

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

RE: Town of Springfield) Declaratory Ruling #111
Hydroelectric Project)
)

This is a request for a declaratory ruling pursuant to 3 V.S.A. 5808 and Environmental Board Rule 4, as to the applicability of 10 V.S.A. Chapter 151 (Act 250) to the Black River Hydroelectric Project, a multifacility generating project proposed to be constructed by the municipal utility of the Town of Springfield, Vermont. The Town of Cavendish filed related requests for declaratory rulings concerning the Black River Project with the Public Service Board and the Environmental Board. On March 21, 1980 Margaret P. Garland, - the Chairman of the Environmental Board, and Richard Saudek, Chairman of the Public Service Board, held a joint pre-hearing conference on these petitions. Following that conference, the two boards decided not to hold a joint hearing on these petitions. A second pre-hearing conference was held on August 27, 1980 before Leonard U. Wilson, Chairman of the Environmental Board. The Environmental Board heard this matter in a public hearing on September 9, 1980, with Chairman Wilson presiding. The following parties were present:

Petitioner, Town of Cavendish, by Sarah E. Vail, Esq.
Town of Springfield, by John Parker, Esq.
Town of Weathersfield, by Karl Stevens, Town Manager
Concerned Citizens of the Black River Valley, by
N. Lawrence Niles, Esq.
Town of Ludlow, by Dean Brown, Jr.

As stated in the pre-hearing conference report, this petition raises the following issues:

1. Whether the jurisdiction of Act 250 extends to Springfield's hydroelectric project or any portion of it;
2. Whether, if such jurisdiction exists, it is nonetheless preempted by federal law; and,
3. Whether the petition should be dismissed as untimely and outside of the jurisdiction of the Environmental Board altogether.

Findings of Fact

1. The Town of Springfield, Vermont proposes to construct a hydroelectric generating project on the Black River in the Towns of Cavendish, Weathersfield, and Springfield, Vermont. The project includes six generating units:

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- a. The largest unit is the Hawks Mountain Dam located on the Cavendish/Weathersfield town line. This dam will be of earth fill construction, 165 feet in height and 900 feet in length at the crest. The impoundment of this dam would extend approximately five miles upstream. Its power output would be **14,600 Kw**;
 - b. The Covered Bridge generating unit (3,170 Kw) would be located downstream of the Hawks Mountain unit in the Town of Weathersfield;
 - c. Three additional generating units would be located in downtown Springfield. All three of these sites, **Gilman** (2,870 Kw), **Comtu Falls** (2,960 Kw) and **Lovejoy** (3,270 Kw) have previously been used for hydroelectric generation.
2. The Town of Springfield has prepared a detailed project proposal for the Black River Project, and has submitted that proposal to the Federal Energy Regulatory Commission (**FERC**) in application for a license to construct the facilities, pursuant to federal law. (Exhibit #1)
 3. The Black River Project includes elements that are integral to the generation of electric power, chiefly the dam structures, power houses, transmission lines, and the impoundments themselves. The project also includes several elements that are not integral to the generation of power, including the reconstruction and relocation of approximately 5.5 miles of Vermont Route 131, and the creation and operation of a set of public access recreational areas: Hawks Mountain Boat Launch, **Tarbell** Road Park, Elm Brook Boat Launch, and a Perimeter Trail System. These improvements involve more than 10 acres of land.
 4. The **Concerned** Citizens of the Black River Valley (CCBRV) is an organization of citizens of the Towns of Cavendish, Weathersfield, Springfield and other Vermont communities who have an active **interest** in the Black River Project. Members of the CCBRV have obtained **intervenor** status in licensing proceedings on this project before the Federal Energy Regulatory Commission. The Board finds that the CCBRV and its members will materially assist the Board in its consideration of this petition, and that they satisfy the requirements of Board Rule 12(C) in that respect.

Conclusions of Law

1. The Town of Springfield has objected to the Board's consideration of this petition, arguing that our jurisdiction is totally preempted by federal law, and that the matter

is not ripe for review in any event because the project has not yet received final approval from the Town or from FERC. We do not agree with those objections. The Board is granted authority to rule on petitions for declaratory rulings in 3 V.S.A. 5808. Both that statute and the Board's Rules state that an interested person may seek a ruling "as to the applicability of any statutory provision or of any rule or order" of the Board. This review may be sought whether or not the proposed project has received final approvals or full funding. The jurisdictional question can be answered so long as the proposed project is sufficiently well-defined within the jurisdictional terms of Act 250 to permit a reasoned review of the applicability of the statutory language. Compare In re State Buildings Division (D.R. #121, October 29, 1980) with In re Waterland (D.R. #113, April 29, 1980). If the project is so defined, we need not wait until construction is imminent to reach the jurisdictional question. The Town of Springfield has prepared a detailed plan for this project and has submitted those plans to FERC for its review. We conclude that those plans indicate the serious intentions of the developer and that they provide sufficient information to support our review of the present petition. This is not an abstract or hypothetical question but an actual, pending application for a specific project affecting the rights and interests of the petitioners.

We also reject Springfield's argument that we are preempted by federal law from even considering the petition before us. The doctrine of preemption is a substantive doctrine, restraining the operation of state law which is in conflict with the legitimate exercise of federal authority. But the question of whether preemption applies is a matter for state as well as federal consideration. See, e.g., Citizens Utilities Co. v. Prouty, 122 Vt. 443 (1961). We conclude that we are obliged by §808 of the Administrative Procedure Act, as well as Act 250 and our own Rules to address the question of federal preemption when it is raised before us. See In re Green Mountain Power Corp. (D.R. #120, November 14, 1980).

2. The Black River Hydroelectric Project is a development for municipal purposes on a tract of land involving more than 10 acres. This project would thus be subject to the jurisdiction of Act 250 were it not for the exemption in the statute applying to "an electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30." 10 V.S.A. §6001(3). This Board has recently considered this exemption in another context, and has concluded that it extends only to "those physical improvements and development activities that are directly related to the construction and operation

of the generating facility." In re Burlington Electric Department (D.R. #119, October 8, 1980). See also, Opinion No. 715, 1971 Op. Atty. Gen. 167. In the present case, we conclude that the exemption extends to the dams and their impoundments, as well as the associated powerhouses and **transmission** lines. The exemption applies to access roads and other transportation facilities only to the

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16 §791a, seq., 42 U.S.C. §717d(a).

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First Iowa coop. v. FPC 328 U.S. 151 (1945); Citizens Utility Co. v. Prouty, 122 Vt. 443 (1961). However, the existence of a federal program in a field does not automatically exclude concurrent state review of some or all of the activities in that field. The federal licensing program established in the Federal Power Act applies **only** to "project works" or "projects." These **defined** in the federal statute as follows:

"(11) 'project' means complete unit of improve-
~~or development~~ of a power
 house, all water conduits, all dams and appur-
 tenant works and structures (including **naviga-**
 tion structures) which are a part of said
 unit, and all storage, diverting, or **forebay**
 reservoirs directly connected therewith, the

therefrom to the point of junction with the
 distribution system or with the interconnected
 primary transmission system, all miscellaneous
structures used and useful in connection with
 said unit or any part thereof, and all **water-**
rights, rights-of-way, ditches, dams, reser-
voirs, lands, or interest in lands the use
 and occupancy of which are necessary or appro-
 priate in the maintenance and operation of
 such unit;

"(12) 'project works' means the physical struc-
 tures of a project; ..." 16 U.S.C. 5796."

We conclude that the Federal Power Act does not preempt this Board from exercising its jurisdiction over corollary

At least with respect to the facts of this case, we conclude that the exemption from Act 250 jurisdiction for an electric generating "facility" under Vermont law is equal in scope to the federal preemption of Act 250 jurisdiction over "projects" and "project works." Improvements not directly related to the generation of electricity are neither exempt from Act 250 review pursuant to 10 V.S.A. §6001(3) nor preempted from Act 250 review under the Federal Power Act.

ORDER

The petitioner's request for review of the Black River Hydroelectric Project as a whole is denied. The Town of Springfield's motion to dismiss the petition as untimely is denied. The Town of Springfield may not commence construction on the relocation of Vermont Route 131 or the recreational areas associated with the hydroelectric project without obtaining an Act 250 permit for those improvements as required by 10 V.S.A. 6081(a).

Dated at Montpelier, Vermont this 19th day of January, 1981.

ENVIRONMENTAL BOARD

By Richard H. Cowart
Richard H. Cowart
Executive Officer

Members voting to issue
this decision:
Leonard U. Wilson
Ferdinand **Bongartz**
Dwight E. Burnham, Sr.
Melvin H. Carter)
Daniel C. Lyons)
Roger N. Miller