

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Vermont Gas Systems, Inc. for authority)	
to condemn easement rights in property interests of)	
the Town of Hinesburg, Vermont at Shelburne)	Docket No. 8643
Falls Road, Hinesburg, Vermont, for the purpose of)	
Constructing the pipeline authorized for Docket 7970)	

**VERMONT GAS COMPANY’S MOTION TO REVOKE THE INTERVENORS’
PERMISSIVE INTERVENTION STATUS**

Petitioner, Vermont Gas Systems, Inc. (“VGS” or “Petitioner”), by and through its attorneys, respectfully moves to terminate the permissive intervention granted to Intervenors under Board Rule 2.209(B)¹ because they have: (1) failed to adequately address the issues “justifying” their intervention; and (2) used their intervenor status inappropriately and beyond the scope of their intervention to forestall the Project’s completion. More specifically, the Intervenors ignored the July 1 and 26 deadlines to submit pre-filed testimony on any issue, including how use of Geprags Park will be affected by placing the pipeline under the Park. Contemporaneously, the Intervenors filed a Show Cause Petition aimed at stopping all Project construction outside of Geprags Park even though that work had no effect on the Park. In a “Pre-Trial Memorandum,” Intervenors promise to raise at the eminent domain hearing additional irrelevant issues (including collateral attacks on the CPG and VGS’s public utility status) unrelated to the reasons they gave for their intervention, and aimed instead at thwarting completion of the Project.

¹ The “Intervenors” include William Marks, Nancy Baker, Linda Gage, Rachel Smolker, Melanie Pulley, Stephanie Spencer, and Lawrence Shelton.

The Intervenor's conduct in this proceeding, in addition to belying the reasons they gave to justify their party status, threatens serious harm to the Project, VGS and the rate paying public. Obtaining timely access across Geprags Park—the only parcel where VGS has yet to acquire a right of way—is of critical importance to the completion of the pipeline construction during this year's construction season. Permitting the Intervenor to use this proceeding and a subsequent supreme court appeal to delay completion of the Project until next year will add substantial unnecessary construction costs to the pipeline and delay potential customers' access to the natural gas that it will carry. Because the Intervenor has used, and are using, their status improperly rather than for the purposes set forth in the Hearing Officer's order on reconsideration, their permissive intervention status should be revoked.

I. The Importance to Project Completion of a Right of Way Through Geprags Park

VGS has now obtained rights of way with 162 of the 163 landowners necessary to construct the pipeline.² Geprags Park is the last and only parcel where VGS needs a right of way to construct the pipeline. All of the rights of way acquired by VGS—whether through easements or fee-interest purchases—were obtained by reaching agreement with public and private parties having ownership interests in the Property. In that vein, based on an affirmative vote by the Selectboard at a warned hearing held on July 28, 2016, Vermont Gas and the Town are entering into a new Revised Stipulation with an updated deed of easement to dispose of substantially all issues in this Docket.³

Based on the Revised Stipulation, VGS has committed to install the pipeline in Geprags Park by horizontal directional drilling (“HDD”), to commence as soon as possible once an order

² VGS sought to voluntarily dismiss the proceeding in Docket 8641—the only other eminent domain petition—on July 23 based on a settlement reached with the private landowner.

³ See Nicole Higgins DeSmet, “VT Gas announces agreement on Hinesburg Land”, *Burlington Free Press*, July 19, 2016, <http://www.burlingtonfreepress.com/story/news/local/2016/07/29/vt-gas-announces-agreement-hinesburg-land/87698738/> (copy attached as Exhibit A).

of condemnation is issued in this proceeding. Although more expensive, HDD will not disturb any wetland areas and will allow the pipeline to be installed through the Park without the need for additional permits. HDD will enhance protections against construction impacts on the use of Geprags Park. Moreover, if VGS is able to complete construction through Geprags Park this year, there is a strong likelihood that construction of the Project can be completed and the pipeline placed into operation this year. Delaying completion of the Project until next year will substantially increase the costs of completion (including the potential for above-rate cap costs), and will delay service to potential customers that would otherwise have been served by the Project in the upcoming heating season.

II. Pertinent Procedural History

A. Denial, Reconsideration and Grant of the Motion for Intervention

The Intervenors—all alleged users of Geprags Park—originally filed their motions to intervene in February 2016. VGS opposed the motions, and the Hearing Officer entered a procedural order on March 24, 2016, correctly denying the motions to intervene. After finding that the Intervenors had no statutory or other right to participate in the hearings, the Hearing Officer rejected the Residents’ request for permissive intervention because: (1) their claimed loss of enjoyment/use of the Park was not a substantial interest within the meaning of Board Rule 2.209; (2) their individual interests in the Park were not sufficiently distinct from those of Hinesburg residents in general, and were adequately represented by the Town; and (3) the requested intervention created a risk of “undue delay and prejudice to the interest of the rate paying public.”

On March 29, 2016, the Residents filed a motion to reconsider the denial of their intervention based on their use of the Park and their stated interest in asserting the “prior public

use doctrine.” The Town independently moved to dismiss the condemnation petition based on the “prior public use” doctrine. VGS responded by filing an Amended Petition for Condemnation on April 27 and an Opposition to the Town’s Motion to Dismiss on April 29.⁴

In a May 23, 2016 Order, the Hearing Officer granted the Residents’ Motion to Reconsider and grant permissive intervention based on their substantial interest in the use and enjoyment of the Park. He ruled the affidavit submitted by Intervenor William Marks was persuasive. The Affidavit stated that Mr. Marks regularly used the Park and had spent many hours constructing, maintaining and using the Park’s trails. It further stated that the Park’s trails are lightly used by the general public and rarely have more than a handful of users at any particular time, and they are used by no one more than Mr. Marks and Ms. Baker (another Intervenor). There is no other evidence in the record regarding any other Intervenor’s use of the Park.

The Hearing Officer relied on the Marks affidavit to conclude that the Intervenors’ had a personal, substantial and particularized interest as users of the Park distinct from other Hinesburg residents that might not be adequately represented by the Town. He further concluded that the Intervenors might help the Board understand the use of the Park and how the pipeline might impact that use. Because the Town had voided an agreement with VGS and was contesting the condemnation, the Hearing Officer believed that granting intervention to the Residents would not result in undue delay or unreasonably prejudice the interests of VGS and the rate paying public. The grant of permissive intervention was opposed by VGS.

⁴ In its May 27, 2016 Order, the Hearing Officer took the Town’s motion “under advisement pending discovery and a technical hearing to develop a record regarding the necessity for authorizing the condemnation of the proposed easement through Geprags Park.” This Order underscored the importance of the need for Intervenors to timely provide prefiled testimony in this Docket. Pursuant to the Revised Stipulation and the affirmative vote of the Selectboard on July 28, 2016, the Town will be withdrawing its motion to dismiss prior to the technical hearing.

B. The Intervenors' Failures to Submit Prefiled Testimony

In a June 16, 2016 Scheduling Order, reached through agreement among the parties, the Intervenors were required pursuant to PSB Rule 2.213 to submit their prefiled testimony by July 1. Although that testimony was supposed to help the Board “develop[] a clear understanding of the nature and extent of the public use that is made of Geprags Park,”⁵ they prefiled no testimony. Nor did the Intervenors request leave to file any testimony after the deadline. As a result, VGS was unable to conduct discovery on the Intervenors in accordance with the Scheduling Order or to submit formal “rebuttal” testimony by July 15 as contemplated in the Scheduling Order. VGS instead filed Supplemental Prefiled Testimony addressing why alternatives to the condemnation of an easement through Geprags Park were unduly expensive and unsuitable for a variety of different reasons. Although the Scheduling Order allowed sur-rebuttal testimony to be filed by July 26, that date came and went without any action by Intervenors. Thus, Intervenors have no witnesses to present evidence on the issues for which permissive intervention was granted.

C. The Intervenors July 2 Letter and Petition to Show Cause

While ignoring their obligations under the Scheduling Order, Petitioners sent a July 2 letter to all parties in this Docket and Docket 7970 (in which they are not parties) demanding that VGS stop construction outside of Geprags Park based on non-delineated wetland areas within Geprags Park. VGS responded on July 3 by making clear that (i) a revised delineation was being completed and (ii) no construction in Geprags Park would occur until a right of way and any necessary permits were acquired.

Nevertheless, on July 8, 2016, the Intervenors unnecessarily and improperly filed a Show Cause Petition seeking an order (a) requiring VGS to cease all construction on the Project, which

⁵ Docket 8643, Order of 5/23/2016 at 6.

was occurring only outside of Geprags Park, and (b) holding VGS in contempt for alleged past and present violations of the December 13, 2013 CPG. The Petition alleged both that the permit for the wetlands in Geprags Park were larger in size than previously delineated, and that VGS had taken or would take an unidentified threatened species in the Park. The Board issued a procedural order that, among other things, expressly reserved judgment “as to whether Intervenors’ Petition has been properly filed in Docket 8643.”⁶

On July 15, VGS, the Department of Public Service and the Agency of Natural Resources filed Responses to the Petition. VGS opposed the Petition, among other reasons, because it was baseless and would substantially increase the Project’s costs and delay its completion. As it had explained to Intervenors 5 days earlier, VGS was already working with ANR to re-delineate the additional wetlands in Geprags Park, and planned no construction there until both a right of way and any necessary ANR approvals were acquired. As ANR confirmed in its own filing, no work could be performed in the re-delineated, additional wetland area of Geprags Park without a permit. Moreover, the permit for the originally-delineated portion of the Park wetland, as well as all other wetland permits obtained by VGS, remained valid. ANR also confirmed that it had no knowledge or any reason to believe that threatened or endangered species existed in Geprags Park, and confirmed there were no requirements with respect to a previously-identified rare plant in Geprags Park.⁷ Neither the Department nor the Agency found that construction needed to cease outside of Geprags Park.

⁶ As though to acknowledge the impropriety of the filing, counsel for the Intervenors has since clarified in a separate docket that the Intervenors were not seeking to intervene in Docket 7970, and that they are evidently abandoning their involvement on these issues in Docket 8643. *See* Reply to Opposition to Motion for Sanctions and Contempt, Docket 7970 (July 27, 2016) at 1, n.1.

⁷ To date, Intervenors have still never stated which threatened species would be taken, nor provided any factual basis for the allegation. Of importance, ANR has stated in response to the Show Cause order that it knows of no threatened species in Geprags Park.

D. Intervenors' Plan To Expand The Scope of The Eminent Domain Proceedings By, Among Other Things, Challenging Whether VGS Is A Public Utility And The Continued Applicability of The CPG

In a "Pretrial Memorandum" filed on July 25, 2016, Intervenors stated they planned to adduce evidence, under the guise of a necessity argument, that VGS allegedly has no duty to serve the public and that the Board has never required them to do so. In addition, the Intervenors purportedly plan to show that condemnation and, presumably construction, for the Project cannot proceed pursuant to the December 13, 2013 CPG because two substantial changes have allegedly occurred that require an amendment to the CPG: (1) the cost has significantly increased; and (2) the Project will no longer reduce greenhouse emissions. Although not disclosed in the "Pretrial Memorandum," it is noteworthy that these exact issues are being separately addressed in Docket 8330 by other parties, and the Intervenors have not sought to intervene in Docket 8330.

III. The Intervenors Permissive Intervention Status in This Condemnation Proceeding Should Be Revoked Because They Have Not Submitted Evidence On The Issues That Were The Basis Of Their Intervention And They Have Used Their Party Status Improperly In Attempts To Delay Construction Of The Pipeline

The Intervenors were permitted to intervene based upon findings that: (1) they had a substantial interest in the use of Geprags Park; (2) they could provide evidence on how the pipeline's placement in the Park might impact the Park's use; and (3) their participation would not create "undue delay" or "unreasonably prejudice" VGS or ratepayers. In fact, since being granted intervention, the Intervenors have ignored their opportunity to provide testimony and instead improperly used their intervenor status to attempt to delay or stop Project construction that has absolutely no effect on Geprags Park. They have stated in their "Pre-Trial Memorandum" that they will continue their inappropriate course at the hearing by challenging the scope of the CPG and attacking VGS's public utility status. The Intervenors conduct in this

proceeding has undermined their justifications for intervention and, accordingly, their party status in this proceeding should be terminated.

Only one intervenor—Mr. Marks—has even provided evidence of the extent and nature of his use of Geprags Park. Although it was expected that the other intervenors might provide such evidence in their prefiled testimony, none of them bothered to submit any prefiled testimony in accordance with the Scheduling Order. At present, there is no evidence from any other intervenors⁸ regarding the frequency or nature of their Park use or why these interests are substantial and distinct from other Hinesburg residents. Intervenors' clear violation of Rule 2.213 prejudices Vermont Gas's and the other parties' ability to prepare this case for technical hearing. As the Board has stated in a similar context:

Adherence to the Board's rules is a long-standing and necessary requirement for participation in Board proceedings. The Vermont legislature has provided that “[t]he board shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction”; consequently, parties who appear in Board proceedings have obligations similar to those of a party in court. As a matter of fairness to all parties, *only those who are prepared to accept and honor these obligations can participate in formal contested-case proceedings before the Board*, such as the present Docket.

Petitions of Vermont Electric Power Company, Inc. and Green Mountain Power Corporation (Northwest Vermont Reliability Project), Docket No. 6860, Order of 10/17/2003, 2003 WL 22480685 at 5 (emphasis added). Consistent with the Board's directive in the *NRP* case, Intervenors should be precluded from offering any testimony or exhibits in their direct case at the August 4, 2016 Technical Hearing, and from further participation in the Docket.⁹

⁸ Mr. Marks did state in his affidavit that Ms. Baker used Geprags Park as frequently as he used it.

⁹ *Accord Amended Joint Petition of Central Vermont Public Service Corporation et. al.*, Docket No. 7770, Order of 11/1/2011 at 12, n.19 (“The Board will have little tolerance in the future for intervening parties who do not follow Board Rules ... *or who fail to adhere to deadlines established in the schedule for this docket.*”) (emphasis added); see also *In re UPC Vermont Wind, LLC*, Docket 7156, Order of 6/7/2006 at 2 (noting that party granted permissive intervention “is responsible for following requirements set out by the Board”, whether by procedural rules or written instructions conveyed in the form of a memorandum.); *Investigation into Access*

Moreover, the Intervenor has failed to provide testimony on the fundamental issue underlying the grant of their intervention: what effect if any would placement of the underground pipeline through Geprags Park have on its use. Intervenor's failure to do so belies the claims that the pipeline installation would significantly and adversely affect their use of the Park. That failure also deprived their intervention of any evidentiary value that it might otherwise have yielded if they had not ignored their opportunity to actually provide testimony or exhibits. By contrast, VGS has provided testimony and documentary evidence demonstrating that the installation of the pipeline can be accomplished in a relatively short period of time and will temporarily affect only a small portion of the Park. The relatively minimal impact on the Park during any actual installation of the pipeline described in the prefiled testimony will now be even less so based on use of HDD.¹⁰ When the installation is completed through directional drilling, except for minor clearing associated with a maintenance corridor, existing uses in Geprags Park will not be materially impacted in any way.

The Intervenor's actions in filing their Show Cause Petition after it was discovered that a wetland in Geprags Park extended beyond the area delineated in the applicable permit further demonstrate that their objective is to delay or stop construction rather than protect any legitimate interests in their use of the Park.

Charge Flow through Compliance Obligations of MCI and Sprint, Dkt. 6437 (Feb. 6, 2001) (noting the unfairness to Department and other parties where permissive intervenor failed to submit prefiled testimony in accordance with deadline).

¹⁰ It bears mentioning that Mr. Marks participated in ongoing, productive discussions between Vermont Gas, the Hinesburg Selectboard, and the Hinesburg Conservation Commission (the latter upon which he serves as a member) in discussing the possibility of using HDD to reduce wetland impacts in the Park. As evidenced in the Conservation Commission's meeting minutes from July 12 (attached as Exhibit B), Mr. Marks introduced a resolution that was voted upon unanimously by the Commission requesting VGS to either seek an alternate route within the Park, or use HDD as an alternate construction method, provided certain additional terms and conditions are met. The Revised Stipulation incorporates both the commitment to HDD, as well as a performance bond and additional compensation.

Even though there was no construction planned for the undelineated portion of wetland until and unless VGS obtained both a right of way through Geprags Park and a supplemental wetland permit from ANR—and despite VGS communicating as much to the Intervenors 5 days earlier—the Intervenors attempted to leverage the delineation error into a cause for stopping construction on the entire Project. Such a stoppage would have been hugely expensive and would have threatened the economic viability of the Project. Of course, that is the apparent purpose of the Intervenors in filing their Petition for a Show Cause in this Docket. Their pursuit of an order designed to stop construction outside of Geprags Park was inconsistent with the parameters of their intervention, which was restricted to their limited interests in the use of the Park, and was contrary to the Hearing Officers finding that granting intervention would not cause delay or prejudice either VGS or the ratepaying public.

The instant motion is all the more necessary due to the severe consequences an appeal of a final order could have for the Project. Once a condemnation order is entered in this matter, the Intervenors will be able to effectively stop construction in Geprags Park simply by filing a notice of appeal. 30 V.S.A. § 124. The effect will be to delay completion of the entire Project, notwithstanding Intervenors' lack of any proprietary interest in the property to be condemned. The Intervenors' pursuit of delay, as evidenced by their actions in this proceeding to date, make it probable that they would notice an appeal and make construction dependent upon VGS obtaining relief from the stay from the Vermont Supreme Court. At best, that will take even more time that VGS can ill afford to lose if it is to complete construction of the pipeline in Geprags Park and the remainder of the Project this year. At worst, it demonstrates a clear abuse of process by Intervenors: they have used their already-tenuous status in this contested case proceeding to thwart their intended purpose of timely providing useful information to be

considered by the parties, the Hearing Officer, and the Board. Intervenors' continued involvement threatens to undermine the significant resources that the Town of Hinesburg and Vermont Gas took to revise, improve, and finalize the agreements and documents presented in the original petition, and which must be approved by the Board in order to timely complete the Addison Natural Gas Project.

IV. Conclusion

For the above reasons, the Hearing Officer should revoke the permissive intervention status granted to Intervenors in this proceeding.

Dated at Burlington, Vermont this 29th day of July, 2016.

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Exhibit A

VT Gas announces agreement on Hinesburg land



Nicole Higgins DeSmet, Free Press Staff Writer 12:59 p.m. EDT July 29, 2016



(Photo: DOROTHY PELLETT/for the FREE PRESS)

Vermont Gas Systems says the utility has reached a critical land deal with the town of Hinesburg that will allow construction of a natural gas pipeline project.

"Lots of hard work and a lot of respectful debate," Selectboard Chairman Michael Bissonette said of the months of work leading up to the agreement at a meeting Thursday night regarding the Addison Natural Gas Project.

The Selectboard had a special meeting to make a final decision on the project to extend the pipeline through land donated to the town, now called Geprags Park. Some town residents believed the park should be protected from any industry.

Bissonette said the agreement to use horizontal drilling was a key component to the compromise. Other town officials were less convinced.

Horizontal drilling or HDD, a technique said to have low impact on surface lands, recently was ordered by Vermont Gas to preserve a previously unmarked wetland area in the pipeline path in Monkton. The idea was to preserve an endangered sunflower, but construction contractors mistakenly uprooted a section of the plants, causing work to be stopped temporarily while re-training occurred.

"HDD done right is a good option for getting through the park with as little impact as possible," Hinesburg Conservation Committee member Robert Hyams said Friday. He described the agreement with Vermont Gas as much better than the one the board offered to pass in December.

"They've come a long way," Hyams said, "but we still have concerns."



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[Rare flowers plucked without permit](#)

<http://www.burlingtonfreepress.com/story/news/2016/07/19/rare-flowers-plucked-without-permit/87293508/>

He spoke of doing what he could to hold the utility accountable. And although he thought the agreement was deficient to ensure the desired outcome, he expressed hope that work would be done according to the utility's word.

Major issues he sees unaddressed included the lack of an expert hired by the town to be a third party in interpreting documents and liability issues related to park access. He specifically noted section three in the deed of easement that reads: "... any decision as to construction method for installing the pipeline — including whether to use horizontal directional drilling or open trench — shall be determined by VGS in its sole and absolute discretion."

Hyams said he found the word "discretion" troubling.

Vermont Gas on Friday morning issued a statement to express gratitude to Hinesburg for the resolution and for allowing the utility to move forward with construction in the park.

The statement said this was the last parcel needed for 100 percent right-of-way, which Vermont Gas says will mean completion of the pipeline within projected limits.



[BURLINGTON FREE PRESS](#)

[Vermont Gas says pipeline cost increases again](#)

<http://www.burlingtonfreepress.com/story/money/2016/06/21/vermont-gas-says-pipeline-cost-12-million-more/86195490/>

The agreement with Vermont Gas also includes a payment to Hinesburg of \$250,000. According to Bissonette, the motion the Selectboard passed Thursday also requires Vermont Gas to secure a performance bond for the drilling. This is a guarantee should the utility fail to meet its obligations. It was not made clear to Free Press which obligations, and this related to the completion of the pipeline.

"This agreement expands the benefits of natural gas service to almost 200 new families and businesses in town," Vermont Gas said.

Vermont Gas originally had offered Hinesburg \$75,000, protection of nesting vegetation for the golden-winged warbler and extension of the distribution line to Richmond Road residents.

The utility noted it is making progress on construction of the gas line and has successfully completed seven horizontal drillings.

"There is more to do to ensure the project is completed this year and we are committed to meeting those challenges head-on, in an open and direct way," the utility's statement read. "This project is about bringing the choice of a cleaner and more affordable energy to thousands of Vermont families and businesses and we look forward to delivering on our promise."

Meanwhile an eminent domain case will be heard on August 4 by the Public Service Board.

Earlier this month, as part of the ongoing case, Kristin Lyons of Monkton filed a petition with the Public Service Board alleging that the company violated wetland and endangered species permit requirements during pipeline construction in her town.

Earlier this week, seven residents of Hinesburg jointly filed a motion for Public Service Board Member Sarah Hofmann to recuse herself from the case due to what they say is a substantial interest in the pipeline project proceeding. The residents are proceeding with an action to attempt to stop the pipeline from violating what they see as the original land donor's intent that the park would be used only for recreational or educational purposes.

SCRIBD

Proposed Agreement Deed of Easement and Exhibits v.06-04-072216

(<https://www.scribd.com/document/319640312/Proposed-Agreement-Deed-of-Easement-and-Exhibits-v-06-04-072216>)

This story was first posted online on July 29, 2016. It was updated at 12:30 p.m. Contact Nicole Higgins DeSmet, ndesmet@freepressmedia.com or 802-660-1845. Follow her on Twitter [@NicoleHDeSmet](https://twitter.com/NicoleHDeSmet) (<https://twitter.com/NicoleHDeSmet>).

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Exhibit B



Conservation Commission

Town of Hinesburg

10632 Route 116 Hinesburg VT 05461

802.482.2281 | hinesburg.org

Meeting Minutes – July 12, 2016

- Draft -

Members Present: Bob Hyams, Shannon Kelly, Alison Lesure, Bill Marks, Merrily Lovell **Members**

Absent: Meg Handler

Guests: Cynthia Hendel, Lawrence Shelton, Michael Bissonette (Hinesburg Select Board)

1. Call to order at 7:04 p.m.
2. Hinesburg residents Cynthia and Lawrence expressed concerns that CC was focusing exclusively upon Geprags Park as it related to the VGS pipeline. Cynthia pointed out that 3 of 7 priority communities identified in the VGS stipulation are located in Hinesburg. CC will inquire of other sites and natural resources impacted.
3. VGS proposal: CC discussed VGS proposal to employ horizontal directional drilling (HDD) to transect 1700 feet within west corridor. Bob expressed concerns that VGS and state are not in a position to adequately manage HDD operation.

Motion: The route east of stream is still the route preferred by the CC. HDD as proposed would be acceptable with strict performance measures, contingency plans, oversight and bonding, and financial compensation commensurate with the value of Geprags to both VGS and the citizens of Hinesburg. Agreement terms will be developed with independent legal and technical expertise, at the CC's choosing, paid for by VGS.

Motion: Bill

Second: Merrily

Approved by unanimous vote

4. Chair succession: Alison is stepping down from Chair position, and is staying on Commission. Bill nominated Shannon as Chair, and Merrily as Vice Chair. Alison seconded the nomination. Nomination carried unanimously.

Next Meeting: July 26, 2016

Meeting Adjourned at 8:51 p.m.

Respectfully submitted by Robert Hyams