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November 8, 2011

Catherine Gattone  
Docket Clerk  
Vermont Supreme Court  
109 State Street  
Montpelier, VT 05609-3278

RE: Donald and Shirley Nelson v. Green Mountain Power Corporation  
Supreme Court Docket No. \_\_\_\_\_  
Superior Court Civil Division Docket No. 256-10-11 Oscv

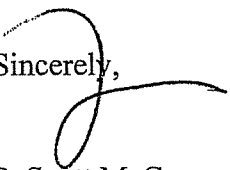
Dear Cathy:

I am enclosing the original and one copy of a complaint for extraordinary relief being filed pursuant to V.R.A.P. 21 along with its various referenced exhibits and attachments. I am also attaching my own Affidavit which is not specifically referenced in the complaint but is filed in support of the complaint.

We are prepared to meet with the court on short notice or take whatever other steps may be requested.

Thank you for your courtesies in this matter.

Sincerely,

  
P. Scott McGee  
[Smcgee@hcsmlaw.com](mailto:Smcgee@hcsmlaw.com)

PSM/bd  
enclosure

cc: Jeffrey R. Behm, Esq.  
Debra L. Bouffard, Esq.  
Jon T. Alexander, Esq.  
Donald and Shirley Nelson  
Penny Carrier, COM

IN THE SUPREME COURT  
OF THE  
STATE OF VERMONT

DONALD AND SHIRLEY NELSON,	)	SUPREME COURT Docket _____
Plaintiffs	)	
	)	
v.	)	Superior Court Civil Division
	)	Docket No. 256-10-11 Oscv
	)	
GREEN MOUNTAIN POWER	)	
CORPORATION,	)	
Defendant	)	
	)	

**COMPLAINT FOR EXTRAORDINARY RELIEF**

NOW COME Plaintiffs Donald and Shirley Nelson (Nelsons), by and through their attorneys, Hershenson, Carter, Scott and McGee, P.C., P.O. Box 909, Norwich, Vermont 05055, and pursuant to V.R.A.P. 21 state their complaint for extraordinary relief.

**Preliminary Statement**

The relief requested herein is necessary because the Orleans Superior Court has issued, without legal basis, a preliminary injunction ousting the Nelsons from a portion of their own land, and the court has declined to dissolve the injunction or grant the Nelsons' permission to appeal.<sup>1</sup> The injunction violates the Nelsons' constitutionally-protected right: (1) to the exclusive possession of their own land, including their right to occupy their land to prevent their leasehold

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<sup>1</sup> The Nelsons filed a motion to dissolve the TRO dated October 17, 2011 (Attached as **Exhibit 1**) and a motion to reconsider the issuance of the preliminary injunction dated November 2, 2011 (Attached as **Exhibit 2**) and a motion for permission to take an interlocutory appeal, dated November 2, 2011 (Attached as **Exhibit 3**). The court denied the motion to dissolve the TRO (Decision attached as **Exhibit 4**) and has not acted on the motion to reconsider or the motion for permission to take an interlocutory appeal.

neighbor, Green Mountain Power Corporation (GMP), from using the Nelsons' land to support GMP's blasting activities; and (2) violates the Nelsons' constitutional rights to free speech and assembly. As set forth in greater detail below, the court's grant of injunctive relief is being used as a tool by GMP to remove any impediment to GMP's continuing its scheduled blasting activities on lands it is leasing by prohibiting the Nelsons from using a portion of the Nelsons' adjoining land. The court's authority should not be used for such a purpose, and the injunctive relief was issued without a clear or compelling legal basis under Vermont law.

GMP's invasive, unconsented and unpermitted use of the Nelsons' land, and the Court's restriction on the Nelsons' right to the exclusive use of their land and on their constitutional rights of free speech and assembly are continuing and will continue unless the relief sought here is granted. The Nelsons have no adequate rights of appeal for the constitutional deprivations set forth herein.

### **Complaint Facts and Procedural History**

1. Don and Shirley Nelson are longtime Lowell, Vermont farmers who own and occupy a 612 acre farm located in the towns of Lowell and Albany, Vermont. The Nelsons' farmhouse and residence is in the town of Lowell. Their property extends to the ridge line of Lowell Mountain in the town of Lowell, and the westerly boundary of their farm runs along portions of what is commonly known as range line 2-3 in the town of Lowell.
2. Green Mountain Power Company (GMP) has leased a parcel of land that abuts the Nelsons' farm property. The GMP leased land shares a common boundary with the Nelsons' land along sections of range line 2-3 in the town of Lowell.
3. GMP has received from the Vermont Public Service Board a Certificate of Public

Good (CPG) pursuant to 30 VSA §248 to construct 21 wind turbines on the land GMP is leasing.

4. The CPG does not expressly or by implication authorize GMP to use or encumber any portion of the Nelsons' property in connection with GMP's construction of its wind turbine project, and the CPG does not impose any restriction on the Nelsons' use of their own property during the time that GMP is constructing its turbine project.

5. GMP has no grant, deed, easement, license, permission, agreement or consent from the Nelsons to utilize any portion of the Nelsons' property in connection with GMP's wind turbine project.

6. To complete its project, GMP contracted with Maine Drilling and Blasting (MDB) to conduct a series of blasts on the side of Lowell Mountain up to and along the ridge line. The blasting will allow GMP to create a roadbed that will enable GMP to have vehicular access to the ridge line areas where the turbines will be built. The access road will be used to deliver materials to the turbine sites for the construction of the turbines and will provide ongoing vehicular access thereafter to facilitate the operation, maintenance and repair of the turbines.

7. Some of the blast sites identified by MDB include sites that are located less than 1,000 feet from the Nelsons' boundary.

8. The MDB blast plan was approved by and incorporated into the CPG. The blast plan contains no provision for a blast safety zone to be created around the blast sites, and the CPG contains no authorization for GMP or MDB to create a blast safety zone on land owned by the Nelsons or on any land beyond the project boundaries. The project boundaries are wholly within the land leased by GMP. (Affidavit of Attorney Jared Margolis, attached as **Exhibit 5**).

9. On October 14, 2011, GMP sought and obtained an *ex parte* temporary restraining

order from the Orleans Superior Court, without notice to the Nelsons.<sup>2</sup> (Copy of TRO attached as **Exhibit 6**).

10. In its application for a TRO, GMP alleged that the Nelsons, by their presence on their own property, were committing a private nuisance by occupying the 1,000 foot area on the Nelsons' property with the motive and intent of preventing GMP and MDB from being able to use the Nelsons' property as a blast safety zone.<sup>3</sup> (Copy of GMP Complaint and application for a TRO attached as **Exhibits 7 and 8**) (without attachments).

11. GMP represented to the court that it would be unable to maintain its blasting schedule unless it was permitted to use the Nelsons' land as a blasting safety zone because GMP's blasting contractor, MDB, had internal protocols that required it to establish a 1,000 foot safety zone around each blast site for blasts of the size designed to be detonated on GMP's land.

12. On November 1, 2011, the Orleans Superior Court issued a preliminary injunction barring Donald and Shirley Nelson and all other persons from occupying the area of the Nelsons' property located within 1,000 feet of the Nelsons' common boundary with the land being leased by GMP. (Copy of Court's November 1, 2011 Preliminary Injunction attached as **Exhibit 9**).

13. The injunction was issued with the express purpose of enabling GMP to use its arbitrarily created "blast safety zone," so-called, on the Nelsons' property by forcing the

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<sup>2</sup> Rule 65(a) requires that notice be given to the party sought to be enjoined before the request is filed with the court. If no notice is given, the Rule requires that the court make express findings in the order as to why the order was granted without notice. No such findings were made, and there was no justification for not notifying the Nelsons other than the improper justification of ensuring that the Nelsons would be unable to debunk GMP's claim before the court acted on the application.

<sup>3</sup> These facts, if true, do not as a matter of law create a legally cognizable claim.

Nelsons' to remain outside of the 1,000 foot "safety zone" on the Nelsons' own property during periods when GMP is engaged in blasting near the Nelsons' boundary line.

14. GMP's blasting expert testified that despite the need to establish the blast safety zone, no flyrock from the blasting would enter the Nelsons' land. Notwithstanding the testimony, flyrock from GMP's blasting has, in fact, entered the Nelsons' land. (Affidavits of Margot Kempers and Fred Scholz attached as **Exhibits 10 and 11**).

15. Engaging in blasting that sets in motion flyrock that enters a neighbor's property is a trespass and is not a reasonable use of the blaster's property even if the blasting is carried out pursuant to a duly issued permit, such as a CPG.<sup>4</sup>

16. The court's injunction violates state and federal constitutional rights of the

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<sup>4</sup> "An invasion of the rights of an owner of real estate by interfering with his enjoyment thereof, through an explosion, either by throwing missiles upon it or by concussion, is as much a trespass as wrongfully going upon it, and, as a continuing trespass may always be enjoined..." *Heilman v. France Stone Co.*, 151 N.E. 798, 799 (Ct of App. Ohio, Sixth Dist (1925).

"[T]he Darneys' nuisance claim 'is not barred by the fact that [Dragon's] activit[ies are] licensed' by the State of Maine. (citation omitted). The Law Court has 'never held that any activity conducted pursuant to a license is necessarily immune from private actions.'" *Karney et al v Dragon Products Company, LLC*, 771 F. Supp. 2d 91, 109 (D. Me. 2011).

"[I]n the so-called "blasting" cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris. [Citations omitted] And the rule of absolute liability for direct injury from blasting has been applied, not only to damage to property, but to the person. [Citations omitted]" *Exner v Sherman Power Construction Co.*, 54 F 2d 510, 5p (2d Cir. 1931). In *Dean Thompson v. Green Mountain Power Corporation*, 144 A.2d 786 (1958) the Vermont Supreme Court held that "the law preserves dynamite in the category of highly dangerous agencies and demands of its use the highest degree of care and caution. *Tinney v. Crosby*, 112 Vt. 95, 104, 22 A.2d 145; *Goupiel v. Grand Trunk R. Co.*, 94 Vt. 337, 342, 111 A. 346." In addition, when engaging in an ultra hazardous activity, such as blasting, GMP is obligated "to take all necessary precautions to avoid foreseeable injury". *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 502 (Vt. 1963).

Nelsons and their guests and invitees, and the Nelsons have no adequate remedy by appeal or by proceedings of extraordinary relief in the superior court to timely eliminate the infringement of their rights.

17. Specifically, the court's order prevents the Nelsons and their invitees from occupying areas of the Nelsons' own land during specified periods during each day in order to allow GMP to use the Nelsons' land as a blasting safety zone and to allow blast debris from GMP's turbine construction project to be propelled onto the Nelsons' land, as has already occurred while the injunctive relief has been in place.

18. The order also prohibits the Nelsons from assembling with others on the Nelsons' land in the area of the so-called safety zone to protest the activities of GMP during the specified periods. Such conduct is protected by the Constitution.<sup>5</sup>

19. As described more fully below, there is not even an arguable basis for the court's injunction; its continuation violates the Nelsons' state and federal constitutional rights and ignores settled law with respect to the rights of Vermont property owners and the elements required to prove a nuisance.

20. The theory advanced by GMP in support of its request for the issuance of an injunction, and the theory relied on by the court in issuing it, is that the Nelsons are committing a nuisance by occupying the Nelsons' own property for the purpose of preventing GMP from using the Nelsons' property as a blast safety zone. This theory was accepted by the court even though

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<sup>5</sup> “Moreover, the rights under the First and 14<sup>th</sup> Amendments guaranteeing freedom of assembly and petition are not confined to verbal expression but also embrace appropriate types of action, including protest in a peaceable and orderly manner by silent and reproachful presence in a place where the protestant has every right to be.” 16A Am. Jur. 2d Constitutional Law §555 (database updated August 2011)(copy attached as **Attachment 2**).

GMP has no right to use the Nelsons' property for such purpose.

21. No principle of law supports such an application of the law of nuisance.

22. There is a complete absence of evidence that the Nelsons' occupancy of their own land rises to the threshold of noxious or unreasonable conduct required by this court's prior decisions defining a private nuisance. The undisputed facts do not permit a finding of nuisance nor a likelihood of such finding. *See Coty v. Ramsey Associates*, 149 Vt. 451; 546 A.2d 196 (1988) (conduct must exhibit "definite offensiveness, inconvenience or annoyance to the normal person in the community). Whatever else can be said about the Nelsons' insistence on occupying their own land to prevent GMP from using it, without their consent, as a blast debris dumping ground, it does not constitute the creation of a nuisance.<sup>6</sup>

23. The court's preliminary injunction was based on the following findings that the court set out in its injunction:

- a. "[The] Defendants [Nelsons] are improperly interfering with Plaintiff's [GMP's] development of a wind generation project in Lowell...."
- b. "Specifically, the evidence shows that the Nelsons and those acting in concert and participation with them are intentionally occupying the northwestern boundary of the Nelsons' property adjoining the Project in close proximity to blasting on GMP property where the Project is being constructed."

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<sup>6</sup> "Generally, if the acts of a landowner are within his or her legal rights, the motive impelling him or her to do certain things on his or her own land is immaterial." American Jurisprudence, 2d Ed., 1 Am. Jur. 2d Adjoining Landowners §6 (updated database through September 2011)(copy attached as **Attachment 1**)

- c. “The purpose of Defendants and those acting in concert and participation with them is to 1) place themselves far inside a 1,000 foot safety zone in order to create a risk to human safety that will prevent the blasting from taking place, and thereby 2) cause irreparable harm to GMP and the public.”

24. Apart from the court’s unsupported characterization of the Nelsons’ conduct as “improperly interfering” with GMP’s construction project (Superior Court’s 11/1/11 Injunction Order, emphasis added), the court’s findings quoted above do not, as a matter of law, establish even a prima facie case of tortious interference constituting a nuisance, and they do not provide a basis for granting injunctive relief to GMP.

25. The Nelsons’ constitutionally protected conduct as described in the superior court’s preliminary injunction does not, as a matter of law, constitute an unreasonable use of the Nelsons’ property or a legally cognizable or unreasonable interference with GMP’s use of its property.

26. The Nelsons’ decision to occupy their property along the common boundary with GMP and to deny GMP the use of the Nelsons’ property, knowing and intending that such decision and conduct will prevent GMP from carrying out its blasting plan as now designed cannot, without more, constitute a nuisance.

27. For purposes of this Complaint, the Nelsons admit the conduct described by the superior court and admit that their intent in occupying their property was to prevent GMP from using their (the Nelsons’) property as a blast safety zone; and the Nelsons admit they believed that without such a zone, GMP’s contractor would be reluctant to carry out the blasting in the

manner proposed; but preventing GMP from using property GMP has no right to use cannot constitute a nuisance or an infringement of GMP's rights because GMP had no right to use the Nelsons' property in the first place.<sup>7</sup>

28. In fact, this Court has recognized that a property owner is immune from liability when taking reasonable action to prevent his real property from being used by another without permission. *Raynes v. Rogers*, 2008 VT 52, ¶12 (Vt. 2008) (“the common-law defense of property reinforced the importance of citizens' private property rights by exempting property owners from liability for protecting their property against the criminal or tortious invasion of others.” (Citation omitted)(emphasis added)

29. The essential predicate to GMP's nuisance theory is that GMP has a right to use part of the Nelsons' land as a blast safety zone. If GMP has such a right, then the Nelsons' denial of such use by GMP could arguably be deemed an unreasonable interference by the Nelsons with GMP's use of its property; but if GMP has no such right, then the Nelsons' choice to occupy their own property and thereby prevent GMP from using it as a blast safety zone cannot, as a matter of law, be deemed a nuisance, even if the Nelsons' conduct does, in fact, have the effect desired by the Nelsons of preventing GMP from proceeding with the blasting as proposed.

30. The fact that the Nelsons' conduct would cause a delay and expense in GMP's construction schedule is not an “interference” that is legally cognizable as a nuisance.<sup>8</sup>

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<sup>7</sup> If GMP wanted to use a portion of the Nelsons' property to temporarily park its equipment or unload its materials, and if the Nelsons refused, GMP's claim that the Nelsons' refusal constitutes a nuisance would be summarily rejected. GMP's current claim rests on no stronger ground.

<sup>8</sup>

If a landowner decides to have a party and shoot off fireworks, but needs to clear a

31. As noted earlier, the Nelsons have moved the court to reconsider its issuance of the preliminary injunction on grounds that the undisputed facts of the case cannot constitute a nuisance and that the injunction is violating the Nelsons' constitutional rights to possess and occupy their property and to use their land to protest the GMP project. The superior court has thus far declined to dissolve the injunction.<sup>9</sup>

32. The superior court's preliminary injunction effectively grants GMP a license to use the Nelsons' property which GMP otherwise would have no right to use. This is a misuse of court power that tramples the rights of Vermont landowners to accommodate a large corporation. The Nelsons have a right to protect their property and to refuse to permit GMP to use it under well-settled Vermont property law.

33. The superior court's acceptance of GMP's novel argument is unprecedented. The Nelsons have a right to have their constitutional rights respected and enforced.

34. The injunction violates the following constitutional rights of the Nelsons:

- a. The injunction ousts the Nelsons from their land during the periods of time specified in the injunction in violation of Chapter I, Article 1 of the Vermont

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section of an abutting neighbor's property to do so and the abutting neighbor refuses to give permission, the landowner would have no basis to claim a nuisance or to obtain an injunctive order permitting the landowner to use the neighbor's property. But this is what GMP has done here.

<sup>9</sup> The superior court has not yet acted on the Nelsons' Motion to Reconsider or on the Nelsons' Motion for Permission to take an interlocutory appeal. GMP has requested a full 15 days for its response before the court should act on the motion. The delay, under the circumstances here is tantamount to a denial since most, if not all, of the objectionable occupation of the Nelsons' land by GMP will be concluded by the time the superior court acts.

Constitution<sup>10</sup> and of the Fifth and Fourteenth Amendments to the United States Constitution;

- b. The injunction prevents the Nelsons from exercising on their own land their constitutional rights under Chapter I, Articles 13 and 20 of the Vermont Constitution<sup>11</sup> and under the First Amendment to the United States Constitution by barring the Nelsons from assembling with others to protest against GMP's activities on the abutting property and to protest the Vermont Public Service Board's issuance of the CPG;
- c. The injunction violates Chapter II, §67 of the Vermont Constitution<sup>12</sup> by restricting the liberty of the Nelsons and their invitees to hunt on the lands they hold.

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<sup>10</sup> Article 1 states in pertinent part "That all persons ... have certain natural, inherent and inalienable rights, amongst which are ... possessing and protecting property..." Those who drafted and ratified Vermont's Constitutions of 1777, 1786, and 1793, like those who framed the federal constitution between 1787 and 1791, understood that "every citizen" has the "the natural, inherent, and inalienable right" to "the enjoyment of his liberty and property," and that this natural right is not only "a fundamental principle of justice" for individuals, but is "essential to every free government . . . ." *Ex parte Allen*, 82 Vt. 365, 373 (1909) (internal quotation marks and citations omitted). "Protection of citizens' rights to security in their land [and other property] was a key motivating force in creating the Vermont Constitution." *State v. Kirchoff*, 156 Vt. 1, 17 (1991) (Springer, J. concurring). Indeed, "the security in property is central to the Vermont Constitution." *Id.*

<sup>11</sup> Article 13 states, "That the people have a right to freedom of speech ... concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."

Article 20 states, "That the people have a right to assemble together to consult for their common good..."

<sup>12</sup> Chapter II, §67 states, "The inhabitants of this State shall have liberty at reasonable times, to hunt and fowl on the lands they hold ..."

35. Immediate and extraordinary relief is necessary. No other avenue of relief is available that will eliminate the infringement of the Nelsons' constitutional rights before GMP completes its blasting. Completing the blasting will render moot the enforcement of the Nelsons' rights because once the blasting is completed, GMP will no longer need to use the Nelsons' land as a blast safety zone.

36. If relief is not immediately granted, GMP will be able to keep the Nelsons off portions of their own property while GMP completes its blasting, and the Nelsons' constitutional right to occupy and possess their own land and to speak out on their own land to protest the continuation of the blasting before the blasting is completed will be lost.

37. The Nelsons have a right to stand their ground on their own property and to express from their own land their opposition to the GMP wind turbine project. The Nelsons have a right to do so from within the blast safety zone, so-called, even if the Nelsons' occupancy of that area prevents its unauthorized use by GMP as a blast safety zone.<sup>13</sup>

38. GMP makes no claim that it has a right to use any portion of the Nelsons' land for any purpose.

39. GMP argues that because it believes it needs a 1,000 foot blast safety zone around its blast sites under the blasting plan as currently designed and because the Nelsons' are

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<sup>13</sup> The superior court's ruling that the lawful and passive occupancy of the Nelsons' own land is a nuisance because it prevents GMP from making unauthorized use of the Nelsons' land eviscerates the Nelsons' right to the reasonable use and enjoyment of their property and has no precedent under Vermont law. If GMP's theory of nuisance were accepted, then a restaurant that needed space for overflow parking would be able to expropriate a neighbor's property for that purpose by arguing that the neighbor's refusal to allow such parking use would interfere with the restaurant's business and would be a nuisance. That is not now and never has been the law in Vermont.

preventing GMP from using the Nelsons' land for that purpose during its blasting operations, the Nelsons are, by their occupancy of their own land, preventing GMP from blasting and, thus, are creating a nuisance.

40. GMP conceded that MDB could have initially designed its blasting plan, and could still redesign its blasting plan to avoid the need for a 1,000 foot safety zone which would eliminate the need to create such a safety zone on the Nelsons' property. GMP told the court that changing the blasting plan at this juncture, would delay the project by up to six weeks, which GMP alleged would cause it enormous financial damage. (Affidavit of Blaisdell dated October 10, 2011 – ¶¶ 35, 45-49, attached as **Exhibit 12**); (conceding that GMP could limit the necessary blast safety zones by implementing additional safety measures). Accepting these assertions as true, they are part of GMP's burden in designing and constructing its project, not a burden that the Nelsons are obligated to help GMP avoid.

41. The Nelsons have steadfastly refused to permit GMP to use any portion of their land for a blast safety zone or for any other purpose, and the Nelsons have made clear their intention to continue to object to and protest GMP's actions and to use and occupy their own property in the area of the blast sites and within the 1,000 foot zone that MDB represents that it must keep clear in order to carry out the blasting as scheduled.

42. The Nelsons declined to remove themselves or others on their property from the 1,000 foot zone and assert their right to continue to occupy their own land and to protest with others the GMP project. If it were not for the prohibition created by the superior court's preliminary injunction, the Nelsons would be able to exercise all of these constitutionally protected rights on their own land.

43. The Nelsons have the right to the exclusive use and occupancy of their own land and to deny the use of their land to others, including GMP, regardless of how important the use of the Nelsons' land may be to GMP.

44. The Nelsons have a First Amendment right to assemble and protest the GMP project, and they have the right to do so from the Nelsons' property as long as they do not trespass on GMP's leased land.

45. There is no adequate remedy by appeal under the Rules or by further proceedings in the superior court because the superior court has refused to dissolve the injunction.

46. Waiting for a merits hearing on GMP's request for a permanent injunction will be an inadequate remedy because GMP's justification for issuance of the injunction, namely, GMP's need for a 1,000 foot blast safety zone, will no longer exist once the blasting has taken place, and the entire issue will be moot. The blasting in the area in question is likely to be completed in the next several days.

47. The preliminary injunction is an on-going violation of the Nelsons' constitutional rights which cannot be remedied by money damages and for which the Nelsons must turn to this court for assistance.

48. The Nelsons only recourse to protect their Constitutionally protected property rights and their Constitutionally protected rights to free speech and assembly with other persons to protest on their own land is for this court to dissolve the injunction issued by the superior court on grounds that it has no legal basis and is violating the Nelsons' rights under the Vermont and United States Constitutions.

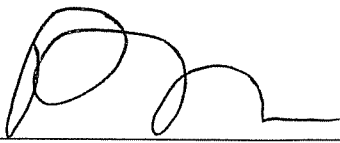
49. Requesting relief in the nature of mandamus to direct the superior court to

dissolve its preliminary injunction is supported here because the superior court's preliminary injunction has no legal basis and is violating constitutional rights of the Nelsons that cannot be vindicated through other means.

WHEREFORE, the Nelsons respectfully request that this court direct the superior court to dissolve the injunction forthwith.

Dated at Hartford, Vermont this 2 day of November, 2011.

DONALD NELSON and SHIRLEY NELSON

By: 

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

# **EXHIBIT 1**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

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

DEFENDANT'S EMERGENCY MOTION TO DISSOLVE  
TEMPORARY RESTRAINING ORDER AND  
REQUEST FOR EMERGENCY HEARING

Defendants Shirley and Don Nelson move this Court for an order immediately dissolving the temporary restraining order issued on October 14, 2011 and request a hearing at the earliest time available on an emergency basis because:

1. The TRO was issued on the basis of false and misleading declarations by Plaintiff, Green Mountain Power (GMP);
2. The indisputable facts demonstrate that GMP could have, but did not, advise Defendants that it would be seeking a TRO thus depriving Defendants of their right to advise the Court on October 14<sup>th</sup> of the erroneous factual assertions upon which GMP relied and violating the standards established by Rule 65(a) of the Vermont Rules of Civil Procedure;
3. The alleged need for immediate relief in the form of either a TRO or a preliminary injunction assert by GMP is based on facts and circumstances wholly within the control of GMP

and the alleged emergency was totally avoidable had GMP acted diligently.

4. GMP's intended actions of blasting in the near vicinity of the defendant's property with the expectation that some blast debris will be projected onto the defendant's property will, if carried out, be a violation of GMP's permit conditions. GMP thus does not come before the court with clean hands and is not entitled to injunctive or other equitable relief.

5. GMP's announced intention to blast in the near vicinity of defendant's property will violate defendants' property rights and will constitute a trespass and a nuisance under settled principles of Vermont law making injunctive relief in GMP's favor unsupported.

## ARGUMENT

### I. THE TRO SHOULD BE DISSOLVED BECAUSE IT WAS BASED ON FALSE STATEMENTS

#### A.1 The False Claim

GMP has represented that GMP had the legal authority and right, granted in the Certificate of Public Good (CPG) issued by the Public Service Board, to conduct blasting on its property even though it created a substantial risk that rock and debris would land on Defendants' property. Plaintiff's Pleading and Motion for TRO at 6-7.

#### A.2 The Truth

The CPG issued to GMP explicitly requires that:

All blasting will be performed in accordance with any and all applicable laws and regulations, including, but not limited to, U.S. Department of Interior Rules 816.61-68 and 817.61-68 and the Blasting Guidance Manual, Office of Surface Mining, Reclamation and Enforcement, U.S. Department of Interior to limit peak particle velocity and ground vibration to safe levels. Noise and air blast effects shall be limited through application of proper techniques and *blasting mats will be*

*used where needed to limit the occurrence of flyrock.*

CPG at ¶ 36 (emphasis added)

The U.S. Department of Interior Rule 816.67 (c) requires that:

Flyrock. Flyrock traveling in the air or along the ground shall not be cast from the blasting site--

- (1) More than one-half the distance to the nearest dwelling or other occupied structure;
- (2) Beyond the area of control required under Section 816.66©); or
- (3) *Beyond the permit boundary.*

*Id.* (emphasis added)

Thus, GMP's plan to conduct blasting without using the necessary blasting mats to prevent fly rock and debris from landing on Defendants' property, if pursued, will be a direct violation of the provisions of its CPG.

#### **B.1 The False Claim**

GMP asserted that unless it was granted a TRO on October 14, 2011 it would suffer irreparable harm by not being able to complete construction of the project by a December 31, 2012 deadline to qualify for the currently available federal production tax credits for wind turbines. Plaintiff's Pleading at 20-21.

#### **B.2 The Truth**

The Public Service Board found, based on testimony offered by GMP, that the only way it could meet its December 31, 2012 deadline was if construction began on August 1, 2011.

50. The proposed project must be in service by December 31, 2012, in order to take advantage of the federal production tax credit. In order to meet that deadline, project construction *must* commence by the beginning of August, 2011. Tr. 2/3/11 at 93, 99, 120 (Pughe).

PSB Order (5/31/11) at 21 (emphasis added). GMP reaffirmed this finding in post-CPG briefs,

stating that “[t]he Order further indicates that GMP must begin construction by the beginning of August, 2011 in order to secure the PTC, and generally imposes requirements that would facilitate construction by then.” GMP's Reply to the Towns' Opposition to GMP's Motion for Reconsideration at 2. In addition, GMP sought and obtained modifications to the CPG by elimination of certain pre-construction conditions imposed by the Board, based on GMP's continued assertion that unless it could begin construction by August 1, 2011 it would lose the federal production tax credits. PSB Order (7/21/11) at (“In the instant case, GMP has pointed out that, despite its efforts, it will be unable to complete the acquisition of the fragmentation-connectivity easements prior to August 1, 2011, meaning that construction will be delayed and the PTCs will be at risk.”)

However, GMP did not begin construction of this project on August 1, 2011 and in fact construction did not begin until September 6, 2011, according to GMP's Press Release of that date. In addition, although in its Press Release, GMP bragged about its strong environmental ethic and claimed “GMP made an extraordinary effort in the design to avoid stream and wetland impacts”, less than one month later its construction was shutdown by Vermont's Department of Environmental Conservation, which found that:

the Agency has determined that discharges and potential discharges from construction activities at the site present a current and potential threat of harm to the environment. The observed non-compliance included but was not limited to the failure by the permittees to construct the necessary permanent stormwater dry ponds, wet ponds, and/or level lip spreaders to serve as temporary sedimentation traps and/or basins in order to manage stormwater runoff from contributing earth disturbance, as specified in the approved erosion prevention and sediment control (EPSC) plan. The permittees are hereby directed to immediately cease all construction activity at the site, except for work necessary to bring the site back into compliance with the approved erosion prevention and sediment control (EPSC) plan.

*In the Matter Of: Kingdom Community Wind (KCW) Lowell Mountain Wind Farm Construction Site Lowell, Vermont Construction Stormwater Discharge Permit No. 6216-INDC NPDES No: VTS0000108, )* October 5, 2011 at p. 1. It took GMP a week to fix the problem and restart construction. See [http://www.reformer.com/latestnews/ci\\_19096452](http://www.reformer.com/latestnews/ci_19096452) in which a GMP spokeswoman, Dorothy Schnure, indicates that construction will resume on October 13<sup>th</sup>.

Thus, if its earlier representations, made to the PSB on at least two occasions and on which the PSB relied in granting a CPG to GMP and in relaxing pre-construction conditions, are to be taken at face value - at a minimum they are admissions of a party - GMP misled the Court when it stated that unless the blasting scheduled to begin on October 17, 2011 were allowed to proceed as planned, it would miss its December 31, 2012 deadline. By its own reckoning it has already missed that deadline by six weeks - five weeks of delay in starting construction and one week delay as a result of its violation of its stormwater permit. What is apparent is that GMP uses the December 31, 2012 "deadline" argument whenever it needs something from a government agency to which it is not otherwise entitled, including this Court, regardless of the truth of the assertions it is making.

### **C.1 The False Claim**

GMP represented that it had a rigid schedule that required it to conduct blasting on the areas immediately adjacent to Defendants' property starting on October 17<sup>th</sup> and that there were no alternatives that could be pursued that would avoid disrupting the final schedule. Plaintiff's Pleading at 10-11.

## C.2 The Truth

On several occasions, a spokeswoman for GMP, Dorothy Schnure, has made public statements indicating that blasting in the area near the Defendants' property was not going to occur until much later in the Fall or perhaps early winter. David Gram, a AP Reporter provided the following information, obtained from Ms. Schnure, in an article published in Bloomsburg Business Week on September 29, 2011:

GMP spokeswoman Dorothy Schnure said blasting had begun on the other side of the mountain and was not expected to near the Nelsons' property until late fall or early winter.

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"If they're still there later this winter when we need to do the work, we'll address it then," Schnure said. "But there's certainly time between now and then to work it out."

In addition, there is nothing in the blasting plan or other permit documents or conditions that requires a specific schedule for when blasting will occur at any given location and the plan contains substantial flexibility to modify the schedule to account for changing events. For example:

Furthermore, it is expected that the OPSC and EPSC Specialist may modify the Construction and Stabilization Sequence and associated EPSC measures provided on the EPSC Plan, as needed, throughout the construction of the project. Modifications will be made in response to actual construction conditions and/or limitations encountered. It is the responsibility of the OPSC and EPSC Specialist to report significant plan modifications and to review those modifications and any updates of the Construction and Stabilization Sequence with VT DEC throughout the construction of the Project, as required, and as such modifications and updates occur.

EPSC Plan Narrative at 6 and Construction plan sheet C-134 under Phasing Plan Notes.

Thus, GMP falsely asserted that the only possible way for it to proceed with construction was to begin blasting adjacent to the Defendants' property on October 17<sup>th</sup>.

**II. THE TEMPORARY RESTRAINING ORDER SHOULD BE  
DISSOLVED BECAUSE THE APPLICATION FOR THE ORDER VIOLATED  
RULE 65(a) OF THE VERMONT RULES OF CIVIL PROCEDURE**

Rule 65(a) of the Vermont Rules of Civil Procedure provides:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney *only if* it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition.

*Id.* (emphasis added). GMP makes no allegation, and could not make an allegation, that it was unable to notify Defendants of its plan to seek a TRO at a time sufficiently in advance of October 14<sup>th</sup> to allow Defendants to appear and present their opposition to the proposed TRO. As the previous discussion demonstrates, it appears GMP was fully aware that if it allowed Defendants a chance to “be heard in opposition” the TRO would never have been granted. In fact, GMP had been in direct contact with Defendants in the days preceding the TRO filing and even had its attorneys send Defendants a letter threatening them with legal action if they did not remove all persons from the 1000 foot safety zone defined by GMP. Nonetheless, at no time did GMP advise Defendants that it would be filing a TRO or that it would do so at the end of the work week preceding the date on which they intended to begin blasting next to Defendants’ property. In fact the GMP spokeswoman, as noted above, was sending out quite a different message apparently designed to deflect Defendants from any thought that legal action was imminent.

GMP concedes that Defendants made them aware of the fact that guests would be camping on Defendants’ property adjacent to where GMP planned to blast as early as September 28, 2011. Motion for TRO at p. 9. GMP concedes that at least by October 5, 2011 it came to believe that the campers intended to stay near the blasting area for the indefinite future. *Id.* at 9-

10. Accepting for the sake of this argument that GMP had a plan that required it to begin blasting adjacent to Defendants' property on October 17<sup>th</sup>, it had ample opportunity to advise Defendants that, unless the persons were removed, it would be filing a TRO request and to identify the time and location where it would make the filing to enable Defendants to "be heard in opposition". Clearly that was not GMP's plan. Rather, it was their plan to file the TRO request, without any notice to Defendants, such that there was no time before the objectionable blasting would be authorized to commence, for Defendants to appear before this Court to provide a rebuttal to the GMP's falsehoods and to seek to dissolve the TRO.

Vermont Courts have been particularly reluctant to grant a TRO unless there has been full compliance with the requirements of Rule 65. *See e.g. Vt. Democratic Party v. Republican Governors Ass'n*, 2004 Vt. Super. LEXIS 93, 2-3 (Vt. Super. Ct. Oct. 26, 2004) ("Our Supreme Court has advised trial court judges that injunctive relief is an extraordinary remedy not routinely granted unless the right to relief is clear. *Committee to Save the Bishop's House v. Medical Hospital of Vermont*, 136 Vt. 213, 218, 388 A.2d 827 (1978). A temporary restraining order will only be granted "if it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition." V.R.C. P. 65.)

Since GMP did not clearly demonstrate that irreparable injury would have resulted if it had advised Defendants of its plan to file a TRO, it has failed to comply with Rule 65 and the TRO should be dissolved.

### III. THE FACTS ALLEGED BY GMP IN SUPPORT OF THE NEED FOR EMERGENCY ACTION ARE NOTHING BUT A CONTRIVED SCENARIO CREATED BY GMP

As noted above, GMP was obligated under the terms of the CPG to develop the details of its blasting plan such that fly rock would not leave the area for which it possessed a permit, which area does not and can not include Defendants property. The CPG also required GMP to use blasting mats to prevent fly rock from leaving the permitted property. Obviously GMP knew that blasting in the area immediately adjacent to Defendants' property would involve the substantial risk of fly rock landing on Defendants' property, which would violate the terms of the CPG and create an actionable trespass on Defendants' property. *See State v. Preseault*, 163 Vt. 38, 43 (Vt. 1994) ("We are also unpersuaded that one instance of encroachment does not equal a continuing trespass. Vermont law is clear that even the threat of continuous trespass entitles a party to injunctive relief. *See, e.g., Barrell v. Renehan*, 114 Vt. 23, 25, 39 A.2d 330, 332 (1944) (permanent injunction appropriate if trespass is threatened); *Kasuba v. Graves*, 109 Vt. 191, 199, 194 A. 455, 458 (1937) (equity will not refuse relief where a trespass is likely to be continued under a claim of right).") It may be expensive to use the blasting mats required by the CPG and may take longer to complete the blasting, but that is a price imposed on GMP by the CPG. It has had months since the CPG was issued to make arrangements to schedule blasting to accommodate the additional time needed and supplies required to meet the CPG conditions. It did nothing. Thus, when it appeared before this Court on October 14<sup>th</sup> seeking a TRO, the emergency it alleged required that action be taken without Defendants being present and in order to meet an October 17<sup>th</sup> scheduling deadline, was an emergency created by its own failure to act prudently and timely in response to the CPG requirements. Like the child who, after killing his

parents pleads for mercy because he is an orphan, GMP pleads for emergency relief to absolve it of its own negligence in planning the blasting. Its failure to act in a prudent manner is not justification for the relief it seeks, particularly since, on the merits, it is not entitled to any relief nor is it entitled to commit a trespass on Defendants' property in order to advance its own economic goals.

**IV. THE TRO SHOULD BE DISSOLVED BECAUSE GMP'S INTENDED ACTIONS AS DESCRIBED IN ITS TRO APPLICATION WILL VIOLATED GMP'S BLASTING PERMIT**

An additional ground for dissolving the TRO is that the actions GMP has told the court it intends to pursue if the TRO is granted will, if carried out, be a violation of clear and express terms of GMP's Certificate of Public Good (CPG) permit and the conditions governing blasting contained therein. Specifically, the CPG requires GMP to abide by federal blasting standards which are set forth at 30 C.F.R. Section 816.67. Those standards mandate that any blasting be conducted in a manner to ensure that no blast debris be cast beyond the permit boundary. The permit boundary for this project ends at the Nelson's property line. GMP is not permitted to conduct blasting that will put at risk the Nelsons' person or property or the use and enjoyment of their property. GMP failed to disclose this permit condition to the court when it applied for and obtained its permit. This failure could not have been inadvertent. Regardless of motive, the permit condition precludes the very actions GMP intends to carry out by virtue of the protection provided by the TRO. This is a manipulation of the court by GMP's failure to disclose facts material to its requested TRO. GMP's actions are in bad faith and are alone sufficient grounds to cause the dissolution of the TRO.

**V. THE TRO SHOULD BE DISSOLVED BECAUSE THE BLASTING ACTIVITY GMP INTENDS TO CONDUCT WILL CONSTITUTE A TRESPASS AND A NUISANCE IN VIOLATION OF THE DEFENDANTS' PROPERTY RIGHTS UNDER SETTLED VERMONT LAW**

A further ground for dissolving the TRO is that the actions intended by GMP will, as described by GMP – casting blast debris onto the defendants' property -- constitute a trespass and a nuisance under settled principles of Vermont law. *Barrell v. Renehan*, 114 Vt. 23, 25, 39 A.2d 330, 332 (1944). GMP, thus, is not entitled to a TRO because it plans to use the TRO to enable it to violate the defendants' rights. Further, several of the blast sites depicted by GMP on its plans are located on the defendants' property. GMP has refused to acknowledge the correct property boundary and has relied on a flawed survey that has been discredited. The defendants had the boundary line in question surveyed when they learned that GMP was planning major changes to the ridgeline area that included the defendants' property. The survey confirmed that the property line asserted by GMP encroaches by a distance of 181 feet onto the land of the defendants. GMP plans to conduct some of its blasting on this area of the defendants' property in reckless and wilful violation of defendants' rights.

The legal underpinnings to GMP's requested TRO are wholly flawed. The law is well established that a person engaging in the ultra-hazardous activity of blasting has the responsibility to ensure that debris from the blasting does not leave the property of the blaster and will present no harm or damage to adjoining landowners.

[I]n the so-called "blasting" cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris. (citations omitted). And the rule of absolute

liability for direct injury from blasting has been applied, not only to damage to property, but to the person.” (citations omitted).

*Exner v Sherman Power Construction Co.*, 54 F 2d 510, 513 (2d Cir. 1931) “One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care. 57A Am Jur 2d § 410 at pp 398-99, citing Restatement Torts, 2d § 519.

In addition to the duties imposed by property and tort law, GMP’s own permit requires that the blasting be conducted in such a way as to prevent any debris or “flyrock” from being cast beyond the permit boundary. Here, turning the legal standard on its head, GMP has announced that it is going to engage in blasting and that the blasting will create a clear and present risk that blasting debris will be thrown onto defendant’s property, creating a risk of grave and serious injury to defendants and their guests if they remain on their property when the blasting occurs. GMP then argues that by remaining on their own property the defendants are interfering with GMP’s use of its land. This is nonsensical. GMP may not create a hazard for its neighbors and then seek injunctive relief to oust the neighbors from parts of the neighbors’ property to allow GMP to carry out the hazardous conduct.

## CONCLUSION

GMP is fully aware that having chosen to embark on a program of blasting it was placing itself in an position where it would be expected to provide the strictest adherence to the law. In *Dean Thompson v. Green Mountain Power Corporation*, 144 A.2d 786 (1958) the Vermont Supreme Court held that “Yet the law preserves dynamite in the category of highly dangerous

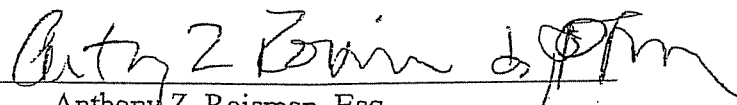
agencies and demands of its use the highest degree of care and caution. *Tinney v. Crosby*, 112 Vt. 95, 104, 22 A.2d 145; *Goupiel v. Grand Trunk R. Co.*, 94 Vt. 337, 342, 111 A. 346. In addition, when engaging in an ultra hazardous activity, such as blasting, GMP is obligated "to take all necessary precautions to avoid foreseeable injury". *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 502 (Vt. 1963). GMP 1) seeks to avoid all necessary precautions, including blasting mats and smaller blasts, even though they are required by its CPG, 2) to use a contrived emergency to obtain a TRO on the very eve of its proposed blasting activities and 3) to thereby turn its callow actions into *fait accomplis*. This Court should not countenance such shenanigans and should promptly dissolve the TRO that was improvidently granted last Friday.

Dated at Hartford, Vermont this 17 day of October, 2011.

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# **EXHIBIT 2**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 Oscv

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

MOTION FOR RECONSIDERATION OF COURT'S PRELIMINARY INJUNCTION  
AND FOR AMENDMENT OF THE PRELIMINARY INJUNCTION ISSUED ON  
NOVEMBER 1, 2011

**I. The Court's Injunction is over-broad and lacks a factual basis**

The court has issued a broadly worded preliminary injunction. By its terms, the injunction bars all persons from being present on the Nelsons' property within 1,000 feet of the Nelsons' common boundary line with GMP's leased land during a two hour window of time when blasting is scheduled to occur. The injunction is overly broad. It goes far beyond the justification for issuance set forth in plaintiff's filing papers and far beyond the court's statement of reasons justifying its issuance. The court's order indicates that the injunction is intended to bar from the Nelsons' property protesters whose purpose is to stop the blasting. The scope of the injunction must be limited to protesters present with that purpose. There is no legal basis to bar persons who do not have that purpose.

The order as issued bars all persons, regardless of purpose, from being present on the Nelsons' land during blasting times, but such a broad scope is not supported by the nuisance claim that provides the legal justification for the order. The nuisance theory accepted by the

court is that the presence on the Nelsons' land of persons attempting to stop the blasting constitutes a nuisance. Persons present but lacking such purpose, such as members of the media, hunters, hikers and others interested only in monitoring and observing GMP's activities but without a purpose to stop the blasting, are, by GMP's own definition, not creating a nuisance; they lack the intent that is foundational to GMP's nuisance claim that the court has relied on in issuing the injunction.

Moreover, persons who wish to protest the turbine project from the vantage point of the Nelsons' property but who have no purpose to use their presence to stop the blasting,<sup>1</sup> have a First Amendment right to assemble and protest. That right is being violated by the court's injunction. The court should amend the injunction to substantially narrow its scope to apply only to persons who are present on the Nelson property for the purpose of stopping the blasting by their presence.

In addition, as noted below, the theory of nuisance supporting the courts' injunction order is fatally flawed in that GMP failed to produce at hearing any evidence that it had a right to use the Nelsons' property to support its turbine project. Without such a right, the Nelsons' occupancy of their property cannot, as a matter of law, constitute an interference with GMP's rights. The court should, therefore, reconsider its decision and dissolve the preliminary injunction.

**II. The court's conclusion that protesters on the Nelsons' property are creating a nuisance is premised on GMP's right to use the Nelsons' land as a safety zone for its blasting, but there are no facts in the record to establish such a**

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<sup>1</sup> As discussed below in section VI B and C protestors who intend by their presence to prevent GMP from blasting also have a First Amendment right to assemble and protest as long as they do not trespass onto GMP's land and confine their protests to the Nelsons' land.

**right; without it, there can be no nuisance, and the injunction should be dissolved**

The nuisance underlying the court's decision is that the Nelsons and their invitees have been occupying the Nelson property near its boundary with GMP's property for the purpose of preventing GMP from using the Nelsons' land as a safety zone for GMP's blasting. The court has determined that such "conduct" by the Nelsons is violating GMP's reasonable use of GMP's property; but the physical presence of protesters on the Nelson land can only be a violation of GMP's reasonable use of GMP's property if GMP has a right to use the Nelson land as a safety zone.

Unless GMP can establish that it has a right to use the Nelsons' land to support its turbine project, the Nelsons' refusal to permit GMP to use the Nelsons' land cannot be deemed a legally cognizable interference with GMP's activities on GMP's land, regardless of the Nelsons' motivation. Stated another way, preventing GMP from using the Nelsons' land as a blast safety zone can only be an interference and nuisance if GMP has a right to use the Nelsons' property. GMP has no such right. GMP produced no evidence at hearing that it had any such right. GMP's only claim at hearing with respect to the Nelsons' land was that its blasters needed the Nelsons' land to use as a safety zone for their blasting. A "need" for additional land does not ripen into a "right," regardless of the magnitude of GMP's project. Moreover, GMP has admitted that its blasters could redesign their blasting plan to eliminate the need to use the Nelsons' property. As such, it is doubtful that GMP could prove "necessity" if it were to seek to condemn the Nelsons' property.

The court has granted GMP the use of the Nelsons' property on the basis of a theory that

has no factual basis. The “nuisance” enjoined by the court’s injunction lacks an essential factual predicate, namely, evidence that GMP has a right to use the Nelsons’ property. Without such a right, the Nelsons’ refusal to make their property available to GMP is not a legally cognizable interference with GMP’s use of its own land. The court should reconsider its decision and dissolve the injunctive relief.

### **III. The Preliminary Injunction is over-broad**

The preliminary injunction issued by the court goes far beyond excluding persons whose sole purpose is to prevent GMP from carrying out its blasting. Rather, the order is phrased with broad sweep and bars all persons, regardless of their motivation or purpose, from being present on the Nelsons’ land within the 1,000 foot area within two hours of scheduled blasts.

This broad and all encompassing language goes far beyond the scope of relief justified by GMP’s application. GMP has advanced no theory that would justify an order barring all persons from the Nelson property. Invitees have a right to use the Nelson property as a vantage point to observe GMP’s operations and to monitor whether GMP is trespassing on the area that the Nelsons claim as their own land. Nor has GMP advanced a theory for excluding members of the press who may wish to document this story and who have no motivation with respect to GMP’s intended blasting. As noted below, the order also bars persons who wish to protest GMP’s activity on the mountain and whose protest rights are protected by the Vermont and Federal Constitutions.

### **IV. Limits to the Application of the Law of Nuisance**

Using nuisance law to oust neighboring landowners from portions of their property, even

if only for two hours a day, is unprecedented in Vermont.<sup>2</sup> Any restriction on the landowners' use of their own property must be narrowly tailored to the specific nuisance alleged by GMP. Here, according to GMP, the nuisance-creating conduct is the Nelsons' and their invitees' presence on the Nelsons' land coupled with the purpose of being present "solely in order to stop MDB's blasting." Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order at page 14 (emphasis added). If the law of nuisance applies to such circumstance – which defendants strongly deny – any injunctive relief must be framed narrowly to enjoin only the offending conduct, and not other reasonable uses that the Nelsons and their invitees may choose to engage in. The existing TRO is not limited to enjoining only those persons whose purpose is to prevent GMP from blasting.

The law of nuisance requires a showing that an activity deemed to interfere with the use and enjoyment of another's property must be unreasonable and substantial. *Coty v. Ramsey*, 149 Vt. 451, 457 (1988), cited in plaintiff's memorandum at page 16 and in the court's order re cross-motions for relief at page 6. Particularly important to determining the scope of any injunction is the definition of the term "substantial" discussed by the court in *Coty*. The court stated:

The standard for determining whether a particular type of interference is substantial is that of "definite offensiveness, inconvenience or annoyance to the normal person in the community ...".

*Coty* at 457 quoting Prosser, Law of Torts, §87, 4<sup>th</sup> Ed. 1971 at p. 578 (emphasis added).

In *Coty*, the offending landowner had created a nuisance by establishing a sham pig farm.

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<sup>2</sup> Every case found by the Nelsons' counsel that resulted in a finding of nuisance involved activities that were offensive to common sensibilities of persons in the community, as required by the court's decision in *Coty v. Ramsey*, 149 Vt. 451, 457 (1988). No Vermont decision has been found where mere presence on one's own land constitutes a nuisance.

The owner dumped on his own land loads of highly odoriferous manure and placed it around the boundary line to maximize its offensiveness to neighbors. The owner then brought in dozens of pigs and allowed at least 22 of them to die and then left their carcasses strewn around the owner's land to create conditions offensive to the neighbors. The court found that the offending landowner's actions created an infestation of flies and odors that infected the neighbors' lands. The court also found that the farm was not operated for reasonable farm purposes but the malicious purpose of interfering with the neighbor's use and enjoyment of their property. Any "normal person in the community" knowing of the facts of *Coty* would conclude that the offending landowner created conditions of "definite offensiveness." Here, by way of contrast, the Nelsons and their invitees, even those who are acting with the purpose of denying GMP the use of the Nelsons' land as a blast safety zone, are engaged in no conduct that a normal person would find offensive.<sup>3</sup> The Nelsons maintain that their mere lawful occupancy of land, in the absence of any active or patently offensive conduct, cannot be characterized as a nuisance. Any other view would allow any landowner to assert a need to use part of a neighbor's land for the landowner's benefit and then claim a nuisance if the neighbor refused. That is not the law in this state or in any state.

**V. The Preliminary Injunction should not extend to persons who are present without a purpose to prevent GMP's blasting**

Even if the court continues to view as a nuisance the Nelsons' occupancy of their own

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<sup>3</sup> Defendants would again note that an essential underpinning to GMP's claim of nuisance is a required showing that GMP has a right to use the Nelsons' property as a blast safety zone. Without such a right, the Nelsons' occupancy of their own land cannot, as a matter of law, constitute a nuisance. If GMP has no right to use the Nelsons' land as a safety zone, then occupancy of that land for any purpose not in itself noxious cannot constitute an infringement on GMP's rights. GMP has asserted no such right to the use, even temporarily, of the Nelsons' land.

land when coupled with an intent to prevent GMP from using the Nelsons' land as a blast safety zone, the same cannot be said for occupants of the Nelsons' land who do not have that intent or purpose. Occupancy alone, without a purpose to interfere with GMP's blasting, cannot constitute a nuisance.<sup>4</sup> Persons may go onto the Nelsons' property at any time for the purpose of observing GMP's activities and for the purpose of reporting to the Nelsons any observed GMP trespass on the Nelson's land. Such persons lack the purpose and motivation that is an essential element of GMP's nuisance theory. There is no basis for enjoining such persons from being present on the Nelson property during the blasting.

Here, as evidenced by the affidavits submitted by Fred Scholz and his wife, Margot Kempers, persons residing in the greater Lowell Mountain area have an interest in Lowell Mountain and in the activities being carried out by GMP on the mountain. They may wish to observe GMP's activities first hand through the vantage point afforded by the Nelsons' property. Such persons are violating no rights of GMP and must not be included within the scope of the court's injunction. Equally, an independent filmmaker who is filming a documentary about the GMP turbine project on Lowell Mountain and the community reaction to it. The filmmaker has no position pro or con as to whether the project should go forward and has no purpose to enable or prevent GMP from continuing its blasting. The filmmaker has a right to be on the Nelsons' property, with the Nelsons' permission, in order to film events to be used in the documentary.

**VI. Preliminary injunction must not bar the exercise of First Amendment rights**

As noted in the various news articles that GMP has filed with the court in this matter, the

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<sup>4</sup> GMP has never made a claim that mere occupancy would support a finding of nuisance or issuance of injunctive relief.

area of the Nelsons' land covered by the court's injunction has been visited by protestors and members of the media. Each of those groups are entitled to First Amendment protections under the United States and Vermont Constitutions. Each have a constitutional right to exercise their freedom of assembly and freedom of speech.

**A. News media have a right to unrestricted presence on the Nelson land**

News media from around the state have been drawn to the site. They have a Constitutional right to be on the Nelsons' property, with the Nelsons' permission. There has been no suggestion, let alone proof, that the members of the media are present for the sole purpose of preventing GMP from blasting. Members of the media have a right to be present on the Nelson land near the boundary to document "news in the making" in order to inform their readers and viewers. Such conduct is Constitutionally protected. It does not and cannot constitute a nuisance or an interference with GMP's contractual rights and GMP has made no such claim. The sweep of the preliminary injunction is unconstitutionally over-broad. It must be significantly restricted in its scope, if not wholly dissolved.

**B. The Nelsons and the protesters have a Constitutional right to be present on the Nelsons' land to protest GMP's actions**

The Nelsons and the protesters also have a right to protest GMP's activities. They have a right to do so on the Nelsons' land, regardless of their motive. The law is well-settled that organized political protest is "classically political speech" which "operates at the core of the First Amendment." *Jones v Parmley*, 465 F.3d 46, \_\_\_ (2<sup>nd</sup> Cir. 2006). The *Parmley* decision further noted that, "First Amendment protections, furthermore, are especially strong where an individual engages in speech activity from his or her own private property. See, e.g. *City of Ladue v. Gilleo*,

512 U.S. 43, 58 (1994).” Id at \_\_\_ (emphasis added).

The protesters are taking no actions on the Nelsons’ land that could be deemed by a “normal person in the community” to constitute an offensive or noxious act causing substantial interference with GMP’s use of its land. Their desire to occupy their land and to invite others to occupy their land may well deprive GMP of a safety zone that GMP would like to use to facilitate GMP’s blasting, but GMP has failed to allege, let alone prove, that it has a right by permit, or by easement, or by agreement or by any other authority to use the Nelsons’ land as part of its construction project. Apart from its novel nuisance theory, GMP has presented no factual or legal authority to obtain by court order a right that it does not otherwise possess. Whether GMP has a pressing need to use the Nelson property as a safety blast zone or as a staging ground for its equipment or to provide better access to its project site, it is not entitled to expropriate land of the Nelsons by merely asserting that without the Nelsons’ land its project would be delayed. Yet that is exactly what GMP has claimed to the court in justifying its request for injunctive relief, and that is what the court has relied upon in granted injunctive relief. The Nelsons request that the court reconsider its decision granting injunctive relief.

**C. Nuisance theory does not override the protection and exercise of First Amendment Rights**

The Nelsons and their invitees have a Constitutional right to assemble on the Nelsons’ property to protest the actions of GMP, even if that protest has the intended effect of denying GMP the use of the Nelsons’ property for its blast safety zone. The situation would be different if the protests were occurring on GMP’s property, but GMP is not permitted to shut down a Constitutionally protected protest taking place on adjoining property by claiming that the protest

is denying GMP the use of the adjoining land unless GMP can establish that it has authorization from the neighbor or from some other lawful source to the exclusive use of that land. When a nuisance is claimed for activities that are protected by the First Amendment, the nuisance claim must be narrowly drawn and cautiously applied because "the sword of public nuisance is ... ill suited to the delicate sphere of the First Amendment where legal overkill is fatal." *Napro Development Corp. v. Town of Berlin*, 155 Vt. 353, 362 (1977) quoting the dissent in "*People ex rel. Bush v. Projection Room Theater*, 550 P.2d 600, 620 (1976).

WHEREFORE, the Nelsons request that the court reconsider its decision and dissolve the injunction; but if the injunction is not dissolved, the Nelsons ask the court to restrict its terms to apply only to persons who are occupying the Nelsons' property for the sole purpose of preventing GMP from using the property as a blast safety zone.

The Nelsons ask that the court act upon this request on an emergency basis because the existing order is interfering with the protected Constitutional rights of the Nelsons and their invitees, including protestors and members of the media.

Dated at Hartford, Vermont this 2 day of November, 2011.

DONALD NELSON and SHIRLEY NELSON

By: 

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

# **EXHIBIT 3**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 Oscv

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

MOTION FOR PERMISSION TO APPEAL

NOW COME defendants Donald and Shirley Nelson pursuant to V.R.A.P. 5(b)(1) and move this court for permission to appeal from the court’s interlocutory order consisting of a preliminary injunction. The grounds for the motion are that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.”

Specifically, the court has issued a preliminary injunction that bars all persons from “being present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson’s Lowell, Vermont property and adjoining GMP’s land for two hours before blasting and until the all clear whistle is sounded.”

That injunction sweeps within its scope persons who have a right to be on the Nelsons’ property and who lack any motive to prevent the GMP blasting. Without said motive, the basis for GMP’s nuisance claim is eliminated and, as a matter of law, such persons’ presence on the Nelsons’ property cannot be deemed to constitute a nuisance, even under the broad interpretation of nuisance being applied here.

Moreover, the Nelsons and their invitees have First Amendment Constitutional rights and to assemble and protest Green Mountain's activities, regardless of whether their purpose in doing so is to render the Nelson property unavailable for use by GMP as a blast safety zone.

The controlling questions of law as to which there is substantial ground for difference of opinion are

1. Did the Superior Court violate defendants' due process right to the exclusive possession of their property by enjoining the defendants from occupying a portion of their property in order to enable the plaintiff to use the defendants' adjoining land as a blasting "safety zone" when the plaintiff had no existing right to use the defendants' property and when the blasting could be accomplished without a need to use any portion of the defendants' property as a safety zone?
2. Did the Superior Court violate the defendants' Constitutional rights to free speech and assembly by enjoining as a private nuisance the defendants' right to assemble on the defendants own' property for the purpose of protesting the plaintiff's plan to blast away portions of a mountain ridge on property adjoining the defendants' property where the plaintiff had no existing right to use the defendants' land for any purpose.

Applying the law of nuisance to oust the Nelsons from a portion of their property is unprecedented in Vermont. It is inconsistent with the settled law of property rights and nuisance in the State of Vermont and violates the Constitutionally protected rights of the Nelsons and their invitees.

An immediate interlocutory appeal will materially advance the termination of the

litigation because it will result either in the dissolution of the preliminary injunction and the termination of the complaint for injunctive relief filed by plaintiff or it will confirm that plaintiff is entitled to permanent injunctive relief.

An expedited decision by this court is essential because GMP's blasting may be completed before the issue can be decided if the court does not act expeditiously on this motion.

WHEREFORE, defendants request that the court grant their motion for permission to appeal. If the court is not inclined to grant the motion, defendants request that the court deny the motion on an expedited basis so that defendants will have the opportunity to timely appeal the denial of the motion before GMP's blasting is completed.

Dated at Hartford, Vermont this 2 day of November, 2011.

DONALD NELSON and SHIRLEY NELSON

By: 

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

# **EXHIBIT 4**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 Osev

Green Mountain Power Corporation  
Plaintiff

v.

Donald and Shirley Nelson  
Defendants

FILED  
NOV - 1 2011  
VERMONT SUPERIOR  
COURT  
ORLEANS UNIT

ORDER RE: CROSS-MOTIONS FOR TEMPORARY INJUNCTIVE RELIEF

This land dispute is before the court on Plaintiff's motion for a preliminary injunction and Defendants' motion for a temporary restraining order. Plaintiff seeks to prohibit Defendants from allowing individuals to place themselves on land owned by Defendants in proximity to blasting performed by employees of Plaintiff. Defendants seek to prevent Plaintiff from conducting blasting and other construction on land allegedly owned by Defendants. On October 14, 2011, this court granted Plaintiff's ex parte Motion for Temporary Restraining Order. The court held evidentiary hearings on October 20 and 25, 2011. Plaintiff Green Mountain Power Corporation (GMP) is represented by R. Jeffrey Behm, Esq., Debra L. Bouffard, Esq., and Jon T. Alexander, Esq.; Defendants Donald and Shirley Nelson are represented by P. Scott McGee, Esq., and Anthony Z. Roisman, Esq. For the reasons discussed below, Plaintiff's motion is GRANTED and Defendants' motion is DENIED.

FACTS

Plaintiff Green Mountain Power Corporation (GMP) is an electric public utility, and as such is regulated by the Public Service Board (PSB). GMP has entered into a long-term lease of land in Lowell, Vermont, for the purpose of constructing and operating the Kingdom Community Wind Project (the "project"). Defendants Donald and Shirley Nelson own a residence and approximately 600 acres of land adjacent to the property leased by GMP for developing this wind power project.

On May 31, 2011, GMP was granted a Certificate of Public Good (CPG) by the PSB to construct and operate this wind project. The PSB considered the potential economic benefit to the State of Vermont as well as any adverse environmental impacts of the project. In granting approval the PSB found that the project will yield significant economic benefit to the State. The total cost of the project is estimated to be 136 million dollars. GMP is also eligible for federal Production Tax Credits (PTCs) of approximately 47 to 48 million dollars during the first ten years of operation, but only if the project is operational by December 31, 2012.

<sup>1</sup>  
EXHIBIT 4

The project consists of a wind power electric generating facility with up to 63 Megawatts of maximum capacity. The construction phase includes building a gravel access road from Route 100 up to a 3.2-mile "crane road" along a ridge line on Lowell Mountain where 21 wind turbines are to be erected.

Building the crane road involves cutting trees, excavating, and blasting rock.<sup>1</sup> The construction of the crane road must proceed in a linear fashion due to environmental concerns. Therefore, GMP does not have the option to commence construction of the project at an arbitrary site along the path. In this case they are proceeding to the north and the south from the point where the access road meets the crane road. In order to obtain material necessary to fill low-lying areas along the crane road they must take blast material from certain locations along its path. One of the first areas where GMP's blasting contractor must remove rock is the area that is the subject of this lawsuit. The rock removed from this area will be used to fill in other sections of the crane road as it is constructed.

Once the crane road is constructed, tower pads will be erected and wind turbines will be placed upon the pads. GMP is attempting to have the pads in place before winter. Construction of the project began on September 1, 2011. The access road has been completed. Blasting was scheduled to commence on October 17, 2011, and cease by November 23, 2011.

Blasting is an ultra-hazardous activity. In this case it involves digging holes into which explosives are placed at a depth necessary to avoid flying rock (fly rock). The danger of fly rock varies depending upon conditions and can be unpredictable. Generally, the more shallow the placement of the explosives, the greater risk of fly rock. Methods can be used to reduce the risk. Crushed rock may be placed into the hole as a cap to limit the amount of fly rock. Large mats can also be placed to reduce and deflect fly rock. Blasts may be set off such that the force is directed away from a particular area.

Maine Drilling and Blasting, Inc. (MDB) is the blasting subcontractor for this project. MDB is one of the largest blasting firms in New England and has many years of experience in the field. Not surprisingly, the blasting industry is highly regulated and must comply strictly with various state and federal regulations. For this project, MDB was required to develop a blasting plan, which has been approved by the PSB. The blasting plan was developed in accordance with applicable federal and state regulations. Basic precautions include limiting traffic in blasting areas and notifying nearby residents of planned blasts. Also as part of the blasting plan, MDB conducted two public meetings. All residents who live within one-half mile of the project were invited to attend the meetings, at which MDB explained the blasting schedule and what warnings neighbors should expect prior to a blast.

The plan limits blasting to certain days and times according to the blasting schedule. Blasting will generally occur once or twice per day in the afternoon. The plan requires that warning signals be audible within a half-mile radius of the blast site. Access to the blast area is regulated to protect the public from effects of the blasts. Blasting mats are to be used as necessary to control excessive amounts of fly rock.

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<sup>1</sup> An estimated 330,000 cubic feet of blasting material will be removed from areas located within 1,000 feet of the Nelsons' property line.

MDB has also developed a safety protocol which establishes a 1000-foot "safety zone" around each blasting site. No persons are to be within this zone for a specified period prior to and after each blast. The court heard extensive testimony with regard to the safety zone. The recognized practice in the industry is that the safety zone should extend 1000 feet from the blasting site. The basic premise is that the safety zone should extend beyond the potential fly rock zone.

The northwestern boundary of the Nelson property is contiguous with a portion of the GMP property. Some sections of the planned crane road are close to the boundary—in some places, less than 100 feet away. The Nelsons claim that portions of the planned crane road will encroach upon on their property. The boundary line is in a remote area nearly one mile from the Nelsons' residence. To reach the area from the Nelsons' homestead requires a hike of approximately 45 minutes.

There are no structures within 1000 feet of the ridge line. The Nelsons' residence is nearly 4500 feet from the project. However, the route of the crane road and certain blasting areas are well within 1000 feet of the disputed boundary line. Tower pads #4 and #5 will be within 100 feet of the boundary.

MDB follows accepted blasting industry standards. While it cannot be guaranteed with complete certainty that no fly rock will reach the Nelsons' property, due to the variable nature of rock blasting, MDB has stated that it is confident that it can confine fly rock to property leased by GMP. However, in their October 31, 2011 Motion for Temporary Restraining Order, the Nelsons submitted affidavits by two persons who claim that small debris particles and a piece of blasting mat were cast onto the Nelsons' property following a nearby blast on October 28. See Def. Mot. TRO (Oct. 31, 2011).

The Nelsons' property has been owned by the Nelson family for several generations. The land has been used for farming and recreation. The Nelsons have kept the land open to allow public use. Students from Sterling College have conducted outdoor programs on the land. There are hiking and snowmobile trails on the property, and it is possible to access the Lowell Mountain ridge line near the boundary of the Nelsons property.

The Nelsons have listed the property for sale for several years. Recently, GMP made an offer to purchase the property from the Nelsons at the listed price. The Nelsons declined the offer and raised the price.

On September 28, 2011, the Nelsons sent a letter to GMP advising that they would have "guests" camping on their property in the area near the construction site. Thereafter GMP observed that several individuals had erected tents along the boundary line area within 1000 feet of where GMP would be conducting blasting. GMP asserts that these campers have purposely placed themselves within this so-called "safety zone" in order to delay or stop construction of the project.

MDB has commenced blasting near tower pad #7. The campers were within 750–800 feet of that blasting site. In order to maintain safety, MDB modified the blasting by using blasting mats and smaller blasts. These extra precautions cause delays in the construction of the crane

road and therefore the entire project. GMP's construction plan requires that 5,000 cubic yards of rock be removed each day to remain on schedule. MDB estimates that if the campers remain within the safety zone throughout the blasting phase, the construction schedule will be lengthened by more than five weeks. This delay will increase the cost of the project by more than one million dollars.

The evidence is essentially uncontroverted that the goal of the campers is to delay or prevent the construction of the project. The Nelsons are aware of the intention of these individuals. In fact, the Nelsons have assisted in their efforts to interfere with the blasting schedule by allowing them to enter and camp on the Nelsons' property for this purpose, by allowing to use the Nelsons' home as a base prior to the scheduled blasting, and by guiding some of the individuals to the site where they have placed themselves within the safety zone.

The Nelsons have been vocal opponents of the project. Donald Nelson testified that he knew that the campers planned "to put a monkey wrench" into the construction. Mr. Nelson also admitted that the camping was a last resort to stop the construction.

The court heard extensive testimony regarding the location of the boundary line between GMP and the Nelsons. The Nelsons offered testimony from Paul Hannan, a surveyor who recently conducted a survey of the boundary evidence along the range line between the parties. Using the best evidence of a clear boundary line on adjacent lots to the north and south of the Nelsons' lots along the range line, and running a straight line between the points gathered on those lots, Hannan avers that a portion of the crane path will encroach upon land actually belonging to the Nelsons. Hannan calculated that the true boundary line is between 156-181 feet within the line claimed by GMP.

GMP offered the testimony of two surveyors who dispute Hannan's analysis. GMP's property claim is supported by a survey recorded in 2002 which contains an agreed-upon boundary line between the Nelsons and the owner of the neighboring land.

## DISCUSSION

### A. GMP's Motion for Preliminary Injunction

GMP has asked this court to issue a preliminary injunction ordering the Nelsons and parties acting in concert with them to stay 1,000 feet from the border of the Nelsons' property with GMP's property for two hours prior to the blasting until the all-clear whistle. Courts consider four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); see also *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948. The court will consider each factor in turn.

#### 1) Irreparable Harm

The first and most important factor is irreparable harm to the movant. "Because of the often drastic effects of the temporary injunction, the power to issue it must be used sparingly,

and only upon a showing of irreparable damage during the pendency of the action . . . ." *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450 (1976). "To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citations omitted). Moreover, the harm "must be shown to be actual and imminent, not remote or speculative." *Id.* "The showing of irreparable harm is perhaps the single most important prerequisite for the issuance of a preliminary injunction, and the moving party must show that injury is likely before the other requirements for an injunction will be considered." *Id.* (citations omitted).

Potential loss of business may satisfy the irreparable harm requirement for the issuance of an injunction and demonstrate the inadequacy of a remedy at law. *Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.*, 148 Vt. 1, 7 (1987) (upholding preliminary injunction issued to purchasers of inn for specific performance of subordination clause of purchase and sale agreement which was necessary for them to get financing for business); see also *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125, 128 (8th Cir. 1979) (evidence that some trucks would not cross picket line and that, as a result, employer suffered a loss of income was sufficient to demonstrate possible irreparable harm as a result of the picketing and to enjoin picketing).

The court is satisfied that GMP has met its burden of proof of irreparable harm. In order to be eligible for federal Production Tax Credits (PTCs) worth approximately \$48 million over the first ten years of operation, the project must be operational by December 31, 2012. The PTC benefits would be passed on to customers in the form of lower energy costs. GMP began construction on September 1, 2011, and currently anticipates completion by early December 2012. The access road to the ridgeline has been completed, and GMP must now construct a road for the crane which will assemble the wind turbines. The construction of the road requires a linear approach, as the earth movers and blasting team must build their way along the crane road in order to move their equipment forward.

It is possible for GMP's blasting subcontractor MDB to blast in the area where the Nelsons and their guests are encamped. However, in order to guarantee safety of persons at the property line, MDB would have to use substantially more blasting mats, reduce its blasting charges, drill more charge holes and rely on a greater number of blasts with smaller charges. MDB estimates that the presence of the Nelsons and their guests at the property line will delay completion of blasting of the crane road by nearly six weeks, doubling the planned time for blasting from 5.5 weeks to 11.5 weeks. MDB's original plan did not require these precautions because the area along the ridge top is uninhabited forest. MDB has worked on several wind projects in the past and has never encountered a situation where persons refuse to leave the safety zone during a blast. MDB estimates that \$1.4 million in expenses will be incurred if MDB has to use the extra safety precautions. More importantly, the delay jeopardizes GMP's chances of completing the project by December 31, 2012, and thus its ability to qualify for the valuable PTCs. This would be a major blow to the viability of the project and would significantly harm GMP and its customers.

## 2) Harm to Nonmoving Party

Second, the court must consider the harm to the nonmoving party if the injunction is granted. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); 11A Wright, Miller & Kane, *supra*, § 2948.2. Here, granting the preliminary injunction will displace the Nelsons and their guests from a portion of their property for brief periods of time. Any harm is thus temporary in nature. The Nelsons argue that this is a taking, creating a temporary easement over the Nelsons' land. The court finds this argument unpersuasive. "[N]ot every 'invasion' of private property resulting from government activity amounts to an appropriation" that is compensable as a taking. *Ondovchik Family Ltd. P'ship v. Agency of Transp.*, 2010 VT 35, ¶ 16, 187 Vt. 556. "[T]emporary, repeated incursions can sometimes rise to the level of a taking, but only in instances where the incursions amount to the taking of an easement . . . When the intrusion is "limited and transient" in nature and occurs for legitimate governmental reasons, it does not amount to a taking." *Id.* ¶ 18.

Here, there is no permanent physical occupation of the Nelsons' property by GMP. GMP does not seek permission to physically invade the Nelsons' property, either with equipment or flyrock.<sup>2</sup> Rather, GMP seeks to clear a 1,000-foot radius around the blast site during each blast as a voluntary precaution to protect human safety. The Nelsons and their guests will be prevented from occupying a small, uninhabited, remote portion of their property for a few hours a day for roughly one month. This is an intrusion that is limited and transient in nature, and occurs for a legitimate government reason: public safety. Accordingly, it does not amount to a taking.

The Nelsons have not shown that they will be harmed by having to leave the safety zone for a few hours during each blast. The injunction will not prevent the Nelsons from using their land for the majority of the time. Nor does it allow GMP to enter the Nelsons' property against their will. The court concludes that the harm to the defendants will be minimal in this case.

### 3) Likelihood of Success on the Merits

Third, the party seeking an injunction must show that it is likely to succeed on the merits of its claim. The party must present a prima facie case but need not show that it is certain to win. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, *supra*, § 2948.3). "[T]he greater the relative hardship to the moving party, the less probability of success must be shown." *Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 873 (9th Cir. 2002). Conversely, a preliminary injunction may be granted even if the plaintiff has not adequately demonstrated irreparable harm, if the plaintiff demonstrates a substantial likelihood that it will ultimately prevail. *Id.*

GMP has sued the Nelsons for nuisance. "In order to be a private nuisance, an individual's interference with the use and enjoyment of another's property must be both substantial and unreasonable." *Coty v. Ramsey Assoc., Inc.*, 149 Vt. 451, 457 (1988). In considering whether a landowner's use constitutes a nuisance, "courts must consider the extent of the interference and the reasonableness of the challenged activities in light of the particular circumstances of the case." *Trickett v. Ochs*, 2003 VT 91, ¶ 37, 176 Vt. 89.

<sup>2</sup> However, the Nelsons allege that GMP has in fact physically invaded their property with fly rock and other debris. See Def. Mot. TRO (Oct. 31, 2011).

The court finds that GMP has met its burden of demonstrating that the Nelsons' activities substantially interfere with GMP's use of its land. The Restatement (Second) of Torts provides a nonexhaustive list of factors that courts may consider in determining the extent of the interference: (1) the extent of the harm involved; (2) the character of the harm involved; (3) the social value that the law attaches to the type of use or enjoyment invaded; (4) the suitability of the particular use or enjoyment invaded to the character of the locality; and (5) the burden on the person harmed of avoiding the harm. Restatement (Second) of Torts § 827. In this case, the court finds the first, third and fifth factors to be decisive. The presence of the Nelsons and their guests within the safety zone may cause GMP to lose millions of dollars in valuable tax credits that would otherwise benefit GMP's consumers. The Public Service Board (PSB) has provided the project with a Certificate of Public Good, finding that the project will help the state of Vermont meet its demand for electricity while increasing the proportion of energy that derives from renewable resources. PSB also determined that the project will provide hundreds of jobs as well as tax benefits to Lowell and surrounding towns. Finally, the burden on GMP of avoiding the harm is significant. To proceed with blasting while the campers remain on the boundary line will delay the project by six weeks, jeopardizing GMP's ability to qualify for the PTCs and costing GMP more than a million dollars in extra construction expenses.

The court recognizes that this is a somewhat unusual application of the nuisance doctrine, but finds that it is warranted in this case. The court finds persuasive the Pennsylvania case relied upon by Plaintiff, *Brewster v. Highway Materials, Inc.*, 7 Pa. D. & C. 5th 514, 2009 WL 2055951 (Pa. Com. Pl. 2009), *aff'd*, 987 A.2d 231 (Pa. Commw. Ct. 2010). In *Brewster*, a quarry operator obtained state and local approval to blast within 25 feet of the defendant's residential property so that it could excavate stone from that portion of the quarry. The defendant appeared on his property line right before the quarry operator was set to begin blasting and refused to move back to a safe location. The quarry operator sued defendant for nuisance and sought an injunction ordering defendant to stay at least 300 feet from the blast location on his own property during blasting. The trial court found that the elements of nuisance were satisfied because the defendant intentionally and unreasonably interfered with the lawful use of the quarry operator's property. The court found that "[the defendant's] obvious intention is to stand on the property line when Highway Materials intends to blast for the sole objective of obstructing Highway Materials from blasting." The defendant's behavior was unreasonable, because he was deliberately exposing himself to blasting hazards. In addition, the interference was substantial, because the quarry would suffer roughly \$15 million in economic losses if it could not mine that portion of the quarry. Accordingly, the court granted the preliminary injunction. *Id.* The defendant appealed the trial court's decision, and the appellate court affirmed without opinion. *Brewster*, 987 A.2d 231 (Pa. Commw. Ct. 2010).

Similarly, GMP has presented a prima facie case that the Nelsons' activities are intentional and unreasonable. Whether a particular use is reasonable depends on the circumstances of the case. *Trickett*, 2003 VT 91, ¶ 37. "Where a defendant acts solely out of malice or spite, such conduct is indefensible on social utility grounds, and nuisance liability attaches." *Coty*, 149 Vt. at 458. "Irrespective of the utility of the land use, the question may come down to whether the activities causing the harm are reasonably avoidable." *Trickett*, 2003 VT 91, ¶ 37.

In this case, the area of the Nelsons' property that is within the safety zone is rugged forested ridgeline that was completely uninhabited until the campers arrived. The Nelsons and their guests can easily remove themselves from the area during the time of blasting, so the harm is reasonably avoidable. Instead, they are deliberately exposing themselves to potential blasting hazards. Donald Nelson admitted at the October 25 hearing that the campers' sole purpose for remaining in the safety zone is to interfere with the project because they oppose large-scale ridgeline wind projects. While camping in the woods is not in and of itself unreasonable, the evidence shows that the Nelsons and their guests are acting out of a desire to injure GMP. The activities of the Nelsons are unreasonable given the circumstances of this case.

The court also concludes that GMP has presented a *prima facie* claim of intentional interference with contract. "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 80 (1984) (quoting Restatement (Second) of Torts § 766). "Intent to interfere with a contractual relationship exists if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he [or she] desires to interfere, even though he [or she] acts for some other purpose in addition." *Id.* at 80-81. "Intent also exists if the actor does not act with the desire to interfere with the contract but knows that interference will be substantially certain to occur as a result of his or her action." *Id.* at 81. Here, GMP has presented substantial evidence that the Nelsons and their guests intentionally have taken up positions within the safety zone in order to prevent MDB from blasting and therefore inhibiting MDB's performance of its contract with GMP. Because they are acting intentionally to derail the project, the Nelsons may be held liable whether or not they specifically intend to interfere with MDB's contract with GMP.

Therefore, this court concludes that GMP has met its burden of showing that it is likely to succeed on the merits of both of its claims.

#### 4) Public interest

Finally, the court must evaluate whether the public interest would be furthered or injured by an injunction. 11A Wright, Miller & Kane, *supra*, § 2948.4. As noted above, the Public Service Board held extensive hearings on all aspects of this project, and ultimately granted a Certificate of Public Good. See *Auelair v. Vt. Elec. Power Co., Inc.*, 133 Vt. 22, 26 (1974) ("[T]he issuance of a certificate of public good is a resolution that the project for which the certificate is granted is in the public interest of the State of Vermont."). Completion of the project by December 31, 2012 is necessary to ensure that the public receives the maximum benefit from this project via the federal PTCs. Thus, the public has a vital interest in avoiding delays to the project, and that interest is served by granting a preliminary injunction.

Having analyzed the factors above, the court concludes that injunctive relief is necessary to avoid irreparable injury to GMP. Accordingly, GMP's motion for a preliminary injunction is granted.

#### B. Nelsons' Motion for a Temporary Restraining Order

The Nelsons filed a counterclaim against GMP, alleging that they are the true owners of a portion of the property that GMP has leased for the purposes of constructing the project, and that GMP is trespassing on their property. They have asked the court for a temporary restraining order (TRO)<sup>3</sup> to enjoin GMP from trespassing on their land, whether directly or by casting flyrock on it. GMP received notice of the TRO motion, and a lengthy hearing was held on October 25 where this court heard evidence on the trespass issue from both parties.

In considering whether a TRO is necessary, the court considers four factors: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993).

1) Likelihood of Success on the Merits

Trespass is an invasion of a person's interest in the exclusive possession of his land. *John Larkin, Inc. v. Marceau*, 2008 VT 61, ¶ 8, 184 Vt. 207. The party showing a direct and tangible invasion of their property generally may obtain injunctive relief and at least nominal damages without proof of any other injury. *Id.* ¶ 9. In order to get injunctive relief for trespass, the Nelsons must present a prima facie case that the disputed area is in fact their property. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, *supra*, § 2948.3).

There is a genuine issue of fact as to whether the property in question belongs to the Nelsons or their neighbors. At the hearing, the Nelsons introduced testimony by their surveyor, Paul Hannan, who stated that the Nelsons' property line actually sits 160–180 feet further east than is shown on town land records. Thus, in Hannan's opinion the Nelsons are the true owners of the westernmost portion of the land that GMP leases from the Nelsons' neighbors, Moose Mountain Forestry, LLC and Moose Mountain Wind, LLC. Mr. Hannan has not created a recordable survey, however. GMP introduced testimony from its own surveyors that challenged the survey method used by Mr. Hannan and indicated that GMP had relied in good faith on an existing recorded survey. The court cannot determine based on the evidence presented where the true boundary line is. However, the Nelsons have set forth a prima facie case of trespass.<sup>4</sup>

2) Irreparable Harm to Defendants, Harm to Plaintiff, and Public Interest

The Nelsons have not demonstrated that they will be irreparably harmed by the alleged trespass. See *Kamerling v. Massanari*, 295 F.3d 206, 214 (2nd Cir. 2002). Any harm is speculative at this point because the Nelsons have not conclusively established that the land is theirs. In addition, the Nelsons have not shown the court that money damages cannot provide adequate compensation in the event that GMP is trespassing. The case of *Welch v. Lague* is instructive here. In that case, plaintiff landowners sued to quiet title in a ten-acre parcel occupied by defendants, who believed they owned the parcel. *Welch v. Lague*, 141 Vt. 644, 645 (1982).

<sup>3</sup> This motion is different from Defendants' October 31 Motion for TRO, which the court has dealt with in a separate order. As this court explained in that order, the Nelsons' claim of trespass by flyrock is also insufficient to support injunctive relief. See Order re: Def. Mot. TRO (Oct. 31, 2011).

<sup>4</sup> The court wishes to emphasize that its analysis here deals solely with the issue of the disputed boundary area, and does not apply to the Nelsons' second TRO motion regarding fly rock cast onto the Nelsons' property. See Order re: Def. Mot. TRO (Oct. 31, 2011).

The Supreme Court held that it was appropriate to award damages based on the reasonable rental value of the property during the defendants' wrongful occupancy. *Id.* at 647. This suggests that a landowner can be adequately compensated by money damages in a trespass case.

In addition, as GMP points out, in the event that this court determines that the Nelsons own the property in question, GMP could initiate proceedings to condemn the property. In such a case, the Nelsons would be entitled only to monetary compensation. *Auclair v. Vt. Elec. Power Co., Inc.*, 133 Vt. 22, 24–25 (1974); 30 V.S.A. §§ 110, 112.

The Nelsons argue that any trespass to land that results in alteration of the land is irreparable harm *per se*, citing *Ferrone v. Rossi*, 42 N.E.2d 564, 566 (Mass. 1942) (issuing mandatory injunction ordering defendant to remove structures he wrongfully placed on plaintiff's land). The court does not find this argument to be supported by the case cited. Moreover, even in encroachment cases like *Ferrone*—i.e., where a landowner has placed a building or structure on his neighbor's land—courts still weigh the benefit to the plaintiff against the harm to the defendant that will result from granting a mandatory injunction to remove the offending structure. See, e.g., *Nichols v. City of Evansdale*, 687 N.W.2d 562, 572 (Iowa 2004) (injunction would not be issued to remove city sewer lines that encroached on plaintiff's lot where expense of removal would be great and plaintiff could be adequately compensated by damages); *Amkco, Ltd., Co. v. Welborn*, 21 P.3d 24, 28 (N.M. 2001) (declining to issue injunction even though defendant's building encroached 58 feet onto plaintiff's property because defendant was unaware of true boundary line and would suffer great hardship if ordered to remove building).

In this case, it is impossible for this court to tell at this point whether GMP is in fact trespassing, so the benefit to the Nelsons of issuing an injunction is at best uncertain. By contrast, as discussed above, the harm to GMP of issuing an injunction that turns out to be erroneous would be great. As also discussed above, the public has a strong interest in this project being completed on time.

The court concludes that the Nelsons have not demonstrated that they will suffer irreparable injury if GMP is in fact trespassing on their land. Nor do other factors weigh in favor of granting injunctive relief. Accordingly, the Nelsons' motion for a TRO is denied.

The court emphasizes that its ruling on the parties' cross-motions for injunctive relief does not represent an adjudication on the merits. The court is not precluded from rendering a different decision based on a more fully developed evidentiary record. See *Gardner v. Jefferys*, 2005 VT 56, ¶ 14, 178 Vt. 594 (mem.).

#### ORDER

Plaintiff's Motion for Preliminary Injunction is GRANTED. Defendants' Motion to Dissolve TRO is therefore rendered moot. Defendants' Motion for Temporary Restraining Order is DENIED.

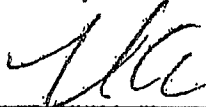
In order to execute this order, law enforcement shall have the authority to enter upon the land of the Defendants.

GMP shall delineate the 1000-foot safety zone for each blast and shall properly post the 1,000-foot safety zone to warn the public of any blasting.

GMP shall provide law enforcement with notice of blasting sufficient allow for execution of this order.

This order shall expire after December 2, 2011.

Dated at North Hero, Vermont this 1<sup>st</sup> day of November 1, 2011.



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Martin A. Maley  
Superior Court Judge  
Orleans Unit

# **EXHIBIT 5**

IN THE SUPREME COURT  
OF THE  
STATE OF VERMONT

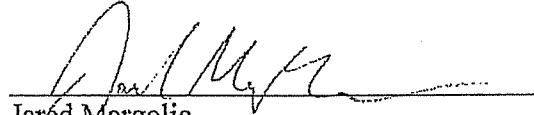
DONALD AND SHIRLEY NELSON,	)	SUPREME COURT Docket_____
Plaintiffs	)	
	)	
v.	)	
	)	Docket No. 256-10-11 Oscr
	)	
GREEN MOUNTAIN POWER	)	
CORPORATION,	)	
Defendant	)	
	)	

AFFIDAVIT OF JARED MARGOLIS

NOW COMES Jared Margolis, upon oath and deposes and states as follows:

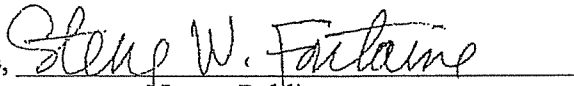
1. I am an attorney licensed in the State of Vermont.
2. I have been representing the Towns of Craftsbury and Albany in connection with proceedings before the Vermont Public Service Board involving the Green Mountain Power/Lowell Mountain wind turbine project.
3. I have closely examined all documents filed with the PSB by GMP and I have closely examined the Certificate of Public Good issued by the PSB with all conditions. I have also examined the documents referenced in the Certificate of Public Good such as the blasting plan being used by Maine Drilling & Blasting which is a part of GMP's submission.
4. The Maine Drilling & Blasting (MDB) blast plan that was approved and incorporated into the Certificate of Public Good contains no provision for a blast safety zone to be created around blast sites.
5. GMP did not identify the need for a safety zone using the Nelsons' land in any of

its filings with the Board. The Certificate of Public Good contains no authority for GMP or MDB to create a blast safety zone on land owned by the Nelsons or on any land beyond the project boundaries. The project boundaries are co-terminus with the land GMP leased on Lowell Mountain which shares a common border with land owned by the Nelsons.

  
\_\_\_\_\_  
Jared Margolis

STATE OF VERMONT  
COUNTY OF Chittenden SS.

At Essex, in said County, this 7<sup>th</sup> day of November, 2011,  
personally appeared Jared Margolis, under oath, and he swore to the truth of the foregoing.

Before me,   
\_\_\_\_\_  
Notary Public

My Commission Expires: 2/10/15.

STEVE W. FONTAINE  
Notary Public, Vermont  
My Commission Expires 2/10/15

# EXHIBIT 6

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION

Docket No. 242-10-11-0scv

GREEN MOUNTAIN POWER  
CORPORATION,  
Plaintiff

v.

DONALD AND SHIRLEY  
NELSON,  
Defendants

FILED

OCT 14 2011

VERMONT SUPERIOR  
COURT  
ORLEANS UNIT

TEMPORARY RESTRAINING ORDER

This matter having come before the Court on the Plaintiff's Motion for a Temporary Restraining Order ("TRO") and a Preliminary Injunction and the Court having considered said Motion, the Supporting Memorandum of Fact and Law with attached affidavits of Charles Pughe and Stephen Blaisdell and exhibits, *ex parte* GRANTS the requested TRO as follows:

The Court finds based on the affidavits, exhibits and points of law submitted by Plaintiff, that it will sustain irreparable injury, loss or damage before the Defendants can be notified and heard in opposition. Based on the evidence presented by Plaintiff, the Court finds that Defendants Donald and Shirley Nelson themselves, and with other persons acting in concert and participation with them, will be, as of October 17, 2011, improperly interfering with Plaintiff's development of a wind generation project in Lowell, Vermont, known as the Kingdom Community Wind Project (the "Project"). Specifically, the material submitted by Plaintiff shows the Nelsons and those acting in concert and participation with them are intentionally occupying the northwesterly boundary of the Nelsons' property adjoining the Project in close proximity to blasting planned by Plaintiff to start on October 17 on GMP property where the Project is being

Ex 6

constructed. The purpose of Defendants and those acting in concert and participation with them is to 1) place themselves far inside a 1,000 foot safety zone in order to create a risk to human safety that will prevent the blasting from taking place, and thereby 2) cause irreparable injury, loss and damage to GMP and the public. The Court finds that based on the material submitted by Plaintiff it is likely to succeed on the merits of its nuisance and contract interference claims, and that issuing the below order will impose no or little cost on Defendants.

Pursuant to V.R.C.P. 65(a), this TRO will expire on October 26, 2011 unless for good cause shown, the Court orders the term of the TRO to be extended. The Court will hold a hearing on Plaintiff's Motion for Preliminary Injunction on October 20, 2011, commencing at 1:45 a.m./p.m. and as set forth in the attached Notice of Hearing.

**IT IS HEREBY ORDERED:**

Pursuant to V.R.C.P. 65(d), that Defendant Donald Nelson, Defendant Shirley Nelson, and any and all of their agents, employees, attorneys, invitees, licensees, permittees and all and any other persons acting in concert and/or in participation with Defendant Donald Nelson and/or Defendant Shirley Nelson are ENJOINED, PROHIBITED and RESTRAINED FROM ENGAGING IN ANY AND ALL OF THE FOLLOWING:

1. Being present within 1,000 feet of the northwesterly boundary of Defendants Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land during and within one hour before and one hour after blasting from the date of this Order, October 17, 2011 through October 26, unless for good cause shown the term of this Order is extended beyond October 26 by further Order of the Court; and

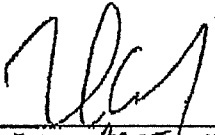
2. Inviting, encouraging or permitting other individuals to be present within 1,000 feet of the northwesterly boundary of Defendants Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land during and within one hour before and one hour after blasting from October 17, 2011 through October 26, unless for good cause shown the term of this Order is extended beyond October 26 by further Order of the Court.

**IT IS FURTHER ORDERED**, the blasting covered by this Order shall be performed between October 17 and November 23, 2011, and will occur only during the hours between 9 a.m. and 5 p.m. Monday through Friday, excepting no blasting shall occur on Vermont State holidays. Each morning GMP will contact the Nelson Defendants by telephone and provide a two hour period of time that day when the actual blasting will occur. Five minutes prior to the blast a whistle audible to a distance of one half mile will be sounded three times in quick succession; one minute prior to the blast a whistle will be sounded twice in quick succession. After blasting has been completed, a continuous whistle will sound once for five continuous seconds indicating the blasting has concluded and giving the all clear.

**IT IS FURTHER ORDERED**, that Donald and Shirley Nelson permit GMP to post signs warning of the blasting and giving notice of this Order on their property on access routes to the above described northwesterly boundary area and at visible locations in that boundary area.

Pursuant to V.R.C.P. 65(c) the Court waives any security requirement. A wrongful issuance of an order will pose little or no cost or burden on Defendants, and as well, Plaintiff has resources to pay for any such minimal costs.

Dated at St Albans, Vermont, this 14<sup>th</sup> day of October 2011.

  
\_\_\_\_\_  
Hon. Robert Bent *MACTY MARY*  
Presiding Judge  
Vermont Superior Court - Orleans Unit

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STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 OSCV

GREEN MOUNTAIN POWER  
CORPORATION,  
Plaintiff

v.

DONALD AND SHIRLEY  
NELSON,  
Defendants

NOTICE OF HEARING ON PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION

TO: Donald and Shirley Nelson  
365 Bayley Hazen Road  
Albany, VT 05820

Green Mountain Power Corporation  
R. Jeffrey Behm  
Debra L. Bouffard  
SHEEHEY FURLONG & BEHM P.C.  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402

This Notice is to notify you that this Court will hold a hearing on Plaintiff's Motion  
for Preliminary Injunction on October 20, 2011, at 1:45 pm.

Dated at Newport, Vermont, this 14th day of October 2011.



~~XXXXXX~~ Penelope Carrier  
~~XXXXXX~~ Court Operations Manager  
~~XXXXXX~~ Vermont Superior Court - Orleans Unit

# **EXHIBIT 7**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

GREEN MOUNTAIN POWER  
CORPORATION,  
Plaintiff

v.

DONALD AND SHIRLEY  
NELSON,  
Defendants

COMPLAINT

Plaintiff, Green Mountain Power Corporation ("GMP"), by and through counsel,  
complains against Defendants, Donald and Shirley Nelson, as follows:

PARTIES, JURISDICTION, VENUE

1. This is an action brought for nuisance and intentional interference with contract and seeking declaratory and injunctive relief and damages.
2. GMP is a Vermont corporation with its principal place of business in Colchester, Vermont. Its business includes the generation, purchasing, distribution, and sale of electricity to approximately 95,000 customers in Vermont.
3. GMP is an electric public utility whose services and rates are subject to regulation by the Vermont Public Service ("PSB").
4. Donald and Shirley Nelson own a house located on a 600 acre tract of land located in Lowell, Vermont. The northwesterly boundary of the Nelsons' land is contiguous to and shared with land GMP possesses pursuant to long-term leases (49.5 years) it entered to construct and operate the Kingdom Community Wind Project (the "Project").

5. The Vermont Superior Court Civil Division has jurisdiction over this matter pursuant to 4 V.S.A. §§ 30, 31.

6. Venue is proper because the property that is the subject of this action is located in Orleans County, Vermont and the Defendants reside there.

### FACTS

#### The Public Service Board's Approval Of The Kingdom Community Wind Project

7. In May 2010, GMP and several other entities petitioned the Vermont Public Service PSB ("PSB") for a certificate of public good ("CPG"), pursuant to 30 V.S.A. § 248, to construct a wind powered electric generation facility on Lowell Mountain in Lowell, Vermont.

8. The Project will have generation capacity up to 63 megawatts and will include 21 wind turbines and associated transmission and interconnection facilities.

9. The turbines will be sited along approximately 3 miles of a ridge in Lowell.

10. The Nelsons' house is located approximately 4,500 feet from location of the Project.

11. The Nelsons were, along with others, permitted to intervene in the PSB proceedings.

12. The Nelsons actively participated in the PSB proceedings and opposed the Project.

13. On May 31, 2011, the PSB entered its "Findings and Order" granting a CPG approving the construction and operation of the Project, subject to certain conditions.

14. In its May 31, 2011 Findings and Order, the PSB concluded that, "the benefits of constructing and operating the proposed project outweigh its impacts and will promote the general good of the state."

15. At the time the CPG was granted, the cost of the Project to GMP was \$136 million.

**The Project's 2012 Completion Deadline To Obtain Tax Credits**

16. A key benefit and component of the Project is that it will be eligible for federal Production Tax Credits ("PTCs") of approximately \$48 million over the first ten years of operation if it satisfies the condition of being operational by December 31, 2012.

17. Construction of the Project began on September 1, 2011.

18. Under GMP's already tight construction schedule, it is estimated that the Project will be operational in early December 2012.

19. Failure to achieve operation of the Project by December 31, 2012, means the Project will not qualify for the PTCs and the economic viability of the Project will be placed at risk.

**The PSB-Approved Blasting Plan For The Project**

20. Construction for the Project includes blasting at points along a three mile crane path on the ridge where the turbines will be located.

21. A portion of the blasting, scheduled to commence on October 17, 2011, will occur on GMP land in an area located within 50 to 900 feet of the northwesterly border of the Nelsons' 600 acre property.

22. Maine Drilling & Blasting, Inc. ("MDB"), a subcontractor of J.A. MacDonald, is obligated under the contract to perform the blasting for the Project. J.A. MacDonald is the site work and earth moving subcontractor to Reed & Reed, Inc., GMP's general contractor responsible for constructing the entire Project. J.A. MacDonald is contractually obligated to Reed & Reed, Inc. to perform all specified site work, including blasting, and Reed & Reed, Inc.

is contractually obligated to GMP to construct the Project, including the site work and the blasting.

23. MDB developed a blasting plan approved by the PSB on July 29, 2011 ("Blasting Plan").

24. Among other things, the Blasting Plan, limits blasting to between 9 a.m. and 5 p.m. on non-holiday, week days, requires that persons with land one-half mile from the blasting be notified each day by phone of the location and estimated time of the blasting, and provides for MDB to perform a security check of the blasting area to ensure no persons are present in the area during blasting.

25. The blasting is scheduled to occur once or twice (generally in the afternoon) daily along this boundary for about two weeks. Prior to the blasting, warning whistles audible within a range of one-half mile will include: (1) 3 whistles at 5 minutes prior to blast, (2) 2 whistles at 1 minute prior to blast, and (3) all clear.

26. The Nelsons and other persons with property located within one-half mile of the Project were notified by certified mail of informational meetings scheduled for August 4 and August 18, 2011, to address blasting safety.

27. The Nelsons attended at least one of those meetings, where participants were provided information about the blasting and warned to stay out of the blasting safety zone.

28. Pursuant to its own and recognized safety protocols for blasting, MDB will establish a 1,000 foot safety zone, free of people, around the blasting site to guarantee human safety.

29. Donald and Shirley Nelson know that persons must stay out of the safety zone or it will prevent or impede blasting.

**The Nelsons' Invitation To Camp On The Property Line And Within The Immediate Vicinity Of The Blasting Sites**

30. The Nelsons are opposed to and wish to stop the construction of the Project.

31. In a letter to GMP's President and Chief Executive Officer, dated September 28, 2011, Donald and Shirley Nelson wrote that their "guests" would be camping on the ridgeline on the northwesterly border of their property adjoining GMP's Project for the foreseeable future.

32. The Nelsons requested GMP send written confirmation that no flyrock from blasting will trespass or intrude on their property and that no one will be endangered.

33. On or about September 28, 2011, the Nelsons told a news reporter they had invited campers to pitch tents on their property near the boundary with GMP's Project land and within the safety zone surrounding the blast sites.

34. Shirley Nelson stated, "Friends and neighbors have decided that it's time that somebody just said something.... We couldn't think of any other way to do it."

35. Persons unidentified to GMP erected tents and have been camping near the northwesterly boundary of the Defendants' 600 acre property since on or about October 1, 2011.

36. These tents are located nearly one mile and a 40-60 minute hike from the Defendants' house, but only about 100-200 feet from a blast site on GMP's land.

37. On October 5, 2011, Defendant Donald Nelson and the Nelsons' unidentified "guests" told another news reporter that the purpose of the campsite is to stop the blasting, and "the hope is that the campsite is so close to the project that contractors won't be able to safely detonate the high explosives necessary to build a wide crane path" that must be built to erect the turbines.

38. Donald Nelson, who was present at the campsite, told the reporter that “high explosives require a 750 foot safety zone, free of people, before they can be set off [and] the camp site is well within that limit.”

39. The reporter identified the campers in his article as a group of Sterling College students and a Craftsbury resident named Ann Morse.

40. On or about September 28, 2011, in a filmed Channel 44 television news interview inside the Nelsons’ house, an unidentified woman said that she and others would be camping at the site for the entire winter and would stay put through any blasting.

**The Presence Of Persons Along The Nelson Boundary Will Delay Completion Of The Blasting By Approximately Six Weeks, Greatly Increase The Costs Of Construction And Place The Economic Viability Of The Project At Risk**

41. Some blasting points along the crane road will be located significantly less than 1,000 feet from points along the Nelsons’ northwesterly property line.

42. If persons are present along the Nelsons’ property line, substantial additional safety precautions will be required if the blasting is to proceed.

43. The safety precautions that will be necessitated by the presence of the Nelsons and their “guests” on the boundary line will delay completion of blasting by nearly six weeks, more than doubling the current estimated time it will take to complete that blasting (from 5.5 weeks to 11.5 weeks), and add estimated costs well over \$1 million. Such additional time and costs places the economic viability of the Project at risk.

**COUNT I**

**(Nuisance)**

44. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 43 above as if set forth in full herein.

45. Defendants' wrongful conduct, acting with each other and in concert and participation with their unidentified "guests" to cause persons to be present well within 1,000 feet of the safety zone for blasting on GMP's property will unreasonably and substantially interfere with Plaintiff's use and enjoyment of its property rights by preventing or impeding the blasting and construction of the Project.

46. The Defendants' purpose and intention in encouraging, inciting, and causing persons and themselves to be present on the northwesterly boundary during scheduled blasting at the Project is to create a safety risk that would stop the blasting and construction of the Project.

47. As a direct and proximate cause of Defendants' conduct, Plaintiff will suffer both irreparable harm and damages to its business and the public will suffer irreparable harm.

## COUNT II

### **(Intentional Interference with Contract)**

48. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 47 above as if set forth in full herein.

49. Defendants' actions will interfere with the performance of GMP's contractors' contractual duties to conduct blasting and timely construct the Project.

50. The Defendants' acts of intentional interference are improper and wrongful and done with the purpose of destroying the Project by interfering with the performance of GMP's contractors' performance of their contractual duties.

51. Specifically, Defendants have themselves been present, as well as invited, incited, encouraged, and caused others to be present along the northwesterly border of the Nelsons' property and within the several hundred feet of certain blasting sites for the purpose of stopping blasting and construction, and intend to continue to do so for the foreseeable future.

52. The Defendants' purpose in encouraging, inciting, and causing persons and themselves to be present on the northwesterly boundary during scheduled blasting at the Project is to create a safety risk that would stop the blasting and construction of the Project.

53. Defendants' wrongful actions have been undertaken with the intended purpose of interfering with the blasting to be performed by MDB pursuant to its contract and for the overall purpose of stopping construction of the Project.

54. As a direct and proximate cause of Defendants' conduct, the Plaintiff will likely suffer both irreparable harm and damages to its business and the public will suffer irreparable harm.

### COUNT III

#### (Request for Declaratory Judgment)

55. Plaintiff incorporates the allegations set forth in Paragraphs 1 through 54 above as if set forth in full herein.

56. The Defendants, acting in concert with others, have encouraged, incited and caused themselves to be present and allowed others to be present on their northwesterly boundary at the Project for the purpose of interfering with Plaintiff's use and enjoyment by impeding or preventing the blasting and construction of the Project.

57. Plaintiff is entitled to a declaratory judgment, pursuant to 12 V.S.A. § 4711, that these actions of Defendants constitute a nuisance.

58. The Defendants, acting in concert with others, have encouraged, incited and caused themselves to be present and allowed others to be present on their northwesterly boundary, well within 1,000 feet of GMP's blasting site at the Project for the purpose of

interfering with Plaintiff's contractual rights to performance of the blasting necessary for the construction of the Project.

59. Plaintiff is entitled to a declaratory judgment, pursuant to 12 V.S.A. § 4711, that Defendants' actions in inviting and allowing others to use and remain on the northwesterly boundary of their property, adjacent to Plaintiff's Project land and within the blasting safety zone, for the purpose of interfering with Plaintiff's contractual rights for the performance of the blasting and the timely construction of the Project, constitute nuisance, intentional interference with contract, and entitle Plaintiff to injunctive relief and damages as requested below.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury on all issues so triable.

**REQUEST FOR RELIEF**

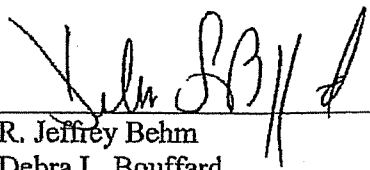
WHEREFORE, Plaintiff respectfully requests this Court to grant the following relief:

- A. Enter judgment declaring that Defendants' conduct will constitute private nuisance and interference with contract causing GMP irreparable harm and injury and entitling Plaintiff to damages and injunctive relief;
- B. Grant Plaintiff the immediate preliminary injunctive relief it has requested;
- C. Award judgment in Plaintiff's favor and against Defendants on each Count;
- D. Award declaratory judgment in Plaintiff's favor and against Defendants;
- E. On all Counts: Award Plaintiff compensatory and consequential damages;
- F. On Counts I and II: Award Plaintiff punitive damages;
- G. Award Plaintiff prejudgment interest, attorneys' fees, expenses and costs of court;  
and
- H. Grant such other relief as this Court deems just and appropriate.

Dated at Burlington, Vermont this 13<sup>th</sup> day of October 2011.

**Green Mountain Power Corporation**

By: \_\_\_\_\_

  
R. Jeffrey Behm  
Debra L. Bouffard  
SHEEHY FURLONG & BEHM P.C.  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402  
(802) 864-9891

# **EXHIBIT 8**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

GREEN MOUNTAIN POWER  
CORPORATION,  
Plaintiff

v.

DONALD AND SHIRLEY  
NELSON,  
Defendants

**PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION AND  
SUPPORTING MEMORANDUM OF FACT AND LAW**

Plaintiff, Green Mountain Power Corporation ("GMP"), by and through its attorney, Sheehy Furlong & Behm P.C., hereby moves pursuant to V.R.C.P. 65(a) and (b) for a temporary restraining order and preliminary injunction to enjoin the Defendants and their unidentified co-conspirators from improperly interfering with GMP's development of a \$136 million wind generation project in Lowell Vermont known as the Kingdom Community Wind Project (the "Project" or "KCW"). The Defendants, having failed in their attempts to stop the Project through legal means,<sup>1</sup> are now attempting to destroy the Project by improper conduct that violates GMP's legally protected rights, subverts the State's legal processes and creates an imminent risk of irreparable harm to GMP and the public interest. Specifically, they are inviting

<sup>1</sup> The Defendants were parties and witnesses in the Vermont Public Service Board approval proceedings under 30 V.S.A. § 248. They are continuing to challenge the KCW Project in appeals to the Public Service Board of water quality permits issued by the Agency of Natural Resources and an appeal (as a member of the Lowell Mountains Group) to the Supreme Court of the Public Service Board's grant of a Section 248 Certificate of Public Good for the Project.

Ex 8

and assisting persons to occupy their land adjoining the Project to create a safety risk that will halt construction blasting on GMP's land essential to the timely completion of the Project.

On May 31, 2011, the Vermont Public Service Board ("PSB"), after holding public and contested case hearings, considering extensive evidence and pleadings submitted by numerous parties, including the Defendants, found that the Project, as conditioned, would promote the general good. It accordingly granted a Certificate of Public Good ("CPG") for GMP's development of the Project. A key benefit and component of the Project is that it will be eligible for federal Production Tax Credits ("PTCs") of approximately \$48 million over the first ten years of operation if it becomes operational by December 31, 2012. Construction of KCW started on September 1, 2011. Under GMP's already tight construction schedule, it is estimated the Project will be operational in early December, 2012.

Construction on the Project is at a stage requiring explosive blasting to build a 3.2 mile crane path on a remote, uninhabited ridge in Lowell. A portion of the blasting, commencing on October 17 will occur on GMP land in an area located within 50 to 900 feet of the northwesterly boundary of the Defendants' 600 acre property.<sup>2</sup> Maine Drilling and Blasting, Inc. ("MDB"), the blasting sub-contractor on GMP's Project, has taken steps that will likely confine flyrock to GMP's land. In order to guarantee human safety, however, MDB's blasting protocols require a safety zone extending 1000 feet from the blast site to be cleared of people for a short period during blasting.

The Defendants have been attempting to sell their Property for the last four years, assert the Project will diminish its value and wish to stop the Project from being constructed. To accomplish this, they have invited and assisted a number of unidentified persons to occupy their

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<sup>2</sup> The facts relating to the blasting and construction details are largely set forth in the Affidavit of Stephen Blaisdell, Vice President of Maine Drilling & Blasting, Inc. ("Blaisdell Aff. ¶ \_\_\_") and Charles Pughe, GMP's Project Manager for the KCW Project ("Pughe Aff. ¶ \_\_\_") attached to this Motion as, respectively, Exhibits 1 and 2.

lands closest to the planned blasting for the purpose of creating a safety risk that will prevent blasting and the construction of the Project. To continue with the blasting in the absence of the requested injunction, MDB must adopt additional costly safety procedures that will delay completion of the blasting by 6 weeks and add well over \$1 million in costs to the Project. Moreover, the delay will create an imminent threat that the Project will not be operational in 2012, which places the economic viability of the entire Project at risk due to loss of the PTCs.<sup>3</sup> This constitutes irreparable harm to GMP and the public interest.

The false premise of the Defendants' scheme to destroy the Project is their assumption they can do whatever they please, no matter how injurious to others, so long as they do it entirely on their own land. That misguided belief is wholly incorrect. Vermont law is clear that a landowner cannot create a condition or pursue a use of their land for the purpose of substantially interfering with another's legitimate use of its property. *Trickett v. Ochs*, 2003 Vt. 91, ¶16, 176 Vt. 89. Equally clear is that the Defendants' wrongful and purposeful interference with the performance of the contracts between GMP and its construction contractors violates GMP's protected interests and gives rise to an actionable interference with contract claim. Although the Defendants' wrongful conduct will make them liable for money damages, the damages are inadequate to redress the harm GMP and the public will suffer from the loss of the Project. Furthermore, to the extent some aspects of the harm could be compensated by money damages, the tens of millions of dollars of damages threatened by Defendants' actions cannot be collected from their finite assets. Where a judgment for money damages cannot be collected, money damages are inadequate and the harm is irreparable as a matter of law.

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<sup>3</sup> In considering the effects of construction delay due to another cause, the PSB recognized that the loss of the PTCs would place the Project's economic viability at risk. *See* PSB's Order Re Motions For Modification Of Conditions, p. 8 (July 12, 2011).

As set forth below in the incorporated Memorandum of Fact and Law, there is a likelihood that GMP will prevail on both the merits of its nuisance and contract interference claims and, in the absence of the requested injunction, there is an imminent threat that both GMP and the public will be irreparably injured. The injunction is therefore both legally necessary and justified. GMP respectfully submits that this Court should issue the Proposed Order appended to this Motion and supporting Memorandum, and enjoin the Defendants and all persons described in V.R.C.P. 65(d) from being present, or encouraging, permitting or causing others to be present on the Nelsons' lands within 1000 feet of the blasting.

### MEMORANDUM OF FACT AND LAW

#### I. RELEVANT FACTS

##### A. The Parties

GMP is Vermont's second largest electric public utility. It is engaged in the business of generating and purchasing electric power for distribution and sale to its approximately 90,000 commercial and residential customers in Vermont. As a public utility, its rates and services are regulated by the Vermont Public Service Board ("PSB"). Prior to constructing or developing electric facilities, GMP is required to obtain approval from the PSB in the form of a Certificate of Public Good ("CPG") under criteria set forth in Act 248 (30 V.S.A. § 248). The PSB granted a CPG for the Project in its "Findings and Order (May 31, 2011)" ("May 31 Order").<sup>4</sup>

The Defendants own a house on a 600 acre tract of land at least partially located in Lowell, Vermont. Their house is located approximately 4,500 feet from the KCW Project. It is listed for sale for \$1.2 million and has been on the market for the past four years. The Nelsons were permitted to intervene as parties in the PSB proceedings. They opposed the grant of a CPG for the Project and testified that the Project would diminish the value of their property. The

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<sup>4</sup> The May 31 Order is attached as Exhibit 3.

northwesterly boundary of the Nelsons' land is contiguous and shared with land GMP acquired and possesses pursuant to long-term leases (49.5 years) it entered to construct and operate the KCW Project.

#### **B. A Description of the Project**

The KCW Project consists of a wind powered electric generation facility with up to 63 Megawatts ("MW") of maximum capacity and associated transmission and interconnection facilities. The generation facilities consist of 21 wind powered turbines that will be situated along 3.2 miles of ridge line in Lowell, Vermont. (May 31 Order at 12). The Project's location was selected because it is a highly favorable site for wind generation of electricity. The wind turbines will be located on support towers 262 to 279 feet high at the nacelle and 459 feet high at the vertical tip of the rotor blade.<sup>5</sup> (May 31 Order at 14, ¶13). The total cost of the project to GMP is estimated to be \$136 million. (May 31 Order at 34, ¶89).

An important economic component of the Project is approximately \$47-48 million in federal PTCs that the Project will be eligible to earn over the first ten years of its operation, subject to the condition that it be operational by December 31, 2012. (Pughe Aff. ¶5). As the PSB recognized in a July 12, 2011 Order modifying a condition in the CPG, the economic viability of the Project would be placed at risk by the failure of GMP to qualify for the PTCs by achieving operation of the Project by the 2012 deadline. *Id.*

Prior to petitioning the PSB for a CPG, GMP first sought to ensure that the residents of Lowell supported the Project. On March 2, 2010, the Town of Lowell held a vote at which 78 percent of the registered voters participated, and three times as many voters supported the Project as opposed it (342-114).

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<sup>5</sup> Another aspect of the Project involves the up-grading of 16.9 miles of transmission line and associated substations.

## **C. The PSB Proceedings And The PSB Findings and Order Granting a CPG For The Project**

### **1. The Proceedings**

On May 21, 2010, GMP, Vermont Electric Cooperative, Inc., Vermont Electric Power Company, Inc. and Vermont Transco LLC jointly petitioned the Vermont Public Service Board for a certificate of public good, pursuant to 30 V.S.A. § 248, to construct up to a 63 MW wind electric generation facility and to install or up-grade associated transmission and interconnection facilities. The PSB thereafter granted permissive joinder to a number of environmental groups, adjoining landowners and landowner groups, and the Towns of Lowell, Craftsbury, and Albany. (May 31 Order at 6-7). The Defendants were among those permitted to intervene as a party. The Vermont Department of Public Service was the public's advocate in the proceedings, and the Vermont Agency of Natural Resources represented the State's interest in the environment. The PSB held a public hearing on September 23, 2010; hundreds of persons attended the hearing and 57 persons spoke. (May 31 Order at 10). All of the parties to the proceedings had an opportunity to submit written testimony and exhibits to the PSB. Technical hearings were conducted on February 3-4, 7-10, and 22-24, 2011, and the parties thereafter submitted briefs and reply briefs.

### **2. The PSB's May 31 Order**

On May 31, 2011, the PSB issued its 157 page May 31 Order concluding that the Project, subject to the conditions imposed by the PSB, will promote the general good of the state. It accordingly granted a CPG permitting the Project's construction and operation.

The PSB found that the Project was necessary to meet the need for present and future demand for electric service and would provide GMP and the Vermont Electric Cooperative with a source of long-term stably priced power. Furthermore, it stated that the Project would assist

GMP in meeting the legislatively set goal of satisfying 20 percent of the State's energy demand from renewable resources and would not emit greenhouse gases. (May 31 Order at 3, 26-28).

The PSB also found that the Project would provide a significant economic benefit to the State by, among other things, adding \$50 million to the State's total economic output during its development phase, 700 full time equivalent job years during construction (with 80 percent being in Orleans County) and 30 in-state jobs during operation (15 to be in Orleans County). In addition, it would generate initial direct state and local property tax payments of nearly \$1 million annually and \$2 million in tax revenues for the General and Transportation Funds during construction and more than \$13 million over the 25 year life of the Project. (May 31 Order at 32-33, ¶84). The net present value of education property taxes and non-tax payments to be made by GMP to Lowell and other Towns is \$10.8 million. (May 31 Order at 35, ¶99).

GMP agreed to, and the PSB imposed still more, conditions and restrictions designed to benefit the environment or to mitigate the Project's effects on sound, wildlife, and aesthetics. One PSB imposed condition was there could be no blasting on the Project until it approved a blasting plan to be submitted by GMP, and it required that the blasting contractor use proper techniques and mats where appropriate to limit the occurrence of flyrock. (May 31 Order at 47-49).

#### **D. The Approved Blasting Plan, Information Meetings and The Start of Construction**

MDB, GMP's blasting subcontractor,<sup>6</sup> developed a blasting plan approved by the PSB on July 29, 2011. Among other things, the plan limited blasting to between 9 a.m. and 5 p.m. on non-holiday, week days, required that persons with land one-half mile from the blasting be

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<sup>6</sup> MDB is a sub-contractor to J.A. McDonald, Inc., which has a contract with Reed & Reed, Inc. to perform earth moving and site work on the Project. Reed & Reed, Inc. is GMP's general contractor for the Project.

notified each day by phone of the location and estimated time of the blasting, and provided for performance of a security check to ensure no persons were present in the area.

The blasting will occur once or twice daily (generally in the afternoon) beginning in the area near the Defendants' boundary on October 17, 2011. Prior to the blasting, a whistle audible for a distance of at least one-half mile will be sounded as follows: three whistles sounded 5 minutes before blasting, two whistles sounded one minute before blasting and one whistle sounded for an "all clear." Signs will be posted in the blasting areas and on access routes to those areas warning of the danger and explaining the meaning of the whistles and the need to keep 1000 feet in distance from the blasting. (Pughe Aff. ¶¶10-11). MDB will use directional blasting and blasting mats (12 feet by 24 feet rubber & steel cable mats weighing about 11,000 pounds each) where necessary to minimize flyrock. (Blaisdell Aff. ¶¶ 31, 47).

Informational meetings were scheduled for August 4 and 18 in the Lowell Firehouse and notices of the meetings were sent by certified mail to all residents living within one-half mile of the blasting area. The Nelson Defendants attended the meetings. (Pughe Aff. ¶¶8, 16). MDB provided the above described information and more at the meetings and fielded questions from the attendees.

Construction on the Project began on September 1. The earth moving contractor has completed the access road leading to the ridge line, and it and MDB are scheduled to commence construction and blasting on the 3.2 mile crane road on October 17. (Pughe Aff. ¶¶6, 15). The construction of the crane road requires a linear approach, as the earth movers and blasting team must build their way along the crane road in order to move their equipment forward. (Blaisdell Aff. ¶¶ 22-24).

**E. The Defendants' and Their Co-Conspirators' Actions To Derail Construction Of The Project On GMP's Leasehold Land By Interfering With MDB's Performance of Its Blasting Contract**

In a letter dated September 28, 2011 and addressed to Mary Powell, GMP's President and CEO, Defendants wrote that, "our guests will be camping, recreating and hunting in that area [their northwesterly boundary] for the foreseeable future" and "we trust you will be respectful of their presence and particularly their safety."<sup>7</sup> The letter continued, "[w]e would appreciate receiving written confirmation that that no flyrock from your blasting will trespass or intrude on our property and that nobody will be endangered." In a news article published the next day, it was reported that in an interview with Don and Shirley Nelson, they said they had invited campers to pitch tents on their property within the safety zone surrounding where some blasting will occur. Shirley Nelson was quoted as saying: "Friends and neighbors have decided that it's time that somebody just said something. We couldn't think of any other way to do it. We have been ignored through this whole process."<sup>8</sup>

Tents were erected and persons have been camping on the northwesterly edge of the Defendants' 600 acre property for the past week. They are located nearly one mile and a 40-60 minute hike from the Defendants' house, but only about 100 feet from a blast site on GMP's land. In another news article dated October 5, it was reported that Defendants and their co-conspirators said the purpose of the campsite is to stop the blasting, and "the hope is that the campsite is so close to the project that contractors won't be able to safely detonate the high explosives necessary to build a wide crane path" that must be built to erect the turbines.<sup>9</sup> Don Nelson, who appears at the campsite in photographs accompanying the article, is reported as

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<sup>7</sup> The letter was signed by both Nelson Defendants and is attached as Exhibit 4.

<sup>8</sup> Boomerberg Business Week (AP), Anti-wind Occupation Begins on Vt. Lowell Mountain, (Sept. 29, 2011). A copy of the article is attached as Exhibit 5.

<sup>9</sup> The Chronical, Campers Hope to Stop Lowell Mountain Blasting, p. 16 (Oct. 5, 2011). A copy of the Article is attached as Exhibit 6.

saying that "high explosives require a 750 foot safety zone, free of people, before they can be set off [and] the camp site is well within that limit." The article reports that the campers were nine Sterling College students and Craftsbury resident, Ann Morse, whose companion, Kevin Gregoire, has accompanied Sterling Students on three winter camping trips as part of a Sterling course/program named, "Expedition." In a Channel 44 television news clip, an unidentified woman was interviewed (apparently inside the Nelson's house) and said that she and others would be camping at the site for the entire winter and would stay through any blasting.

**F. The Presence Of Persons Along The Nelson Boundary Will Delay Completion Of The Blasting By Approximately Six Weeks And Significantly Increase The Costs Of Construction**

MDB's present blasting plan involves using directional blasting and blasting mats where necessary to limit flyrock. MDB is the largest blasting contractor in the Northeastern United States and has extensive general experience in controlled blasting and specific experience with wind generation projects. (Blaisdell Aff. ¶¶ 2-13). A blasting mat is a 288 square foot rubber and steel mat weighing about 11,000 pounds. (Blaisdell Aff. ¶47). Directional blasting involves shaping the rock face in a manner that will focus the explosive gases and blast debris in a direction away from an area to be avoided. (Blaisdell Aff. ¶¶30-31). On occasion, an unobservable fissure in the rock, running in a direction not indicated by the rock grain, will permit the explosive gases to vent and expel flyrock in an unexpected direction. (Blaisdell Aff. ¶34). Based upon its examination of the site and extensive experience with blasting, MDB believes the current plan is likely to keep flyrock confined to GMP's property. (Blaisdell Aff. ¶33). However, because human safety is of much greater importance than property damage, MDB requires that all non-blasting personnel be cleared from a safety zone extending 1000 feet from the blast point. (Blaisdell Aff. ¶36).

Areas depicted by the red shading on the diagram attached to the Blaisdell Affidavit, identify blasting points along the crane road that will be located significantly less than 1000 feet from points along the Nelson's westerly property line. Attachment 1 to the Pughe Affidavit shows actual distances between blasting areas on the crane path and the Nelson boundary. In order to guarantee the safety of persons at the property line, MDB must use substantially more blasting mats in additional areas, reduce its blasting charges, drill more charge holes and rely on a greater number of blasts with smaller charges. (Blaisdell Aff. ¶¶37-52). The degree of precautions that must be taken increases the closer a person is located to the blast, *e.g.*, additional layers of matting and smaller charges. There is an estimated 330,000 cubic feet of rock to be removed by blasting located within 1,000 feet from the Nelson boundary.

Mr. Blaisdell estimates that the presence of the Nelsons and their "guests" on the boundary line will delay completion of blasting on the crane road by nearly six weeks, more than doubling the current time it will take to complete that blasting (from the currently estimated 5.5 weeks to 11.5 weeks). (Blaisdell Aff. ¶¶42-54). MDB will have to purchase 50 additional blast mats and significant additional blasting crew days will be necessary too. Because construction of the crane road must occur before other Project work is performed on the ridge line, a day's delay in blasting necessarily results in a day's delay in the dates the Project becomes operational (Pughe Affid. ¶6). It is estimated that an additional \$1.4 million in expenses will be incurred if it is necessary to adopt measures to safeguard person's present along the Nelson boundary during blasting. (Pughe Aff. ¶18).

## **II. THE STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Preliminary injunctive relief should be granted under V.R.C.P 65(b) if the movant establishes that there is an imminent threat it will suffer an irreparable injury in the absence of

the injunction and that it has a likelihood of success on the merits. See *Campbell Inns v. Banholzer, Turnure & Co.*, 148 Vt. 1, 4, 7-8 (1987); *Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment*, 138 Vt. 250, 256-257 (1980); see also *Rosso-Lino Beverage Distributors, Inc. v. Coca Cola Bottling Co. of NY, Inc.*, 749 F.2d 124, 125 (2d Cir. 1984) (cited with approval by *Campbell Inns*, 148 Vt. at 7). A threat is imminent if it is present now even though the harm may not be felt until much later. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996).

Injunctive relief, in the form of a temporary restraining order ("TRO"), may be granted on a temporary basis without notice to the adverse party where, "it clearly appears from specific facts shown by affidavit or by the verified complaint that irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." V.R.C.P. 65(a).

Generally, "to determine whether an injunction is appropriate, the court must weigh the relative hardships on the parties, looking at . . . the relative injury [including the public interest] to be cured as compared with the hardship of injunctive relief." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000); accord *In re J.G.*, 160 Vt. 250, 255 n.2 (1993) (noting that "the factors considered for issuance of preliminary injunctions are (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest.").

The existence of irreparable harm is often the decisive factor in determining whether preliminary injunctive relief is appropriate. The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction. *Campbell Inns, Inc.*, 148 Vt. at 7. Where the harm suffered is purely economic, irreparable harm will be found if such damages are

“clearly difficult to assess and measure.” *Danielson v. Local 275, Laborers Int’l Union of North America*, 479 F.2d 1033, 1037 (2d Cir. 1973); *Ecolab, Inv. v. K.P. Laundry Machinery, Inc.*, 656 F. Supp. 894, 899-900 (S.D.N.Y. 1987) (irreparable harm shown because extent of business loss “may be very difficult to measure to the point that [plaintiff] might not be fairly compensated if left to a damage remedy”).

Similarly, economic harm is deemed irreparable if recovery of a monetary damage judgment is likely to be uncollectible. *See, e.g., United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1991) (irreparable harm where principles of sovereign immunity injected doubt into whether monetary damages could be recovered); *see also Zeltser v. Regal V World-Wide Holdings, Inc.*, 111 F.3d 124, 1997 WL 176851, \*1 (2d Cir. 1996) (threatened injury may be irreparable if movant would be unable to collect on judgment).

V.R.C.P. 65(d) provides that every TRO and injunction is binding upon the parties, their agents, attorney and all persons in active concert or participation who receive actual notice of the order by service or otherwise. *See Vermont Women’s Health Center v. Operation Rescue*, 159 Vt. 141, 146 (1992) (actual notice rather than service necessary to ensure courts can enforce their orders against unnamed parties acting in concert with defendant and violating the rights of others).

III. **PLAINTIFF'S MOTION FOR A TRO AND PRELIMINARY INJUNCTION SHOULD BE GRANTED BECAUSE IT HAS DEMONSTRATED: A LIKELIHOOD OF SUCCESS ON THE MERITS, IMMEDIATE AND IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED, A BALANCE OF THE HARDSHIPS FAVORS GRANTING THE RELIEF, AND INJUNCTIVE RELIEF IS CONSISTENT WITH THE PUBLIC INTEREST.**

A. **Plaintiff Is Likely To Succeed On The Merits Of Both Its Nuisance and Intentional Interference With Contract Claims.**

**1. Nuisance**

The Nelson Defendants actions in occupying, and in allowing, encouraging and aiding others to occupy, their lands solely in order to stop MDB's blasting and the construction of the Project clearly constitutes a nuisance.

The tort of nuisance protects a plaintiff's intangible right to use and enjoy its land. Dobbs, The Law of Torts §398 (2001 5<sup>th</sup> ed.). A private nuisance "is a condition or activity that [substantially] interferes with the possessor's use and enjoyment of her land, typically by incorporeal or non-trespassory invasions." *Id.* at § 399, at 618. In most nuisance cases, the condition or conduct interfering with another's use of property takes place on the interferor's own property. *See generally*, Dobbs, The Law of Torts §398.

conduct must be more than a mere use

In order to prevail upon a claim of nuisance, the Plaintiff must demonstrate that there is a substantial interference with his use and enjoyment of his property and the defendant's activity causing the interference is unreasonable. *Trickett v. Ochs*, 2003 Vt. 91, ¶16 (Determining whether there is a nuisance requires the court to determine the extent of the interference and the reasonableness of the challenged activity). A possessor of land upon which a third person carries on an activity creating an actionable nuisance is subject to liability if: (a) the possessor knows or has reason to know the activity is being carried on and involves an unreasonable risk of causing

the nuisance and (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance. *Restatement (Second) Torts* § 838.

#### Determining the Extent of the Interference

The *Restatement (Second) of Torts* ¶827 lists factors courts should consider in determining whether the interference is substantial: “(a) the extent of the harm; (b) the character of the harm; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm. In this case, the Defendants’ actions on their own property not only will delay Project operation and cause substantial monetary damage to GMP, it threatens the economic viability and existence of a \$136 million Project that the PSB has already determined will promote the public good in a variety of ways. In short, the magnitude and nature of the harm to GMP and the public is huge and affects both private and public interests. Even if the Defendants’ unabated nuisance does not stop the Project from being built and operated, the nuisance will have greatly increased the costs to construct it and produce power there. The potential losses, in addition to monetary damages, includes the loss of a renewable source of stably priced electricity whose generation is relatively free of carbon emissions. In addition, public tax revenues and the educational and other services they fund will be lost, and the loss of a significant number of jobs would be placed at risk.

#### Determining Unreasonableness

The second inquiry in a nuisance case is the reasonableness of the defendant’s conduct, which must be assessed “in light of the particular circumstances of the case.” *Trickett v. Ochs*, 2003 VT 91, ¶ 37. “Even when engaged in a lawful business use, the owner of the business must act in a reasonable manner so as not to unreasonably interfere with the rights of adjoining

property owners.” *Trickett*, 2003 VT 91, ¶ 37. In *Trickett*, the court emphasized that pursuits with clear economic value and social utility must still be conducted in a reasonable “manner, at the place, and under the circumstances in questions.” *Id.*

More pertinently to the facts of this matter, however, is the established principle that an activity interfering with the plaintiff’s use of its property is unreasonable if either: 1) the harm could be avoided without undue hardship to the interferor/defendant or 2) the interferor’s activity is undertaken for the sole purpose of causing harm to the plaintiff. *See Trickett*, 2003 VT 91, ¶37 (“Irrespective of the utility of the land use, the question may come down to whether the activities causing the harm are reasonably avoidable”); Restatement (Second) of Torts ¶ 830 (1979) (A substantial interference is unreasonable if the interferor could “avoid the harm in whole or in part without undue hardship”); *see also Coty v. Ramsey Assoc., Inc.*, 149 Vt. 451, 458 (1988) (defendant’s creation of a condition on its land whose sole purpose was to substantially interfere with neighbors use and enjoyment of their land was malicious and not justifiable on social utility grounds).

but mere  
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land cannot  
be a nuisance

In the instant matter, the Defendants’ actions are motivated solely by their desire to destroy GMP’s Project and, just as clearly, the Defendants could easily avoid causing the nuisance by staying a thousand feet from the blasting area for the short duration of the blasting that will occur each day over a period of about two weeks.

In a published Pennsylvania case with facts strikingly similar to those involved here, the court held that a person who takes up a position along his property boundary in order to prevent approved blasting on a neighboring property commits a nuisance that may be preliminarily enjoined. *See Brewster v. Highway Materials Inc.*, 7 Pa. D&C 5<sup>th</sup> 514, 2009 WL 2055951 (Pa. Ct. C.P. 2009), *aff’d*, 987 A.2d 231 (Pa. Commw. Ct. 2010). (Attached as Exhibit 7). In

*Brewster*, a quarry operator obtained government approvals to excavate stone from a portion of the quarry adjacent to the defendants' residential property by blasting within twenty-five feet of the boundary with defendants' property. *Id.* at 517-19. Just before the blasting was to start, a defendant positioned himself just inside his property boundary with the quarry in the immediate vicinity of the blasting and refused to move to a safe location. *See id.* at 520. The quarry operator sued the defendants for private nuisance and moved to enjoin them from placing themselves on their own property in a position of personal danger during blasting. *Id.* at 520-21.

The Pennsylvania trial court granted the request for a preliminary injunction and ordered, *inter alia*, that:

If plaintiff is blasting adjacent to the defendants' property, the defendants, their family or any other third party acting on their behalf, shall remain at a location of at least 300 or more feet from the location where the blast shall occur on plaintiff's property from the time that the explosives on plaintiff's property are wired for detonation until the blast is set off.

*Id.* at 516 n.2.

In granting the preliminary injunction – a decision affirmed on appeal -- the *Brewster* Court found that:

Clearly, [plaintiff] established the requirements of private nuisance. [Defendant] deliberately took up positions on his property line with the express intention of preventing [plaintiff] from proceeding with their plans. [Defendants] have intentionally interfered with the lawful use of the adjoining property and with the lawful activities of the property owner.

*Id.* at 540. The *Brewster* Court continued:

There could not be a clearer illustration of an individual impairing another's private right of use or enjoyment of land than the [defendants'] intentional actions. Neither is there a clearer demonstration of intentional and unreasonable interference with the quarry's legal use of its land than that of the [defendants] . . . [The Department of Environmental Protection] designated this situation as extreme where [defendant] deliberately exposes himself to potential blasting hazards. The risk that [defendant] represents cannot be ignored.

*Id.* at 541. The court further found that if the quarry operator were not allowed to blast and mine near the defendants' property, it stood to lose approximately \$15 million, the quarry would close, and twenty-five employees would lose their jobs. *Id.* at 542, 543-44. Balanced against this irreparable harm, the court found that the 300 foot safety zone would constitute a "relatively minor" interference with the defendants' use of their property that would not require them to even temporarily vacate their home. *Id.* at 542, 525.

## 2. Intentional Interference with Contract

Vermont's courts recognize the tort of intentional interference with contract as set forth in the Restatement (Second) of Torts §766 (1965):

One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

*William v. Chittenden Trust Co.*, 145 Vt. 76, 80 (1984) (quoting Section 766); accord *Gifford v. Sun Data, Inc.*, 165 Vt. 611, 612 (1996).

The element of intent can be shown by proof that the defendant desired the interference or knew that interference was substantially certain to occur even if the defendant also acts for some other purpose. *Williams*, 145 Vt. at 81. There are no specific requirements as to the means of interference; it may be accomplished by force, threats, depriving the contractor of the ability to perform, promises, or other inducements. See Restatement §766, cmt k.

Prevailing on a contract interference claim requires proof that the interference was improper, which requires courts to consider the factors set forth in Restatement §767. These include: a) the nature of the actor's conduct; b) the actor's motive; c) the interests of the plaintiff; d) the interests sought to be advanced by the actor; e) the social interests in protecting

the actor's freedom of action and the contractual interests of the plaintiff; f) the proximity or remoteness of the actor's conduct to the interference; and g) the relations between the parties. "An actor has no legal right to invade the contractual relation of others solely to promote his own financial interests." *Sun Data*, 165 Vt. at 612.<sup>10</sup>

In this matter, the Defendants have undertaken their conduct solely for the purpose of interfering with the performance by GMP's construction contractors of their contractual obligations to use blasting and construct the Project. It is an illegitimate, extra-legal act designed to circumvent the Vermont PSB's grant of a CPG. It is clearly wrongful for the Defendants and their cohorts to resort to vigilantism to interfere with and destroy GMP's valuable and lawfully created contract rights because they disagree with the PSB's grant of a CPG or believe available legal processes are inadequate.<sup>11</sup> Nor do the Nelsons, as stated in *Sun Data*, have a right to intentionally interfere with GMP's contract rights in order to further their own economic interests. Defendants may not arrogate to themselves decisional authority over whether GMP's Project can be built, especially when that authority has already been committed to Vermont's courts and administrative agencies.

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<sup>10</sup> Vermont courts also recognize the tort of intentional interference with prospective business, economic or contractual relations. To prevail on such a claim, the plaintiff must show:

the existence of a valid business relationship or expectancy; 2) knowledge by the interferor of the relationship or expectancy; (3) an intentional act of interference on the part of the interferor; 4) damage to the party whose relationship or expectancy was disrupted; and 5; proof that interference caused the harm sustained.

*J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 245, ¶21 (citing *Sun Data*).

<sup>11</sup> The Nelsons are currently appellants in appeals to the Supreme Court challenging the PSB's decision to grant a CPG for the Project.

**B. There Is An Imminent Threat Of Irreparable Harm If A Temporary Restraining Order And A Preliminary Injunction Is Not Granted.**

There is an imminent threat that the Defendants' conduct will result in irreparable harm to GMP and the public interest in the absence of the requested injunctive relief. GMP's contractors are scheduled to begin blasting within 1,000 feet of the Nelson camp on October 17, and harm (delay and added costs) will begin to be felt that day. (Pughe Aff. ¶¶6-7). Because GMP will begin to suffer that harm on October 17 when the blasting is to begin, it requests that a TRO be issued without notice until the Court can conduct a hearing on the preliminary injunction motion.

A delay in the construction of the Project will place the economic viability of the entire Project at risk by threatening that the Project will not be operational by 2012 and qualify for the PTCs. (Pughe Aff. ¶5). The injury that will be inflicted upon both GMP and the public is not compensable in money damages. From GMP's standpoint, the total loss of a large wind generating facility planned to operate for at least 25 years is the same in nature as the entire loss of an inn business, which the court in *Cambell Inns*, 148 Vt. at 4, 7-8, found constituted irreparable harm. Additionally the loss of a substantial power source (63 MW) fueled by a non-polluting, CO<sub>2</sub> free source will undermine the legislatively set goals and GMP's own goals of increasing the share of its power supply provided by renewable energy and new renewable energy sources. Losing those sources may result in a range of legal consequences for GMP not subject to redress by damages. (30 V.S.A. §§8001, 8004-05).

GMP's money damages from losing a stable power source of "new renewable power" expected to operate for at least 25 years would be virtually impossible to calculate with the certainty necessary to support a damages judgment, which constitutes irreparable harm. See *Danielson*, 479 F.2d at 1037; *Ecolab*, 656 F.Supp. at 899-900. Money damages that are

uncollectible are inadequate and constitute irreparable harm. *Zeltser*, 111 F.3d 124; *US v. New York*, 708F.2d at 93. Thus, even if the Project can be operated economically without the PTCs, the loss of \$48 million in PTCs and added construction and development costs almost certainly will be too great to be satisfied from Defendants assets.

The loss of the Project will also inflict irreparable harm upon the public, as evidenced by the PSB's finding that the Project will benefit the general public good. Among other things, the jobs that will be created by the Project will be lost, the millions of dollars in taxes paid into the State's general and transportation fund and its educational fund will be lost, the State's interest in increasing use of renewable energy sources and those that do not emit greenhouse gases will be frustrated, and the benefits to the public of securing a needed and long-term source of stably priced power will be jeopardized. None of those losses can be adequately compensated by money damages and therefore constitute irreparable harm.

**C. A Balancing Of The Hardships Favors Granting The Requested Injunction.**

"[T]o determine whether an injunction is appropriate, the court must weigh the relative hardships on the parties, looking at . . . the relative injury [including the public interest] to be cured as compared with the hardship of injunctive relief." *Okemo Mountain, Inc.*, 171 Vt. at 212

In this case, the harm to GMP and the public that will occur in the absence of the requested injunction is manifestly severe; issuing the injunction will at most require only that Defendants leave the portion of their property located in the 1,000 safety zone for the short period two hours or less each day during the few weeks when there will be blasting in that area. (Pughe Aff. ¶¶9, 15). Indeed, but for their desire to destroy the Project, Defendants and their "guests" would likely not even be present in this remote, difficult to access portion of Defendants' land. In weighing the delay and increased costs caused by the Defendants' presence

on the boundary against the de minimus or non-existent burden the TRO will impose on Defendants, it is clear that the balance should be struck in favor of issuing the requested injunctive relief.

**D. The Requested Injunction Is Consistent With The Public Interest.**

The loss of a Project that the PSB has found promotes the public good is inimical to the public's interest.

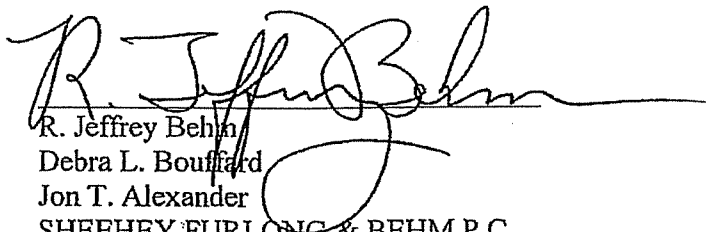
**IV. CONCLUSION**

For all of the above reasons, it is respectfully submitted that this Court should issue a temporary restraining order and preliminary injunction as set forth in the attached proposed TRO and Preliminary Injunction Order.

Dated at Burlington, Vermont this 13<sup>th</sup> day of October 2011.

Green Mountain Power Corporation

By:



R. Jeffrey Behm  
Debra L. Bouffard  
Jon T. Alexander  
SHEEHEY FURLONG & BEHM P.C.  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402  
(802) 864-9891

# EXHIBIT 9

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 256-10-11 Oscv

Green Mountain Power Corporation  
Plaintiff

v.

Donald and Shirley Nelson  
Defendants

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VERMONT SUPERIOR  
COURT  
ORLEANS UNIT

PRELIMINARY INJUNCTION

This matter came before the court on Plaintiff's Motion for a Preliminary Injunction. Pursuant to V.R.C.P. 65(b), Defendants received notice and the court held hearings on October 20 and 25, 2011 at which Plaintiff and Defendants presented evidence. Having considered the evidence as well as the parties' various motions, supporting memoranda of facts and law, affidavits, and exhibits, the court GRANTS the requested Preliminary Injunction.

The court finds, based on the evidence presented by both parties, that Plaintiff will sustain irreparable harm if an injunction is not issued. The court finds that Defendants Donald and Shirley Nelson and other persons acting in concert and participation with Defendants are improperly interfering with Plaintiff's development of a wind generation project in Lowell, Vermont, known as the Kingdom Community Wind Project (the "Project"). Specifically, the evidence shows that the Nelsons and those acting in concert and participation with them are intentionally occupying the northwesterly boundary of the Nelsons' property adjoining the Project in close proximity to blasting on GMP property where the Project is being constructed.

The purpose of Defendants and those acting in concert and participation with them is to 1) place themselves far inside a 1,000 foot safety zone in order to create a risk to human safety that will prevent the blasting from taking place, and thereby 2) cause irreparable harm to GMP and the public. Plaintiff has presented sufficient evidence that it is likely to succeed on the merits of its nuisance and contract interference claims, and that issuing the below order will impose no or little cost on Defendants.

IT IS HEREBY ORDERED:

Pursuant to V.R.C.P. 65(d), that Defendants Donald and Shirley Nelson, and any and all of their agents, employees, attorneys, invitees, licensees, permittees and all and any other persons acting in concert or in participation with Defendants Donald and Shirley Nelson are ENJOINED, PROHIBITED and RESTRAINED FROM ENGAGING IN ANY AND ALL OF THE FOLLOWING:

Ex 9

1. Being present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land for two hours before blasting until the all-clear whistle is sounded.
2. Inviting, encouraging or permitting other individuals to be present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land for two hours before blasting until the all-clear whistle is sounded.

IT IS FURTHER ORDERED, that Donald and Shirley Nelson permit GMP to post signs warning of the blasting and giving notice of this Order on their property on access routes to the above described northwesterly boundary area and at visible locations in that boundary area. GMP shall delineate the 1,000-foot safety zone for each blast and shall properly post the 1,000-foot safety zone to warn the public of any blasting. GMP shall provide law enforcement with notice of blasting sufficient to allow for execution of this order.

Pursuant to V.R.C.P. 65(c) the court waives any security requirement. A wrongful issuance of an order will pose little or no cost or burden on Defendants, and Plaintiff has resources to pay for any such minimal costs.

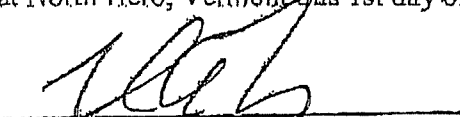
The Orleans County Sheriff, with any assistance provided by other County Sheriff Offices, and the Vermont State Police are authorized to arrest and remove any individuals within 1,000 feet of that boundary within the specified two hour period. The Sheriffs' Offices and Vermont State Police are authorized to enter onto the land of Donald and Shirley Nelson within 1,000 feet of the Green Mountain Power Project boundary to effectuate the implementation and enforcement of all aspects of this Order.

The Sheriffs' Offices and the Vermont State Police shall read this Preliminary Injunction out loud and provide or make available a copy to persons on the Nelsons' land within 1,000 feet of the boundary. Persons who refuse to move away from the boundary as directed by this order shall be removed, arrested, and after being properly identified, issued a citation to appear before this court at the earliest possible date to receive Notice of the charge of Criminal Contempt, pursuant to V.R.Cr.P. 42(b), and to be served with any process for civil contempt to be served by Plaintiff pursuant to 12 V.S.A. § 122.

**VIOLATION OF THIS ORDER MAY RESULT IN PROSECUTION FOR  
CRIMINAL CONTEMPT BY FINE, IMPRISONMENT, OR BOTH.**

This order shall expire at 5 P.M. on Friday, December 2, 2011.

Dated at North Hero, Vermont this 1st day of November, 2011.

  
\_\_\_\_\_  
Hon. Martin A. Malley,  
Superior Court-Orleans Unit

# **EXHIBIT 10**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

GREEN MOUNTAIN POWER )  
CORPORATION, )  
Plaintiff, )

v. )

DONALD AND SHIRLEY )  
NELSON, )  
Defendants. )

AFFIDAVIT OF MARGOT KEMPERS

NOW COMES Margot Kempers, upon oath, and deposes and states as follows:

1. I am a part-time resident of Albany, Vermont and I am a part-time resident of Cambridge, Massachusetts where I live with my husband, Fred Scholz. I am a retired college professor and my husband owns his own business but is no longer working full time.
2. I have read the affidavit of my husband and can hereby affirm that the contents are true and were witnessed and participated in by me, except that I did not hear his discussion with the man in the hard hat as I was standing further away.
3. I did make observations that my husband did not make. In particular, after my husband suggested that I stand behind a tree, I did so. Then, about a minute after hearing the two horn blasts, an enormous explosion went off, shaking the ground I was standing on.
4. As I stood there and closely upon the sound and feel of the explosion, I saw what appeared to be a fragment of a rubber mat land and bounce on the ground with a

Ex 10

distinct thud and come to rest.

5. I also heard something land behind me with a thud.
6. Within seconds of the blast, I could hear the sound of debris falling through the branches of the trees. The bulk of the debris was very fine particles, but I also found several larger chunks of freshly chipped rocks that were lying on top of the leaves and appeared very different from their surroundings.
7. Once I heard the horn blast that I understood to mean that the blasting was over, I turned to look at the area where I had heard the thud. I saw a gray colored chunk of rock that had rough edges and appeared to be freshly created. It was lying on top of the leaves and was the source of the thud sound I had heard immediately after the blast.
8. One of the other persons who were in the area came over and took a photograph of the rock chunk and put some sticks in the ground with a ribbon to mark the rock.
9. I looked further downhill and found a very similar, nearly identical rock chunk having the same features and color of the first chunk. This second chunk was also lying on top of the leaves and had a fresh cut appearance showing no signs of any weather or wear and not fitting with its surroundings.
10. I have looked at the photographs attached and can confirm that these photos depict the rubber mat fragment that I saw coming to rest immediately after the blast and the rock chunks that I have described above. All were located on the Nelsons' side of the tape and signs at the mountain top.

Margot Kempers  
Margot Kempers

STATE OF Massachusetts  
COUNTY OF Middlesex, SS.

At Cambridge, in said County, this 30<sup>th</sup> day of October, 2011, personally appeared Margot Kempers, under oath, and she swore to the truth of the foregoing.

Before me, [Signature]  
Notary Public

My Commission Expires: 3/19/2015

# **EXHIBIT 11**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

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

AFFIDAVIT OF R. FRED SCHOLZ

NOW COMES R. Fred Scholz, upon oath, and deposes and states as follows:

1. I am a part-time resident of Albany, Vermont where my wife and I have a home, and I am a part-time resident of Cambridge, Massachusetts where we also have a home. I am a semi-retired owner of a cleaning business, and my wife is a retired college professor. We built our home in Albany about 12 years ago, but have had associations with the Albany, Vermont area for more than 40 years.
2. On 10/28/11, my wife and I decided to take a first-hand look at the work Green Mountain Power was doing on the mountain and to visit the area where the clearing and blasting was occurring to see for ourselves, up close, the impact on Lowell Mountain. This was our first visit to the area where Green Mountain Power has been clearing an blasting.
3. We had heard that a court had issued an order against the Nelsons, but did not know the details of the order and had not read it ourselves.
4. We are familiar with the Nelson property. We decided that we would not go to

Ex 11

the Nelson property as we were not sure we would be permitted to park at the Nelsons' home and did not want to cause any difficulties for the Nelsons.

5. We drove past the Nelsons' home where there was a field near the Bayley-Hazen Road where people were parking. We parked there as well. The field appeared to allow us access to the mountain.
6. We hiked though the field and through woodlands, finding some trails and doing some bushwacking and then found an old logging road that led us near to the top of the mountain where the clearing and blasting was taking place. The hike took us about 45 minutes.
7. At no point during our walk up the mountain or when on top of the mountain did we see any signs warning us that we were not permitted to walk or stand in any particular area or placing any other restriction on our actions.
8. We never saw an order of the court, and no person read or warned us of the contents of an order of the court.
9. We were generally aware of the issues between the Nelsons and Green Mountain Power, and we had heard that a court had issued an order, but we had also heard that the county sheriff had said the order was not enforceable.
10. We were not aware whether an order was still in effect. We had heard that law enforcement officers had met with the judge to request that a new order be issued or for some form of clarification, but we had not heard any further reports as to whether a new order had been issue or whether the first order remained in effect or was on hold until the judge decided whether to issue a new or modified order.

In any event, we had not read any order and did not know the particulars.

11. We had heard mention of a 1,000 yard area or distance, but did not know the particulars or the significance of that and did not know where it started or ended. We expected that if there was such an area it would be marked when we got to the top of the mountain.
12. We had no desire to violate an order of the court or to enter into a prohibited area. We had no reason to believe that we had done so.
13. As we approached the summit, we could begin seeing through the trees some of the clearing and the results of blasting that had already taken place. There was no person that we saw or could identify as being from law enforcement or from Green Mountain Power in the area where we were standing, and certainly no one told us that we were not permitted to be there or that we should not observe the construction site from that vantage point.
14. I saw a man wearing a hard hat in the area ahead of us where there were tapes and ribbons. I spoke to him and asked him whether we were on the right side of the line. He said we were. I understood this to mean that we were permitted to be and stand in the area where we were standing.
15. As we were standing in an area where we could see through the trees in front of us to an area that appeared to be the area that had been cleared, we could see a line of tape and some signs. We then heard three horn blasts in quick succession. I saw a sign that explained what the horn blasts meant. The three horn blasts meant that a blast was going to take place in about 5 minutes.

16. I told my wife that she should get behind a tree, and I got behind a tree myself.
17. There were no markings that we could see that indicated any area where we were not permitted to be or to cross over except for the tape and signs ahead of us. We did not go past those signs and tape and assumed that they were the demarcation of the 1,000 foot area, if there was one.
18. Shortly thereafter, we heard two horn blasts which we understood to mean that the blast would take place quite soon.
19. Shortly after that, likely about a minute later, a thunderous blast shook the mountain and the ground we were standing on.
20. Very close on the heels of the blast we could hear and feel particles moving through the trees. They were more than dust, but smaller than pea size. I felt some of the particles, which I will refer to as blast debris, in my hair. It sounded like rain as it came through the tree branches.
21. After we heard another horn blast which we understood meant that any danger from the blast was over, we looked around and saw a fragment of blasting mat that looked like part of a rubber tire lying on the ground. My wife also found lying close to where she had been standing several larger chunks of stone that looked like they had been freshly chipped. They were laying on top of the matted leaves and appeared to be fresh cut and not previously exposed to wear or weather.
22. There were other persons in the area, and one or more of them took photographs of the stones and of the rubber tire. Those photos are attached and they accurately

depict the stones and fragment of blast mat that we observed immediately after the blast.

23. I can confirm by what we saw and felt that debris from the blast, including a fragment of a blast mat and small chunks of stone from the blast area as well as smaller particles were projected onto the Nelson property where we were standing when the blast occurred.

R. Fred Scholz  
R. Fred Scholz

STATE OF Massachusetts  
COUNTY OF Middlesex, SS.

At Cambridge, in said County, this 30<sup>th</sup> day of October, 2011, personally appeared R. Fred Scholz, under oath, and he swore to the truth of the foregoing.

Before me, [Signature]  
Notary Public

My Commission Expires: 3/19/2015

# **EXHIBIT 12**

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. \_\_\_\_\_

GREEN MOUNTAIN POWER  
CORPORATION,  
Plaintiff,

v.

DONALD AND SHIRLEY  
NELSON  
Defendants.

AFFIDAVIT OF STEPHEN BLAISDELL

I, Stephen Blaisdell, after having been first duly sworn, on oath depose and say as follows:

1. I am personally familiar with the facts set forth in this Affidavit. If called to testify, I could and would testify competently as to the facts set forth herein.
2. I am Vice President of Engineering for Maine Drilling & Blasting, Inc. ("MDB") and have been employed by MDB since May 2000.
3. MDB is engaged in the planning and performance of controlled explosive blasts for the construction of highways, quarries, utility infrastructure, harbors, commercial buildings, residences, and other forms of development.
4. I am a licensed Professional Engineer in the State of Maine and hold a bachelor's degree in Civil Engineering from the University of Maine.
5. I have 36 years of experience in the construction industry and 11 years of experience in the controlled explosive blasting field.

Ex 12

6. I am in charge of MDB's Engineering and Estimating Department. I have overall responsible for estimating the time, labor, materials and equipment that will be required to make sure that MDB can blast each project in a safe manner.
7. MDB is headquartered in Gardiner, Maine and is, by most measures, the largest blasting contractor in the northeastern United States.
8. MDB performs approximately 7,000 controlled blasts each year and has performed over one million controlled blasts since its founding in 1966.
9. MDB has substantial experience in performing the blasting associated with the development of wind power projects.
10. Specifically, MDB has performed the blasting necessary to construct access roads and prepare foundations for wind turbine towers on at least nine completed wind power projects in Maine, Massachusetts, Rhode Island and New York.
11. These projects represent approximately 90 percent of completed wind power projects in the northeastern United States.
12. I have been personally involved in the planning and estimating MDB's blasting for each of these nine completed wind power projects.
13. I have also been personally involved in planning and estimating MDB's proposed blasting for the construction of the Kingdom Community Wind Project ("KCW Project") in Lowell, Vermont for its developer, Green Mountain Power Corp. ("GMP").
14. MDB's role in the KCW Project is to plan and perform all necessary explosive blasting of rock to construct the foundations for 21 wind turbine towers and a 'Crane Road' approximately three miles in length linking these towers through land leased by GMP on Lowell Mountain.

15. Foundations for six of the planned wind turbine towers, specifically, Towers 4, 5, 6, 7, 8 and 12, and the portion of the Crane Road linking them will be located on GMP's property within 1000 feet of land owned by Don and Shirley Nelson ("Nelson Property").
16. Specifically, the foundation pads for Towers 4 and 5 and their associated portion of the Crane Road will be located within approximately 50 feet of the boundary between GMP's parcel for the KCW Project area and the Nelson Property ("Nelson Property line"). The Tower 7 and 8 pads will be located within approximately 500 feet of the Nelson Property line. The Tower 12 pad will be located within approximately 900 feet of the Nelson Property line.
17. An engineering drawing I have prepared with the assistance of other MDB personnel, copy attached hereto as Attachment 1, depicts the planned foundation locations for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them along a southwest-northeast axis in relation to the Nelson Property line.
18. A separate already-constructed Access Road, also depicted on Attachment 1, intersects with the Crane Road at the Tower 7 location and provides the only access to the nearest public road, Vermont Route 100.
19. Between the six affected tower sites and the portion of the Crane Road linking them, MDB will need to blast approximately 330,000 square feet of rock located within 1000 feet of the Nelson Property line.
20. Blasting for the KCW Project is scheduled to commence on Monday, October 17, 2011.
21. The proposed sites for Towers 6, 7 and 8 are the closet tower locations to the Access Road leading to Vermont Route 100.

22. Owing to the fact that the KCW Project area on Lowell Mountain is steep, rugged, and undeveloped terrain with no other points of access other than via the Access Road to Vermont Route 100, MDB will be required to begin its blasting operations on October 17<sup>th</sup> around Towers 6, 7 and 8.
23. In other words, MDB will be required to 'blast its way' into the KCW Project area beginning around the Tower 6, 7 and 8 locations approximately 200 to 600 feet north of the Nelson Property. *See Attachment 1.*
24. It would be highly impracticable, if not impossible, for MDB to begin blasting at other locations for the KCW Project farther away from the Nelson Property line.
25. The red-colored areas on Attachment 1 represent areas of planned blasting for the tower foundations and Crane Road. The blue-colored areas on Exhibit 1 represent areas where fill will be added after the completion of blasting.
26. The shade of red depicts the relative subsurface depths of MDB's planned blast locations. Lighter-shaded red areas represent shallower blast locations, whereas darker-shaded red areas represent deeper blast locations.
27. Shallower blast locations are associated with a greater potential for airborne rock fragments created by the blast, called 'flyrock,' to be projected into adjacent areas.
28. When planning a controlled explosive blast, MDB demarcates a 'blast area' and a larger 'safety area' surrounding the blast area.
29. The blast area is the area where the blasted rock is expected to land without any threat to human life or property.

30. Because the explosive charges used by MDB are shaped and positioned to direct the rock in a limited range of directions and distances, the blast area is usually a fan-shaped area around the blast location, rather than a radial circle.
31. The blast areas for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them are fan-shaped areas extending from 200 to 400 feet in distance away from each blast location, depending on the depth of the blast location and the amount of explosive that will need to be used.
32. In the case of MDB's blasting for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them, all blasts will be designed to be directed away from the Nelson Property, that is, to the north.
33. As a result, no flyrock from MDB's blasting is expected to land on any part of the Nelson Property.
34. However, because unobservable and unknown rock fissures may sometimes cause explosive gases and flyrock to be projected in unexpected directions and for unanticipated distances, MDB also establishes an additional safety area around each blast area.
35. Generally, the safety area is the circular area within a 1000 foot radius of the blast location. Smaller safety areas can be established only if additional time consuming and costly safety measures are implemented.
36. Because of the danger, however slight, of flyrock being projected beyond the blast area, it is MDB's policy and practice to insist that no persons be present within the safety area, that is, within 1000 feet of the blast location, at the time of detonation.


37. It is also MDB's policy and practice to cancel any blasting if it cannot be reasonably assured that no persons will be present within the safety area at the time of detonation.
38. Consequently, MDB will be unable to proceed with blasting for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them unless it can be reasonably assured that no persons will be present within 1000 feet of these blast locations at the time of detonation.
39. Because the blast locations for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them are within 1000 feet of the Nelson Property line, portions of the Nelson Property are within MDB's safety area for these blast locations.
40. I have learned through reports from MDB's site manager for the KCW Project, Mark Billings, that Mr. and Mrs. Nelson have invited persons to position themselves in campsites on their property immediately adjacent to the planned blast locations for Towers 4, 5, 6, 7, 8 and 12 on GMP's property.
41. I understand that the express purpose of these persons in positioning themselves at or near the Nelson Property line, thereby exposing themselves to potential injury from the planned blasting, is to impede and prevent MDB's blasting in this area.
42. I have also learned through reports from MDB's site manager for the KCW Project, Mark Billings, that certain persons have apparently accepted the Nelsons' invitation and, with the knowledge and assistance of the Nelsons, have occupied positions on or near the Nelson Property line adjacent to the proposed blast locations for Towers 4, 5, 6, 7, 8 and 12.

43. The actual or even potential presence of persons on the Nelson Property within 1000 feet or less of MDB's blast locations will cause MDB to cancel blasting scheduled to begin October 17<sup>th</sup>.
44. Given the site conditions described above, MDB will be unable to proceed with blasting at any other locations for the KCW Project until it completes blasting for Towers 4, 5, 6, 7, 8 and 12 and the portion of the Crane Road linking them.
45. It is possible, albeit time-consuming and expensive, to adopt safety measures for the blasting at these locations that would allow for a safety area of as little as 200 feet in every direction from the blast locations.
46. Specifically, MDB could install what are called 'blast mats' over all the blast hole locations to reduce the possibility of flyrock.
47. A blast mat is typically a 12-foot by 24-foot mat made of recycled tires and highly compressed steel cable that weighs about 11,000 pounds.
48. MDB could also reduce the size of the explosive charges at each blast location to reduce the possibility of flyrock. However, if using smaller charges, MDB would be required to perform more blasts to remove the same needed quantity of rock.
49. I have calculated that to reduce the safety area for the blast locations around Towers 4, 5, 6, 7, 8 and 12 to as little as 200 feet from the blast locations, 50 additional blast mats would need to be brought to the KCW Project Area by truck and tracked vehicle, positioned over each of the blast holes within 1000 feet of the Nelson Property, and then removed at the conclusion of the blasting.

50. The use of blast mats will significantly slow MDB's blasting. First, using excavators to position 11,000 pound blast mats over live detonation systems requires careful and time-consuming handling.
51. Second, because the use of blast mats limits access to one side of the blast location, the overall blast area using a blast mat is about one-half the size of an area without a mat.
52. The smaller blast areas associated with the use of blast mats necessitates the time-consuming preparation and execution of a larger number of blasts to clear the same needed quantity of rock.
53. I have calculated that it would more than double the time needed to complete blasting for the KCW Project if MDB and other contractors on the KCW Project are required to procure, transport, install and remove blast mats for all blast locations within 1000 feet of the Nelson Property, as well as to perform additional blasting with smaller explosive charges.
54. Specifically, these additional safety measures would add approximately 6 weeks to the existing 5 ½ week KCW Project blasting schedule for a total of nearly 11 ½ weeks.

FURTHER AFFIANT SAYETH NOT.

Dated at Auburn, NH, this 10 day of October, 2011.

  
STEPHEN BLAISDELL

STATE OF NEW HAMPSHIRE  
COUNTY OF Rockingham, SS.

On this 10 day of October, 2011, before me personally appeared STEPHEN  
BLAISDELL, known to me to be the person whose name is subscribed to the within instrument  
and acknowledged that the within statements made by him are true and accurate to the best of his  
knowledge and belief.

Sharyn M. Sullivan  
Notary Public  
My Commission Expires:  
SHARYN M. SULLIVAN, Notary Public  
My Commission Expires April 1, 2014

# ATTACHMENT 1

11/07/11 4:11pm

Attachment 1



AMJUR ADJOINING § 6  
1 Am. Jur. 2d Adjoining Landowners § 6

Page 1

American Jurisprudence, Second Edition  
Database updated September 2011

Adjoining Landowners  
Jeffrey J. Shampo, J.D.

- I. In General; Mutual Rights, Duties, and Liabilities
  - A. Overview
2. Landowner's Right to Use and Enjoyment of Property

Topic Summary Correlation Table References

### § 6. Motive of use

#### West's Key Number Digest

West's Key Number Digest, Adjoining Landowners ↪ 1, 8

Generally, if the acts of a landowner are within his or her legal rights, the motive impelling him or her to do certain things on his or her own land is immaterial.[1] Thus, the fact that the construction of improvements is brought about through malice or ill will does not necessarily alter the right of the landowner to make the improvements.[2] However, other authority holds that the malicious use of land by its owner for the sole purpose of injuring another is unlawful.[3]

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[FN1] Paola Lodge No. 147, I. O. O. F. v. Bank of Knob Noster, 238 Mo. App. 96, 176 S.W.2d 511 (1943); Cohen v. Perrino, 355 Pa. 455, 50 A.2d 348 (1947); Harrison v. Langlinais, 312 S.W.2d 286 (Tex. Civ. App. San Antonio 1958).

[FN2] Harrison v. Langlinais, 312 S.W.2d 286 (Tex. Civ. App. San Antonio 1958) (masonry wall).

As to liability regarding spite fences or structures, see §§ 108 to 119.

[FN3] Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20, 133 A.L.R. 684 (1941); Rowley v. Marrcrest Homeowners' Ass'n, 656 P.2d 414 (Utah 1982).

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AMJUR ADJOINING § 6

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# ATTACHMENT 2

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Attachment 2

American Jurisprudence, Second Edition  
Database updated August 2011

## Constitutional Law

George Blum, J.D., James Buchwalter, J.D., Paul M. Coltoff, J.D., Jefferson James Davis, J.D., Laura Hunter Dietz, J.D., Romualdo P. Eclavea, J.D., Tracy Farrell, J.D., J.S., Richard Link, J.D., Lucas Martin, J.D., Thomas Muskas, J.D., Jeffrey J. Shampo, J.D., Eric C. Surette, J.D., Susan L. Thomas, and Eleanor L. Grossman, J.D., Glenda K. Harnad, and Anne E. Melley, J.D., LL.M. of the staff of the National Legal Research Group, Inc.

## IX. Fundamental Rights and Privileges

## C. Specific Fundamental Rights

## 1. First Amendment Rights

## d. Right to Assemble Peaceably and to Petition Government

## (1) In General

Topic Summary Correlation Table References

## § 555. Nature of right

## West's Key Number Digest

West's Key Number Digest, Constitutional Law ☞1430, 1435

The right of the people to assemble for the purpose of petitioning for a redress of grievances or for anything else connected with the powers or the duties of the government is an attribute of citizenship.[1] It extends to all, irrespective of their race or ideology.[2] It is a right cognate to those of free speech and free press and is equally fundamental.[3]

The right of assembly guaranteed in the Federal Constitution to the people is not restricted to the literal right of meeting together "to petition the government for a redress of grievances." [4] Further, the grievances for redress of which the right of petition was ensured, and with it the right of assembly, are not solely religious or political ones.[5] Moreover, the rights under the First and 14th Amendments guaranteeing freedom of assembly and petition are not confined to verbal expression but also embrace appropriate types of action, including protest in a peaceable and orderly manner by silent and reproachful presence in a place where the protestant has every right to be.[6]

**Observation:**

The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association, and petition.[7]

[FN1] Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

[FN2] Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

[FN3] De Jonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

[FN4] American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145, 160 A.L.R. 873 (1944).

[FN5] Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); Bowe v. Secretary of the Com., 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).

[FN6] Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

[FN7] Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005), opinion amended on denial of reh'g, 2005 WL 1692466 (9th Cir. 2005) and as amended on denial of reh'g, (July 21, 2005).

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AMJUR CONSTLAW § 555

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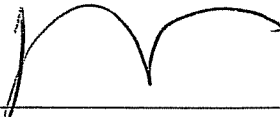
IN THE SUPREME COURT  
OF THE  
STATE OF VERMONT

DONALD AND SHIRLEY NELSON, ) SUPREME COURT Docket \_\_\_\_\_  
Plaintiffs )  
)  
v. ) Superior Court Civil Division  
) Docket No. 256-10-11 Osev  
)  
GREEN MOUNTAIN POWER )  
CORPORATION, )  
Defendant )  
)

AFFIDAVIT OF P. SCOTT MCGEE

NOW COMES P. Scott McGee, upon oath, and deposes and states as follows:

1. I am the attorney for Donald and Shirley Nelson in the above-captioned cause.
2. All representations made in the Nelsons' complaint for extraordinary relief insofar as they characterize statements and representations made by Green Mountain Power Corporation (GMP) or its agents are true and correct to the best of my knowledge and belief based upon a review of documents submitted by GMP in filings with the court.

  
\_\_\_\_\_  
P. Scott McGee

STATE OF VERMONT  
WINDSOR COUNTY, SS.

At Hartford, in said County, this 7 day of November, 2011, personally appeared P. Scott McGee, under oath, and he swore to the truth of the foregoing.

Before me, Bonnie M. Downs  
Notary Public