

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7970

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 Project" 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: 6/24/2014

ORDER RE: VGS'S MOTION FOR LIMITED WAIVER OF CPG CONDITION NO. 2

I. INTRODUCTION

In today's Order, the Vermont Public Service Board (the "Board") denies the motion of Vermont Gas Systems, Inc. ("VGS" or the "Company") requesting a limited waiver of condition number 2 of the Certificate of Public Good ("CPG") issued by the Board on December 23, 2013.

II. PROCEDURAL BACKGROUND

On December 23, 2013, the Board issued a final Order (the "December 23rd Order") granting the Company a CPG pursuant to 30 V.S.A. § 248 to construct a natural gas pipeline extension into Addison County, Vermont (the "Project"). In the December 23rd Order, the Board directed the Company to obtain all necessary permits before commencement of construction or site preparation.

Condition number 2 of the CPG, as corrected on December 26, 2013, provides:

2. Petitioner shall obtain all necessary permits from the Agency of Natural Resources, the U.S. Army Corps of Engineers, and the Vermont Agency of Transportation before commencement of construction or site preparation. This includes the Vermont Stream Alteration Permit, Vermont Wetland Permit, Section

401 Water Quality Certification, NPDES Stormwater Permit, and Army Corps of Engineers Section 404 Permit. Prior to proceeding with construction in any given area, Petitioner shall also obtain all other necessary permits and approvals required for the proposed construction activities in that area. Construction, operation and maintenance of the proposed Project shall be in accordance with such permits and approvals, and with all other applicable regulations, including those of the Vermont Agency of Natural Resources and the U.S. Army Corps of Engineers.¹

On June 10, 2014, VGS filed a motion seeking a limited waiver of this specific condition of the CPG to allow for the establishment of two staging areas in non-wetlands in Williston and New Haven as part of its construction mobilization process though it had not yet obtained the required Army Corps of Engineers ("ACOE") wetlands permits ("June 10th Motion").

On June 12, 2014, the Board issued an order directing that all comments on VGS's June 10th Motion be filed by no later than the close of business on June 16, 2014.

On June 13, 2014, the Conservation Law Foundation ("CLF") filed comments opposing VGS's June 10th Motion.

On June 16, 2014, Mr. Nathan Palmer ("the Palmers") and Mr. Michael Hurlburt ("the Hurlburts") each made filings opposing VGS's June 10th Motion. The Vermont Fuel Dealers Association ("VFDA") and the Town of New Haven ("New Haven") also filed comments opposing VGS's June 10th Motion.

No other comments were received.

III. POSITIONS OF THE PARTIES

VGS

In the June 10th Motion, VGS seeks a limited waiver of condition number 2 of the CPG, pursuant to V.R.C.P. § 60(b)(6), to allow construction staging areas to be established pursuant to the Project plan in Williston and New Haven. VGS asserts that "[d]elaying deliveries to the Williston and New Haven staging areas until later this month will further impact the overall construction schedule and cost."² In the June 10th Motion, VGS also states that it had conferred with the Agency of Natural Resources ("ANR"), the Vermont Agency of Transportation

1. Docket 7970, CPG dated 12/23/13 at 1-2, corrected 12/26/13.

2. June 10th Motion at 2.

("VTrans"), the ACOE, and the Department of Public Service ("DPS" or the "Department"), and that all four agencies had no objection to VGS's limited waiver request.

CLF

CLF opposes the Board's granting the June 10th Motion for three reasons. First, CLF argues that the Board was aware of the fact that not all permits would be decided at the same time when it required that all permits be in place before the construction began. Second, CLF notes that the Project has the potential to create significant environmental degradation, justifying an assurance that the water quality and wetland issues to be addressed in the ACOE permit have been reviewed before construction begins. And third, CLF argues that VGS has failed to articulate any extenuating circumstances justifying its request.³

The Palmers

The Palmers' Motion to Deny the June 10th Motion argues several bases for the Board to deny VGS's request:

- 1.1. V.R.C.P. § 60(b)(6) relief is unavailable since VGS made tactical choices that led to the delay.
- 1.2. V.R.C.P. § 60(b)(6) relief is unavailable to VGS because it made bad business decisions that may cause it some hardship.
2. The Board ordered condition number 2 and the permits it requires before construction in lieu of seeking additional evidence mitigating undue adverse findings for certain § 248 environmental criteria. That is, there can be no finding of public good in the absence of all the required permits.
- 3.1. Granting relief would create an injustice by disallowing the parties the opportunity to engage in meaningful comment on the ACOE permit activity.
- 3.2. Granting relief would undermine the protections afforded to ratepayers by the Board's thorough review of all the § 248 criteria.

3. Pages 1-2 of the motion attached to letter from Sandra Levine, Esq., to Susan Hudson, Clerk of the Board, filed June 13, 2014.

3.3. Granting relief would cause an undue risk of injustice to non-intervening landowners by compressing the easement negotiation schedule.

4.1. VGS presented no evidence to demonstrate either harm or delay.

4.2. VGS presented no evidence to demonstrate that delay in setting up the staging areas would cause follow-on delay in the construction schedule.

4.3. VGS presented no evidence that it would suffer a hardship if the requested waiver were not provided.

4.4. VGS presented no evidence that ANR, which had requested the specific language of condition number 2, actually acquiesced to its limited waiver as requested by VGS.⁴

The Hurlburts

The Hurlburts objected to the June 10th Motion and moved the Board to deny it because there were still water quality and easement issues to be resolved before any construction could begin.⁵

VFDA

VFDA objected to the June 10th Motion for two reasons. First, VFDA argues that VGS has demonstrated no significant hardship justifying its request for relief. Second, VFDA urges that granting relief would set a poor precedent by giving the impression that a waiver would be available to any project petitioner who encountered delay in obtaining necessary environmental permits.⁶

New Haven

New Haven objected to the June 10th Motion for three specific reasons. First, New Haven argues that water quality and wetland issues along the Project route have not yet been resolved and construction should not begin until the ACOE permit resolving those issues is obtained.

4. Motion of the Palmers, filed June 16, 2014, at 2-12.

5. Page 1 of the motion attached to letter from Michael Hurlburt to Susan Hudson, Clerk of the Board, filed June 16, 2014.

6. Comments of Vermont Fuel Dealers Association Regarding Request of Petitioner for Partial Waiver, filed June 16, 2014, at 1-2.

Second, New Haven notes that it acceded to the issuance of the CPG only after the relevant conditions, like condition number 2, were installed and that granting the waiver would negate the due process previously afforded to the parties. And third, New Haven argues that VGS has identified no reason to waive condition number 2 other than VGS's convenience, which is insufficient for the Board to grant the relief. Finally, New Haven also generally adopted all the reasons stated by the Palmers in their Motion to Deny VGS's request for a limited waiver.⁷

IV. DISCUSSION AND CONCLUSION

In pertinent part, V.R.C.P. § 60(b) states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment.

Under the § 60(b)(6) "catch-all" provision, the Board "enjoys broad discretion to amend a judgment in the interests of justice."⁸

In this case, VGS asks the Board to exercise its broad discretion based on VGS's assertions that (1) obtaining the ACOE permit prior to constructing the staging areas will create a delay and impact overall construction schedule and cost, and (2) ANR, VTrans, the ACOE, and the DPS do not object to their request.

The Board ordered condition number 2 of the CPG with an awareness of the likelihood of sequential, and time-consuming, permitting activity. We also ordered this condition to ensure that the undue adverse impacts to water quality and wetlands were effectively mitigated by VGS prior to construction actually beginning.⁹

The Board finds that the two statements relied upon by VGS in the June 10th Motion provide an insufficient reason to compel our exercise of Rule 60(b)(6) to prevent hardship or injustice.

7. The Town of New Haven's Opposition to Vermont Gas Systems' Request to Waive CPG Conditions, filed June 16, 2014 at 1-3.

8. *Levin v. Grundstein*, 2013 WL 2631310 (Vt.), citing *Sandgate Sch. Dist. V. Cate*, 178 Vt. 625, 883 A.2d 774, 2005 VT 88, ¶7 (mem.) ("Relief from judgment under Rule 60(b)(6) is intended to prevent hardship or injustice and thus [is] to be liberally construed and applied.").

9. Docket 7970, Order of 12/23/13, at 116.

Therefore, the Board is denying the Company's request for a limited waiver of condition 2 of the CPG to allow for construction of staging areas in Williston and New Haven.

SO ORDERED.

Dated at Montpelier, Vermont, this 24th day of June, 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: June 24, 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.