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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket 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:

8/23/2016

ORDER OPENING AND STAYING INVESTIGATION

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”).

In today’s Order the Board opens an investigation, pursuant to 30 V.S.A. §§ 30 and 209, into whether the Company violated the 2013 Final Order and CPG by taking a threatened 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.

On July 19, 2016, VGS filed notice with the Board that during pipeline construction in Monkton, Vermont, on July 18, 2016, there was an inadvertent disturbance of harsh sunflower plants and that the Company was investigating the incident and would work closely with the Vermont Agency of Natural Resources (“ANR”) to “address all regulatory issues.”¹

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

1. Letter from John St. Hilaire, to Judith C. Whitney, Clerk of the Board, dated July 15, 2016, at 2-3.

another violation of the 2013 Final Order (the “Lyons Request”),² in addition to an earlier violation alleged on July 8, 2016.³ 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 asserts that in so doing the Company violated conditions 2 and 3 of the CPG in Docket 7970.⁴ ANR requests 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 represents that the Vermont Department of Public Service (the “Department”) joins in its request to open an investigation pursuant to 30 V.S.A. § 30.

2. Condition 3 of the 2013 Final Order states, in part: “The Petitioner shall obtain all necessary permits from the Agency of Natural Resources . . . before commencement of construction or site preparation.”

3. On July 8, 2016, Ms. Lyons moved that the Board: (1) order the Company to show cause why construction should not cease; (2) conduct an investigation into other alleged permit shortfalls in violation of the 2013 Final Order; and (3) impose appropriate sanctions. The Board ruled on this motion in Docket 7970 by Order of 8/23/16.

4. Condition 2 of the CPG states that: “Petitioner shall obtain any state and federal permits required for the Project and shall comply with all conditions set forth in any required permits.” Condition 3 of the CPG requires 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”). In that letter, ANR also represents that upon discovery of the damaged sunflower plants it:

. . . requested that VGS refrain from all activity on the Peyser parcel until VGS prepared, and submitted to the Agency for review and approval, a detailed avoidance plan in order to prevent further takings of the harsh sunflower. An avoidance plan was subsequently approved by the Agency on July 28, 2016. The major elements of the plan generally include requirements for training of all on-site workers in avoidance, demarcation of the sunflower plants, a detailed site plan depicting plant locations and construction activities, procedures to avoid harming the plants before, during, and after horizontal directional drilling work on the site, and daily oversight and reporting by environmental compliance monitors. Agency staff performed a field inspection to confirm that the plants were correctly demarcated in the course of reviewing the avoidance plan.

Finally, ANR states that it intends to pursue a civil enforcement action against the Company for the unauthorized taking of the plants under ANR's independent authority pursuant to 10 V.S.A. § 5403.

Also on August 5, the Company filed a response to the Lyons Request, stating that ANR is investigating the alleged taking and requesting that the Board "defer any action until ANR has completed its investigation."⁶ The Company represents that ANR and the Department do not object to VGS's deferral request.

No other responses to the Lyons Request were filed.

The Board hereby opens an investigation to determine whether the Company has violated the 2013 Final Order and CPG by taking a threatened plant species during pipeline construction in Monkton, Vermont, and, if so, whether it is appropriate to order any remedial action, impose a penalty, or take any other steps authorized by law. The investigation is hereby stayed until ANR has completed its investigation into the incident and has concluded the civil enforcement action ANR intends to pursue under its enforcement authority (10 V.S.A. § 5403). Once the Board has been notified by ANR that the investigation and enforcement action have been completed, the stay ordered today shall be lifted and a status conference shall be convened to determine the next steps in this proceeding.

SO ORDERED.

6. Letter from Peter H. Zamore, Esq., to Judith C. Whitney, Clerk of the Board, dated August 5, 2016, at 2.

Dated at Montpelier, Vermont, this 23rd day of August, 2016.

[Signature]
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[Signature]
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[Signature]
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PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: August 23, 2016

ATTEST: [Signature]
Deputy 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@vermont.gov)

Sent on 8/23/16 (10A) + D.B.

PSB Docket No. 8791 - SERVICE LIST

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STATE OF VERMONT
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