

**State of Vermont**

**Superior Court  
Orleans Unit**

**Civil Division**

Seymour Lake Association  
Plaintiff

v.

Dckt. No. \_\_\_\_\_

The State of Vermont, acting by and through its  
Agency of Natural Resources and Department  
of Environmental Conservation  
Defendants

**SUMMONS**

THIS SUMMONS IS DIRECTED TO: The Attorney General for the State of Vermont,  
Attn: Susanne R. Young, Esq., 109 State St., Montpelier, VT 05609-  
1001

1. *YOU ARE BEING SUED.* The plaintiff has started a lawsuit against you.  
The Plaintiff's Complaint against you is attached to this summons. Do not  
throw these papers away. They are official papers that affect your rights.

2. *YOU MUST REPLY WITHIN 20j DAYS TO PROTECT YOUR RIGHTS.* You must  
give or mail the Plaintiff *a written response* called an Answer within 20\* days of the  
date on which you received this Summons. You must send a copy of your Answer  
to the Plaintiff's attorney located at: David F. Kelley, 1501 Shadow Lake Road,  
Craftsbury Common, VT 05827

You must also give or mail your Answer to the Court located at: Vermont Superior  
Court, Orleans Unit, Civil Division, 247 Main Street, Newport, VT 05855 Attn:  
Penelope Carrier

3. *YOU MUST RESPOND TO EACH CLAIM.* The Answer is your written response to  
the Plaintiff's Complaint. In your Answer you must state whether you agree or  
disagree with each paragraph of the Complaint. If you believe the Plaintiff  
should not be given everything asked for in the Complaint, you must say so in  
your Answer.

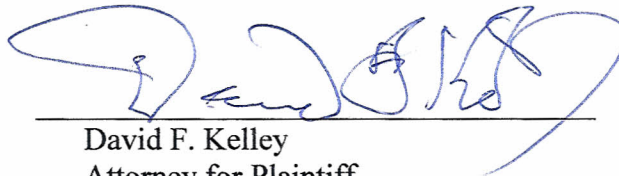
4. *YOU WILL LOSE YOUR CASE IF YOU DO NOT GIVE YOUR WRITTEN ANSWER  
TO THE COURT.* If you do not Answer within 20 days and file it with the Court, you  
will lose this case. You will not get to tell your side of the story, and the

Court may decide against you and award the Plaintiff everything asked for in the complaint.

5. *YOU MUST MAKE ANY CLAIMS AGAINST THE PLAINTIFF IN YOUR REPLY.* Your Answer must state any related legal claims you have against the Plaintiff. Your claims against the Plaintiff are called Counterclaims. If you do not make your Counterclaims in writing in your Answer, you may not be able to bring them up at all. Even if you have insurance and the insurance company will defend you, you must still file any Counterclaims you may have.

6. *LEGAL ASSISTANCE.* You may wish to get legal help from a lawyer. If you cannot afford a lawyer, you should ask the court clerk for information about places where you can get free legal help. *Even if you cannot get legal help, you must still give the Court a written Answer to protect your rights or you may lose the case.*

*Dated at Greensboro, Vermont, this 29<sup>th</sup> day of April, 2014.*

A handwritten signature in blue ink, appearing to read "David F. Kelley", is written over a horizontal line.

David F. Kelley  
Attorney for Plaintiff  
1501 Shadow Lake Road  
Craftsbury Common, VT 05827  
802 249 8262  
davidkelley05602@gmail.com

Served on:

*Date:*

*Sheriff:*

**State of Vermont**

**Superior Court  
Orleans Unit**

**Civil Division**

Seymour Lake Association  
Plaintiff

v.

Dckt. No. 108-4-14 OXU

The State of Vermont, acting by and through its  
Agency of Natural Resources and Department  
of Environmental Conservation  
Defendants

**COMPLAINT**

Now comes the Plaintiff, Seymour Lake Association, by and through their attorney, David F. Kelley, and does hereby allege and petition as follows:

1. The Plaintiff, Seymour Lake Association, is a domestic not for profit corporation created to facilitate, coordinate and protect the beauty and quality of Lake Seymour and to represent property owners at Lake Seymour in Morgan, Vermont. In 2013 approximately 125 volunteers from Seymour Lake Association's 288 members owning lakefront property, hosted or participated in watershed ecology workshops, the Blueberries for Blue Lakes program, the Lake Wise program, the first-ever Septic Socials (learning about the most current septic systems) and workshops to plant buffer zones. As volunteers, they test six Seymour tributaries to identify potential sources of pollution. They also train and pay staff for the Invasive Patroller and Access Greeter program and volunteer with kayaks to constantly monitor the lake for invasive species.

2. The Defendant State of Vermont is the trustee of all navigable waters within the political boundaries of the State of Vermont.

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ORLEANS UNIT

3. The Agency of Natural Resources is the agent of the State of Vermont commissioned with responsibility for protecting and preserving the natural resources within the State of Vermont, and more specifically with respect to the issues herein, the navigable waters and shore lands of Vermont. The Department of Environmental Conservation is a Department within that Agency which has assumed control and responsibility for those matters at issue herein.

### **I. Background**

4. In 1921 a dam with gates was erected at the outlet of Lake Seymour. That dam was replaced in 1928.

5. In 1923 and in 1948 substantial blasting was done at or around this dam which together with the dam worked to alter water levels in Lake Seymour.

6. In 1951 these issues came before the Vermont General Assembly and were addressed with laws that are essentially the same today:

*“The Public Service Commission shall ascertain and establish the natural maximum and minimum water levels of Lake Seymour at the outlet, excluding from its determination of such levels the effect on natural conditions disturbed by blasting of the barrier, changes in the depth and width of the channel above and below the barrier, as well as the effect the present control dam may have on such levels.” 30 V.S.A. 401.*

7. Vermont Law further requires:

*“That the waters of Lake Seymour shall not by any artificial means be raised higher or drawn lower, or permitted through neglect to become lower or higher, than the maximum and minimum levels established by the board.” 30 V.S.A. 402.*

8. The statutes set forth above concerning Lake Seymour were enacted in 1951 and amended in 1959 to change the name “Public Service Commission” to “Public Service Board.”



9. In September of 1951 the then Public Service Commission issued findings of fact that included the following:

*"That the natural maximum water level of Lake Seymour at its outlet, disregarding the effect of the dams and blasting, is 6 inches above the crest of the present dam.*

And further:

*" That the natural minimum water level of Lake Seymour at its outlet, disregarding the effect of the dams and blasting, is 8 inches below the crest of the present dam. "*

10. Those findings were later affirmed by the Vermont Supreme Court. *In re: Establishment of Water Levels of Lake Seymour*, 117 Vt. 367, 91 A.2d 813, 1952 Vt. LEXIS 147 (1952).

11. Since that time, and until 2004, a gate was used to augment spillway flows, in order to maintain "natural and normal" water levels.

12. Vermont law states that: "To aid in the fulfillment of the State's role as trustee of its navigable waters and to promote public health, safety, convenience, and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans, make rules, encourage and promote buffers adjacent to lakes...The purposes of the rules shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, and aquatic life; control building sites, placement of structures, and land uses; reduce fluvial erosion hazards; reduce property loss and damage; preserve shore cover, natural beauty, and natural stability; and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the State." 10 V.S.A. 1421.

13. And furthermore Vermont law states: “The Secretary shall prepare a comprehensive plan...governed by the following general standards...Particular attention shall be given to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; and shore land layout for residential and commercial developments.” 10 V.S.A. 1423(b)(6).

14. As part of the Clyde River Hydroelectric Project, in 2004 Citizens Utilities Company replaced the dam that had been built in 1928 with a new dam, likewise outfitted with a gate.

15. During the licensing process, the Vermont Agency of Natural Resources and its Department of Environmental Conservation (hereinafter the “Defendants”) issued a “401 Certification.” A 401 Certification is a tool created by the federal Clean Water Act that allows states to ensure that a dam licensed by the Federal Energy Regulatory Commission is in compliance with State Water Quality Standards. The Defendants’ 401 Certification was appealed to the Water Resources Board and a final decision was issued on July 2, 2003.

16. During the licensing process for the replacement dam there was no evidence offered to contradict or alter the Public Service Board’s earlier findings, established pursuant to 10 V.S.A. 401, concerning the “natural and normal” water levels of Lake Seymour.

17. Condition H of the July 2, 2003, of the Agency of Natural Resources 401 Certification reads in pertinent part: “The design shall also include a gate bay to enable future operation of the gate if the Department determines that the modified dam has significantly increased the magnitude, frequency or duration of shoreline flooding and this impact cannot reasonably be abated.”

18. The new, modified dam has regularly and continually caused significant increases in water levels above the maximum levels established pursuant to 30 V.S.A. 401. The result has been significant shore land flooding and damage which contributes to water quality damage and damage to the shore lands of Lake Seymour.

19. The Plaintiff has met and communicated with Defendants repeatedly over a six year period seeking compliance with the law and permission to use the gate for maintenance of “natural and normal” water levels and minimization of substantial shore land flooding and consequent erosion and water quality and property damage from said flooding.

## **II. Violation of Ministerial Duties**

20. Since the installation of the new dam, the Defendants have continually, neglectfully, willfully, wantonly and recklessly refused to allow the gate to be used to maintain “natural and normal” water levels as required by the Vermont Statutes and the Vermont Supreme Court, despite substantial evidence from their own staff that the new dam has resulted in significant increases above the maximum levels already established and mandated as per the law of the State of Vermont.

21. The failure of the Defendants to abide by their duties and their failure to allow the gate to be used to maintain “natural and normal” water levels at Lake Seymour



as established by law has contributed to, and been a proximate cause to the loss of trees, bushes, flowers and buffers, to erosion exposing the root system of mature trees and the loss of beaches.

22. Furthermore Defendants' acts and omissions have been a contributory and proximate cause to reduced water quality in Lake Seymour, contrary to public policy, to the health and safety of the public, and to the diminishment of Plaintiffs' and public's use and enjoyment of Lake Seymour.

23. In allowing the water levels to be raised beyond the "natural and normal" levels by an artificial means, to wit, the installation of the 2004 dam, the Defendants are in continuing and ongoing violation of 30 V.S.A. 402 and are in continuing and ongoing violation of the Defendant's ministerial duties as established by law.

24. The result of the Defendants' violation of Vermont's Supreme Court decision and 10 V.S.A. 401 and 402 and their continuing and ongoing failure to adhere to the "natural and normal" water levels established by the Public Service Board pursuant to 30 V.S.A. 401 has contributed to and been a proximate cause of damage to the water quality and shoreline and shore lands of Lake Seymour and has been a proximate cause of loss and impairment of the uses and enjoyment of Plaintiff's property and of Lake Seymour by the public in general.

25. Furthermore, the refusal of the Agency of Natural Resources, acting by and through its Department of Environmental Conservation, to allow the use of the gate to maintain "natural and normal" water levels, is contrary to the conservation policies of the State of Vermont as established by Vermont's General Assembly at 10 V.S.A. 1421.



26. Defendants' failure to abide by their above referenced duties to protect and maintain the shore lands and water quality of Lake Seymour together with Defendants' failure to protect and maintain existing uses of the waters and the level of water quality necessary to protect those existing uses constitutes a violation of the Vermont Water Quality Standards, Section 1-03 Anti-Degradation Policy, and of the Clean Water Act, Anti Degradation Policy, 40 CFR 131.12.

### **III. Public Nuisance**

27. Plaintiffs hereby incorporate paragraphs 1-26 above by reference and further allege as follows:

28. That Defendants have a duty to protect the shore lands of Lake Seymour.

29. That Defendants have failed to perform their legal duty to protect said shore lands.

30. That Defendants' acts and omissions have caused damage to the shore lands of Lake Seymour and to the waters of Lake Seymour and furthermore have impaired Plaintiff's use and enjoyment of their property and Lake Seymour and have impaired the public's use and enjoyment of this public resource.

### **IV. Nuisance Per Se**

31. Plaintiff hereby incorporates paragraphs 1-30 above by reference and further states that:

32. The acts and omissions of Defendants are in direct violation of 30 V.S.A. 401 and 402, the 1952 decision of Vermont's Supreme Court, the policy of the State of Vermont as set forth at 10 V.S.A. 1421 and 1423 (b) (6), Section 1-03 of the Vermont Water Quality Standards and the Anti-Degradation Policy of the federal Clean Water Act.

33. That Defendants' failure to comply with the laws of the State of Vermont has created a nuisance per se.

**Request for Relief: *Wherefore*** Plaintiff requests that:

1) This Court issue a Writ of Mandamus directing the Agency of Natural Resources and the Department of Environmental Conservation to return to the practice mandated by Vermont statutes and the Vermont Supreme Court and to allow water levels at Lake Seymour to be maintained within "natural and normal" levels by use of the gate installed at the dam belonging to Great Bay Hydro Corporation, at the outlet of Lake Seymour, as contemplated by Condition H of the dam's 401 Certification and as required by 30 V.S.A. 401 and 402 and *In re: Establishment of Water Levels of Lake Seymour*, supra in such a manner as to preserve shore growth, and to protect and maintain existing uses such as the enjoyment of aquatic recreation, boating, fishing, and to protect and maintain safe and healthful conditions.

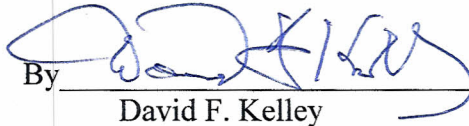
2) That the Agency of Natural Resources and the Department of Environmental Conservation be enjoined from continuing to prevent Great Bay Hydro Corporation and/or the Seymour Lake Association from using the gate installed on the dam at the outlet of Lake Seymour to maintain "natural and normal" water levels so as to prevent ongoing shore land flooding and thereby preventing further damage and loss to the shore lands and water quality of Lake Seymour.

3) And that this Court order such other relief as the Court may deem just and

equitable, including costs and attorney's fees.

Dated at Morgan, Vermont, this 29<sup>TH</sup> day of April, 2014.

By



David F. Kelley  
Attorney for Plaintiffs  
1501 Shadow Lake Road  
Craftsbury Common, VT 05827  
802 249 8262/802 586 2588  
davidkelley05602@gmail.com

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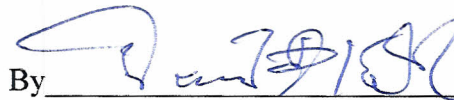
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Defendants

**Jury Demand**

Now come the Plaintiffs in the above captioned matter, and by and through their attorney, David F. Kelley, do hereby demand trial by jury as to those matters which may be so tried.

Dated at Morgan, Vermont, this 29<sup>th</sup> day of April, 2014

By



David F. Kelley  
Attorney for Plaintiffs  
1501 Shadow Lake Road  
Craftsbury Common, VT 05827  
802 249 8262/802 586 2588  
davidkelley05602@gmail.com