

20. Criterion 8(A) (Necessary Wildlife Habitat)

I. Requirements for Issuance of Permit

Criterion 8(A) provides that:

A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species; or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

10 V.S.A. § 6086(a)(8)(A)(i)-(iii).

II. Burden of Proof

The burden of proof is on the opponent under Criterion 8(A). *Id.* § 6088(b). But the applicant retains the burden of producing evidence of compliance with all criteria.

III. Analysis

Three-Part Test.

Criterion 8(A) involves a three part test: (1) whether the alleged habitat constitutes “necessary wildlife habitat;” (2) if so, whether the Project will destroy or significantly imperil such habitat; and (3) if so, whether one or more of subcriteria (i) through (iii) is satisfied.

Necessary Wildlife Habitat

Does alleged habitat constitute “necessary wildlife habitat? If yes, continue the inquiry. If no, stop the inquiry.

1. “Necessary wildlife habitat” means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a

species of wildlife at any period in its life including breeding and migratory periods. 10 V.S.A. § 6001(12).

2. The Vermont Supreme Court has upheld the Environmental Board's conclusion that deer wintering areas constitute necessary wildlife habitat under 10 V.S.A. § 6001(12). See *In re Southview Associates*, 153 Vt. 171, 175-76 (1989), *affirming Re: Southview Associates*, #2W0634-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Env. Bd. Jun. 30, 1987); see also, *Re: Luce Hill Partnership*, #5L1055-EB, Findings of Fact, Conclusions of Law, and Order at 4-8 (Vt. Env. Bd. Jul. 7, 1992).
3. Necessary wildlife habitat need only be decisive to the survival of the wildlife using that habitat, not to the survival of the entire species. *Re: Southview Associates*, #2W0634-EB, Findings, Conclusions and Order at 5-6, *aff'd, In re Southview Assocs.*, 153 Vt. 171 (1989); *Re: White Sands Realty Company*, #3W0360-1-EB, Findings of Fact and Conclusions of Law (Feb. 25, 1982).

Destruction or Significant Imperilment

Will the project destroy or significantly imperil such habitat? If yes, continue the inquiry. If no, stop the inquiry.

1. Disruption in use of habitat off the project site may constitute "significant imperilment." *Re: Nile and Julie Dupstadt*, #4C1013 (Corrected)-EB, Findings, Conclusions and Order (Vt. Env. Bd. Apr. 30, 1999)("Even though a Project Tract does not contain necessary wildlife habitat, it is possible that a Project significantly imperil necessary wildlife habitat by virtue of its close proximity to the habitat. An indirect impact to wildlife habitat is the disruption in use of the habitat by wildlife.")
2. No significant imperilment where nearby project will not disturb wildlife. *Re: Nile and Julie Dupstadt*, #4C1013 (Corrected)-EB, Findings, Conclusions and Order (Vt. Env. Bd. Apr. 30, 1999)(proposed residential development over 350 feet from wildlife habitat, screened by dense vegetative barrier, would not cause undue disturbance of wildlife habitat).

Applying the subcriteria

Are one or more of subcriteria (i) through (iii) satisfied? If yes, a permit will not be granted. If no, a permit will be granted.

- (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
- (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
- (iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

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