Overview of the Section 248 Process

What is Section 248?

- Requires energy, gas, telecom, and water developers to obtain a **Certificate of Public Good (CPG)** from the Public Service Board
- Board considers 10 statutory criteria, including environmental criteria from Act 250 plus issues like need, reliability, economic benefit, and the general public good

http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=30&Chapter=005&Section=00248

Who is the Public Service Board?

Public Service Board = the judges

PSB Mission: To ensure the provision of high quality public utility services in Vermont at minimum reasonable costs, consistent with the long-term public good of the state….

http://psb.vermont.gov/

What do we mean by “Public Interest” and “Public Good?”

- Balanced good of all consumers in state
- To receive CPG, projects must meet these criteria:
  - **Orderly development** of the region
  - **Demand for service** (present and future)
  - **System stability & reliability**
  - **Economic benefit** to state & residents
  - **No undue adverse effect on esthetics, historic sites, air and water purity, the natural environment, and public health and safety**

Participating in 248: Formal Parties and Members of the Public

- Formal Party to a Case
  - May provide testimony
  - May participate in hearings
  - Must follow Board rules
  - Subject to discovery and cross-examination
- Members of the Public
  - May speak at public hearings
  - May send the Board written comments
  - May *not* participate in hearings
  - May petition Board to become formal parties

Automatic Formal Party #1: PSD

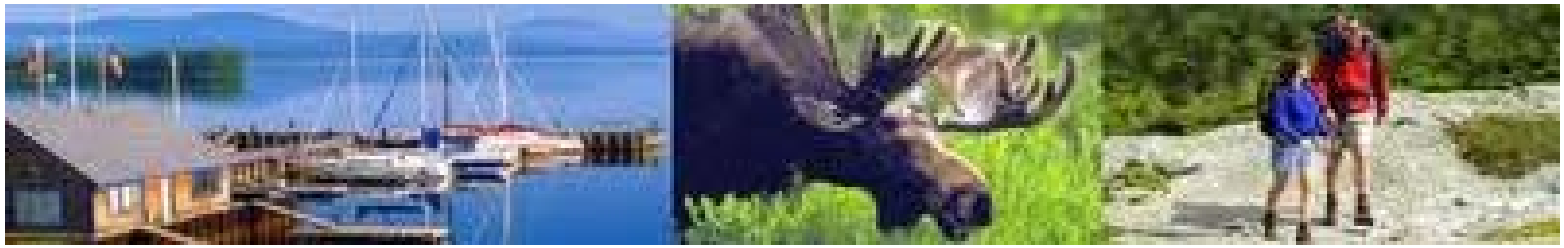
The Public Service Department = represents the interests of the people of the state as a whole

- Represents public interest in utility cases
- Provides long-range planning for the state's energy and telecom needs
- Ensures all Vermonters share in the benefits of modern communications
- Administers federal energy programs
- Resolves utility customer complaints
- Informs public about utility-related matters
- Makes and administers power purchase contracts

http://publicservice.vermont.gov/

Automatic Formal Party #2: ANR

Agency of Natural Resources = protects the environment



ANR Mission: To draw from and build upon Vermonters' shared ethic of responsibility for our natural environment, an ethic that encompasses a sense of place, community and quality of life, and understanding that we are an integral part of the environment and that we must all be responsible stewards for this and future generations.

http://www.anr.state.vt.us/

Other Formal Parties

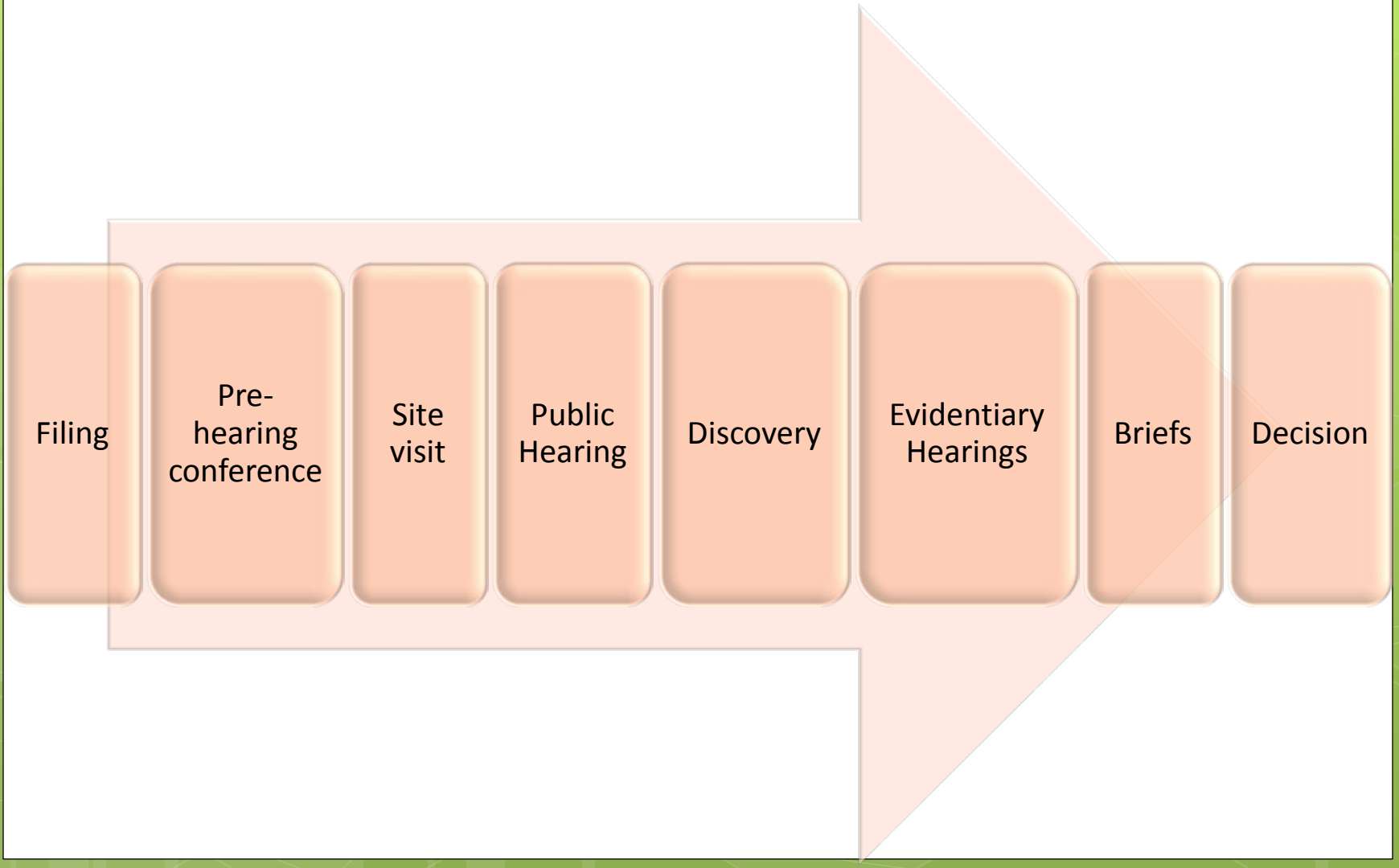
The utilities or project developers = automatic formal parties

Intervenors = must be granted party status by the Board via the formal “intervention” process; e.g. landowners, environmental organizations, public interest groups, business organizations.

Who Receives Notice & Other Information?

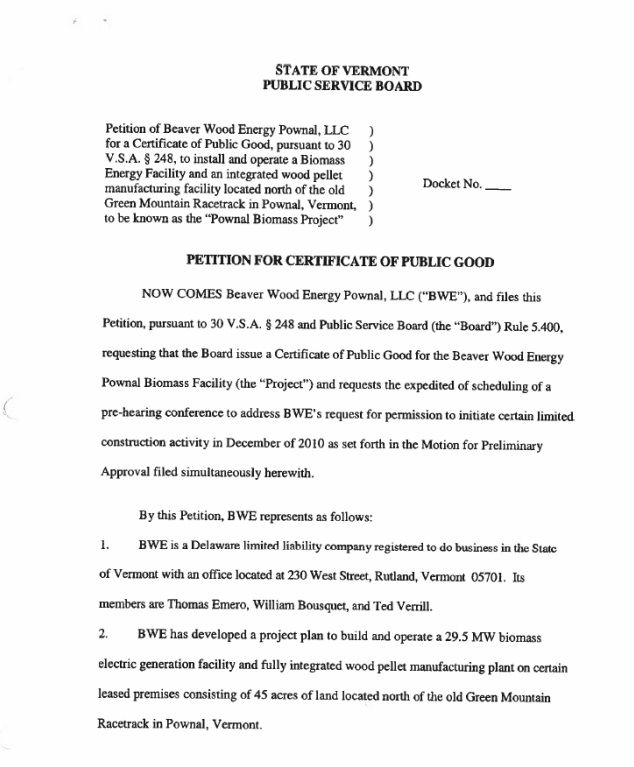
- *Construction plans 45 days prior to petition filing:* **municipal and regional planning commissions**
- *Notice when petition is filed*: Certain **state agencies and affected towns**, **local and regional planning commissions**, **adjoining landowners**
- *Notices and orders from Board*: **Individuals and organizations** that have asked to be added to the Board's mailing list as an "interested person"
- *Everything*: **Formal parties, including those granted intervenor status**

248 Process: Step by Step



248 Process: Filing

- 45-day notice period
- Developer files petition, along with supporting testimony and exhibits
- Board assigns a docket number



STATE OF VERMONT
PUBLIC SERVICE BOARD

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. ____

PETITION FOR CERTIFICATE OF PUBLIC GOOD

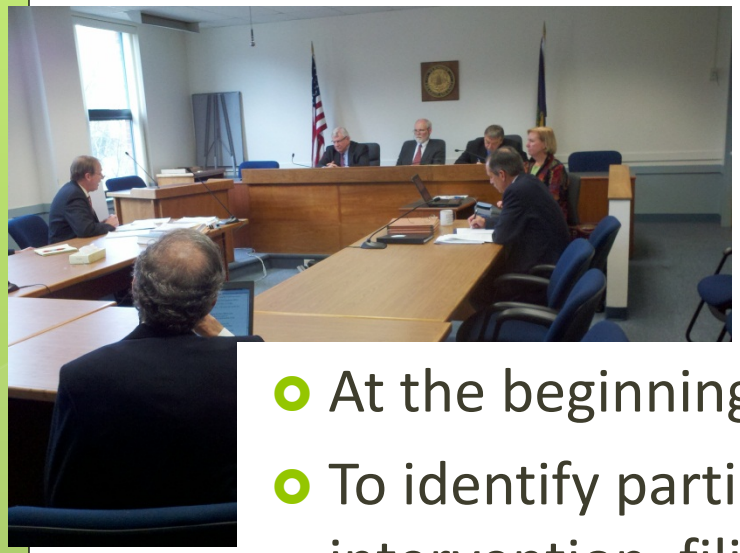
NOW COMES Beaver Wood Energy Pownal, LLC ("BWE"), and files this Petition, pursuant to 30 V.S.A. § 248 and Public Service Board (the "Board") Rule 5.400, requesting that the Board issue a Certificate of Public Good for the Beaver Wood Energy Pownal Biomass Facility (the "Project") and requests the expedited of scheduling of a pre-hearing conference to address BWE's request for permission to initiate certain limited construction activity in December of 2010 as set forth in the Motion for Preliminary Approval filed simultaneously herewith.

By this Petition, BWE represents as follows:

1. BWE is a Delaware limited liability company registered to do business in the State of Vermont with an office located at 230 West Street, Rutland, Vermont 05701. Its members are Thomas Emero, William Bousquet, and Ted Verrill.

2. BWE has developed a project plan to build and operate a 29.5 MW biomass electric generation facility and fully integrated wood pellet manufacturing plant on certain leased premises consisting of 45 acres of land located north of the old Green Mountain Racetrack in Pownal, Vermont.

248 Process: Prehearing Conference



- At the beginning of a case
- To identify parties, issues, schedule – including intervention, filing deadlines
- May set date for a public hearing and site visit
- Board issues Prehearing Conference Memorandum addressing issues above and including “service list” of all parties and interested persons.

248 Process: Determining Parties

- Person or organization may file a motion to intervene, "as of right," based on **substantial individualized interest** which:
  - may be adversely affected
  - is not protected by other parties or alternative means
  - won't unduly delay proceedings or prejudice parties/public
- Person or organization may also file a motion to intervene "permissively," within reason

TIP: Read Board Rule 2.209 (http://psb.vermont.gov/sites/psb/files/rules/OfficialAdoptedRules/2000_Rules_of_Practice.pdf)

Determining Parties, cont.

- Motion to intervene must be filed with the Board and all parties
- Board will issue order granting or denying motion; may restrict intervenor's participation to particular issues or require party cooperation
- Intervenors often represented by an attorney, though are allowed to represent themselves ("pro se"). Pro se intervenors have both rights and responsibilities of an attorney

248 Process: Site Visit

- May include discussion of:
  - Description of project
  - Viewing of existing conditions
  - Explanation of how conditions will be altered
  - Identification of relevant landscape features, discussion of potential effects
  - Identification/visits to potential alternative locations
- Not part of evidentiary record unless Board grants entry of observations or facts into evidentiary hearings

248 Process: Public Hearing

- Allows Board to hear comments and concerns from general public
  - Transcribed by court reporter, becomes part of public file
  - Not part of evidentiary record
  - Raises new issues/perspectives that Board can consider and ask parties to present evidence on
  - Public also encouraged to submit written comments to Board by email or mail

248 Process: Discovery

- Parties ask petitioner questions about pre-filed testimony, file their own written testimony & exhibits
- Testimony & exhibits admitted into evidentiary record
- Parties ask each other questions about their testimony & exhibits, in order to understand positions, formulate responsive testimony, and prepare cross-examination
- Not automatically part of the evidentiary record

TIP: All testimony should provide facts – i.e., opinions should be accompanied by some basis of fact.

248 Process: Evidentiary Hearings (aka Technical Hearings)

- Like a trial, except testimony prefiled in writing before the hearing
- Prefiled testimony entered into evidentiary record under oath
- Witnesses called to testify under oath and may be cross-examined
- Parties may not provide new testimony unless authorized

248 Process: Briefs

- Filed by parties at close of evidentiary hearings, typically in two rounds – initial and reply
- Not evidence, and no new issues may be raised
- Opportunity for parties to cite facts from the record and applicable statutes, rules, regulations, precedent and explain their position for Board to consider

248 Process: Decision

- Issued by Board after briefs submitted
- Must be based on evidentiary record
- Includes findings of fact from 248 criteria and conclusions of law
- If issued by hearing officer, parties can file written comments on the proposal and ask for oral argument before Board
- Subject to motions for reconsideration
- May be appealed to Vermont Supreme Court

Alternative 248 Procedures

248(j)

- Expedited review of certain projects of limited size & scope
- Board may issue order without holding public or evidentiary hearings

248(k)

- Allows Board to temporarily waive CPG requirement if certain conditions met – usually emergency situations

Recap: Ways to Participate in a § 248 Case

Obtain "party" status by following PSB rule 2.209

- Being a party has rights and responsibilities (you get to cross-examine witnesses; you get all the filings but also have to serve on everyone else; you have to respond to discovery; you can file motions; you have to advocate within the rules)

Become an "interested person"

- You get the major notices and pleadings in the case

Provide public comment

- You appear at a public hearing and voice your questions, concerns, or comments on the project

Resource:

Citizens Guide to the Vermont Public Service Board's Section 248 Process:

http://psb.vermont.gov/sites/psb/files/publications/Citizens%27%20Guide%20to%20248%20February%2014%202012.pdf

[Or go to http://psb.vermont.gov and search: "citizens' guide"]

Vermont Agency of Natural Resources (ANR) Role in 248

ANR consists of three Departments that provide a range of services to Vermonters:

- Department of Fish and Wildlife
- Department of Environmental Conservation (DEC)
- Department of Forests, Parks and Recreation

VT ANR

ANR as a statutory party is required to provide the PSB with evidence and recommendations concerning the natural resource issues and may provide evidence and recommendations on any other matters before the Board.

VT ANR

- 30 V.S.A. § 248 (a)(4)(E): The agency of natural resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the board in such a proceeding.

VT ANR

- 30 V.S.A. § 248 (b)(5): Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction… with respect to an in-state facility, 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 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K);

VT ANR

In determining whether the Project will result in an "undue adverse effect", the Board will consider the project's effect on a range of natural resources including, but not limited to:

- Headwaters, streams, wetlands, etc.
- Rare and Irreplaceable Natural Areas
- Necessary Wildlife Habitat
- Endangered Species

A Project may not endanger the public investment in or jeopardize or interfere with the public's use, enjoyment or access to public lands, facilities or services.

For projects that require an ANR permit, such as stormwater or wetlands permit, ANR requests that the Petitioner file applications for these permits at the time it files its CPG petition.

VT ANR

- When assessing a project's natural resource impacts, ANR requires a comprehensive pre-construction resource assessment.
  - ANR reviews proposed sites based on available data and provides the petitioner with initial observations.
  - ANR staff work with petitioner's consultants to design field studies and wildlife monitoring protocols to gather additional information about the site.

VT ANR

- Natural Resource Assessment may require more than two years of field work.
- ANR requires this assessment prior to the fling of a petition.
- ANR staff have typically invested significant time and resources in reviewing a proposed site well before a permit application is filed.

VT ANR

- As information is gathered about a site, ANR shares any concerns or ‘red flags’ with petitioner by identifying resource attributes that may be unduly effected by the proposed project.
- By assessing the resource values early in the process, ANR gives the petitioner as much information as possible to decide whether to go forward with the project, revisit the design, or explore an alternative site.

VT ANR

- If a petition is filled, ANR participates fully in the proceedings and provides expert testimony.
- In the course of the proceedings ANR may reach agreement with the petitioner on certain measures or modifications to the project that eliminate or minimize its impact to particular resource values.
  - ANR would recommend the PSB adopt those measures as a condition of the CPG.

VT ANR

- If ANR believes a project poses an undue adverse effect to the natural environment that cannot be mitigated, it will recommend the PSB find against the petition on those grounds.
- If a project is permitted, ANR may require post-construction monitoring to track actual impacts on natural resources.
- If a CPG is granted, the petitioner may still need to obtain ANR permits prior to the start of construction or operation.

VT ANR

- ANR Resources
  - Environmental Interest Locator
    - http://www.anr.state.vt.us/site/html/maps.htm
  - Sec. 248 Docket Website:
    - http://www.anr.state.vt.us/site/cfm/legal/dockets.cfm
  - BioFinder:
    - Available January 2013

- Available to answer question and take comments regarding the resource attributes of a given site.

Supplementary Slides

Criteria of §248 (b)(1) – (5)

- (b) Before the public service board issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment or construction:
- (1) with respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. However, with respect to a natural gas transmission line subject to board review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the board shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located;
- (2) is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title;
- (3) will not adversely affect system stability and reliability;
- (4) will result in an economic benefit to the state and its residents;
- (5) with respect to an in-state facility, 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 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K);

Criteria of § 248(b)(6)-(10)

- (6) with respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least cost integrated plan;
- (7) except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action;
- (8) does not involve a facility affecting or located on any segment of the waters of the state that has been designated as outstanding resource waters by the water resources board, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters;
- (9) with respect to a waste to energy facility, is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the state solid waste management plan; and
- (10) except as to a natural gas facility that is not part of or incidental to an electric generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.