STATE OF VERMONT
PUBLIC SERVICE BOARD

Case No. 8791

Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged taking of harsh sunflower plants by Vermont Gas Systems, Inc. in Monkton, Vermont	

Order entered:

PROPOSAL FOR DECISION

I. INTRODUCTION

On December 23, 2013, the Vermont Public Service Board (the "Board") issued a final Order (the "2013 Final Order") and certificate of public good ("CPG") in Docket 7970, in which the Board authorized Vermont Gas Systems, Inc. ("VGS" or the "Company") to construct a natural gas transmission line from Chittenden County into Addison County, Vermont (the "Project").[1] On August 23, 2016, the Board, based on information provided to the Board by the Company, opened an investigation to determine whether the Company violated the 2013 Final Order and CPG by taking a rare, threatened, or endangered ("RTE") plant species during pipeline construction in Monkton, Vermont without an endangered species takings permit, and if so, whether it is appropriate to order any remedial action, impose a penalty, or take any other steps authorized by law. In this Proposal for Decision, I recommend that the Board impose a civil penalty of $25,000 on the Company pursuant to 30 V.S.A. § 30 for violating the 2013 Final Order and CPG.

II. PROCEDURAL HISTORY

On July 19, 2016, the Company filed notice with the Board that on July 18, 2016, during pipeline construction there was an inadvertent disturbance of harsh sunflower plants in Monkton, Vermont, and that the Company was investigating the incident and would work closely with the

[1] *Petition of Vermont Gas Systems, Inc. for a certificate of public good authorizing the construction of the "Addison Natural Gas Project,"* Docket 7970, Order of 12/23/13.

Vermont Agency of Natural Resources ("ANR") to "address all regulatory issues" (the "VGS Self Report").[2]

On July 28, 2016, Kristin Lyons, a party in Docket 7970, requested that the Board investigate whether the Company's report of an alleged taking of an endangered species was a violation of the 2013 Final Order (the "Lyons Request").[3] Also on July 28, the Board set a deadline of August 5, 2016, for the parties in Docket 7970 to file responses to the Lyons Request.

On August 5, 2016, ANR responded to the Lyons Request stating that on July 20, 2016, ANR conducted a site visit at the affected parcel of land in Monkton and observed approximately 77 harsh sunflower plants (*Helianthus strumosus*) that the Company damaged during construction of the pipeline on July 18, 2016. ANR asserted that in so doing the Company violated conditions 2 and 3 of the CPG in Docket 7970.[4] ANR requested that the Board open an investigation to impose penalties for the violation of these CPG conditions pursuant to 30 V.S.A. § 30 because the "taking was in violation of the state endangered species law, as VGS did not have a takings permit for these plants."[5] ANR represented that the Vermont Department of Public Service (the "Department") joined in its request to open an investigation pursuant to 30 V.S.A. § 30.

On August 23, 2016, the Board opened an investigation pursuant to 30 V.S.A. §§ 30 and 209. The Board stayed the investigation until ANR completed its investigation and concluded its intended civil enforcement action under 10 V.S.A. § 5403.

On December 29, 2016, ANR filed a request for the Board to lift the stay and provided a copy of an Assurance of Discontinuance issued by the Superior Court, Environmental Division

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[2] VGS Self Report at 2-3.

[3] Condition 3 of the 2013 Final Order and Condition 2 of the CPG state, in part: "The Petitioner shall obtain all necessary permits from the Agency of Natural Resources . . . before commencement of construction or site preparation."

[4] Condition 4 of the 2013 Final Order and Condition 3 of the CPG require the Company to comply with the provisions of its Memorandum of Understanding with ANR (the "ANR MOU"). Paragraph 11 of the ANR MOU addresses threatened plants and states that "VGS will re-align the pipe as feasible to avoid the plant species. If the species cannot be avoided, VGS will obtain a takings permit prior to construction."

[5] Letter from Donald J. Einhorn, Esq., to Judith C. Whitney, Clerk of the Board, dated August 5, 2016, at 1-2, citing 10 V.S.A. § 5403 (the "Monkton ANR Comments").

on December 7, 2016 ("AOD").[6] The AOD is a stipulation between ANR and the Company adopted as an order of the Environmental Court that documents certain facts about the incident, including the Company's payment of a $33,687.50 civil penalty.

On January 20, 2017, the Board issued an Order lifting the stay, scheduling a status conference, and appointing me to serve as the Hearing Officer to conduct the proceedings in this matter.

On January 31, 2017, I held a status conference in this Docket. The parties agreed upon a schedule that was memorialized in a scheduling order.

On April 5, 2017, the Department, VGS, and ANR participated in a public information session at Holley Hall in Bristol, Vermont. Following the information session, I held a public hearing at which 14 members of the public provided comments about the investigation.

On April 14, 2017, the Company filed a stipulated proposal for decision agreed to by the Department, ANR, and the Company and requested no further hearing or other process (the "Stipulation"). The Department, ANR, and the Company agree that the Stipulation and its attachments may be admitted as evidence in this proceeding. Attached to the Stipulation were the AOD, an affidavit of John St. Hilaire, and the VGS Self Report.

Also on April 14, 2017, the Department filed comments in support of the Stipulation and recommending a $6,000 civil penalty. ANR filed comments recommending that the $6,000 penalty be paid to the New England Wildflower Society.

No public comments on the Stipulation have been received.

III. Public Comments

Along with the comments made by 14 members of the public at the public hearing held on April 5, 2017, the Board received nearly four dozen other comments from the public on the investigation. These other comments requested that the Board either hold a public hearing or hold a hearing in the matter that is open to the public.

The speakers at the public hearing requested that the Board issue the maximum possible penalty on the Company for its violation of the 2013 Final Order. The commenters asserted that

[6] *Agency of Natural Resources v. Vermont Gas Systems, Inc.*, Docket No. 163-12-16 vtec. (Vt. Super. Ct. Envtl. Div. Dec. 7, 2016).

a high penalty was appropriate because: (1) the Company had repeatedly violated the law in the construction of the pipeline; (2) the penalty needed to have a deterrent effect greater than the cost of doing business; (3) the violation reflected a management problem within the Company that allowed for blatant disrespect of compliance requirements; and (4) the violation was an active, intentional deception. Several speakers also requested that, along with a civil penalty, the Board should require that VGS document the restoration of the future health of the harsh sunflower at the site of the incident.

IV. Findings

Based on the agreement of the parties, I hereby admit the Stipulation and its attachments into evidence. Pursuant to 30 V.S.A. § 8(c), and based on the evidence of record, I present the following proposed findings of fact to the Board.

1. VGS is a Vermont-registered corporation engaged in the business of transmission and distribution of natural gas. AOD at ¶ 1.

2. On December 23, 2013, in Docket No. 7970, the Board issued the 2013 Final Order and CPG to the Company for the construction and operation of the Project. AOD at ¶ 2.

3. The Project includes the installation of natural gas transmission pipeline in several municipalities, including Monkton, Vermont. AOD at ¶ 3.

4. The pipeline route crosses over property identified as 57 Cedar Lane in Monkton (the "Property"), which VGS acquired in 2016. AOD at ¶ 4.

5. On September 13, 2013, ANR and the Company entered into the ANR MOU concerning the Project. AOD at ¶ 8.

6. The ANR MOU stated that harsh sunflowers had been identified at the Property, acknowledged that the Company did not have access to the Property at the time of the ANR MOU, and provided that the Company would perform a survey of the plants once it gained access to the Property prior to construction of the pipeline. AOD at ¶ 9.

7. In December 2015, environmental consultants working on behalf of the Company met with ANR to discuss a potential takings permit for installation of the pipeline on the Property in connection with the Project. AOD at ¶ 10.

8. The Company initially planned to install the pipeline on the Property by excavating an open trench. This method of installation would, by necessity, involve direct disturbance of any plants in the pipeline's route. AOD at ¶ 10; St. Hilaire at ¶ 4.

9. In May, June, and July of 2016, after the Company gained access to the Property, the Company's environmental consultants visited the Property on three occasions to survey the extent of the harsh sunflower plants and gather information so that the Company could apply to ANR for a takings permit for the plants. AOD at ¶ 11.

10. The Company filed a takings permit application with ANR on June 9, 2016. The takings permit application was updated on July 8, 2016. AOD at ¶ 12.

11. The Company's takings permit application indicated that the total harsh sunflower population consisted of 2,004 individual plants, made up of five polygons (distinct groups of plants) within the proposed pipeline corridor, and two polygons outside the corridor. The total number of plants was calculated by treating stems arising more than three inches apart as individual plants, consistent with a protocol established by ANR. AOD at ¶ 14.

12. The takings permit application indicated that 717 individual plants, approximately 36% of the total population, would be affected by Project work if the pipeline was installed using open trenching. AOD at ¶ 15.

13. On July 14, 2016, ANR notified potentially interested persons of the takings permit application, scheduled a public informational hearing for Thursday, July 28, 2016, and established a public comment deadline of August 15, 2016, in connection with the application. AOD at ¶ 19.

14. Prior to the public hearing on the takings permit, the Company concluded that utilizing horizontal directional drilling ("HDD") was a preferable construction technique that could be used to completely avoid the sunflowers. St. Hilaire at ¶ 6.

15. On Friday, July 15, 2016, the Company notified ANR that it was formally withdrawing its takings permit application. AOD at ¶ 20.

16. The Company stated that its reason for withdrawing the application was that it had decided to utilize HDD, instead of open trenching, to install the pipeline on the Property.

According to the Company, utilizing HDD would result in "no disturbance or impact to harsh sunflowers or other protected species." AOD at ¶ 21.

17. The Company held a preconstruction meeting with its contractors to discuss the need to avoid the sunflowers. St. Hilaire at ¶ 8.

18. On Monday, July 18, 2016, an employee of Michels Corporation, the Company's HDD contractor, cleared a path through vegetation on the Property in preparation for the HDD work. The clearing occurred in the area of the harsh sunflower population, and was discovered later that day by a VGS environmental compliance contractor. AOD at ¶ 22.

19. The Company immediately stopped all work at the site. VGS Notice Letter.

20. On Tuesday, July 19, 2016, the Company notified the Department, ANR, and the Board of the clearing and the impacts on the harsh sunflower plants. VGS continued to investigate the incident and determine the next steps. VGS Self Report; AOD at ¶ 23; St. Hilaire at ¶ 10.

21. ANR personnel inspected the Property on July 20, 2016, and observed that two of the harsh sunflower polygons had been impacted, resulting in 77 separate state-threatened plants being taken without a permit. AOD at ¶ 24 and ¶ 25.

22. On July 21, 2016, in response to the taking, ANR requested that the Company develop a harsh sunflower avoidance plan and submit it to ANR for review and approval before restarting work at the Property. AOD at ¶ 27.

23. On July 28, 2016, ANR approved the plan and indicated it would be acceptable for the Company to resume work at the Property provided the approved plan was implemented. The final version of the avoidance plan included: (1) requirements for demarcation and placement of barriers around the sunflower populations; (2) daily briefings of work crews on harsh sunflower avoidance; and (3) daily on-site monitoring with submission of written reports to ANR by pre-approved environmental compliance monitors. AOD at ¶ 28.

24. Work on the Property resumed on July 29, 2016, without further incident to the plants and the Company submitted daily reports to ANR as required by the approved avoidance plan. AOD at ¶ 29.

25. For the takings of harsh sunflowers in violation of 10 V.S.A. § 5403(a), the Company paid a total penalty of $33,687.50 to the State of Vermont. Stipulation at 8.

V. LEGAL REQUIREMENTS

Title 10

10 V.S.A. § 5401(18)(B) defines a "taking" as "uprooting, transplanting, gathering seeds or fruit, cutting, injuring, harming,or killing or any attempt to do the same or assisting another who is doing or is attempting to do the same."

10 V.S.A. § 5403 states:

> (a) Except as authorized under this chapter, a person shall not . . . take, possess, or transport wildlife or wild plants that are members of a threatened or endangered species; . . . .
>
> (b) Any person who takes a threatened or endangered species shall report the taking to the Secretary. . . .
>
> (d) The Secretary may bring an environmental enforcement action against any person who violates subsection (a) or (b) of this section or rules adopted under this chapter in accordance with chapters 201 and 211 of this title.

The 2013 Final Order and CPG

The 2013 Final Order and the CPG in Docket 7970 both state that the Company "shall obtain all necessary permits from the Agency of Natural Resources . . . before commencement of construction or site preparation."[7]

Both the 2013 Final Order and the CPG also direct the Company to comply with the provisions of the ANR MOU.[8] With regard to the impact of the Project on RTE plants, the Board concluded:

> The MOU between ANR and VGS addresses how construction and on-going maintenance will occur in areas potentially containing rare plant species. Given the mitigation measure for rare plants set forth in the MOU between VGS and ANR, the Project will not result in an undue adverse impact to any rare,

[7] 2013 Final Order at p.146, CPG at ¶ 3.
[8] *Id.*

> threatened, or endangered species. Therefore, our approval of the Project is conditioned upon VGS's compliance with the terms of that agreement.[9]

The ANR MOU specifically identifies harsh sunflowers as present along the path of pipeline construction and requires the Company to: (1) conduct a survey prior to construction to determine how many harsh sunflower plants are present; and (2) re-align the pipeline to avoid the plant species, if possible; or (3) obtain a takings permit prior to construction.[10]

Title 30

Subsection 30(a) of Title 30 provides that: "A person, company or corporation subject to the supervision of the board or the department of public service . . . who fails within a reasonable time to obey an order or decree of the board . . . shall be required to pay a civil penalty as provided in subsection (b) of this section, after notice and opportunity for a hearing."

Subsection (b) of Section 30 provides as follows with respect to civil penalty amounts for such violations:

> The board may impose a civil penalty under subsection (a) of this section of not more than $40,000.00. In the case of a continuing violation, an additional fine of not more than $10,000.00 per day may be imposed. In no event shall the total fine exceed the larger of:
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> (1) $100,000.00; or
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> (2) one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company or corporation in the preceding year.

Subsection 30(c) identifies eight factors that the Board may consider in determining the amount of a civil penalty:

> (1) the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers;
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> (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
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> (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
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> (4) the length of time that the violation existed;

[9] 2013 Final Order at 132.

[10] ANR MOU, Docket 7970, Order of 12/23/13, exh. VGS-ANR Joint 1 at 8.

(5) the deterrent effect of the penalty;
(6) the economic resources of the respondent;
(7) the respondent's record of compliance; and
(8) any other aggravating or mitigating circumstance.

VI. DISCUSSION

The basic facts are undisputed. The Company agrees that the 77 harsh sunflower plants were mowed. Once that occurred, the Company stopped work at the site and self-reported the takings incident.[11] By taking 77 harsh sunflowers without a permit, the Company agrees that it violated 10 V.S.A. § 5403(a).[12] There is also no dispute as to whether the takings incident was a failure to obey a Board order in the form of the 2013 Final Order and CPG, as derived from the ANR MOU, making the Company subject to a civil penalty. Further, the Company does not seek a hearing.[13] Therefore, this discussion addresses the factors involved in determining an appropriate civil penalty in an amount that is informed by the factors established by 30 V.S.A. § 30(c) and is subject to the limitations of 30 V.S.A. § 30(b). I recommend that the Board impose a $25,000 penalty on the Company without further hearing. Each of the 30 V.S.A. § 30(c) factors is addressed, in turn, below.

1. The extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service, or the other interests of utility customers

By failing to obtain a permit before taking 77 harsh sunflower plants, the Company violated state environmental law, the 2013 Final Order and CPG, and the ANR MOU. The unpermitted taking of 77 of 2,004 harsh sunflower plants along the route of the pipeline harmed the health of an RTE plant species. It is expected that the sunflowers, which are perennials, will grow back in the subject locations, and the harm will not be permanent.[14] The Company's failure to get a permit also resulted in a harm to the regulatory oversight process. The Company

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[11] Findings 18-20.
[12] AOD at ¶ 27.
[13] Stipulation at 3.
[14] *Id.* at 9.

adversely affected the interests of utility customers because such failures are unnecessarily burdensome and diminish the credibility of the regulatory process.

2. Whether the Company knew or had reason to know the violation existed and whether the violation was intentional

There is evidence that the Company: (1) knew about the presence of the harsh sunflower plants at the Property;[15] (2) took steps to comply with the ANR MOU by surveying the site prior to construction;[16] (3) applied for a takings permit and then re-aligned the pipeline to avoid the sunflowers using HDD;[17] (4) failed to ensure that the workers on site knew to avoid the plants;[18] and (5) became aware of the violation the same day it occurred.[19] Because of a failure in oversight and lapse in communication, an employee of the Company's pipeline contractor, Michels Corporation, took 77 harsh sunflower plants while mowing the site to prepare for the HDD work. This intentional, though inadvertent, action by an agent of the Company violated the ANR MOU, the 2013 Final Order, and the CPG.

3. The economic benefit, if any, that the Company could have anticipated from an intentional or knowing violation

The record in this case contains no evidence of any economic benefit that the Company could have anticipated from intentional or knowing violations of the 2013 Final Order and CPG.[20]

4. The length of time that the violation existed

The record demonstrates that the taking of the 77 RTE plants at the work site occurred on July 18, 2016, was discovered the same day, and was reported to the Board on July 19, 2016.

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[15] *See* ANR MOU.
[16] Finding 9
[17] Findings 14-16.
[18] Finding 18.
[19] *Id.*
[20] *See* St. Hilaire. at ¶ 12 ("VGS gained no economic benefit from the incident.")

5. The deterrent effect of the penalty

The penalty imposed in this case should be sufficient to both specifically deter the Company from committing a similar violation of a Board order in the future and generally deter other CPG holders from committing similar violations. The Company, the Department, and ANR agreed upon a recommended $6,000 penalty in the Stipulation. In conjunction with the approximately $34,000 penalty assessed by the Environmental Court, if the Board imposed a $6,000 civil penalty in this proceeding, the total civil penalty paid by the Company for the taking of the 77 harsh sunflower plants would then be approximately $40,000. However, the $6,000 penalty agreed to by the parties does not appear to be significant enough to deter either the Company or other CPG holders from similar violations in the future.

While the takings resulted in two enforcement actions, the Stipulation and its recommended $6,000 penalty do not address the different purposes of the environmental and Board enforcement actions. The Vermont Superior Court, Environmental Division penalized the Company for violating state environmental law, pursuant to 10 V.S.A. § 5403(a). The Board's enforcement action is for violation of the 2013 Final Order and CPG, pursuant 30 V.S.A. § 30. Just as the Environmental Court determined that the penalty in the earlier proceeding was significant enough to deter future violations of state environmental law, the penalty in this action should also be significant enough, independent of the Environmental Court's penalty, to deter both the Company and others from violating Board orders that direct compliance with specific MOU conditions.

It is my conclusion that a $6,000 civil penalty from the Board is not significant enough to have the effect of deterring the Company from failing to strictly comply with the requirements in Board orders and CPGs, including the terms of MOUs incorporated into those orders and CPGs. The cost of a higher civil penalty in this case would have a specific deterrent effect on the Company. A higher civil penalty would also have a general deterrent effect here, placing the Company and other CPG holders on notice that they are responsible for ensuring that their contractors are in strict compliance, not only with state environmental laws, but also with applicable Board Orders, CPGs, and MOUs upon which the Board conditioned approval of a project. Imposing a penalty of $25,000 here would provide both of these specific and general

deterrent effects. Therefore, I recommend a $25,000 penalty, which approaches the maximum but takes into account the Company's responsiveness in mitigating the incident.

6. The economic resources of the Company

There is no evidence in the record to establish the economic resources of the Company. I observe, however, from the Company's public filing of its FERC Form no. 2-A annual report that the Company's net utility plant value is just over $293 million and that in 2016 the Company had gross Vermont revenues just over $100 million.[21]

7. The Company's record of compliance

There is no evidence in the record to document the Company's record of compliance. However, I also observe that in recent Board dockets there have been two other civil penalties imposed on the Company for violations of Board rules and orders arising from its construction of the Project. The first was a civil penalty of $100,000 for violating Board Rule 5.409 by failing to timely report a cost estimate increase in excess of 20% for the Project approved by the Board in Docket 7970.[22] The second civil penalty was $95,000 for the Company's failure to fully comply with comprehensive written specifications prepared consistent with federal gas safety standards.[23] These prior incidents reflect a lack of compliance with Board rules and orders while constructing the pipeline and should be accounted for in determining an appropriate penalty amount for the current violation.

8. Any other aggravating or mitigating circumstances

While I do not find evidence of aggravating circumstances, the Company has taken several mitigating steps in response to the taking of the 77 harsh sunflower plants. The Company responded to the taking by: (1) self-reporting the incident;[24] (2) stopping work at the

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[21] Letter from Ashley Weiner, VGS Vice President for Finance, to the PSB Clerk, dated April 13, 2017.

[22] *Investigation into alleged violation by Vermont Gas Systems, Inc., of Public Service Board Rule 5.409*, Docket 8328, Order of 7/31/15.

[23] *Notice of Probable Violation of Intrastate Gas Pipeline Safety Regulations by Vermont Gas Systems, Inc.*, Docket 8814, Order of 12/8/16. The 2013 Final Order and CPG were both conditioned on the Company's meeting or exceeding federal gas safety standards.

[24] Finding 20.

site for ten days;[25] and (3) developing and implementing a harsh sunflower avoidance plan.[26] The Company then engaged in negotiations with both the Department and ANR to resolve the issues that are the subject of the Board's investigation, and ultimately reached the Stipulation, in which the Company acknowledges its responsibility for the taking of 77 RTE plants in violation of the ANR MOU, the 2013 Final Order, and the CPG.

I believe the Board should accord the Company's mitigating steps significant weight in determining the appropriate amount of any penalty imposed in this case.

Having given due consideration to each of the statutory factors enumerated in 30 V.S.A. § 30(c), I recommend that the Board impose a penalty of $25,000 for the Company's violation of the 2013 Final Order and CPG.

VII. Conclusion

Based on the uncontested evidence in this proceeding, I recommend that the Board conclude that the Company violated the terms of the 2013 Final Order and CPG in Docket 7970 because it failed to observe the terms of the ANR MOU and obtain a permit before taking 77 harsh sunflower plants. As a result, I recommend that the Board adopt the findings of fact and conclusions of law proposed herein and impose a $25,000 penalty on the Company without further hearing.

This report and recommendation has been circulated to the parties for review and comment pursuant to 3 V.S.A. § 811.

Dated at Montpelier, Vermont this 2nd day of May, 2017.

Michael Tousley, Esq.
Hearing Officer

[25] Findings 19 and 25.
[26] Findings 23-25.

VIII. **ORDER**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Service Board ("Board") that:

1. The findings, conclusions, and recommendations of the Hearing Officer are hereby adopted.

2. Pursuant to 30 V.S.A. § 30, Vermont Gas Systems, Inc., shall pay a penalty of $25,000 by sending to the Board at 112 State Street, Montpelier, VT 05620-2701, a check in that amount made payable to the State of Vermont within 30 days of the date of this Order.

Dated at Montpelier, Vermont this ________ day of ______________, 2017.

______________________	)	
James Volz	)	PUBLIC SERVICE
	)	
	)	
______________________	)	BOARD
Margaret Cheney	)	
	)	
	)	OF VERMONT
______________________	)	
Sarah Hofmann	)	

OFFICE OF THE CLERK

Filed:

Attest: ______________________
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) or any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)

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.