

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 Oscv\_

GREEN MOUNTAIN POWER )  
CORPORATION, )  
                                  Plaintiff, )  
  ) )  
v. )  
  ) )  
DONALD AND SHIRLEY )  
NELSON, )  
                                  Defendants. )

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE TRO GRANTED TO GREEN MOUNTAIN POWER CO**

**1. GMP has failed to comply with safety standards for blasting that are mandated by law and as a part of its Certificate of Public Good**

GMP has a clear and mandated obligation to conduct its blasting activities to prevent flyrock from leaving the permitted site. In the Amended Blasting Plan GMP filed with the PSB and with which it is required to be in compliance, GMP's blaster provides the following assurance: "We are knowledgeable of and will follow all local, state and federal regulations related to transportation and use of explosives." Amended Blasting Plan at 3. Vermont has adopted the National Fire Protection Association (NFPA) Uniform Fire Code (NFPA 1) within the Vermont Fire & Building Safety Code. Pursuant to NFPA 1, the use of explosive material shall comply with NFPA 495 - Explosive Materials Code. See NFPA 1-330 § 65.9.1. The Vermont Division of Fire Safety website confirms that "Regulations on the safety, storage and use of explosive materials are contained in the National Fire Protection Association (NFPA) Standard 495, Explosives Material Code, 2006 edition, adopted under the Vermont Fire &

Building Safety Code." Pursuant to NFPA 495, "[f]lyrock<sup>1</sup> shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation." NFPA 495-39 § 11.3.2. *See also* NFPA 495 11.3.1 ("flyrock travelling through the air or along the ground shall not be cast from the blast site in an uncontrolled manner that could result in personal injury or property damage.")

The Amended Blasting Plan also includes the following commitments:

1. "Mats will be placed so as to protect all people and structures on, or surrounding the blast site and property." Amended Blasting Plan at 4.

2. The Plan Attaches Material Safety Data Sheets for the materials to be used during blasting, several of which require the user of that material to "COMPLY WITH THE SAFETY LIBRARY PUBLICATION NO.4 "WARNINGS AND INSTRUCTIONS" AS ADOPTED BY INSTITUTE OF MAKERS OF EXPLOSIVES". *See e.g.* Amended Blasting Plan, MSDS No. B-3 for AUS ITN ITE WR SERIES at 2; MSDS No. C-3 for SHOCK\*STAR (TM) SHOCK TUBING at 2; MSDS MDB-1 for MDB BLEND 1966 at 2. Safety Library Publication No. 4 of the Institute of Makers of Explosives includes the requirement that the blaster should "ALWAYS use a blasting mat or other protective means when blasting close to residences or other occupied buildings or other locations where injury to persons or damage to property could occur as a result of flyrock."

GMP possesses a Certificate of Public Good (CPG) from the Vermont Public Service Board (PSB) which, *inter alia*, requires that:

1. "All blasting will be performed in accordance with any and all applicable laws

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<sup>1</sup> Flyrock is a term used to describe solid blast debris created by a blast.

and regulations” including the requirements of Office of Surface Mining Reclamation and Enforcement (OSM) Blasting Performance Standards contained in 30 C.F.R. §§ 816.61-816.68 and 817.61-817.68. (These standards prohibit any blasting that will cause “fly rock” to be cast “beyond the permit boundary” (30 C.F.R. §§ 816.67 (c)(3) and 817.67(c)(3)). CPG at Paragraph 36)

2. The CPG also mandates that blasting mats be used to control “limit the occurrence of flyrock”. *Id.*

3. The base of all towers for turbines must be at least 60 meters from the nearest property line. CPG at Paragraph 23.

GMP’s current and planned blasting activities do not comply with the cited provisions of its Amended Blasting Plan, the relevant regulations and industry standards or its CPG and its current blasting activities, to the extent they involve the possible casting of debris and flyrock on to property owned by defendants, where individually are lawfully camping.

The persons who are camped on defendants’ property are lawfully on that property and are within the zone of people for whom the use of “all necessary precautions” is required. They are entitled to the protections assured by Amended Blasting Plan and required by the CPG and the MSDS for the materials being used in the blasting. Nothing in the relevant law of Vermont would force defendants to restrict the use of their property for a lawful purpose just to allow GMP to avoid the cost of complying with obligations which it assumed when it sought and obtained a CPG for its wind turbines.

**2. GMP has already caused delay that has jeopardized its opportunity to obtain a federal production tax credit (PTC)**

Furthermore, while GMP has claimed that any delay would cause increased costs to its ratepayers from the loss of PTCs, this is clearly not the case. As discussed above, GMP can no longer qualify for the PTCs. Additionally, the Public Service Board recently ruled that the PTCs

are not related to the economic benefits of the Project, and therefore do not implicate any criteria under 30 V.S.A. §248. Order Re Motions for Reconsideration and Revocation at 7-9 (Oct. 3, 2011). The Board stated that the PTCs only pertain to the economic viability of the Project, not the economic benefits to the public, and that “economic viability for this project refers to whether it makes economic sense from GMP’s perspective to construct the project....” *Id.* at 8-9. The Board found that the risk of moving forward without the PTCs was on GMP, and that any attempts to pass on additional costs from the loss of the PTCs to the ratepayers would be subject to challenge. *Id.* This contradicts the claims made by GMP regarding the impacts to the public of further delay in the construction of the Project.

GMP is apparently attempting to move forward as quickly as possible in order to try to get the Project constructed prior to the deadline for the PTCs, and in doing so has violated its construction stormwater permits, and now its CPG, which as discussed above requires GMP to prevent flyrock from intruding on adjacent properties. GMP should not be allowed to flagrantly flaunt well established law of trespass, nuisance and property rights, as well as their permits, in order to secure tax credits that are no longer available pursuant to its own testimony and arguments before the Public Service Board. GMP’s campaign of fear mongering against the Nelson’s is unsupported by logic and law, and their attempts to prevent the Nelson’s and their guests from peaceably using their own property is untenable. While GMP has been granted, based on half-truths and misinformation, an injunction preventing the Nelson’s from occupying their own land so that GMP can violate established law and the permits for the Project, it is GMP that must be kept from continuing to violate the law, their permits, and the Nelson’s well established property rights.

**3. The Defendants' have a right to occupy their land to monitor GMP's activities**

The Nelsons have a vantage point on their land that provides a view of the construction activities being conducted on the Project site, especially the area where the Nelson's believe GMP intends to construct portions of two turbine pads and over 300 feet of crane path on their property. As the Court is aware, people have been camping in this area, at the invitation of the Nelson's, in order to observe the construction activities. The Nelsons have every right to monitor the activities of GMP on the adjoining property it has leased for its wind turbine project, and the Nelsons have a right to encourage and invite others to assist them with this task. GMP has filed plans indicating that it intends to blast land owned by the Nelsons. The Nelsons have a right to document each and every trespass that is now occurring, including the clear cutting of the fragile, mountain ridge land owned by the Nelsons.

Moreover, GMP has a documented record of ignoring its permit obligations and ignoring the rights of its neighbors and being less than forthcoming with the PSB and the Court, and the Nelsons are justified in wanting to monitor GMP's actions on the ridge. Indeed as recently as Monday, October 17, GMP ignored the requirements of the TRO that mandate that it notify the Nelsons on the morning of any intended blasting. Instead, ignoring its court-ordered obligations, GMP gave the Nelsons less than a half hour notice on the afternoon of October 17 that it was going to begin blasting that day. This provided inadequate time to warn those people on the ridgeline that blasting was imminent and they might be in danger. Other instances of GMP misconduct are:

- In its June 14, 2011 Motion for Reconsideration of the Board's Order in Docket 7628, GMP argued that reconsideration of certain permit conditions was appropriate since no

other party had requested those conditions and they were therefore unforeseen – this was entirely incorrect and misleading.

- On June 24, 2011, GMP provided a letter to the Board admitting that its statement in its Motion for Reconsideration was “erroneous.”
- In its August 9, 2011 Opposition to Craftsbury and Albany’s Motion for Stay Pending Appeal, GMP argued that the timing to obtain certain easements set forth in an MOU reflected the priority of those easements and did not suggest that GMP had knowledge of the potential for delay from altering the timing to secure those easements.
  - On August 11, 2011, GMP provided a letter to the Board stating that pursuant to a request from ANR, GMP was altering its argument, and that the timing to obtain the easements was actually by GMP’s request, which was based on its concerns regarding delay of the project, completely contradicting their prior argument.
  - The Board later acknowledged that the August 11 admission by GMP raised “significant concerns” that GMP had provided misleading arguments to the Board. *See* Sep. 6, 2011 Order Re Motions for Stay at 6.
- On July 21, 2011, GMP submitted a letter to the Board indicating that a GMP contractor had cut “approximately 10” trees on the Project site prior to being permitted by GMP and the Board to do so. The letter also indicated that the owner of land being used for habitat mitigation for the Project had cut dozens of trees, widened roads and filled wetlands without a permit and contrary to the expected protection of those parcels pursuant to the CPG for habitat mitigation. This led to a §1272 Remediation Order from ANR.
  - GMP later admitted that over 80 trees had been cut by its contractor, not 10.
- On October 5, 2011 the Vermont Agency of Natural Resources issued a Stop Work Order for violations of GMP’s construction stormwater discharge permit and the Vermont Water Quality Standards.
- GMP continues to claim that any delay will result in a loss of Production Tax Credits and thereby harm ratepayers, even though it is clear from GMP’s own arguments and the findings of the Board that the PTCs are no longer available to GMP, and the costs to GMP from the loss of these tax credits cannot be passed on to the consumers.

The Nelsons therefore have good reason to be wary of GMP, whose prior actions would make any neighbor feel the need to keep an eye on the activities on the Project site to ensure that GMP follows the applicable laws, regulations and conditions of its permits. The misleading information provided by GMP to support its motion for a TRO, as discussed herein, is not the first time GMP has made disingenuous arguments regarding this Project. This pattern of deception, along with GMP's attempts to coerce the Nelsons into selling GMP their land through a threatening letter, provide ample reason for the Nelsons to consider GMP to be a bad actor that will ignore the law and do whatever it can, right or wrong, to get what it wants. This track record of violations and disregard for legal obligations provides ample reason for the Nelsons to mistrust GMP, and to want persons to be on site to ensure that GMP follows the law.

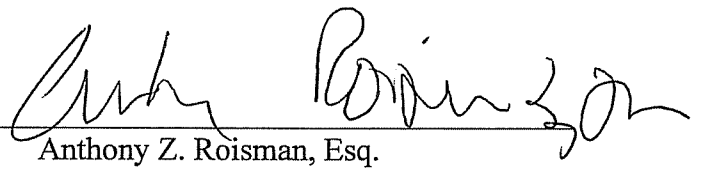
Wherefore, for the additional reasons discussed above and as previously requested, the defendants submit that GMP does not come before the court with clean hands and is not entitled to equitable relief. Further, as noted above, GMP will not suffer irreparable harm if the TRO is not granted and is not likely to prevail on the merits. GMP has used the device of a TRO to obtain an easement over the defendants' property to which it has no lawful right. The TRO should be dissolved.

Dated at Hartford, Vermont this 18 day of October, 2011.

DONALD NELSON and SHIRLEY NELSON

By: 

P. Scott McGee, Esquire  
Hershenson, Carter, Scott and McGee, P.C.  
P.O. Box 909, Norwich, VT 05055  
(802) 295-2800

By: 

Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm, P.C.  
241 Poverty Lane, Unit 1  
Lebanon, NH 03766  
(603) 443-4162