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February 7, 2011

Mrs. Susan M. Hudson, Clerk
Chittenden Bank Building
Vermont Public Service Board
112 State Street - Drawer 20
Montpelier, VT 05620-2701

Re: Docket No. 7678/7679 – Beaver Wood Energy Biomass Projects Pownal-Fair Haven

Dear Mrs. Hudson:

The Department of Public Service (DPS or the Department) files these comments pursuant to the Board's Memorandum of 12/23/10 setting a schedule for the briefing of the jurisdictional issue in the above-referenced dockets.

Beaver Wood Energy (BWE or Petitioner) has requested that the Vermont Public Service Board (PSB or the Board) take jurisdiction pursuant to 30 V.S.A. § 248 over the permitting of two wood pellet manufacturing facilities that BWE seeks to collocate with the biomass energy facilities they propose to build in Pownal and Fair Haven. The main thrust of BWE's argument is that "one-stop shopping" permitting (resulting in a single permit under Section 248 for the biomass and wood pellet plants) is more efficient and in this case is allowed by law. While the former may be true, the latter is not.

The Department has reviewed the brief filed by John Hasen, Esq. of the Vermont Natural Resources Board (NRB) which asserts that Act 250 jurisdiction and not Section 248 jurisdiction exists over the proposed wood pellet manufacturing facilities. The Department agrees with the ultimate conclusion reached by the NRB that Act 250 review is required for Petitioner's facilities under current law. However, the Department does not ascribe to the interpretation of the standard as articulated by NRB that would limit the Section 6001(3)(D) exemption to those "necessary components" or "necessary parts" of an electric generation facility.

It appears beyond dispute that the statutes at issue, Act 250, 10 V.S.A. §6001(3)(D) and 30 V.S.A. § 248, do not themselves provide the answer regarding whether Petitioner's project may escape Act 250 review. The Department also believes the Attorney General's Opinion (No. 715 dated August 5, 1971) cited first by Beaver Wood Energy and then by other parties does not definitively answer this question. The Attorney General's opinion was in response to an inquiry about whether Act 250 or Section 248 governed jurisdiction over *man-made changes to the land, other than those directly appurtenant to generation and power lines, that may by incidental to,*

but not integral to the facility. The opinion rejected the inquiry as posed, instead formulating a definition for the word "facilities" which does not, in the opinion of the Department, support an Act 250 exemption here.

Both Beaver Wood Energy and the NRB highlight the conclusion in the opinion that the question turns on whether there is a "reasonable relationship" between the generation or transmission portion of the project and the other improvements. But what the opinion has done in effect is to supplant the proposed *incidental to but not integral to* standard with the AG's own *reasonable relationship* standard.

> I can conceive that a situation might arise whereby a utility might propose to construct an improvement amounting to a "development" under Act 250 and the improvement bears no reasonable relationship to the simultaneous construction of an electric transmission or generation facility. Should such a situation arise, I believe that an Act 250 permit would be required for such an improvement. However, where a proposed improvement bears a reasonable relationship and can be considered to be part of an electric transmission and generation facility having in mind the broad meaning to be ascribed to the word "facility", it is my opinion that the exemption applies and no Act 250 permit can be required prior to construction.

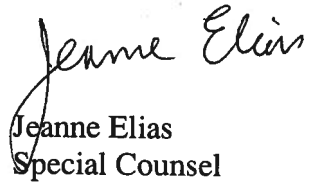
AG Opinion No. 715 at 5.

The AG's *reasonable relationship* standard was crafted after review of sparse state and federal law regarding the definition of an "electric generating facility," As evidenced by the arguments of BWE and the NRB in this case, such a broad and undefined standard can easily be interpreted by a party to support any outcome. The Department notes that the Opinion states that such an improvement must bear a "reasonable relationship to the *simultaneous construction* of an electric transmission or generation facility," as in a road or treatment lagoon as posited in that Opinion.

Given the lack of specific guidance provided by the statutes themselves and the cited Attorney General Opinion, the Department believes a review of prior precedents is required. It is the Department's position that neither the prior Board precedents in the Monument Farms (Docket 7592) and UPC (Docket 6884) nor the Environmental Court precedent in Glebe Mountain Wind Energy LLC, Dkt. No. 234-11-05 Vtec govern this specific situation or provide support for exempting Petitioner's project from Act 250 review.

While the Department applauds the efforts of Beaver Wood Energy to collocate synergistic projects on the site of its biomass generation facility, current law does not allow that such collocated projects be permitted solely under Section 248. Just as with other potentially synergistic projects, such as composting on farm sites, see 10 V.S.A. § 6001(3)(D)(vii), the Legislature may determine to exempt from the definition of "developments" projects such as Petitioner's, and provide criteria and guidance for that exemption. Current law and precedents do not support the exemption Petitioner seeks.

Sincerely,



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cc: Attached Service List

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