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

PETITIONERS' MEMORANDUM OF LAW RELATING TO INITIAL JURISDICTIONAL ISSUE

NOW COME Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven, LLC (collectively "BWE"), and respectfully submit this Memorandum of Law Relating to Initial Jurisdictional Issue.

Introduction

On December 23, 2010, the Hearing Officers in Docket Nos. 7678 and 7679 issued a Procedural Order that established a briefing schedule for the initial jurisdictional question of whether the Board should assume jurisdiction over the pellet manufacturing aspects of the Projects. As will be shown below, the two aspects of the proposed projects, generation of electricity and the manufacture of wood pellets, are so closely

integrated that conducting separate Section 248 and Act 250 proceedings would be not only impractical, inefficient, and inconsistent with legislative intent, but also contrary to Board and court precedent and State policy.

Factual Background

The primary purpose for integrating the wood pellet facility into the power plant is to increase the energy efficiency of the combined facilities. *Prefiled Testimony of William Bousquet in Docket Nos. 7678 and 7679 and Exhibit A, Affidavit of William Bousquet at ¶ 2, hereinafter "Affidavit"*[1]. The use of waste heat from the power generation facility in the manufacture of pellets increases the combined plants' energy efficiency by approximately 15%. *Affidavit at ¶2.* The power plant is clearly the most significant aspect of the Projects, as the pellet facility represents less than 15% of the total project cost while the power plant represents more than 85%. *Affidavit at ¶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. *Affidavit at ¶4.*

The fully integrated nature of the two facilities has been acknowledged by every permitting entity in the State that has reviewed the Projects. *Affidavit at ¶6.* The Pownal Project has applied for and/or received approximately 20 permits, the Fair Haven Project has applied for and/or received approximately 30 permits. *Affidavit at ¶5.* To date every permitting entity has treated the pellet and generating facilities as a single, fully-integrated project. *Affidavit at ¶6.* There will be a single air permit, access permit, water

[1] Much, but not all, of what is set forth in the Bousquet Affidavit is also found in the Bousquet testimony but for ease of reference, Petitioners will just cite to the Affidavit.

withdrawal permit, and stormwater permit for the Projects. *Affidavit at ¶7.* This is not surprising as the power plant and pellet facility are located on the same lot and will share interior roads, electrical service, potable water supplies, office space, stormwater discharge system, storage areas, truck scales, fire protection systems, ingresses and egresses from state roads, exterior fences, parking areas, security lighting, conveyor belt systems, septic systems in addition to other shared infrastructure. *Affidavit at ¶8.* Furthermore, certain employees will be shared, e.g. security personnel and office staff. *Affidavit at ¶9.* The plants will likely share a single fuel procurement employee and contract with a single forestry consultant. *Affidavit at ¶9.* There will also be identical management and cross-training of employees. Attached as Exhibits B and C are color coded site maps of the facilities showing the shared aspects of the facilities and the degree to which the two facilities, pellet and electrical, are physically and operationally intertwined. *Affidavit at ¶10.*

I. The Board has Jurisdiction Over All Project Improvements Reasonably Related To The Electrical Generating Facility.

Consistent with prior Board decisions and existing precedent, under Section 248 the Board's jurisdiction is not limited solely to electric generating facilities but extends to include any other site improvements reasonably related to those facilities. *Attorney General Opinion*, 1972 Op. Atty Gen. Vt. 167, 1-3 (Aug. 5, 1971). As the pellet and electric generating facilities are reasonably related to one another, the Board should assume jurisdiction over the entirety of both projects.

Act 250 permits are required in the State of Vermont prior to the commencement of development. 10 V.S.A. § 6081(a). The term "development" is defined expressly to

exclude "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). Similarly, Section 248 provides that no company may begin site preparation for an electric generation facility without first obtaining a certificate of public good (CPG). 30 V.S.A. § 248(1)(2)(A). The term "electric generation facility" is not defined in the statutes or rules.

Whether the Board is authorized to assert jurisdiction over a commercial development that is fully integrated with an electrical generation facility (located on the same lot solely for the purpose of increasing the efficiency of the electrical generation facility) is a question that has not been addressed by a Vermont court. In 1971, however, the Vermont Attorney General issued an opinion addressing the following question:

> 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 looked to the exception in § 6001(3), which, as quoted above, excludes "electric generation facilities" from "development", and determined that the question turned on the interpretation of the word "facility". *See id.* at 1. The Attorney General concluded that "the word 'facility' would be given a broad interpretation." *See id.* at 2. More specifically, "a separate Act 250 permit is not required for the construction of impoundments, roads, rail spurs and lagoons in connection with electric generation facilities." *Id.* at 3.

The Attorney General then articulated a broader rule regarding the scope of Board jurisdiction over developments associated with an electric generation facility, viz:

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

Id. (emphasis added). This is precisely the circumstance in the instant case. As shown below, there can be no question that the pellet facility bears a reasonable relationship to, and is a part of, the electrical generating facility.

Opinions of the attorney general are given consideration and will be followed if persuasive. Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201 (2000) (citing Ruiz v. Hull, 957 P.2d 984, 992 (Ariz. 1998) (opinions of attorney general are advisory and not binding; however, reasoned opinion should be accorded respectful consideration) and City of Bismarck v. Fettig, 601 N.W.2d 247, 253 (N.D. 1999) (attorney general opinions are not binding, but court will follow them if they are persuasive)).

Board precedent on this point stands in sharp contrast to prior decisions of the Environmental Board. The former Environmental Board ruled that only facilities and infrastructure that were "directly related" to power generation facilities were exempt from Act 250 review. *See* In re Burlington Electric Department (D.R. # 119, October 8, 1980); *see also,* Town of Springfield Hydroelectric Project (D.R. #111, January 19, 1981). In contrast, this Board has consistently adhered to the view expressed in the Attorney General's Opinion. *See e.g.,* In re: UPC Wind Management, LLC, 2004 WL 882046 (Vt.P.S.B.), 9 (April 21, 2004) (summarizing the 1971 Advisory Opinion and rule

and criticizing Environmental Board's rulings). Accordingly, this Board has jurisdiction not only over electric generation facilities, but also over any improvements that "bear a reasonable relationship to" and can be considered to "be a part of" those facilities, such as the pellet facilities proposed here.

II. The Pellet Facility Is Reasonably Related To And Is A Part Of The Electrical Generating Facility.

The sole purpose for co-locating the two facilities is to increase the overall energy efficiency of the combined facilities. *Affidavit at ¶11.* Petitioners are not in the wood pellet business nor have they ever been. *Affidavit at ¶12* When Petitioners designed the plants, they explored means of increasing the plants' overall energy efficiency and determined that the integration of a pellet facility on-site was best way to accomplish that goal. *Affidavit at ¶13.* By using waste heat from the electrical facility in the production of pellets, the energy efficiency of the combined facilities is increased by more than fifteen percent, thereby lowering the cost of the energy produced and maximizing the energy that can be derived from the fuel source. *Affidavit at ¶2.* Petitioners would have no interest in constructing and operating a pellet facility that was not fully integrated with the electrical facility. *Affidavit at ¶14.* Accordingly, not only is the pellet facility "reasonably related" to the electrical generating facility, its relationship to the electrical facility is the sole reason for its existence.

In addition, from an engineering perspective, the two facilities are engineered to function as a single unit. *Affidavit at ¶15.* Importantly, the power plant must be running for the pellet facility to operate as expected and if the power plant goes off-line, the production of pellets falls precipitously. *Affidavit at ¶15.* The pellet facility uses waste heat from the electrical facility to dry the pellet feed stock and steam from the electrical

facility to pre-treat the pellet feed stock in the pressing operation. *Affidavit at ¶16.* Waste, in the form of bark, from the production of the pellets is used as fuel in the electrical facility. *Affidavit at ¶17.* Therefore, from an engineering perspective, the two facilities are "reasonably related," in fact they are inexorably linked.

The two facilities are also located so closely together that any attempt to consider their respective environmental impacts separately would be impractical, if not impossible. Conveyor belts and hot flue gas pipes physically connect the two facilities, and the facilities share many of the site improvements including interior roads, electrical service, potable water supplies, office space, stormwater discharge system, storage areas, truck scales, fire protection systems, ingresses and egresses from state roads, parking areas, exterior fences and security lighting, and septic systems in addition to other features. *Affidavit at ¶8.* The color coded Pownal and Fair Haven Site Maps, B and C hereto, demonstrate how closely the two facilities are intertwined and the number of the site improvements that are shared by the two facilities. *Affidavit at ¶10.* AS previously mentioned, all of the permits issued to date have treated the project as a single facility, not as two separate facilities. As will be explained in more detail below, any examination of the pellet facilities' environmental impacts necessarily will involve consideration of the electrical facilities' impacts and vice versa, both as a practical matter and as a matter of law. Therefore, the pellet facility is "reasonably related" to the electrical generating facility and the Board should exercise jurisdiction over both.

III. The State Has A Long-Established Policy Of Promoting One-Stop-Shopping With Respect To Land Use Permitting.

In recent decisions, both this Board and the Environmental Court have recognized a long standing State policy of providing one-stop-shopping in the context of land use permits and the importance of avoiding redundant environmental review and duplicative permitting processes where Section 248 and Act 250 jurisdiction overlap. In a recent decision dealing with circumstances where there jurisdiction of a District Commission overlapped with that of the Board, the Environmental Court expressly held that the Board should retain jurisdiction over all improvements within the boundary of the electrical generation facility and that it was within the Board's discretion to establish that boundary. Glebe Mountain Wind Energy, LLC, Docket #234-11-05 Vtec, *Revised Decision on Cross Motions for Summary Judgment*, at 8 (Aug. 3, 2006) (hereinafter, "Glebe Mountain").

In *Glebe Mountain*, the land beneath the generating facility was subject to an existing Act 250 permit. Per the plain language of Title 10, EBR Rules, and existing precedent, the construction of the proposed electrical facility constituted a material change to the existing Act 250 project and required an amendment of the Act 250 permit. In *Glebe Mountain*, the project proponent argued that Board jurisdiction superseded the existing Act 250 permit (such that an Act 250 amendment was not required) because of language set forth in 30 V.S.A. § 248(b)(5). That section provides that, prior to issuing a certificate of public good, the Board must affirmatively find that the project will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given

to Act 250 Criteria 1-8 and 9(K). The project proponent argued that, because the Board essentially would be conducting an analysis under the Act 250 criteria, a separate review by the Commission of the same criteria would be redundant and potentially could lead to inconsistent results.[2] This is precisely the argument raised by Petitioners in these Dockets.

After a measured and thorough analysis, the Court agreed with the project proponent determining that no Act 250 jurisdiction existed based on the legislature's stated desire to avoid redundant environmental review and to provide for "one-stop-permit shopping". Glebe Mountain at 14. The Court noted that, before the Board can grant a permit for a facility, it must consider most of the Act 250 criteria. This suggested to the Court that the Board's jurisdiction likely was intended to supersede the District Commission's jurisdiction under Act 250; otherwise, the applicant would be required to obtain two separate permits, and the Board and the District Commission would be required undertake redundant reviews of the project's impacts. In explaining its decision, the Court quoted the following excerpt from a March 13, 1988 hearing of the Senate Natural Resources and Energy Committee featuring the testimony of then Board Chair Rich Cowart:

> At one point I was discussing one-stop versus two-stop shopping and why I think that it is preferable to keep this review at the PSB rather than having an Environmental Board review and a PSB review. First, as I said, all on the system stability and economic factors, we're going to have that review in any event so you would have a dual track. *You'd have the environmental review going off over here and the financial review going on over here. Now that raises an immediate coordination problem, not just in timing. It's a burden on everybody.* It's a burden on citizens who want to oppose a facility. It's a burden on local select boards and planning commissions who have got to go to two sets of hearings. It's a burden on

[2] As will be shown below, the Board's review is even broader than the enumerated criteria and encompasses all of a project's environmental impacts.

> the applicant. It takes longer. I don't think it's worth it. But there's an even more fundamental problem. As you've seen with Vicon, over on the environmental side every time you change the litigation [sic "mitigation"] requirement, you change the economics of the project. You better install a new scrubber. You've got to change your ash disposal methods; you've got to do something over here. All of a sudden your finances are different, and the terms of any contract that you've got for the sale of your power is going to be different. *So the idea that you can somehow segregate these things in their two different worlds is just not reality. I think it's a lot more sensible to keep them in the same place.*

Glebe Mountain at 14-15 (emphasis added). After further consideration of the legislature's discussion regarding circumstances where there is an overlap between Act 250 and Section 248 jurisdiction, the Court held that the legislature had placed great emphasis on the importance of maintaining "one stop permit shopping" and avoiding duplicative permitting processes. *Id.* For those reasons, the Court determined that this Board had exclusive jurisdiction over the project.

This Board previously reached the same conclusion with respect to the Sheffield Wind Project. When opponents to the Sheffield Wind Project argued that wind measurement towers that were to be installed before the construction of the wind energy generation project should be reviewed through the Act 250 process instead of the Act 248 process, the Board held that:

> While developers of wind generation facilities may be able to apply for Act 250 permits for wind measurement towers from their local district commissions in lieu of applying to the Board for approval under Section 248, to require them first to obtain an Act 250 permit and then later, if they determine that a wind generation facility is feasible at the site of the wind measurement tower, to apply to the Board for approval of the wind generation facility would not promote judicial efficiency or economy. This is particularly relevant when one or more of the measurement towers can later be included in the application to become a permanent part of the wind generation facility, which is sometimes the case. Consequently, the Board has traditionally accepted petitions for approval of wind measurement towers under Section 248 as a reasonable way to provide 'one-stop shopping' for wind developers.

In re: UPC Wind Management, LLC 2004 WL 882046 (Vt.P.S.B.), 3(April 21, 2004). The Board later affirmed its preference for "one-stop shopping" with respect to land use permits in a subsequent wind case. In re: EMDC, LLC, 2005 WL 2076440 (Vt.P.S.B.), 3 (July 29, 2005). In accordance with the forgoing precedent, the Board should exercise jurisdiction over the pellet facilities in order to avoid unnecessary, burdensome and duplicative permitting processes and ensure Petitioners are afforded 'one-stop permit shopping'.

IV. Requiring The Pellet Facility To Obtain An Act 250 Permit Will Result In Redundant Environmental Review And Duplicative Permitting Processes.

If the Board declines to exercise jurisdiction over the pellet facility, the result will be simultaneous litigation of identical issues in two different forums. Project opponents may contend the District Commission's review of the pellet facility would be limited to those environmental impacts associated solely with that facility while the Board's review would be limited to the generating facilities' environmental impacts. However, such a segregated review is impossible from a practical standpoint given the number of improvements shared by the two facilities, would be inconsistent with prior precedent, and might very well result in the Projects' environmental impacts being understated. An example of the practical difficulties associated with separate review is possible impacts on prime agricultural land. If it is alleged that the shared parking area is located on prime agricultural land, which forum determines if that is indeed the case, and if so, what nature of mitigation is necessary, the Board or the District Commission? If it is alleged that the shared interior roads cross over an area of archeological interest or an area populated by an endangered plant species, which forum determines if that is indeed the case, and if so, what nature of mitigation is necessary, the Board or the

District Commission? There are an endless number of similar examples that can be given where it would be not only possible, but extremely likely, that each forum would review the same alleged impacts and reach different conclusions about the extent of the impacts and, therefore, issue conflicting mandates (an outcome that is possible even if the two forums agree on the extent of the impacts).

In addition, neither the District Commission nor the Board could effectively review the two facilities' impacts in isolation. An example of this would be consideration of the environmental impacts of the noise generated by the two facilities. It 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). 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. It would be inconsistent with the mandate of both Section 248 and Act 250 to engage in such piecemeal review, 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.

The same argument could hold true with respect to other environmental impacts like traffic. The truck traffic associated with each project considered separately might not mandate a turning lane or other safety feature when the combined truck volume would. Again, both the Board and the District Commission will have to consider the

combined facilities' impact in their respective review of the Projects or the Projects' environmental impacts will be understated. If the Board and District Commission both consider the combined facilities' environmental impacts, they will be conducting identical reviews of the Projects, an outcome wholly inconsistent with the long established State policy of providing for one-stop shopping for land use permits.

In recognition of the desirability of providing one-stop shopping, the Environmental Court also noted that "it is up to the Board to determine the physical boundaries of the facility, within which its jurisdiction is exclusive . . .." Glebe Mountain at 8-14. The Court ceded discretion in establishing the boundaries of the Board's to the Board, not the District Commission. As is explained herein, the Board should exercise that discretion by extending its jurisdiction to include both facilities as they are located on the same lot and so closely intertwined as to make separate review impractical. One look at Exhibits B and C hereto clearly shows that it would be impractical, if not impossible, for the Board to create a boundary around the electrical generating facility that excluded the pellet facility. *Affidavit at ¶10.* It is also true that it is entirely impractical, if not impossible to segregate and consider separately the environmental impacts of the pellet facility and the electrical facility. Therefore, the Board should establish a facility boundary that includes the entire Project sites.

V. 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.

Project opponents may allege that certain of the pellet facilities' environmental impacts may avoid review if no Act 250 permit is required because not all of the Act 250 criteria are incorporated into Section 248. This is simply not the case.

Pursuant to Section 248(b)(5), the Board is required to find, before issuing a CPG, that the Project:

> Will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in subsection 1424a(d) and subdivision 6086(a)(1) through (8) and (9)(K) of Title 10.

The fact that subsection (b)(5) articulates some but not all of the criteria under Act 250 has led some to argue that the scope of review by this Board of a project's environmental impacts is narrower than the review of such impacts by the District Commissions under Act 250. *See, e.g.*, In re: Georgia Mountain Community Wind, LLC, Docket No. 7508, Findings & Order at 27-28 (June 11, 2010) (considering contention that stricter standards of environmental review are inappropriate for renewable generation projects). This argument has been consistently and resoundingly rejected by this Board, which has made it clear that its review of environmental impacts is not limited by the Act 250 criteria selectively enumerated in subsection (b)(5). *See id.* ("Depending on the nature and scope of a project's impacts, the Board may extend the review of that project's impacts beyond the referenced criteria of Act 250 under Section 248(b)(5)"); *see also* Petition of Deerfield Wind, LLC, Docket 7250, Order at 73 (April 16, 2009 (*citing* City of South Burlington v. Vermont Electric Power Co., 133 Vt. 438 (1975)). This Board must determine whether a project will have an undue adverse effect on the natural environment and, in doing so, "often expand[s] [its] analysis of the project's impacts beyond the narrow Act 250 criteria." Georgia Mtn. at 28.

Indeed, this Board "has consistently held" that its "evaluation under the Act 250 criteria is not dispositive, as we must, in the end, apply Section 248(b)(5) and determine

whether the Project will have an undue adverse effect on the natural environment." *Id.* at 28-29. Thus, this Board's review encompasses not only those Act 250 criteria enumerated in Section 248(b)(5), but also the remaining Act 250 criteria – as well as other environmental impacts not considered under Act 250.

An example of this is the fact that this Board on occasion has considered projects' impacts to primary agricultural soils, which is listed under Act 250 Criterion 9(B), a criterion omitted from Section 248(b)(5). *See, e.g.*, Petition of Triland Partners, LP, Docket 7632, Decision at 27 (Nov. 30, 2010); *see also* Petition of Green Mountain Power Corp., Docket No. 7601, Decision at 3 (May 4, 2010). In this regard, Petitioner reminds the Board that the Agency of Agriculture, Food and Markets has filed an appearance in the Fair Haven Docket, and will be examining the Project's impacts, if any, upon important State and local soils. Furthermore, it goes without saying that this Board's review of energy generation projects often encompasses other Act 250 criteria that are not listed in Section 248(b)(5), such as energy conservation (Act 250 Criterion 9F), private utilities (Criterion 9(G)), and public utilities (Criterion 9(J)). Again, the Board has made it clear that the Board's jurisdiction is sufficiently broad to encompass not only all of the Act 250 criteria, but all other environmental impacts as well.

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. The Projects' potential impacts to the environment will be adequately considered and addressed by this Board in connection with this proceeding. A separate review of any portion of the Projects by the District Commission would be at best redundant, and at

worst would lead to inconsistent or contradictory results and/or conditions, and should not be allowed.

VI. Treating The Pellet And Power Facilities As Separate Projects Will Lead To Absurd Results.

In construing the scope of the Board's jurisdiction under Section 248, it is important not to adopt a limited view of the scope of that jurisdiction as it "is essential that the construction not be such that will render the act ineffective or lead to irrational consequences." Audette v. Greer, 134 Vt. 300, 302 (1976) (citations omitted). Mandating separate Act 250 review of the pellet facility will make enforcement impractical and defeat the statute's purpose.

For example, 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. This 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 which delivering materials for the pellet facility. A truck could enter the site for one purpose and leave for another. A car entering the facility could be driven by an employee who works for both facilities. When the debarker or conveyor belt that carries waste product from the pellet process to the electrical facility to be used as fuel is running, to which facility should that noise be attributed? As is immediately evident, the issuance of two land use permits for the same Projects would make enforcement virtually impossible. Furthermore, 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 different periods of time, enforcement becomes even more difficult.

Further consider the possible complications that could arise from dual review of the Projects' aesthetic impacts. The Board might conclude that one the Projects complies with the *Quechee* test. As this is largely a subjective analysis, the District Commission, on the same evidence, could conclude that it did not. Assuming the Commission's decision is affirmed on appeal to Environmental Court and both decisions are appealed to the Supreme Court, the Supreme Court would be faced with an impossible dilemma. Per its existing standards of review, the Supreme Court would be expected to show deference to both the Environmental Court and Board's conflicting decisions and could affirm two contrary findings or be forced to conduct its own independent review of the record, reach its own conclusions and fashion its own mitigation measures. The same could happen with respect to any number of issues form whether the site consists of prime agricultural land to whether there are unacceptable wetland impacts.

VII. Joint Review Will Result in Greater Judicial Efficiency.

As already pointed out, requiring duplicative reviews of the Projects' environmental impacts under Act 250 and Section 248 serves no purpose. The only outcome of such redundant reviews would be to reduce judicial efficiency and increase the opportunities for inconsistent of contradictory results or conditions imposed upon the Projects. It would also strongly discourage developers of such innovative renewable energy facilities from attempting to locate such projects in Vermont. Requiring a separate land use permit for closely-integrated projects would double the development cost, increase uncertainty of obtaining a permit, and increase the possibility of a lengthy

appeals process, thereby dissuading developers from attempting this type of development in Vermont, despite Vermont's stated policy of promoting the development of such projects. Beyond the fact that such result makes no common sense, it is contrary to Vermont law and judicial policy. Dual review by judicial or quasi-judicial bodies has long been discouraged for this reason.

In fact, the doctrine of claim preclusion exists precisely to prevent such redundant review of the same issue by two separate panels, or by the same panel at different times. *See, e.g.*, Faulkner v. Caledonia County Fair Ass'n, 2004 VT 123, 178 Vt. 51, 54-55, 869 A.2d 103, 107 (2004) (noting that the doctrine of claim preclusion "advances the efficient and fair administration of justice" because it serves "(1) to conserve the resources of courts and litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudication." *Citing* In re Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 20, 769 A.2d 668, 673 (2001)). Allowing these Projects' potential impacts upon the environment to be reviewed separately by this Board and the District Commission would be contrary to the efficient and fair administration of justice, would waste the resources of both panels and the Petitioner, would encourage vexatious litigation, would jeopardize the finality of judgments, and would increase the chances of inconsistent adjudication. This Board's review of the Projects will be adequate to address any and all environmental impacts. Further review by the District Commission of the same impacts serves no purpose, is contrary to established judicial policy and precedent, and should not be allowed.

VIII. The Jurisdictional Grant Should Be Construed In Such A Manner As To Advance The Statute's Purpose.

The legislature stated that it is State policy to embrace renewable energy and "to ensure that to the greatest extent possible, the economic benefits of renewable energy in the state flow to the Vermont economy in general, and to the rate paying citizens of the state in particular." 30 V.S.A. § 8001(a)(1). It is State policy to "support development of renewable energy and related planned energy industries in Vermont, in particular, while retaining and supporting existing renewable energy infrastructure" and to support "[d]eveloping viable markets for renewable energy." 30 V.S.A. § 8001 (a)(2) and (a)(4). The Projects are the kind of development the legislature has expressly supported, *i.e.*, renewable energy projects where the benefits flow to Vermont rate-payers. A narrow reading of the Board's jurisdictional grant would defeat Title 30's stated purpose of promoting this type of development. Therefore, the Board should conclude that the pellet facility is reasonably related to the electrical facility and assume jurisdiction over both.

CONCLUSION

For all the forgoing reasons, BWE respectfully requests that the Board review the environmental impacts associated with the fully integrated making a separate Act 250 proceeding unnecessary.

Dated at Rutland, Vermont this 14th day of January, 2011.

KENLAN, SCHWIEBERT, FACEY & GOSS, P.C.

By_____

Hans G. Huessy, Esq.
Attorney for Beaver Wood Energy Pownal, LLC
and Beaver Wood Energy Fair Haven, LLC

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AFFIDAVIT OF WILLIAM BOUSQUET

William Bousquet, being duly sworn, deposes and says:

1. My name is William Bousquet. I am more than eighteen years old and competent to testify to the matters set forth herein of which I have personal knowledge.
2. The primary purpose for integrating the wood pellet facility into the power plant is to increase the efficiency of the combined facilities. The use of waste heat from the power generation facility in the manufacture of pellets increases the combined plants' energy efficiency by approximately 15%.
3. The pellet facility represents less than 15% of the total project cost while the power plant represents more than 85%.

4. While the power plants can be constructed without the integration of the pellet facilities, the resulting separate facilities would be markedly less energy efficient.
5. The Pownal Project has applied for and/or received approximately 20 permits, the Fair Haven Project has applied for and/or received approximately 30 permits.
6. To date every permitting entity has treated the pellet and generating facilities as a single, fully-integrated project.
7. There will be a single air permit, access permit, water withdrawal permit, and stormwater permit.
8. The power plant and pellet facility are located on the same lot and will share interior roads, electrical service, potable water supplies, office space, stormwater discharge system, storage areas, truck scales, fire protection systems, ingresses and egresses from state roads, exterior fences, parking areas, security lighting, conveyor belt systems, septic systems in addition to other features.
9. Certain employees will be shared, e.g. security personnel and office staff. The plants will likely share a single fuel procurement employee and contract with a single forestry consultant. There will also be identical management and cross-training of employees.
10. Exhibits A and B to Petitioners' Memorandum are color coded site maps of the facilities showing the shared aspects of the facilities and showing the degree to which the two facilities, pellet and electrical, are physically intertwined.
11. The sole purpose for co-locating the two facilities is to increase the overall efficiency of the electrical generating facility.
12. Petitioners are not in the wood pellet business nor have they ever been.

13. When Petitioners designed the plants, they explored means of increasing the plants' overall efficiency and determined that the integration of a pellet facility on-site was the most beneficial means of accomplishing that goal.

14. Petitioners have no interest in constructing and operating a pellet facility that was not fully integrated with the electrical facility.

15. The two facilities are engineered to function as a single unit. The power plant must be running for the pellet facility to operate as expected and if the power plant goes off-line, the production of pellets falls precipitously.

16. The pellet facility uses waste heat from the electrical facility to dry the pellet stock and steam from the electrical facility to pre-treat the pellet stock.

17. Waste from the production of the pellets is used as fuel in the electrical facility.

18. Further deponent sayeth not.

DATED at Hollis, New Hampshire this 14 day of January, 2011.

William Bousquet

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Subscribed and sworn to this 14 day of January, 2011, before me.

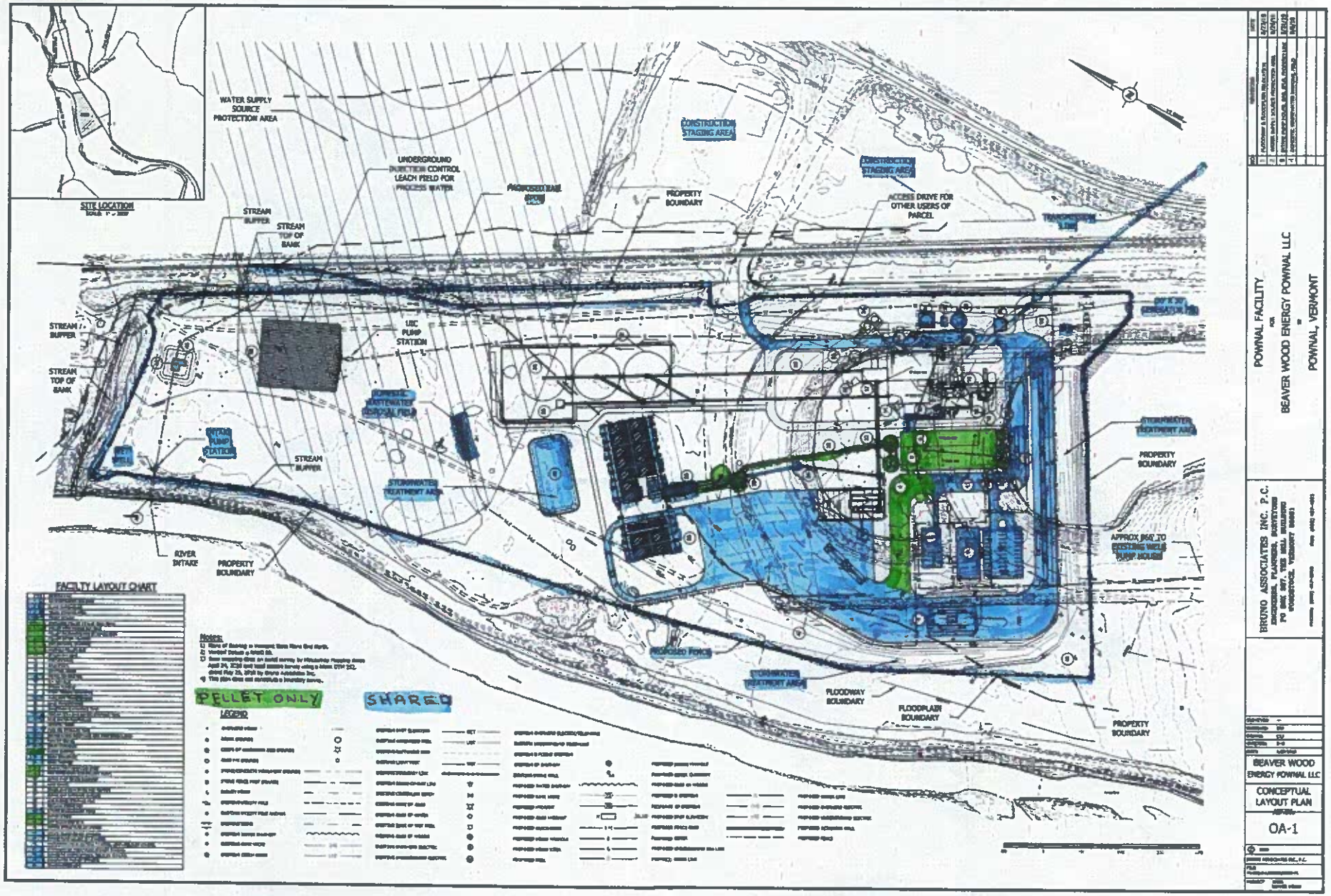
NOTARY PUBLIC

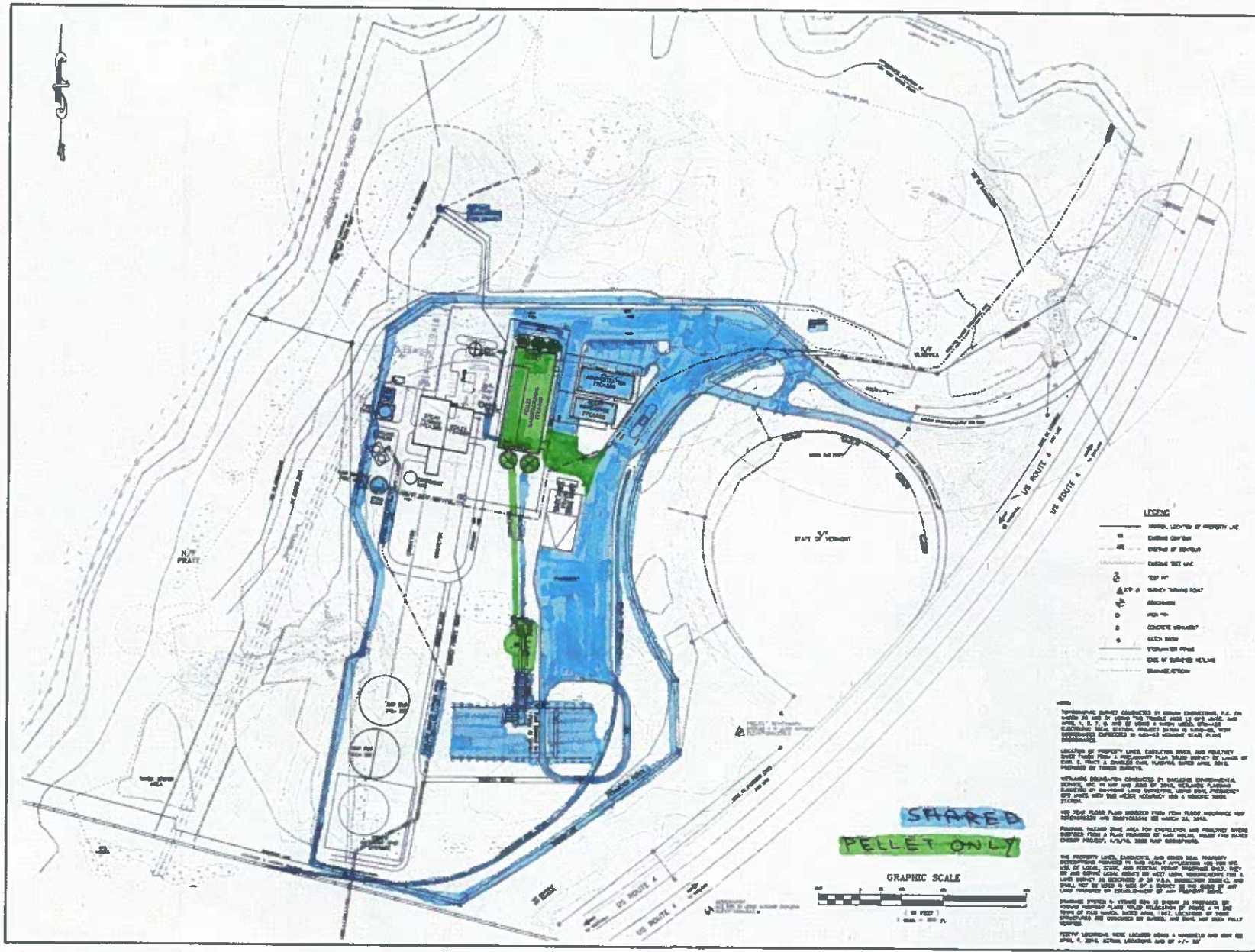
Notary Commission Expires:

BRENDA RANDLETT
Notary Public - New Hampshire
My Commission Expires December 11, 2012

EXHIBIT

B


SITE LOCATION
WATER SUPPLY SOURCE PROTECTION AREA
UNDERGROUND INJECTION CONTROL LEACH FIELD FOR PROCESS WATER
PROPOSED BASE
CONSTRUCTION STAGING AREA
CONSTRUCTION STAGING AREA
PROPERTY BOUNDARY
ACCESS DRIVE FOR OTHER USERS OF PARCEL
TRANSFORMER
STREAM BUFFER
STREAM TOP OF BANK
STREAM BUFFER
STREAM TOP OF BANK
UIC PUMP STATION
STORMWATER DISPOSAL FIELD
WATER PUMP STATION
STREAM BUFFER
STORMWATER TREATMENT AREA
STORMWATER TREATMENT AREA
PROPERTY BOUNDARY
APPROX 950' TO EXISTING WELL PUMP HOUSE
RIVER INTAKE
PROPERTY BOUNDARY
PROPOSED FENCE
STORMWATER TREATMENT AREA
FLOODWAY BOUNDARY
FLOODPLAIN BOUNDARY
PROPERTY BOUNDARY
FACILITY LAYOUT CHART
PELLET ONLY
SHARED
LEGEND
POWNAL FACILITY
FOR
BEAVER WOOD ENERGY POWNAL LLC
POWNAL, VERMONT
BRUNO ASSOCIATES INC. P.C.
BEAVER WOOD ENERGY POWNAL LLC
CONCEPTUAL LAYOUT PLAN
OA-1



DESIGN DATE:	06/16/10
RELEASE DATE:	09/07/10
ISSUED FOR:	PRELIMINARY PLANNING
REVISIONS:	

BEAVER WOOD ENERGY
FAIR HAVEN, LLC

U.S. ROUTE 4
FAIR HAVEN, VERMONT

Enman Engineering

PRELIMINARY SITE LAYOUT PLAN

SCALE:	AS NOTED
DESIGN BY:	BJE/NSK
DRAWN BY:	JPL
SHEET NO:	C2
PROJECT NO:	9833.1

EXHIBIT
C