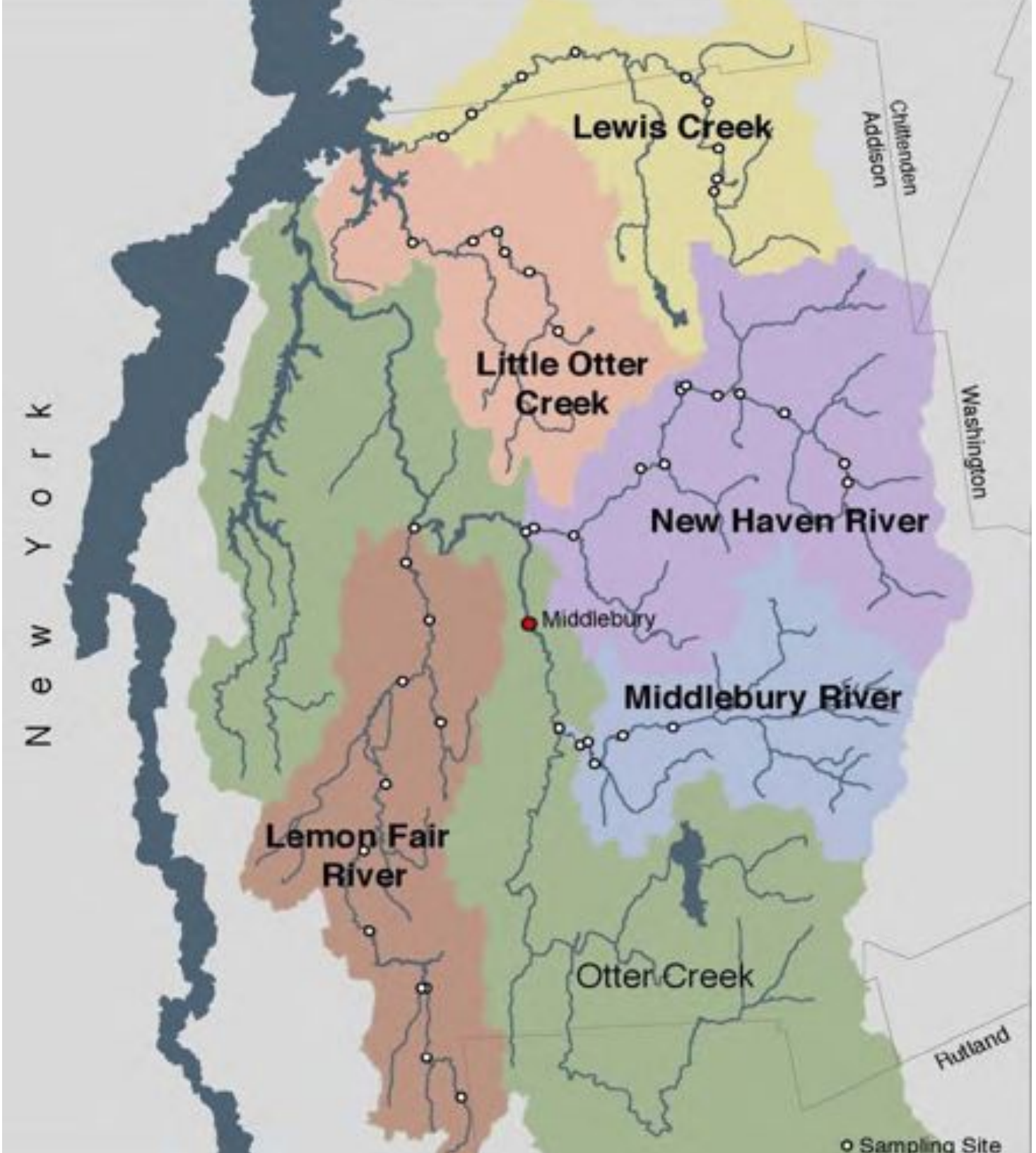
Hydropower in Middlebury

1. Historical background
2. Hydro regulation and project development
3. FERC and Current status of 'Middlebury Upper'

Fred Dunnington
Town Planner
12-1-2012


Lewis Creek
Chittenden
Addison
Little Otter
Creek
Washington
New Haven River
New York
Middlebury
Middlebury River
Lemon Fair
River
Otter Creek
Rutland
Sampling Site

Hydro in Town of Middlebury

HISTORIC (1700's – 1900's):

- Otter Creek - Middlebury falls (several) & Pulp Mill falls
- Middlebury River (multiple sites in East Middlebury)
- Muddy Branch…

CURRENTLY OPERATING:

- CVPS Middlebury Lower - (below Pulp Mill Br.) FERC # 2737

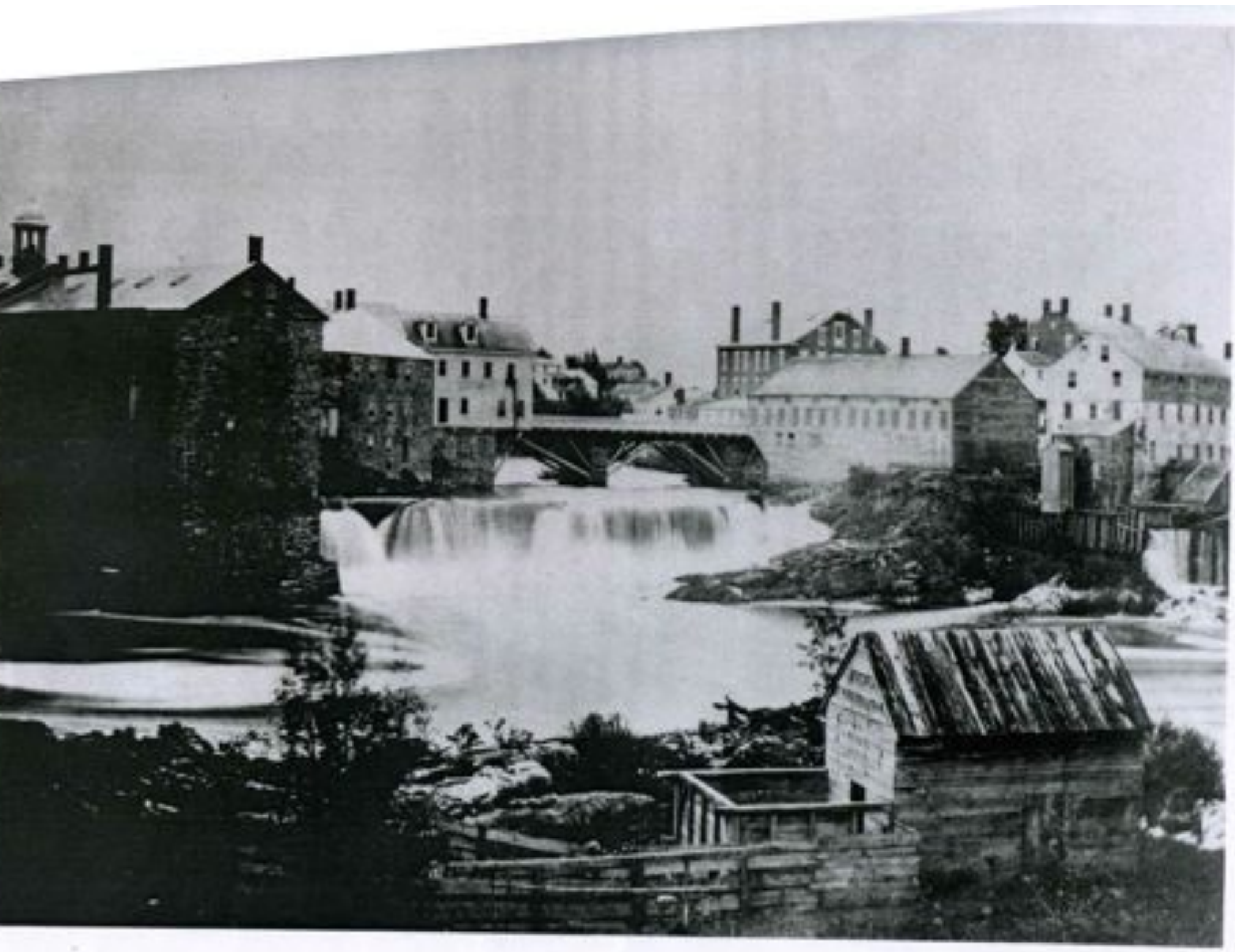
PROPOSED (since 1970):

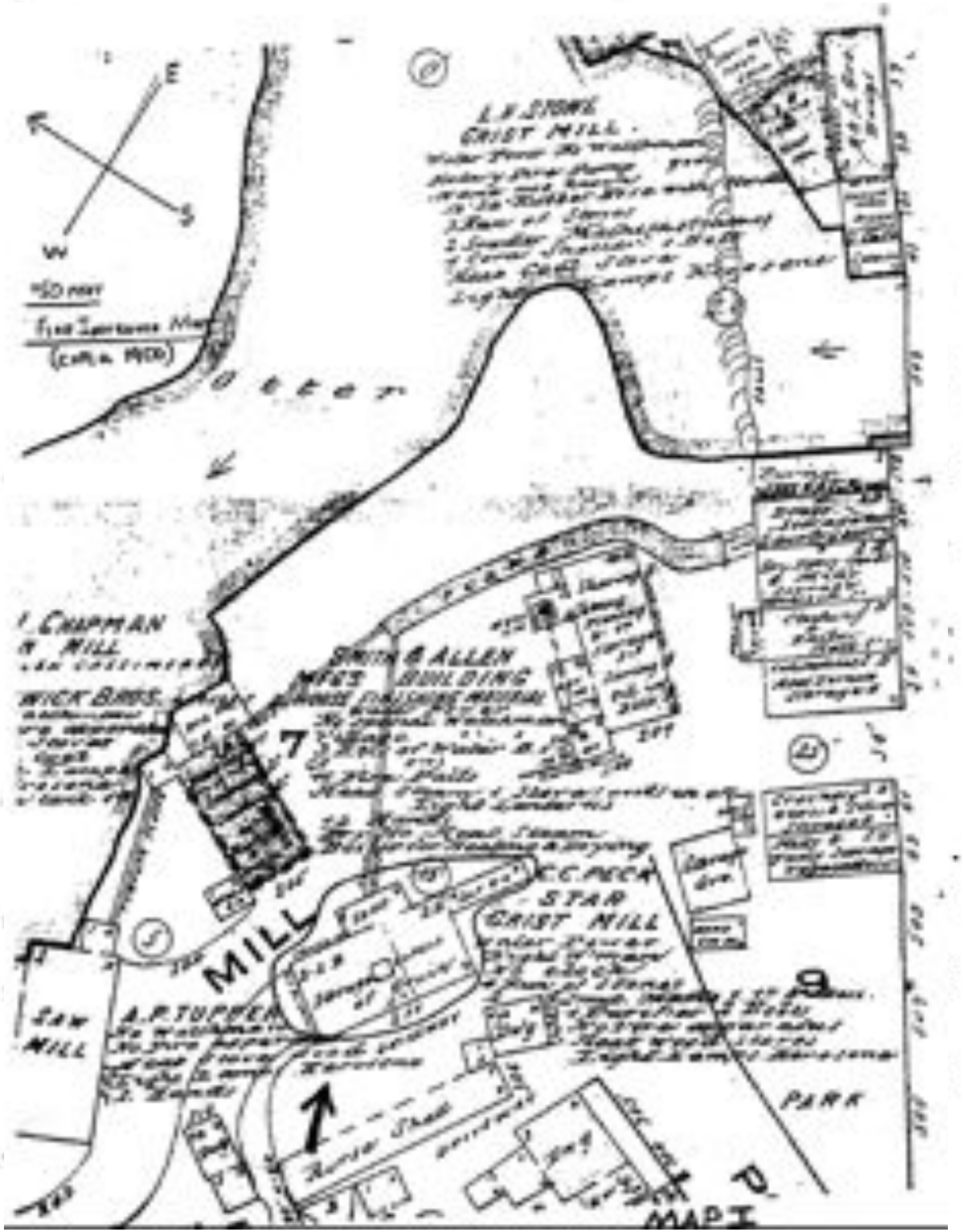
- Pump storage – Abbey Pond – East Munger St. c.1972
- CVPS - Middlebury Falls 1980 – 1983
  - Town Vote + Agreement + FERC permit app. ...

    …project abandoned by CVPS for 'economic reasons'… follow-up applicants:
  - 1984-85 Hydroelectric Development Inc. of Denver Co. (Mike Demos) [Sel. Rejected 5-2]
  - 1986-87 Midd. Falls Hydropower Inc. /Environmental Power Corp. (John Spencer) - FERC app.

    Town meeting vote 1987 - Sel. 3/12/87 voted unanimously "Town not interested in hydro".
- 2006-present:

  "Middlebury Upper"- Holm proposed project at the Frog Hollow sluice
  - "Middlebury Upper East" FERC app. – to prevent competing use of across-river sites




E
W
L.B. STONE
GRIST MILL
I. CHAPMAN
& MILL
WICK BROS.
SMITH & ALLEN
MFG'S
BUILDING
7
MILL
C.C. PECK
STAR
GRIST MILL
9
SAW
MILL
A.P. TUPPER
PARK
MAP

CVPS - Middlebury Lower

OTTER CREEK:
THE CHANGING VISION OF A MIDDLEBURY RESOURCE

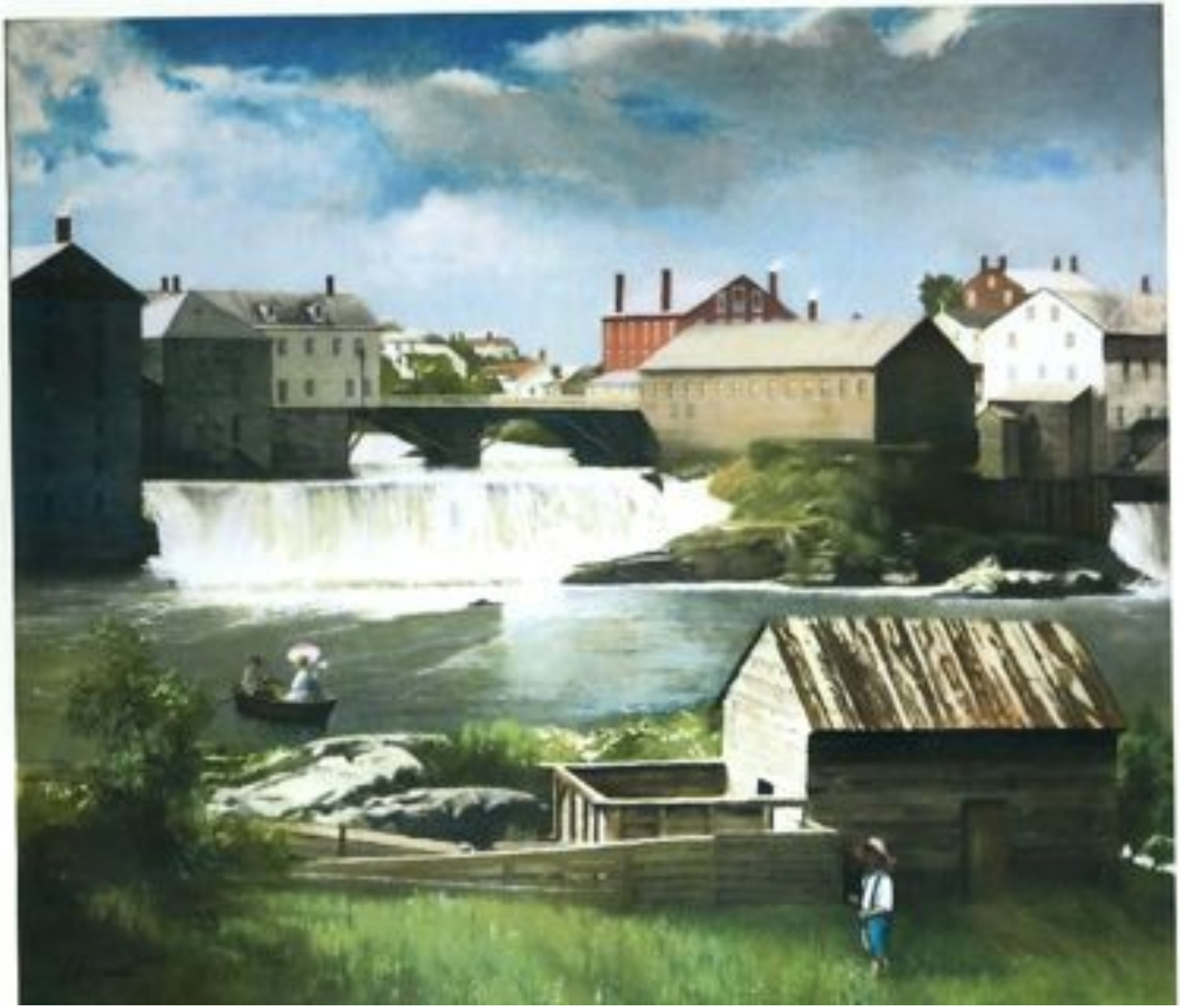
BY DUNCAN T. ECCLESTON

Submitted in Partial Fulfillment of the
Requirements for the Degree of Bachelor of Arts in
the Department of History, Middlebury College

April, 1995

Approved _____

Chairman, Department of History



CVPS 1980 proposal

Photo of river below of water spilling over falls at Dexter Sullivan Hydroelectric facility

THE FROG HOLLOW AGREEMENT: A Good Look At A Lot of Water

The Frog Hollow Agreement between the Middlebury organizations and Central Vermont Public Service Corporation spells out quite clearly what you can expect with hydroelectric redevelopment.

1. More than four inches of water tumbling over the falls and twice channel **at least** 12 hours a day, and seven days a week from June through October. Plenty of water for waterfall beauty.
2. **At least** an inch of water over the falls and the wall of the intake channel **at least** eight hours a day, seven days a week from November through May. All the usual ice formations on trees and bushes.
3. Road, drainage and landscaping improvements. To revitalize this historic area.
4. A covered walkway along the Rogers Block. To allow access from Main Street.
5. A road and a landscaped Jessica Swift Memorial Park, along with funds every year to help maintain the park.

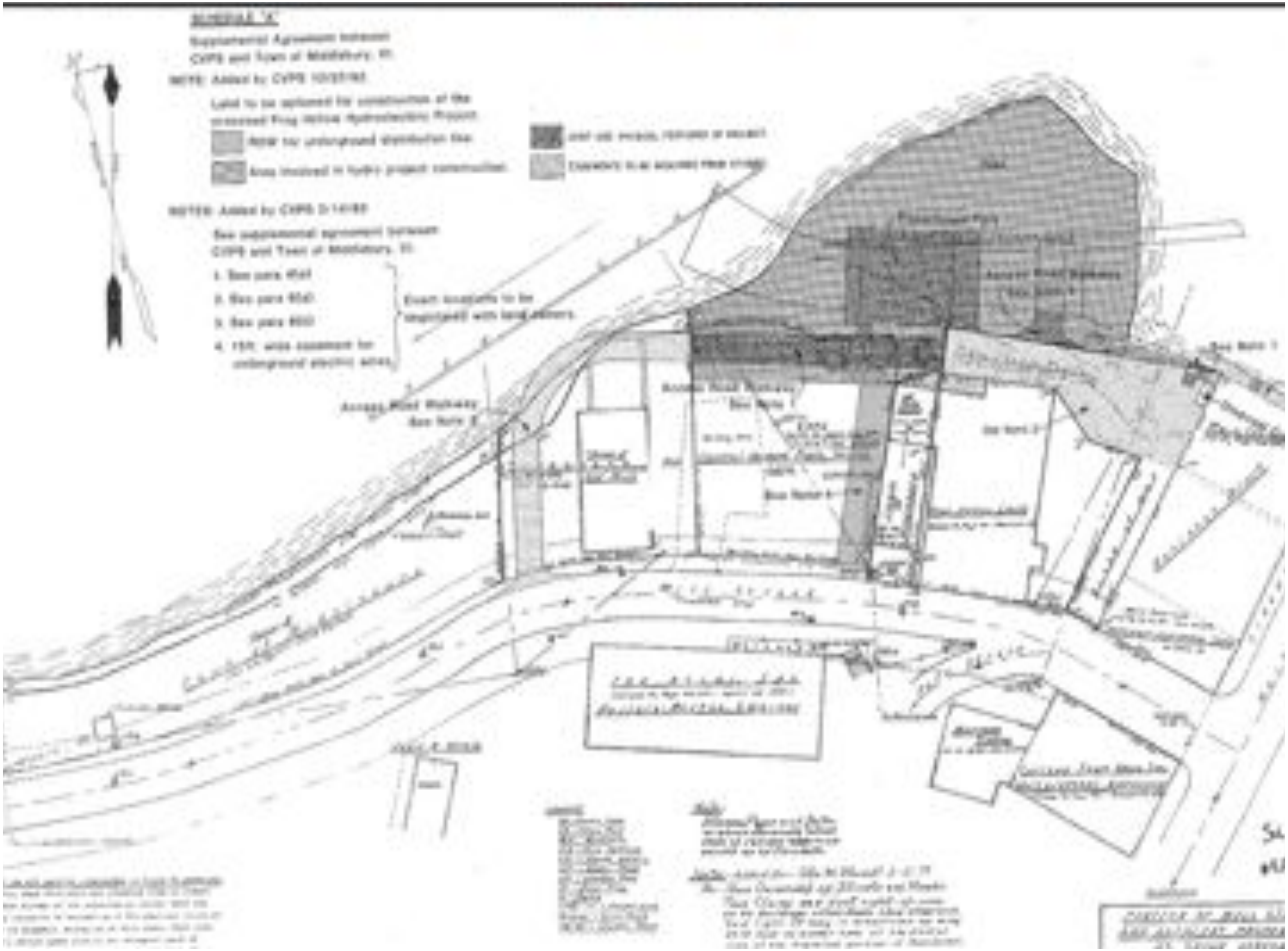
Of course, there's a lot more, not the least being a non-polluting renewable energy source that keeps the lights on in case of a blackout. Reduction of oil imports. Construction jobs. Insurance against damage and economic loss. And $70,000 a year in taxes.

But none of this comes easy.

It's going to take your vote.

Central Vermont Public Service

(This ad was paid for by CVPS stockholders.)


Supplemental Agreement between
CVPS and Town of Middlebury, Vt.
Land to be optioned for construction of the
proposed Frog Hollow Hydroelectric Project
Area involved in hydro project construction
See supplemental agreement between
CVPS and Town of Middlebury, Vt.
Easement to be negotiated with land owners
Access Road Walkway

Middlebury Votes to Purchase Parcel Near Falls

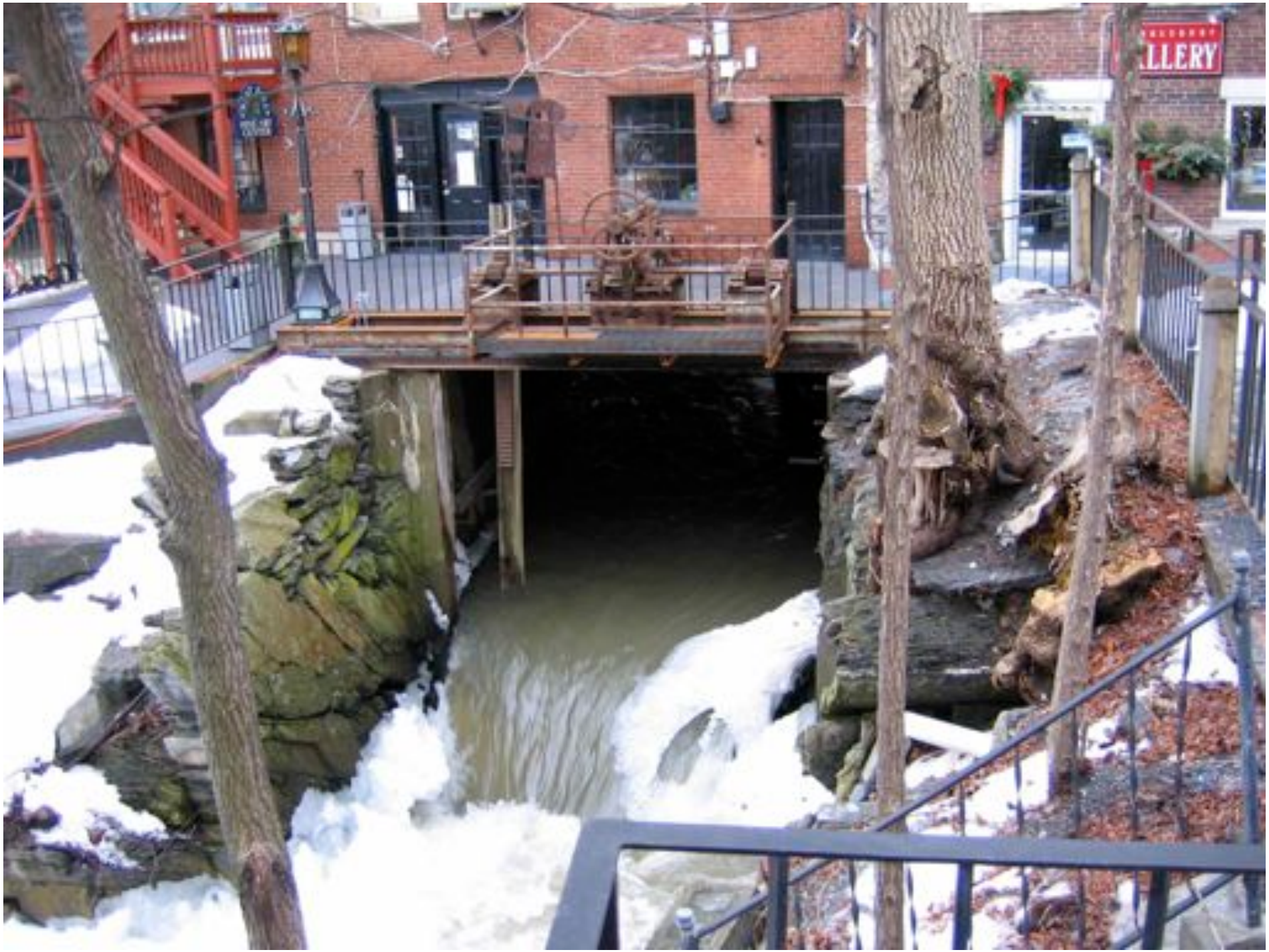
Town Hydro Project Must Meet Conditions

Park, Power Seen as Compatible

SAVE THE MIDDLEBURY FALLS!

Vote "NO" on the CVPS Hydro Plant at Town Meeting March 2, 1982


CITY PARK
NO ANCHORING
CABLE CROSSING


LLERY

Hydro regulations

Planning and Development of Small-Hydro Facilities in Vermont

photo courtesy of Community Hydro

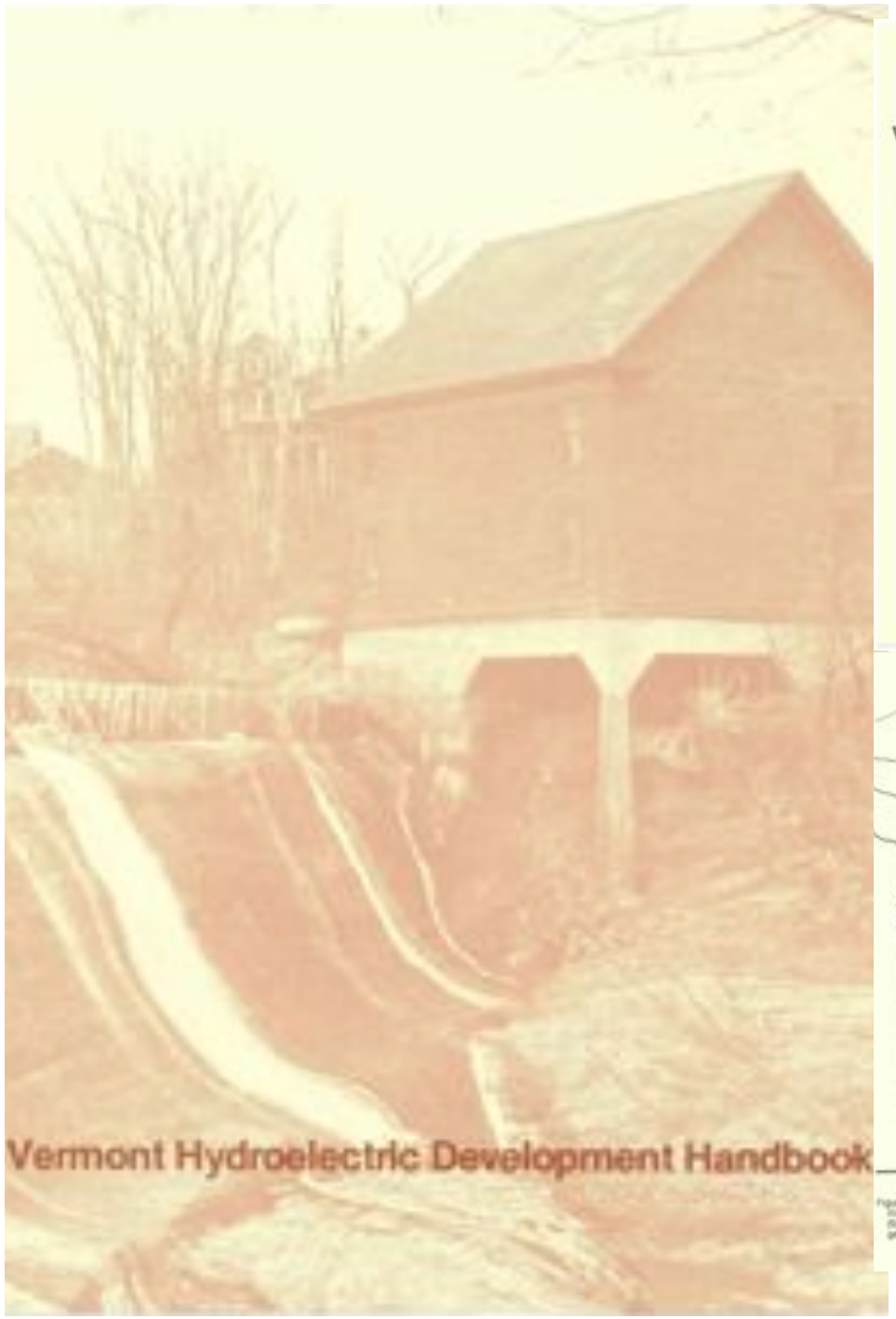
April 26, 2007
Vermont Technical College

VERMONT
AGENCY OF NATURAL RESOURCES

AGENDA
Planning and Development of Small-Hydro Facilities in Vermont

April 26, 2007

9:00am	**Welcome and Agenda Review** Julie Moore, Agency of Natural Resources (ANR)
9:10am	**Opening Remarks** George Crombie, ANR Secretary
9:25am	**Site Evaluation and Feasibility Studies** Lori Barg, Community Hydro Barry Cahoon, P.E., ANR, River Management Tom Sullivan, P.E., Gomez and Sullivan Engineers, PC
10:45am	**BREAK**
11:00am	**Project Engineering** Jim Syska, P.E., independent engineer Jay Boeri, P.E., independent engineer Bill Jordan, Department of Public Service (DPS)
12:15pm	**Lunch (provided)**
1:00pm	**Regulatory Framework (120 minutes)** licensing panel Michael Spencer, Federal Energy Regulatory Commission (FERC) Brian Fitzgerald, ANR Dam Safety and Hydrology John Warner, U.S. Fish and Wildlife Service Rod Wentworth, ANR, Fish and Wildlife Nancy Boone, Vermont Historic Preservation IPP/SPEED re: net-metering Gregg Fahey, PSB John Spencer, VEPP
3:00pm	**BREAK**
3:15pm	**Project Economics** Dave Lamont, DPS
3:45pm	**Owning & Operating a Small Hydropower Facility** John Wardlow, independent power producer Jeff Wallin, Multiple Resources Management
4:30pm	**Closing Remarks** John Sayles, ANR Director of Policy Research and Planning



Vermont Hydroelectric Development Handbook

Robert E. Howland
Vermont Public Service Board

Susanna Adams, editor
Office of Terrence J. Boyle
Planning Consultants

Prepared under the auspices of the Vermont Public Service Board

Available free upon request

June 1980

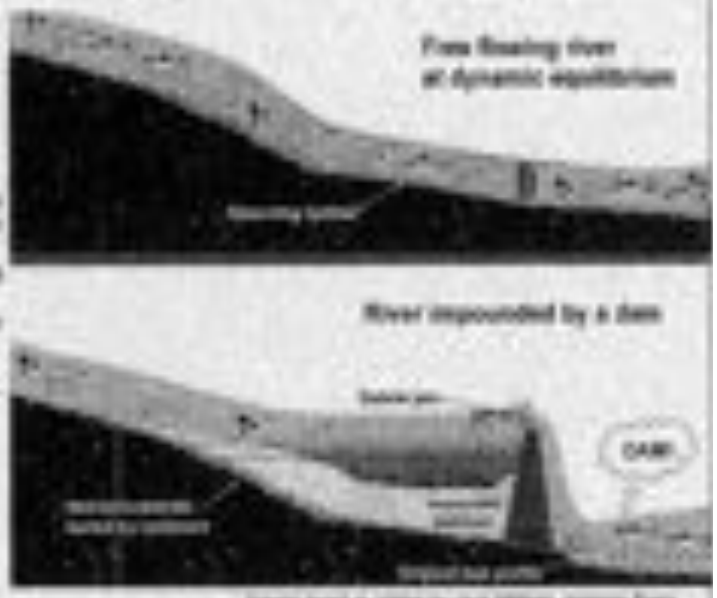
Figure 2.1 **Typical Vermont Hydropower Installation.** The walls of the powerhouse and intake structure are removed to illustrate the project works: (1) Dam with Tainterpenta, (2) waste gates and gatehouse, (3) intake forebay, (4) trash racks, (5) intake gate, (6) intake gate hoist, (7) penstock, (8) shut-off valve, (9) turbine, (10) draft tube, (11) generator, (12) switch gear, (13) transformer, (14) circuit breaker, (15) draft tube gate and hoist.

Table of Contents

Figure 2-1 **Typical Vanmond Hydropower Installation.** The walls of the powerhouse and intake structure are removed to illustrate the project works: (1) Dam with headpond, (2) waste gates and gatehouse, (3) intake forebay, (4) trash racks, (5) intake gate, (6) intake gate hoist, (7) penstock, (8) shut-off valve, (9) turbine, (10) draft tube, (11) generator, (12) bevel gear, (13) transformer, (14) circuit breaker, (15) draft tube gate and hoist.

How a Dam Affects a River

Building a dam can affect a river in many ways. Fundamentally, the dam is a barrier that interrupts the natural river dynamics. The impoundment that forms behind the dam loses many of its riverine characteristics, impacting species that depend on river habitat for their survival.



Graphic based on original by Laura Hildreth, Anderson Rivers

	Free-flowing river	Impounded river
Temperature	Natural temperature regime	Greater surface area of impoundment and surface release often results in higher water temperatures in impoundment and downstream
Dissolved oxygen	Turbulent flow and shallower water depths result in high dissolved oxygen concentration	Loss of turbulent flow may reduce dissolved oxygen concentration. Impoundment may stratify, further reducing dissolved oxygen
Habitat	Riverine coldwater habitat	Habitat is more lacustrine and often unsuitable for coldwater fish species
Fish movement	Fish and other organisms free to move up-stream and downstream, including migratory fish such as Atlantic salmon	Access to habitat blocked or fragmented
Flow regime	Natural flow regime	Modified flow regime
Sediment	Natural transport processes maintained	Trapped in impoundment – natural substrate buried by sediment in impoundment, down-stream channel erosion may result in "replace" trapped sediment
Pollutants	Metals and organics are distributed down-stream	Metals and organics are concentrated in the sediments trapped in impoundment
Nutrient transport	Nutrients are transported downstream	Portion of nutrients trapped in impoundment
Woody debris	Woody debris is transported downstream to	Portion of woody debris trapped in impound-

ASSEMBLING THE PARTS: AN ENGINEERING GUIDE FOR SMALL HYDRO

WHAT ARE YOU TRYING TO DO?

?

RESOURCE INVENTORY

CONSIDERATIONS

LIMITS

THE DESIGN

CONSTRUCTION

OPERATIONS

SITE EVALUATION AND FEASIBILITY STUDIES

OVERVIEW

PRE-FEASIBILITY STUDY

- Preliminary investigation - hydrology, hydraulics, energy potential & potential interdevelopment constraints
- Is it worthwhile to invest additional money
- for more detailed feasibility studies, licensing and design?

FULL FEASIBILITY STUDY

- More detailed study to firm up potential site configurations, development costs and energy production
- Allowing proposal to a point where it
- can be submitted to FERC and state gov't for [illegible]

DESIGN

- Permitting
- Construction Bid Package

PRE-FEASIBILITY STUDY

- HYDROLOGIC ANALYSIS -

TOTAL FLOW AVAILABLE AT SITE

- Gaged Watershed – Streamflow Data
- Ungaged Watershed – Synthetic Methods Relate to a Gaged Watershed, considering
  - Drainage Areas
  - Land Use and Land Slopes
  - Precipitation

FLOW AVAILABLE FOR DEVELOPMENT

- Water Use Constraints
- Infrastructure Constraints

PRE-FEASIBILITY STUDY

LEVEL OF EFFORT

- Site Review Using Best Available Information
- Supplement with Site Visit and Water Surveying, if needed

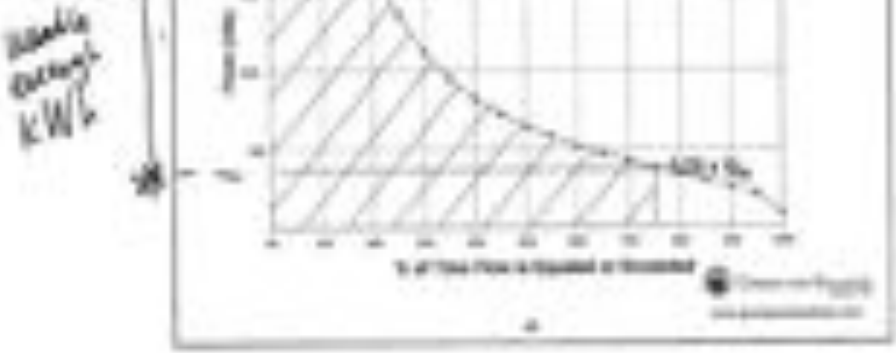
INFORMATION NEEDED

- Hydrology and Hydraulics (Flow, Head)
- Potential Regulatory Constraints
- Existing Infrastructure and Site Data

DELIVERABLE

- Report/Memo on Potential Economic Feasibility

DESIGNING CAPACITY ... NO MINIMUM FLOW REQUIREMENT ... NO SITE INFRASTRUCTURE CONSTRAINTS



Usable Energy kWh

PRE-FEASIBILITY STUDY

– CONSTRAINT ANALYSIS –

CONSULT WITH REGULATORY AGENCIES TO DETERMINE POSSIBLE CONSTRAINTS

- Minimum Flows for Other Uses
  - Aesthetics
  - Habitat
  - Fish Passage
  - Waste Assimilation
- Threatened or Endangered Species
- Historic Properties
- Hazardous Materials
- Public Use of River

FEASIBILITY STUDY

More Detailed Reports
Fill in Data Gaps

- DETAILED TOPOGRAPHY and BATHYMETRY
  - Firm up excavation quantities
- DETAILED HYDRAULIC ANALYSIS
  - Firm up head and tailwater
  - over a range of flows
- BORINGS & GEOTECHNICAL DATA
  - Firm up type of material for excavation
- RE-EXAMINE ENERGY AND COST IN MORE DETAIL

PRE-FEASIBILITY STUDY

PRELIMINARY COST OPINION

- Turbine, Generator, Other Equipment/Components
- Civil Works
- Regulatory and Legal
- Engineering and Administration Costs
- Contingency Allowance

– ECONOMIC ANALYSIS AND REPORT –

- Engineering Economic Analysis Only
- Issue Long to own Payback

LICENSE APPLICATION

FINAL LEVEL OF DATA COMPILATION AND ASSESSMENT

- COMPETING WATER USES
  - Other hydropower users
  - Agricultural/Industrial users
  - Water needed for aesthetics, Fish habitat, fish passage and waste assimilation

- FISH PASSAGE STRUCTURES
- RECREATION ENHANCEMENTS

- HISTORIC and ARCHAEOLOGICAL RESOURCES

DESIGN

- Initiate at appropriate level of regulatory certainty
- 30% completion – May initiate "permit" review
- 90% completion – Full "permit" application & review
- 100% Complete – Based on agency and owner comments, complete design for contractor bid package

Federal Rules on Hydroelectric Plants Supersede State Policies, Justices Say

By Stephen Wermiel
Staff Reporter of The Wall Street Journal

WASHINGTON — The Supreme Court ruled that state water policies must take a back seat to federal regulation of hydroelectric plants.

The 9-0 decision was a setback for state attempts to set minimum water-flow levels for rivers and streams affected by federally licensed hydroelectric plants.

In an opinion written by Associate Justice Sandra Day O'Connor, the high court declined a suggestion by California that it reconsider a 44-year-old decision. That 1946 decision said that in a clash between state and federal regulations over water flow, state authority is limited to water for irrigation or municipal use.

The court ruled in a dispute over the minimum water flow required for Rock Creek, a tributary of the American River located near Placerville, Calif., between Sacramento and the Sierra Nevada. In granting a license for a hydroelectric plant on Rock Creek in 1980, the Federal Energy Regulatory Commission established minimum levels for the flow of water that must remain in the creek. But a California state agency proposed higher minimum flow rates in 1987, causing the operators of the power plant to appeal to the FERC; the commission said its own order should be enforced.

Last June, a federal appeals court in San Francisco ruled that FERC's policies pre-empted state law. Yesterday, the high court affirmed the appeals court ruling.

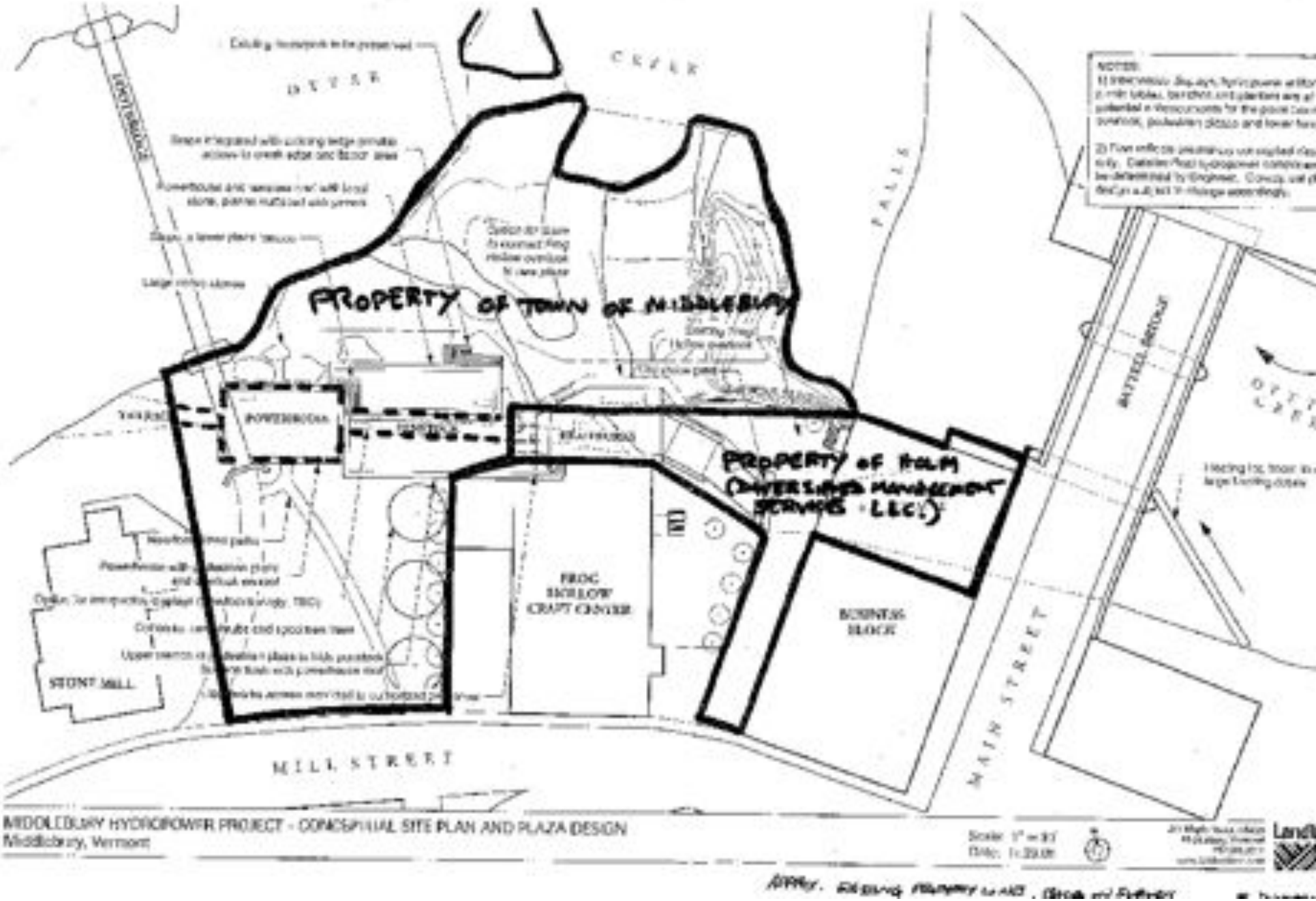
In a friend-of-the-court brief supporting California, 43 other states warned that if the appeals court ruling were allowed to stand, it would "fundamentally alter state control of water resources and will eviscerate comprehensive state regulatory systems for allocating water." (California vs. FERC)

STATUS OF HOLM'S "MIDDLEBURY UPPER EAST PROJECT"

Town –Land Works – Holm Plan 2006 – since modified by Holm

Simulated view of the Otter Creek Falls and conceptual hydropower project/park enhancements

Existing conditions


PROPERTY OF TOWN OF MIDDLEBURY
PROPERTY of RLM
(RIVERLAND MANAGEMENT SERVICES, LLC)
FROG HOLLOW CRAFT CENTER
BUSINESS BLOCK
STONE MILL
MILL STREET
MAIN STREET
FALLS
MIDDLEBURY HYDROPOWER PROJECT - CONCEPTUAL SITE PLAN AND PLAZA DESIGN
Middlebury, Vermont

TOWN WATER RIGHTS ISSUE

c. Middlebury Manufacturing Company to Tolman and Goodrich, 30:403 (2/15/1888). Source: Deck to Village of Middlebury (1890), paragraph 2 above: "The 1888 deed defines the water rights as "the right to draw three hundred and twenty-five inches of water to be taken from the mill flume or bulkhead belonging to said Company at or near the bottom of said flume or bulkhead as may be, [and the mean?] most convenient point for conveying said water to the wheel [set?] on the land herein conveyed, said water to be measured at the raceway after leaving the wheel, under a head of twenty feet, and said water as conveyed when the following conditions, to wit: If there shall at any time be less than six hundred and fifty inches of water for the use of both the woolen mill of said Company and the mills to be put in operation on the premises herein conveyed, then the water shall be equally shared and divided between said Company, their successors and assigns, and the said Tolman and Goodrich, their heirs and assigns."

d. Middlebury Electric Company to Village of Middlebury, 30:421 (11/10/1890). Paragraph 2 above: In the 1890 deed, the rights include all the property and property rights of the Middlebury Manufacturing Company.

Conclusion: It appears from this review of the deeds that the Town, through these various deeds, and in particular the last quitclaim deed (#d5), owns all of the remaining rights to waters through the flumes, either those for 323 inches of water within the control of BAE, via the 1870 deed.

CVPS retained rights in the 1982 quit claim deed to the Town (97:118-122) to certain land, formerly owned by the Middlebury Manufacturing Company and conveyed to the Middlebury Electric Company in 1893 (31:29-32). Actually, that latter deed is not very specific about what was conveyed, but the courses and bounds of the land conveyed to the Town in 1982 are found in that deed. What CVPS retained requires tracing back from 1890 to piece together the extent of the rights conveyed, which will require the help of a surveyor, but based on the Lowell survey this includes at least the powerhouse at the western end of the penstock.

A question arose during the research on the meaning of "inches of water," a term not familiar to several hydrologists we spoke with, who originally advised us it was a measure of pressure. Looking at an old case from Wisconsin (Blanchard v. Denning, 1891, synopsis attached), we learned that twice as sometimes described as "square inches of water," and is a rather measure of water as the flume

downtown Middlebury. Middlebury Electric owns the Roger's Building, the property involving the intake, headworks as well as the portion of land upon which the powerhouse will be located. The Town of Middlebury owns the property involving the tailrace. Recent restoration efforts on the building have allowed access to a previously hidden area of the flume, which has been found to be in excellent condition.

Mill rights as well as water rights for the portion of Otter Creek flowing through the abovementioned Roger's property were transferred by Quitclaim deed by CVPS to previous owners of the property on September 27th, 1966. These rights were subsequently transferred to the Holm family via its real estate holding corporation, Diversified Management Services, with the sale of the property in 1984. See attachment #5 for more details. Diversified Management Services has since transferred those rights to Middlebury Electric, also owned by the Holm family.

HOLM CLAIMS WATER RIGHTS

In summary, through Middlebury Electric and Diversified Management Services the Holm family owns the property, mill rights as well as riparian rights to the private portion of the proposed project. Discussions are ongoing with Middlebury regarding a partnership arrangement.

The municipal portion of the property will be vital to the success of the project. Several prospective partnerships have been considered. The most likely arrangement is a partnership similar to the previous CVPS agreement from 1983 with the Town of Middlebury..

3/16/09 Select Board Letter to Holm re: MY 2010 Plan Info

TOWN of MIDDLEBURY
77 Main Street
Middlebury, Vermont 05753

William H. Boyle, Town Manager
[redacted]
[redacted]
[redacted]

Anders Holm
5436 Lake Street
Charlotte, VT 05445

Peter Holm
3372 VT 30
Cornwall, VT 05753

Eric Holm
56 Darwin Road
Boston, MA 02114

Dear Anders, Peter and Eric,

I am pleased to report that we have concluded review of the 1982 Mediation Agreement and 1990 Supplemental Agreement between the Town and CVPS. As a mutually agreeable one, the Select Board is prepared to recommend the Discussion Region at a special meeting held on February 17, 2009. We ask you to carefully review our analysis of the 1982 and 1990 agreements. We have summarized, as follows, the general stipulations and objectives that we believe have ensuing relevance to a Holm Agreement below:

1. Provide the land rights as needed for the hydro project, while retaining Town property ownership or contractual safeguards by contract (rather than having the Town address this by intervention in FERC or FERC proceedings).

2. Aesthetics preservation and riverfront public access:

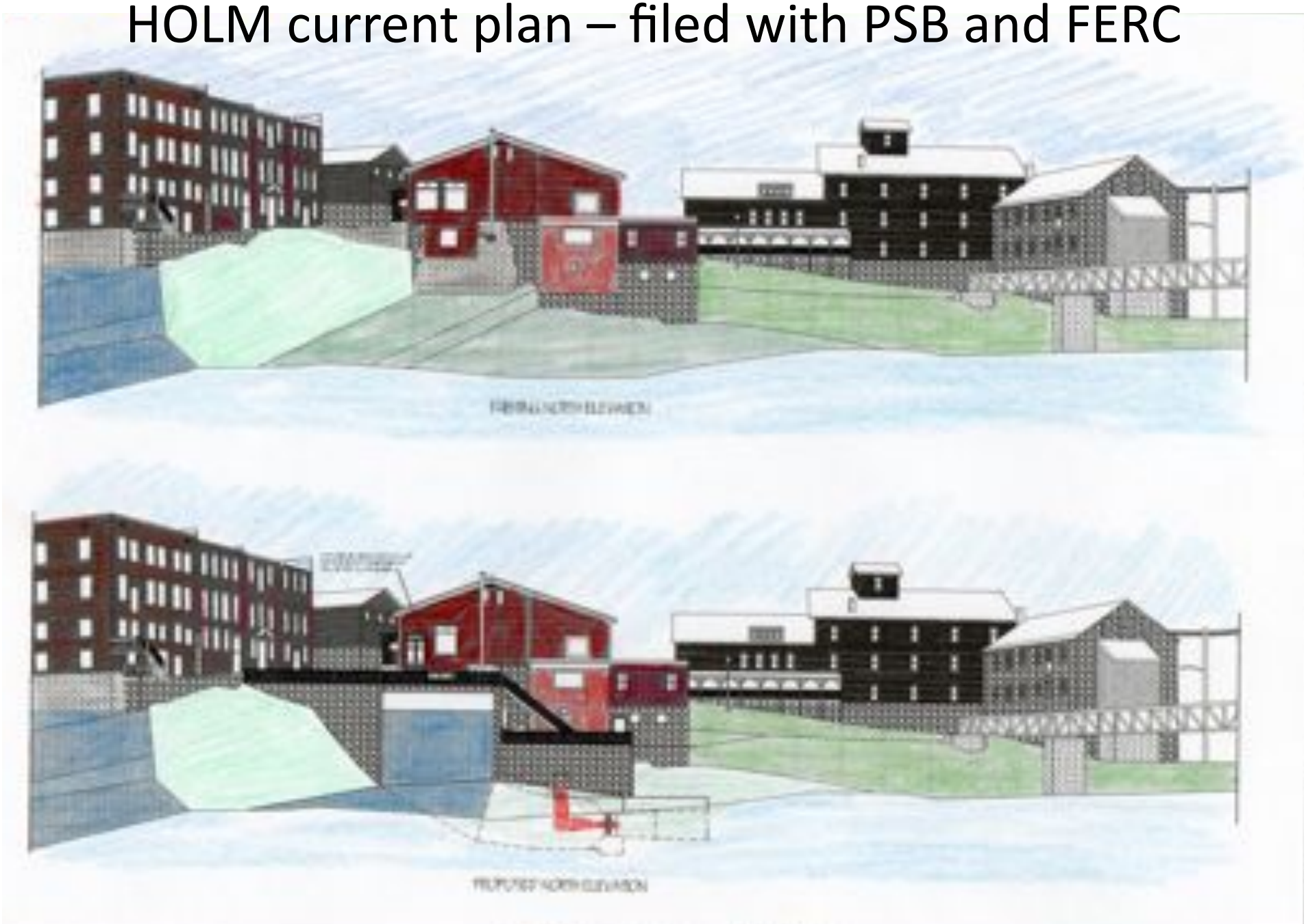
   A. Ensure falls minimum flow consistent with ANR water quality requirements.

   B. Underground the wires and minimize the facility scale - as much as possible - and blend this facilities in with the area historic structures by use of stone, masonry, river rocks etc.

   C. Preserve the natural ledge as base of falls - and the natural shoreline riverfront "Jessica Scott Park" - and provide for improved public access to these with steps, --or if necessary by ramps / bridges etc.

   D. Provide stone/masonry terraces that connect the street businesses (and condominium) (mass businesses) with public access throughout the length of the hydro project – from the pedestrian bridge to the Holm's falls overlook.

HOLM current plan – filed with PSB and FERC



MIDDLEBURY UPPER RESTORATION PROJECT
FERC No. P-13235

DRAFT APPLICATION FOR NEW LICENSE
EXHIBIT A

PROJECT DESCRIPTION AND OPERATION

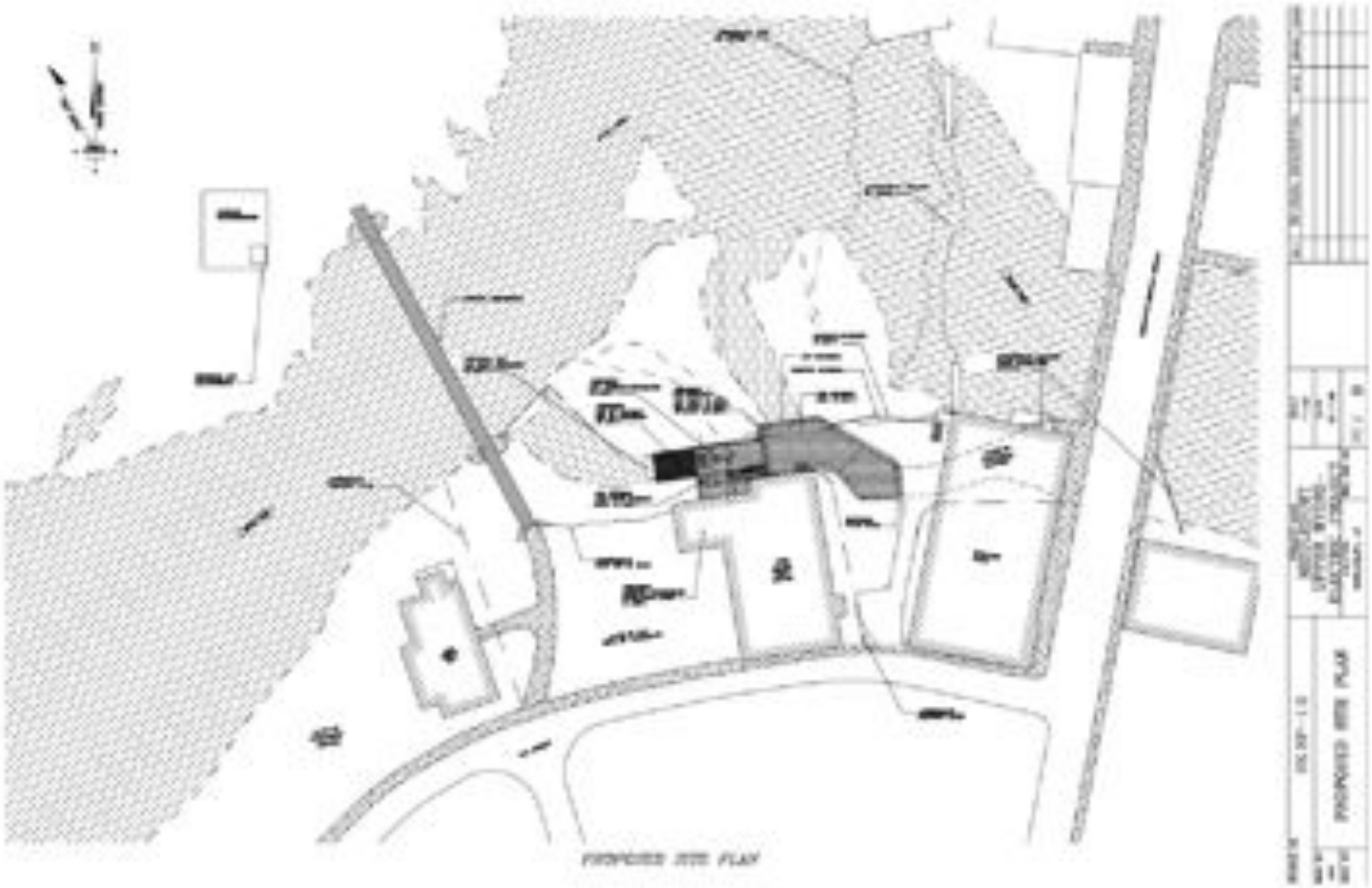
INTRODUCTION

The Middlebury Upper Restoration Project consists of a 23-foot natural ledge with concrete cap, an intake canal, a powerhouse, and appurtenant facilities. Original construction of the project was completed in 1890.

The powerhouse will contain one pit style 1590 kW generating unit, for a total installed capacity of 1590 kW. Structural repairs were completed to the canal intake and sluice gate in 2009. The Rogers Building overlying the intake underwent extensive repair in 2009 to assure flow was maintained under the building. The Middlebury Upper Restoration Project will be automatically operated in a run-of-river mode and remotely monitored.

The project and its operation are more fully described below. A summary of the project is included on

PROJECT LANDS AND BOUNDARIES



BIRD'S EYE VIEW OF POWERHOUSE

State of Vermont
Department of Environmental Conservation
[illegible]
Waterbury, VT [illegible]

phone [illegible]
fax [illegible]

June 9, 2009

Andrew Holm
Middlebury Electric LLC
3418 Lake Road
Charlotte, VT 05445-9407

Re: Middlebury Hydroelectric Project – FERC # P-11?1?

Dear Dr. Holm:

I am writing to follow up on the June 1, 2009 meeting, as well as some of the recent correspondence that ANR has received from you.

Flow Issues

Your letter of today indicates that you are contemplating releasing the Aquatic Base Flow (ABF) into the bypassed reach. In contrast, the 2008 Kleinschmidt feasibility study suggests a flow regime that will require further study in order for the Agency to assess whether your project complies with the Vermont Water Quality Standards. Specifically, the Kleinschmidt feasibility study assumes a minimum flow of 130 cfs. At the June 1st meeting, you also suggested that you may be contemplating a different minimum flow more consistent with the ABF, perhaps a flow in the order of 314 cfs.

The Middlebury Hydroelectric Project details regarding proposed turbine flows and minimum bypass flows are critical to determining whether a 401 Certificate can be issued for the project and whether it will be necessary to conduct additional studies. For example, if you are contemplating a flow which is consistent with the (ABF) for the Middlebury site (approximately 314 cfs), the Agency would not require you to conduct a dissolved oxygen (DO) study, a fish study, nor an aesthetics study. Please note that the Agency cannot advise you regarding the impact of your proposed flow regime on the economic feasibility of the project.

However, if at any time you determine that the Middlebury Hydroelectric Project will entail minimum flows which are less than the ABF, in the order of 130 cfs, then you will be required to conduct environmental studies. Such studies were contemplated in your June 5, 2008 preliminary permit application prepared by Kleinschmidt Associates. For a proposed flow of 130 cfs, the required studies would focus on DO, fish habitat and aesthetics. In the event that you wish to consider lower minimum flows, the following study requirements will apply to the project.

Dissolved Oxygen

The Agency is unaware of any current baseline information regarding DO in the project reach of Otter Creek upstream of the dam. The most recent information on file at the Agency is from the 1980s. As noted by Jeffrey Cueto, Kleinschmidt is collecting DO data on Otter Creek for other projects and perhaps that data collection could be coordinated with the data collection required for your project. Recent EPA comments on the Middlebury Wastewater Treatment Facility (WWTF) permit raised issues concerning the impacts of the Middlebury WWTF on the downstream DO profile. Any reduction in spillage at the falls may impact on DO. Given the lack of current data and the potential impacts of the Middlebury Hydroelectric Project flow regime on DO, it will be necessary to conduct a DO study to assess those impacts.

The proposed DO study must define the impact that the proposed Middlebury Hydroelectric Project flow regime will have on DO during critical summer conditions. In order to ensure that the study parameters meet Agency approval, your consultants must submit the sampling protocols and DO modeling parameters to the Agency for review and comment prior to implementation. As we recommended at the recent meeting, it would be helpful for you to meet with Agency staff to discuss the scope of the study before you develop a proposed study plan.

Fish Habitat Studies

The purpose of a fish habitat study is to determine the amount of flow necessary in the bypass to provide suitable fish habitat. The requirement for fish habitat studies is dependent on:

- the proposed project flows;
- the design details of the project, particularly the proposed intake location and the bypass;
- the quality and extent of fish habitat in the bypass reach; and
- the fish population at the project location.

The 2007 project originally proposed only a small change to the amount of flow in the bypass. The Kleinschmidt feasibility study contemplates a minimum flow of 130 cfs which, coupled with the turbine capacity, would significantly reduce bypass flows. Because these factors are project and site specific, the Agency cannot provide you with a generic study protocol. We can, however, assist you in defining study requirements, if any, once we have the essential details from you and have been able to observe the existing habitat conditions in the proposed bypass reach. We typically visit the site when flows recede to about ABF, so that we can see the substrate and low flow conditions (depth, velocity) and then decisions about study requirements and design can be finalized at that time. The first step is for us to meet on site so that we can clearly see your proposed project layout "on the ground" and view the bypass characteristics at a low flow. Based on that information, we will recommend the appropriate next step. Depending on site conditions and the specifics of your project, the Agency may require very little for studies or may require a site-specific study, such as a typical transect-based habitat-flow study, such as Instream Flow Incremental Methodology.

Fish passage facilities will not be required. However as we indicated in our June 13, 2007 letter to you, it will be necessary to design and install suitable screening that minimizes fish impingement and entrainment. We will defer to the recommendations of the U.S. Fish and Wildlife Service concerning the design specifications.

As summary

You must provide the Agency with the turbine design and location, a definitive statement concerning the final scope of proposed flows, the flow distribution between the falls and the power house, any operational protocols which will affect flows, and specifics on how flows will be captured upstream. In addition, if the project will entail dredging, blasting or excavation, we will need specifics on that work and you may wish to contact the U.S. Army Corps of Engineers to inquire whether the Corps will have possible issues over that aspect of the project. The Corps contact information is as follows:

Martha (Marty) Ahnas
8 Carmichael Street, Suite 205
Essex Junction, VT 05452
(802) 872-2893

Finally, depending on the details of your plans, the USGS gage may need to be relocated as well.

Based on your plan to apply the ADP, it appears that you will not be required to conduct additional studies. I would still like to set up a meeting with you so that we discuss the design details of the project and provide you with answers to any questions you may have regarding the FERC process. Agency staff is available to meet with you on the following dates: any time Friday 4/17 and Tuesday 4/14 in the afternoon. Please let me know if one of these times and dates are convenient for you and your consultants. If not, let me know what other dates work for you and we will try to accommodate you.

Please feel free to contact me at (802) 241-3793 or at catherine.o'connor@state.vt.us with any questions or concerns you may have.

Sincerely,

Catherine O'Connor
General Counsel

cc: Susanne Claar Acret
Representative Wilbur Jewett
Representative Steve Maier
Bill Fraser, Town of Middlebury


FERC: Projects Near You - Windows Internet Explorer
FERC
Project Name
Description
Company Name
Docket
Sub Docket
Information
State
Region

	near the City of Waterville and Town of Winslow, Kennebec County, Maine.						
Middlebury Upper and Upper East Bank	Filed an application, pursuant to section 4 (f) of the Federal Power Act (FPA), to study the feasibility of Middlebury Upper Hydroelectric Project. The proposed project would be located on the Otter Creek in Addison County, Vermont.	Middlebury Electric, LLC	P-13235, P-13355	301, 302	Notice of intent to file license application	VT	Northeast
Middlebury Upper East Bank Hydroelectric Project	An application proposing to study the feasibility of the Middlebury Upper East Bank Hydroelectric Project, to be located on Otter Creek, in Addison County, Vermont.	Middlebury Electric, LLC	P-13355	300	Order issuing preliminary permit	VT	Northeast
Mill River Pipeline	Proposal to construct two new natural gas lateral pipelines and ancillary facilities located in Fall River, Massachusetts.	Mill River Pipeline, LLC	CP04-41	300	Order on Rehearing	MA	Northeast
Millenium Phase I Project	Project involves design and route changes to the pipeline facilities previously approved as part of the Millennium Pipeline Project 1. Together, these projects are referred to as the	Millenium Pipeline Company	CP98-150	313	Order amending certificate	NY	Northeast

a license for the project that is being studied.[3] Because a permit is issued only to allow the permit holder to conduct investigations and secure necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.[4]

5. Interior's comments express concern that project construction and operation could adversely affect natural, cultural, and recreational resources. Interior recommends that the applicant consult with state and federal fish and wildlife agencies, the State Historic Preservation Officer, State Liaison Officer, county officials, and non-governmental organizations to identify studies that may be needed to assess project effects and to identify mitigation, protection, and enhancement measures that may be needed as the result of the project's construction and operation, as well as to ensure compliance with laws and regulations for the protection and enhancement of cultural, natural, and recreational resources. Finally, Interior recommends that an Article 7 directing the permittee to consult with appropriate agencies, conduct investigations, and explore project alternatives be included in any permit issued by the Commission.

6. As noted, a preliminary permit does not authorize a permittee to undertake any construction or operations. Furthermore, the purpose of a preliminary permit is to study the feasibility of the project, including [illegible] project's potential impacts. It is the responsibility of the permit holder to undertake the appropriate consultations and obtain the necessary [illegible] to comply with [illegible] in a manner consistent with applicable laws and regulations. The Commission has not sought to place all relevant study requirements in [illegible] studies to be undertaken by a permit holder are based [illegible]

FERC - Preliminary Permit – Formal consultation to occur with agencies & Town

responsibility of the permit holder to undertake the appropriate consultations and obtain the necessary authorizations to conduct permit studies in a manner consistent with applicable laws and regulations. The Commission has not sought to place all relevant study requirements in preliminary permits.[5] Rather, the studies to be undertaken by a permit holder are shaped by the Commission's filing requirements for development

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[3] *See, e.g., Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

[4] Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

[5] *See, e.g., Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.[11]

The Director orders:

(A) A preliminary permit is issued for the Middlebury Upper East Bank Project No. 13355 to Middlebury Electric, LLC for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

FEDERAL ENERGY REGULATORY COMMISSION

TERMS AND CONDITIONS OF PRELIMINARY PERMIT

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times, exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in

128 FERC ¶ 62,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Middlebury Electric, LLC Project No. 13355-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(July 10, 2009)

1. Middlebury Electric, LLC (Middlebury Electric) filed an application, pursuant to section 4(f) of the Federal Power Act (FPA),[1] to study the feasibility of the proposed Middlebury Upper East Bank Project No. 13355 to be located on Otter Creek, in Addison County, Vermont.

2. The proposed Middlebury Upper East Bank Project would consist of: (1) a proposed refurbished mill structure including a new intake structure, penstock, tailrace and appurtenant facilities; (2) new turbine generators with a total installed capacity of 0.4 megawatts; (3) a proposed direct connection to an existing Central Vermont Public Service (CVPS) transmission line, and (4) appurtenant facilities. The project would have an average annual generation of 3,400 megawatt-hours, which would be sold to CVPS.

I. Background

3. The Commission issued public notice for the Middlebury Upper East Bank Project

H_2e^-

Middlebury Electric Company

Est 1880

#5 Frog Hollow Alley

Middlebury, Vermont 05445

May 25, 2010

Re Middlebury Upper FERC P-13235 Biannual Progress Support

Dear Ms. Bose.

As per Article 4 of the Preliminary Permit Middlebury Electric LLC submits the following update. We have had no change in status since our December update as we have lost private backing due to state permitting issues.

We are confident however with a new Governor this fall aggressive permit reform will allow us to resume our efforts to restore this abandoned and dilapidated site to working order.

Respectfully Submitted,

Anders Holm MD

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Middlebury Electric, LLC

Project Nos. P-13235-002 and P-13355-001

NOTICE OF INTENT TO FILE LICENSE APPLICATION, FILING OF PRE-APPLICATION DOCUMENT, AND APPROVING USE OF THE TRADITIONAL LICENSING PROCESS

(January 5, 2012)

a. Type of Filings: Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. Project Nos.: P-13235-002 and P-13355-001

c. Dates Filed: May 5, 2011, and June 20, 2011, respectively

d. Submitted By: Middlebury Electric, LLC

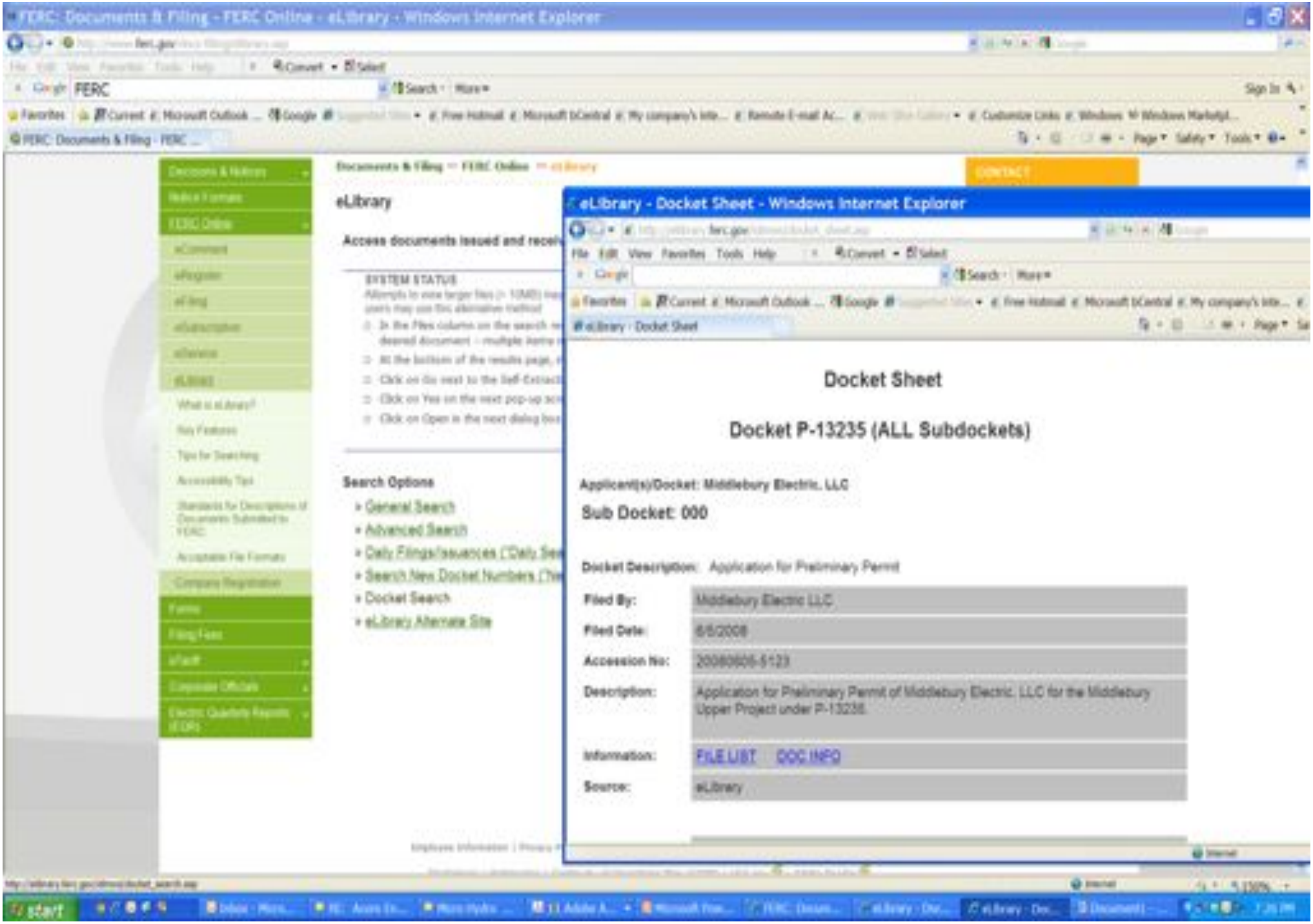
e. Name of Projects: Middlebury Upper Hydroelectric Project and Middlebury Upper East Bank Hydroelectric Project, respectively.

k. With this notice, we are initiating informal consultation with: (a) the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Vermont State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Middlebury Electric, LLC filed Pre-Application Documents (PADs; including proposed process plans and schedules) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. Copies of the PADs are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (http://www.ferc.gov), using the "eLibrary" link. For either project, enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, (202) 502-8659. Copies are also available for inspection and reproduction at the address in paragraph h.

n. Register online at http://www.ferc.gov/docs-filing/esubscription.asp to be notified via e-mail of new filings and issuances related to these or other pending projects. For assistance, contact FERC Online Support.


FERC: Documents & Filing - FERC Online - eLibrary - Windows Internet Explorer
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eLibrary Alternate Site
eLibrary - Docket Sheet - Windows Internet Explorer
Docket Sheet
Docket P-13235 (ALL Subdockets)
Applicant(s)/Docket: Middlebury Electric, LLC
Sub Docket: 000
Docket Description: Application for Preliminary Permit
Filed By: Middlebury Electric LLC
Filed Date: 8/5/2008
Accession No: 20080808-5123
Description: Application for Preliminary Permit of Middlebury Electric, LLC for the Middlebury Upper Project under P-13235.
Information: FILE LIST DOC INFO
Source: eLibrary


eLibrary - Docket Sheet - Windows Internet Explorer
Filed Date: 1/23/2012
Accession No: 20120124-0008
Description: Middlebury Electric LLC submits Draft Application for License for a hydroelectric facility at the former Central Vermont Public Service Middlebury Upper etc under P-13235.
Information: FILE LIST DOC INFO
Source: eLibrary
Filed By: Edgewood Property Holdings, LLC
Filed Date: 2/6/2012
Accession No: 20120206-5142
Description: Comments of Edgewood Property Holdings, LLC in support of Town of Middlebury Vermont's Motion to Dismiss Middlebury Electric LLC's draft License Application under P-13235-002
Information: FILE LIST DOC INFO
Source: eLibrary
Filed By: Individual No Affiliation
Filed Date: 2/7/2012
Accession No: 20120207-5026
Description: Supplemental Information of Anders Holm under P-13235.
Information: FILE LIST DOC INFO
Source: eLibrary

…the latest exchange…

H_2O
Est. 1880
Middlebury Electric Company

[redacted]
February 5, 2011

Project No. 13235
Middlebury Upper Restoration Hydroelectric Project

Dear Ms. Rowe,

Once again, recent comments by the Town of Middlebury Select Board and their attorneys require clarification.

Summary of Communications
To summarize the communication between the Town of Middlebury and the Select Board and their various legal teams since 2006:

- Middlebury Electric met with the Town Planner, Fred Dunnington, on numerous occasions. As part of this process, a three dimensional simulation of the site was created and reviewed publicly at Town Meeting of 2008. Mr. Dunnington played a vital role in obtaining a stream alteration permit from the Army Corps of Engineers.
- Numerous meetings with the Town Manager, and multiple email correspondences with State Representatives.
- Televised meeting with the town and select board.
- Further Public meetings held at the Town library to solicit public feedback.
- Prominent Display of Site plans in local shop windows.

Mediated Sessions
Of particular note were multiple mediated sessions over the span of many months with the Town Manager and Town Council. During these meetings, the following was reviewed:

- Site plans
- Project Impact
- Aesthetics
- Schedule
- Line level diagrams of the site
- Water rights and ownership issues

Based on these formal, detailed discussions, the Town felt it appropriate to draft a Partnership Agreement with Middlebury Electric. This was based upon the consultation materials made available as well as the result of negotiation. The materials provided to the Town are of a level of detail far exceeding that provided in the Frog Hollow restoration attempt and the Middlebury Lower relicensing.

Based on this series of events, we find it surprising that the Town's Attorney would raise numerous issues in his letter dated February 3rd, many of which have been discussed extensively and were in many cases thought to be resolved. Other issues enumerated are not related to the FERC application process. We feel that such patently preposterous statements made in this letter seem to represent a gross misrepresentation of the facts or the inability to assimilate them.

Response to TLP Communications/Meeting Claim

The Town's Legal team attempts to make the case that ME failed to schedule a meeting 15 days prior to TLP submission.

This claim apparently omits the fact that Middlebury Electric sought to have a public meeting with the town and relevant parties as part of the TLP process.

To be clear: ME attempted repeatedly to schedule meetings prior to the TLP submission. We were disappointed that the Town made no response to our requests.

In a further attempt to facilitate open communication, ME notified FERC regarding our concern with the Town's lacking responsiveness as well.

As the email below with John Ramer of FERC clearly demonstrates:

----- Forwarded Message -----
From: andersJohn <[redacted]@yahoo.com>
To: "[redacted]@ferc.gov" <[redacted]@ferc.gov>
Sent: Monday, November 14, 2011 9:56 AM
Subject: Middlebury updates

I am working with Brian Fitzgerald to schedule a meeting. I have not heard back from the Town or Edgewood Holdings regarding their request for further studies.

The Town's failure to agree to a meeting to discuss proposed studies is beyond our control. It should be further noted that in their previous comment to FERC, the Town states the following " we will consider your request for a public hearing" proving beyond a doubt they were aware of our effort to schedule a meeting prior to TLP submission but for some reason would not commit to one. Holding a meeting without their attendance would have been unethical due to their vital role in the process.

It should also be noted that only the ANR+ commended formally on the TLP document as shown in the FERC docket. The Select Board and their legal team neglected to do so.

Other Matters Discussed

It is once again disappointing that the Town is using the FERC process to re-hash various issues that have been discussed and we had understood to be resolved long ago. Issues such as water rights, which had been previously negotiated, have once again been raised.

For anyone familiar with riparian law, water rights ownership is typically, as is the case in this instance, is predicated upon the concept of lawful use of the Water. The town has yet to demonstrate in any capacity how ME's lawful use of the excess flow of the water in our flume will lead to substantive harm to their use of their easement to a small portion of water on ME's property. As such the water rights issue remains moot. Until the Town can justify a lawful use of approximately 470 inches of their directed water in our flume their claims remain baseless and an unnecessary distraction. The total flow in the flume is approximately 11,000 inches. This should be obvious to any counsel familiar with riparian law and its continued inclusion as a legitimate claim despite clear and relevant contrary legal precedent is confusing and concerning.

The Town's counsel has been provided case law regarding riparian law as well as the Vermont Supreme Court's ruling regarding the reality behind the necessity to demonstrate lawful use of water in the Holm family's flume for any claim to an easement. It should be noted that during meetings with the town, the Town Council was repeatedly given the opportunity to respond to this line of reasoning. This opportunity was declined.

It is very disappointing that this basic and standard background check into precedent has apparently been ignored and as such, by omission, misrepresentation of the facts promulgated.

Conclusion

The recent aggressive stance taken by the Select Board and their legal team contradicts the many years of progress the project has enjoyed. Significant restoration of the underpinnings of the facility have gone uncontested by the Town, despite the clear understanding that the ultimate goal was the restoration of the Middlebury Upper site as a hydroelectric facility. Indeed, the consideration of closing off the intakes to the facilities flume was met with great resistance by the Town as it would have ended our effort. The rationale behind the sudden and late opposition to the completion of the restoration is unclear.

We feel that our application is consistent with previous successful applications for this project. We have reviewed at length previous submissions that have been licensed by FERC and met or surpassed them.

While we understand that this 90 day review period is a time to solicit comment and feedback, the select board's request to dismiss the application during the draft period is premature and very out of synch with the standard FERC process, particularly given the strength of the current application compared to other successful applications at the same site.

Given the amount of time and communication spent during the last half dozen years, we feel that 90 days is adequate for a constructive review, particularly if the select board and their legal team focuses on the matters relevant to the FERC process with the common goal of finishing the restoration project that Middlebury began over a half decade ago.

Due to the unique central location of the project the continued restoration of Middlebury Upper is of vital interest to Middlebury residents not only as renewed source of local electricity but also as a centerpiece of downtown. The successful licensing and completion of this restoration is clearly in the best interest of local residents and well in line with both State and Federal initiatives to support a broad based network of locally produced power generation. We are hopeful that FERC will continue to support this project through the licensing process.

Should the Select Board's legal team's efforts to be successful in dismissing our application we will reapply. This will represent yet another large delay in the process to the detriment of the residents of Middlebury. As outlined in the Aesthetics section of our supplemental information, this restoration project has been of significant and irrefutable benefit to the downtown.

Middlebury Electric has repeatedly requested a public hearing due to the unique location of the project as well as the striking disparity between public statements of support made by the Selectboard and the harmful comments made to FERC surreptitiously.

This marked divergence and confusing behavior is now to point that it gives us cause for concern that we will be guaranteed due process and fair treatment under local governance as is our right as American citizens. This project may require protection from harm if it is to proceed.

Our documentation of our repeated efforts to engage the Town to schedule a hearing and other interested parties will be filed separately.

Respectfully submitted,

Anders Holm ME

VIA ELECTRONIC FILING
February 6, 2012

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Middlebury Upper East Restoration Project, P-13235: Edgewood support of Town of Middlebury's Motion to Dismiss Draft License Application

Dear Secretary Bose:

For the reasons set forth below, Edgewood Property Holdings, LLC ("Edgewood"), supports the Town of Middlebury's ("Town's") Motion to Dismiss the draft License Application of Middlebury Electric LLC ("Motion to Dismiss"). In the Motion to Dismiss, the Town requests that the Federal Energy Regulatory Commission ("Commission") dismiss the draft License Application of Middlebury Electric LLC ("ME") filed on January 17, 2012 and direct ME to fulfill its consultation obligations pursuant to the Traditional Licensing Process ("TLP").

Consultation.

On October 5, 2011, the Commission's Director of the Division of Hydropower Licensing issued an authorization to use TLP and rejected ME's request to waive the TLP consultation requirements for the proposed Middlebury Upper Hydroelectric Project (the "Project"). ME was therefore obligated to hold a joint meeting, in which members of the public were notified and invited to attend, by December 4, 2011. 18 C.F.R. § 4.38(b)(3)(i)(A), (4). Edgewood did not receive notice of any such joint meeting and is unaware that such a meeting was in fact undertaken.

Edgewood's interest in requiring ME to fulfill its consultation obligations is based on (1) the fact that Edgewood's building abuts the proposed Project, (2) ME has failed to demonstrate that it is financially or technically qualified to construct and operate the Project in a manner that

protects Edgewood against adverse impacts and (3) ME has failed to respond to Edgewood's repeated requests for information relating to these concerns. Based on the limited information Edgewood has been able to obtain, ME's lack of competence is demonstrated by the following.

First, ME claims that it has complied with state law requirements, including Title 30 V.S.A. Draft License Application, Initial Statement at 12; Exh. A, Introduction. Yet ME withdrew its request for a PSB Certificate of Public Good ("CPG"), which a company must obtain to engage in the business of, among other things, generation of electricity. Attachment A.

Second, ME states that it "holds a preliminary permit." Draft License Application, Exh. A, Introduction. The Preliminary Permit for the Project was issued on December 24, 2008 and therefore expired on December 24, 2011.

Third, ME claims that it "expects to sell the project output to local utilities through the Vermont SPEED program." Draft License Application, Exh. C at 2. In fact, ME's application to sell Project output pursuant to Vermont's SPEED program is listed as "withdrawn or deleted from the queue." Attachment B.

Fourth, there is no information whatsoever in the Draft License Application describing the revenues for Project output or financing sources, and even the list of annual expenses appears to be incomplete. Draft License Application, D, Section 3.0. This omission is significant since ME advised the PSB when withdrawing its CPG request in 2009 that an illness of one of its principal investors "has created some financial uncertainty that may necessitate a reassessment or reordering of the funding for this project." Attachment A. Although it advised the PSB that it would refile its CPG petition "after resolving these financial matters," Edgewood is unaware that ME has in fact refiled its petition.

Fifth, key information is missing from the Draft License Application. Despite references to Exhibit G in the table of contents, this exhibit is not attached to the Draft License Application, as required by 18 C.F.R. § 4.61(h). Nor is there a record of consultation, despite the references in the table of contents. In addition, ME has not fully complied with the consultation requirements of 18 CFR § 4.38(b)(2), which require it to:

a. provide detailed maps showing the specific location of all proposed project facilities, including transmission lines and other appurtenant facilities. 18 CFR § 4.38(b)(2)(i);
b. provide a general engineering design of the proposed project. 18 CFR § 4.38(b)(2)(ii);
c. provide a summary of the proposed operational mode of the project. 18 CFR § 4.38(b)(2)(iii);
d. identify the environment to be affected, including the significant resources present, the proposed environmental protection, mitigation and enhancement plans. 18 CFR § 4.38(b)(2)(iv);
e. provide copies of all records used to derive the flow data used in the applicant's engineering calculations. 18 CFR § 4.38(b)(2)(v); and

f. provide detailed descriptions of any proposed studies and the proposed methodologies to be employed. 18 CFR § 4.38(f)(7)(vi).

Moreover, MI has not complied with the specifications for maps and drawings set forth in 18 CFR § 4.39.

Finally, MI has ignored Edgewood's repeated requests for information intended to address the potential adverse impacts on Edgewood arising from the Project. For instance, of all the information requested in Edgewood's November 9, 2011 correspondence (which summarized earlier requests), MI has provided only minimal design plans,[1] an apparently incomplete list of annual expenses and the names (but not credentials) involved in designing the Project.

Draft License Application

MI filed its Draft License Application before it had completed its consultation obligations. Its actions are contrary to the requirement to complete Stage 1 consultation and required studies prior to filing the Draft License Application under Stage 2. *18 C.F.R.* § 4.41(h)(2). The filing of the Draft License Application also triggers the requirement to file comments within 90 days after filing, even though Edgewood has not had an opportunity to obtain information needed to develop such comments.

For these reasons, Edgewood has not an adequate opportunity to address concerns relating to the Project through the consultation process. As a result, Edgewood requests that the Commission require MI to fulfill its consultation obligations pursuant to the ILP and dismiss MI's Draft License Application.

Sincerely yours,

[illegible]

Charlotte B. Azzoli

ChbAzzoli
Enclosure
cc: P-13225 Service List

[1] Many of the details in the plans contained in Exh. F are so blurred that they are unreadable.

MIDDLEBURY ELECTRIC COMPANY ET AL. v. CHARLES S. MURELAND ET AL

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF VERMONT

89 Vt. 10; 93 A. 291; 1915 Vt. LEXIS 181

March 13, 1915
February Term, 1915. Opinion filed March 13, 1915.

PRIOR HISTORY: [***1] APPEAL IN CHANCERY, Addison County. Heard at Chambers, September 30, 1909, Butler, Chancellor, on the pleadings and the report of a special master. Decree for the orators. The defendants appealed. The opinion states the case.

DISPOSITION: *Decree reversed, and cause remanded with directions to dissolve the injunction and dismiss the bill.*

HEADNOTES

Waters and Water Courses--Rights of Riparian Owners--Equity--Pleadings--Aider by Answer.

Where the rights of orators and defendants to the water of a stream were measured in inches, and there was no evidence to show the total amount of water available at the time in question, nor how much either orators, or any of them, or defendants, were using, orators were not entitled to a decree against defendants.

Where orators were entitled to 600 inches of the water in a stream and defendants to 50 inches and to 200 inches of the surplus water after orators had used their proper quantities, a finding that defendants were at times using more than 50 inches, unaccompanied by a finding that at such times there was no such surplus, or that orators at such times used only their proper quantities, will not sustain a decree for orators, restraining defendants, for it is only when a wrongful use by one riparian owner infringes the lawful use of another riparian owner that the latter can maintain a suit for equitable relief.

In a suit in equity the orators must stand or fall on the allegations of the bill, unaided by those of the answer.

COUNSEL: *W. H. Davis* and *M. C. Webber* for the orators.

Nor has the master found that the defendants have, in fact, used more than their just proportion of the water. They have interfered somewhat with the running of the wheels of the orators; but as already suggested, it must be made to appear that they have exceeded their right, before they can be subjected to the payment of damages or restrained. For although the orators were troubled by the shortage of water, this result may have been due to the fault of themselves, or some of them. The only finding that the defendants ever overdrew their share of the stream is the one already referred to, which, for the reasons stated, is not enough to support the decree.

The orators say, however, that the defendants should be restrained because they threaten to continue in an unlawful use of the water. [***5] There is nothing in the report to [**293] warrant a decree upon this ground. There is no finding that the defendants intend to do anything more than they have been doing. Nothing more is alleged in the bill. But the orators say that the defendants set up in their answers a prescriptive right to use all the water they please whenever it is running over the dam. This allegation, however, does not help the orators. They must stand or fall upon the allegations of the bill, unaided by the allegations in the answers. Thomas v. Warner, 15 Vt. 110; Nye v. Stewart, 83 Vt. 521, 77 A. 340. There is no finding of any such claim. The defendants claim the right to run both their wheels whenever there is water enough to run over the dam. It is not found that this means taking more than their share of the water. Nothing appears to warrant an inference that it does. If the claim of the defendants is excessive, the orators have failed to show it. And since we are bound by the findings, the result must be.

H_2e^-

Middlebury Electric Company
Est. 1880

#5 Frog Hollow Alley
Middlebury, VT 05753

November 6, 2012

Project No. 13235-002
Middlebury Upper Hydroelectric Project

Dear Ms. Bose,

As per Article 4 of the preliminary permit Middlebury Electric LLC submits the following biannual update of the Middlebury Upper Restoration.

Since our last update Middlebury Electric LLC has worked with the Vermont Department of Historical Preservation as well as the Army Corps of Engineers both of whom see no issues with the current restoration plans unless major changes are made. Both agencies have made written statements to that effect. Middlebury Electric LLC continues to wait for the Vermont DEP to finish the 401 Water Quality Permit prior to holding the open hearing as their approval is also mandatory to proceed. Their timeline remains unknown.
Both sides of the river continue to sustain severe damage from uncontrolled flow over the remnants making recreationalism even more dangerous. In the last year there has been one drowning and at least one near drowning adjacent to the Middlebury Upper Falls. Restoration of the Upper site will allow for safe access to the west bank and allow for control of the flow over the falls. Recent adjustments will make the Upper site relatively unique in that it will be able to protect itself from hurricane level flows not only mitigating damage but also allowing it to produce electricity to downtown including municipal buildings in the even of grid failure due to flooding.
In addition has been found that blasting will ***not*** be mandatory and excavation can be done with stone saws and jackhammers as was done with the month long sluice gate restoration in 2010 that was accomplished without incident or protest.
Given the increasingly murky future of Vermont's nuclear power plant and industrial wind farms it appears all but inevitable at least one of the former hydroelectric sites of Middlebury Upper will be needed to secure a consistent, reliable and emission free source of power to the adjacent buildings downtown. Centuries of experience with the site suggest current Middlebury residents can benefit from the site in a fashion similar to their ancestors in harmony with the local flora. We continue to patiently await permission to proceed with restoring this vital source of local power and see no reason to be denied based on the input of State and Federal agencies. Three FERC licenses have been granted at the same falls in the past.
Further aesthetic studies were conducted this fall.
Middlebury Electric LLC is considering several merger offers and continues to strive toward a private/ municipal partnership with Middlebury based on the successful and precedent setting Winooski One partnership (FERC # 2756).

Anders Holm

Middlebury Electric Company

Guidance on the Internet

To access guidance on small hydropower development:

- Point your browser to www.ferc.gov
- Using the drop down menu from the fifth navy blue tab, **Industries**, select **Hydropower**.
- Scroll to the bottom of the page and click on **General Information** in the lower right hand corner.
- Click on **Licensing**

For further assistance please contact us at: 1-866-914-2849 or smallhydro@ferc.gov

Federal Energy Regulatory Commission
888 First St. N.E.
Washington, D.C. 20426

Guide to Developing Small/Low-Impact Hydropower Projects

Federal Energy Regulatory Commission

Developing Small/Low-Impact Hydropower Projects

The Federal Energy Regulatory Commission (FERC) is experiencing increased interest from those seeking to develop small/low-impact hydropower projects. This brochure explains how best to obtain Commission authorization to construct and operate these small/low-impact projects while assuring adequate protection of environmental resources. Benefits of developing these projects include:

- Emission-free renewable source of energy
- Low impacts to environmental resources
- Financial incentives to developers under state Renewable Portfolio Standards

FERC's Role

Under the Federal Power Act, FERC is charged with the authorization and regulation of the nation's non-federal hydropower resources. FERC issues three types of authorizations:

- **License** – issued for 30- to 50-year terms. Must be received. Gives the licensee the power of "eminent domain" to obtain lands or other rights needed to construct, operate, and maintain the hydroelectric project.
- **5-Megawatt (5MW) Exemption** – issued in perpetuity. Must be located at the site of an existing dam or use a natural water feature. Must propose increased capacity. The exemptee must own all lands and facilities other than federal lands to be eligible.
- **Conduit Exemption** – issued in perpetuity. Must use the potential of a conduit constructed primarily for non-hydropower purpose. The exemptee must own the proposed powerhouse and the lands upon which the powerhouse will be located. A conduit exemption may not use federal lands.

General Process for License and Exemption Applications

Getting started

- Contact FERC staff to get advice on the best way to obtain authorization for your project (1-866-914-2849 or small.hydro@ferc.gov)

Pre-filing consultation and initial project review

- Gather needed information to identify project-related effects
- Send package describing your proposal and environmental effects to Commission staff, all relevant government and tribal agencies, and non-government and public entities
- Meet with all affected agencies and entities to explain your proposal and to request input
- Determine whether and to what degree affected agencies and entities are willing to expedite the consultation process or forego a consultation step
- Apply for and obtain a state Water Quality Certification or waiver

- Prepare and file a license or exemption application

Application processing

- Commission staff requests comments on application from all interested agencies and entities
- Commission staff conducts comprehensive project review, including issuing environmental document (not usually required for conduit exemption)
- Commission acts on application

How FERC May Expedite the Process

- With resource agency cooperation, waive some pre-filing consultation requirements
- Combine scoping of issues with pre-filing consultation
- Combine public noticing requirements
- Shorten comment periods
- Use a single environmental document in lieu of draft and final documents

Factors that Reduce Time and Cost

- Project at existing dam
- Little change to water flow and use
- Unlikely to: affect threatened and endangered species or need fish passage
- Applicant owns all lands needed for project construction and operation
- Information on existing environmental resources and project effects readily available
- A complete application that addresses all issues

Examples of Successfully Expedited Projects

- Lower Tumbull Drop Project No. 12597 (3.0 MW), Upper Tumbull Drop Project No. 12598 (4.1 MW), Mill Coulee Drop Project No. 12599 (3.03 MW): licenses issued (07/26/06) 8 months from filing

- Corriveau Project No. 12629 (350 kW): exemption issued (10/24/06) 10 months from filing

Questions?

Contact info:
fdunnington@townofmiddlebury.org