

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

Amended Petition of Vermont Gas Systems, Inc. for a)
certificate of public good, pursuant to 30 V.S.A. § 248,)
authorizing the construction of the "Addison Natural Gas)
Pipeline" consisting of approximately 43 miles of new)
natural gas transmission pipeline in Chittenden and)
Addison Counties, approximately 5 miles of new)
distribution mainlines in Addison County, together with)
three new gate stations in Williston, New Haven and)
Middlebury, Vermont)

Order entered: 8/26/2014

ORDER LIFTING STAY

I. INTRODUCTION

On July 25, 2014, the Vermont Public Service Board ("Board") issued an Order (the "July 25th Order") requiring that Vermont Gas Systems, Inc. ("VGS" or the "Company") temporarily halt all soil-disturbing activity associated with the construction of Phase I of the Addison Natural Gas Pipeline (the "Project") in the right-of-way owned by the Vermont Electric Power Company, Inc. ("VELCO") until after the Company had filed a soil management plan ("SMP") for consideration by the Board, following an opportunity for comment by parties to this Docket. VGS has since filed an SMP and parties have had an opportunity to comment on it. The Board has reviewed the SMP and the comments from the parties. In this Order, the Board lifts the stay imposed by the July 25th Order, provided that VGS follows the SMP protocols as modified by this Order. The Board further directs VGS to file the results of a recommended field study with the Board and the parties when the field study is completed.

II. PROCEDURAL HISTORY

On July 8, 2014, VGS filed with the Board a letter written by the Agency of Natural Resources ("ANR") in which ANR stated that it would be prudent for VGS to develop an SMP to screen potentially contaminated soils in close proximity to VELCO's utility poles that were treated with Pentachlorophenol ("PCP").¹ Approximately 20 miles of the 46-mile Project route are located along the VELCO right-of-way.

On July 11, 2014, the Board issued an Order in which it requested that VGS either: (1) advise whether it had developed an SMP as recommended by ANR and if so, to provide a copy; or (2), if VGS did not have an SMP, explain why it had not developed an SMP.

On July 21, 2014, VGS filed a letter stating "that it would be prudent for [VGS] to develop and implement an SMP for construction."² VGS further stated that it planned to develop an SMP in consultation with ANR and that it planned to file an SMP with the Board by August 1, 2014.

On July 25, 2014, the Board issued the July 25th Order requiring that VGS temporarily halt all soil-disturbing activity associated with the construction of the Project in the VELCO right-of-way until after the Company had filed an SMP for consideration by the Board. VGS responded by filing the draft SMP on the same day.

On July 28, 2014, Kristin Lyons and Nathan and Jane Palmer (collectively, the "Landowners") filed comments on the SMP.³ These comments were updated by a correction filed on August 4, 2014.

On August 1, 2014, the Board received comments from the Town of Monkton and ANR on the SMP.⁴

1. Letter of George Desch, Director of ANR's Waste Management and Prevention Division, to Diane Derrick, dated June 17, 2014.

2. Letter of Kimberly K. Hayden, on behalf of VGS, to Susan M. Hudson, Clerk of the Board, dated July 21, 2014.

3. Letter of James Dumont, Esq., on behalf of Kristin Lyons and Nathan and Jane Palmer, to Susan M. Hudson, Clerk of the Board, dated July 28, 2014 (hereinafter, the "Landowner Comments").

4. Letter of Judith Dillon, Esq., on behalf of the Agency of Natural Resources, to Susan M. Hudson, Clerk of the Board, dated August 1, 2014; Letter of William Ellis, Esq., on behalf of the Town of Monkton, to Susan M. Hudson, Clerk of the Board, dated August 1, 2014 (hereinafter, the "ANR Comments" and "Monkton Comments,"

(continued...)

On August 4, 2014, the Hurlburts filed comments on the SMP.⁵

On August 18, 2014, VGS filed a response to all the comments on the SMP.

III. DISCUSSION AND CONCLUSION

Summary of the SMP

The SMP provided for our consideration sets forth protocols for identifying, avoiding, and mitigating potential sources of contamination that may exist in the vicinity of the Project route. While the filing of the SMP was precipitated by concerns specifically regarding PCP contamination, the SMP is designed to identify and respond to a variety of contamination sources including hazardous waste sites designated by ANR, underground storage tanks, PCP originating from treated wood products, including utility poles, and other hazardous materials, including illegal dumps.⁶

VGS has conducted an assessment of the entire Project route in order to identify areas of elevated risk where existing contaminated soils or groundwater might be encountered during construction. This assessment has identified 153 PCP-treated structures within 50 feet of the Project's Limits Of Disturbance ("LOD"), in addition to other potential contaminant sources.⁷ However, the assessment identified no PCP-treated structures within 50 feet of the Project's trench. In addition to the inventory of known potential sources of contaminants, the SMP calls for the Project's contractor to perform a "look-ahead" before commencing construction in any given area to identify any additional undocumented areas of elevated risk.

The SMP requires construction personnel to observe the ground and soil during construction for soil staining in areas of elevated risk. Utility poles within the VELCO right-of-way will be inspected for soil staining around the base of the poles. Soil staining that extends beyond 12 inches from the base of a pole would be considered evidence of contamination. Where soil staining or other evidence of potential contamination is observed, these soils will be

4. (...continued) respectively).

5. Letter of Michael Hurlburt, on behalf of the Hurlburts, to Susan M. Hudson, Clerk of the Board, dated August 4, 2014 (hereinafter, the "Hurlburt Comments").

6. SMP at 2.

7. SMP at 6.

tested by a certified environmental scientist for contamination using a photoionization detector ("PID") and by olfactory and visual inspection.⁸ When contaminated soils are found, the SMP provides for notice to the Department of Environmental Conservation ("DEC") and sets protocols for the testing, segregation, storage, and disposal of such soils. Contaminated soils are required to be managed in accordance with the Vermont Hazardous Waste Regulations ("VHWR").

The SMP further contains statements asserting that, as a U.S. Environmental Protection Agency registered pesticide, PCP applied under certain circumstances is not considered a "hazardous material" under the VHWR. Finally, VGS has filed an addendum to the SMP, labeled Appendix A, which sets forth contaminant levels that will trigger action under the SMP. VGS represents that these numbers were developed in consultation with DEC.

Positions of the Parties

ANR supports the implementation of a plan to address and manage the potential risk posed by potential contamination from PCP-treated poles as well as other DEC-designated hazardous sites. ANR represents that it has consulted with VGS on the development of the SMP. ANR also states that it has joined with other state agencies to recommend that the Board open an investigative docket on the use of PCP-treated utility poles as a separate proceeding.⁹

ANR states that the SMP's methodology for assessing potential risks appears sound. ANR recommends that VGS perform a field study to verify that a 50-foot buffer between the utility poles and the Project's trench is sufficient to prevent any contamination of the construction area. ANR represents that it is coordinating with VGS and the Agency of Agriculture Food and Markets ("AAFM") to finalize the elements of the field study protocol. ANR also recommends three "adjustments" to the SMP, the most relevant of which is that ANR considers PCP-contaminated soil to be "hazardous material" under the VHWR. ANR represents that the Department and AAFM support the field study and ANR's recommended adjustments to the SMP.

8. SMP at 9 and 13.

9. On July 31, 2014, the Board opened such an investigation in Docket No. 8310.

The Town of Monkton ("Monkton") states that the SMP is not adequate or appropriate for the task of identifying and defining the extent of PCP contamination but instead appears to be designed for identifying petroleum contamination. Monkton recommends that the SMP be rewritten to address concerns regarding PCP and creosote contamination separately. Monkton also questions whether the personnel employed by VGS will have the requisite skill to identify creosote staining and contends that field workers should receive additional training. Monkton also contends that the equipment proposed to be used for the detection of contaminants is not adequate for the task.

Monkton objects to the use of contaminated soils as backfill. Monkton recommends that all contaminated or potentially contaminated soils be segregated from clean material and properly disposed of. Monkton contends that it would be better for the SMP to focus on areas where the pipeline is located near structures that have been treated with PCP as opposed to allowing concurrent construction and investigation.

The Landowners argue that the SMP fails to protect the public and is unlawful. The Landowners assert that PCP-contaminated soil is "hazardous material" under applicable law. Therefore, they contend, the SMP should not allow for the backfilling of contaminated soil. The Landowners contend that VGS has failed to include an analysis of how much the implementation of the SMP will cost, and that such information is necessary for the Board to review in determining whether the Project's CPG should be reopened. The Landowners request that the Board maintain the stay of construction in the VELCO right-of-way until after a hearing, if requested by a party, to approve a protocol for performing soil tests at all VELCO poles within 50 feet of the LOD and all elevated risk areas. The Landowners also request that the Board order VGS to conform any clean-up of contaminated soils with the requirements of Section 7-105 of the VHWR.

The Hurlburts request that the Board reject the soil management plan as inadequate and instead reopen the proceedings under V.R.C.P. Rules 60(b)(2) and (b)(6) to take account of new evidence or to consider the potential for hardship or injustice that may result from VGS encountering potentially contaminated soils. The Hurlburts also state that the SMP is silent on the apportionment of authority, responsibility, and accountability of VGS and VELCO for

contamination identified within the shared portions of the VELCO right-of-way or between VGS and other owners of utility poles. The Hurlburts contend that the SMP only protects soil and fails to protect water resources and does not account for other sources of contamination such as creosote, dioxins, hexachlorobenzene, and other compounds from utility poles, including poles owned by utilities other than VELCO.

The Hurlburts also question the competence and impartiality of VGS's contractor because the contractor has worked previously for VELCO. The Hurlburts request further inquiry and discovery to determine whether alterations to the Project's design are necessary to make the SMP workable. The Hurlburts contend that "the SMP cannot stand on its own as sufficient evidence for the Board to find that the Project 'will not have an undue adverse effect' [on the natural environment], a condition precedent to issuance of a certificate of public good under Section 248(b)(5)."¹⁰ Accordingly, the Hurlburts request that the Board adopt numerous additional conditions for the Project's CPG. Finally the Hurlburts request that the Board direct the Department, ANR, the Vermont Department of Health, and AAFM "to develop a clear policy for coordinated [sic] and plan for the integrated monitoring, oversight, and performance management of more than one utility operating on the same territory or within the same corridor."¹¹

VGS responds that it has agreed with ANR to complete the recommended field study and expects that the field study will validate the approach laid out in the SMP. VGS further agrees with two of ANR's recommended changes to the SMP, relating to the state's Petroleum Cleanup Fund and the addition of regulatory standards that will trigger action under the SMP. VGS represents that it has worked with ANR to develop those standards and provided an addendum to the SMP.

VGS disagrees, however, with ANR's position that PCP-contaminated soil is classified as a "hazardous material" under the VHWR. VGS contends that, as an initial matter, ANR's legal conclusion is not appropriate to include in the SMP, which is a technical document. Second, VGS disagrees with ANR's legal conclusion because the VHWR specifically exempts herbicides

10. Hurlburt Comments at 17.

11. Hurlburt Comments at 18.

and pesticides applied consistent with good practice and in conformity with federal, state and local law.

VGS disputes the Landowners' contention that the chemicals resulting from the biodegradation of PCP are "more toxic" than PCP. VGS rejects the Landowners' contention that PCP will not be detectable by sight or smell. The Company argues that the carrier oils used to apply PCP will allow such detection to occur. Additionally, VGS alleges that these carrier oils will also allow for detection with a PID. Finally, VGS reiterates its position that PCP is not a "hazardous material" and that accordingly, the backfilling of contaminated soils is consistent with ANR's guidance.

In response to Monkton's comments, VGS further contends that the field study being performed as recommended by ANR should confirm the efficacy of the SMP. Finally, VGS states that construction not associated with the Project could be occurring near utility poles in Monkton at this time and that it "does not make sense to single out [VGS]" as a venue to investigate issues related to the use of PCP on utility poles. VGS contends the proper venue would be the Board's general investigation in Docket 8310.

Discussion

As a preliminary matter, we reiterate that our decision in the July 25th Order to stay VGS's operations in the VELCO right-of-way pending our review of the SMP was an exercise of our general supervisory jurisdiction to regulate the conduct of companies in order to protect public safety.¹² The potential for encountering PCP-contaminated soil was brought to our attention during construction of the Project, but before construction commenced in the VELCO right-of-way. In light of comments we received from ANR and VGS stating that it would be prudent for the company to have an SMP, we were concerned that VGS's operations near VELCO-owned poles without an SMP in place might pose a risk to the general public. Accordingly, we required that VGS file an SMP for our review and for comment by the parties in this Docket.

After reviewing the SMP and considering the comments of the parties, we have determined that the SMP, subject to ANR's recommendations relating to the state's Petroleum

12. 30 V.S.A. § 209(a)(3).

Cleanup Fund and the addition of the regulatory standards contained in Appendix A, and coupled with verification by ANR's recommended field study, is a reasonable approach to managing this risk.¹³ Accordingly, we require VGS to follow the protocols set out in the SMP as it constructs the Project. We conclude that the stay imposed by the July 25th Order is no longer warranted because compliance with the SMP provides a reasonable approach to identifying potential areas of contaminated soils to allow for appropriate adjustments to construction if needed.

The SMP addresses the risk associated with potentially PCP-contaminated soils primarily through a strategy of avoidance. The SMP states that previous studies have shown that PCP concentrations in soil surrounding utility poles usually diminishes to background levels beyond 40 inches from the base of utility poles.¹⁴ Accordingly, the SMP concludes that the probability of encountering PCP contamination is small. The Hurlburts and other parties have challenged this assumption and allege that PCP has the potential to migrate further under certain circumstances.¹⁵ ANR has recommended, and is working with VGS to develop, a field study to test VGS's hypothesis that maintaining a distance of 50 feet between VGS's trench and PCP-treated poles in the VELCO corridor will avoid the disturbance of PCP-contaminated soil.¹⁶ This field study will specifically investigate areas with elevated risk factors that could cause PCP to migrate away from a utility pole, including the presence of shallow ground water. Accordingly, we are satisfied that, coupled with verification by the field study, the SMP's strategy of avoidance is acceptable. We require that VGS file the results of the field study with the Board and the parties when the field study is complete.

With this in mind, we are not persuaded by comments we received from parties in opposition to the SMP critiquing the SMP's protocol for identifying evidence of contamination and screening for actual contamination because those methods are not the primary strategy

13. VGS has agreed to two of ANR's recommended changes to the SMP, relating to the state's Petroleum Cleanup Fund and the addition of regulatory standards that will trigger action under the SMP. Today's Order makes no ruling regarding the merits of ANR's third recommended change, which is simply a statement of ANR's position that PCP contaminated soil is "hazardous material." As the agency of jurisdiction charged with enforcing the VHWR, ANR is responsible for applying and enforcing its rules.

14. SMP at 3.

15. Hurlburt Comments at 9.

16. ANR Comments at 1.

employed by the SMP for mitigating risks associated with PCP (i.e., avoidance). The SMP is designed to assess and mitigate risks associated with contamination from a variety of sources, not just PCP-treated poles. Accordingly, even if some of the protocol included in the SMP are not appropriate for identifying PCP contamination, they are still appropriately included in the SMP because they will help mitigate risks associated with other contaminants.

Several parties have taken issue with the SMP's characterization of PCP and whether it is a "hazardous material." Building on this dispute, the Landowners and Monkton allege that the SMP's protocol for backfilling contaminated soil is illegal or would require a permit.¹⁷ As a preliminary matter, the SMP does not specifically state that PCP-contaminated soil will be backfilled. Instead, the SMP states that after "contaminated soil" has been evaluated, it should be placed in a permanent location for treatment, and that backfilling is the "preferred option."¹⁸ Accordingly, we do not interpret the SMP to necessarily require backfilling in inappropriate circumstances. We observe that ANR's comments make clear that it believes that PCP-contaminated soil is "hazardous material" but not "hazardous waste" under the relevant statutes and regulations.¹⁹ The resolution of this issue is not necessary today for purposes of our decision as to whether it is now appropriate to lift the stay. VGS has an independent obligation to comply with all applicable state and federal laws, including the Vermont Hazardous Waste Regulations. Nothing in our decision here to dissolve the stay on construction in the VELCO right-of-way should be interpreted as altering this obligation. For this reason, we are unpersuaded by the comments we received on this issue.

The Hurlburt Motion and Other Issues

The Hurlburts request that we "determine that any soil plan alone is insufficient proof that the Project will not result in undue adverse effect to the environment, water purity, natural resources, and public health and safety (hereinafter "environment and public health") under Section 248(b)(5)." Essentially, the Hurlburts request a new trial on the issue of whether an SMP

17. Landowner Comments at 6.

18. SMP at 10.

19. ANR Comments at 2.

is necessary to ensure that the Project satisfies the requirements of Section 248(b)(5). We deny the Hurlburts' motion to reopen this docket pursuant to V.R.C.P. Rules 60(b)(2) and (6).

As an initial matter we lack the jurisdiction to entertain such a motion because the Final Order granting a CPG for the Project is on appeal to the Vermont Supreme Court.²⁰ Moreover, even if we had jurisdiction, none of the comments filed regarding the need for an SMP have persuaded us that this issue rises to the level of materiality so as to be likely to change the outcome of our December 23rd Order. Secondly, as explained above, we determined that it was in the public interest to take independent action pursuant to our general supervisory jurisdiction over VGS to ensure that VGS would conduct its construction activities with an SMP in place — a precaution that both VGS and ANR agreed would be "prudent" to take. At the time we ordered the stay, we did not have the benefit of the comments we have subsequently received on this issue. We are now satisfied that our concerns about public safety related to these post-certification construction activities have been answered. That said, we emphasize that our decision to allow construction to move forward does not authorize VGS to spread contamination or act in any manner contrary to law.

Similarly, we are not persuaded by the Hurlburts' comments that the Board should undertake at this time to apportion liability in advance between various parties for any potential spreading of contaminants in the VELCO right-of-way. This issue is not properly before us for decision. At this time there has been no verified allegation that VGS has spread any contaminants. To the extent the Hurlburts would be seeking to pursue a claim for alleged contamination, it is not clear whether such process is within the Board's jurisdiction to entertain. Therefore, we will not take up the issue of allocation as requested by the Hurlburts, particularly not without a specific, verified instance of contamination.

Finally, we turn to the Landowners' and the Hurlburts' request that the Board require VGS to submit any additional costs of implementing the SMP to the Board for review along with the cost increases that VGS has already brought to the Board's attention pursuant to Board Rule

20. *See Kotz v. Kotz*, 134 Vt. 36, 38, 349 A.2d 882, 884 (1975) (trial court lacks authority to consider motions for relief from final judgment while an appeal of that same judgment is pending in the supreme court).

5.409. This issue is unrelated to our consideration of whether to lift the stay of construction. Accordingly, the Board will not address this issue in this Order.

For the reasons stated above, the stay on construction in the VELCO right-of-way imposed in the July 25 Order is lifted. VGS shall follow the protocols of SMP as modified by this Order. VGS shall file the results of the field study with the Board and the parties when the study is completed.

SO ORDERED.

Dated at Montpelier, Vermont, this 26th day of August, 2014.

<u>s/ James Volz</u>)	
)	
)	PUBLIC SERVICE
)	
<u>s/ John D. Burke</u>)	
)	BOARD
)	
)	OF VERMONT
<u>s/ Margaret Cheney</u>)	

OFFICE OF THE CLERK

FILED: August 26, 2014

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.