

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

RE: Green Mountain Power Corp.] Declaratory Ruling #120
and U.S. Dept. of Energy]
Thomas N. Wies, Esq.]
1 Main Street]
Burlington, Vermont 05401]

This is a petition for a declaratory ruling, filed on July 15, 1980 by the Save Lincoln Mountain Committee, concerning the applicability of Act 250 to a meteorological tower proposed to be built approximately 700 feet south of Lincoln Peak, Lincoln, Vermont, in the Green Mountain National Forest. The tower is to be built by the U.S. Department of Energy for the purpose of studying the meteorological conditions on Lincoln Ridge, and in particular, the suitability of the site for a large, wind-powered electrical generating facility. On August 26, 1980 a hearing was held on this matter before the Environmental Board in Bristol, Vermont, with Chairman Leonard U. Wilson presiding. The parties present at that hearing were:

Petitioner, Save Lincoln Mountain Committee, by
Richard F. Taylor, Esq.
Green Mountain Power Company, by Thomas Bucher
and Thomas N. Wies, Esq.
Village of Bristol, by R.W. Smith
Town of Lincoln, by William Finger
Lincoln Planning Commission, by Tari Shattuck
Addison County Regional Planning Commission,
by A.F. Johnson.

Findings of Fact

1. The U.S. Department of Energy (DOE) and the Green Mountain Power Corporation (GMP) have entered into an agreement concerning the erection and maintenance of a meteorological tower to be located approximately 700 feet south of Lincoln Peak, Lincoln, Vermont, in the Green Mountain National Forest. This tower will be approximately 160 feet in height, and of a triangular shape, 17 inches on each side. It will be supported by guy lines anchored into rocks on the ridge. It will be transported to the site over an existing access road and trail. The tower will be located at an elevation of 3930 feet.
2. The site of the proposed meteorological tower is on-federal land within the Green Mountain National Forest. The erection of the tower within the Forest requires a special use permit, which may be issued by the USDA Forest Service pursuant to federal statutory authority. The Forest Service has found that the location of the tower on National

Forest land is a legitimate and permissible use. See letter of Eric Curtis, Regional Attorney, U.S. Department of Agriculture, to Margaret Garland, Chairman, Vermont Environmental Board, dated July 25, 1980. An application for a special use permit for that purpose was filed with the Forest Service by Green Mountain Power on May 6, 1980.

3. We find that this research project is, in all significant respects, a project of the federal government, built with federal funds, under federal control, and located on federal land. We find that **GMP's** role in this project is limited for all practical purposes to the role of a contractor. This finding is based upon a careful review of the contract between GMP and DOE (Cooperative Agreement #DE-FC06-80RL10194, Exhibit #3), as well as the DOE Program Opportunity Notice (Exhibit #1), and the GMP application filed in response to that notice (Exhibit #2). These documents provide that:
 - a. DOE will pay for and furnish the meteorological tower, wind measuring instruments, data logger, and other equipment to be used in the research program. This equipment is to remain the property of DOE, and DOE remains responsible for maintaining it.
 - b. The information to be recorded by the measuring equipment is to remain the property of DOE, and will be decoded and evaluated by DOE or its authorized subcontractor.
 - c. Substantially all of the construction and assembly of the tower and its equipment will be done by DOE.

The responsibilities of GMP, by comparison, are relatively minor. GMP must provide legal access to the project site, must provide reasonable security to the facility, and must assign a trained employee to monitor the recording instruments and remove the data tapes for transmittal to DOE for decoding.

4. The information to be developed in this project will become part of DOE's national data base for the evaluation of the feasibility of wind-generated electricity.' This program is part of a national DOE program in support of that form of electrical generation. We are aware that GMP will also have access to that data, and that GMP has a potentially significant interest in the research as well as in the Lincoln Ridge site as a potential site for a wind generator. However, we do not feel that **GMP's** future interest in this site is sufficient to alter our finding that at this stage the research program is a federal project, and that GMP is merely a contractor for that program.

Conclusions of Law

1. The jurisdiction of Act 250, 10 V.S.A. Chapter 151, extends to the construction of improvements for any purpose above the elevation of 2500 feet. 10 V.S.A. **§6081** and **§6001(3)**; Board Rule **2(A)(1)**. The searching and sensitive scrutiny of the Act is applied without exception to improvements at that elevation because of the particularly fragile nature of the ecology of our high mountaintops, and because of their dramatic visibility and scenic importance to the State of Vermont. In the absence of the exercise of countervailing federal power, the construction and operation of the meteorological tower on Lincoln Ridge would be subject to the permit requirements of Act 250.
2. The federal government, through the USDA Forest Service, and the federal contractor, GMP, have set out a claim of federal preemption of the power of the State of Vermont to exercise its permit authority over this project. See letter of John **McArdle**, Forest Supervisor, to Michael Robinson, Coordinator, District #5 Environmental Commission, dated June 6, 1980; and letter of Eric Curtis, Regional Attorney, U.S. Department of Agriculture, to Margaret Garland, Chairman, Vermont Environmental Board, dated July 25, 1980. While we regret that in these sensitive circumstances such a claim has been raised, we feel it is our obligation to consider the claim within our normal procedure for determining declaratory ruling requests.
3. The Green Mountain National Forest was created in Vermont with the **consent of** the State as set forth in 1 V.S.A. **§§554-556**. Those statutory sections authorize the United States to acquire lands in certain areas for the creation of the National Forest; the site which is the subject of this petition was so acquired. The statute states, "The United States shall have jurisdiction to make and enforce such laws, rules and regulations as the **United States** shall deem necessary for the administration, protection and management of such national forests." 1 V.S.A. **§555**. Although the statute states that the jurisdiction of Vermont **will** apply in the national forests "in all other respects," 1 V.S.A. **§556**, we conclude that the scope of state jurisdiction is limited and the statute gives the **United States** the authority to regulate 'the use of land by the federal government within the national forest to the extent it deems it necessary to do so. The Forest Service has established applicable rules and regulations and a special use permit program for this purpose.
4. The Supremacy and Property Clauses of the United States Constitution, Article VI, Clause 2 and Article IV, Section 3, Clause 2 establish the principle of federal **supremacy** and control of federal programs and federal facilities. Federal authority to administer federal programs and

facilities will preempt any conflicting state regulation except where Congress authorizes concurrent state control. Kleppe V. New Mexico, 426 U.S. 529 (1976). This principle is accepted by the Vermont courts. Citizens Utilities Co. v. Prouty, 122 Vt. 443 (1961). We have found that the meteorological tower on Lincoln Ridge is a federal project to be located exclusively on federal land. We have found no grant of concurrent state regulation in the federal statutes relevant to this matter; we must therefore conclude, that the application of Act 250 to this project is preempted by federal law.

Discussion

. While **concluding that** the development in question is a federal project on federal land, and that the jurisdiction of Act 250 has, therefore, been preempted, the Board believes that the federal agencies involved have the authority to exercise their jurisdiction concurrently with the environmental agencies of the state. Forest Service planning regulations commit the Service to coordination with state governments to ensure that state and-federal government objectives, policies and programs are compatible to the extent possible. See Forest Service Manual, Subparagraph 219.8(a). From the testimony given and the DOE Program Opportunity Notice (Exhibit #1 at A.5.C), it appears that that **agency** is concerned with state regulatory agency attitudes on environmental considerations. It would seem that in a state with clearly articulated development and environmental. objectives and a citizen participation process for evaluating proposed development in the light of these objectives, the responsible federal agencies would wish to encourage state involvement in the review of development proposals within the National Forest.

Our nation and our state are faced with a wide range of environmental and resource problems of substantial technical, economic, and environmental complexity; --The resolution of most of these problems will require the cooperation, trust, and meaningful participation of citizens and entities of all levels of government. The federal government has played, and most likely will continue to play, a **major** role in the **promotion and** development of energy production facilities. We raise no objection to this role. We raise no objection to a nationwide wind power research program. But we must protest the **imple-**mentation of federal energy programs in the State of Vermont without the full application of our environmental statutes, **and** without the full participation of the citizens of Vermont as provided for in those statutes.

Dated at Montpelier, Vermont this 14th day of November, 1980.

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.

Members opposed:
Melvin H. Carter
Michael A. Kimack