

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7886

Petition of Michael and Denna Benjamin for a)
Certificate of Public Good ("CPG"), pursuant to)
30 V.S.A. Section 248(j), authorizing the installation)
and operation of a 189 kW agricultural-methane electric)
generation facility at the Riverview Farm, 4420 Lake)
Road, Franklin, Vermont)

Order entered: 7/23/2013

ORDER RE REQUEST TO AMEND CERTIFICATE OF PUBLIC GOOD

I. INTRODUCTION

On September 7, 2012, the Public Service Board ("Board") granted Michael and Denna Benjamin (the "Petitioners") a Certificate of Public Good ("CPG") authorizing the construction and operation of a 189 kW agricultural-methane electric generation facility at the Riverview Farm, at 4420 Lake Road, Franklin, Vermont (the "Project"). On April 8, 2013, the Petitioners filed a request with the Board for an amendment to their CPG. The request for an amendment specifically seeks authorization to: (1) move the location of the generator/digestate building; (2) add rain drainage below the digester;¹ (3) construct two pump houses; (4) change the location of the transformer; (5) change the location of the combined heat and power ("CHP") muffler and cooling system; and (6) add a concrete pad-mounted biogas dryer. In today's Order we examine the relocation of the generator/digestate building, transformer, and CHP muffler and cooling system, and the addition of a concrete pad-mounted biogas dryer, in light of recent changes to 30 V.S.A. § 248. For the reasons outlined below, we determine that the proposed Project modifications do not constitute material deviations from the plans for the Project that were originally approved when the CPG was issued. Therefore, we conclude the Petitioners may

1. For these first two items, the Petitioners seek retroactive Board approval of these as-built structures.

construct and operate the Project, as modified by the proposed changes, under authority of the existing CPG.

II. PROCEDURAL HISTORY

On April 8, 2013, the Petitioners filed their request for an amended CPG.

On April 15, 2013, Mr. N. James Benjamin, who is not a party to this proceeding, filed a letter regarding the request for an amended CPG. Mr. N. James Benjamin seeks to have the Project's riser pole removed.

On May 2, 2013, the Clerk of the Board issued a memorandum directing the Petitioners to file additional information regarding the proposed CPG amendments no later than May 8, 2013. The memorandum further established a May 22, 2013, deadline for parties to comment on the substance of the request, as well as on whether the as-built structures that have deviated from the previously approved plans represent material deviations from those plans or a substantial change pursuant to Board Rule 5.408,² and if so, whether the Petitioners' failure to obtain advance approval from the Board represents a violation of Condition 1 of the previously issued CPG.³ Parties were also given an opportunity to comment no later than May 22, 2013, on the letter from Mr. N. James Benjamin.

On May 8, 2013, the Petitioners filed supplemental testimony in response to the Board's May 2, 2013, memorandum. The Petitioners also commented at that time on the letter from Mr. N. James Benjamin.

On May 30, 2013, Mr. N. James Benjamin filed additional comments. Mr. Benjamin reasserted his opposition to the riser pole location and offered two alternative configurations: (1) putting the Project's interconnection line under the road; or (2) moving the crossing point to the next pole.

2. Pursuant to Board Rule 5.400, a "substantial change" is a change in the approved proposal that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the State under Section 248(a).

3. Condition 1 of the CPG states: "Construction, operation, and maintenance of the proposed project shall be in accordance with the plans and evidence as submitted in these proceedings. Any material deviation from these plans must be approved by the Board. Failure to obtain advance approval from the Board for a material deviation from the approved plans may result in the assessment of a penalty pursuant to 30 V.S.A. §§ 30 and 247."

On June 21, 2013, the Petitioners filed a letter stating that they have continued to consult with the Department of Public Service ("Department") and Mr. N. James Benjamin, and that all have agreed to a change in pole location from the original location adjacent to Lake Road to a new location approximately 15 feet from the generator/digestate building.

On June 26, 2013, the Department filed a letter challenging the Petitioners' June 21 letter characterizing the reason for the change in pole location. The Department contends that the view in question is more accurately described as a public view, and thus, the riser pole relocation should be described as a public aesthetic mitigation measure. Nonetheless, the Department states that the revised pole location is acceptable to the Department and Mr. N. James Benjamin. The Department further states that it does not believe that the deviations from the previously approved site plan are material, and recommends that the request for an amended CPG be approved expeditiously.

No other party has filed comment.

III. FINDINGS

1. Construction of the Project commenced on October 15, 2012, and continued until the second week of December 2012. Guay pf. at 2.
2. Upon commencing construction, the Petitioners discovered that the soil conditions on the site required modifications to the location of some facilities. Guay pf. at 2.
3. The elevation of the generator/digestate building was lowered by 1 foot relative to the previously approved plans due to soil conditions. The size of the building has not changed. Guay pf. at 3.
4. The location of the generator/digestate building was moved approximately 20 feet to the west, closer to Lake Road, to accommodate the request of the Project's electrical engineer to relocate the transformer to the east side of the generator/digestate building in order to be closer to the generator equipment, thereby reducing line losses. Guay pf. at 3.
5. As of the filing of the request to amend the CPG, construction of the generator/digestate building is complete. Guay pf. at 4.

6. The concrete pad for the transformer has not been poured and the transformer is not in place. The size of the transformer has not changed. Guay pf. at 4, 7.

7. The CHP muffler and cooling system will remain on the east side of the generator/digestate building. The CHP muffler and cooling system will be relocated slightly to the south of the previously approved location. Exh. Pet. FG-1.

8. The biogas dryer will be mounted on a concrete pad located on the east side of the generator/digestate building. The biogas dryer will replace the previously approved plan for "condensate field" piping that would have been underground to the west of the digester tank. The biogas dryer will measure 3 feet wide by 15 feet long and will be approximately 10 feet tall. Guay pf. at 8; exh. Pet. FG-1.

9. The proposed changes will not impact orderly development of the region. The town and regional planning commissions previously supported the Project. Guay pf. at 11.

10. The Petitioners have consulted with Vermont Electric Cooperative, Inc., and confirmed that the proposed changes will not impact system stability and reliability or change any of the analysis contained in the System Impact Study. Guay pf. at 8-9.

11. The proposed changes are all within the existing Project area, therefore, the changes will not impact the findings previously made with respect to the natural resources criteria included in Section 248(b)(5), including the criteria specified in 10 V.S.A. §§ 1424(a)(d) and 6086(a)(1)-(8)(a) and (9)(k) and 30 V.S.A. § 248(b)(8). Guay pf. at 9-10.

12. The Project will continue to use two noise-reduction systems. The Petitioners previously predicted that the Project's noise level would not exceed 50.4 decibels ("dB(A)") at the nearest residence. With the generator/digestate building now located approximately 20 feet closer, the noise level will not exceed 51 dB(A) at the nearest residence. Guay pf. at 6-7, 9.

13. The total amount of disturbed or impacted soils will remain under one acre and therefore a Stormwater Discharge permit will still not be required. The Petitioners will continue to employ appropriate erosion control practices during construction, as provided by the Vermont Low Risk Site Handbook for Erosion Prevention and Sediment Control. Guay pf. at 9; Guay supp. pf. at 3.

14. The proposed changes will not alter the overall aesthetic impacts of the Project. Guay pf. at 10.

IV. DISCUSSION AND CONCLUSION

On June 17, 2013, Public Act 88 was signed into law, with an effective date of July 1, 2013.⁴ Public Act 88 has changed the scope of the Board's jurisdiction under Section 248 for plants using methane derived from an agricultural operation. Thus, in regard to such facilities, the Board's jurisdiction now includes only "the equipment used to generate electricity from biogas, the equipment used to refine biogas into natural gas, the structures housing such equipment used to generate electricity or refine biogas, and the interconnection to electric and natural gas distribution and transmission systems." Conversely, the Board's jurisdiction now no longer includes the methane digester, the digester influents and non-gas effluents, the buildings and equipment used to handle such influents and non-gas effluents, or the on-farm use of heat and exhaust produced by the generation of electricity. Thus, in the case of the Petitioners' Project, the Board retains Section 248 jurisdiction with respect to the relocation of the generator/digestate building, transformer, and CHP muffler and cooling system, and the addition of the concrete pad-mounted biogas dryer. The Petitioners no longer need Board approval of the proposed changes to the digester, rain drainage, or pump houses. Accordingly, in this Order we limit our review to those changes related to the generator/digestate building, transformer, CHP muffler and cooling system, and biogas dryer.

Based on the above findings, we conclude that the proposed relocation of the concrete pad-mounted transformer to the east side of the generator/digestate building, the relocation of the CHP muffler and cooling system, and the addition of the biogas dryer neither have the potential to have significant impacts on the Section 248(b) criteria nor constitute material deviations from the previously approved plans for the Project.

4. Public Act No. 88 (2013 Vt., Bien. Sess.). Pursuant to Act 88, Section 248 was amended to now include subsection 248(q)(2), which states in relevant part:

Notwithstanding 1 V.S.A. § 214 and Board Rule 5.408, if the Board issued a certificate to a plant using methane derived from an agricultural operation prior to July 1, 2013, such certificate shall require an amendment only when there is a substantial change, pursuant to Board Rule 5.408, to the equipment used to generate electricity from biogas, the equipment used to refine biogas into natural gas, the structures housing such equipment used to generate electricity or refine biogas, or the interconnection to electric and natural gas distribution and transmission systems.

Similarly, we conclude that the relocation of the as-built generator/digestate building approximately 20 feet closer to Lake Road does not have the potential to have a significant impact on the Section 248(b) criteria and does not constitute a material deviation from the previously approved plans. The new location is entirely within the previously approved Project site, does not represent a change in the building's height, and reduces the building's elevation by one foot. While noise from the generator may increase by less than 1 dB(A) at the nearest residence, and thus could result in an impact to the Section 248(b)(5) criteria, specifically the air pollution criterion, we conclude that this does not constitute a *significant* impact. Moreover, the noise-related CPG condition shall continue to apply. This standard is independent of the generator's location, thus, the Petitioners continue to bear the risk associated with meeting this standard.⁵

With respect to Mr. N. James Benjamin's public comments regarding the Project's riser pole, the Petitioners represent that a resolution amenable to the Petitioners, Mr. Benjamin, and the Department has been achieved. Based on this representation, it is not necessary for the Board to rule on the merits of this issue.⁶ The Project as amended will continue to not have an undue adverse impact on aesthetics, and thus, the Project, as modified, will continue to satisfy the criteria of 30 V.S.A. § 248, and continue to promote the general good of the State. Therefore, we conclude the Petitioners may construct and operate the Project, as modified, under authority of the existing CPG.

We now turn to the question of whether the Petitioners' relocation, without prior Board approval, of the site where the generator/digestate building now stands constructed represents a violation of their CPG. Condition 1 of the Petitioners' CPG requires that "[c]onstruction, operation, and maintenance of the proposed project shall be in accordance with the plans and evidence as submitted in these proceedings. Any material deviation from these plans must be

5. Condition 7 of the CPG states, in part: "Noise from the proposed project shall not increase the ambient sound level measured at a residence on any property adjoining the property on which the project is located by more than 10 decibels [dB(A)]."

6. We observe that the original site plans, like the amended site plans, included a new riser pole adjacent to Lake Road. Therefore, it would have been more appropriate for objections to the riser pole to have been filed during the 30-day comment period following notice of the original petition on July 13, 2012.

approved by the Board. Failure to obtain advance approval from the Board for a material deviation from the approved plans may result in the assessment of a penalty pursuant to 30 V.S.A. §§ 30 and 247."

As discussed above, we have determined that the Petitioners' relocation of the site where the generator/digestate building now stands constructed did not constitute a material deviation from the approved plans. Thus, the Petitioners' relocation, without prior Board approval, of the generator/digestate building site does not constitute a violation of Condition 1 of their CPG. We have reached this conclusion based solely on an analysis of the modifications to the Project components over which we continue to have jurisdiction. We find it appropriate to limit our review in this manner in recognition of the passage of Public Act 88, which took effect on July 1, 2013. Had we considered the entirety of the Project changes, including those over which our jurisdiction has been removed since the filing of this request for an amended CPG, we may well have arrived at a different conclusion and found it appropriate to assess a penalty pursuant to 30 V.S.A. §§ 30 or 247. Therefore, we caution the Petitioners that, going forward, there is a need to be aware of and to adhere strictly to the conditions in their CPG to the extent that these conditions have not been affected by the enactment of Public Act 88.

SO ORDERED.

Dated at Montpelier, Vermont, this 23rd day of July, 2013.

s/James Volz)

) PUBLIC SERVICE

s/David C. Coen)

) BOARD

s/John D. Burke)

) OF VERMONT

OFFICE OF THE CLERK

FILED: July 23, 2013

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.