

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: 11/7/2014

**ORDER DENYING MOTION TO MODIFY SMP**

**I. INTRODUCTION**

In today's Order, the Vermont Public Service Board ("Board") denies a motion filed by the Town of Monkton ("Monkton") pursuant to Rule 59(e) of the Vermont Rules of Civil Procedure and Board Rule 2.103 asking that the Board alter or amend its Order of August 26, 2014 (the "Monkton Motion").

**II. PROCEDURAL HISTORY**

On July 25, 2014, the Board issued an Order (the "July 25<sup>th</sup> 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 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. VGS responded by filing the draft SMP on the same day. The July 25<sup>th</sup> Order also directed the parties to file any comments on the SMP within one week of VGS's filing of the SMP with the Board.

On August 1, 2014, the Board received comments from Monkton on the SMP

("August 1<sup>st</sup> Comments").

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

On August 26, 2014, the Board lifted the stay imposed by the July 25<sup>th</sup> Order, on the condition that VGS follows the SMP protocols as modified by that Order (the "August 26<sup>th</sup> Order").

On September 10, 2014, Monkton filed the Monkton Motion.

On September 18, 2014, by Order, the Board set a September 26, 2014, deadline for comments from the parties on the Monkton Motion.

On September 26, 2014, VGS and the Agency of Natural Resources ("ANR") (on behalf of ANR, the Department of Public Service, and the Agency of Agriculture, Food, and Markets (the "State Agencies")) filed comments on the Monkton Motion (the "VGS Comments" and "State Agency Comments," respectively). The VGS Comments also include a filing of the results of the recommended field study as directed by the Board in the August 26<sup>th</sup> Order.

No other comments were filed on the Monkton Motion.

### **III. POSITIONS OF THE PARTIES**

#### **Monkton**

Monkton requests that the Board re-assess the terms of the SMP in light of additional comments, dated August 18, 2014, prepared by Monkton's consultant, Deborah H. Gaynor, Ph.D., of Phoenix Chemistry Services. Monkton states that it was unable to file Dr. Gaynor's comments prior to the issuance of the August 26<sup>th</sup> Order.

Monkton summarizes Dr. Gaynor's concerns with the SMP as follows:

(1) [W]hether the 50-foot Buffer Is Adequate Given the Distance Contamination Traveled in Connection with the Velco Pole Replacement of February 2014; (2) the Appropriateness of Using a Photoionization Detector for Identifying Contamination; (3) the Training and Qualifications of the Individuals Charged with Identifying Contamination; (4) the Stockpiling of Contaminated Soils; (5) the Appropriate Screening Levels for Contaminated Residential or Agricultural Soils; and (6) the Accreditation of Endyne to Perform Certain Testing.<sup>1</sup>

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1. Monkton Motion at 2.

Monkton requests that the Board direct VGS to amend the SMP to reflect these concerns.

### VGS

VGS urges the Board to deny the Monkton Motion because the "SMP is protective of human health and the environment and has been approved by ANR."<sup>2</sup> VGS argues that there is no need to alter or amend the SMP because most of Monkton's concerns were already addressed in the SMP based on Monkton's comments on the SMP filed on August 1. VGS also argues that the recommended field test verified the adequacy of the SMP protocols.

### The State Agencies

The State Agencies recommend that the Board deny the Monkton Motion, arguing that the results of the recommended field study show that Dr. Gaynor's concerns do not warrant a reconsideration of the SMP. The State Agency Comments emphasize that:

ANR staff monitored and observed the sampling collection methods during the field verification study and . . . has determined that the minimum detection levels were sufficiently sensitive to detect possible exceedances of soil and groundwater standards. . . . The verification study demonstrates that the fifty-foot buffer is sufficient. ANR concurs with the elements of the Soil Management Plan and supports its implementation during construction of the Vermont Gas pipeline.<sup>3</sup>

The State Agencies note that VGS "has an independent obligation to comply with all applicable state and federal laws"<sup>4</sup> and that the issues Dr. Gaynor highlights will be addressed by the working group established in Docket 8310 to investigate the practices of Vermont utilities that use poles treated with pentachlorophenol ("PCP").

### **IV. DISCUSSION AND CONCLUSION**

The Monkton Motion is supported by a technical memorandum prepared by Dr. Gaynor. Monkton states that it "was unable to file these comments with the Board prior to its issuance of its Order Lifting Stay, and does so now as part of the instant motion to allow the Board a more

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2. VGS Comments at 11.

3. ANR Comments at 3-4.

4. *Id.* at 4 quoting the August 26<sup>th</sup> Order at 9.

complete record on which to base its determination as to whether the SMP adequately addresses the public safety concerns related to VGS's post-certification construction activities."<sup>5</sup>

The Monkton Motion was filed pursuant to Rule 59(e). Monkton states that the purpose of Rule 59(e) is to give the Board a last opportunity to ensure the completeness and accuracy of its decision. However, it is settled law that Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the court prior to the judgment."<sup>6</sup> As discussed in the procedural history above, the deadline for comments on the SMP was August 1, 2014. Monkton submitted timely comments on August 1, including a memorandum from Dr. Gaynor, critiquing the SMP — which we considered in our review of the SMP. Monkton has not provided any persuasive justification for allowing it to have a second opportunity to raise the additional issues about the SMP contained in Monkton's request for reconsideration filed on September 10 — a date that is 40 days after the August 1<sup>st</sup> comment deadline. In these circumstances, the Board declines to consider any new arguments raised in the Monkton Motion.

However, even if we were to consider Monkton's new arguments, we would not be persuaded that good cause exists to alter the August 26<sup>th</sup> Order. The State Agencies have represented that the results of VGS's field verification testing indicate that the SMP's 50-foot buffer is sufficient to protect public health and safety. These tests were monitored and observed by ANR. Based on this representation, it appears that construction conducted pursuant to the SMP is unlikely to encounter contamination caused by utility poles — which was the principal concern that prompted the Board to order VGS to develop an SMP. Accordingly, we are satisfied that the SMP is still a reasonable approach to mitigating this risk.

For the reasons stated above, we have determined that the Monkton Motion does not provide a sound basis for the Board to alter or amend the August 26<sup>th</sup> Order. Therefore, the Monkton Motion is denied.

**SO ORDERED.**

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5. Monkton Motion at 2.

6. *In re SP Land Company, LLC*, 2011 VT 104 at ¶ 33.

Dated at Montpelier, Vermont, this 7<sup>th</sup> day of November, 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: November 7, 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.*