



July 19, 2011

Terese Churchill  
EverGreen Environmental Health & Safety, Inc.  
345 May Farm Road  
Barton Vermont 05822

Re: Jurisdictional Opinion 5-15 State of Vermont Capitol Complex Central Heat Plant  
Replacement, City of Montpelier

Dear Terese:

This letter constitutes a Jurisdictional Opinion, pursuant to the provisions of 10 V.S.A. 6007(C) and Act 250 Rule 3, and is issued in response to your request dated June 20, 2011 and filed by means of electronic transmission. In summary, the issue at hand is whether the upgrade and expansion of the existing central heat plant situated behind 120 State Street in the City of Montpelier, will require the filing of an application for a land use permit for the review of the District 5 Environmental Commission. A proposed Jurisdictional Opinion was circulated on June 29, 2011 for comments from yourself, the Department of Buildings and General Services, and the statutory parties. Comments were requested by July 16, 2011. No comments were filed by July 18, 2011, the next business day following the comment deadline [Act 250 Rule 6]. As explained below, the conclusion is that a land use permit will be required because the proposal constitutes a "substantial change" to "pre-existing development" pursuant to 10 V.S.A. 6081(b) and Act 250 Rule 2(C)(7).

### **FACTS**

1. The salient and relevant facts are those contained in the June 20, 2011 filing by EverGreen Environmental Health & Safety, Inc. The State of Vermont, through the Department of Buildings and General Services will upgrade the existing Capitol Complex district heat plant to incorporate two modern combination biomass and #2 fuel oil steam boilers rated at 600BHP per unit. The proposal will involve a new building to accommodate the boilers, wood chip handling and auxiliaries. An existing oil boiler will be converted to accommodate #2 fuel oil and will serve as an emergency backup unit. The new boiler plant will provide low pressure steam to the existing Capitol Complex steam distribution system. Thermal energy conversion and consequent heat exchange capability at the heat plant will allow for a possible future interconnection to a hot water distribution system.
2. Site and floor plans for the proposed project did not accompany the June 20, 2011 submittals. However, the submittals state that the existing above ground central heat plant building will be expanded, either to the east or to the west, and that the existing above ground central heat plant building may be demolished.
3. The present proposal is similar in scope to a proposal brought forward in December 2006 and which was the subject of a jurisdictional Project Review Sheet dated January 12, 2007 indicating that a land use permit was required pursuant to the provisions of 10 V.S.A. 6081(b) and Act 250 Rule 2(C)(7).

4. As was described in more detail in jurisdictional Advisory Opinions 5-21 and 5-22, both issued on December 30, 1985, the Capitol Complex, a designated 27 acre area of the City of Montpelier including 24 acres of State owned property and 4 acres of private lands, was determined to constitute a “pre-existing development”.

### **CONCLUSIONS**

The provisions of 10 V.S.A. 6081(b) set out legislative requirements for land use permits for otherwise pre-existing developments. Further legislative provisions specify exceptions to the general “substantial change” standard and 10 V.S.A. 6081(d) specifically states, in pertinent part:

- (d) *For purposes of this section, the following construction of improvements to preexisting municipal, county, or state projects shall not be considered to be substantial changes and shall not require a permit as provided under subsection (a) of this section...*
- (4) *municipal, county, or state building renovations or reconstruction that does not expand the floor space of the building by more than 25 percent.*

Rule 2(C)(7) reads:

*“Substantial change” means any change in a pre-existing development or subdivision which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10).*

As a threshold matter, without supplemental facts concerning the dimensions of the building proposal, it is not possible to determine whether the proposal qualifies for the 25% footprint exception created by 10 V.S.A. 608(d)(4). It has been held that a person laying claim to a jurisdictional exemption or exception bears the evidentiary burden of proof for providing adequate facts to support such a claim [See, eg, Village of Cambridge Declaratory Ruling 272 at page 8 (September 15, 1993), citing Bluto vs. Department of Employment Security 135 Vt 205 (1977)].

Additional jurisdictional analysis is necessary because of the conclusions stated in the two 1985 advisory opinions, neither of which were appealed to the Environmental Board or Supreme Court. In those decisions, jurisdiction applied to proposed expansions of the State House, the Pavilion office building and the Supreme Court building.\* The Environmental Board and Supreme Court have generally held that jurisdictional determinations are binding and final on persons who are provided such determinations [See, eg, Merritt Declaratory Ruling 407 (June 20, 2002)] and that once jurisdiction is established, the jurisdiction of a District Commission is continuing (See In re: Rusin 162 Vt 185 (1994); In re: Wildcat Construction Co., Inc. 160 Vt 631 (1993)). Thus, there is reason to believe that the 1985 jurisdictional determinations, concerning the 27 acre area of the Capitol Complex as a “pre-existing development”, are controlling with respect to the present jurisdictional inquiry. In other words, the provisions of 10 V.S.A. 6081(d)(4) notwithstanding, the proposed changes to the central heat plant are to be viewed as changes to the “pre-existing development” as was previously defined in the 1985 decisions. In this context, the principle of res judicata would apply and the question of “pre-existing development” for Capitol Complex jurisdictional analyses under Act 250 has been previously settled. [In re: Quechee Lakes Corp. 154 Vt 543 (1990); Merritt, *supra*; Berlin Associates 5W0584-14-EB (February 4, 1993)].

\* These building expansions were subsequently authorized by Land Use Permits 5W0881 and 5W0884.

Over time Environmental Board, Environmental Court and Supreme Court decisions have provided guidance in the application of the “substantial change” rule. Essentially, the “substantial change” analysis involves a two-part inquiry: 1) whether a “cognizable change” is proposed and 2) whether the change has the potential for significant impact under one or more of the criteria of Act 250 [See, eg, In re Manosh Corp. 147 Vt 367 (1986); In re: Snopek and Telscher #269-12-07 Vtec (July 24, 2008); Vermont Association of Snow Travelers Declaratory Ruling 430 (March 11, 2005)].

A “cognizable change” is a physical change [See Developer’s Diversified Realty Corp. Declaratory Rulings 364, 371 and 375 (March 25, 1999)]. In-kind, replacement of existing equipment with substantially similar equipment is not a cognizable change [(F.W. Whitcomb Construction Co. Declaratory Ruling 408 (December 19, 2002)]. In the present matter, and based upon available facts, the proposed physical changes to the central heat plant are cognizable changes and do not qualify for the Whitcomb “in-kind” exception.

The second part of the “substantial change” inquiry - the potential (emphasis added) for significant impact under Act 250 criteria is specific to the project site and design. Based upon available facts about the project and its location, it is reasonable to conclude that the upgrade to the central heat plant represents the potential for significant impacts under criteria 1 (Air Pollution), 1(D), 1(F), 4, 5 and 8 (aesthetics and historic sites).

Based upon the above analysis of statutory and regulatory provisions and case precedents, it is concluded that the proposed construction of improvements to upgrade and expand the Capitol Complex central heat plant are “substantial changes” requiring the filing of an application for a land use permit for the review of the District 5 Environmental Commission.

Sincerely,

/s/ *Edward Stanak*  
Edward Stanak  
District Coordinator

cc: Jeff W. Lively, Esq., Department of Buildings and General Services  
City of Montpelier Council  
City of Montpelier Planning Commission  
Central Vermont Regional Planning Commission  
Agency of Natural Resources: Attn. Elizabeth Lord, Esq.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Natural Resources Board Rule 3(A).

Reconsideration requests are governed by Natural Resources Board Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., National Life Drive, Montpelier, Vermont 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at [www.vermontjudiciary.org](http://www.vermontjudiciary.org). The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

