NATURAL RESOURCES BOARD
National Life Records Center Building
1 National Life Drive
Montpelier, Vermont 05620-3201

February 4, 2011

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620

RE: *Petition of Beaver Wood Energy Fair Haven, LLC* Docket No 7679
Petition of Beaver Wood Energy Pownal, LLC Docket No 7678

Dear Ms. Hudson:

Enclosed please find the Natural Resources Board, Land Use Panel comments in the above mentioned matter.

If I can furnish any additional information, please let me know. Thank you for your help.

Sincerely,

John H. Hasen
General Counsel

Enc.

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Beaver Wood Energy Fair Haven, 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 Route 4 in Fair Haven, Vermont to be known as the "Fair Haven Biomass Project"	Docket No 7679
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

Comments of the Natural Resources Board, Land Use Panel

Relative to the *Petitions for Certificate of Public Good* filed by Beaver Wood Energy Fair Haven LLC, and Beaver Wood Energy Pownal, LLC, (collectively Beaver Wood) for projects in Fair Haven and Pownal, Vermont, the question has arisen as to whether the proposed projects (or portions of the projects) are subject to the jurisdiction of the Public Service Board (PSB), pursuant to 30 V.S.A. § 248, or the District 1 (Rutland County) and 8 (Bennington County) Environmental Commissions, pursuant to 10 V.S.A. Ch. 151 (Act 250).

The Natural Resources Board, Land Use Panel (NRB) files these public comments.

1. The relationship between Section 248 and Act 250

The jurisdictional question presented in this case involves interpretation of two regulatory schemes. One involves development and construction of a narrow class of

facilities while the other addresses more general land use, development, and construction activities. 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). The statutory construction 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." *Id.*

Act 250 has jurisdiction over "developments," which are defined, in part, as "the construction of improvements for commercial or industrial purposes" on one acre of land or involving more than 10 acres of land, depending on whether the municipality where the project is proposed has local zoning and subdivision regulations. 10 V.S.A. § 6001(3)(A)(i) and(ii). Specifically excluded from the definition of "development" (and thus Act 250 jurisdiction) is the "construction of improvements for an electric generation or transmission facility that requires a certificate of public good under 30 V.S.A. § 248...." 10 V.S.A. § 6001(3)(D)(ii).[1] Thus, if the PSB takes jurisdiction over a project pursuant to §248, Act 250 jurisdiction is precluded.

Under Vermont law, "no company ... may begin site preparation for or construction of an electric generation facility ...within the state which is designed for

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[1] Likewise, the PSB 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).

immediate or eventual operation at any voltage, ... unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect." 30 V.S.A. §248(a)(2).

Thus, Act 250 broadly covers "development" while the PSB's jurisdiction is specifically limited to electric generating facilities.[2] This difference informs whether construction of each regulatory scheme should receive broad or narrow construction. Cf. *Lamell Lumber Corporation v. Newstress International, Inc.,* 2007 VT 83 ¶6, 983 A.2d 1215, 1219 (scope of authority of court of limited jurisdiction is strictly construed while the opposite is true of courts of general jurisdiction).

2. The Beaver Wood projects

The Beaver Wood projects have two components, the NRB does not dispute that that these components are, as Beaver Wood maintains, related. *Petitioner's Memorandum of Law Relating to Initial Jurisdictional Issue (Jan. 14, 2011) (January Memorandum)* at 2 - 3. One building on the project sites will be a biomass power plant. As this component will generate electricity, it falls outside of the jurisdiction of Act 250.

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[2] By its plain language in 30 V.S.A. §248 and 10 V.S.A. §6001(3)(D)(ii) , the Legislature intended the PSB to have jurisdiction over a limited class of development; that involving electric general facilities. The PSB has no expertise in applying §248 criterion - or Act 250 criterion specifically incorporated into §248 - to the broad range of other development projects involving non-electric generating facilities. Cf. *In re Doolittle Mountain Lots, Inc.*, 2007 VT 104, ¶6,182 Vt. 617, 618, 938 A.2d 1230, 1232

The second component to each project is a wood pellet manufacturing facility, to be built adjacent to the power plant on each project site. It is this component of the projects that raises the question concerning the application of Act 250 jurisdiction.

Specifically, as to the relationship between the biomass power plants and the wood pellet manufacturing facilities on each site, the *Petition for Certificate of Public Good* filed by Beaver Wood states:

> 2. [Beaver Wood Energy] has developed a project plan to build a 29.5 MW biomass electric generation facility and fully integrated wood pellet manufacturing plant ... (on 72 acres) in Fair Haven, Vermont.
>
> 10. The integration of the pellet plant with the biomass generator makes the Project more energy efficient than other biomass facilities. The use of the power boiler flue gas to provide drying energy to the pellet fryer is very unique and advanced technology. This energy that would ordinarily be discharged up the chimney is instead used to dry the high moisture chips before they are made into dry pellets.
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> 11. Another synergy resulting from the integration of the two facilities is the use of the bark that is removed from the logs to make pellets as fuel for the power boiler. As a result, this bark does not become a waster product. The air emissions from the Project will be the lowest in the country for a facility of this type.

In its *Motion for Preliminary Approval* at 1, Beaver Wood describes its project as "the construction and operation of a 29.5 MW biomass electric generating facility and a fully integrated pellet manufacturing plant." The NRB notes that even Beaver Wood does not state here that the pellet factories are actually "electric generating facilities," only that the two components to its projects are "fully integrated."

The term "electric generation facility" is not defined in Vermont statutes or in the rules of the PSB or Public Service Department. 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); and see *In re Reynolds*, 170 Vt. 352 (2000) (court presumes that the plain and ordinary meaning of statutory language was intended by the legislature); *Braun v. Board of Dental Examiners*, 167 Vt. 110, 116 (1997); *State v. Young*, 143 Vt. 413, 415 (1983). Not to be overly obvious or pedantic, but the plain and ordinary meaning of the words "electric generation facility" means a facility that generates electricity. The question, then, is whether the Beaver Wood projects, in part or in their entirety, are such facilities.

3. The wood pellet factory components of the Beaver Wood projects are subject to Act 250 jurisdiction.

The two parts of the projects are related because heat from the biomass buildings will be sent to the pellet buildings and waste bark from the pellet components will become fuel for the biomass components. *January Memorandum* at 2 – 3. But this relationship does not make the pellet plants "electric generating facilities" any more than a house or business that receives electricity from wind turbines becomes a part of such a facility or a coal mine that sends its product to a coal-fired electric plant becomes part of such an electric plant. To hold otherwise would make the definition of "electric generating facility" so broad as to be meaningless and absurd, as all construction that receives electricity or sends fuel would then be exempt from the jurisdiction of Act 250. Such a statutory construction cannot be endorsed because it would render Act 250 "ineffective or irrational." *In re Southview Associates*, 153 Vt. 171, 175 (1989).

Certainly, because the legislature is not assumed to act in an irrational manner, *In re Judy Ann's Inc.*,143 Vt. 228 (1983), Beaver Wood's assertion that the pellet manufacturing plants should be considered to be a part of the biomass plants – and thus themselves "electric generating facilities" – is without merit.

a. The Opinion of the Attorney General is neither on point nor controlling.

Citing a 1972 Opinion of the Attorney General, Beaver Wood contends that the PSB's jurisdiction over electric generating facilities extends to improvements that are "reasonably related" to such facilities. *January Memorandum* at 3 - 4. But as the portions of the Opinion which Beaver Wood quotes on pages 4 and 5 of its *January Memorandum* make clear, the Opinion did not address the question presented by the factual scenario of Petitioners proposed projects. Rather, the question in the Opinion turns on whether the "improvements" (which includes, according to the Opinion, "impoundments, roads, rail spurs, and lagoons") can be "considered to be a part of the electric generating ...facility."[3] The NRB submits that the improvements that are the subject of the Opinion encompass only those that are a *necessary* part of the facility. Electric generating facilities need roads; some may also need impoundments, rail spurs, and lagoons in order to function. While such construction might trigger Act 250

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[3] Moreover, the Attorney General's Opinion was issued 40 years ago, prior to the large body of case law developed by the PSB, the Environmental Board, or the courts.

jurisdiction if considered independent of an electric generating facility, it is reasonable to read the Opinion to state that, to the extent that such construction is a necessary element to the facility, it should be included within the definition of the term, subject to PSB jurisdiction, and therefore beyond Act 250 review.

The NRB does not doubt that the wood pellet factories proposed by Beaver Wood will contribute to the overall efficiency of the Pownal and Fair Haven facilities. But it is physically possible to build and operate the electric generating facility components of the overall projects without them; indeed, the NRB is not aware of any other electric generating facility which has such a pellet factory on site. Thus, while the pellet factories may be desired, complimentary buildings constructed on the same site as the electric generating facilities, they are not "a part" of such facilities, and they are thus not exempt from Act 250 jurisdiction.

b. The PSB's decision in *In re: UPC Wind Management LLC* does not support Beaver Wood's arguments.

Beaver Wood cites the PSB decision in *In re: UPC Wind Management LLC,* 2004 WL 882046 (Apr. 21, 2004), as support for its claim that the wood pellet factories are "a part of" their proposed electric generating facilities. In *UPC Wind Management* the question before the PSB was whether anemometers that would be used to determine the economic viability of a wind electric generating facility were within the scope of such a "facility" as expressed in the 1972 Attorney General Opinion. The PSB held that they were. Notably, the PSB decision described the anemometers in a way that makes it

clear that the PSB saw the anemometers to be "a part of" the electric generating facility project itself. The PSB referred to the wind measurement towers " as a precursor to a wind generation project." It is apparent that the PSB viewed the anemometers as a necessary component to the wind facility - - without their installation, the wind facility could not be built because its economic feasibility would be not known. Under these circumstances, the inclusion of the anemometers within the scope of the electric generating facility project is reasonable and rational.

But the holding of the *UPC Wind Management* case is a far cry from the situation presented here. The wood pellet factories are neither precursors to the electric generating facilities, nor are they an essential part of such facilities, such that, without them the electric generating facilities cannot be physically built. The *UPC Wind Management* case does little, therefore, to further Beaver Wood's arguments in this matter.

c. The integration of the two components of the Beaver Wood projects does not result in an increase in efficiency to the electric generating facility.

In its quest to establish that the wood pellet factories are a part of its proposed electric generating facilities, Beaver Wood argues that the combination of its two components leads to a more efficient whole. *January Memorandum* at 6 -7. The NRB has no reason to dispute this claim. But a finding that the construction of the two

components in a single project will lead to an increase in the efficiency of the Fair Haven and Pownal sites is not dispositive of the question before the PSB.

It is important to read the *Affidavit of William Bousquet* carefully. First, Mr. Bousquet's position is never stated; we cannot tell from his affidavit who he is, where he works, or what his qualifications are. Second, and perhaps more importantly, Mr. Bousquet does not state that the inclusion of the wood pellet factories in the overall projects *will lead to an increase in the efficiency of the electric generating facilities.* Rather, the use of the waste heat from the electric generating facilities causes *the wood pellet factories* to operate more efficiently. [4] Mr. Bousquet glosses over this distinction with the statement that the integration of the two components of the projects will "increase the efficiency of the combined facilities." *Affidavit* at ¶2

Certainly, if Edward owns a Hummer and Alice owns a Hummer and Edward trades his Hummer in for a Prius, Edward's and Alice's *combined* fuel efficiency has improved. But Alice is still getting only ten miles to the gallon. Likewise, the integration

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[4] Indeed, Beaver Wood notes that it would not build the wood pellet factory but for the fact that it can obtain a benefit from being located next to the electric generating facility. *January Memorandum* at 6, citing *Affidavit* at ¶14. But nowhere does it argue that the existence of the pellet factory *on the site* of the power plant leads to greater efficiencies at the plant itself. The fact that waste wood from the wood pellet factory will be used as fuel for the electric generating facility does not, as Beaver Wood argues, make the two components "inexorably linked." *January Memorandum* at 7, citing *Affidavit* at ¶17. Waste wood can come from anywhere. Would waste wood from a wood pellet factory located in Castleton "inexorably link" such factory to the Fair Haven electric generating facility? Rutland? Montpelier? At what point does the link become no longer inexorable?

of the wood pellet factories and the electric generating facilities on the same sites may lead to cheaper wood pellets and better profits for the wood pellet factories. But the generation of electricity by the power plant components of the "combined facilities" has not improved in efficiency.

Since the PSB is concerned about efficiencies in the generation of electricity by the power plant, because an increase in efficiency is better for the environment and better for the ratepayers, anything that increases the efficiency of an electric generating facility is fair game for argument. But Beaver Wood does not argue that the existence of the wood pellet factories on its sites will lead to greater efficiency in the production of electricity at the power plants. Thus, Beaver Wood's efficiency arguments are misplaced and misdirected.

d. The decision by Beaver Wood to build the two components of its projects on the same sites does not control the question of whether there is Act 250 jurisdiction over the wood pellet factories.

The NRB takes issue with the fact that, merely because Beaver Wood has chosen to build its wood pellet factories and its electric generating facilities on the same sites (apparently to improve the economic viability of the pellet factories, *Affidavit* at 14), this simple fact makes the pellet factories "a part of" the generating facilities and thus exempt from Act 250 jurisdiction. *January Memorandum* at 7. Suppose Beaver Wood decided to build 100 condominium units on the sites and send the waste heat from its power plants to those dwellings. Could Beaver Wood then claim that those condos

generated electricity? Whether the PSB or Act 250 has jurisdiction over the wood pellet factories should not turn on the economic choices of the applicant.

Likewise, the fact that Beaver Wood has decided to build the two components as a single project cannot be the determinative factor in deciding jurisdiction. Section 248 and 10 V.S.A. §6001(D) make it clear that issues regarding *the production of electricity* are within the purview of the PSB (and thus outside the reach of Act 250). But this does not mean that the legislature intended to allow Beaver Wood to construct projects in such a way as to allow components of such projects to avoid Act 250 jurisdiction.

e. Beaver Wood's desire for one-stop shopping is not supported by case law and cannot preclude Act 250 jurisdiction over the wood pellet factories.

Citing the Environmental Court's decision in *Glebe Mountain Wind Energy LLC*, Dkt. No. 324-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment (Aug. 3, 2006), Beaver Wood argues next that the state has a policy of one-stop shopping. But Beaver Wood's reliance on *Glebe Mountain* is misplaced, as that case is not on point. In *Glebe Mountain,* the question was whether Act 250 or the PSB had jurisdiction over a Section 248 project that was proposed to be built on lands already subject to an Act 250 permit. The Court's holding was simply that, despite the Act 250 rules that would have characterized the project as a "material change" to the existing permit, because the project was a Section 248 project, the statute, 10 V.S.A. §6001(D)(ii) divests the Act 250 Commissions of jurisdiction over even those electric

generating facilities that are built on Act 250 regulated lands. The fact that the PSB reviews Section 248 with an eye to the Act 250 Criteria argued in favor of vesting jurisdiction in the PSB, but it was not the determinative factor - - the language of §6001(D)(ii) was.[5]

Further, the present Beaver Wood projects do not fall within the *Glebe Mountain* model. They are not – as was the case in *Glebe Mountain* - only electric generating facilities, nor are they proposed for lands subject to existing Act 250 permits. Clearly, a project that is solely an electric generating facility (as was the case in *Glebe Mountain* and in the Sheffield Wind Project that Beaver Wood mentions on page 10 of its *January Memorandum*) should be treated differently from the situation presented here, which concerns the construction of an electric generating facility and a wood pellet factory which does not generate electricity. Despite Beaver Wood's attempts to find similarities between *Glebe Mountain* and the present matter, such similarities do not exist. One-stop shopping makes sense when one is discussing where to hold hearings on an

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[5] The *Glebe* Court wrote: "Interested Person VELCO asserts that "[b]ecause [10 V.S.A.] § 6001(3)(D)(ii) excludes electric generation and transmission facilities that require a [certificate of public good], Act 250 jurisdiction does not apply to such facilities regardless of whether they would constitute a material or substantial change to existing development." VELCO Mem. in Support of Appellant's Mot. for Summ. J. at 11. We agree. Such facilities are carved out of Act 250 jurisdiction by the plain language of the statute." *Glebe Mountain Wind Energy LLC,* Decision at 15. While the concept of "one-stop shopping" supported the Court's reasoning, it was the language of the statute that was the determining factor in the Court's decision, not a policy-based rationale.

electric generating facility, even if it to be located on lands already subject to Act 250 jurisdiction. But to then jump to the conclusion that state policy supports such shopping when a project includes both a Section 248 component and an Act 250 component is not justified.

f. Review of the electric generating facilities by the PSB and the wood pellet factories by the District Commissions will not be redundant or duplicative.

Beaver Wood next argues that if review of its projects is to occur in two separate forums (by the PSB and by the District Commission) this could lead to a redundant and duplicative permitting processes. *January Memorandum* at 11 – 12. One solution, of course, is to allow all review to occur before the District Commission, but Beaver Wood does not propose this. Rather, having decided to proceed with project that include components that should be reviewed both by the PSB and by Act 250, Beaver Wood then contends that the only viable solution to its decision is to deprive the District Commissions of their statutory authority. This argument is without merit. Applicants do not control which body regulates their activities; the statutes do.

Beaver Wood also asserts that duplicative review could result in *less* environmental protection because each regulatory agency would only look at the impacts caused by its particular component. *January Memorandum* at 12 -13. But this is not the case. District Commissions routinely review projects with an eye to other developments that are proposed in the same area. Certainly, since Beaver Wood

appears to be concerned that the examinations of the impacts from of its power plants and wood pellet factories might occur in isolation, it can present each agency with information as to the environmental impacts that may result from the construction of both components to its projects. In that way, the limited review that Beaver Wood apparently fears can be avoided.

g. Review by the PSB differs significantly from review by a District Commission.

Asserting that the PSB will conduct an adequate review, and citing 30 V.S.A. §248(b)(5), Beaver Wood contends that nothing will be gained by requiring its projects to undergo Act 250 review. *January Memorandum* at 13 – 16. Beaver Wood further notes that the PSB has often held that its review can extend beyond the Act 250 criteria listed in subsection (b)(5). *Id.*

The NRB does not doubt that the PSB's review of the Beaver Wood projects will be thorough, but it notes that the cited provision requires the PSB to give only "due consideration" to the Act 250 criteria.[6] By contrast, Act 250 (specifically 10 V.S.A. §6086(a)) requires that, before issuing a permit, a District Commission must find that an

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[6] As the Environmental Court noted in its *Glebe Mountain* decision at 9: "The "due consideration" language of § 248(b)(1) was interpreted by our Supreme Court to mean that those recommendations and land conservation measures were "advisory rather than controlling." Quoting *City of South Burlington v. Vermont Electric Power Co.,* 133 Vt. 438, 447 (1975).

application *complies* with such criteria. Further, the PSB's decision to extend its review of a project beyond the listed criteria is discretionary. Thus, while the differences between the standards of review engaged in by the PSB and the Commission may be slight, they are nevertheless significant.

In addition, the review afforded by the PSB under §248(b)(5) is tempered somewhat by the fact that the PSB's "consideration of aesthetics under Section 248 is "significantly informed by overall societal benefits of the project." *Petition of EMDC, LLC, d/b/a East Haven Windfarm*, Dkt. No. 6911 at 49, and see 50 – 56, 103 n. 125 (Jul. 17, 2006). Thus, the Act 250 aesthetics criterion is not sacrosanct within the PSB review process, as its protections may be outweighed by the "societal benefits" of a project.

h. Review by one administrative body does not and should not preclude review by another.

An argument that because one agency will review a project another agency should be barred from also reviewing that project leads to a result that is both not countenanced by statute and dangerous as policy. As required by law and local ordinances, many projects in Vermont undergo both local zoning and planning review and Act 250 review. In many cases, the review that is undertaken by the Act 250 District Commission is more comprehensive and complete than that conducted by the municipality. But an argument that, in these instances, local review is unnecessary or superseded has never been accepted. Rather, each regulatory agency's statutory

authority to review those aspects of a project within its jurisdiction has always been respected. There is no reason to abandon that respect in this case.

Beaver Wood argues having its projects subject to two permits will lead to difficulties in enforcement, as it might be difficult for the state to determine which entity is in violation of its permit. *January Memorandum* at 16 – 17. To make this point, Beaver Wood provides a number of possible scenarios - - for example, that it might be impossible to segregate the noise that is produced by the electric generating facilities from that produced by the wood pellet factories or that differentiating between trucks that are delivering material to the factories from those that are being used by the power plants may be difficult. But these are not scenarios that are unique to this project; enforcement officials often have to determine whether a permitted project is in violation of its permit conditions or whether the "violation" is produced by a neighboring site that is not subject to a permit. Such difficulties may exist at these projects, but they are not grounds for a decision that divests the District Commissions from their statutory authority.

Likewise, Beaver Wood's claim that its electric generating facilities might be subject to different standards than those imposed on its wood pellet factories (*January Memorandum* at 17) would lead to absurd results is without merit. In many instances, projects are subject to municipal requirements that may be different from (and may even conflict) with those which are imposed by an Act 250 Commission. For example, in *Re: Allen Brook Investments, LLC and Raymond Beaudry,* Land Use Permit Application

#4C1110-EB, Findings of Fact, Conclusions of Law, and Order (Jan, 27, 2004), the applicant sought to construct a housing project in the Town of Williston. The Town would "not allow ABI to build within the 'conservation corridor' areas along Allen Brook, as identified in §IV(C)(7) of the Town of Williston's 2000 Comprehensive Plan (2000 Plan); the only place that ABI can build on the site, therefore, is in the open meadow area where Williston will allow construction to occur." Finding 5. But the former Environmental Board held that the project could not be built in the meadow because of its impermissible impact on the meadow's primary agricultural soils. The solution to this predicament was not to deprive either the Town or Act 250 of its authority to hear the application; the solution was that project had to comply with both sets of rules, which, in that case, resulted in a denial of the project. This was unfortunate; but to hold otherwise would have been to hold that one regulatory agency's rules had to be discarded in order to allow compliance with the other agency's rules.

The Vermont Supreme Court has held that "where local regulation is in effect, a person proposing to subdivide or develop might have to gain approval both at the state and local levels . . ." *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), quoting *Committee to Save Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 145 (1979). The former Environmental Board has recognized the potential for conflict and yet has held that it would not relinquish its authority. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact,* #4C1117-EB, Findings of Fact and Conclusions of Law at 16 (May 27, 2004) (while an Act 250 requirement that clustering occur might be in conflict with

local requirements, Board need not abandon Criterion 9(B)(iii)). And see *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 10 (Oct. 8, 2003). Nor could Act 250 require a municipality to bow to the Environmental Board's requirements. *In re Agency of Transportation*, 157 Vt. 203, 208 (1991) (legislature provided that an Act 250 permit "shall not supersede or replace the requirements for a permit of any other state agency or municipal government.") The fact that the PSB might in this case apply a standard different from that imposed by the District Commissions is a possibility, but it is not grounds to strip the Commissions of their authority to act. That would be the absurd result that Beaver Wood claims it wishes to avoid.

i. A desire for judicial efficiency or to improve the economics of the Beaver Wood project is not grounds for divesting Act 250 of jurisdiction over the wood pellet factory.

Beaver Wood asserts that limiting the review of its project to the jurisdiction of the PSB would result in better efficiencies. It argues further that requiring review by both the PSB and Act 250 will discourage other developers from designing projects similar to that proposed by Beaver Wood and not advance the purpose of the PSB statutes. *January Memorandum* at 17 - 18.

As noted above, projects often are required to undergo review before more than one agency. While one can argue that a single review is more efficient and economic for the applicant, it is not grounds to preclude review by all other affected entities.

Whether a project is going to be subject to multiple review is an economic decision that should guide the applicant in determining whether to go forward with a project; it should not guide the PSB in its determination as to whether to affirmatively divest Act 250 of jurisdiction over the wood pellet factories.

Beaver Wood's arguments regarding redundant review and claim preclusion (*January Memorandum at 18)* are not relevant. The NRB does not contend that Act 250 should also review those aspects of the Beaver Wood projects that will be subject to PSB jurisdiction. Rather, each administrative body has a component of the Beaver Wood projects that is subject to its authority.

Lastly, Beaver Wood cites to subsections of 30 V.S.A. §8001 for the proposition that renewable energy should be encouraged and supported. *January Memorandum* at 19. The NRB does not contest these policies. But Beaver Wood provides no basis for its claims that its projects, in their entireties, advance these goals; there is no affidavit to the effect that the existence of the wood pellet factories will increase the efficiency of the electric generating facilities. There is a general claim that renewable energy projects allow "benefits" to "flow to Vermont rate-payers." *Id.* But Beaver Wood has provided no evidence that its project will result in lower utility rates or that requiring review of the wood pellet factory by the District Commissions will result in higher energy rates. Vague assertions of the benefits of renewable energy do not further Beaver Wood's claims.

4. Conclusion

Vermont law grants authority to the PSB and to the District Commissions to hear projects within their respective jurisdictions. Where a project requires a Certificate of Public Good from the PSB, the project is exempt from Act 250 review. But, here, the wood pellet factories do not require a CPG; only the electric generating facility components of the Beaver Wood projects do. Act 250 jurisdiction over the wood pellet factories exists and is not removed either by operation of law or the application of policy.

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

VERMONT NATURAL RESOURCES BOARD

John H. Hasen
General Counsel