

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	
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Order entered: 05/25/2017

**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”).<sup>1</sup> 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 Vermont Agency of Natural Resources (“ANR”) to “address all regulatory issues” (the “VGS Self Report”).<sup>2</sup>

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

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<sup>1</sup> *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.

<sup>2</sup> VGS Self Report at 2-3.

violation of the 2013 Final Order (the “Lyons Request”).<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup> 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 on December 7, 2016 (“AOD”).<sup>6</sup> 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.

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<sup>3</sup> 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.”

<sup>4</sup> 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.”

<sup>5</sup> 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”).

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

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 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 Self Report.

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 affected, 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.”<sup>7</sup>

Both the 2013 Final Order and the CPG also direct the Company to comply with the provisions of the ANR MOU.<sup>8</sup> 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, threatened, or endangered species. Therefore, our approval of the Project is conditioned upon VGS’s compliance with the terms of that agreement.<sup>9</sup>

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<sup>7</sup> 2013 Final Order at p.146, CPG at ¶ 3.

<sup>8</sup> *Id.*

<sup>9</sup> 2013 Final Order at 132.

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.<sup>10</sup>

### 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:

- (1) \$100,000.00; or
- (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;
- (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
- (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
- (4) the length of time that the violation existed;
- (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.

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

## 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.<sup>11</sup> By taking 77 harsh sunflowers without a permit, the Company agrees that it violated 10 V.S.A. § 5403(a).<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> The Company's failure to get a permit also resulted in a harm to the regulatory oversight process. The Company adversely affected the interests of utility customers because such failures are unnecessarily burdensome and diminish the credibility of the regulatory process.

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<sup>11</sup> Findings 18-20.

<sup>12</sup> AOD at ¶ 27.

<sup>13</sup> Stipulation at 3.

<sup>14</sup> *Id.* at 9.

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;<sup>15</sup> (2) took steps to comply with the ANR MOU by surveying the site prior to construction;<sup>16</sup> (3) applied for a takings permit and then re-aligned the pipeline to avoid the sunflowers using HDD;<sup>17</sup> (4) failed to ensure that the workers on site knew to avoid the plants;<sup>18</sup> and (5) became aware of the violation the same day it occurred.<sup>19</sup> 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.<sup>20</sup>

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.

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

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<sup>15</sup> See ANR MOU.

<sup>16</sup> Finding 9

<sup>17</sup> Findings 14-16.

<sup>18</sup> Finding 18.

<sup>19</sup> *Id.*

<sup>20</sup> See St. Hilaire. at ¶ 12 ("VGS gained no economic benefit from the incident.")

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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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;<sup>24</sup> (2) stopping work at the site for ten days;<sup>25</sup> and (3) developing and implementing a harsh sunflower avoidance plan.<sup>26</sup> The Company then engaged in negotiations with both the Department and ANR to resolve the

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<sup>21</sup> Letter from Ashley Weiner, VGS Vice President for Finance, to the PSB Clerk, dated April 13, 2017.

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

<sup>23</sup> *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.

<sup>24</sup> Finding 20.

<sup>25</sup> Findings 19 and 25.

<sup>26</sup> Findings 23-25.

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.

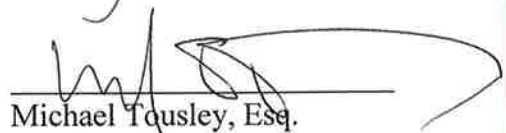
Having given due consideration to each of the statutory factors enumerated in 30 V.S.A. § 30(c), I recommend that the Board impose a penalty of \$25,000 for the Company's violation of the 2013 Final Order and CPG.

#### **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.

  
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Michael Tousley, Esq.  
Hearing Officer

#### **VIII. BOARD DISCUSSION**

On May 16, 2017, ANR and the Company each filed comments on the Hearing Officer's proposal for decision. In their comments, both ANR and the Company requested that the Board set aside \$6,000 of the \$25,000 penalty recommended by the Hearing Officer to be paid to the New England Wildflower Society ("NEWS"). These funds would pay for a supplemental

environmental project (“SEP”) that would “further seed collection and banking work funded in part by ANR’s separate enforcement action.”<sup>27</sup> ANR also represented that the Department supported this request. This \$6,000 SEP payment to NEWS had been previously agreed upon by the parties to the Stipulation as the recommended penalty for the taking of the harsh sunflowers without a permit.<sup>28</sup>

Under Section 30, penalties are directed to the General Fund. However, we interpret the parties’ comments to be a request that we issue a penalty under § 30 for \$19,000 (rather than the \$25,000 recommended by the Hearing Officer) and also adopt the Stipulation under which the Company will voluntarily contribute \$6,000 to NEWS. We find this approach to be reasonable.

Accordingly, we adopt the Stipulation in which the Company agrees to the SEP payment to NEWS for the harm caused to the natural resources when the Company violated the terms of the 2013 Final Order and CPG in Docket 7970 by taking 77 harsh sunflower plants without a permit. We also agree with the Hearing Officer that the Company’s failure to get a permit to take the sunflowers resulted in a separate harm to the regulatory oversight process. For these reasons, we are ordering the Company to both comply with the terms of the Stipulation by making the \$6,000 payment to NEWS agreed upon therein and pay a civil penalty of \$19,000, pursuant to 30 V.S.A. § 30, for violating the terms of the 2013 Final Order.

### **IX. ORDER**

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

1. Except as modified above, the findings, conclusions, and recommendations of the Hearing Officer are hereby adopted.

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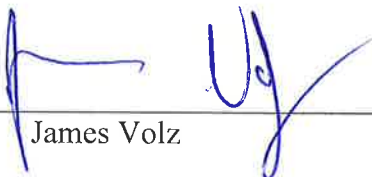
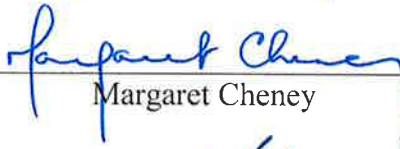

<sup>27</sup> Letter from Donald J. Einhorn, Esq., to Judith C. Whitney, Clerk of the Board, dated May 16, 2017.

<sup>28</sup> Stipulation at 9.

2. Vermont Gas Systems, Inc. shall comply with the terms of the Stipulation by paying \$6,000 to the New England Wildflower Society to fund a supplemental environmental project that furthers wildflower seed collection and banking work.

3. Pursuant to 30 V.S.A. § 30, Vermont Gas Systems, Inc., shall pay a penalty of \$19,000 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 25th day of May, 2017

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

OFFICE OF THE CLERK

Filed: May 25, 2017

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.*

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

Investigation pursuant to 30 V.S.A. §§ 30 and 209 )  
regarding the alleged taking of harsh sunflower ) Docket No. 8791  
plants by Vermont Gas Systems, Inc. in Monkton, )  
Vermont )

Order entered:

**STIPULATED PROPOSAL FOR DECISION  
SUBMITTED ON BEHALF OF VERMONT GAS SYSTEMS, INC., THE VERMONT  
DEPARTMENT OF PUBLIC SERVICE AND THE VERMONT AGENCY OF  
NATURAL RESOURCES**

PRESENT: Michael Tousley, Hearing Officer

APPEARANCES: Louise Porter, Special Counsel  
Aaron Kisicki, Special Counsel  
for Vermont Department of Public Service

Donald J. Einhorn, Esq.  
for the Vermont Agency of Natural Resources

Debra L. Bouffard, Esq.  
Sheehey Furlong & Behm P.C.  
for Vermont Gas Systems, Inc.

**I. INTRODUCTION**

This matter involves the investigation by the Vermont Public Service Board (“Board”) into the alleged taking of seventy- seven (77) harsh sunflower plants by Vermont Gas Systems, Inc. through its HDD contractor, Michels Corporation, that occurred during the construction of the Addison Natural Gas Project (“ANGP”) in the town of Monkton, Vermont in July of 2016.

**II. PROCEDURAL HISTORY**

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 by VGS contractor, Michels Corporation.

On August 23, 2016, the Board opened an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether Vermont Gas Systems, Inc. (“VGS” or the “Company”) violated the 2013 Final Order and Certificate of Public Good (“CPG”) issued by the Board for the ANGP in Docket 7970 by taking a threatened plant species during pipeline construction in Monkton, Vermont.

At the same time, the Board stayed the proceedings until the Agency of Natural Resources (“ANR” or the “Agency”) completed its investigation into the incident and concluded a civil enforcement action pursuant to ANR’s enforcement authority under 10 V.S.A. § 5403.

Upon the conclusion of its investigation, ANR determined that VGS had violated 10 V.S.A. § 5403(a) for the taking of seventy-seven (77) individual harsh sunflower plants. ANR and VGS reached an Assurance of Discontinuance (“AOD”) for the violations that was signed by VGS on October 26, 2016 and the Agency on October 31, 2016, and approved by the Vermont Superior Court, Environmental Division on December 7, 2016.

On December 29, 2016, ANR filed notice of the completion of its investigation and enforcement action and requested that the Board lift the stay on these proceedings. ANR filed a copy of the AOD with the Board.

On January 20, 2017, the Board lifted the stay and scheduled a status conference. A status conference was held on January 31, 2017. Notices of Appearance were entered for ANR and the Department of Public Service (“Department”). The Department filed a proposed schedule that was agreed to by ANR and VGS on February 7, 2017. The schedule included a public hearing and the schedule was approved by the Board.

On April 5, 2017, at 6:00 p.m., the Department, VGS and ANR participated in a public information session at the Town of Bristol’s Holley Hall in Bristol, Vermont. That same day,

following the information session and in the same location, a public hearing was held by Board Hearing Officer, Michael Tousley.

The Parties filed a Stipulated Proposal for Decision (“PFD”) on April 14, 2017, and indicated that no further hearing or other process was being requested by the Parties. Attached to the Stipulated Proposal for Decision was a copy of the AOD (Attachment 1), along with an affidavit from John St. Hilaire, Vice President- Operations for Vermont Gas (Attachment 2), and a copy of Mr. St. Hilaire’s July 19, 2016 letter reporting the sunflower cutting to the Board (Attachment 3). On April 14, 2017, the ANR and the DPS also each submitted letters indicating their respective recommendations for an additional penalty in this proceeding. VGS also filed a letter indicating that it did not object to the recommendations made by the ANR and the DPS in those respective letters. Pursuant to the schedule approved in this Docket, the draft Stipulated Proposal for Decision was posted for comment on the Board’s website from April 15-28.

### **III. FINDINGS**

The Parties agree that the facts set out in the Assurance of Discontinuance (“AOD”) between the Agency of Natural Resources and VGS, as approved by the Vermont Superior Court Environmental Division, and which was included with the Stipulated PFD as Attachment A, may be adopted as facts for purposes of this proceeding.

Based on the record evidence in this proceeding, I report the following findings to the Board in accordance with 30 V.S.A. § 8:

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 Vermont Public Service Board issued an Order and a Certificate of Public Good to VGS for the construction and operation of

the Addison Natural Gas Project (ANGP), for the proposed expansion of natural gas service to Addison County, Vermont.” AOD at ¶ 2.

3. “The ANGP 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 and identified as LLN 155 and 153 (the "Property"), which VGS acquired in 2016.” AOD at ¶ 4.
5. “VGS did not have full access to the Property until after it was acquired from the prior owner.” AOD at ¶ 5.
6. “A VELCO electric transmission line right of way (ROW) crosses the Property and partially overlaps the area of the ANGP.” AOD at ¶ 6.
7. “In 2009, Gilman and Briggs Environmental, an environmental consulting firm, observed harsh sunflower plants at the Property while performing environmental survey work on behalf of VELCO.” AOD at ¶ 7
8. “On September 13, 2013, the Agency and VGS entered into Memorandum of Agreement concerning the ANGP.” AOD at ¶ 8.
9. “The Memorandum of Agreement noted the prior identification of harsh sunflower at the Property, acknowledged that VGS did not have access to the Property at the time of the agreement, and provided that VGS would perform a survey of the plants once it gained access to, and prior to construction of the pipeline on, the Property.” AOD at ¶ 9.
10. “In December 2015, environmental consultants working on behalf of VGS met with the Agency to discuss a potential takings permit for installation of the pipeline on the Property in connection with the ANGP. At that time, the pipeline was to be installed 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. VGS obtained access to the property in April, 2016. St. Hilaire Aff. at ¶4.

11. "In May, June and July of 2016, Gilman and Briggs Environmental visited the Property on three occasions on behalf of VGS to survey the extent of the harsh sunflower plants and gather information so that VGS could apply to the Agency for a takings permit for the plants." AOD at ¶ 11.
12. "VGS filed a takings permit application with the Agency on June 9, 2016. The takings permit application was updated on July 8, 2016." AOD at ¶ 12.
13. "With respect to plants, 10 V.S.A. § 5401 defines a 'taking' as 'uprooting, transplanting, cutting, injuring or killing or any attempt to do the same or assisting another who is doing or is attempting to do the same.'" AOD at ¶ 13.
14. "The VGS takings permit application indicated that the total harsh sunflower population consisted of 2004 individuals, made up of five polygons (distinct groups of plants) within the proposed pipeline corridor, and two polygons outside the corridor, but within the adjacent VELCO transmission ROW or field edge. The total number of plants was calculated by treating stems arising more than three inches apart as individuals, consistent with a protocol established by the Agency." AOD at ¶ 14.
15. "The takings permit application indicated that 717 individual plants, approximately 36% of the total population, would be impacted by the ANGP work on the Property." AOD at ¶ 15.
16. "VGS represented that its purpose for applying for the takings permit was 'economic hardship.' VGS further explained that if permit authorization was not granted, financial

hardship would result from costs incurred in re-designing, and constructing, the ANGP in a manner that avoided the harsh sunflower population.” AOD at ¶ 16.

17. “As mitigation for the taking of the sunflower plants, VGS proposed to transplant the individual plants that would be directly impacted, and then annually monitor the transplanted individuals as well as the undisturbed portion of the existing population.” AOD at ¶ 17.
18. “10 V.S.A. § 5408(f)(1)(b) provides that the fee to be charged to an applicant for an economic hardship takings permit shall be ‘\$250.00 for each listed animal or plant taken up to a maximum of \$25,000.00 or, if the Secretary determines that it is in the best interest of the species, the parties may agree to mitigation in lieu of a monetary fee.’” AOD at ¶ 18.
19. “On July 14, 2016, the Agency 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.
20. After having access to the property and reviewing the construction conditions, Vermont Gas concluded that utilizing horizontal directional drilling was a preferable construction technique and would change the vertical alignment of the pipeline to completely avoid the sunflowers. St. Hilaire Aff. at ¶ 6.
21. “On Friday, July 15, 2016, VGS notified the Agency that it was formally withdrawing its takings permit application.” AOD at ¶ 20.
22. “VGS indicated that its reason for withdrawing the application was that it had decided to utilize horizontal directional drilling (HDD), instead of open trenching, to install the

- pipeline on the Property. According to VGS, utilizing HDD would result in ‘no disturbance or impact to harsh sunflowers or other protected species.’” AOD at ¶ 21.
23. VGS did have a preconstruction meeting with its contractors to discuss the need to avoid the sunflowers, and it took other steps to protect the plants. St. Hilaire Aff. at ¶ 8.
24. “On Monday, July 18, 2016, an employee of Michels Corporation (Michels), the HDD contractor working for VGS, 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. VGS immediately required the crew to stop work. See July 19, 2016 letter from John St. Hilaire to the Board (Attachment 3 to the Stipulated PFD).
25. “On Tuesday, July 19, VGS notified the Department, the Agency and the Public Service Board of the clearing, and of impacts to harsh sunflower plants. VGS also stopped work at the Property to investigate the incident and determine the next steps.” AOD at ¶ 23; St. Hilaire Aff. at ¶ 10.
26. “Agency personnel inspected the Property on July 20 and observed that two of the harsh sunflower polygons had been impacted, resulting in seventy-seven separate state threatened plants being injured as follows. In the northernmost polygon, sixty-seven (67) individual plants were cut and five (5) were severely trampled. In the southernmost polygon, one individual was cut and four were severely trampled. Additional plants had been knocked over, but were able to be righted.” AOD at ¶ 24.
27. “The injuries to the 77 plants constituted a taking for which neither VGS nor Michels had a takings permit.” AOD at ¶ 25.

28. “By taking harsh sunflower, a state threatened plant, without a permit, VGS, through its contractor Michels, violated 10 V.S.A. § 5403(a).” AOD at ¶ 26.
29. “On July 21, in response to the taking, the Agency requested that VGS develop a harsh sunflower avoidance plan and submit it to the Agency for review and approval before restarting work at the Property.” AOD at ¶ 27,
30. “Over the course of the next week, VGS shared drafts of its proposed avoidance plan with the Agency for review and comments. VGS made revisions to its plan and, on July 28, the Agency approved the plan and indicated it would be acceptable for VGS to resume work at the Property provided the approved plan was implemented. The final version of the avoidance plan included requirements for demarcation and placement of barriers around the sunflower populations; daily briefings of work crews on harsh sunflower avoidance; and daily on-site monitoring, and submission of written reports to the Agency, by pre-approved environmental compliance monitors.” AOD at ¶ 28.
31. “Work on the Property resumed on July 29 without further incident to the plants and daily reports were submitted to the Agency as required by the approved avoidance plan.” AOD at ¶ 29.
32. For the violations described in the AOD, the Company paid a total penalty of \$33,687.50 to the State of Vermont, including \$10,828.00 paid to one or more Supplemental Environmental Projects (“SEP”) pursuant to 10 V.S.A. § 8007(b)(2). See AOD at 6.
33. The AOD was signed by VGS on October 26, 2017 and the Agency on October 31, 2016 and was posted on the Environmental Compliance Division website for public notice and comment on November 2, 2016. One comment was received during the 30-day public

notice and comment period. See December 7, 2016 Certification of Public Notice and Participation, attached to the AOD.

34. The AOD was filed with Vermont Superior Court, Environmental Division, and approved on December 7, 2016. See *Agency of Natural Resources v. Vermont Gas Systems, Inc.*, Docket No. 163-12-16 vtec. (Vt. Super. Ct. Env'tl. Div. Dec. 7, 2016).

### **POSITIONS OF THE PARTIES**

The Parties agree to the facts set forth above and have agreed that the Stipulated Proposal for Decision and attachments may be admitted as record evidence in this proceeding.

Through a letter filed by the Department to the Board on April 14, 2017, the Department recommends an additional penalty should be imposed on VGS in the amount of \$6000.00 for the violations of the Board's CPG and Final Order. See April 14, 2017 letter from Aaron Kisicki, Special Counsel, on behalf of the Department.

Through a letter filed by ANR to the Board on April 14, 2017, ANR supports the Department's recommendation for an additional \$6000.00 penalty, and has asked that the funds be provided to the New England Wildflower Society. See April 14, 2017 letter from Donald J. Einhorn, Esq., on behalf of ANR.

The Company does not object to the positions of the Department and ANR and is agreeable to providing the \$6000.00 to the New England Wildflower Society. See April 14, 2017 correspondence from Debra L. Bouffard, Esq., on behalf of VGS.

It is VGS' position that the facts of this incident do not support a penalty in excess of what it agreed to in the ANR proceeding and the additional \$6000 penalty the agencies seek in this Docket for the following reasons. First, it is expected that the sunflowers, which are perennials, will grow back in the subject locations, and thus the harm is not permanent in nature.

See St. Hilaire Aff. at ¶ 14. Second, the disturbance was an accident, not intentional, and caused by VGS' contractor notwithstanding VGS efforts to protect the sunflower locations. See St. Hilaire Aff. at ¶ 11. Third, there was no economic benefit to VGS for this incident. To the contrary, this was an accidental cutting, and VGS has incurred costs in the form of monetary penalties for this incident as well as costs related to halting construction and developing avoidance plans. See St. Hilaire Aff. at ¶ 12. Fourth, immediately upon discovering the incident, VGS immediately required the crew to stop work in the subject area, and VGS self-reported the incident to the Department, the ANR, and to the Board. See St. Hilaire Aff. at ¶ 10. Fifth, the penalty VGS has already paid to ANR is a significant deterrent. In addition to the penalty, VGS personnel have expended considerable time working with ANR to address and resolve this situation. In addition, VGS has sustained further public scrutiny and reputational harm on account of this accidental incident caused by its contractor. See St. Hilaire Aff. at ¶ 13. Sixth, VGS has had no other environmental violations in connection with this project. See St. Hilaire Aff. at ¶ 15. And last, as described more above, VGS immediately self-reported this incident, and it took steps to work promptly with ANR to develop a plan to avoid any further incident. See St. Hilaire Aff. at ¶¶ 10, 12–13.

### **DISCUSSION**

Today's Order addresses the amount of the civil penalty to be imposed on VGS for its violation of 30 V.S.A. § 30 as a result of the taking of seventy seven (77) harsh sunflower plants as described above.

The Board may impose a civil penalty under 30 V.S.A. § 30(a) of not more than \$40,000. In determining the amount of a civil penalty, the Board may consider: (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; (2) whether [VGS] knew or had reason to know the violation existed and whether the violation was intentional; (3) the economic benefit to VGS, if any, that could have been anticipated from an intentional or knowing violation; (4) the length of time that the violation existed; (5) the deterrent effect of the penalty; (6) the economic resources of VGS; (7) VGS's record of compliance; and (8) any other aggravating or mitigating circumstance.<sup>1</sup>

In this investigation, the Board determines that VGS is required to pay a penalty of \$6000.00 for its violation of 30 V.S.A. § 30 caused by the taking of seventy- seven (77) harsh sunflowers. Pursuant to the Parties' agreement, the \$6000.00 payment is to be made to the New England Wildflower Society. In setting the appropriate penalty amount, the Board recognizes that VGS has already paid a significant penalty to ANR for the same violation under consideration here. Additionally, the Board notes that VGS gained no economic benefit from the violation and immediately self-reported the violation once it was discovered. As set forth in the uncontested Affidavit of John St. Hilaire, other mitigating factors include the fact that VGS has cooperated and fully complied with all requirements of ANR to develop and implement a plan to protect the harsh sunflowers and avoid future impacts to the harsh sunflower population in the vicinity of the ANGP.

Accordingly, after considering the factors set out in 30 V.S.A. § 30(c) as applied to the facts here, the Board agrees with the recommendations of the Department and ANR and concludes that a penalty of \$6000.00 is appropriate under these circumstances. This penalty is consistent with other penalties imposed by the Board, and is based, in part, upon our understanding, shared by the Department and ANR, that the violation was the result of a singular

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<sup>1</sup> 30 V.S.A. § 30(c).

inadvertent event by a VGS contractor, immediately reported by VGS, and that VGS has taken steps to ensure such violations do not occur in the future.<sup>2</sup>

### **CONCLUSION**

Therefore, pursuant to 30 V.S.A. § 30(c) and for the reasons set forth above, I recommend that the Board impose a penalty on VGS in the amount of \$6000.00 to be paid to the New England Wildflower Society for VGS' violations of its CPG and the Board's Final Order in Docket No. 7970 relating to the taking of 77 harsh sunflower plants.

### **ORDER**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that the findings, conclusions, and recommendations of the Hearing Officer are adopted.

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<sup>2</sup> See *In re Petition of Central Vermont Public Service Corporation ("CVPS") for an amended Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the construction of a new 46 kV electrical substation, and the reconstruction of an existing substation*, Docket No. 7635 at 3 (Vt. Pub. Serv. Bd. June 18, 2012).

Dated at Montpelier, Vermont this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_) )  
\_\_\_\_\_) ) PUBLIC SERVICE  
\_\_\_\_\_) )  
\_\_\_\_\_) ) BOARD  
\_\_\_\_\_) )  
\_\_\_\_\_) ) OF VERMONT  
\_\_\_\_\_) )

A true copy:

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) of 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.*

STATE OF VERMONT  
SUPERIOR COURT  
ENVIRONMENTAL DIVISION

Agency of Natural Resources,  
Petitioner,

v.

Vermont Gas Systems, Inc.,  
Respondent.

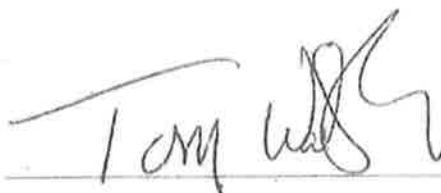
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Docket # 163-12-16 Vtec

ORDER

The Assurance of Discontinuance signed by the Respondent on October 26, 2016, and filed with the Superior Court, Environmental Division, on December 7, 2016, is hereby entered as an order of this Court, pursuant to 10 V.S.A. 8007(c).

Dated this 7th day of December 2016.



Thomas G. Walsh, Judge Superior Court  
Environmental Division

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION  
Docket No.

SECRETARY, VERMONT  
AGENCY OF NATURAL RESOURCES,  
Plaintiff

v.

VERMONT GAS SYSTEMS, INC.,  
Respondent

VIOLATION

1. 10 V.S.A. § 5403(a): Taking of seventy-seven (77) individual harsh sunflower (*Helianthus strumosus*) plants, a Vermont listed threatened species, without a takings permit.

ASSURANCE OF DISCONTINUANCE

Pursuant to the provisions of 10 V.S.A. Section 8007, the Secretary (Secretary) of the Agency of Natural Resources (Agency) and Vermont Gas Systems, Inc. (Respondent or VGS) hereby enter into this Assurance of Discontinuance (Assurance), and stipulate and agree as follows:

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATION

1. Respondent is a Vermont-registered corporation engaged in the business of transmission and distribution of natural gas.
2. On December 23, 2013, in Docket No. 7970, the Vermont Public Service Board issued an Order and a Certificate of Public Good to VGS for the construction and operation of the Addison Natural Gas Project (ANGP), for the proposed expansion of natural gas service to Addison County, Vermont.
3. The ANGP includes the installation of natural gas transmission pipeline in several municipalities, including Monkton, Vermont.

4. The pipeline route crosses over property identified as 57 Cedar Lane in Monkton and identified as LLN 155 and 153 (the "Property"), which VGS acquired in 2016.
5. VGS did not have full access to the Property until after it was acquired from the prior owner.
6. A VELCO electric transmission line right of way (ROW) crosses the Property and partially overlaps the area of the ANGP.
7. In 2009, Gilman and Briggs Environmental, an environmental consulting firm, observed harsh sunflower plants at the Property while performing environmental survey work on behalf of VELCO.
8. On September 13, 2013, the Agency and VGS entered into Memorandum of Agreement concerning the ANGP.
9. The Memorandum of Agreement noted the prior identification of harsh sunflower at the Property, acknowledged that VGS did not have access to the Property at the time of the agreement, and provided that VGS would perform a survey of the plants once it gained access to, and prior to construction of the pipeline on, the Property.
10. In December 2015, environmental consultants working on behalf of VGS met with the Agency to discuss a potential takings permit for installation of the pipeline on the Property in connection with the ANGP. At that time, the pipeline was to be installed by excavating an open trench. This method of installation would, by necessity, involve direct disturbance of any plants in the pipeline's route.
11. In May, June and July of 2016, Gilman and Briggs Environmental visited the Property on three occasions on behalf of VGS to survey the extent of the harsh sunflower plants and gather information so that VGS could apply to the Agency for a takings permit for the plants.

12. VGS filed a takings permit application with the Agency on June 9, 2016. The takings permit application was updated on July 8, 2016.
13. With respect to plants, 10 V.S.A. § 5401 defines a "taking" as "uprooting, transplanting, cutting, injuring or killing or any attempt to do the same or assisting another who is doing or is attempting to do the same."
14. The VGS takings permit application indicated that the total harsh sunflower population consisted of 2004 individuals, made up of five polygons (distinct groups of plants) within the proposed pipeline corridor, and two polygons outside the corridor, but within the adjacent VELCO transmission ROW or field edge. The total number of plants was calculated by treating stems arising more than three inches apart as individuals, consistent with a protocol established by the Agency.
15. The takings permit application indicated that 717 individual plants, approximately 36% of the total population, would be impacted by the ANGP work on the Property.
16. VGS represented that its purpose for applying for the takings permit was "economic hardship." VGS further explained that if permit authorization was not granted, financial hardship would result from costs incurred in re-designing, and constructing, the ANGP in a manner that avoided the harsh sunflower population.
17. As mitigation for the taking of the sunflower plants, VGS proposed to transplant the individual plants that would be directly impacted, and then annually monitor the transplanted individuals as well as the undisturbed portion of the existing population.
18. 10 V.S.A. § 5408(f)(1)(b) provides that the fee to be charged to an applicant for an economic hardship takings permit shall be "\$250.00 for each listed animal or plant taken up to a

maximum of \$25,000.00 or, if the Secretary determines that it is in the best interest of the species, the parties may agree to mitigation in lieu of a monetary fee.”

19. On July 14, 2016, the Agency 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.
20. On Friday, July 15, 2016, VGS notified the Agency that it was formally withdrawing its takings permit application.
21. VGS indicated that its reason for withdrawing the application was that it had decided to utilize horizontal directional drilling (HDD), instead of open trenching, to install the pipeline on the Property. According to VGS, utilizing HDD would result in “no disturbance or impact to harsh sunflowers or other protected species.”
22. On Monday, July 18, 2016, an employee of Michels Corporation (Michels), the HDD contractor working for VGS, 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.
23. On Tuesday, July 19, VGS notified the Agency and the Public Service Board of the clearing, and of impacts to harsh sunflower plants. VGS also stopped work at the Property to investigate the incident and determine the next steps.
24. Agency personnel inspected the Property on July 20 and observed that two of the harsh sunflower polygons had been impacted, resulting in seventy-seven separate state threatened plants being injured as follows. In the northernmost polygon, sixty-seven (67) individual plants were cut and five (5) were severely trampled. In the southernmost polygon, one

individual was cut and four were severely trampled. Additional plants had been knocked over, but were able to be righted.

25. The injuries to the 77 plants constituted a taking for which neither VGS nor Michels had a takings permit.
26. By taking harsh sunflower, a state threatened plant, without a permit, VGS, through its contractor Michels, violated 10 V.S.A. § 5403(a).
27. On July 21, in response to the taking, the Agency requested that VGS develop a harsh sunflower avoidance plan and submit it to the Agency for review and approval before restarting work at the Property.
28. Over the course of the next week, VGS shared drafts of its proposed avoidance plan with the Agency for review and comments. VGS made revisions to its plan and, on July 28, the Agency approved the plan and indicated it would be acceptable for VGS to resume work at the Property provided the approved plan was implemented. The final version of the avoidance plan included requirements for demarcation and placement of barriers around the sunflower populations; daily briefings of work crews on harsh sunflower avoidance; and daily on-site monitoring, and submission of written reports to the Agency, by pre-approved environmental compliance monitors.
29. Work on the Property resumed on July 29 without further incident to the plants and daily reports were submitted to the Agency as required by the approved avoidance plan.
30. By Order dated August 23, 2016, the Vermont Public Service Board opened an investigation in Docket No. 8791 "to determine whether [VGS] 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.”

31. The Public Service Board has stayed its investigation until the enforcement action, which is the subject of this Assurance, is concluded.

#### AGREEMENT

Based on the foregoing Statement of Facts and Description of Violations, the parties agree as follows:

A. For the violations described above, Respondent shall pay a total penalty amount of

\$33,687.50, as follows:

- i. Respondent shall pay a partial penalty of \$22,859.50. Payment shall be by check made payable to the “Treasurer, State of Vermont” and forwarded to:

Administrative Assistant  
Agency of Natural Resources  
Environmental Compliance Division  
1 National Life Drive, Davis 2  
Montpelier, VT 05620-3803

Payment shall be received no later than thirty (30) consecutive calendar days following the date this Assurance is entered as an Order by signature of the Environmental Court (effective date).

- ii. Respondent shall also contribute \$10,828.00 to one or more Supplemental Environmental Project(s) (SEP), pursuant to 10 V.S.A. §8007(b)(2). The SEP(s) shall be subject to the approval of both the Respondent and the Secretary, and shall be funded by the Respondent no later than thirty (30) consecutive calendar days following the effective date of this Assurance. If, at the close of the thirty (30) consecutive calendar days, any of the \$10,828.00 has not been allocated by the Respondent, that amount shall be immediately

duc and payable to the State of Vermont. In that case, Respondent shall make said payment by check made payable to the "Treasurer, State of Vermont" and forwarded to:

Administrative Assistant  
Agency of Natural Resources  
Environmental Compliance Division  
1 National Life Drive, Davis 2  
Montpelier, VT 05620-3803

Respondent agrees that funds directed to any SEP(s) are not tax deductible and consequently shall not deduct, nor attempt to deduct any SEP expenditures from Respondent's taxes. Further, in the event Respondent publicly communicates, or publishes by any means, directly or indirectly, Respondent's involvement in, or the result of, any SEP that Respondent has funded, the Respondent shall also include in that publication or communication a statement that the SEP is the result of a settlement of an environmental enforcement action brought by the Vermont Agency of Natural Resources. Respondent shall not publish, or issue any public communication, concerning any SEP without first obtaining the Agency's prior written approval of its content.

- B. The State of Vermont and the Agency reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and violations set forth hereinabove.
- C. Nothing in this Assurance shall be construed as having relieved, modified, or in any manner affected the Respondent's on-going obligation to comply with all other federal, state or local statutes, regulations or directives applicable to the Respondent in the operation of their business, including, but not limited to, the Final Order and Certificate of Public Good issued by the Vermont Public Service Board on December 23, 2013 in Docket No. 7970.

- D. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Environmental Court. When so entered by the Environmental Court, this Assurance shall become a judicial order. In the event that such order is vacated, the Assurance shall be null and void.
- E. The Respondent and Agency acknowledge that the Vermont Public Service Board has opened a separate investigation in Docket No. 8791 to determine whether the same events which gave rise to this Assurance also resulted in violations of the Board's Final Order and Certificate of Public Good dated December 23, 2013 and, if so, whether the Board should order any remedial action, impose a penalty, or take any other steps authorized by law.
- F. The Agency expressly reserves the right to recommend that the Board impose penalties, or order any other relief authorized by law, in Docket No. 8791 for the activities that gave rise to this Assurance.
- G. The Respondent and Agency agree that, except for the Agency's expressly reserved right to recommend penalties or other relief and the Board's independent right to impose penalties or other relief in Docket No. 8791, described above and acknowledged by the parties to this agreement, Respondent shall not be liable for additional civil or criminal penalties with respect to the specific facts described herein occurring before the effective date of the Assurance, provided that the Respondent fully complies with the agreements set forth above.
- H. This Assurance sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated in an order issued by the Environmental Court. Alleged representations not set forth in this Assurance, whether written or oral, shall not

be binding upon any party hereto, and such alleged representations shall be of no legal force or effect.

- I. Any violation of any agreement set forth herein will be deemed to be a violation of a judicial order, and may result in the imposition of injunctive relief and/or penalties, including penalties set forth in 10 V.S.A. Chapters 201 and/or 211.
- J. This Assurance is subject to the provisions of 10 V.S.A. Sections 8007 and 8020.

*[Remainder of Page Intentionally Left Blank]*

... of ...  
... of ...  
... of ...

SIGNATURES

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Further, I Eileen Simollardes, the undersigned, hereby state under oath that I am the Vice President of Regulatory Affairs of Vermont Gas Systems, Inc. and an authorized representative of Vermont Gas Systems, Inc., and that I have the power to contract on behalf of that entity, and that I have been duly authorized to enter into the foregoing Assurance of Discontinuance on behalf of that entity.

Dated at So. Burlington, Vermont, this 26 day of October, 2016.

VERMONT GAS SYSTEMS, INC.

By: Eileen Simollardes  
Eileen Simollardes, Vice President

STATE OF VERMONT  
COUNTY OF Chittenden, ss.

At 9:37, Vermont, this 26<sup>th</sup> day of October, 2016,  
the above-signatory personally appeared and swore to the truth of the foregoing. Before me,

K. Talbot  
Notary Public

Term expires: Kathryn A. Talbot  
My Commission Expires  
February 10, 2019

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at Montpelier, Vermont, this 31<sup>st</sup> day of October, 2016.

SECRETARY, AGENCY OF NATURAL RESOURCES

By: Deborah Markowitz  
Deborah Markowitz, Secretary

**Vermont Agency of Natural Resources  
Department of Environmental Conservation  
Environmental Compliance Division**

**Secretary, Vermont Agency of Natural Resources,**  
*Plaintiff*

**V.**

**Vermont Gas Systems, Inc.**  
*Respondent*

**CERTIFICATION OF PUBLIC NOTICE AND PARTICIPATION**

I, Marcella Dent, Administrative Assistant for the Office of General Counsel of the Agency of Natural Resources, hereby certify that the Assurance of Discontinuance in the above-captioned matter was posted on the Environmental Compliance Division website for public notice and comment on November 2, 2016 pursuant to 10 V.S.A. §8020(b). One comment was received on this Assurance of Discontinuance during the 30-day public notice and comment period. This Assurance of Discontinuance was posted on the Environmental Compliance Division website for the 14-day public notice period on December 7, 2016 pursuant to 10 V.S.A. §8020(b).

Dated at Montpelier, Vermont, this 7<sup>th</sup> day of December 2016.



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Marcella Dent  
Administrative Assistant

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

Investigation pursuant to 30 V.S.A. §§ 30 and 209 )  
regarding the alleged taking of harsh sunflower ) Docket No. 8791  
plants by Vermont Gas Systems, Inc. in Monkton, )  
Vermont )

**AFFIDAVIT OF JOHN ST. HILAIRE**

I, John St. Hilaire, being duly sworn, hereby depose and state:

1. I am employed by Vermont Gas Systems, Inc. (“VGS”) as Vice President of Operations. I have been employed by VGS for 26 years. I have personal knowledge of the information submitted in this affidavit.
2. During the approval process for the Addison Natural Gas Pipeline (“ANGP” or “Project”) the potential for harsh sunflowers, a threatened species, was identified at 57 Cedar Lane in Monkton, Vermont (the “Property”) along the proposed Project route.
3. At the time of Project approval in 2013, VGS did not have access to the Property.
4. VGS obtained access to the Property in April of 2016.
5. Initially open trench construction was proposed for the length of pipe that was to run through the Property. Because this was the initial plan and would have disturbed the harsh sunflowers, as required by the Memorandum of Understanding with the Agency of Natural Resources, VGS sought a taking permit for the disturbance of the harsh sunflowers in the pipeline path.
6. After gaining access to the Property and reviewing the construction conditions, however, Vermont Gas concluded that using horizontal directional drilling (“HDD”) was a preferable construction technique and would change the vertical alignment of the pipeline to completely avoid the harsh sunflowers.

7. On July 15, 2016, VGS withdrew its taking permit request once it determined that HDD would be used and therefore no sunflowers should be disturbed.

8. Prior to the HDD drill, VGS had a preconstruction meeting with its contractors to discuss the need to avoid the sunflowers, and VGS took other steps to protect the plants.

9. Late in the day on Monday July 18, 2016, Vermont Gas' environmental inspector discovered that an employee of Michels Corporation ("Michels"), the HDD contractor at the time, in preparation for the HDD drill, had inadvertently disturbed harsh sunflower plants while clearing vegetation outside of the Project plan's specified "limits of disturbance."

10. Upon discovering the damage, VGS immediately required the crew to stop work and self-reported the incident to the Department, ANR and to the Public Service Board.

11. The damage to the sunflowers was an accident, not intentional, and caused by VGS' contractor, notwithstanding the efforts taken by VGS to protect the sunflower polygons.

12. VGS gained no economic benefit from the incident. This was an accidental cutting, and VGS has incurred significant costs in the form of a monetary penalty for this incident, pursuant to the ANR investigation, as well as costs related to halting construction and developing the avoidance plan in concert with ANR to prevent further harm to the harsh sunflowers on this Property.

13. The \$33,687.50 penalty VGS has already paid to ANR is a significant deterrent. In addition to the penalty, VGS personnel have expended considerable time working with ANR to address and resolve this situation. As well, VGS has sustained further public scrutiny and reputational harm on account of this accidental incident caused by its contractor.


14. Based on information from our environmental consultant, VHB, it is expected that the sunflowers, which are perennials, will grow back in this location, and thus the harm is not permanent in nature.

15. VGS has had no other environmental violations in connection with this Project.

Dated at So. Burlington Vermont this 13<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
JOHN ST. HILAIRE

Subscribed and sworn to before me this 13<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
Notary Public  
My commission expires: \_\_\_\_\_

Kathleen McCann  
My Commission Expires  
February 10, 2019



Judith Whitney, Clerk  
Vermont Public Service Board  
112 State Street  
Drawer 20  
Montpelier, VT 05620-2701

VIA HAND DELIVERY  
July 19, 2016

Re: **Docket No. 7970**  
**Petition of Vermont Gas Systems, Inc.**

I write on behalf of Vermont Gas Systems, Inc. ("VGS") to inform the Public Service Board ("Board") and the parties of an event that occurred late yesterday on property owned by Vermont Gas in Monkton, Vermont at 57 Cedar Lane.

The incident occurred while contractors were preparing an area in Monkton within the Addison Natural Gas Pipeline ("ANGP") corridor on the Property for a horizontal directional drill. This is the same drilling activity VGS provided notification to the Board, the Department, and the other parties in Docket 7970 on Friday, July 15. In preparation of the HDD, the contractors inadvertently disturbed Harsh Sunflower Plants in the area while cutting vegetation in an area outside of the project's "limits of disturbance," as specified in project plans.

Vermont Gas immediately required the crew to stop work and has notified the appropriate Agency of Natural Resources ("ANR") representatives. All work at that site has ceased while we work at ANR to determine next steps, and to submit the appropriate documentation to the Board.

We will conduct a thorough investigation, working with regulators and our environmental consultants to evaluate the impact of what occurred, and to take appropriate remedial measures, which will likely include the need for an after-the-fact Takings Permit for the impacted Harsh Sunflower plants. Vermont Gas will work closely with the ANR to address all regulatory issues.

We take this matter extremely seriously and will undertake what is necessary to address it before recommencing construction on the property (consistent with the requirements of the certificate of public good). We will keep the Board and the parties informed of further actions in this regard.

PSB Case No. 8791 - SERVICE LIST

Parties:

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