

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

RE: Chace Mill Hydroelectric Project Findings of Fact and  
Winooski and Burlington, Vermont Conclusions of Law  
Declaratory Ruling #128

On July 1, 1981 the City of Winooski filed with the Environmental Board (the "Board") a petition for a declaratory ruling as to the applicability of 10 V.S.A., Chapter 151 (Act 250) to the Chace Mill Hydroelectric Project proposed by Burlington Electric Department ("BED"). The facility is **described** as a "run-of-the-river" project with a 12 megawatt installed capacity to be located in Winooski and Burlington, Vermont. The project boundaries extend into Colchester and South Burlington, Vermont.

Chairman Leonard U. Wilson held a pre-hearing conference on July 27, 1981 in South Burlington, Vermont. At that pre-hearing conference, BED presented a motion to deny without hearing the City of Winooski's petition. On August 11, 1981 the Board convened in South Burlington, Vermont to hear oral \*argument on BED's motion. The Board issued a Memorandum of Decision on August 18, 1981 denying BED's motion. In the Decision, the Board granted a request from the City of Winooski to defer action on this petition until the Public Service Board ("**PSB**") ruled upon a declaratory ruling request filed May 4, 1981 by the City of Winooski.

On-September 14, 1981 BED filed its own petition requesting the Board to declare the Chace Mill Hydroelectric Project exempt from Act 250 review. On September 30, 1981 the Board convened in South Burlington, Vermont to hear oral argument on this issue. On October 2, 1981 the Board issued a second Memorandum of Decision stating it would defer action until the PSB ruled upon the City of Winooski's May 4, 1981 request. On February 9, 1982 the PSB ruled that BED's proposed Chace Mill project requires review under 30 V.S.A. 5248.

On March 10, 1982 BED renewed its September 14, 1981 hearing request to the Board. The City of Winooski asked the Board to continue to defer action until BED's challenge to the **PSB's** ruling is resolved in the United States District Court. On April 19, 1982 the Board issued a third Memorandum of Decision deferring action on the petition.

On May 3, 1982 BED filed an objection to the Board's continued deferral of this matter and withdrew its hearing

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requests of September 14, 1981 and March 10, 1982. On May 19, 1982 the Board issued a fourth Memorandum of Decision stating that it had decided to reopen this matter and hold a public hearing.

Lawrence H. Bruce, Jr., member of the Board, held a second pre-hearing conference on June 17, 1982 in Essex Junction, Vermont. A public hearing was scheduled for June 30, 1982. The hearing was postponed at the request of the City of Winooski and with the agreement of the parties.

The Board convened a public hearing on the petition on October 12, 1982 at City Hall, Winooski, Vermont. The following parties were present:

Petitioner, City of Winooski by William E. **Wargo**, Esq.; and **Burlington Electric** Department by Robert E. Fletcher, Esq.

At the hearing the Board heard a description of the project and oral argument on the applicability of Act 250 to the project. The parties agreed to the admission of BED's license application before the Federal Energy Regulatory Commission ("**FERC**") for use by the Board in this proceeding. The hearing was recessed pending receipt of proposed Findings of Fact and Conclusions of Law, memoranda of law and a review of the record. The Board received requests for findings and conclusions and memoranda of law on October 25, 1982. On October 26, 1982 **the** Board determined the record complete and adjourned the hearing. The City of Winooski's original petition for declaratory ruling is now ready for decision.

A. ISSUE RAISED BY THE DECLARATORY RULING REQUEST

The declaratory ruling request raises the **issue** of whether Act 250 jurisdiction applies to BED's proposed Chace Mill hydroelectric project; specifically,

- (a) does 10 V.S.A. **§6001(3)** exempt the hydroelectric project from Act 250 jurisdiction because development is defined not to "include an electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30;" and
- (b) are there corollary improvements or improvements incidental to the hydroelectric project subject to Act 250 jurisdiction.

B. FINDINGS OF FACT

1. The City of Burlington Electric Department proposes to construct a hydroelectric generating facility on the Winooski River. The Chace Mill project will be a

run-of-the-river hydroelectric development, located in Winooski and Burlington, Vermont with project boundaries extending into Colchester and South Burlington, Vermont. The dam and intake will be located approximately 750 feet upstream of the bridge carrying U.S. Routes 2 and 7 between Burlington and Winooski. The project will consist of a dam with minimal ponding capacity, an intake structure, a tunnel penstock, powerhouse, tailrace and connection to an electric transmission facility serving the site. There is 56 feet of head available. Average annual energy output is estimated at 43,000 MWH with an installed capacity of approximately 12 MW. Because the upstream stations are operated as peaking facilities, the flow regime governing the Chace Mill project will cause it to be a "run-of-the-river/peaking" facility. Exhibit #1.

2. In July, 1980 BED applied to FERC for a license to construct and operate this facility. Exhibit #1. The FERC application is still under review.
3. According to Exhibit R contained in BED's FERC application, BED is specifically setting aside approximately .73 acres of land for future recreational development. The land is located along the river front adjacent to the intake structure for the project. The frontage will allow access via the service road to the area upstream of the dam for canoeing, boating, and skating. The site itself will provide for various forms of small group activities. There is no evidence of any physical construction activities on this .73 acre of land. Exhibit #1.
4. On May 4, 1981 the City of Winooski filed a declaratory ruling request with the PSB. On February 9, 1982 the PSB ruled that the Chace Mill hydroelectric project requires a Certificate of Public Good under 30 V.S.A. §248 ("Section 248"). BED has challenged the PSB ruling before the United States District Court in Vermont.

C. CONCLUSIONS OF LAW

1. The Board concludes that BED's Chace Mill hydroelectric project is not subject to Act 250 jurisdiction:
  - ..(a) On February 9, 1982 the PSB ruled that the hydroelectric project requires a Certificate of Public Good under Section 248. Under 10 V.S.A. §6001(3), hydroelectric facilities that require a Certificate of Public Good under Section 248 are

exempt from Act 250 jurisdiction. Therefore, the Board is without authority to exercise Act 250 jurisdiction over the proposed project; and

(b) Without evidence of the construction of corollary improvements or improvements incidental to the proposed project, we cannot conclude that the project, or any part of the project, is subject to Act 250 jurisdiction. See In re Town of Springfield Hydroelectric Project, Declaratory Ruling No. 111 (January 19, 1981), overruled by the United States District Court, Vermont, appeal pending United States Court of Appeals, 2nd Cir.

2. Section 808 of Title 3, Vermont Statutes Annotated, authorizes the Environmental Board, as an agency, to issue "declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency... ." Pursuant to Section 808 the Board has adopted Rule 3(D) governing such requests. Limited by the statutory authorization and the language of Rule 3(D), the Board can only review proposed projects under 10 V.S.A., Chapter 151 and the corresponding Board rules.

(a) The City of Winooski requests the Board to find that BED's proposed project is subject to **review** by some state agency. The Board's powers under Section 808 are limited to determining whether 10 V.S.A., Chapter 151 applies to a project. The Board is without statutory authority to determine whether other state agencies have jurisdiction over a project.

(b) The Board is asked by BED to determine federal jurisdiction over this project. It is not within the statutory power of the Board to determine the applicability and/or the scope of federal jurisdiction over hydroelectric facilities on navigable waterways. Whether or not FERC has jurisdiction over BED's hydroelectric project is not within the Board's purview. Nor is it necessary for the Board to address the question of federal pre-emption in the present case. BED's project is exempt from Act 250 jurisdiction under 10 V.S.A. §6001(3) because another state agency has exercised its jurisdiction, viz., the PSB under 30 V.S.A. 5248.

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ORDER

For the reasons set forth above, the City of Winooski's request for Act 250 review of the Chace Mill hydroelectric project is denied.

Dated at Waterbury, Vermont this 10th day of November, 1982.

FOR THE BOARD:

*Leonard U. Wilson*  
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*Lawrence H. Bruce, Jr.*  
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*Priscilla N. Smith*  
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*Donald B. Sargent*  
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*Warren M. Cone*  
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*Melvin H. Carter*  
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*Dwight E. Burnham*  
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*Ferdinand Bongartz*  
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Dissenting:

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Members participating  
in this decision:

-Leonard U. Wilson  
Lawrence H. Bruce, Jr.  
Priscilla N. Smith  
Donald B. Sargent  
Warren M. Cone  
Melvin H. Carter  
Dwight E. **Burnham**  
Ferdinand Bongartz