STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc. for a certificate of public good, pursuant to 30 V.S.A. Section 248, to construct up to a 63 MW wind electric generation facility and associated facilities on Lowell Mountain in Lowell, Vermont, and the installation or upgrade of approximately 16.9 miles of transmission line and associated substations in Lowell, Westfield and Jay, Vermont	))))))))))

Order entered: 10/3/2011

ORDER RE MOTIONS FOR RECONSIDERATION AND REVOCATION

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "May 31 Order") and Certificate of Public Good (the "CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. On July 12, 2011, in response to motions filed by a number of parties to this proceeding, the Board issued its Order re: Motions and Requests for Modification, Amendment, Clarification and Correction (the "July 12 Order").

On August 30, 2011, the Towns of Albany and Craftsbury (the "Towns") jointly filed a Motion to Revoke Certificate of Public Good ("Towns' Motion"). Also on August 30, 2011, Lowell Mountains Group, Inc. ("LMG") filed a Motion for Reconsideration of May 31, 2011, CPG Findings re: Cost Effectiveness and Habitat Fragmentation, and to Revoke CPG ("LMG's Motion").

On September 8, 2011, Green Mountain Power Corporation ("GMP") filed its Opposition to Lowell Mountains Group's Motion to Reconsider and Revoke, and Albany and Craftsbury's Motion to Revoke ("GMP Opposition").

On September 14, 2011, the Towns filed their Reply to GMP's Opposition to the Towns' Motion to Revoke Certificate of Public Good ("Towns' Reply"). LMG did not file a reply.

In this Order we conclude that we cannot grant the relief requested by the Towns and LMG because we are without authority to entertain their motions due to the pending appeal of the May 31 Order and the July 12 Order, absent a remand for that purpose. To the extent that the Towns' Motion can be construed as a request to revoke the CPG based on non-compliance with the terms and conditions of approval of the project, we deny that motion because the Towns have failed to demonstrate any non-compliance with the CPG or our May 31 and July 12, 2011, Orders in this proceeding.[1]

The Towns' Motion

The Towns assert that the project can no longer be considered economically viable because it will fail to qualify for federal Production Tax Credits ("PTCs") as a result of construction not commencing by August 1, 2011.[2] The Towns further argue that the PTCs were a substantial component of the Board's finding of economic benefit from the project, and that without them, the Board's finding is no longer sound.[3] The Towns also assert that increases in project costs and the unknown nature of the costs related to securing certain required conservation easements, make the loss of the PTCs even more significant in terms of the project's economic viability.[4]

1. Even if demonstrated, an instance of non-compliance in and of itself does not necessarily warrant revocation of a CPG depending on the severity of the violation. The Board has other options available for addressing non-compliance, such as the imposition of civil penalties or restraint of unlawful acts. *See*, 30 V.S.A. §§ 30 and 209(a)(6). LMG also asks that the CPG be revoked. However, LMG's request is based on its request for amended findings to our May 31 Order and therefore cannot be construed as seeking revocation for a violation of the *existing* terms and conditions of project approval.
2. Towns' Motion at 1-2.
3. Towns' Motion at 2-3.
4. Towns' Motion at 4-5.

Green Mountain Power Opposition

In its opposition, GMP argues that the Board is without jurisdiction to entertain the Towns' Motion because of the pending appeal of the May 31 Order and July 12 Order.[5] GMP also argues that the Towns' Motion should be denied because it is not based on any newly discovered evidence. GMP contends that the May 31 Order concluded the project would provide an economic benefit even though the costs associated with obtaining certain conservation easements and the costs associated with any system upgrades identified by a System Impact Study ("SIS") were unknown at the time. Accordingly, GMP concludes, the fact that these costs remain unknown at this time does not provide a basis for modifying the May 31 Order.[6] GMP further contends that the Board did not condition approval of the project on construction starting by August 1, 2011, and that while its challenges in obtaining the PTCs have increased, it is addressing those challenges and began construction on September 1, 2011, the day immediately following the Board's determination that GMP had complied with the last preconstruction condition.[7] Lastly, GMP argues that the Towns have failed to provide a basis for altering the Board's conclusion that the project will provide an economic benefit to the state, asserting that project costs are by necessity based on forecasts, and that the cost of power was not the only source of economic benefit produced by the project.[8]

Town's Reply to GMP Opposition

In their reply to GMP's Opposition, the Towns contend that the Board has jurisdiction to rule on their motion because they did not raise the issue of economic benefit in their appeal.[9] The Towns also contend that granting their motion does not require the Board to make any changes to its May 31 Order in order to determine that the project is no longer economically viable and therefore no longer complies with the requirements of 30 V.S.A. § 248.[10] The Towns

5. GMP Opposition at 2.
6. GMP Opposition at 3.
7. GMP Opposition at 3-4.
8. GMP Opposition at 4.
9. Towns' Reply at 2-3.
10. Towns' Reply at 4.

also argue that their motion is properly presented under V.R.C.P. 60(b) because: (1) it is based on newly discovered evidence, in that whether construction would commence by August 1, 2011, could not have been known until that date; (2) it is based on arguments and information repeatedly put forth by GMP which show the project can no longer be considered economically viable; and (3) GMP's current contention that the project remains economically viable even with construction not commencing by August 1, 2011, indicates that GMP provided misleading testimony to the Board when it said the August 1 start date was necessary.[11] The Towns also assert that GMP's contentions that the project can still be constructed in time to qualify for the PTCs and that it remains economically viable, are not supported by any evidence, and that GMP should be required to provide testimony on these topics, which should then be subject to cross-examination.[12] Lastly, the Towns contend that GMP's own arguments regarding the PTCs and the project's economic viability provide the basis for the Board to modify its finding that the project will provide an economic benefit to the state.[13]

DISCUSSION

We are without authority to grant the requested relief because doing so requires amendment of the May 31 Order which is the subject of the pending appeal to the Vermont Supreme Court. Accordingly, we are without jurisdiction to entertain a motion filed under V.R.C.P. 60(b) to modify or amend that Order absent a remand for that purpose. Additionally, to the extent the Towns' Motion can be read as seeking CPG revocation for GMP's failure to

11. The Towns also claim that GMP is "once again providing false information to the Board" when GMP asserts that project construction commenced on September 1, 2011. The Towns base this accusation on the fact that a press release issued by GMP shows that construction did not start until September 6. Towns' Motion at 7. We have reviewed the content of the press release and disagree with the Towns' characterization of its contents. The press release, provided as an attachment to the Towns' Reply, is dated September 6, 2011. However, nowhere in the press release does it state that construction began that day. It simply states that GMP has begun construction with no specific date given for when that construction started. In the future, we expect the Towns to provide a more substantive basis before making accusations of false representations by another party.

12. Towns' Reply at 7-8.

13. Towns' Reply at 8-9.

comply with a requirement in either the Order or CPG, we deny the motion because the Towns have not demonstrated any such non-compliance.[14]

The Towns' Motion does not specify which statute or rule it is being brought under, and instead simply states that it is a "Motion to Revoke Certificate of Public Good." However, in their reply to GMP's opposition, the Towns make clear that they are seeking relief under Rule 60(b)(2) based on newly discovered evidence, Rule 60(b)(3) based on misrepresentations by GMP, and Rule 60(b)(6) for any other reason justifying relief from judgment.[15] The Towns assert that the Board can properly consider their Rule 60(b) motion because they are seeking relief with respect to the economic viability of the project, and argue that the Board's jurisdiction to rule on the motion was not divested by the pending appeal because the economics of the project were not listed as a claim of error on their Docketing Statement filed with the Vermont Supreme Court.[16]

The Towns quote portions of the Vermont Supreme Court's ruling in *Kotz v. Kotz*[17] for the proposition that a trial court is divested of jurisdiction only for those issues raised in an appellant's claims of error as set forth in the Docketing Statement. In particular, the Towns rely on the following two passages from *Kotz*:

> In this jurisdiction, it has long been the rule established by judicial decision that when a proper notice of appeal from a final judgment or order of the lower court is filed the cause is transferred to this Court, and the lower court is divested of jurisdiction as to all matters within the scope of the appeal.[18]
>
> For this reason alone, we hold that the trial court, in the absence of a remand, possessed no authority or jurisdiction to entertain, much less grant, any relief from

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14. Because Board orders are not automatically stayed pending appeal, the Board retains its jurisdiction to ensure compliance with its orders. Accordingly, absent an order imposing a stay, the Board does have jurisdiction to entertain a motion to revoke a CPG or impose other available remedies for violations of its orders, even when those orders are on appeal.

15. Towns' Reply at 5-6.

16. A copy of the Docketing Statement was provided as an attachment to the Towns' Reply.

17. *Kotz v. Kotz* 134 Vt. 36 (1975).

18. *Kotz*, 134 Vt.36, 38 (1975) (*citing, Downer v. Battles*, 103 Vt. 201 (1930); *Alfred v. Alfred,* 87 Vt. 542 (1914)). Towns' Reply at 3.

> final judgment while the denial of the very same requested relief was pending in this Court.[19]

The Towns have misinterpreted *Kotz*. *Kotz* instead holds that a trial court is without jurisdiction to entertain a Rule 60(b) motion addressing any aspect of that court's order while an appeal from the same order is pending. That this is the holding in *Kotz* is clear upon reading the entire opinion, and not just the two selections in isolation that the Towns have cited.

In *Kotz*, the Court said that a trial court is precluded from even entertaining, much less granting, a request for *"any relief from final judgment"* while denial of the same relief is pending before the Court.[20] In their motion, the Towns state that the Board must now find that the project no longer meets the requirements of 30 V.S.A. § 248 and that the CPG must now be revoked.[21] It is therefore clear that the Towns are seeking relief from final judgment in this proceeding, relief they are not able to seek from the Board absent a remand for that purpose. The Court in *Kotz* made this point clear when it expressly adopted the following as the applicable rule in Vermont, "While a cause is pending in this Court, the trial courts have no power to rule on V.R.C.P. 60(b) motions in the absence of a remand for that purpose."[22] We find this language to be a bar to the Board's consideration of the Towns' requested relief in the absence of a remand.

Thus, the phrase "scope of the appeal" as used by the Vermont Supreme Court in *Kotz* refers to the order being appealed from, and not the issues raised in an appellant's Docketing Statement.[23] The Towns' interpretation would cause an unmanageable result in instances where there are multiple appellants, or cross-appellants, all raising different claims of error by the trial court.[24]

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19. *Kotz*, 134 Vt. at 38. Towns' Reply at 3.

20. *Kotz*, 134 Vt. at 38 (emphasis added).

21. Towns' Motion at 5, Towns' Reply at 6, 9.

22. *Kotz*, 134 Vt. at 39.

23. Our conclusion does not render the phrase "scope of the appeal" meaningless. For example, execution of a Board order is not stayed by the filing of a Notice of Appeal. Therefore, issues of compliance with the terms and conditions of Board orders do not fall within the scope of an appeal seeking relief from the final order itself.

24. The current case presents a good example. LMG has also filed a Notice of Appeal but has not provided the Board with a copy of its Docketing Statement. Accordingly, the Board does not know what claims of error have been asserted by LMG in its appeal. Additionally, the Town's do not explain how a trial court should proceed if one appellant raises a particular claim of error and another does not, and the appellant that does not raise that claim of

(continued...)

Further, any ambiguity perceived by the Towns in the language employed by the Court in *Kotz* is dispelled by the language in the precedent the Court relied on in crafting its decision in *Kotz*. In *Downer v. Battles* the Vermont Supreme Court found that, "The effect of an appeal, when perfected, is to remove from the jurisdiction of the trial court all questions concerning the validity or correctness of the judgment or order appealed from."[25] This language makes clear that the "scope of the appeal" includes any questions regarding the order or judgment appealed from. The Towns' Motion raises questions about the validity or correctness of the Board's May 31 and July 12, 2011, Orders, questions that are no longer within the Board's jurisdiction absent a remand for that purpose.

We also reject the Towns' argument that it is unnecessary for the Board to amend its findings in order to determine the project no longer complies with the requirements of Section 248.

A fundamental problem with the Towns' argument on this point is that Section 248 requires the Board to make affirmative findings for all applicable criteria prior to finding a project in compliance with Section 248 and issuing a CPG. Therefore, to find the project no longer complies with the requirements of Section 248 of necessity would require the Board to amend its findings. Furthermore, the substance of the Towns' argument is unpersuasive. The Towns assert that the project can no longer be considered economically viable because construction did not commence by August 1, 2011, putting the PTCs at risk, and that the CPG must therefore be revoked.[26] However, the Towns' argument appears to confuse economic viability of the project, which is not a criterion under Section 248, with economic benefit to the state and its residents from the project, which is an applicable criterion found at 30 V.S.A. § 248(b)(4). In their reply to GMP's opposition, the Towns ultimately concede this point and acknowledge that the Board must change its finding with respect to economic benefit in order to revoke the CPG when they state, "The basis for modifying the Board's conclusion that the Project

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24. (...continued)
error seeks Rule 60(b) relief from the trial court arguing that its motion is proper because it did not raise the issue in its appeal.

25. *Downer v. Battles*, 103 Vt. 201 (1930).

26. Towns' Reply at 4.

provides an economic benefit to the State is therefore contained right in GMP's own arguments."[27]

While the Towns eventually acknowledge that the Board must amend its findings with respect to economic benefit to grant them their requested relief, they fail to demonstrate how the loss of the PTCs would eliminate the economic benefit of the project to the state. Accordingly, even if we had jurisdiction to entertain the Towns' Motion, we would deny it. We found in our May 31 Order that the project will provide economic benefits in the form of "increased tax revenues, jobs (both temporary during construction and permanent during operations), lease payments, and other direct and indirect economic benefits during construction and operation. These benefits have the potential of amounting to millions of dollars in state economic output, disposable income gains, state and local tax revenues, and other payments."[28] We also found economic benefits to Lowell and certain surrounding towns due to GMP's agreement with the Town of Lowell and the establishment of the Good Neighbor Fund.[29] Nowhere in our findings or discussion of economic benefit are the PTCs mentioned, and the Towns do not demonstrate how loss of the PTCs would eliminate any of the benefits that the Board relied on in making its finding of an economic benefit to the state and its residents.

Further, the economic viability of the project with reference to the PTCs is not discussed in our May 31 Order. It is discussed in our July 12 Order. However, nowhere in the July 12 Order does it conclusively state that the PTCs will be lost if construction does not commence by August 1, 2011, or that the project will be uneconomic if the PTCs are lost. Rather, it states that delay results in a potential loss of the PTCs, which would place the economic viability of the project "at risk."[30] Additionally, as noted above, the concept of economic viability is different from economic benefit to the state and its residents. Economic viability for this project refers to whether it makes economic sense from GMP's perspective to construct the project, or to seek a different source of new renewable generation in its stead. In making this decision, GMP must exercise prudent managerial discretion, and if in the future, GMP's decision-making process turns

27. Towns' Reply at 9.
28. Docket 7628, Order of 5/31/11 at 38-39.
29. Docket 7628, Order of 5/31/11 at 38-39.
30. Docket 7628, Order of 7/12/11 at 8.

out to have been imprudent and resulted in project costs that are higher than they should have been, then recovery of those costs from ratepayers will be subject to challenge.

Lastly, to the extent the Towns' Motion can be read as seeking CPG revocation for GMP's failure to comply with a requirement in either the May 31 Order or CPG, we deny the motion because the Towns have not demonstrated any such non-compliance. In support of their position, the Towns rely on Paragraph 1 of the CPG, which states, "Construction, operation and maintenance of the Project shall be in accordance with the findings and requirements set forth in today's Order in this Docket," in conjunction with finding 50 in our May 31 Order, which states, "The proposed project must be in service by December 31, 2012, in order to take advantage of the federal production tax credit. In order to meet that deadline, project construction must commence by the beginning of August, 2011. Tr. 2/3/11 at 93, 99, 120 (Pughe)." The Towns argue that, taken together, paragraph 1 of the CPG and finding 50 of the May 31 Order require project construction to have commenced by August 1, 2011, and that GMP's failure to commence construction by that date demonstrates a lack of compliance with its obligations.[31]

The Towns' argument is based on an unsupportable interpretation of the language of finding 50 of the May 31 Order. Finding 50 simply states that in order to qualify for the PTCs, construction needs to commence by August 1, 2011. It is an observation, not a requirement. Finding 50 does not direct that construction must commence by August 1, 2011, nor does it require the project to be in operation in time to qualify for the PTCs. Accordingly, the Towns have failed to demonstrate a lack of compliance with either the CPG or the May 31 Order.

For the foregoing reasons, we conclude that we are without authority to grant the relief requested by the Towns due to the pending appeal. Additionally, to the extent the Towns' Motion can be read as a motion to revoke the CPG due to violations of the terms and conditions of the project's approval, we deny the motion because the Towns have failed to demonstrate any such violations.

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31. Towns' Reply at 6-7. In a number of places in the Towns' Reply, the Towns refer to GMP's "decision" to start construction after August 1, 2011, suggesting that GMP could have commenced construction earlier but simply chose not to. We are unaware of any factual basis to support this suggestion.

LMG's Motion

LMG's Motion seeks "relief from and reconsideration of" our May 31 Order, pursuant to Rule 60(b)(2), regarding the cost effectiveness and financial viability of the project, and mitigation of habitat fragmentation. LMG also seeks revocation of the CPG issued for the project on May 31, 2011. LMG incorporates the comments and requests made by the Towns in filings dated July 22, 2011, and August 24, 2011, as well as the memorandum filed by the Towns in support of the Towns' Motion discussed above.[32] LMG contends that the Board may entertain its motion pursuant to the Vermont Supreme Court's ruling in *Kotz*.[33] LMG argues that increases in project costs related to fixed costs, costs for securing certain conservation easements, and costs associated with remediating impacts from recent unauthorized activities on three conservation parcels[34] render the project uneconomic, particularly in light of the fact that construction did not commence on August 1, 2011, placing the availability of the PTCs at risk.[35] LMG also argues that the unauthorized activities on the three conservation parcels calls into question whether GMP can secure adequate mitigation to offset project impacts to the natural environment. Lastly, LMG argues that the costs of mitigating the impacts from the unauthorized activities on the three conservation parcels, coupled with potential system improvements required as a result of an SIS, and the potential unavailability of the PTCs, render the project uneconomic. LMG asks that the Board do the following: order GMP to submit comprehensive cost updates which account for all project changes to date; reconsider the financial viability of and environmental impacts from the project; and find that the project is no longer financially viable and will have an undue adverse impact on wildlife habitat and other natural resources. Based on these revised findings, LMG asks that the project's CPG be revoked.

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32. LMG's Motion at 1.

33. LMG's Motion at 1-2. LMG incorrectly cites to the caption of the case as *Katz v. Katz* instead of *Kotz v. Kotz*.

34. For a detailed description of the unauthorized activities, their impacts, and the steps taken to remediate those impacts, *see* Docket 7628, Order of 8/31/11.

35. LMG's Motion at 2-4.

Green Mountain Power Opposition

GMP advances the same arguments in opposition to LMG's motion as it advanced with respect to the Towns' motion.[36]

DISCUSSION

As with the Towns' Motion, we conclude that we are without authority to grant the requested relief because doing so requires amendment of the May 31 Order which is the subject of the pending appeal to the Vermont Supreme Court. Accordingly, we are without jurisdiction to entertain a motion filed under V.R.C.P. 60(b) to modify or amend that Order absent a remand for that purpose.

LMG's Motion expressly seeks modifications to findings in our May 31 Order, and based on those modified findings, seeks revocation of the CPG. LMG cites to language in the *Kotz* decision that, it asserts, allows the Board to consider its motion.[37] However, the language LMG relies on is not the holding of the Court in *Kotz*. It is merely the Court describing a process that has apparently been adopted by the Second Circuit for addressing Rule 60(b) motions when a case is on appeal in that venue. When the Vermont Supreme Court announced the rule that applies in Vermont, it did not adopt the process employed by the Second Circuit. Instead it stated that, "While a cause is pending in this Court, the trial courts have no power to rule on V.R.C.P. 60(b) motions in the absence of a remand for that purpose."[38] Based on the holding in *Kotz*, we conclude that we are without authority to consider LMG's Motion.

Even if we retained authority to entertain LMG's Motion, we would deny it with respect to economic viability for many of the same reasons described above with respect to the Towns' Motion. LMG appears to have confused economic viability with economic benefit to the state and its residents in the same way the Towns have done. And, like the Towns, LMG has failed to

36. GMP Opposition generally.
37. LMG's Motion at 2.
38. *Kotz*, 134 Vt. at 39.

demonstrate that the economic benefits that the Board found and relied on in approving the project will be eliminated if the cost of project power increases.[39]

We would also deny the motion with respect to impacts to the natural environment. According to LMG, the impacts from the unauthorized activities on the three conservation parcels call into question whether GMP can still obtain adequate fragmentation-connectivity easements to mitigate natural resource impacts from the project. LMG asserts that the impacts to the conservation parcels should be deemed a substantial change in the project, requiring an amendment to the CPG and reconsideration of whether the project still complies with the natural resources criterion of Section 248.[40] In our August 31, 2011, Order re GMP Remediation and Supplemental Mitigation we found that "GMP's remediation actions in conjunction with the proposed supplemental mitigation, subject to ongoing monitoring as required by ANR pursuant to its authority under 10 V.S.A. § 1272, adequately offset the impacts that resulted from the recent activity on Parcels 1, 2 and 3." Thus, there is no merit to LMG's contention that the impacts to these parcels calls into question whether GMP will be able to secure adequate fragmentation-connectivity easements and no basis to conclude that the impacts have resulted in a substantial change requiring an amendment to the CPG.

Lastly, we decline to direct GMP to file cost updates as requested by LMG. GMP is obligated by Board rule to notify the Board and parties if the estimated capital costs of the project increase by 20% or more,[41] and LMG has not shown that GMP is violating this obligation. In fact, GMP notified the Board and parties of an increase in capital costs resulting from the final selection of a turbine model for the project, even though that increase in capital costs was less than 20%. We see no reason to issue the order requested by LMG.

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39. In listing potential cost increases, LMG includes increased fixed costs resulting from the final selection of a turbine model, but ignores the reduced projected power costs that result from use of that more efficient model. LMG also points to uncertainties associated with the costs of remediating the impacts of the unauthorized activities on the three conservation parcels, but apparently overlooks the fact that the costs of that remediation are being borne by the landowner, Mr. Wileman, and not by GMP. LMG's Motion at 2-3. With respect to the costs of obtaining the habitat fragmentation-connectivity easements, a projected cost was incorporated into GMP's cost analysis.

40. LMG's Motion at 4-5.

41. PSB Rule 5.409.

CONCLUSION

Due to the pending appeal of the May 31 Order and July 12 Order, we are without authority to grant the relief requested by the Towns and LMG. Additionally, to the extent the Towns' Motion can be read as a request to revoke the CPG due to violations of the terms and conditions of the project approval, the motion is denied because the Towns have failed to demonstrate any such violation. Lastly, we decline to issue the order requested by LMG directing GMP to file updated cost information for the project because there is no indication that GMP is not complying with its obligations pursuant to Board Rule 5.409.

SO ORDERED.

Dated at Montpelier, Vermont, this 3rd day of October, 2011.

s/ James Volz)
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) PUBLIC SERVICE
)
s/ David C. Coen) BOARD
)
) OF VERMONT
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OFFICE OF THE CLERK

FILED: October 3, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

SEPARATE OPINION OF JOHN D. BURKE, DISSENTING IN PART AND CONCURRING IN PART

I am issuing a separate statement to concur in part with and to dissent in part from the majority's decision. I concur with all aspects of the Board's decision with the exception of its decision on one issue raised by LMG in its motion.

Specifically, LMG contends that the impacts from the unauthorized activities on the three conservation parcels call into question whether GMP can still obtain adequate fragmentation-connectivity easements to mitigate natural resource impacts from the project. LMG asserts that the impacts to the conservation parcels should be deemed a substantial change in the project, requiring an amendment to the CPG and reconsideration of whether the project still complies with the natural resources criterion of Section 248. In the Board's August 31, 2011, Order re GMP Remediation and Supplemental Mitigation, I dissented because I believed that evidentiary hearings were necessary before the Board could reach a determination as to the adequacy of GMP's efforts to remediate the impacts to the three conservation parcels. The same reasoning applies in this instance. I believe that an evidentiary hearing is needed before the Board can determine whether the impacts to the three conservation parcels have resulted in non-compliance with the natural resources criterion of Section 248, or constitute a substantial change to the project, and whether an amendment to the CPG is necessary.

As I did in my August 31, 2011, dissent, I again stress that my disagreement with my colleagues is over the process being employed to decide this issue. My disagreement does not necessarily extend to their ultimate conclusion that LMG's claim is without merit. Indeed, it is only after a technical hearing with sworn testimony by and cross-examination of expert witnesses that I will be able to render my opinion on this issue, one way or the other.

Thus, I dissent with respect to this issue. I concur with my colleagues in all other regards.

Dated at Montpelier, Vermont, this 3rd day of October, 2011.

s/ John D. Burke
John D. Burke, Board Member

OFFICE OF THE CLERK

FILED: October 3, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board