinery was idling. When the processor is actively cutting, they get readings of up to 50 decibels. Exhibit 031
10. The Spurlocks stated that when the saw operation is running, they can experience hours of long drones reaching 45 decibels and more. Exhibit 031
11. The Spurlocks stated that their usual noise pollution base level is at 35. Exhibit 031
12. The Spurlocks stated that they have been awakened on weekend mornings to the sound of the saw. They also stated that the noise from the firewood processing operation has exacerbated migraines and has increased stress levels in their household. Exhibit 031
13. The Spurlocks have experienced noise from the Project on their outside porch at 8:00 AM. Patrick Spurlock hearing testimony 12/3/21
14. Mr. Spurlock is a recording musician. As such, he is very cognizant and hyper-aware of noise. Patrick Spurlock hearing testimony 12/3/21
15. The Commission observed that noise levels vary during the Applicants' wood splitting operations. The engine of the Cord King wood processor has a sound, but the sound of the processor's saw cutting through logs is the loudest sound produced during the process. The sound of the saw is not constant, but intermittent. The Commission also observed that the sound of the saw and the processor engine are interrupted periodically for several minutes at a time, when logs are being loaded onto the Cord King deck. The Commission made these observations from various points along Routes 121 and 35, including from the Spurlock property. Commission observations during 11/8/21 prehearing conference
16. Applicant Hitchcock's Firewood, LLC makes the following estimates: Scott Hitchcock can cut one cord of 16" (average length) firewood using a straight log in approximately 20 minutes. He can cut 8 cords of wood over the course of an average 8-hour day, during which the Cord King processor runs for 3 – 4 hours. He can cut 2 – 3 cords of wood over

the course of an average 5-hour day, during which the Cord King processor runs for 1 – 2 hours. Exhibit 028

Conclusions of Law

Act 250 regulates noise as air pollution only when it rises above annoyance and aggravation, (i.e., when it has the potential to cause adverse health effects). Adverse health effects include both physical effects, such as damage to hearing, and psychological effects. In numerous prior applications, the former Environmental Board rendered decisions that established noise level thresholds for assessing compliance with Criterion 1. In one case, the Environmental Board adopted EPA's adverse health impact standard of 70 dB(A) for 24 hours a day, 365 days a year, over a lifetime, as the level at which noise constitutes an unacceptable level of air pollution under Criterion 1. *Re: Pike Industries, Inc.* No. 5R1415-EB, Findings of Fact, Conclusions of Law, and Order, at 32 (Vt. Env'tl. Bd. June 7, 2005). In another, the Environmental Board noted that "unsafe noise levels begin at around 90 decibels" and that maximum noise levels considerably below that level do not constitute air pollution under Criterion 1. *Re: Wildcat Construction Co.*, No. 6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order at 7, 10 (Vt. Env'tl. Bd. Oct. 4, 1991), *aff'd, In re Wildcat Construction Co.*, 160 Vt. 631 (1993). In this case, while noise from the operation of this Project is audible from offsite locations, and might be annoying to some, the noise levels and duration will not come close to approaching those established standards for adverse health effects. Effects of noise that amount to annoyance and aggravation are analyzed under criterion 8 (Aesthetics).

The Commission concludes that this Project will not result in undue air pollution, and that this Project complies with Criterion 1(Air Pollution).

Criterion 1(D) - Floodways:

Findings of Fact

17. The Project is located in a regulatory floodway. Exhibit 012
18. Mr. Roberts voiced concerns at the prehearing conference and hearing that focused on the potential for the Project to impact his downstream property during flooding, particularly the potential for debris from the Project to end up on his field as a result of flooding. Roberts testimony, 11/8/21 prehearing conference and 12/3/21 hearing
19. Applicants currently use a container to collect sawdust from the firewood processor. Scott Hitchcock hearing testimony 12/3/21
20. Piles of sawdust and bark debris are currently removed by, or delivered to, local farms, gardens, and landowners. Exhibit 001

21. Applicants have agreed to sweep the area after operations. Scott Hitchcock hearing testimony 12/3/21
22. The storage of materials is considered development under the National Flood Insurance Program (NFIP) and must meet the standards found within the Agency of Natural Resources' Flood Hazard Area and River Corridor Protection Procedure (FHARCPP). Exhibit 029
23. The Applicants have put forward a plan to require the removal of sawdust and debris before the piles of each reach 512 cubic feet. In addition, the plan places limits on the volume of logs (300 cords) and split firewood (80 cords) that may be stockpiled on the site at any given time. Finally, the stockpiles of sawdust and debris will be contained within Jersey barriers to prevent them from being transported downstream during the occurrence of the base flood. The Jersey barriers will be constructed of huge concrete blocks, stacked to create bins. The Jersey barrier construction will not be permanent. Exhibits 033 and 036 and Scott Hitchcock hearing testimony 12/3/21
24. The locations of the wood processor, logs, split firewood, and sawdust and debris piles are identified on a site map. Exhibit 035
25. John Broker-Campbell, District Floodplain Manager, reviewed the information, site map, and Hearing Recess Order (HRO) responses provided by the Applicants on 1/20/2022. Based on the information provided, the Project is in conformance with ANR's Flood Hazard Area and River Corridor Protection Procedure. Exhibit 036
26. The Jersey barriers and the stockpile maintenance commitments made by the Applicants will address Mr. Roberts' concerns about debris from the Project potentially impacting his property during flooding. Roberts testimony, 12/3/21 hearing
27. The Applicant will stack logs parallel to the river to minimize their potential to divert the flow of flood waters in the event of a flood. Exhibit 001

Conclusions of Law

The Project will involve the development of lands within a floodway. The Commission will place conditions in the land use permit amendment requiring sawdust, wood debris, logs, and firewood to be stockpiled, maintained, and contained onsite in accordance with the standards and volume limits outlined in Exhibit 033. As conditioned, the Commission concludes that the Project will not restrict or divert the flow of flood waters or endanger the health, safety, or welfare of the public or riparian owners during flooding.

The Project complies with Criterion 1(D).

Criterion 1(E) - Streams:

Findings of Fact

28. The Project Tract is located adjacent to the Saxtons River. Exhibit 003
29. The Applicant proposes to locate the Project adjacent to the banks of the river. Exhibit 08
30. Land use permit 2W0394-3 includes the following condition: "The permittee shall maintain a 50-foot undisturbed, unmowed, naturally vegetated buffer strip between the top of the bank of the Saxtons River and any disturbed area. The buffer shall be permanently marked prior to October 1, 1996." Exhibit 027 and LUP 2W0394-3
31. During the prehearing conference, the Commission noticed that an 11-foot wide by 32-foot long area had recently been cleared of vegetation within the 50-foot stream buffer. The vegetation was removed where the sawdust and bark debris were stored. This observation was later confirmed by the Natural Resources Board (NRB)'s Enforcement Officer. Commission observation, 11/8/21 prehearing conference and Exhibit 027
32. Applicant has stored woody debris within the 50-foot stream buffer. Exhibit 027
33. Applicant has agreed to remove the piled woody debris from the stream buffer and replant the 11-foot wide by 32-foot long area with native hardwood saplings with a diameter at breast height (DBH) of 2-inches and 8 feet on center apart. Exhibits 027 and 030
34. During the prehearing conference, the Commission noticed that nothing had been installed to demarcate the 50-foot stream buffer. This observation was later confirmed by the Natural Resources Board (NRB)'s Enforcement Officer. Commission observation, 11/8/21 prehearing conference and Exhibit 027
35. Applicant has agreed to install stream buffer signs for the areas over which Applicant has control and that are potentially affected by Applicant's Project. Exhibit 030
36. Applicant has mowed grass within the 50-foot stream buffer. Exhibit 027
37. Applicant has agreed to cease mowing within the stream buffer in the future. Exhibit 030

Conclusions of Law

To ensure that the Saxtons River will be maintained in a natural condition, the Commission will include conditions in the permit requiring compliance with remediation directives 2 and 3 and the buffer signage requirements in remediation directive 7 of Exhibit 027. The Commission will also include an updated riparian zone condition in the permit, emphasizing the types of activities that are prohibited within that zone. The Commission will rely on the NRB to resolve

the additional land use permit violations outlined in Exhibit 027 through the enforcement process.

As conditioned, the Commission concludes that the applicant will maintain the natural condition of the Saxtons River, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.

The Project complies with Criterion 1(E).

Criterion 1(G) - Wetlands:

38. Findings of Fact

39. A large wetland complex that contains two significant natural communities (Sugar Maple Floodplain Forest and River Cobble Shore) is located on the southern end of the Project Tract. Exhibit 026

40. The Applicants have maintained a mowed area that encroaches into the 50-foot wetland buffer and is within 11 feet of the significant natural community. Exhibit 027

41. Applicant has agreed to cease mowing within the wetland buffer in the future. Exhibit 030

42. In the future, if the Applicants wish to build any new structures, expand activities, or propose additional disturbances south of the existing project footprint, the Agency of Natural Resources encourages the Applicants to contact the District Wetland Ecologist and Fish and the Wildlife Natural Heritage Program Ecologist to review the project for feedback regarding wetland permitting and review under Criterion 8. Exhibit 026

Conclusions of Law

Applicant has agreed to stop mowing within the wetland buffer. The Commission will include a wetland buffer zone condition in the permit, emphasizing the types of activities that are prohibited within that zone. The Commission will rely on the NRB to resolve the additional land use permit violations outlined in Exhibit 027 through the enforcement process.

As conditioned, the Project complies with Criterion 1(G).

Criterion 4 - Soil Erosion:

Findings of Fact

43. No earthwork is proposed or will be taking place as part of this Project. Exhibit 001

44. The Project Tract includes about 30,228 square feet of existing asphalt pavement and about 3,455 square feet of existing crushed slate paving. Exhibit 009
45. The Project will not increase impervious surfaces on the Project Tract beyond those previously permitted. Exhibit 001
46. An inspection by the NRB Compliance and Enforcement Officer found that an existing drainage channel is incised and conveys stormwater runoff from the paved parking lot directly into the Saxton's River. Exhibit 027
47. The Applicant has agreed to line the existing drainage channel with riprap 4-5 inches in diameter in a layer 10 inches deep. Exhibits 027 and 030
48. To intercept stormwater and reduce the risk of a discharge to the Saxton's River, the Applicants have agreed to cooperate to create a shallow swale and two stormwater runoff turnouts on or near the parking lot. Exhibits 027 and 030

Conclusions of Law

No earthwork is proposed as part of this Project. Therefore, the risk of soil erosion resulting from the placement of the Project infrastructure is low. However, existing runoff is causing erosion near the location of the wood processor and increasing the risk of continued sedimentation into the Saxtons River. To address this soil erosion concern, the Commission will include a condition in the permit requiring compliance with the drainage channel and stormwater remediation directives in section 3 of Exhibit 027. As conditioned, the Commission concludes that the construction of the Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The Project complies with Criterion 4.

Criterion 8 - Aesthetics:

Findings of Fact

49. The Spurlocks are concerned about the aesthetics of seeing a sawmill from their house. Exhibit 031
50. Trees and other native vegetation to be protected within the existing 50-foot Riparian Zone will help to attenuate noise from the Project and screen it from view from most public roads. Exhibit 004
51. Grafton does not have a noise ordinance. Grafton Selectboard Chair Joe Pollio testimony, 12/3/21 hearing

52. The Town Plan states, "Noise pollution at certain levels can dramatically alter the character of the neighborhood. The town should be aware of the noise levels of its own activities, and should work to establish appropriate noise thresholds." Grafton Town Plan, page 20
53. The Applicants' firewood delivery truck does not have exhaust brakes. Applicant testimony, 12/3/21 hearing and Exhibit 017
54. Over the past year, the Applicants have delivered firewood via Rte. 35 an average of 4.25 times per month, or roughly 1 time per week. Exhibit 017
55. Land Use Permit series 2W0394 allows for 18 round-trip deliveries be made to the Project Tract per day by tractor-trailer. There are currently no businesses at this address utilizing that allowance. Exhibit 017
56. During the 15-month period ending on 8/11/21, the Applicants received a total of 36 log deliveries. Of those 36 deliveries, 23 loads came up Route 35 from the south—an average of 1.5 loads per month. Most deliveries were made in the afternoon. The remaining 13 log loads delivered during that period accessed the Project Tract via Route 121. Exhibit 017

Conclusions of Law

Prior to granting a permit, the Commission must find that the subdivision or development under Criterion 8 "will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A § 6086(a)(8). This Project involves concerns under Criterion 8 related primarily to noise, and to a lesser extent, visual impact. Noise was also analyzed under Criterion 1. The Commission will rely on findings from that section under this analysis as well.

The Commission uses a two-part test to determine whether a project meets the portion of Criterion 8 relating to aesthetics and natural and scenic beauty. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. *In re Rinkers, Inc.*, No. 302-12-08 *Vtec*, *Decision and Order at 12 (Vt. Env'tl. Ct. May 17, 2010)* (citations omitted); see also, *Re: Quechee Lakes Corporation*, #3W0411-EB and #3W0439-EB, *Findings of Fact, Conclusions of Law, and Order at 18-20 (Vt. Env'tl. Bd. Nov. 4, 1985)*; *In re Halnon*, 174 *Vt. 514 (mem.)* (applying Quechee test in Section 248 context).

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

introduced by any of the parties or witnesses" *In re McShinsky*, 153 Vt. 586, 589 (1990) (quoting *In re Quechee Lakes Corp.*, 154 Vt. 543, 553–54 (1990)).

1. Adverse Effect

To determine whether the Project will have an adverse aesthetic effect, the Commission looks to whether the Project will "fit" the context in which it will be located. In making this evaluation, the Commission examines a number of specific factors, including the following: the nature of the project's surroundings; the compatibility of the project's design with those surroundings; the suitability of the colors and materials selected for the project; the locations from which the project can be viewed; and the potential impact of the project on open space. *Quechee Lakes Corp et al.* #3W0411-EB and #3W0439-EB *Findings of Fact, Conclusions of Law and Order at 18 (Vt. Envtl. Bd., Nov. 4, 1985)* (cited in *Rinkers, No. 302-12-08 Vtec, Decision and Order at 12-13*).

The Project is located on an existing commercial/light industrial tract that is primarily occupied by a large warehouse building. The Applicants propose to place the firewood processing infrastructure on the existing parking lot between the warehouse and the Saxtons River. The Project Tract is located in the historic village of Cambridgeport, a traditional small New England village with about two dozen wood-frame houses and a general store, all clustered close to the roads. Firewood processing equipment, vehicles, and piles of logs and firewood will be visible to passing motorists on limited portions of Route 121, and from some neighboring residences to a limited extent when the leaves are down. The sound of the firewood processor's saw and other equipment operating is audible from many of the houses in the village, and therefore, the Project will have an adverse aesthetic impact. Accordingly, we must determine whether that impact is undue.

2. Undue Adverse Effect

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

(a) Clear, Written Community Standard

In evaluating whether a project violates a clear written community standard, the Commission looks to town plans, open land studies, and other municipal documents to discern whether a clear, written community standard exists to be applied in review of aesthetic impacts of a project. *Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB, Findings of Fact,*

Conclusions of Law, and Order at 18 (Vt. Envtl. Bd. 4/9/02). A clear, written community standard must be intended to preserve the aesthetics or scenic beauty of the area where the project is located. *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2WO694-I-EB, Findings of Fact, Conclusions of Law, and Order at 36 (Vt. Envtl. Bd. 12/21/00)*. A plan which states "consideration should be made . . ." is not a clear, written community standard. *Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079(Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 81 (Vt. Envtl. Bd. Dec. 8, 2000)*.

The Commission has reviewed the relevant portions of the Grafton Town Plan. The Plan identified no specific standard relating to noise or visual aesthetics in the area in which the Project is located. Furthermore, Grafton does not have a noise ordinance. Therefore, the proposed Project does/does not violate a clear community standard.

(b) Offensive or Shocking Character

Criterion 8 "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from their property will remain the same forever." *Re: Okemo Mountain, Inc. #2S0351-S-EB Findings of Fact, Conclusions of Law, and Order (Dec. 18, 1986)*. Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Rinkers, No. 302-12-08 Vtec, Decision and Order at 11-12; Horizon Development Corp., #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Aug. 21, 1992)*.

The Commission understands and appreciates concerns expressed by the Spurlocks that this Project will alter the way that they experience their property. The Commission observed the equipment in operation while on the Project Tract, and also walked the neighborhood during a live demonstration of the equipment. While in operation, the equipment was audible from numerous residential properties in the neighborhood. Rather than a loud drone, the sound generated by the Project equipment was intermittent—the most conspicuous noise is the sound of the processor's saw intermittently cutting through wood. Some people are more sensitive to noise than others. Mr. Spurlock, for example, stated that he is very cognizant and hyper-aware of noise. While annoying to some, the sound of a sawmill in operation is certainly not out of character in a traditional New England village. Vermont's traditional villages are intended to serve as centers for both residential and commercial activities, and many villages support some sort of light industry in or near the village center. As average citizens and fellow residents of this region, this Commission did not find the sound of the firewood processing operation to be offensive, shocking, or out of character in this village setting, particularly as increasing distance was gained from the firewood processing equipment. From the Spurlocks' property, for example, the Commission found the sound of the firewood processor to be audible but intermittent, and far from shocking or offensive.

Likewise, the sound of passing trucks is commonplace on Vermont's state highways. The findings reflect that the Applicants' firewood delivery truck and occasional deliveries of logs to the Project Tract contribute relatively little to the traffic and associated traffic noise on area roadways.

Given Vermont's cold climate and vibrant forest products industry, piles of firewood and logs are a common sight in both rural and more settled areas throughout Vermont. Likewise, trucks and industrial equipment are commonplace at commercial and industrial sites statewide, such as the previously approved commercial and industrial warehouse property upon which this project has been proposed.

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

(c) Generally Available Mitigating Steps

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

To mitigate the aesthetic impacts of the Project, the Applicants have located the Project as far from residential uses as possible. The closest residence to the Project is located 330.17 feet from the equipment location. All other residential homes in the village are located at least 400 feet from the equipment location. The large warehouse building helps to screen views of the Project equipment and attenuate sound from the Project for the majority of houses in the village, which are located to the east of the warehouse. To the south and west, mature forest in the project's existing riparian zones helps to screen views of the Project equipment from adjoining land uses, even when leaves are down.

The Applicants' proposed limited hours of operation will also help to minimize impacts on nearby residential landowners. The Applicants have proposed to operate the Project during normal working hours (Monday through Friday, 9:00 AM – 5:00 PM), with reduced hours on Saturdays (9:00 AM – 2:00 PM) with no operations on Sundays, evenings, or federal holidays, when more people are typically at home. Furthermore, when the Project is operating, the firewood processing machine is not running constantly. As the Commission observed during the prehearing conference, it must be stopped periodically to move accumulated firewood and

to load uncut logs onto the wood processor. Therefore, as the Applicants have pointed out in their submissions, during an average 8-hour day, the Cord King processor will only be running for about 3 – 4 hours. Furthermore, during an average 5-hour day, the Cord King processor will only be running for about 1 – 2 hours. To mitigate noise impacts on the neighborhood, the Commission will condition the permit to limit Project operation to specific hours.

Given all of these considerations, we find that the Applicants have taken the available mitigating steps to minimize the adverse impacts of the proposed Project on the aesthetics of the area.

Conclusions Of Law

Based on the above, the Commission concludes that the Project will not have an undue adverse effect on aesthetics.

VII. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit series 2W0394, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VIII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 2W0394-4 is hereby issued.

DATED this 7th day of February 2022.

By 
Thomas Fitzgerald, Chair
District 2 Environmental Commission

Commissioners participating in this decision:

Abbie Corse

Cheryl Cox

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

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

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

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

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

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