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February 4, 2011

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, Vermont 05620

Re: Beaver Wood Energy Pownal, LLC – PSB Docket No. 7678

Dear Sue:

Enclosed please find a Certificate of Service and an original and eight copies of the Joint Opposition of the Town of Williamstown, Massachusetts and Southern Vermont Citizens for Environmental Conservation & Sustainable Energy to Petitioner's Request to Assert Jurisdiction Over Pellet Manufacturing Plant, the Affidavit of Leslie Blomberg and a facsimile copy of the Affidavit of Michael Oman for filing in the above-captioned matter. The original of the Oman Affidavit will be forwarded on to the Board immediately upon its receipt.

Thank you.

Very truly yours,

Gerald R. Tarrant

cc: Client
Service List

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7678

Petition of Beaver Wood Energy Pownal, LLC	)
for a Certificate of Public Good, pursuant to 30 V.S.A.	)
§ 248, to install and operate a Biomass Energy Facility	)
and an integrated wood pellet manufacturing facility	)
located north of the old Green Mountain Racetrack in	)
Pownal, Vermont, to be known as the "Pownal Biomass	)
Project"	)

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Joint Opposition of the Town of Williamstown, Massachusetts and Southern Vermont Citizens for Environmental Conservation & Sustainable Energy to Petitioner's Request to Assert Jurisdiction Over Pellet Manufacturing Plant upon the parties hereto by mailing it, via first-class mail, to the addresses listed below.

Dated at Montpelier, Vermont, this 4th day of February, 2011.

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STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Beaver Wood Energy Pownal, LLC For a Certificate of Public Good, pursuant to 30 V.S.A. § 248, to install and operate a Biomass Energy Facility and an integrated wood pellet manufacturing facility located north of the old Green mountain Racetrack in Pownal, Vermont, To be known as the "Pownal Biomass Project"	)))))))	Docket No. 7678

JOINT OPPOSITION BY THE TOWN OF WILLIAMSTOWN AND SOUTHERN VERMONT CITIZENS FOR ENVIRONMENTAL CONSERVATION & SUSTAINABLE ENERGY TO PETITIONER'S REQUEST TO ASSERT JURISDICTION OVER A PELLET MANUFACTURING PLANT

NOW COME the Town of Williamstown ("Town") and Southern Vermont Citizens for Environmental Conservation & Sustainable Energy, Inc. ("SVCECSE")[1] and oppose Beaver Wood Energy - Pownal, LLC's ("BWE") request that the Public Service Board ("Board") assert jurisdiction over BWE's proposed pellet manufacturing plant. Opposition is based on the grounds that the Board's statutory authority does not extend over private industrial enterprises such as a pellet manufacturing plant, that the Board can effectively regulate the electric generating plant without regulating the pellet manufacturing plant and for other good reasons set forth below.

INTRODUCTION

BWE's request is troubling. The implementation of its theories would be damaging not just to utility regulation but private industry. Extending jurisdiction over a private pellet plant because it is a direct customer of the generating facility that allegedly improves the electric plant's efficiency ignores the real purposes of utility regulation. Expanding the jurisdiction of the Board to regulate manufacturing customers presents more risks than solutions and introduces many more problems than answers. In the end it is accountability by the applicant,

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[1] Joint opposition was filed consistent with the Board's request that parties with joint interests work together to minimize their filings.

not slogans about one stop shopping[2] and arguments about being better able to assign traffic counts and discern noise levels. Aesthetics, noise and traffic issues are relatively easy to address by competent consultants. See e.g. Affidavits of Leslie Blomberg and Michael Oman, attached.

BWE argues that applying Act 250 jurisdiction would be "contrary to Board and court precedent". (p.2) BWE then acknowledges that the "question "has not been addressed by a Vermont court." (p.4) The cases and opinions BWE relies on do not help its position. Each of BWE's arguments is misdirected, unsupported or factually and legally deficient.

Throughout its jurisdictional pleading BWE contends that Section 248 review overlaps with Act 250 jurisdiction and that it would be inefficient, impractical and inconsistent to regulate from both perspectives especially when the Board effectively regulates under virtually all of the criteria set forth within Act 250.[3] Nowhere does BWE address the subject of local zoning relative to commercial and industrial projects – as opposed to electric generating facilities. Indeed, BWE acknowledges that the pellet facility is a separate structure (BWE Exhibit A) and separate business (BWE Memo at p. 2) ("While the power plants could be constructed without the integration of the pellet facilities, the resulting power plants would be markedly less energy efficient as the waste heat would not be captured and, therefore, the energy they would produce would be substantially more expensive." Citations omitted).

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[2] The reference to former Chairman Cowart's testimony about one-stop shopping was taken out of context. Chairman Cowart was concerned about communities throwing up road blocks to a state-wide interest in energy matters. There is no state-wide interest in a pellet plant. It is not a Section 248 regulated facility.

[3] Its silence relative to regulation under local zoning bylaws is deafening. Local control is a state policy. Zoning bylaws are not necessarily replicated by Act 250 or Section 248. The Pownal Planning Commission has continued to argue that Beaver Wood Energy – Pownal is required to obtain local zoning approval. Attachment 1. The policies behind Act 250 and Section 248 are also different. Act 250 and Section 248 criteria are not mirror images of each other. For instance, aesthetic review under Section 248 is similar but not identical to that created under Act 250. Aesthetic review under §248(b)(5) is "significantly informed by overall societal benefits of the project." *Petition of EMDC, LLC, d/b/a East Haven Windfarm*, Dkt. No. 6911 at pp. 49, 50-56, 103n. 125 (Jul. 17, 2006).

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In a turn-around of sorts, BWE wants utility regulation for a non-utility industry. After arguing that the Board's decision in *Monument Farms*[4] permitted the Board to abstain from exercising its jurisdiction over the construction of its interior roads and other associated infrastructure without first obtaining a CPG, and without any statutory or case law in support of its position, BWE now contends that the Board should exercise jurisdiction over a separate pellet manufacturing facility it desires to construct down the road simply because BWE will be supplying some of its excess heat to the pellet plant from a pipe connected to the electric plant. Utility regulation is the exception to *laissez-faire* policies in this country for very good reasons. BWE's arguments about one stop shopping and promises of efficiency would establish a precedent that promises serious repercussions to Section 248 review if non-utility customers become part of an electric facility.

Establishing a customer base for waste heat does not transform the customer into an electric facility or provide a basis for jurisdiction over the customer.

Its arguments are without support. Its request should be denied.

ARGUMENT

BWE mentions that it has received 20-30 permits already. That may be. Many permits are based on the representations by the applicant. They are evaluated by technical staff at the appropriate state agencies. Many of the environmental permits are not contested, nor are they subject to discovery. Moreover, Vermont's regulatory structure is ***not*** one stop shopping. What is one-stop shopping is that electric generating and transmission facilities do not need to obtain both Act 250 and section 248 review. They only need Section 248 review. Everyone

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[4] The Board has been careful to restrict its "authority to approve the construction of facilities" to only "those facilities that lie within our jurisdiction, which in this instance would be electric generation. We have no authority to affirmatively approve construction of facilities that lie outside of our jurisdiction." *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, Order Re: Request To Commence Construction at 4 (Oct. 22, 2010).

seems to be in agreement on that point. True one-stop permitting would be very difficult to administer and is ***not*** the policy of the state. Vermont has local zoning, Act 250, agricultural permits, solid waste certifications, storm water permits, wetlands permits, VTrans approvals – well, apparently more than 20-30 permits and approvals. That is the way it works in this state. The only one stop aspect is that electric generation facilities need not stop at Act 250. So BWE has it backwards.

BWE's reliance on *Glebe Mountain Wind Energy LLC*, Dkt. No. 324-11-05 Vtec, Revised Decision (Aug. 3, 2006) is misplaced. In *Glebe Mountain*, the question was whether Act 250 or the Board had jurisdiction over a Section 248 project that was proposed to be built on lands already subject to an Act 250 permit. The Court held that despite the Act 250 rules that would have characterized the proposal as a "material change", because the project was an electric generating facility, 10 V.S.A. §6001(D)(ii) divested the Act 250 commission of jurisdiction over electric generating facilities that are built on land already regulated by Act 250. The decision was rational and relied on the language of 10 V.S.A. §6001(D)(ii).

On the other hand, BWE's attempt to bring pellet plants under the Board's jurisdiction to escape local zoning review violates local control and that is a very important part of the make-up of our State.

I. Electric Generation is Not an Efficient Use of Biomass.

Let's start at the beginning. For biomass plants, conversion efficiency is a very important consideration related to the impact on forest resources. Using biomass for the generation of electricity is a particularly inefficient use of this natural resource. See Affidavit of Timothy Maker, December 9, 2010, para. 4, 5. There are various uses of biomass, including: i.) thermal applications; ii.) community district heating systems; iii.) CHP (combined heat and

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power systems) systems;[5] and iv.) electric power systems. Each has various benefits; some have distinct drawbacks. Maker Affidavit at pp. 2-3.

BWE tells us what we already know. A pellet factory is not an integral part of any generating plant. BWE is not in the business of manufacturing pellets. BWE Memo at p. 6. BWE acknowledges it "has no interest in constructing and operating a pellet facility" except it provides some increased efficiency by consuming the waste heat. Id. BWE has recognized the inefficiency of its electrical operation – a major drawback to using biomass for electrical generation - and has recognized that it did not have a municipal downtown or a large business customer as an anchor to connect to for heating purposes to elevate the overall inefficiency associated with biomass power production. Id. BWE could not replicate a downtown in Pownal so it determined a manufacturing plant could be constructed cost effectively that would consume sufficient thermal energy to make its clearly inefficient electric generation operation "fifteen percent" more efficient. Id. at p. 2,6; Affidavit of William Bousquet at ¶ 2, 4 ; cf. Testimony of Bousquet of 10/25/10 at pp. 2-3; also Timothy Maker Affidavit at 4.

The pellet manufacturing plant, operating in an unregulated market, does not have a guaranteed customer base. Maker Affidavit at 4. If its niche in the market is lost the pellet manufacturing plant may cease operations. And while BWE's proposed electric generating facility is inefficient even with the pellet manufacturing plant operating, it will become a more noticeably uneconomic and become an environmental drain on the region if or when the pellet factory decreases or ceases operations. As Mr. Maker stated:

[5]In a CHP system the thermal (heat) energy is the primary use and the electrical output is a secondary use, with the combined use having an annual efficiency greater than 50 percent. Maker Affidavit, p. 3. In an optimized CHP system the primary system will be heat oriented. BWE has "proposed a power plant with thermal energy as a byproduct, thus reversing the order and giving precedence to the inefficient electrical power side of the CHP equation." Maker Affidavit, p. 3.

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> Beaver Wood also does not offer a plan for how the thermal usage and overall efficiency would be maintained if the pellet facility were ever to close or reduce its production due to changes in the pellet market or for any other reason. Unlike capturing waste energy and using it for heating at a public institution or in a municipal district heating system, where the thermal load can be expected to be there for the life of the energy plant, an industrial heating load cannot be guaranteed for the long term. The Applicant does not make any assertion of how the pellet business could be guaranteed to stay in operation for the life of the power plant. In the case of the pellet plant ceasing operations at some point in the future, the Beaver Wood power plant would cease to have a use for thermal energy, the net useable energy output would drop, the plant's net efficiency would be reduced, and more wood would be wasted.

Maker Affidavit para. 4 at pp. 3-4.

Very simply, the demand for electricity is not tied into the demand for wood pellets. They are separate businesses. And the business of wood pellets is not necessarily a business that will survive over the life of the generating plant.[6] This is especially true for a plant the owners have no experience or desire in operating. BWE Memo. at p.6.

The pellet plant provides a customer/user for the generating plant's thermal energy but has no relationship to output of the electric generating plant. They are separate, stand alone businesses.[7]

Because a pellet plant is not part of an electric generating plant it cannot be regulated by the Public Service Board. If it were, then the next biomass plant applicant may propose a wood working shop, a toy factory, or a shopping mall, perhaps a hospital or a gas station or some other temporary commercial or industrial use to improve its worthiness, at least on paper, for some period of time.

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[6] See "Man with pellet plant plan says Beaver Wood would push him out", by Keith Whitcomb, 2/2/2011, Bennington Banner.com. Attachment 2.

[7] Should an electric utility purchase a portion of the 29.5 MWs of output, it will still receive the output assuming the plant can afford to operate. The real cost of operating the biomass plant will fall on the owner/operator, whomever that might be in the future, the region and its forest resources.

II. The Plain Meaning Applies.

The primary objective in resolving the jurisdictional issue must be "to effectuate the intent of the Legislature." *In re South Burlington-Shelburne Highway Project*, 174 Vt. 604, 605, 817 A.2d 49, 51 (2002); citing *Okemo Mtn., Inc. v. Town of Ludlow*, 171 Vt. 201, 210, 762 A.2d 1219, 1227 (2000). The term "electric generation facility" is not defined in Vermont statutes or the rules of the Public Service Board. When words in a statute are undefined they "are to be given their plain and commonly accepted meaning." *Vincent v. State Retirement Board*, 148 Vt. 531, 535-36 (1987); *In re Picket Fence Preview*, 173 Vt. 369, 371, 795 A.2d 1242, 1244 (2002). To follow BWE's argument would make the definition of an "electric generating plant" so broad as to be meaningless and absurd.

III. The Board has Encountered this Issue before and Denied Jurisdiction.

While cloaked in a new manufacturing/Act 250 argument, the issue presented is not new to the Board. The Board was faced with a similar question relating to its jurisdiction in 2006 and realized the unforeseen consequences of extending jurisdiction.

A. Unforeseen Consequences – Be Careful What You Regulate.

It is not difficult to imagine the unforeseen consequences if the Board were to assert jurisdiction over separate businesses and manufacturing enterprises every time a business or firm might receive steam through a pipe from a nearby generating plant.[8] The cases are too numerous to mention but if the Board asserted jurisdiction over every paper mill or small business built next to a hydro electric plant that received hydro electricity, or every nearby

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[8] The Board does not have jurisdiction over the use of steam heat (or hot water for heating) by a private entity or the sale of steam heat to a nearby customer. See e.g. 30 V.S.A. §§ 203(1) and (2); 209 (a)(8)(A).

home business or residential area that received steam from a nearby biomass plant,[9] or every manufacturing plant that received gas from a direct interconnection with a gas pipeline the Board would be continually regulating widgets, gadgets and devices and Vermont municipalities would have no say in the traditional zoning oversight in these matters.

In Docket No. 7201, the Board initially required Vermont Electric Cooperative, Inc. to file as a co-applicant to defend the environmental impacts of a distribution line upgrade. See *In re Petition of Vermont Electric Cooperative, Inc. for a Declaratory Ruling that VEC's Distribution Line Upgrade required for the Berkshire Cow Power project in Berkshire, Vermont, is not subject to 30 V.S.A. Section 248.* In a motion for reconsideration, the Vermont Department of Public Service argued that jurisdiction "would have some consequences that (the Board) did not intend." The Board concluded that while the distribution line was necessary[10] for the proposed Berkshire project, it was not "properly considered part of the proposed project." Order at 1. The Board held that the upgrade was part of the electric grid, not the methane project, and "by itself, does not constitute a facility subject to Section 248." The Board did not ignore the impacts, rather it concluded "the Board must receive testimony from VEC describing the upgrade and addressing any criteria under Section 248(b) on which the upgrade has the potential for significant impact."

BWC cites to the board's decision in *UPC Wind Management LLC*, 2004 WL 882046 (Apr. 21, 2004) to support its claim that the wood pellet factory is "a part of" its proposed electric generating facility. *UPC Wind Management* is not on point. The Board found that the

[9] See http://en.wikipedia.org/wiki/cogeneration "In the united States, Con Edison distributes 30 billion pounds of 350° F/180° C steam each year through its seven cogeneration plants to 100,000 buildings in Manhattan – the biggest steam district in the United States."

[10] Even BWE does not assert the pellet plant is "necessary" for its biomass plant, only that it would be less efficient without distributing its waste heat to a customer such as the pellet plant. BWE Memo at p. 2.

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anemometers were part of the wind facility because they were a precursor to "a wind generation project." The data it collected would be data critical to the development of the wind facility. Wood pellet facilities are neither a precursor to an electric generating facility nor essential to its operation.

If there are impacts from the pellet factory, the owner (Beaver Wood Energy – Pownal), can provide testimony on the factory upgrades and impacts that might affect the entrance or road or noise levels BWE seems so concerned about. As the Board concluded in Docket No. 7201 "That does not mean, however, that the distribution upgrade itself is brought under Section 248 jurisdiction." Similarly, the pellet factory itself is not brought under Section 248 jurisdiction.

IV. The Public Service Board's Powers Are Limited.

The Legislature has established that authority in an administrative agency cannot arise through implication; an explicit grant of authority is required. *Miner v. Chater*, 137 Vt. 330, 403 A.2d 274 (1979). The Public Service Board only has such powers as are expressly conferred to it by the Vermont Legislature along with those powers implied as necessary for the full exercise of those expressly granted. *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7, 20 A.2d 117 (1941) (The Public Service Commission is a body exercising special and statutory powers not according to the course of common law as to which nothing will be presumed in favor of its jurisdiction.); also *In re Lake Sadawga Dam*, 121 Vt. 367, 370, 159 A.2d 337 (1960) ("Whereas a reviewing court is required, when it can do so consistently with the record, to presume that a court of general jurisdiction regularly acquired and lawfully exercised its jurisdiction, no such presumption of jurisdiction is indulged in where the lower court is one of limited or special jurisdiction. (Citation omitted)")

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As an administrative body with limited and special powers the Board may not trump Act 250 and local zoning with respect to a private manufacturing business.

A. Public Policy Considerations of Theoretical One-Stop Shopping Do Not Out Weigh Statutory Authorizations.

BWE's has argued that a manufacturing plant should be regulated by the Board because that would be consistent with the policy of one stop shopping.

BWE argues that the State of Vermont has adopted a one stop shopping policy to assist developers and entrepreneurs. It argues that to carry out that policy the Board should assert jurisdiction over a facility it would not otherwise statutorily regulate to assist the applicant in securing its permits and preclude confusion, inefficiency and redundancy. BWE Memo at p. 2.

State policies are enacted through enabling legislation. They are not slogans to be applied indiscriminately regardless of the statutory language. The public service board is a body exercising special and limited jurisdiction. Its powers are carefully developed by the Legislature to ensure proper regulation of utility operations, not manufacturing businesses. Without express statutory authority BWE's policy theory is simply that – a theory – and a bad one at that.

B. BWE Characterizations of the Attorney General's Opinion Are Misleading.

BWE spends substantial time on the significance of a 1971 Vermont Attorney General's Opinion it acknowledges is not precedential. The 1971 Opinion BWE relies on is not helpful to BWE.

The A.G.'s Opinion only concludes that "other site improvements" that are "reasonably related" to an electric generation or transmission facility are part of the Section 248 review process. That is an eminently reasonable interpretation of the law. It even identifies the site improvements it was referring to, as follows:

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> Does this exemption [in 10 V.S.A. § 6001(3)] apply to all man-made changes to the land, other than those directly appurtenant to generation and power lines, that may be incidental to, but not integral to, the facility, **such as impoundments, roads, rail spurs, and lagoons**?

Attorney General Opinion, 1972 Op. Atty Gen. Vt. 167, 1 (Aug. 5, 1971).

The Attorney General was not addressing other businesses or industries that might use the electricity or heat energy from the generating plant. It was addressing "improvements" such as roads and culverts and lagoons.

The public service board has had an opportunity to review the 1971 Opinion in its decision in *In re: UPC Wind Management, LLC.*, 2004 WL 882046 (Vt. P.S.B.), 9 (April 21, 2004) and how it may be applied to Section 248. The Board held in that case:

> The Attorney General's opinion provides some examples of the broad meaning of "facility"; specifically, the opinion states that "a separate Act 250 permit is not required for the construction of impoundments, roads, rail spurs and lagoons in connection with electric generation and transmission facilities. The opinion states that the substantial overlap between Act 250 review and the Board's analysis under Section 248 demonstrates that the Vermont General Assembly was seeking to avoid duplication of effort by exempting transmission and generation facilities from Act 250 review.

The Board hit the nail on the head. Transmission and generation facilities should not have to go through Act 250 review. See 10 V.S.A. § 6001(1)(D)(ii) ("The word development' does not include . . .ii.) The construction of improvements for an electric generation and transmission facility that requires a certificate of public good under 30 V.S.A. § 248 . . . ."; also 24 V.S.A. §4413(B) "A bylaw under this chapter shall not regulate public utility power generating plants and transmission facilities regulated under 30 V.S.A § 248.")

The A.G. and the Legislature were never intending that the so-called one stop policy would be turned around to include private manufacturing businesses under Section 248 review.

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BWE's analysis is inconsistent with both the A.G.'s 1971 Opinion and this Board's decision in *UPC Wind Management* and would lead to "irrational consequences." *Audette v. Greer*, 134 Vt. 300, 302 (1976) (citations omitted.)

V. Environmental Considerations, Including Noise and Traffic, Can Be Effectively Regulated By the Public Service Board, the Environmental Commissions and Local Zoning Boards.

BWE advances its argument as if local zoning and Act 250 never existed. In today's marketplace, it is the rule rather than the exception to see both Act 250 and local zoning reviews exercising jurisdiction. Moreover, BWE's argument on pp. 7-8 of its Memorandum that the review by the Public Service Board *of the electric generating plant* and the review by the district commission *of the pellet manufacturing plant* would be "redundant" defies explanation. Each plant would have its own discrete issues and impacts, each could be effectively analyzed and regulated and any conditions could be independently enforced. Traffic, noise and aesthetics are not problematic. Affidavits of Blomberg and Oman, attached.

A. Section 248 and Act 250 Reviews Are Not Redundant.

BWE's argues that there is "no reason to require duplicative reviews" by both the Public Service Board under Section 248 and the district commissions under Act 250. BWE Memo at 15. The premise of its argument, however, is not well thought out. BWE's argument that "the scope of this Board's jurisdiction over environmental impacts is at least as broad as that of the District Commission's under Act 250 – and is certainly not narrower – . . . ." is wrong. As Mr. Blomberg correctly points out, BWE overlooks the possibility of local zoning and how that may impact development. Blomberg Affidavit, para. 10. As Mr. Blomberg succinctly states: "The Section 248 review is not broader in terms of noise primarily because there is no mandatory local zoning review." Id.

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BWE's arguments that "noise" and "traffic" cannot be adequately regulated if reviewed by two separate regulators or that they may reach different results is only hypothetically true because - as BWE agrees on page 2 – they are two totally different facilities. One is an electric generating plant that is much larger, probably much noisier, probably will require more truck traffic and probably will look much different aesthetically than the smaller and less noisy pellet plant.

These facilities can be segregated and evaluated separately. Traffic engineers and noise consultants are highly trained and can evaluate impacts significantly more easily than BWE has suggested to the Board. See attached Affidavits of Michael Oman (traffic) and Leslie Blomberg (noise). Mr. Blomberg states:

> The determination of the origins of noise, far from being impossible, is exactly what acoustical experts do. . . . There are methods and standards to do this. This can be done for all types of noise, including truck traffic. Distinguishing the source of noises is the most basic skill of noise measurement.

Blomberg Affidavit, para. 12.

Traffic is no different. Truck traffic can be separated for regulatory purposes. See Oman Affidavit at para. 6, 9, 11-12. Mr. Oman does not expect any problems in regulating or enforcing traffic issues. *Id.*, para. 19.

There is no redundancy and certainly no confusion or undue difficulty in evaluating the impacts of BWE's proposal(s). If BWE was truly concerned about residents living nearby (BWE Memo, p. 16) being unable to distinguish between excess noise from the generator and/or pellet factory it could do the right thing: it can design the facilities to meet the relevant noise standards. Blomberg Affidavit at para. 6 and 8.

TARRANT, GILLIES,
MERRIMAN & RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

CONCLUSION

The jurisdictional question presented involves the interpretation of two separate regulatory schemes. One involves development and construction of electric and transmission facilities and the other involves more general land use, development and construction activities. Statutory construction of Vermont's utility law must consider the context of the laws involved, "as a whole, looking to the reason and spirit of the law and its consequences and effects to reach a fair and rational result. (citation omitted)" *In re South Burlington-Shelburne Highway Project*, 174 Vt. 604, 605, 817 A.2d 49, 51 (2002).

There should be no unusual difficulty in regulating the generating facilities under Section 248 of Title 30 and regulating the manufacturing facilities under Chapter 151 of Title 10.

For the reasons set forth above, BWE's jurisdictional request should be denied

DATED at Montpelier, Vermont, this 3rd day of February, 2011.

TOWN OF WILLIAMSTOWN AND SOUTHERN VERMONT CITIZENS FOR ENVIRONMENTAL CONSERVATION & SUSTAINABLE ENERGY

By: Gerald R. Tarrant

Gerald R. Tarrant
Their Attorney
P.O. Box 1440
Montpelier, Vermont 05601-1440

TARRANT, GILLIES, MERRIMAN & RICHARDSON
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250 ANNIVERSARY
POWNAL 1760~2010

TOWN OF POWNAL PO BOX 411, POWNAL, VERMONT 05261
TOWN CLERK 802.823.7757 • SELECTMEN 802.823.0132 • FAX 802.823.0116

FYI

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JAN 10 2011

Planning Commission

January 10, 2011

James Volz, Chairman
Vermont Public Service Board
112 State Street, (Chittenden Bank Building)
Montpelier, VT. 052620-2701

Re: PSB Docket No. 7678 - Beaver Wood Energy Pownal, LLC. Biomass and Wood Pellet Facility – Petirion for Certificate of Public Good

Dear Board Members:

Attached is a copy of the Pownal Planning Commission's letter to you of October 15, 2010.

Nothing has come to our attention in the intervening three months changing our conclusion, expressed in Paragraph I. of our earlier letter, that the wood pellet plant proposed by Beaver Wood Energy LLC is a separate and distinct manufacturing facility from the electric generation facility, is not within jurisdiction of the Public Service Board under section 248 and is subject to a separete regulatory process under section 250.

Respectfully submitted,
Pownal Planning Commission

By: _____
Michael Slattery, Chairman

TOWN OF POWNAL
PLANNING BOARD
P.O. BOX 411
POWNAL, VT, 05261

October 15, 2010

VIA FEDERAL EXPRESS

James Volz, Chairman
Vermont Public Service Board
112 State Street, (Chittenden Bank Building)
Montpelier, VT 05620-2701

Re: Beaver Wood Energy Pownal, LLC Biomass and Wood Pellet Facility – Petition for Certificate of Public Good

Dear Board Members:

This letter is filed with the Public Service Board ("PSB") in connection with a petition for a Certificate of Public Good to be filed by Beaver Wood Energy Pownal, LLC (the "Proponent") on October 25, 2010 for what the Proponent describes as "a 29.5 megawatt wood biomass – fired electric generation plant and integrated wood pellet manufacturing facility" proposed to be located in the Town of Pownal, Vermont (the "Project").

This letter is filed by the Town of Pownal Planning Commission as preliminary comment and recommendation on the Project plans in accordance with PSB Rule 5.402.

The Planning Commission has conducted two public meetings with respect to the Project and has received public comment at both. In addition, Planning Commission members have attended public presentations made by the Project Proponent. Unfortunately, the Planning Commission has not had an opportunity to review the Proponent's petition for a Certificate of Public Good.

I. Characterization of the Project.

Notwithstanding the Project Proponent's hopeful suggestion that its Project is a single project, it is in fact two separate and distinct projects, a wood biomass – fired electric generation plant and a separate wood pellet manufacturing facility. Notwithstanding the Proponent's characterization of the wood pellet manufacturing facility as "integrated" and using "by-products" of the electric generation plant, wood pellet manufacturing is a

separate manufacturing use and not generation of electricity. Wood pellet manufacturing is a separate use subject to Town of Pownal local zoning jurisdiction.

II. Further Studies.

The Pownal Planning Commission respectfully urges the PSB to require the Project Proponent to submit to the PSB full and detailed studies, surveys and test results relating to the entire operation of the wood biomass-fired electric plant (and, of course the wood pellet manufacturing plant if the PSB determines it has jurisdiction over wood pellet manufacturing) and its effect on the environment and our community including, without limitation, air quality, environmental impacts, traffic impacts, biomass (forest) sustainability, water quality, atmospheric inversion in the Pownal valley, utility line interconnection, financial capacity of the Proponent, feasibility of the Project and the record of prior projects by members of the Proponent, and have such studies peer reviewed.

III. Town Plan.

The proposed location of the Project in Pownal is zoned Village district by the Zoning Bylaw. The Town plan describes villages as "more compact settlements with a mix of uses [which] tend to be at higher densities of use than surrounding areas. The minimum lot size in the Village area is ten thousand square feet except that the standards for some uses may result in a larger lot area."

A centralized waste water collection and treatment system has been constructed by the Town of Pownal to serve the Village areas to encourage small village growth there.

The installation of a centralized waste water collection and treatment system by the Town of Pownal was designed to facilitate appropriate development, described above, of the Village zone districts (see Section 7.2 of the Town Plan). The Project Proponent has stated that it does not intend to connect to the municipal sewer system but rather intends to use a leach field, which also fails to comply with the intention of the Town plan.

IV. Further Comment and Recommendations.

The Pownal Planning Commission respectfully reserves it right to make further comments and recommendations to the Project after it has an opportunity to review the petition for a Certificate of Public Good and the supporting materials submitted by the Proponent.

Respectfully submitted,

TOWN OF POWNAL PLANNING COMMISSION

By: Julie M. Weber
JULIE WEBER, its Secretary, duly authorized

cc: Bennington County Regional Planning Commission
(Via e-mail gburke@bcrcvt.org)
Hans Huessy, Esquire (Via e-mail hhuessy@kenlanlaw.com
Town of Pownal, Board of Selectmen, ATTN: Linda Sciarappa
Via e-mail pownal@sover.net)
Pownal Planning Commission Members

ALL-STATE LEGAL® Attachment 2

BenningtonBanner.com

Man with pellet plant plan says Beaver Wood would push him out

KEITH WHITCOMB JR.

Posted: 02/02/2011 11:05:56 PM EST

Wednesday February 2, 2011

POWNAL -- The owner of the former Northeast Wood Products property says there likely isn't room for two wood pellet operations in town.

Bill Drunsic, of Manchester, purchased NWP in March for $240,000 at a foreclosure auction. One week after the developers of a proposed biomass and wood pellet manufacturing facility made their pitch to the Select Board to build at the former Green Mountain Race Track site, Drunsic approached the Planning Commission with his plans to turn the former saw mill, which abuts the track, into a wood pellet facility.

Plans are currently before the Development Review Board for Drunsic's proposed operation, which he said would purchase wood pellets from Vermont Wood Pellets in Clarendon, package them, and ship them to customers.

He said in the long-term, he hopes to manufacture pellets at the site -- about 30,000 tons per year -- a much smaller operation than Beaver Wood Energy, LLC's proposed 130,000 tons.

"If the biomass [project] goes through, it will put us out of business," Drunsic said, adding that if his own permit hurdles are cleared, he would hope to open by the end of the year. He said the biomass facility would take up the entire wood market for the area.

Drunsic said the DRB has requested he get some kind of indication from Pan Am Railways that the railroad crossing near the NWP property could handle the traffic. The same is needed for a culvert on Route 7. He said communicating

with Pan Am has been difficult, but he doesn't foresee any real issues with the permits.

Allan Benoit, of Vermont Renewable Fuels -- Drunsic's company -- said the five buildings on-site have all had renovations, bringing them up to state codes and repairing damage to the roofs and electrical systems. One new building will include a 28-foot silo, which he said will store about 60 tons of wood pellets. He said the silo reserves will be built up for the summer months when demand is low.

The silo won't be visible from the roads, he said, and will be a typical agriculture-style design.

Drunsic said that aside from the purchase price, about $50,000 has been spent on renovations and permit applications on the 8.7-acre site. He said if built, he expects to employ between 15 and 18 people.

The biomass planners are seeking a certificate of public good from the Public Service Board. Beaver Wood hopes to show the PSB that it also has jurisdiction of the wood pellet manufacturing side of the operation. Opponents of the project have argued that the Section 248 process should consider the biomass electric generation only, and have the company go through an Act 250 process for the wood pellet manufacturing side.

Beaver Wood has proposed a nearly identical plant

BenningtonBanner.com

in Fair Haven, where there has been less criticism of the project. In Pownal, local opposition groups as well as entities based in Williamstown, Mass., have expressed concerns over the project's impacts.

In 2009, NWP was foreclosed on by the Berkshire Bank, which said the company owed half a million dollars. Robert Kobelia, who bought the saw mill in 1991, said his company employed around 24 people throughout the 1990s. NWP officially shut down in 2008.

The company was founded in 1946 by Siegfried Tolle and Vincent Pizzano. In its heyday, the company made high-end furniture and made use of the nearby railroad to ship goods.

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7678

Petition of Beaver Wood Energy Pownal, LLC	)
for a Certificate of Public Good, pursuant to 30 V.S.A.	)
§ 248, to install and operate a Biomass Energy Facility	)
and an integrated wood pellet manufacturing facility	)
located north of the old Green Mountain Racetrack in	)
Pownal, Vermont, to be known as the "Pownal Biomass	)
Project"	)

AFFIDAVIT

I, Leslie D. Blomberg, being duly sworn, depose and say that:

1. My name is Leslie David Blomberg. I reside in Montpelier, Vermont.

2. I am the Executive Director of the Noise Pollution Clearinghouse, a national non-profit dealing with noise pollution issues, which I founded in 1996. I have testified about noise and noise impacts in cases involving numerous bodies such as the Environmental Board, the Environmental Court, various Act 250 District Commissions, many local planning and zoning boards, and the Public Service Board. I am a member of the American National Standards Institute Accredited Committee, S12 Noise. Also I hold patent number 7,780,609 related to noise measurement and detection of noise health effects.

3. I have reviewed the application by Beaver Wood to construct a 29.5 MW generation facility in Pownal, Vermont. I understand a substantially similar biomass plant is proposed in Fair Haven, Vermont.

4. I have reviewed the Memorandum dated January 14, 2011, signed by Beaver Wood Energy's lawyer Hans G. Huessy, Esq. and the affidavit of Mr. William Bousquet dated January 14, 2011, filed in support of Mr. Huessy's Memorandum. I have been asked to

respond to the representations contained in Mr. Huessy's Memorandum concerning noise specifically the arguments by Mr. Huessy that the electric generating plant and the pellet manufacturing plant are so closely integrated that conducting separate Section 248 and Act 250 proceedings relative to noise impacts "would be impractical, if not impossible" and "enforcement virtually impossible." Memo. at p. 7 and pp. 13 and 16. Mr. Huessy is incorrect. I offer this affidavit a response to his discussion concerning noise.

5. On p. 12 of his Memorandum Mr. Huessy argues that noise is an example where "neither the District Commission nor Public Service Board could effectively review the two facilities' impacts in isolation." He argues "[i]t is certainly possible that if considered separately, the individual facility's noise impacts will be less than if they are considered jointly (while noise levels are not cumulative per se, noise standards are measured over time intervals and combining the facilities' noise impacts could lead to higher average noise levels during the relevant time interval.)"

6. There are a number of problems with this statement. First, the facility can be designed to meet noise standards, with an adequate margin of error, to eliminate the concerns raised by Mr. Huessy. Second, noise impacts are measured at the property line or beyond, and in general property line noise levels are dominated by the closer noise sources (since noise decreases with distance). Noise sources that are more distant from the property line, unless they are poorly designed and unreasonably loud, should have little contribution to the total sound pressure level. Noise from the closest facility to the property line will likely dominate. Third, Mr. Huessy assumes the noise limit will be a time-averaged limit. In Act 250, noise is not regulated in the way he describes. With respect to Act 250, noise regulations generally rely

on instantaneous maximums. For example, "Noise shall not exceed ___ dBA at the property line."

7. Also on page 12, Mr. Huessy argues that "It is entirely possible that each facility might be able to safely meet the relevant sound standard standing alone when it is also true that the combined noise levels would approach or exceed the upper limits of the standard. . . . (and) issuing permits for the two facilities in isolation on the ground that they meet the standard when a permit may not have issued if the combined noise of the two facilities had been considered."

8. It is certainly possible that two facilities will be louder than one. Assuming, for example that both facilities are permitted to be 55 dBA, then their combined noise theoretically could be 58 dBA at some very limited locations. If the noise limits were different values, the theoretical maximum would be even less than a 3 decibel increase. A 3 dBA increase is a noticeable increase, but near the threshold of our ability to distinguish, and the fact that it would occur at very limited locations further mitigates this problem. There are, however, solutions that eliminate this problem entirely. The most important solution is to properly design the facilities so as to not be within a couple decibels of the limit. The permitable level should not be the design standard. Acoustic experts should provide a margin of error when designing the facilities that will ensure that neither facility risks violating the permit conditions.

9. In section V., entitled "*Given the Broad Scope of The Board's Environmental Review, Nothing Would Be Gained By Requiring The Pellet Facility To Obtain An Act 250 Permit*", Mr. Huessy suggests that environmental review will be as complete in Act 250 as with Section 248.

10. Act 250 and Section 248 have different standards. Section 248 merely requires "due consideration" of Act 250 criteria, including noise. Also, an applicant required to obtain

an Act 250 permit would have to obtain local planning and zoning approval, if applicable. Section 248 does not require local zoning approval. And local zoning could have a different standard for noise. The premise of Mr. Huessy's argument on page 15, that "Because the scope of this Board's jurisdiction over environmental impacts is at least as broad as that of the District Commission's under Act 250—and is certainly not narrower—there is no reason to require duplicative reviews by both entities," is false. The Section 248 review is not broader in terms of noise primarily because there is no mandatory local zoning review. Mr. Huessy's conclusion therefore is not convincing.

11. On page 16, Mr. Huessy argues that "it will be impossible to segregate the noise generated by the electrical facility from that generated by the pellet facility. If a citizen alleges the noise standards are being exceeded, the party seeking to enforce compliance will have no way of knowing whether the violation is of the Act 250 permit or the Section 248 permit."

12. The determination of the origins of noise, far from being impossible, is exactly what acoustical experts do. For example, in every measurement situation, we have to differentiate the background noise (i.e. the noise not from the facility) from the source noise. Background noise can include both short term and long term noises. Each of these must be distinguished. There are methods and standards to do this. This can be done for all types of noise, including truck traffic. Distinguishing the source of noises is the most basic skill of noise measurement.

13. Distinguishing noise source is so basic, that it often can be done by a trained layperson. Police officers, for example, are not acousticians, but they can be trained to determine the source of a noise, and accurately measure it. It is rare that a situation is so

complicated that measurement is beyond the training of a police officer, but for those cases, an acoustician can make the distinction.

14. Also on page 16 Mr. Huessy argues that "the forgoing assumes that the Board and the District Commission would establish the same noise standard, an eventuality that is anything but certain. If there are different standards adopted, i.e. different decibel levels or the same decibel levels but averaged (sic) different periods of time, enforcement becomes even more difficult."

15. Mr. Huessy's concern is unfounded. Enforcement of different standards is easy and occurs not infrequently. Often zoning regulations have different standards than the noise ordinance in a community. For equipment that can have much lower noise levels, zoning regulations might specify lower levels, even though the noise ordinance property line standard is higher. Consider just such a situation where there are different zoning and noise ordinance standards. The zoning administrator enforces one noise level from the zoning bylaws, and the police officer another from the noise ordinance. They both apply. Moreover, there is no confusion when this is brought to court. In my experience, the facility must comply with both.

16. Moreover, Act 250 can set different standards than local regulations (because they have to consider additional criteria than the local standard). Again, there is no confusion when it comes to enforcement. In my experience both the local standard and the Act 250 standard apply. If a hypothetical challenge ever got to the Supreme Court, the Court would not be faced with an impossible dilemma. Both apply.

AND FURTHER DEPONENTS SAYETH NOT.

Dated at Montpelier, Vermont, this 1st day of February, 2011.

Leslie D. Blomberg

STATE OF VERMONT
WASHINGTON COUNTY, SS

SUBSCRIBED and sworn to by Leslie D. Blomberg, before me this 1st day of February, 2011.

Notary Public

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7678

Petition of Beaver Wood Energy Pownal, LLC	)
for a Certificate of Public Good, pursuant to 30 V.S.A.	)
§ 248, to install and operate a Biomass Energy Facility	)
and an integrated wood pellet manufacturing facility	)
located north of the old Green Mountain Racetrack in	)
Pownal, Vermont, to be known as the "Pownal Biomass	)
Project"	)

AFFIDAVIT

I, Michael Oman, being duly sworn, depose and say that:

1. My name is Michael Oman. I reside in Underhill, Vermont.

2. I was the transportation director for the Chittenden County Regional Planning Commission from 1992 - 1997. I was the Director of Land Use and Environment for the Boston, Massachusetts Metropolitan Area Planning Council from 1980 - 1984. I have been in private planning consulting practice since 1997 and between 1984 and 1992. I have completed transportation plans ranging from the first full regional plan under the revised federal transportation law, ISTEA to the City of Burlington, to small communities such as Morrisville and Wolcott. I have been admitted as an expert witness in transportation matters for the Vermont Environmental Court, the Vermont Environmental Board when in force, and numerous District Environmental Commissions and local Design Review Boards (DRBs).

3. I have reviewed the application by Beaver Wood to construct a 29.5 MW generation facility in Pownal, Vermont, including RSG's traffic study dated 17 September, 2010. I understand a substantially similar biomass plant is proposed in Fair Haven, Vermont.

4. I have reviewed the Memorandum dated January 14, 2011, signed by Beaver Wood's lawyer Hans G. Huessy, Esq. and the affidavit of William Bousquet dated January 14, 2011, filed in support of Mr. Huessy's Memorandum. I have been asked to respond to the representations contained in Mr. Huessy's Memorandum concerning traffic, specifically the arguments by Mr. Huessy that the electric generating plant and the pellet manufacturing plant are so closely integrated that conducting separate Section 248 and Act 250 proceedings relative to traffic impacts "would be impractical, if not impossible" and "enforcement virtually impossible." Memo. at p. 7 and p. 16. I offer this affidavit as a response to such suggestions and arguments.

5. On p. 12 of his Memorandum Mr. Huessy argues: "The truck traffic associated with each project considered separately might not mandate a turning lane or other safety feature when combined truck volume would."

6. Generally, in traffic engineering, it is necessary to account for all of the traffic that will occur in the area of a project. This is true even where the traffic is generated off site by an entirely different party. So regardless of how the jurisdictional issue is resolved, the analysis under either will need to account for all the traffic generated by the new development as well as any other relevant traffic in the area.

7. The analysis Beaver Wood Energy – Pownal presented in its original filing indicates that no turning lane is required even for the whole development. I haven't analyzed the proposal at the level to be certain that is entirely accurate, but, based on the general level of traffic anticipated, it seems a reasonable conclusion to me. So, since no turning lane is required for both developments, obviously none is called for either separately so I am not sure why Mr. Hussy made this argument.
8. On p. 16 of his Memorandum Mr. Huessy argues relative to noise that "[t]his is especially true of truck traffic because at any given time there may be several trucks on site, some of which are delivering fuel to the electrical facility and some of which delivering materials for the pellet facility."
9. The destinations and purposes of truck trips are readily discernable by what they deliver (or pick up) to/from where. This occurs all the time in our world. This is the easy part of the analysis.
10. Also on p. 12 Mr. Huessy indicates that "A truck could enter the site for one purpose and leave for another."
11. The types of trucks identified in the RSG traffic study (chip trucks, log trucks, ash trucks and pellet delivery trucks) are pretty specialized and not readily interchangeable, so it is unclear how one could do one thing on the way in, and another on the way out. But in the event they did, that could be determined.
12. In any case, trip generation recognizes that a single round trip, in fact, consists of two individual trips (i.e. "trip ends") that can be accounted for individually.
13. On p. 16 Mr. Huessy presents the situation where "a car entering the facility could be driven by an employee who works for both facilities."

14. Employees may be a little more problematic than truck trips, although because overall traffic volumes are fairly low, overall levels of service are anticipated to be satisfactory, and since the biggest issue is truck traffic (rather than overall traffic volume) this is not a major issue.

15. I believe most employees will probably be directly "assignable" to one function/facility or the other based on the jobs they do (almost certainly the bulk of the shift workers).

16. Any of the remaining employees that are "unassignable" (security, some maintenance, some management, etc.) may be allocated to one or the other facility based on some reasonable parameter. That might be the construction value presented by the applicant, i.e. 85/15, although other factors are also possible, e.g. in proportion to the assigned employees.

17. The few remaining trips (visitors, etc.) may be assigned on a similar basis.

18. Also on p. 16 Mr. Huessy argues that "as is immediately evident, the issuance of two land use permits for the same Projects would make enforcement virtually impossible."

19. I don't see a generating plant and a pellet plant that are at two different locations on the site and have two different structures, with two different purposes, and two different sets of employees (even if some are shared and need to be assigned) as problematic in terms of regulation. I do not see why it would be impossible to enforce any permit conditions if the vehicles, employees, etc. can otherwise be allocated or assigned.

AND FURTHER DEPONENTS SAYETH NOT.

Dated at Underhill, Vermont, this 4 day of February, 2011.

Michael F. Oman

STATE OF VERMONT
CHITTENDEN COUNTY, SS

SUBSCRIBED and sworn to by Michael Oman, before me this 4th day of February, 2011.

Notary Public