

STATE OF VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION

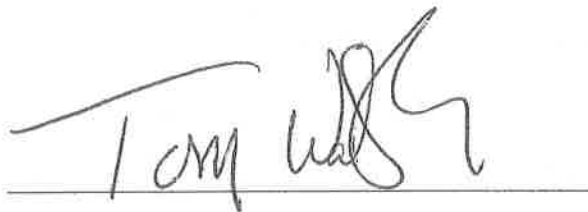
Agency of Natural Resources,)
Petitioner,)
v.)
Vermont Gas Systems, Inc.,)
Respondent.)

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

due 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.

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2010-2011
Annual Report
of the
State of Vermont

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 26th 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: February 10, 2019
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 31st day of October, 2016.

SECRETARY, AGENCY OF NATURAL RESOURCES

By: Deborah Markowitz
Deborah Markowitz, Secretary