Vermont Superior Court
Filed 07/07/26
Addison Unit

STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
ADDISON UNIT **Docket No. 72-4-20 Ancv**

AERIE POINT HOLDINGS, LLC,
Plaintiff,

v.

VORSTEVELD FARM, LLP,
Defendant

Decision: Part #2 of Motion to Demonstrate Compliance (Motion #42)

The Merits Decision of March 28, 2022 in this case resulted in an Injunction in which the court found that Vorsteveld Farm LLC ("Farm") had committed trespass and nuisance against its downslope neighbor Aerie Point Holdings LLC ("Aerie Point") by increasing the volume and velocity of water discharged into two streams that crossed Aerie Point land. This occurred as a result of the installation of an extensive tile drainage system on the Farm's upslope land resulting in the discharge of concentrated water from 17 discharge points from drain tiles in a manner that caused damage in a number of ways, including erosion of land and deposits of sediment and phosphorous.

The resulting Judgment was an Injunction that issued as follows:

> "Defendant is enjoined from allowing water, and any particles it carries, from flowing from the discharge points of Defendant's drain tile system into the public ditches and culverts westerly of Defendant's land on Arnold Bay Road between Adams Ferry Road and Pease Road."

In Decisions dated January 8, 2024, and September 13, 2024, the Farm was held in contempt for failure to comply with the Injunction. The court imposed sanctions in the form of daily fines but suspended them until November 16, 2024, to give the Farm time to come into compliance.

On November 14, 2024 the Farm filed this motion claiming compliance. An initial evidentiary hearing was held on April 24 and 25, 2025. Present at that hearing was Gerard Vorsteveld for the Farm with attorneys Claudine C. Safar and Miles M. Stafford. Vicki and Dennis Hopper were present for Aerie Point with attorney Merrill E. Bent.

The court issued a partial decision dated May 1, 2025 (Part #1 of rulings on the Motion). It found in Part #1 that the Farm had taken steps to comply and had halted the ongoing flow of water and particles that were damaging Aerie Point property at least on a temporary basis by plugging the drain tiles at their discharge points, and thus the court suspended daily fines as of November 14, 2024. Nevertheless, based on prior undisputed testimony in the case, both expert and non-expert, the court found that the method of compliance might only be a temporary fix,

such that the required standard of compliance, clear and convincing evidence, was not met for an injunction designed for permanence.[1] The court determined that the Motion would remain pending to give the Farm the opportunity to meet the clear and convincing standard with additional evidence.

A follow-up evidentiary hearing was held on June 17, 2026, one and a half years after the plugging of the discharge outlets. Present in person was Gerard Vorsteveld on behalf of the Farm with attorneys Claudine C. Safar and Miles M. Stafford. Dennis Hopper was present remotely on behalf of Aerie Point, represented by attorney Merrill E. Bent in person.

Prior to the hearing, on May 29, 2026, the parties and attorneys engaged in a joint inspection of the respective properties to observe conditions on the ground, and they filed a joint statement of stipulated facts. The findings of fact below are based on both the stipulated facts and the court's evaluation of the testimony and exhibits introduced at the hearing.

Findings of Fact

The court hereby incorporates all of the Findings of Fact set forth in Part #1 of the Decision on the Motion (#42) filed May 1, 2025 as well as all of the Findings of Fact in the Decisions on the Motion for Contempt filed January 8, 2024 and September 12, 2024, as if fully set forth herein.

In the Decision of May 1, 2025, based on the evidence at the April 2025 hearing (Part #1 of the present motion), the court found that the Farm had complied with the Judgment "on at least a temporary basis but has not proved meaningful compliance with a permanent Injunction by clear and convincing evidence." (May 1, 2025 Decision, page 9.) "This is because, prior to capping the tile drains, both parties in this case testified that plugging the tile drains was not recommended because it would result in blowouts, and if it was done, it should be done at multiple locations along the pipes, not just at the end." *Id.* at 7.

Gerard Vorsteveld testified, and the court finds, that since the April 2025 hearing, he has checked the capped ends every two weeks. He also checked the fields approximately every six months. Otherwise, there is no evidence of any changes made to the system between the hearing in April 2025 and the Part #2 hearing in June of 2026.

The parties and their attorneys were accompanied on the May 29, 2026 site visit by Aerie Point's expert, Dr. Harold Van Es, a professor of soil science, and the Farm's expert, Richard Hamlin, an engineer. The site visit included a visual inspection of fifteen tile drain outlets, and in-field locations near the outlets.

Based on the site visit, Dr. Van Es, Plaintiff's expert, made the following conclusions which both Aerie Point and the Farm accept as findings of fact:

[1] See legal standards for contempt proceedings in the Decision of January 8, 2024, pages 6-7 and Decision of September 13, 2024, pages 9-10.

a. All tile drains have been effectively plugged. No drain water discharge was observed in any of the plugged tile drains. Modest ground seepage is observed around some (but not all) of the plugged tile drains. Seepage is presently not sufficient in amount to result in significant off-site impacts.
b. Holes were identified in the field in the vicinity of Tile Drain 5A and12/13.
c. The holes are currently modest in number and size (observed approximately 7 holes, each 5-10" in diameter) and have no known off-site impact at this time.
d. Other conservation practices (including grassed waterways, sediment retention basins, and cover crops) are effectively implemented on site, at present.
e. The grassed waterways the Farm has planted and maintained in convergence areas are having their beneficial effect.
f. Surface water retention structures have been effectively implemented in the lower parts of the Arnold Bay and Exline fields.
g. Cereal rye cover crop was also effectively established in the Arnold Bay and Exline Fields in fall 2025, with ameliorative effect.
h. Water flowing from the Vorsteveld Farm property onto the Aerie Point property appears to be reduced in quantity and intensity.
i. Observations on April 22, 2026 (one week after a heavy rainfall) showed only modest flow upslope of the Arnold Bay Road culverts.
j. No signs of high velocity flow such as erosion or vegetation flattening or damage were observed at any of the three culverts leading onto Aerie Point along Arnold Bay Road.
k. Low flow was observed at the culvert under Adams Ferry Road.

The remaining disagreement between the parties is what caused the holes, and the implication of those holes for the future of how well the capping of the tile drains will prevent damaging impact on Aerie Point land.

Gerard Vorsteveld thinks that the holes were made when the crop planting machine crossed the field and kicked up stones, leaving holes. He also opined that they were made by animals. The court does not find either of these explanations consistent with all the evidence about them. The holes are all located toward the bottom of the sloped fields, within 30 feet of the base of the slope along Arnold Bay Road and near the toeline pipe that runs perpendicular to the drain lines and receives water from them. There is no evidence that there are such holes further upslope.

Some of the holes are 3-5" deep and some are as much as 15" deep. They are all perfectly round openings with the grass around the edges matted down, neatly enclosing the round opening. Some have water in them. There is no indication of a machine having dragged stones along the dirt near them, and no indication that animals have dug them out, leaving nearby loose dirt displaced from digging. Moreover, it would be unusual for animals to dig holes as close together as some of the holes are.

The Farm's expert, Richard Hamlin is an engineer who works with water movement in connection with his engineering work. His experience with tile drains was as an engineer on one

project. His opinion is that due to the expected behavior of the water table underground in the fields as a whole, water would not be moving downhill and causing pressure that would contribute to the development of such holes. He acknowledges the possibility that if a coupling between two sections of tile drains fails, water and soil surrounding the failed coupling could go down and enter the drain pipe, presumably creating a depression in the soil above. However his primary opinion is that the water table in the entire fields is stable and above the level of the drain pipes and exerting no downward pressure. He accepts Gerard Vorsteveld's idea that the holes are attributable to stones or animals. He particularly disagrees with a description of the cause of the holes as "blowouts," as there is no evidence of soil having erupted out of the holes and scattering soil on the surrounding ground.

Aerie Point's expert, Dr. Harold Van Es, has advanced degrees in soil physics and has authored journal articles about soil hydrology and drainage. He also has experience with installing drain tiles at the Cornell farm which is located across Lake Champlain from the subject property and has similar soils to those on the Farm. His opinion is that what he calls "blowouts" do not necessarily involve eruptions of water and soil and scattering of soil, especially in the type of soil at the Farm, and that blowouts, as he labels them, are the cause of the holes. His description of blowouts is similar to what Mr. Hamlin described: they occur when soil sinks down into the drain pipe, such as when a coupling fails, and water that is under pressure moves upward into the holes. To him it is telling that this is occurring at the base of the slope, where water is most likely to be under pressure at the bottom of the sloping fields, and he does not agree with Mr. Hamlin's opinion that water is not under pressure in the hillside fields. His opinion is that water upslope continues to flow downhill underground, exerting pressure as it descends, and that this pressure contributes to blowouts.

The holes are all in some proximity to the toeline, and the experts differed about whether the toeline was perforated or not and whether perforations would or would not affect development of blowouts. The toeline is underground and the reality is unknown, but the court finds the opinion of Dr. Van Es credible that blowouts as he describes them could occur with or without perforation in the toeline. They can also occur along the pipelines and in the intervals between lines of drain tiles, which is where some of the holes appear to be. The court finds the explanation of Dr. Van Es of the cause of the holes to be credible.

It is clear that over a year and a half after the tile drains were capped at the discharge outlets, as well as after the successful establishment of grassy waterways and sediment retention basins in the fields and effective cover crops –all having beneficial mitigation effects on concentration of downslope water flow--damaging water and sediment is not currently flowing through the discharge outlets in the tile drain system into the ditch along Arnold Bay Road and through the three culverts to Aerie Point land. There is currently no erosion effect or other damage to Aerie Point property. The evidence shows that the steps taken have been effective through two winters and spring melts and some heavy rains.

Whether there is a risk that deterioration of the drain tile system in the future could cause water and sediment flow to increase and again flow onto Aerie Point land is a reasonable concern expressed by Aerie Point, given prior testimony in the case and the development of the holes. Yet

the evidence does not currently support a conclusion that the system will inevitably fail causing damage to Aerie Point land.

Dr. Van Es believes that additional blowouts could occur on an expanded basis in the future. The evidence previously given in this case was that if plugging the system at the discharge points were to be done, plugging should be done at multiple locations throughout the fields in addition to those at the discharge points to minimize blowouts that could affect Aerie Point land. This has not been done to date. Dr. Van Es also recommends additional land management measures, such as planting particular crops that are beneficial, to protect against damage to Aerie Point land.

The evidence is that the plugging of the discharge outlets that was done, while it has been effective to date, is most likely not a one-time final solution to the problem, but that ongoing vigilance will be required with a reasonable possibility that other measures will need to be taken over time. As this court has previously made clear and the Farm's counsel acknowledged in oral argument, what the Farm has done to date does not absolve it from the obligation of on-going compliance with the permanent Injunction in the future. However, the passage of time and the current condition of both properties does not support a conclusion that the prior contempt is ongoing.

Conclusions

The Farm has made a sufficient showing by clear and convincing evidence that compliance actions were undertaken that have been effective over the last year and a half. Consequently, the court concludes that the Farm has shown current compliance by the required standard, and the fines previously established are now terminated. Attorney fees incurred by Aerie Point to date are the consequence of not only the contempt but the failure to establish compliance by clear and convincing evidence until now. They are the obligation of the Farm.

Order

Based on the foregoing:

1. The Farm is not currently in contempt of its obligation under the Injunction.
2. Fines previously imposed and suspended temporarily are now terminated.
3. Plaintiff Aerie Point is entitled to attorney fees in connection with the above Motion. Any request for fees incurred to date, not previously addressed, must be filed by July 21, 2026 and must be supported by time and billing records If such a request is filed, Defendant Farm may file any objection within 14 days.

Electronically signed July 7, 2026 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned