

STATE OF VERMONT  
PUBLIC UTILITIES COMMISSION

Investigation Pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged failure of Vermont Gas Systems, Inc. to comply with the Certificate of Public Good in Docket 7970	)	
	)	Case No. 17-3550-INV
Notice of Probable Violations by Vermont Gas Systems	)	Case No. 18-0395 INV
	)	

**INTERVENORS' MOTION FOR AN INJUNCTION**

Kristin Lyons, Jane Palmer, Nate Palmer, Lawrence Shelton and Rachel Smolker, Ph.D. (“Intervenors”) hereby move pursuant to 30 V.S.A. §§ 248(a), (b) and (k) and Commission Rules 2.206, 2.406, 5.5401-5.404, and 5.413 for a permanent injunction compelling Vermont Gas Systems to either: *a)* apply for and obtain a temporary waiver pursuant to § 248(k) of the requirement that it hold a Certificate of Public Good (CPG) to operate the substantially changed version of the Addison Natural Gas Pipeline (ANGP) while VGS applies for a new CPG; or *b)* cease operation of the substantially changed ANGP unless and until it obtains a new CPG.

**MEMORANDUM OF LAW**

**QUESTION PRESENTED**

May VGS lawfully continue to operate the ANGP without a new or amended CPG and without a temporary waiver under 30 V.S.A. § 248(k) where:

1) the Commission found that VGS had made five substantial changes to the ANGP without first obtaining amendments to its CPG, and then the Commission issued findings that the substantially changed ANGP should be approved under § 248, and issued an amended CPG approving of the substantially changed ANGP; and

2) the Supreme Court of Vermont ruled that the Commission had acted unlawfully in issuing an amended CPG for the substantially changed ANGP without notice to the public under then-Rule 5.408 (now Rule 5.402) and without notice to Intervenor, vacated all the Commission's findings that the changes satisfy § 248, and remanded this matter to the Commission—leaving VGS without a CPG for the substantially changed ANGP that it continues to operate?

### **BRIEF ANSWER**

No. The legislature's intent in adopting § 248(k) was to allow operation while applying for a CPG, but only if the applicant demonstrates to the Commission that operation satisfies the statutory criteria for temporary waiver and the Commission issues the temporary waiver with appropriate conditions.

### **CERTIFICATE PURSUANT TO COMMISSION RULE 2.206(K)**

Intervenor's counsel asked VGS's counsel whether VGS will apply for a temporary waiver pursuant to § 248(k). VGS's counsel responded that VGS will not file a waiver petition. VGS articulated two reasons were for this position. First, VGS believes that it already possesses a CPG for the ANGP and that the lack of an amended CPG for the substantially changed ANGP differs from lacking a CPG; second, VGS believes that it needs a CPG only for construction, not for operation.<sup>1</sup>

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<sup>1</sup> VGS's counsel later filed a memorandum with the Commission stating that the Intervenor cannot raise § 248(k) for a different reason. VGS claims that the Commission already rejected the § 248(k) argument, and the Intervenor did not appeal that ruling. This is incorrect. The Commission never addressed § 248(k). It had no reason to do so. As explained below, the Commission granted VGS an amended CPG, so the § 248(k) waiver issue had become moot.

## STATEMENT OF FACTS

In December 2012, VGS petitioned for a CPG under 30 V.S.A. § 248(a) and (b) to construct a natural gas pipeline from Williston to Middlebury. In December 2013, the Commission found that the construction and operation of the project would promote the general good under § 248(a) and satisfy the criteria of § 248(b), and issued a CPG to VGS. The ruling relied upon numerous findings about how the pipeline would be constructed and also how it would be operated after construction was complete. The findings about operation included findings on post-construction safety procedures that would be in effect throughout the life of the pipeline (see, e.g., findings 262, 272, 274, 276, 277, and 278). One of the Commission's key conclusions was the following:

The evidence in this proceeding persuasively demonstrates that public health and safety will not be adversely affected by the design, construction and **operation** of the Project. Vermont Gas has designed and **will construct and operate** the Project in a manner which meets or exceeds all applicable state and federal codes and standards.

Final Order, Petition of Vt. Gas Systems, Inc., Docket No. 7970 (Vt.P.S.B. Dec. 23, 2013 at 64 (emphasis added)).

Five substantial changes occurred during the construction process: (1) in New Haven, VGS employed a burial method (the sink-in-swamp method) that substantially differed from the two authorized methods (the trench method and the horizontal directional drilling method); (2) in New Haven, VGS failed to bury the pipeline at least four feet deep as required by the CPG at 18 locations in the VELCO right-of-way; (3) VGS failed to comply with pipeline safety specifications required by the CPG regarding pipeline burial on the trench floor, in numerous locations; (4) VGS failed to comply with specifications in the CPG regarding the installation of trench breakers and soil compaction in numerous locations; and (5) no responsible charge

engineer approved of the construction plans before construction and supervised implementation of those plans. Despite these changes, and without informing the Commission of the changes, VGS gassed the pipeline up, making the project operational in April of 2017.

In June of 2017, VGS reported that it had failed to bury the pipeline to the required four-foot depth in 18 locations along the VELCO right-of-way and asked that the Commission rule that this change was not substantial. The Commission responded by ordering an investigation to determine whether VGS violated the Final Order in Docket No. 7970 and if the changes made were substantial.

After the evidentiary hearings had concluded, the parties submitted briefing. VGS denied that there had been any substantial changes. Intervenors argued not only that there had been substantial changes, but also that the Commission should order VGS to apply for a temporary waiver under § 248(k) while it applies for an amended CPG to address the substantial changes. Intervenors' Corrected Proposed Findings of Fact and Conclusions of Law re: Load-Bearing in VELCO Right-of-Way and Remedies, January 10, 2022, pp. 21-22.

The Hearing Officer issued a Proposal for Decision that found five substantial changes and proposed an order that VGS apply for an amended permit. The Hearing Officer rejected Intervenors' request for an order requiring VGS to apply for a temporary waiver while VGS applied for an amended CPG.

On April 6th, 2023, the Commission issued a final order finding that there had been five substantial changes and determining that VGS needed to amend the CPG for these changes to be lawful—and then found that the § 248 criteria had been satisfied and granted VGS the amended CPG that it needed.

The Commission never addressed whether VGS needed a § 248(k) waiver while VGS was applying for an amended permit. There was no reason for the Commission to address whether a 248(k) waiver was needed while VGS applied for an amended CPG—because the Commission granted VGS the amended CPG.

Intervenors appealed. The Supreme Court of Vermont reversed in part. It concluded that the Commission had acted unlawfully in issuing an amended CPG for the five changes without notice to the public under then-Rule 5.408 (now Rule 5.402) and without notice to Intervenors, vacated all the Commission’s findings about the changes, and remanded this matter to the Commission.

Following the Supreme Court ruling, counsel for the Intervenors inquired of VGS’s counsel whether VGS would apply for a waiver pursuant to § 248(k) to authorize continued operation while VGS applies for a new (or amended) CPG. VGS’s counsel stated that VGS would not apply for a waiver, because VGS does not need an amended CPG to continue to operate the substantially changed pipeline.

### **APPLICABLE LAW**

#### **30 V.S.A. § 248(a) & (b)**

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Section 248(a)(3) states that no company “may in any way begin site preparation for or commence construction of any natural gas facility... unless the Commission first finds that the same will promote the general good of the State and issues a certificate to that effect under this section.” This sentence mentions only site preparation and construction, not operation.

However, subsection (b) imposes on the Commission the duty to consider the operation of a natural gas pipeline, as well as construction, when reviewing § 248 petitions. Subsection (b) provides that the Commission must find that the project will not interfere with the orderly

development of the region, is required to meet demand for service that cannot cost-effectively be met through energy conservation and efficiency, will provide an economic benefit to the state, and will not have an adverse effect or undue adverse effect on system stability and reliability, aesthetics, historic sites, air purity, water purity, the natural environment, the use of natural resources, public health and safety, primary agricultural soils, and greenhouse gas emissions. Many of these criteria pertain to how a natural gas pipeline operates after it has been constructed, as opposed to the construction of a natural gas pipeline.

Public safety is the clearest example. The principal public safety risks of a gas pipeline—which subsection (b) governs— occur during operation, not during construction. When the Commission approves of, or withholds approval of, a CPG for a gas pipeline, it necessarily is ruling upon how the pipeline will operate after construction is complete. It is just as unlawful to operate a substantially changed gas pipeline without an amended CPG as it is to construct a substantially changed pipeline without an amended CPG.

Greenhouse gas emissions also relate to operation. Methane is 80 times more potent as a greenhouse gas than carbon dioxide. Natural gas consists primarily of methane. Methane that leaks from gas pipelines during production, transmission, and distribution is widely recognized as one of the major drivers of climate change.

The orderly development of the region also relates to operation, because this often pertains to whether service connections will be allowed. Meeting demand for service that cannot be met cost-effectively through energy conservation and efficiency clearly pertains to operation; it addresses how much gas will be sold at and what environmental and financial cost. System stability and reliability pertain to pipeline use as well as pipeline construction. Economic benefit includes whether the gas that is sold will reduce or increase costs for consumers after

construction is complete. Air and water quality impacts arise both during construction and during operation.

Thus, the Commission routinely considers how a natural gas pipeline will operate, in all these respects, when deciding whether to issue a CPG. *See, e.g., Petition of Vermont Gas Systems, Inc., under 30 V.S.A. Section 248, for a certificate of public good authorizing the acquisition of a 9.9-mile natural gas transmission corridor in Highgate and Swanton, Vermont, and the construction of a 3.1-mile pipeline therein from Beebe Road to Frontage Road in Swanton and Highgate, Docket No. 5772 (Vt. P.S.B., June 12, 1995).* See findings 19 (use of gas will be less polluting than use of other fuels), 38-53 (use of the natural gas will assist economic development), 54-75 (gas will serve future demand), 96 (gas will provide an economic benefit to the state), 101 (leakage of gas will be subject to the company's leakage standards), 107 (neither construction nor operation will cause discharges into headwaters), 111 (water discharged after use for hydrostatic testing will be acceptable), 112 (operation will not use water), 121 (maintenance of the pipeline will not harm local traffic) and 188 (neither construction period nor temporary access later will harm farmers). As set forth above, in Docket No. 7970 the Commission repeatedly addressed the operation of the gas pipeline in this case.

### **The Substantial Change Doctrine**

A substantial change makes the changed project unauthorized under the original permit. An unauthorized project remains unauthorized until it files an application for an amended permit and obtains that permit after undergoing the permit review process. "If a substantial change has occurred, without an amended CPG the permittee would not be authorized to proceed with the modified project, regardless of whether the original CPG were on appeal." *Re: Vermont Electric Power Company, Inc., Docket 6860, Order 9/23/05 at 20, n.28.* This principle was applied again

regarding this pipeline, in Docket No. 8330, *Petition of Conservation Law Foundation*, Order Denying Request for Declaratory Judgment (3/30/17) at 6 (“a certificate for a given facility confers no authority to construct a different one.”). The Supreme Court, in *In re Petition of Conservation Law Foundation*, 2018 VT 42, ¶¶ 2, 19, 20, 24, 207 Vt. 309, 188 A.3d 667, affirmed. If there is a substantial change from the approved version of the construction, operation or maintenance of a pipeline, the Court said, the CPG remains in effect only for “the originally approved design or use.” *In re Petition of Conservation Law Foundation*, 2018 VT 42, ¶ 24, 207 Vt. 309, 188 A.3d 667. If there is a substantial change, the “order approving the original project is not reopened—the original CPG remains valid for the project as approved—but instead the amended application is considered in a new proceeding.” *Id.* at ¶ 19 (quoting the Commission’s prior ruling in *In re Vermont Electric Power Co.*, *supra*).

### **30 V.S.A. § 248(k)**

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In 1994 and 2004, the legislature added and then amended subsection (k). It explicitly applies to natural gas facilities. It states:

(k)(1) Notwithstanding any other provisions of this section, the Board may waive, for a specified and limited time, the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility or a generation facility necessary to assure the stability or reliability of the electric system or a natural gas facility, pending full review under this section.

(2) A person seeking a waiver under this subsection shall file a petition with the Board and shall provide copies to the Department of Public Service and the Agency of Natural Resources. Upon receiving the petition, the Board shall conduct an expedited preliminary hearing, upon such notice to the governmental bodies listed in subdivision (a)(4)(C) of this section as the Board may require.

(3) An order granting a waiver may include terms, conditions, and safeguards, including the posting of a bond or other security, as the Board deems proper, considering the scope and duration of the requested waiver.

(4) A waiver shall be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the Board deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b) (5) and (8) of this section; and

(D) taking into account any terms, conditions, and safeguards that the Board may require, the waiver will promote the general good of the State.

(5) Upon the expiration of a waiver, if a certificate of public good has not been issued under this section, the Board shall require the removal, relocation or alteration of the facilities subject to the waiver, as it finds will best promote the general good of the State.

The origin of subsection (k) was an ice storm. During the spring, 1994, session, legislators had proposed House Bill 730 to modify the tax rates paid by utilities. The House passed the bill and sent it to the Senate. Then, on April 19, 1994, an ice storm damaged eleven of VELCO's PV20 H-poles in Lake Champlain between Milton and South Hero. The line was essential to providing reliable electric service to northwestern Vermont. On May 4, 1994—after the Senate committee had reported out H.730—the Senate added the language of subsection (k) to H.730 by an amendment offered on the floor. 1994 Senate Journal p. 583. The House concurred with the amendment on May 10, 1994. 1994 House Journal, pp. 1006-1007. The Governor signed the bill on May 19, 1994, as part of Act 159 of the Laws of 1993, Adj. Sess.

The day before the Governor signed the bill (that is, on May 18, 1994) VELCO filed a petition under the new subsection. The petition sought a waiver of § 248's CPG requirement for an emergency replacement line that involved poles that differed from the destroyed poles in height, and that were to be 40 to 70 feet from the locations of the destroyed poles, although in the

same right-of-way. On May 24, 1994, the Board held a hearing on the petition and granted the waiver the next day. *Petition of Vermont Electric Power Company, Inc. pursuant to 30 V.S.A. §248 (k) for a waiver of the prohibition against site preparation and construction of a replacement PV20 transmission line in Milton and South Hero, Vermont prior to the issuance of a certificate of public good*, Docket No. 5742, Order issued July 13, 1994. The order stated that VELCO had satisfied each of the statutory criteria and had committed to filing an application for the replacement electric line. The Board ordered VELCO to do so by October 31, 1994. VELCO complied and a new CPG was granted.

The version adopted in 1994 did not include natural gas facilities. In 2004, the legislature amended the statute to include natural gas facilities. Senate Bill 172 § 2 accomplished this, which became Public Act 82 of the Laws of 2004.

Decisions by the Commission have repeatedly applied § 248(k) to temporarily waive the CPG requirement, while conditioning the waiver upon filing of a petition for a CPG within a specified time. For example, in *Petition of Green Mountain Power Corporation (“GMP”) for a waiver under 30 V.S.A. s 248(k) to allow for the emergency installation of a 5.25 MVA transformer in GMP’s existing Barre South End #37 substation in Barre, Vermont*, Docket No. 7876 (Vt. P.S.B. June 18, 2012), a lightning strike had destroyed a transformer in Barre, and GMP sought to immediately replace that transformer with a larger transformer and then study whether to make the larger transformer permanent or replace it with another option. The waiver was granted, on condition that GMP file a § 248 petition within one year. In *Petition of Green Mountain Power Corporation for a certificate of public good, pursuant to 30 V.S.A. s 248(j), authorizing the installation of a transformer and upgrade to the oil containment system at the Barre South End electrical substation #37 in the city of Barre, Vermont*, Docket No.8069 (Vt.

P.S.B. Aug. 29, 2013), GMP filed a § 248 petition and evidence that addressed all of the criteria of subsection (b), and the Board granted a CPG for the larger transformer. Similarly, in *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for a waiver pursuant to 30 V.S.A. § 248(k) concerning the emergency installation of a new transformer at its nuclear power plant located in Vernon, Vermont*, Docket No. 6757 (Vt. P.S.B. Sep. 25, 2002), Entergy Nuclear filed a § 248(k) petition because the station's transformer was facing imminent failure, and Entergy Nuclear sought to replace it with a larger transformer. The waiver was granted on condition that Entergy Nuclear file a § 248 petition within five months. In *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., for a certificate of public good to modify certain generation facilities at the Vermont Yankee Nuclear Power Station in order to increase the Station's generation output*, Docket No. 6812 (March 15, 2004), the Board granted a CPG for the larger transformer based on evidence addressing each of the subsection (b) criteria.

### **Rule 5.413**

Commission Rule 5.413, effective March 1, 2024, states that when there has been a substantial change to an approved project and the project has been commissioned, the utility must apply for a new permit rather than an amended permit. The utility must follow all the notice requirements pertaining to a new permit.<sup>2</sup>

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<sup>2</sup> "Commissioned" means that a vessel has been made ready for active service ("commissioned," Merriam-Webster.com); in this context, it means that the pipeline has been made ready for active service.

## APPLICATION OF THE LAW TO THE FACTS

It is unlawful for VGS to operate the ANGP without a new permit. The Commission has determined that the ANGP has been substantially changed in five respects. Under the substantial change doctrine, the existing CPG authorized only the project as approved, not the substantially changed project. The Commission issued an amended CPG for the substantially changed ANGP, but the Supreme Court ruled that it was an error for the Commission to issue the amended permit without prior notice to the public and Intervenors. The Supreme Court reversed the grant of the amended CPG and vacated all the Commission's findings that had justified the amended permit. Under Rule 5.413, the changes require an application for a new permit rather than an amended permit. Yet, VGS continues to operate the ANGP without either a new permit or an amended permit.

The legislature has created a safe harbor for utilities that believe that the public interest requires the operation of a jurisdictional facility without a new or amended CPG—§248(k). However, VGS refuses to apply for a waiver under § 248(k). Its refusal appears to be based on the theory that it already possesses a CPG authorizing the construction of the ANGP.

VGS is incorrect. Its CPG authorized the version of the ANGP that the Commission approved, not the substantially changed version that VGS constructed. The *VELCO* and *Conservation Law Foundation* decisions of the Commission and the Supreme Court make this clear. VGS lacks a CPG for the project that it constructed and is now using to transmit natural gas.

VGS also appears to be asserting that, even if it unlawfully constructed a pipeline that was substantially changed from what was authorized, that illegality does not affect its operation of the ANGP because § 248 governs only construction, not operation. Under this theory, a utility

is free to operate a substantially changed pipeline that lacks an amended permit because § 248 governs only construction.

This theory too is incorrect for multiple reasons. First, it simply makes no sense. The obvious purpose of the statute is to protect Vermonters and Vermont's natural resources during the operation of natural gas pipelines, not just when they are being constructed. Under this theory, if the pipeline had only 1 inch of cover in the VELCO right-of-way, or was resting on the surface of the ground in the VELCO right-of-way, VELCO would remain free to operate the pipeline. VGS would simply pay a fine for unlawful construction, and then continue to operate the un-permitted pipeline.

If VGS believes that the CPG only governs construction, not operation, it should have raised that objection in 2012 or 2013. Instead, it made commitments to operational standards and asked the Commission and the parties to rely on those commitments. The Commission did so, incorporating them into its Final Order. Claim preclusion and issue preclusion prevent VGS from raising this argument now. *Daiello v. Town of Vernon*, 2018 VT 17 ¶¶ 12, 13, 207 Vt. 139, 184 A.3d 1192. VGS is also judicially estopped from making this argument. *Avery v. Avery*, 2018 VT 59 ¶ 10, 207 Vt. 570, 192 A.3d 1250, *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98–99 (2d Cir.1997).

This theory also flies in the face of the wording of subsection (b). As addressed above, subsection (b) imposes on the Commission the duty to address the post-construction operation of a gas pipeline as an integral part of its permitting process. The necessity for a CPG applies to both construction and operation of a natural gas pipeline.

This theory also conflicts with § 248(k). VELCO already had a CPG for its PV20 line. It wanted to substantially change that line in a hurry to operate a replacement facility. If Vermont

law had allowed a jurisdictional facility to operate a substantially changed facility without an amended CPG, there would have been no reason to adopt subsection (k).

Regarding the argument that the § 248(k) argument was already rejected by the Commission, and not appealed, Intervenors point out that the Commission never addressed this issue.

Intervenors' request in 2023 that the Commission order VGS to comply with § 248(k) while it applied for an amended CPG was temporarily mooted by the Commission's erroneous decision to find that substantial changes had indeed occurred—and simultaneously grant VGS an amended CPG to authorize those changes. As a result, there was no § 248(k) ruling to appeal.

The Commission's decision to issue the amended CPG now has been reversed. VGS now must apply for a new permit, and yet VGS has refused to apply for a § 248(k) waiver while it does so. This issue now is live and awaits the Commission's decision.

### **CONCLUSION**

Municipalities and affected landowners spent countless hours and dollars participating in detailed scrutiny of this pipeline in 2012 and 2013 because of the hazards the pipeline may introduce to their communities, their lands, and their wetlands, rivers, and streams. These communities and landowners are now hosting a substantially changed pipeline that has yet to be subject to that scrutiny. These municipalities and landowners would be astonished were they informed that a substantially changed pipeline is now coursing through their communities and across their lands, wetlands, rivers, and streams—and that the Commission is allowing this to occur without either an amended CPG or a temporary waiver granted by the Commission with appropriate conditions.

The Commission should order VGS to either: *a)* apply for and obtain a temporary waiver pursuant to § 248(k) of the requirement that it hold a Certificate of Public Good (CPG) to operate

the substantially changed Addison Natural Gas Pipeline while VGS applies for a new CPG; or *b*)  
cease operation of the substantially changed ANGP unless and until it obtains a new CPG.

Date: July 1, 2024

KRISTIN LYONS, JANE PALMER,  
NATE PALMER, LAWRENCE SHELTON  
and RACHEL SMOLKER, PH.D.

By:

/s/ James A. Dumont \_\_\_\_\_

James A. Dumont, Esq.

Law Office of James A. Dumont, Esq. PC

15 Main St., PO Box 229

Bristol, VT 05443

(802) 453-7011 office

(802) 349-7342 cell

[dumont@gmavt.net](mailto:dumont@gmavt.net)

[dumont.vt@gmail.com](mailto:dumont.vt@gmail.com)

Assisted by Isabella Nangano

VLGS Class of 2026