STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-3550-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged failure of Vermont Gas Systems, Inc. to comply with the certificate of public good in Docket 7970 by burying the pipeline at less than required depth in New Haven, Vermont	

Case No. 18-0395-INV

Notice of Probable Violations of Vermont Gas Systems, Inc. for certain aspects of the construction of the Addison natural gas pipeline	

MEMORANDUM OF FACT AND LAW IN SUPPORT OF VGS'S MOTION FOR INTERLOCUTORY REVIEW

VGS submits the following Memorandum of Fact and Law in support of its Motion for Interlocutory Review of the Hearing Officer's January 29, 2021 Order re: Liability and Lifting of Stay of Proceedings in Case No. 18-0395-PET (the "Jan. 29 Order") in the above-captioned matters. For the reasons set forth in detail below, the Vermont Public Utility Commission ("Commission" or "PUC") should reject the Jan. 29 Order because the key findings in the Order are clearly erroneous and the Order fails to apply the Commission's legal standards.

This Memorandum details nine distinct clearly erroneous findings where the Jan. 29 Order is either: (a) directly contradicted by all expert witnesses on the relevant issue—including the Commission-appointed pipeline safety expert, (b) is supported by no evidence at all, or (c) ignores clearly relevant evidence. These clearly erroneous findings form the basis of the Jan. 29 Order's application of the law, which leads to two fully unfounded substantial change determinations regarding the Clay Plains Swamp. These determinations are discussed in detail in Discussion Sections A and B.

Additionally, the Jan. 29 Order relies on both clearly erroneous findings and significantly flawed legal reasoning—or a complete absence of legal analysis—in three substantial change determinations and one material deviation determination. On each of these issues, the evidence was complex, and the construction process was not perfect. VGS has acknowledged fault where fault was due and undertaken proactive remedial measures to address these issues, including making changes to improve processes going forward. But the Jan. 29 Order fails to dig into the substance of these issues and examine the evidence. The evidence on all of these issues demonstrated that even where a technical specification was not met, or there was room for debate over the meaning of a written specification, VGS addressed the issues appropriately and ensured there were no impacts on the safety or the integrity of the pipeline. This was confirmed by the Commission-appointed expert in all cases. The Jan. 29 Order's substantial change and material deviation determinations are not based on the evidence or application of the Commission's standards. These issues are addressed in Discussion Section C.

I. STANDARD OF REVIEW

Pursuant to 3 V.S.A. § 809(g), the Commission must make findings of fact in contested cases based on evidence.[1] Beyond this mandate, the Commission is not confined to any standard when reviewing the Hearing Officer's decision and is permitted to review that decision *de novo*.[2] As stated by the Vermont Supreme Court:

> [I]t is a proper and expected function under its legislative mandate for the Board to examine the record, take additional evidence and, where required, rework the findings in the light of its own special competence. That is precisely what occurred in this case, and it was not improper. The Board, having examined the record and the evidence, can proceed to make its own findings based on all the evidence in the

[1] *See Petition of Otter Creek Solar LLC*, Docket No. 8797, 2017 WL 4841505, at *1 (Vt. Pub. Util. Comm'n Oct. 20, 2017).

[2] *Vermont Elec. Power Co. v. Bandel*, 135 Vt. 141, 147 (1977) (holding that the Commission is not bound by the "clearly erroneous" standard when reviewing a Hearing Officer's order, but is free "to make any judgment").

> case, without a special hearing for the purpose, and *without being restrained by contrary conclusions or differing views of controverted facts by its examiner*.[3]

On appeal, the Vermont Supreme Court reviews the Commission's findings of fact for clear error.[4] Therefore, at a minimum, the Commission must overturn the Jan. 29 Order's findings where, as here, they are clearly erroneous.

"[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[5] For example, a finding of fact is clearly erroneous where it is "unsupported by the evidence,"[6] or "there is no credible evidence to support [it]."[7] Clear error can also be found where the finder "has obviously misunderstood the testimony of a witness and based a finding of fact on that misunderstanding"; or "where the evidence opposed to the [finder's] version, though not indisputable, has overwhelming persuasive force."[8]

The Commission's decisions are also governed by applicable legal standards. The Court has said that is "error when a regulation is inconsistently applied" because "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike."[9] The Commission's regulations and cases establish that a "substantial change" or a "material

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3 *Id.* (emphasis added).

4 30 V.S.A. § 11(c); *see also In re Derby GLC Solar, LLC*, 2019 VT 77, ¶ 18.

5 *In re Quechee Lakes Corp.*, 154 Vt. 543, 554 n.10 (1990) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

6 *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 41, 202 Vt. 59.

7 *Peralta v. Brannan*, 2020 VT 100, ¶ 21.

8 *Wu Lin v. Lynch*, 813 F.3d 122, 127 (2d Cir. 2016); *see also* 9C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2585 (3d ed. 2007) ("If the findings of fact are against the clear weight of the evidence or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made by the trial court, the appellate court will set the findings aside even though there is evidence supporting them that, by itself, would be considered substantial.").

9 *In re Stowe Cady Hill Solar*, LLC, 2018 VT 3, ¶¶ 21-22, 206 Vt. 430 (citing *Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007)); *see also Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 356 (2000) (holding that, though "generally an agency's construction of its own regulations is entitled to substantial deference," agency construction that "contradicts the agency's own previous construction" is not due any deference (internal quotation marks omitted)).

deviation" from the plans and evidence, without prior Commission approval, is a violation of the Final Order and CPG. In particular, PUC Rule 5.408, defines a "substantial change" as "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)." Likewise, a "material deviation" is often one that has "potential for significant impact," and the determination is guided by PUC Rule 5.408.[10] The Commission has provided very limited guidance about how a "material deviation" differs from a substantial change, but it seems clear that a material deviation must also implicate impacts on Section 248(b) criteria. In one case the Commission concluded that the "cumulative effect" of many different changes was a "material deviation."[11] In another case, the Commission held that a change was a "material deviation" because it was a "broad alteration" to the permit due to "[s]ignificant activity [in an area] that was not proposed."[12]

II. DISCUSSION

A. The Jan. 29 Order's finding that ANGP did not comply with the applicable surface loading standard in the VELCO right of way was clearly erroneous because all the loading calculations and expert testimony concluded the loading standard was met in the Clay Plains Swamp.

VGS was required to meet a loading standard for pipeline buried along the VELCO ROW pursuant to a Memorandum of Understanding ("MOU") with VELCO that was incorporated into the CPG. All of the evidence in the record indicates that VGS met this requirement. Accordingly,

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[10] *Petition of Otter Creek Solar LLC*, Case Nos. 8797 & 8798, No. 19-3031-PET, 2020 WL 1471758, at *33 (Vt. Pub. Util. Comm'n Mar. 19, 2020) (hereinafter "Otter Creek Solar") (noting that Commission "has at times relied on Rule 5.408's 'potential for significant impact' as guidance in assessing whether proposed changes also constitute material deviations for CPG compliance purposes").

[11] *Petition of ERWR Whitcomb Farm Solar, LLC*, Docket No. 8076, 2014 WL 4735165, at *4 (Vt. Pub. Util. Comm'n Sept. 18, 2014) (hereinafter "ERWR Whitcomb").

[12] *Otter Creek Solar*, at *6.

the Jan. 29 Order's finding that VGS did not meet the loading standard is clearly erroneous because it is based on no evidence. In particular, the Jan. 29 Order concluded:

> In their after-the-fact reviews, VELCO, Mr. Byrd, and Mr. Berger all acknowledge that Vermont Gas's failure to properly bury the pipeline in the Clay Plains Swamp may affect the safety of the pipeline and create limits on the use of the VELCO right-of-way.
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> . . .
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> The failure to *meet the required load standard* has a potential impact principally on public safety under § 248(b)(5).[13]

This is clear error because VELCO, Mr. Byrd, and Mr. Berger (the Department's independent pipeline expert) all came to the opposite conclusion.

The area called the "Clay Plains Swamp" is an approximately 2,500-foot-long section of the ANGP located in New Haven, Vermont.[14] When construction crews encountered wet, challenging conditions in this area in September 2016, they informed VGS they may not be able to bury the pipeline four feet deep as planned in this area.[15] This was a potential issue because the Final Order and CPG required VGS to bury the pipeline three feet in all locations and four feet in the VELCO right of way in accordance with VGS's MOU with VELCO, which states: "VGS will design the Project in VELCO's ROW and access roads into VELCO's ROW to meet an HS-20+15% standard which VGS plans to meet by using Class 3 pipe interred at a depth of 4 feet."[16]

VGS immediately began assessing whether the ongoing construction could result in potential impacts on safety if crews were unable to achieve four feet of depth.[17] A 2016 loading

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13 Jan. 29 Order at 27–28 (emphasis added).
14 Exhibit VGS-JSH-6.
15 Tr. 9/3/20 at 29 (St. Hilaire) (testifying that "the first thing I wanted to know [when VGS learned crews may not achieve four feet] was how to evaluate the safety of that pipe and the expectations from VELCO").
16 Independent Report A#44 (VELCO MOU).
17 Tr. 9/3/20 at 29 (St. Hilaire), *supra* note 15.

calculation performed by Mott McDonald analyzed whether the ANGP would meet the HS-20+15% standard with three, four, or five feet of cover with a variety soil conditions.[18] According to the loading calculations, the ANGP easily passed the loading test at three feet; the loading stress on the pipeline "barely change[s] at all" as a result of the lesser cover.[19] When final depths of cover were all reported over three feet in November 2016, VGS and VELCO exchanged correspondence memorializing their conclusion that the ANGP met the HS-20+15% loading standard in the Clay Plains Swamp even though it was not buried four feet deep.[20]

In June 2017, VGS went a step further. It wanted to know if the ANGP would meet the HS-20+15% loading standard if future on-site conditions resulted in less than three feet of cover. Mott MacDonald performed additional loading calculations for the ANGP, concluding that ANGP met the loading standard with as little as 2 feet of cover.[21] There is no location in the Clay Plains Swamp where the ANGP was not at least three feet deep when installed.[22] On-site

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[18] Exhibit VGS-JSH-2 at 126 ("The stress calculations show that under all soil types, paired with 3', 4', and 5' of cover, the pipeline passes all stress checks (Hoop, Effective, Girth Weld, and Longitudinal Weld).").

[19] *Id.*; Tr. 9/2/20 at 28 (Byrd) ("So they looked at three feet, four feet, five feet depth, how does that change the calculation? And the answer was *it barely changed at all."* (emphasis added)).

[20] Contrary to the Jan. 29 Order, VGS has never argued that the Final Order and CPG allowed it to renegotiate the depth of cover requirement without Commission approval. On the contrary, VGS filed a non-substantial change request that initiated this case with the express purpose of asking the Commission to confirm its analysis that this deviation did not have the potential for a significant impact on safety under PUC Rule 5.408 because the relevant loading and safety standard in the VELCO ROW was met and, therefore, the purpose and intent of the VELCO MOU was achieved without any adverse impacts.

[21] St. Hilaire pf. rb. at 10; Exhibit VGS-JSH-8 (Daniel J. Hartman, P.E., stating "Long story short the calculations pass for up to a depth of 2' but that is the cutoff").

[22] Independent Report A#9 at 8 – 9 (showing installed depth under the "kmz depth" column at 5', 5'2", 4'9", 4'5", 3'6", 3'1", 3'3", 3'1, 3'0", 3'1", 3'2", 3'5", 3'2", 3'10", 4'5", 4'6", 4'1", 4'1", 4'0", 3'8" 3'6"); Exhibit VGS-JSH-2 at 146 (VELCO correspondence stating, "It is our understanding that the installed gas pipeline varies in burial depth between 3.0' and slightly less than 4.0' in approximately 18 locations in this swamp area along VELCO's K43 transmission line, primarily between structures 261 and 267 . . . . Based upon the detailed field information and engineering analyses that have been provided to VELCO, along with our discussions and correspondence over the past few months; VELCO understands that the loading of HS20+15% can be met at a less-than 4' burial depth with the thicker-walled pipe.").

measurements taken by Mr. Byrd a year and half after installation confirmed that ANGP meets the loading standard, even where the depth now measures less than three feet.[23]

Contrary to the findings in the Jan. 29 Order, VELCO, Mr. Byrd, and Mr. Berger all concluded the pipeline in the Clay Plains Swamp met the loading standard and thus the lesser depth of cover had no impact on safety. In correspondence as recent as July 2020, VELCO wrote:

> VELCO accepts the installation of the pipeline within our ROW corridor given that the HS-20+ 15% loading specifications have been accomplished in all areas subject to our agreement. . . . VELCO appreciates the updated information and understands that the loading of HS-20+ 15% has been met at a less-than 4' burial depth in certain areas. The loading criteria, not the depth, is VELCO's primary objective that needs to be maintained.[24]

Mr. Byrd testified that, "VGS and its contractors addressed the constructability issues in [the Clay Plains Swamp] in a reasonable fashion and with proper regard for environmental protection and public safety."[25] With specific reference to the loading standard, Mr. Byrd said the "HS-20+15% loading criteria" was "excessively conservative for a pipeline ROW" but that:

> it doesn't matter because *ANGP can meet that loading standard at any reasonable burial depth or level of compaction*. Per the CEPA surface loading report in Attachment A#49, ANGP would easily pass the "very conservative" screening analysis and require no further analysis, while *greatly exceeding HS-20+15% standards - regardless of soil compaction*. *Surface loading under any anticipated scenarios isn't a concern for ANGP. This has been confirmed by multiple analyses from different engineers using different software*.[26]

Mr. Byrd also had his own team of pipeline experts independently confirm the engineering calculations by performing the analysis themselves.[27] Finally, Mr. Berger reviewed the loading

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[23] Independent Report A#9 at 8 – 9 (showing depths in the Clay Plains Swamp at 4'7", 4'5", 4'8", 4'9", 4'0", 4'0", 3'7", 2'9", 2'9", 2'9", 2'6", 2'6", 2'5", 2'11", 3'0", 3'4", 4'8", 4'4", 4'5", 4'8", 4'3", 4'4", 3'9").

[24] Exhibit VGS-JSH-9 (July 29, 2020 correspondence from VELCO).

[25] Independent Report at 70.

[26] Independent Report at 67 (emphases added).

[27] Tr. 9/2/20 (Byrd) at 27 (testifying that his team ran the loading calculations themselves and "got basically the same answers").

calculations and found, "the loading on the pipeline by heavy equipment does not impair the integrity of the pipeline."[28]

No expert or qualified witness of any kind testified that the ANGP did not meet the HS-20+15% loading standard in the Clay Plains Swamp.

To get to the unsupported conclusion that the loading standard was not met, the Jan. 29 Order asserted that the calculations that VGS, VELCO, Mr. Byrd, and Mr. Berger all reviewed should have been performed with different assumptions. Citing Mr. Byrd's live testimony on cross examination, the Order erroneously concludes that the loading calculations were incorrect because of assumptions used by the engineers about: (1) the installation method being a bore and (2) the width of the trench or pipe.[29] While Mr. Byrd did agree that these assumptions appear to have been used,[30] Mr. Byrd's testimony identifies no doubt about the validity of the calculations. Mr. Byrd never testified that the loading calculations "should" have been performed with different assumptions, nor that there was any fault in the way the loading calculations were done.

Moreover, the Jan. 29 Order's leap to that conclusion is inconsistent with both: (1) the engineering calculation itself regarding the installation method and (2) Byrd's testimony about the trench width assumptions. The loading calculation clearly did not overlook the fact that it was an open cut trench installation rather than a bore because the data assessment page expressly states: "Notes: **Open cut construction, calculation run using HS-20 loading + 15%**."[31] Clearly, the engineers who performed the calculation were well aware that the installation method was open cut construction not HDD. Likewise, Mr. Byrd dismissed the contention that

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[28] June 23, 2017 Letter of Timothy M. Duggan, Department, to Judith Whitney, Clerk of the Commission, Attachment 2 letter from David Berger.

[29] Jan. 29 Order ¶ 44 (citing Tr. 9/2/10 at 27; St. Hilaire Exhibit 2 at 124-126). Mr. Byrd was asked whether "the assumed trench width that Mott MacDonald used was 12.75 inches."Mr. Byrd responded, "Yeah, it looks like they, they analyzed it as if it was installed as a bore instead of an open trench."

[30] Tr. 9/2/20 at 27.

[31] Exhibit VGS-JSH-2 at 128.

trench width was a meaningful factor in the calculation. When asked whether the width of the trench would "make any difference on the load that would be imposed on the pipeline," Mr. Byrd responded:

> [A]ssuming that the material you're backfilling the trench with is consistent with the material in the area, **no, it doesn't matter at all**. You know, it's, the trench width, really, from a calculation standpoint, is only going to matter if the material in the trench physically, you know, bears load differently than the material around the trench, and, in this case, it's backfilled with the exact same material that came out of the trench. So, you know, the **width of the trench during construction is, is more of, you know, a curiosity than anything else. It's not going to matter from an engineering calculation standpoint.**[32]

Accordingly, the Jan. 29 Order is clearly reaching when it concludes the calculation "should" have been performed with different assumptions. That was neither the opinion of the engineers performing the calculation nor Mr. Byrd.[33] Mr. Byrd clearly opined that trench width assumptions did not matter from an engineering calculation standpoint.

This clearly erroneous finding about the loading standard led to erroneous legal conclusions under PUC Rule 5.408. The Order concludes: "The failure to meet the required load standard has a potential impact principally on public safety under § 248(b)(5)."[34] This conclusion is wrong because the "required load standard" was in fact met. The witnesses quoted did not conclude there were impacts on safety. They reached the opposition conclusion.

Similarly, the Order's further legal conclusions that the burial depth had potential impacts on future electrical transmission needs under Section 248(b)(2), the future stability and reliability of the electric transmission system under Section 248(b)(3), and therefore the economy of the State under Section 248(b)(4) are all erroneous because they rest on the same mistaken and clearly erroneous finding. The Jan. 29 Order states:

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32 Tr. 9/2/20 at 24.
33 Jan. 29 Order ¶ 44.
34 Jan. 29 Order at 28.

> Unfortunately, VELCO relied on an engineering study that concluded that the loading standard would be achieved using HDD, not the sink-in-the-swamp burial method. By relying on this incorrect study, VELCO inadvertently accepted limits on the future use of its right-of-way.[35]

But VELCO did not rely on an "incorrect study" because there is no evidence that the loading calculations were "incorrect." The calculations were confirmed independently by Mr. Byrd and his team. Further, there is no evidence that VELCO accepted any limitations on its use of the right of way, and VELCO never made any statements to that effect. In its own words, VELCO's interest was in "protecting its ability to safely and reliably own, operate, maintain and expand as required its bulk electric transmission system and related facilities,"[36] and the "[t]he loading criteria, not the depth, is VELCO's primary objective that needs to be maintained."[37] As Mr. Byrd testified at the hearing, under the HS-20+15% loading standard achieved in the Clay Plains Swamp, you can safely drive a fully loaded 18-wheeler over the pipeline in the Clay Plains Swamp (if you could avoid getting stuck in the swamp).[38] There are no restrictions on the use of heavy equipment in the VELCO right of way, which is exactly what VELCO wanted to accomplish by ensuring the loading standard was met.

The Commission should reject the Jan. 29 Order's findings about the loading standard because they are clearly erroneous. Likewise, because the basis for the Order's conclusions under PUC Rule 5.408 rest on those clearly erroneous findings, the Commission should reject the conclusion that the depth of cover in the Clay Plains Swamp had any safety impacts or created any limitation on VELCO's right of way. The evidence plainly supports the opposite conclusion.

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35 Jan. 29 Order at 26.
36 Lind. pf. at 2 (Docket 7970).
37 Exhibit VGS-JSH-9 (Jul. 29, 2020 VELCO correspondence from P. Lind).
38 Tr. 9/2/20 at 15 (Byrd) (explaining that the loading calculations 'are based off of semi-tractor-trailers that are fully loaded").

B. <u>Trenching Techniques</u>: The Jan. 29 Order's finding that trench construction in the Clay Plains Swamp had potential impacts on natural resources was clearly erroneous.

The Jan. 29 Order found that the trenching techniques used in the Clay Plains Swamp resulted in potential impacts to natural resources based on factual findings that: (1) the trenching process described was "unapproved" and (2) the wetland soils were not segregated as contemplated in the Final Order and CPG.[39] Both of these findings are clearly erroneous. First, testimony from multiple pipeline construction experts, and statements from the Agency of Natural Resources ("ANR"), confirmed the trenching process had no impacts on safety or the environment and that it was an appropriate application of the open-cut trenching method approved by the Commission. Second, photos and sworn testimony clearly show soils were segregated and stockpiled in the Clay Plains Swamp.

1. <u>The Jan. 29 Order's finding that trenching techniques were "unapproved" was clearly erroneous.</u>

The ANGP was installed in the Clay Plains Swamp by excavating a trench. The trenching techniques were evaluated by Mr. Byrd and compared to industry standards and recommended practices. Mr. Byrd concluded:

- *The pipe in the VELCO ROW was installed using open cut trench excavation, as described in section 6.2 of the [recommended practice].*[40]

It is undisputed that open cut trench excavation was one of the two installation methods contemplated in the Final Order and CPG.[41]

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39 Jan. 29 Order at 17; *id.* ¶ 30.

40 Independent Report at 41 – 42.

41 Final Order ¶ 370 (referring to the trenching methods as "open-cut trenching"); *id.* ¶ 444 (describing the trenching process as the "traditional open-cut method[]"); *id.* ¶ 62 (describing the "trenching process" that will be used in areas that do not involve horizontal directional drilling).

Construction crews had to accommodate for the wet and muddy conditions encountered in the Clay Plains Swamp. They used timber mats and staged the pipe in a shallow ditch.[42] Mr. Byrd assessed these techniques and concluded:

- *VGS and its contractors addressed the constructability issues in this area in a reasonable fashion and with proper regard for environmental protection and public safety.*[43]
- *The project plans and specifications gave the [construction management team] the authority and responsibility to address site-specific conditions, and they acted appropriately when addressing the conditions in the Clay Plains Swamp (and other swamps).*[44]
- *[V]ariation[s] in construction technique was not in violation of the law nor applicable pipeline safety regulations.*[45]

VGS presented additional evidence to help inform the Commission's consideration of this issue. John St. Hilaire, VGS's Vice-President of Operations, testified that trenching in the Clay Plains Swamp was an application of open-cut trenching. When questioned by the Hearing Officer about whether it was consistent with the trenching detail submitted to the Commission, Mr. St. Hilaire said, "that's a trench cross-section, and I think, when you look at the trench in the swamp profile, it's very similar to that."[46]

VGS also engaged pipeline expert John Godfrey to review the construction process and inform the Commission about standard pipeline construction techniques. Mr. Godfrey has over thirty years of experience with pipeline safety initiatives and advises regulatory agencies on the development of construction specifications, quality management, and compliance. He co-authored the PHMSA research report "Improving Quality Management System for Pipeline

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42 Independent Report at 57 ("This method involved excavation of an initial trench shallower than ultimately required but not so deep that it would collapse in the muck, installing the pipe in that ditch, and then excavating adjacent to the pipe to allow the pipe to sink deeper into the excavation.").

43 *Id.* at 70.

44 *Id.*

45 *Id.*

46 Tr. 9/3/20 at 35 (St. Hilaire).

Construction Activities."[47] He testified that the Clay Plains Swamp construction was "not uncommon" and is "considered an open cut method" of trench installation.[48]

Rather than relying upon the expert testimony presented on this issue, the Jan. 29 Order adopts the legal argument of Intervenors' counsel, who coined the phrase "sink-in-swamp" and argued the construction technique was distinct from open-cut trenching. But "arguments made by the lawyers are not evidence in the case."[49] The Jan. 29 Order's finding that the open-cut trenching process used in the swamp was an "unapproved", so-called "sink-in-swamp" method that was distinct from the open-cut trenching process contemplated in the Final Order and CPG is clearly erroneous because it is not based on any evidence and is directly contrary to the evidence presented.

2. The Jan. 29 Order's finding that the soils were not segregated in the Clay Plains Swamp was clearly erroneous.

The Jan. 29 Order concluded that the construction method used in the Clay Plains Swamp was a substantial change because "soils were not removed from the trench in layers, stockpiled in layers, or returned in layers that corresponded with the surrounding soils."[50] This is clearly erroneous because although the finding appeared in Intervenors' legal brief (nearly verbatim), it has no support in the evidentiary record. Proposed findings are not evidence.[51]

The Final Order and CPG required soils to be segregated: "In wetlands and agricultural areas, where trenches are used, soil horizons will be removed in order and stockpiled so that

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47 Godfrey pf. rb. at 3.

48 Godfrey pf. rb. at 12-13. The Hearing Officer did not ask Mr. Godfrey any questions at the hearing and the Jan. 29 Order does not cite Mr. Godfrey's testimony once.

49 *Needham v. Coordinated Apparel Grp., Inc.*, 174 Vt. 263, 279, (2002) (quoting standard jury instructions).

50 Jan. 29 Order ¶ 30.

51 PUC Rule 2.222 requires: "Each proposed finding shall contain a citation or citations to the specific part or parts of the record containing the evidence upon which the proposed finding is based." Where findings are not supported by the evidence, as here, they should be rejected by the Commission. *See also* 3 V.S.A. § 809(g) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed.").

horizons can be restored as closely as possible to preconstruction conditions."[52] The evidentiary record in this case clearly established that soils were excavated in layers in the Clay Plains Swamp as shown on the following inspection report that was admitted into evidence.

Photograph 4: Station 1649+00; trenching and lowering in the pipe through Clay Plains. Topsoil and subsoil are segregated and placed on timber mats. Photograph taken looking north.

The caption clearly states: "*Topsoil and subsoil are segregated and placed on timber mats*" in the Clay Plains Swamp.[53]

Multiple witnesses also testified that soils were segregated during the excavation process in the Clay Plains Swamp. John St. Hilaire testified that you could see the soils piled up along the trench in Intervenors' own photos and video of the Clay Plains Swamp construction.[54] Carl Bubolz, who was on site during the Clay Plains Swamp construction, testified that the initial two to three feet of soil was excavated and placed on one side of the trench and the remainder was

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52 Final Order ¶ 68.

53 LeForce Deposition Exhibit 51 (admitted into evidence as a list of stipulated exhibits and testimony); Tr. 9/1/20 at 37 (Tousley) (emphasis added).

54 Tr. 9/3/20 at 41 (St. Hilaire).

placed on the other side. When asked by Intervenors' counsel why they did this, Mr. Bubolz answered because "it was a requirement."[55]

In contrast, the Jan. 29 Order adopts a proposed finding verbatim from Intervenors' brief, and cites Mr. Bubolz's deposition at page 88:

> In the Clay Plains Swamp, soils were not removed from the trench in layers, stockpiled in layers, or returned in layers that corresponded with the surrounding soils. There was not enough room to stack the removed soils, so this was not done. Some of the excess soil was deposited offsite because there was nowhere in the narrow right-of-way to place it. Bubolz Deposition at 88.[56]

But page 88 of the Bubolz Deposition does not discuss segregation of soils at all—it discusses general challenges of working in a narrow right of way. The finding that soils were not segregated is clearly erroneous because there is no supporting evidence at all. In fact, all the evidence demonstrates the opposite is true.

3. The Jan. 29 Order erred by concluding that installation in the Clay Plains Swamp had potential impacts on natural resources.

The Jan. 29 Order's conclusion that trenching in Clay Plains Swamp was a substantial change under Rule 5.408 is based on the clearly erroneous finding that the trenching process was unapproved, and the soils were not segregated. Because the factual bases for this conclusion are clearly erroneous, the legal conclusion under PUC Rule 5.408 is also erroneous. Further, this conclusion is inconsistent with ANR's review of the construction techniques in the Clay Plains Swamp:

> The pipeline burial method [in the swamp] does not change the disturbance footprint and *does not raise any significant concerns with regard to impacts to the natural environment*. In addition, the described work does not require any [ANR] permits.[57]

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[55] Bubolz at 104 (explaining that some excavated material was place on the matting and the "first couple feet" were placed on the other side because "it was a requirement").

[56] Jan. 29 Order ¶ 30.

[57] Jan. 29 Order at 20 (citing Letter from Donald J. Einhorn, Esq., ANR, to Judith C. Whitney, Clerk of the Commission, dated June 19, 2017) (emphasis added).

There is no evidence that supports the Jan. 29 Order's conclusion that the trenching process in the Clay Plains Swamp resulted in the potential for significant impacts on natural resources.[58]

C. Whether the Jan. 29 Order was clearly erroneous and wrong as a matter of law by finding substantial changes or material deviations based on non-compliance with technical or written specifications that had no impact on pipeline safety, integrity, or the environment.

In addition to the substantial change findings discussed above, the Jan. 29 Order concluded there were three additional substantial changes and one material deviation—all of which had no impact on pipeline safety, integrity, or the environment. While VGS acknowledges that ANGP construction was not perfect, and that it made changes to process to address concerns as they arose, the Jan. 29 Order's conclusion that these issues had potential impacts on safety or the environment is erroneous based on the facts, and in some cases, a standardless application of legal requirements.

[58] The Jan. 29 Order makes several other notable errors on this issue. First, it appears the Jan. 29 Order concludes that the Commission designated this area as a rare and irreplaceable natural area ("RINA"). While VGS does not dispute that this area was considered a "significant natural community," as designated by the Department of Fish and Wildlife, the RINA designation is for the Commission to determine, and the Final Order never made any such designation. Second, the findings appear to criticize VGS for not utilizing HDD, using an alternative route, and engaging in construction in a narrow wetlands right of way. The Clay Plains Swamp was the approved route for the Project under the Final Order and the width of the right of way was narrowed as a mitigation measure to reduce the impact on the wetland. Final Order ¶ 67 (citing Heintz pf. supp. at 19-20). The Clay Plains Swamp is located at mile post 31.10–31.55, which is one of the areas subject to "Resource Impact Avoidance and Minimization ROW Narrowing" listed on Exhibit JH-16 (2/28/13).

Vermont-Licensed Engineer

1. The Jan. 29 Order's finding that VGS did not have a Vermont-licensed engineer serving as a "responsible charge engineer" was clearly erroneous.

The Jan. 29 Order concludes that VGS failed to "staff the Project with a Vermont-licensed engineer serving as the responsible charge engineer."[59] This finding is clearly erroneous. Clough Harbour & Associates ("CHA") was the engineer of record for the duration of the entire ANGP planning, permitting, and construction. The Jan. 29 Order acknowledges this fact, stating that CHA "served as the Project's engineer."[60] The evidence also demonstrated that CHA was the engineer on the Project:

- *At all times, "CHA's plans were prepared under the supervision of a Vermont-licensed engineer and in accordance with professional standards."*[61]
- *"Prior to the commencement of construction, CHA provided VGS with final plans clearly labeled as IFC (an indication that the plans were suitable for construction), enabling VGS to establish a Quality Assurance Plan. CHA remained engineer of record throughout the ANGP . . . ."*[62]
- *CHA provided "competent engineering work that met the high standard required by the 2013 Final Order and CPG."*[63]

As to whether CHA was the "responsible charge" engineer, Title 26 defines "responsible charge" as "direct control and personal supervision of engineering work."[64] There is no question that CHA was serving as "responsible charge" engineer for ANGP.[65]

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59 Jan. 29 Order at 33.
60 Jan. 29 Order at 37.
61 Exhibit VGS-JSH-4 at 5.
62 *Id.*
63 Jan. 29 Order at 38 (citing Mr. Byrd).
64 26 V.S.A. § 1161(8).
65 Exhibit VGS-JSH-4 at 5 (identifying all the Vermont-licensed engineers from CHA that supervised preparation of CHA's design plans at various stages of the Project).

Moreover, the evidence demonstrated that CHA's design work on the Project was competently performed. Mr. Byrd found there was "no evidence that the engineering or design work for the Project was deficient, was not performed by competent engineers, or posed a risk to 'public health, safety, and welfare.'"[66]

VGS acknowledged that the design plans for construction were not initially stamped by CHA,[67] but there is no evidence that the absence of CHA's formal signature on the plans undermined quality assurance as alleged by Intervenors. Mr. Byrd evaluated that claim and rejected it:

> - *The plans and specifications provided a strong basis for quality assurance.*[68]
> - *Extensive specifications of all types were prepared in advance of construction, and extensive inspections were performed by multiple parties to ensure conformance with those specifications - with contemporaneous reporting up to the [Construction Management Team ("CMT")]. The CMT was well defined and actively involved in the oversight of the construction project. In every situation, VGS addressed issues as they were identified and non-compliance was corrected or properly managed in conjunction with the appropriate regulatory agency. ANGP did develop and comply with a QA program to oversee the pipeline contractor and subcontractors.*[69]

The Jan. 29 Order's conclusion that VGS did not staff the Project with a Vermont-licensed engineer serving as "responsible charge engineer" is clearly erroneous because CHA served as the responsible charge engineer throughout the entire planning and construction phases. The Jan. 29 Order identifies no evidence of sub-standard engineering. Nor does the Order identify any shortcoming in VGS's quality assurance plan.

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66 Independent Report at 64.

67 VGS has since ensured that all issued-for-construction plans are stamped by a Vermont-licensed engineer prior to construction.

68 *Id.*

69 *Id.*

2. The Jan. 29 Order's conclusion that Title 26 and the Final Order and CPG required engineers to supervise construction of the ANGP was wrong as a matter of law.

The Jan. 29 Order concludes that, although CHA was the engineer on the Project, the "organizational practice" did not conform to Title 26 licensing requirements that "called for a 'responsible charge engineer'" and VGS's construction oversight practices were not consistent with the evidence in Docket 7970 because VGS "provided testimony that a licensed professional engineer was part of the team constructing the Project."[70] The Jan. 29 Order reaches too far here for several reasons.

First, the finding that VGS testified that a licensed engineer was "part of the team *constructing* the Project" is another example of the Jan. 29 Order quoting Intervenors' legal brief verbatim to present a fact that is actually misleading or untrue.[71] The cited testimony is an exchange between Intervenors in Docket 7970 and CHA's John Heintz, who explains that he is not personally an engineer, but "we have a licensed professional engineer as part of our *design* team."[72] That is true. In fact, CHA had many, many engineers on their *design* team and multiple engineers licensed in Vermont.[73] It was clearly erroneous to conclude that this testimony supports the conclusion that engineers should be in the field making construction decisions.

Second, it was wrong as a matter of law to conclude that Title 26 or the Final Order and CPG required the engineering design team to supervise construction in the field. Quality assurance in the field was part of VGS's quality assurance plan required by the Final Order and CPG.[74] Nonetheless, the Jan. 29 Order concludes that a "responsible charge engineer" is required

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70 Jan. 29 Order at 33; *id.* ¶ 79 (citing Docket 7970 Tr. 9/17/13 at 63-63 (Heintz)).

71 *Compare* Jan. 29 Order ¶ 79 *with* Intervenors Proposed Findings of Fact ¶ 42.

72 Docket 7970 Tr. 9/17/13 at 63-63 (Heintz).

73 Exhibit VGS-JSH-4 (Correspondence from CHA listing the Vermont-licensed engineer who were overseeing the preparation of CHA's plans throughout the project).

74 *See, e.g.*, Final Order ¶ 264 ("The *construction of the pipeline* will be done under a quality assurance plan which addresses pipe inspection, hauling and stringing, field bending, welding, non-destructive examination of girth

to be a member of the construction management team under Title 26. Title 26 includes no such requirement. As discussed above, "responsible charge" is defined in Title 26 as an activity overseeing the preparation of engineering design documents—not supervision of construction activities in the field.[75] CHA was never hired to supervise construction in the field, and the fact that they did not was neither a violation of Title 26 nor the Final Order and CPG. The only potential violation of Title 26 was CHA's failure to formally sign and seal the design drawings in the first instance. To the extent the Jan. 29 Order reached the merits of CHA's compliance with its professional licensing requirements, it did so in error because CHA's licensing compliance is beyond the Commission's jurisdiction, as the Commission itself has acknowledged in prior cases.[76]

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welds, applying and testing field-applied coating, lowering of the pipeline into the ditch, padding and backfilling, and hydrostatic testing." (emphasis added)).

[75] 26 V.S.A. § 1161(8) (defining responsible charge as "direct control and personal supervision of engineering work"); Engineering Rules 2.7(c) (providing that a "licensee may sign and seal *instruments of service*" even if they were prepared by an engineer "not under the licensee's responsible charge" if the licensee assumes responsibility for the work (emphasis added)); 26 V.S.A. § 1161(8) (defining "Instruments of service" as "project deliverables, such as reports, specifications, drawings, plans, construction documents, or engineering surveys, that have been prepared under the licensee's responsible charge").

[76] *Petition of N. Springfield Sustainable Energy Project LLC*, Docket No. 7833, 2014 WL 580146, at *91 (Vt. Pub. Serv. Bd. Feb. 11, 2014) (declining to rule on whether activity violated professional licensing requirements under Title 26 because it "is not a matter within the Board's jurisdiction to determine").

It was also error to conclude that the Final Order and CPG required strict adherence to Title 26 as a condition of the CPG, which states, "The Project has been designed and will be constructed and operated to meet or exceed all applicable state and federal codes and standards." Final Order ¶ 259. It is undisputed that neither the state pipeline safety regulations nor federal pipeline safety code require adherence to Title 26. *See* Jan. 29 Order ¶ 88 ("The pipeline safety regulations in Vermont and at the federal level do not contain any requirements for professional engineering certification of plans and specifications. This matter is left up to the state professional engineering regulatory bodies (in this case, the Vermont Secretary of State, Office of Professional Regulation).").

There is no reference to compliance with Title 26 in the Final Order or any specific roles for engineers supervising construction. In other dockets, the Commission has explicitly incorporated specific requirements regarding professional engineers into Section 248 CPGs. *See, e.g.*, *Petition of New Cingular Wireless PCS, LLC,* Docket No. 7842, 2012 WL 601438, at *1 (Vt. Pub. Serv. Bd. Feb. 17, 2012) (adopting the Department's recommendation to require petitioner to "submit tower and foundation designs, approved by a professional engineer, prior to construction, as a condition of the CPG"); *Petition of Salisbury Ad 1, LLC*, Case No. 18-3449-PET, 2019 WL 1259349, at *5 (Vt. Pub. Serv. Bd. Mar. 14, 2019) ("The 'for construction' drawings for the effluent storage tanks shall be stamped by a Vermont licensed professional engineer, filed with the Commission, and provided to the parties at least 30 days prior to construction of the tanks."). It did not so do in this case.

While VGS acknowledges that CHA did not formally stamp the plans at the time they were issued for construction, CHA promptly affirmed its compliance with all professional duties and signed and sealed the plans.[77] There are no substantive concerns about their design work, and there is no requirement under Title 26 or the Final Order that mandated CHA's supervision of construction. As noted above, that role was appropriately executed under VGS's quality assurance plan as required by the Final Order. While VGS does not dispute that CHA may not have complied with the formal requirements of Vermont licensing regulations, this non-compliance had no impact whatsoever on the substantive engineering work or the ANGP. CHA's formal signature and seal had no impact on the quality of the plans and specifications or the implementation of those plans in the field according to strong quality assurance measures. Accordingly, the Jan. 29 Order's conclusion that failing to sign the engineering plans had the potential for significant impacts on safety is erroneous.

Compliance with Written Specifications

The 2013 Final Order and CPG required VGS to meet or exceed the Federal Minimum Pipeline Safety Standards found in 49 C.F.R. Part 192.[78] Federal safety standards require, "Each operator shall maintain, *modify as appropriate*, and follow the plans, procedures, and programs

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[77] Exhibit VGS-JSH-4 at 3 ("Please rest assured that all of the instruments of service provided by Clough, Harbour & Associates, LLP ("CHA") in connection with the Addison Natural Gas Project were prepared under the responsible charge of an engineer licensed in Vermont — namely, Michael E. Hollowood (civil, license number 018.0097764), Joseph J. Thomson (mechanical, license number 018.0090983) and James B. Fuller (electrical, license number 018.0009337). Enclosed, please find the drawings issued for construction sealed and signed by Mr. Hollowood, Mr. Thomson and Mr. Fuller.").

The Office of Professional Regulation investigated a complaint about CHA's engineering work during the permitting phase of the project and rejected claims that the work was being performed by unlicensed engineers. Independent Report at 20 ("Both unlicensed respondents under the Vermont Licensee's supervision were highly qualified by training, experience, and education; and each had attained licensure in a foreign jurisdiction. The Vermont licensee was actively engaged in the project and verified the subordinates' work; he did not act as a rubber stamp." (quoting OPR's decision)).

[78] 2013 Final Order Finding 259.

that it is required to establish under this part."[79] VGS had written specifications about installation of the pipe in the trench as well as installing trench breakers in the field.

1. The Jan. 29 Order's finding that installation on the trench bottom did not comply with written specifications was clearly erroneous.

The Jan. 29 Order concludes VGS stipulated to "trench bottom and trench breaker violations" alleged in Case No. 18-0395-PET, but provides no analysis of how VGS's installation of the pipeline on the bottom of the trench was a violation of VGS's written specification. Moreover, while VGS agreed with the Department to certain remedial actions in that case, it never stipulated to any violations.

It is undisputed that VGS's written specifications expressly allowed installation on the trench bottom: "The pipe shall rest on undisturbed trench bottom provided the material does not include rocks, sharp objects and / or debris that may cause damage to the pipe."[80] This was consistent with documented guidance from CHA, the engineer of record, who stated that it was "acceptable to lay directly on trench bottom 'as long as it is sufficiently supported as stated in 3.3.C.'"[81]

There was no dispute about this specification until the following year, when Department inspectors raised concerns about this practice. Rather than argue the point, VGS accepted the recommendation that pipe support be installed regardless of whether the trench bottom was suitable for pipe support or not. Mr. Byrd evaluated this issue in depth and concluded that "VGS complied appropriately with the specifications for bedding and pipe support as they were understood at the time and responded in the most conservative fashion (bedding all the pipe

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79 49 C.F.R. § 192.13 (emphasis added); *see also* 49 C.F.R. §§ 192.303, 192.219.
80 Independent Report at 36.
81 *Id.* at 38.

regardless of soil type) after questions were raised."[82] There is therefore no evidence that VGS did not comply with written specifications, and the Jan. 29 Order's finding on this is clearly erroneous.

2. The Jan. 29 Order's finding that installation on the trench bottom in this location had potential impacts on safety is clearly erroneous because it is not supported by any evidence.

The Department's initial concern about installation on the trench bottom related to potential pipeline corrosion, citing a white paper that referred to potential corrosion where the pipeline is installed directly on "oxygen-starved compacted clay soil" and backfilled with "oxygen rich sand backfill." Mr. Byrd studied this potential concern as part of his investigation and found:

- *The only areas where ANGP was installed directly on the trench bottom were also areas that used native backfill – which eliminates the potential for this problem. The potentially corrosive situation described in Bushman's paper simply doesn't exist on ANGP.*[83]
- *The burial techniques for ANGP, including burial directly on the trench bottom in some locations, had no deleterious effects on corrosion control and did not create a corrosive environment for the pipeline.*[84]

There is no other evidence that the installation of the pipeline on the trench bottom in this location had the potential to impact pipeline integrity in any way. Mr. Byrd was the only witness who testified about the allegation that this installation had potential impacts and his conclusion was that there were none. The Jan. 29 Order likewise cites no support and its conclusion on this point is therefore erroneous.

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82 *Id.* at 65.
83 *Id.* at 66.
84 *Id.*

3. The Jan. 29 Order's finding regarding trench breakers is clearly erroneous because trench breakers are an environmental mitigation device—not a safety measure—and there is no evidence of an adverse impact at all.

Trench breakers are installed in the pipeline to stabilize the trench during construction and "prevent[] future water flow down the trench."[85] Trench breakers have no relation to safety.[86] VGS's written specifications allowed "discretion in determining the location of trench breakers as needed for site conditions."[87] The specifications did not require documentation of each trench breaker. In response to the Department's concerns about documentation during construction, VGS documented all trench breaker locations going forward and studied the installation of trench breakers in 2014 to ensure they were installed or there was no impact. VGS's environmental consultant, VHB, reported to ANR that there was no observable or significant alteration of the wetland hydrology in the five locations where no documentation exists of a trench breaker.[88] ANR has not expressed any concern about these areas or filed evidence in this case indicating it is concerned with these areas.

The Jan. 29 Order acknowledges that "ANR has concluded based on site inspections that the deviations in the placement of trench breakers has not had an adverse impact on the environment."[89] The Jan. 29 Order goes on to conclude, however, that "Vermont Gas's failure to conform with the Project's trench bottom and trench breaker specifications has a potential for significant impact on public health and safety." This is wrong because it is based on the clearly erroneous finding that VGS failed to conform to specifications, and because it is unsupported by

85 *Id.* at 47.
86 *Id.* at 47 ("The pipeline safety regulations make no mention of trench breakers.").
87 *Id.* at 48.
88 *Id.* at 68 (quoting Independent Report A#70) ("VHB has reached the conclusion that the potential absence of 10 trench breakers located at 5 wetlands did not observably or significantly alter the wetland hydrology to the extent that any Class II wetland boundaries or functions were impacted beyond what was permitted.").
89 Jan. 29 Order ¶ 70.

any showing of significant impacts of any kind. Absent the potential for significant impacts, the placement of trench breakers cannot and does not constitute a substantial change to the CPG.

In any event, even though VGS disagrees that these alleged deviations violated the CPG, it has agreed with the Department to stipulate to a penalty and remedial actions, which more than adequately address any alleged violation. Even if the Commission agrees with the Jan. 29 Order that a violation occurred, it should clarify that neither issue has any impact on safety as demonstrated by the evidence.

Non-Jurisdictional Streams

The ANGP crossed both jurisdictional and non-jurisdictional streams. At several non-jurisdictional streams, the pipeline was buried five feet deep instead of seven feet deep. There is some dispute about whether the seven-foot depth specification for jurisdictional streams was also intended for non-jurisdictional streams.[90] It is undisputed, however, that burial at five feet was sufficient.[91]

The Jan. 29 Order's discussion acknowledges that burial at several non-jurisdictional streams "results in no significant impact and is immaterial to the Project's [permits]," and was "purely of a technical nature with no impacts on pipeline safety or the environment."[92] The Jan. 29 Order concludes, however, that VGS made a "material deviation," but provides no judicial

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90 Exhibit VGS-JAN-2 ("Depth of cover requirements for larger SAP jurisdictional streams are specified at a minimum of seven feet consistently through the project record to include Docket 7970 application materials, issued CPG, and non-substantial change filings as well as the issued Stream Alteration Permit and application materials. . . . ANR did not review or specify depth of cover for the smaller streams on the project. The depth of cover for smaller streams was not specified by VGS in Docket 7970 prior to the August 25, 2015 NSC 3 filing. This filing clarified that, unless otherwise specified, the depth of cover requirements for a stream crossing is five feet. . . . The 5-foot depth of cover for the smaller streams, compared to the depth requirements for the larger streams, is appropriate and protective, given the limited potential for stream channel downcutting or lateral migration associated with these features.").

91 *Id.*; *see also* Jan. 29 Order at 41.

92 Jan. 29 Order at 41.

assessment of how that conclusion is consistent with the Commission's standard that requires there to be a potential for significant impact on Section 248(b) criteria to find a CPG violation.

This shortcoming is not just an absence of analysis, it is a failure to apply the Commission's standard. In the vast majority of cases, the Commission has said that even a "material deviation" must have "the potential for significant impact" as contemplated by Rule 5.408. The non-jurisdictional stream issue clearly does not meet that standard based on the Jan. 29 Order's findings. In only a few cases, the Commission has distinguished a "material deviation" from a "substantial change," explaining that "broad alterations" to a project with "[s]ignificant activity that was not proposed" or that have a "cumulative effect" can be considered material deviations.[93] The Jan. 29 Order does not apply this standard either—it does not identify any significant activities that were not proposed or any cumulative impacts. It was error to conclude that a technical deviation expressly described as "immaterial" is a "material deviation" under the Commission's existing standards.

Compaction

VGS has acknowledged that it did not perform testing on the compaction of backfilled material in accordance with initial specifications. Although Mr. Byrd found those specifications "excessively conservative and over-prescribed,"[94] he did note that VGS should have monitored compaction levels at open cut roads. There is no evidence that adequate compaction levels were not achieved at the 15 locations where the pipeline was installed by open cut trenching across dirt roads. Nevertheless, VGS has agreed that it will have these locations inspected and monitored. The Jan. 29 Order's conclusion that installation of the pipeline at these locations was a substantial change from the CPG is clearly erroneous because there is no evidence that failing

93 *Supra* notes 10-12.
94 Independent Report at 67.

to *test* the compaction in these areas had potential impacts under the Section 248(b) criteria. The Jan. 29 Order's findings acknowledge that even if the compaction was not sufficient at these locations, "[l]ack of compaction poses no danger to the pipeline itself."[95] Accordingly, there is no basis to conclude that this was a substantial change that had the potential for significant impacts on public safety as the Jan. 29 Order did.

Even if the Commission agrees with the Jan. 29 Order on this issue, it should clarify that this potential impact is not based on any evidence of threats to pipeline safety or integrity. The issue is limited to the testing of compaction and does not have broad import to the safety and integrity of the pipeline itself.

III. CONCLUSION

For the foregoing reasons, the Commission should overturn the Jan. 29 Order and reject the challenged proposed findings of fact and conclusions of law therein.

DATED at Burlington, Vermont, on this 26th day of February 2021.

VERMONT GAS SYSTEMS, INC.

By: */s/ Owen J. McClain*
Debra L. Bouffard, Esq.
Owen J. McClain, Esq.
SHEEHEY FURLONG & BEHM P.C.
30 Main Street, 6th Floor
P.O. Box 66
Burlington, Vermont 05402-0066
(802) 864-9891
dbouffard@sheeheyvt.com
omcclain@sheeheyvt.com

[95] Jan. 29 Order at 32.