STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 108-4-14 Oscv

SEYMOUR LAKE ASSOCIATION,)
Plaintiff,)
)
V.)
)
THE STATE OF VERMONT, acting by and)
through its AGENCY OF NATURAL)
RESOURCES and DEPARTMENT OF)
ENVIRONMENTAL CONSERVATION)
Defendants.)

Plaintiff's Response to Defendants' Motion to Dismiss

Now comes the Plaintiff, by and through their attorney, David F. Kelley, and does hereby respond to Defendants' Motion to Dismiss as follows:

I. Synopsis

A. As a result of increased shoreline flooding following the replacement of the dam at the outlet of Lake Seymour in 2004, and Defendants' refusal to take steps to abate that flooding, Plaintiff has filed a complaint asking the Court for 1) A "writ of mandamus" directing the Defendants to comply with their legal duties pursuant to 30 V.S.A. 401 and 402; the Vermont Supreme Court's decision in *In re Water Levels of Lake Seymour*, 117 VT 367; 91 A.2d 813 at 815; 1952 Vt. LEXIS 147 (1952); the anti-degradation policies of the Clean Water Act and Vermont Water Quality Standards; 10 V.S.A. 1423(b)(6); 10 V.S.A. 1421; and the express intent of the 401 Water Quality Certificate in the Clyde River Hydroelectric Project, FERC Project License No. 2306-008; and 2) to enjoin the

Defendants from allowing a public nuisance (undue flooding) and nuisance per se to continue.

B. Defendants have filed a motion to dismiss claiming lack of jurisdiction, V.R.C.P. 12(b)(1), and failure to state a claim upon which relief can be granted, V.R.C.P. 12(b)(6). They have argued: 1) This is an appeal of a Department of Environmental Conservation decision, therefore jurisdiction lies with the Environmental Division, not the Civil Division; 2) This is not a matter of State law. The issues are preempted by federal law; and 3) Vermont has sovereign immunity because there is no private analog and this is a matter where government may exercise its discretion.[1]

With respect to preemption, Defendants' argument may be summarized as follows: 1) Conditions of a FERC license are a matter of federal law; 2) Federal law preempts state law; 3) To modify a FERC license Plaintiff must go to FERC.

C. Plaintiff's response to Defendant's arguments, set out with specificity below, is as follows:

1. Preliminarily, a 12(b)(6) motion cannot be granted unless it is "beyond doubt" that there are no facts or circumstances that would entitle Plaintiff to relief.

2. Jurisdiction Belongs With the Civil Division of the Superior Court, not the Environmental Court:

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[1] Rule 12(b)(6) says in pertinent part "If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Defendants' motion contains substantial material outside of the pleadings, for example: 1) References to substantial communications from SLA to Defendants. Defendants provide the Court with Defendants' responses to some of that material but with none of Plaintiffs' information or communications, **Defendants' Memo, 9 and 10;** 2) Defendants attach substantial water level data that is hearsay and also misleading—the sort of data that would trigger conversion to summary judgment and to which Plaintiff must be afforded an opportunity to respond, **Defendants' Memo, Ex. D,E and F**; 3) References to comments made by Plaintiff's attorney to a State Senator, taken out of context, which likewise merits response. **Defendants' Memo, p. 27.** A more accurate summary of my commentary to State Senators can be found in **Attachment G.**

This is not an appeal of an Agency decision. This is a petition to compel compliance with legal duties explicitly set forth in Vermont State law and common law. It is specifically assigned to Superior Court-Civil Division by statute. Furthermore, it is not a circumstance where the law contemplates an avenue of appeal from a putative agency decision.

3. The matter is not preempted by federal law:

a. Plaintiff does not seek modification of the FERC license. Plaintiff seeks compliance with specific mandates of Vermont State law and federal law and with the express language of the 401 Water Quality Certificate and the Project License.

b. There is no federal preemption of any State law in this matter because: 1) there is no conflict between relevant State law and federal law and, 2) The controlling federal law was put in place so that these issues would be controlled by State law.

c. The State's 401 Water Quality Certificate must be interpreted so as to harmonize with controlling Vermont State statutes. There is no law, federal or State, that gives Vermont agencies the right to amend or revoke Vermont statutes or Vermont Supreme Court decisions, specifically 30 V.S.A. 401 and 402 and *In re Water Levels of Lake Seymour,* supra. The Department's discretion concerning use of the gate at Lake Seymour, as set forth in Condition H of the 401 Certificate, is circumscribed by Vermont statutes and an explicit decision of the Vermont Supreme Court.

d. The Department specifically reserved unto itself the decision making power with respect to the use of the gate at Condition H of the 401 Certificate. FERC acquiesced to that condition by incorporating it in the license. FERC has nothing to do with the decision regarding use of the gate. Most importantly, the Department's decision making power must be exercised in compliance with the dictates of the Vermont Legislature and the Vermont Supreme Court.

e. If a modification was necessary with respect to water quality issues (and it is not), the license in question waives any federal jurisdiction and specifically reserves that authority to the Defendants, the Vermont Agency of Natural Resources and the Vermont Department of Environmental Conservation at condition W.

f. The key cases cited by Defendants are inapplicable to this matter. In fact, some cases cited by Defendants are no longer good law at all. Some are not good law within the facts of this case.

4. Vermont does not have sovereign immunity:

a. There is no immunity so far as a writ of mandamus is concerned. States are not immune from actions that seek to compel them to comply with the law.

b. There are plenty of private analogs for Plaintiff's nuisance claims. Owners and managers of dams have been sued for flooding for as long as there have been dams.

c. Sovereign immunity is intended to protect the State treasury. Here Plaintiffs are not seeking any monetary damages. They seek equitable relief—a prospective injunction--- to protect the water quality of the Lake they live on and love.

II. History

A dam with gates was erected at the outlet of Lake Seymour in 1921. In 1923 Citizens Utilities Company or its predecessors in ownership blasted out the channel at the outlet of the Lake from a point below where the present dam is now located for a distance of some 1200 feet toward the lake forever changing the natural hydrology of the Lake. The dam was fitted with a gate to manage water levels. In 1928 a new dam was constructed, approximately 1200 feet downstream from the outlet of the Lake. The dam was again fitted with a gate. Citizens Utilities Company continued to do additional blasting in the channel up to 1948. The blasting significantly affected the natural maximum and minimum levels of Lake Seymour by widening and lowering the channel. *In Re Establishment of Water Levels of Lake Seymour,* supra.

As a result of the impact of this blasting on water levels at Lake Seymour, citizens living at or around the Lake brought their concerns to Vermont's General Assembly and in 1951 the following Vermont law was adopted:

"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. When such levels are so established, the commission shall certify its findings to the Secretary of State and cause the same to be recorded in the offices of the town clerks of the towns of Morgan and Charleston." (Amended 1959, No. 329 (Adj. Sess.), § 39(b), eff. March 1, 1961.) ***30 V.S.A. 401.***[2]

[2] The word "Commission" was changed to "Board" in 1959.

And further:

"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 commission." (Amended 1959, No. 329 (Adj. Sess.), § 39(b), eff. March 1, 1961.) ***30 V.S.A. 402.*** (Emphasis added).[3]

On September 15 1951, pursuant to those laws, the then Public Service Commission issued the following:

With respect to the natural maximum water level, the Commission wrote: *"We hereby Certify that the natural maximum water level of Lake Seymour at the outlet is six inches higher than the crest of the present Citizens Utilities Company dam, which dam is located about 1200 feet below the lake outlet."*

And with respect to the natural minimum water level, the Commission wrote: *"We hereby Certify that the natural minimum water level of Lake Seymour at the outlet is eight inches below the crest of the present Citizens Utilities Company dam, which dam is located about 1200 feet below the lake outlet."* See ***In Re Establishment of Water Levels of Lake Seymour,*** *supra.*

That certification was subsequently ratified and upheld by the Vermont Supreme Court which pointed out that, "… the commission gave Citizens the benefit of the utmost fluctuation and fall from the maximum to the minimum level." ***In Re Establishment of Water Levels of Lake Seymour,*** 117 VT 367; 91 A.2d 813; 1952 Vt. LEXIS 147 at 4 (1952). The Court wrote "…we hold that the term 'natural' means 'normal' and that it was the duty of the commission to find what are the normal maximum and minimum levels of Lake Seymour." Supra at 3. (Emphasis added).

Until the year 2004 the gate that was installed in the dam was used to maintain water levels in Lake Seymour at what the Vermont Supreme Court had confirmed were, historically, the "natural and normal" levels of the Lake.

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[3] Today the dam installed in 2004 is an artificial means by which water levels are being raised well above the maximum levels set by law, not only neglectfully, but willfully. **See Attachment C, Affidavit of Timothy Buzzell, PE.**

On November 6, 1963, Citizens Utilities was issued a license by the Federal Energy Regulatory Commission (FERC) for the "Clyde River Hydroelectric Project" with a term expiring on December 31, 1993. The Clyde River Hydroelectric Project, as originally licensed, consisted of three hydroelectric dams on the Clyde River and two storage impoundments. One of those storage dams was the dam below the outlet at Lake Seymour. As part of the Lake Seymour dam there was a 5 foot by 4.3 foot sluice gate to maintain water levels in compliance with Vermont law. ***In re Citizens Utilities Company, Order Issuing New License,*** FERC, Project Nos. 2306-008 and-024, pages 1-3 (2003).[4]

On December 23, 1991, Citizens Utilities filed an application with FERC for a new license. Under Section 401(a)(1) of the Federal Water Pollution Control Act (the Clean Water Act) 33 U.S.C. 1341(a)(1) FERC could not issue a new license for a hydroelectric project unless the appropriate state agency issued a "401 Water Quality Certification" certifying compliance with Vermont State law and water quality standards or waived such certification. On July 8, 1994, Vermont's Agency of Natural Resources and Department of Environmental Conservation denied Citizens' application for a 401 Water Quality Certification. Ultimately, the Vermont Agency of Natural Resources and the Department of Environmental Conservation issued the requested Water Quality Certification on August 1, 2002. On August 15, 2002, that certification was appealed by the Seymour Lake Association, the Vermont Natural Resources Council and Vermont Trout Unlimited. After a *de novo* hearing the Vermont Water Resources Board issued an

[4] The Lake Seymour dam has not been used for production of electricity and since 1987 the Lake Seymour dam has ceased to be used even for storage for electricity. **See Attachment A, paragraph 250.**

amended 401 Certification on July 11, 2003. ***Re Clyde River Hydroelectric Project, Vt. WRB Docket No.WQ-02-08 A and B (2003).***

The Water Quality Certification that was issued by the Water Resources Board on July 11, 2003, contained the following language (at page 36, Condition H):

"....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 be reasonably abated. However, the gate operator shall not be installed and the gate shall not be operated in any way without prior approval by the Department." See **Attachment A-2, *Re Clyde River Hydroelectric Project, supra at 36 ;* and Attachment B, *FERC Project License 2306-008 at appendix, p. 4 (2003).***

Condition H must be read in conjunction with Paragraph 255 of the of the Water Resources Board's final order (at p. 15 of Attachment A-2): At paragraph 255 the Board writes: "Nevertheless, because of the significance of the issue to the Seymour Lake Association, conditions F and H have been amended so as to set forth monitoring requirements and a consultation process between the Applicant, the Department and the Seymour Lake Association which the Board finds are reasonable to assess the performance of the new dam and to verify the conclusions of the current analysis, while ensuring compliance with the VWQS." (Emphasis added).

Furthermore, Condition H must be read in conjunction with Condition B (as well as other provisions discussed infra) which calls for "true run of river" outflow. Repeated shoreline flooding demonstrates "true run of river" is not happening. **See Attachment C, Affidavit of Timothy Buzzell, PE.**[5]

Citizens was issued a license to rebuild their dam at the outlet of Lake Seymour on November 21, 2003, and subsequently built a new dam with a gate bay to enable future operation of the gate. **See Attachment B, FERC Project License 2306-008.** The dam was subsequently sold to Great Bay Hydro.

The Seymour Lake Association, through its representatives, has engaged in the above described "consultation process" with the Vermont Agency of Natural Resources

[5] The conditions of the State's 401 Water Quality Certification are attached as an Appendix to the FERC Project License. **See Attachment B.**

and its Department of Environmental Conservation for over seven years. They have sought to maintain water levels within the "normal and natural" range established by virtue of the Vermont statutes and the mandate of the Vermont Supreme Court. The Association's pleas have fallen on deaf ears, leaving the Association with no alternative but to seek redress in this Court. **See Attachment D, Affidavit of Ronald Kolar, PE.**

III. Standard of Review

"A motion for failure to state a claim may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." ***Kaplan v. Morgan Stanley & Co.****, 2009 VT 78 at 7. Courts "assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume that all contravening assertions in defendant's pleadings are false."* ***Mahoney v. Tara, LLC,*** 2011 VT 3 at 7.

IV. Whether Jurisdiction Lies With the Environmental Division or Civil Division of the Superior Court?

The Defendants characterize this action as an appeal from a decision of the Agency of Natural Resources and/or the Department of Environmental Conservation. It is not. This is first, a petition in the nature of mandamus. Plaintiff seeks an order from the Superior Court, to the Agency of Natural Resources and the Department of Environmental Conservation enjoining them from violations of, and directing compliance with, their duties pursuant to 1) Vermont State statutes, 2) the mandates of the Vermont Supreme Court, 3) an order of the Vermont Water Resources Board, 4) their duties as trustees of the navigable waters of the State of Vermont, 5) the Vermont Water Quality Standards, Section 1-03, and 6) the anti-degradation policy of the Clean Water Act, ***40 C.F.R. 131(12)***. See generally ***Petition of Robert and Ann Fairchild,*** 159 Vt. 125, 616 A.2d 228 (1992).

"The Civil Division shall have ...(3) original jurisdiction concurrent with the Supreme Court, of proceedings in certiorari, mandamus, prohibition and quo warranto..." ***4 V.S.A. 31.***

Secondly, Plaintiff's complaint of nuisance and nuisance per se are civil tort actions, plainly within the jurisdiction of the Civil Division of the Superior Court. ***4 V.S.A. 31(1).*** When government fails to exercise discretionary authority, "by its neglect or refusal to act," in the face of a nuisance a mandamus action in the Civil Division of Superior Court is an appropriate remedy:

> *"Whether or not the word 'may' in Section 609 is to be construed as permissive or mandatory is immaterial in this case. It comes down to whether there was an abuse of the power vested by the statute in the board of health by its neglect or refusal to act under the facts and circumstances appearing in the case...*
>
> *"We think the dangerous public health hazard was a compelling reason for the board to exercise its powers under the statute and required it to cause the condition to be eliminated or removed in accordance with the order to Dutil and the applicable statute. The failure and neglect of the board to take such action amounted to an arbitrary abuse of its lawful authority."* Furthermore, the Court goes on to add: *"...mandamus affords a plain, speedy and adequate remedy."* ***Roy v. Farr,*** 128 Vt. 30 at 36 and 37, 258 A.2d 799 (1969). See also ***Couture v. Selectmen of Berkshire***, 121 Vt. 359, 159 A.2d 78 (1960).

Finally, this is not a circumstance where the law provides for an avenue of appeal from a putative agency decision. There has been no contested case with any kind of record prepared for review as contemplated by the Administrative Procedures Act. ***3 V.S.A. 809.*** It has been a rare creature indeed: a seven or eight year "consultation process." See **Attachment A-1, *401 Water Quality Certificate,*** paragraph 255.

V. Whether Vermont State Law is Preempted by Federal Law?

Defendants' argument may be summarized as follows: 1) Conditions of a FERC license are a matter of federal law; 2) Federal law preempts state law; 3) To modify a FERC license Plaintiff must go to FERC.

A. Plaintiff does not seek modification of the FERC license. Plaintiff seeks Defendants' compliance with their lawful duties pursuant to:

1) **30 V.S.A. 401 and 402** and the accompanying mandate of the Vermont Supreme Court at ***In re: Water Levels of Lake Seymour***, supra. The Defendants have no right to violate those laws. Defendants' discretion is strictly limited by law in this case.

2) Anti-degradation policies of the Clean Water Act (40 CFR 131.12) and Vermont Water Quality Standards (Section 1-03). "All waters shall be maintained in accordance with these rules to protect, maintain and improve water quality." (Emphasis added).

3) 10 V.S.A. 1421 and 1423(b)(6) setting forth fundamental obligations of the Defendants with respect to water quality;[6] and

4) Requirements and the conditions of the license itself:

It is clear from the language of the Agency's original Water Quality Certification at Findings of Fact 250-253 (and incorporated by reference in the final Water Resources Board order) that it was the intent of the parties to recognize the "natural" high and low water levels and to adhere to those legally established target levels. **See Attachment A, Water Quality Certification, Clyde River Hydroelectric Project,** pages 81-83. A common sense reading of those findings indicates that the intent of the Water Quality Certification was to comply with the law, not to ignore it. For example:

a. At paragraph 252 the Board's final order states: "High inflows to the lake would continue to cause it to rise, but the dam design is intended to maintain high levels that mimic natural conditions."[7] Those natural conditions were

[6] Defendants' duties pursuant to 10 V.S.A. 1423(b)(6) are particularly applicable to this matter: "Particular attention shall be given to…assure proper operation of septic disposal fields near navigable waters." See Attachment C, Affidavit of Timothy Buzzell at para. 14. See also Attachment D, Affidavit of Ronald Kolar, para. 15.

[7] The evidence shows it has not done so. As alleged in the complaint, there has been a significant increase in the "magnitude, frequency and duration of shoreline flooding." See **Attachment C, Affidavit of Timothy Buzzell, PE** and **Attachment F, Affidavit of Charles Nichols.**

plainly and explicitly set out by the Vermont Supreme Court. ***In re Water Levels of Lake Seymour***, supra.

b. At paragraph 254 the Board writes: "The dam spillway should be set two inches lower than proposed to provide additional flexibility in assuring that the target lake levels are attained. [8]

c. At paragraph 255 the Board writes: "Nevertheless, because of the significance of the issue to the Seymour Lake Association, conditions F and H have been amended so as to set forth monitoring requirements **and a consultation process** between the Applicant, the Department and the Seymour Lake Association which the Board finds are reasonable to assess the performance of the new dam and to verify the conclusions of the current analysis, while ensuring compliance with the VWQS." (Emphasis added).[9]

If the "conclusions of the current analysis" referred to at "c" above had been accurate, the Seymour Lake Association would not be here in Court today. However an examination of what the Board refers to as "the current analysis" and relevant data shows that analysis to be significantly wrong. The actual water levels have greatly exceeded the run of river standard required by Condition B of the license. Despite radical differences between the actual Lake levels and what the analysis at the time of the dam's construction predicted, Defendants have shown no willingness to engage in any meaningful "consultation process." Defendants claim that they are willing to remove the flash boards, but have not said they would allow them to be replaced, nor do they mention the impracticality and dangerous of using flashboards to maintain water levels. **See Attachment C, Affidavit of Timothy Buzzell, PE, Attachment F, Affidavit of Charles Nichols, and Attachment D, Affidavit of Ronald Kolar.**

The data plainly evidences not only frequent violations of Vermont statutes and the mandate of the Vermont Supreme Court, not to mention the anti-degradation policies

[8] The only "Target Lake levels" ever established were the "natural and normal" levels mandated by the Supreme Court.
[9] A "consultation process" carries with it an implied duty of good faith.

of the CWA and the Vermont WQS, but also "that the modified dam has significantly increased the magnitude, frequency, or duration of shoreline flooding" as set out in Condition H and in violation of Condition B of the 401 Water Quality Certificate. The flow regime, as now managed, does not in any way "mimic natural conditions" as was plainly intended by the 401 Water Quality Certificate. **See Attachment C, Affidavit of Timothy Buzzell, PE. See also Attachment F, Affidavit of Charles Nichols.** Even the former hydrologist for the Agency of Natural Resources has acknowledged "lake levels are higher now that (sic) they were for similar spring runoff conditions before the dam project." **See Attachment H, June 26, 2009 letter from Jeff Cueto to Ronald Kolar at pp. 2-3.**

Additionally, an examination of the data will show not only that the water levels are consistently and substantially exceeding the "normal and natural" high water levels established by law and the mandate of the Vermont Supreme Court, but also the 401 Water Quality Certificate, and the Project License. There is overwhelming evidence that the modified dam has significantly increased the "magnitude, frequency, or duration of shoreline flooding." See **Condition H in Attachments A and B.** See also **Attachments C and F.**

B. There is no federal preemption of 30 V.S.A. 401 and 402 or *In re Water Levels of Lake Seymour* or other State law mandates cited by Plaintiff.

1. For there to be any preemption, state law must conflict in some way with federal law.

As the Vermont Supreme Court pointed out in ***Levine v. Wyeth***, 2006 Vt 107 at Paragraph 7:

"The United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, cl. 2. The Supremacy Clause is the basis for the doctrine of preemption, according to which 'state law that conflicts with federal law is without effect.' ***Cipollone v. Liggett Group, Inc.****, 505 U.S. 504, 516 (1992) (quoting* ***Maryland v. Louisiana,*** *451 U.S. 725, 746 (1981)). In* ***Cipollone****, the Court described the relevant analysis for determining whether Congress intended a federal statute to preempt state law:*

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Id. (quotations and citations omitted). Absent clear congressional intent to supersede state law, including state common law duties, there is a presumption against preemption. ***Medtronic, Inc. v. Lohr****, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."); **Cipollone**, 505 U.S. at 516 ("Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " (quoting* ***Rice v. Santa Fe Elevator Corp.,*** *331 U.S. 218, 230 (1947)).* (emphasis added).

As the Washington Supreme Court pointed out in ***Washington Dept. of Ecology v. P.U.D. No. 1 of Jefferson County***, 849 P.2d 646 at 654 (1993), affirmed by the United States Supreme Court in ***P.U.D. No. 1 of Jefferson County,*** 511 U.S. 700, 114 S. Ct. 1900 (1994):

"Simply put, [the] federal preemption doctrine does not apply in a context where a state is acting to fulfill its federally mandated role in the comprehensive federal scheme embodied in the CWA."

The Court also ruled that there was no preemption because there was no conflict between the water level requirements imposed by Washington State law and any federal action. The Court asserted that given CWA Section 401(d), it could not rule that the Federal Power Act has occupied the field so as to preclude state action. ***Id.*** The court

interpreted the phrase "any other appropriate requirement of state law" in CWA § 401(d) to include "all state water-quality related statutes and rules" including those that relate to water levels. ***Id.*** at 654. That would certainly include 30 V.S.A. 401 and 402.

Whether the Agency's and the Department's duties arise out of federal law or state law (in this case those duties arise out of both) is beside the point. The proper forum to compel compliance with those duties (a mandamus action) is the Civil Division of the Vermont Superior Court. It defies common sense to suggest that the language used by Congress was somehow intended to delegate oversight responsibility for the Vermont Agency of Natural Resources and the Vermont Department of Environmental Conservation as well as for the oversight one of Vermont's most precious water bodies and the interpretation of the Vermont Statutes to the Federal Energy Regulatory Commission—especially for a dam that does not produce electricity and is not even used for storage for other dams that do produce electricity, as is the case with the Lake Seymour dam. See ***401 Water Quality Certification at 250.***[10]

2. In this case there is not only no conflict with federal law, but the controlling federal law embraces state law.

The United States Environmental Protection Agency (EPA) and the United States Supreme Court have both made it clear that Section 401 of the Clean Water Act was not intended to preempt state law. On the contrary, its purpose was just the opposite. Its

[10] It is doubtful that FERC has <u>any</u> jurisdiction over this dam. FERC's jurisdiction is set forth in Section 23(b)(1) of the Federal Power Act. 16 U.S.C. 817(1). Their jurisdiction is limited to the construction, operation and maintenance of dams "for the purpose of developing electric power." The dam in question has nothing to do with developing electric power. Jurisdiction arose in 1963 because the dam was used for storage. But it hasn't been used for storage since 1987. See 401 Water Quality Certification, paragraphs 40 and 250. See also *Central Maine Power Co.,* 81 FERC 61,087 (1997); *Georgia Pacific Corporation.,* 91 FERC 61,047 at p. 61,172 n. 25 (2000).

purpose was to give states a tool by which they could insure that state laws were complied with. It is enlightening to read how the Vermont Attorney General's office has interpreted Section 401(d) in amicus briefs they have written and filed in those cases where the purpose of Section 401(d) was clarified and underscored (in cases involving water levels).

In an amicus brief in the seminal case of ***P.U.D. No. 1 of Jefferson County v. State of Washington, Department of Fisheries, Department of Ecology,*** 511 U.S. 700, 114 S.Ct. 1900 (1994) the Vermont Attorney General's office indicated that they plainly understood the clear meaning of Section 401(d). They wrote:

> *"If Section 401(d) is to be given purpose, it must extend to state laws beyond water quality standards. As evidenced by Section 401(a) and (b), Congress knew how to specify provisions of the Clean Water Act for implementation through Section 401. It did not opt in Section 401(a)(1) to authorize the denial or conditioning of certifications based on specified provisions of the Act. Rather it plainly chose to authorize states to assure compliance with 'any other appropriate state laws through Section 401(d).'" See* ***33 U.S.C. 1341(a) and (d). Brief of Amici Curiae States of Vermont et al. (Jeffrey L. Amestoy, Attorney General, Ronald A. Shems, Assistant Attorney General, Of Counsel) at 29 (1993).*** (Emphasis added).

The U.S. Supreme Court agreed. Justice O'Connor writes that Section 401(d) "allows the State to impose 'other' limitations on the project in general to assure compliance with various provisions of the CWA and with 'any other appropriate State law." See ***P.U.D. No. 1 of Jefferson County v. State of Washington,*** supra, at 1908.

The introduction to the EPA's Guidance Document, entitled ***Clean Water Act Section 401 Water Quality Certification: A Water Quality Tool for States and Tribes*** (EPA 2010) at page 1, quotes the U.S. Supreme Court case of ***S.D. Warren v. Maine Board of Environmental Protection*** in explaining the purpose of Section 401 of the Clean Water Act:

"State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

'No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.' 116 Cong. Rec. 8984 (1970).

The EPA Guidance Document goes on to further quote the ***S.D. Warren*** decision:

"These are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of State law,' 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge," ***S. D. Warren Co. v. Maine Board of Environmental Protection et al,*** 547 U.S. 370, 126 S.Ct. 1843 (2006).

The United States Congress was clear, that the Clean Water Act set minimum standards but that the states' authority was pre-eminent after that: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution." 33 U.S.C. 1251(b). **See Attachment E, EPA Guidance Document, The Clean Water Act Section 401, A Water Quality Protection Tool for States and Tribes (2010).**

As David Mears, the Vermont Commissioner of the Department of Environmental Conservation, noted at page 23 in his **Amicus Curiae for the National Wildlife Federation** filed in ***S.D. Warren v. Maine,*** supra, the reservation of these powers to the states is particularly important with respect to dams.

"This determination, that the Act protects uses, not just numerical criteria, is consistent with the conclusion that Section 401 is intended to give states significant authority to address a broad spectrum of harms to waters of the United States such as those caused by hydropower dams."

As will be discussed in **"D"** and **"E"** infra, those powers don't vanish just because a federal license has been issued.

Given the language of the United States Congress itself, it is clear that Congress in no way intended to occupy this field so as to preempt state laws. On the contrary, Congress intended just the opposite. The 401 Water Quality Certification process provided for in the Clean Water Act did not give the Vermont Agency of Natural Resources or the Vermont Department of Environmental Conservation a license to ignore the mandates of Vermont's General Assembly or the Vermont Supreme Court in the FERC licensing process. Rather it gave those agencies of the State of Vermont a tool by which they were expected to implement the mandates of Vermont's General Assembly and the Vermont Supreme Court. To the extent that the Department was given discretion, it is circumscribed by State law. Nothing in the Clean Water Act or the Federal Power Act empowers the Agency, the Department or the Water Resources Board to amend, alter or reverse acts of the Vermont General Assembly or mandates of the Vermont Supreme Court establishing and requiring maintenance of the "normal and natural" water levels of Lake Seymour.

C. The 401 Water Quality Certification issued by the Vermont Water Resources Board in this matter must be read so as to harmonize with clear mandates of the Legislative branch.

As the Vermont Supreme Court has noted in ***Levine v. Wyeth,*** 2006 Vt 107 at Paragraphs 30 and 31, within the scheme of separation of powers, an administrative agency cannot re-write the unambiguous laws of a legislative body:

"...deference to an agency's interpretation is appropriate only when a statute is 'silent or ambiguous with respect to the specific issue' the agency has considered; otherwise, 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' 467 U.S. at 842-43. Moreover, '[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" Id. at 843 n.9.

D. The Defendants have "preempted" FERC

Decisions with respect to the use of the gate at the dam at Lake Seymour have nothing to do with FERC. At Condition H of the 401 Water Quality Certificate the Department reserves that decision to itself. FERC concedes that authority when they incorporate that condition into the license. ***American Rivers, Inc. v. F.E.R.C.,*** 129 F.3d 99 (1997).

E. If there was any need for modification, Vermont retains jurisdiction.

Plaintiff does not seek to modify the 401 Water Quality Certification or the FERC License. Plaintiff does not even seek review of the appropriateness of the conditions in either document. Rather, Plaintiff seeks the application of, and compliance with, Vermont law as contemplated by Congress.

Furthermore, given the facts and data, the License and Certification plainly contemplate use of the gate to maintain the "natural and normal" water levels mandated by the Vermont Supreme Court. To ignore the language of the License, the Certification and Vermont law is to create a nuisance per se. However, <u>even if some modification was required</u>, the plain language of the Certificate itself, indicates that the Federal Energy Regulatory Commission has waived any claim to jurisdiction relative to the terms and conditions of the 401 Certification. The Certificate and the License, read at Condition W:

"**W. Continuing Jurisdiction.** *The Board returns jurisdiction over this matter to the Secretary of ANR to assure Project implementation and compliance with the Certificate issued on August 1, 2002, as amended herein.* <u>*The Department may add and alter the terms and conditions of this amended Certificate, when authorized by law and as appropriate to carry out its responsibilities with respect to the protection and enhancement of water quality during the license period.*</u>" Emphasis added.

The Vermont Attorney General's office has successfully argued that this language "reserves the right in Vermont to amend (or 're-open') the certification when appropriate." ***American Rivers, Inc. v. F.E.R.C.,*** supra at 102 (1997).

F. Key cases relied on by Defendants are inapplicable to this matter

It is noteworthy that the cases cited by Defendants relative to federal preemption, in their section entitled "Legal Framework," either do not involve application of a state 401 Water Quality Certification or pre-date the U.S. Supreme Court decisions in ***P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology***, 511 U.S. 700 (1994), and ***S.D. Warren v. Maine Board of Environmental Protection***, 547 U.S. 270 (2006). See ***Defendant's Memorandum*** dated June 20, 2014, pages 3-4.[11] The ***P.U.D. No. 1*** and ***S.D. Warren*** cases have changed the federal-state relationship with respect to management of our navigable waters.

Justice O'Connor wrote the Supreme Court's decision in ***California v. F.E.R.C.***, supra. She also wrote the Court's decision in ***P.U.D.No. 1 of Jefferson County v. Washington Dept. of Ecology***. In ***California v. F.E.R.C.*** Justice O'Connor wrote that California could not impose State minimum stream flow requirements on a federally licensed hydroelectric dam. In ***P.U.D. No. 1 of Jefferson County*** Justice O'Connor

[11] Defendants cite: *California v. F. E.R. C.*, 495 U.S. 490, 503 (1990); *Town of Springfield, Vt. v. McCarren,* 549 F. Supp. 1134, 1156 (D. Vt. 1982); *Niagara Mohawk Power Corp. v. New York* State *Dept. of Envtl. Conservation*, 187 A.D.2d 7, 9 (N.Y.A.D. 3 Dept. 1993); *First Iowa Hydro—Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 167-68 (1946)); *Karuk Tribe v. California Reg'l Water Quality Control Bd.*, 183 Cal.App.4th 330, 355 (Cal. 2010). It should be noted that the *Niagara Mohawk* case cited by Defendants is no longer good law. *Niagara* disallowed the application of state laws designed to protect stream beds, fish habitat and water levels and was at odds with *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976), *Arnold Irrig. Dist. v. Department of Envtl. Quality*, 79 Or. App. 136, 717 P.2d 1274, review denied, 301 Or. 765 (1986) and *Washington Dept. of Ecology v. P.U.D. No. 1 of Jefferson County*, 849 P.2d 646 at 654 (1993). For that reason the U.S. Supreme Court granted cert. in the *P.U.D. No. 1 of Jefferson County* case and upheld the broader application of state laws under 401(d) that had been adopted in the other better reasoned cases.

wrote that the State of Washington could impose its minimum stream flow requirements on a federally licensed hydroelectric dam.

There were three simple differences between those two Supreme Court cases: 1) ***California v. FERC*** was decided in 1990 and ***P.U.D. No. 1 of Jefferson County*** was decided in 1994; 2) In ***California v. FERC*** the State adopted new minimum stream flow requirements three years after the FERC license was issued, and tried to impose the newly adopted standards after already consenting to the less stringent standard three years earlier (thus, unlike the case at bar, a genuine conflict between state and federal law); 3) Most importantly, in ***California v. FERC*** there was no reference to any state 401 Water Quality Certificate whereas in ***P.U.D. No. 1 of Jefferson County*** the State exercised its authority pursuant to Section 401(d).

The distinction rests most squarely on the shoulders of Section 401(d) of the Clean Water Act: As Justice O'Connor explains at page 711:

"Section 401(d) provides that any certification shall set forth 'any effluent limitations and other limitations...necessary to assure any applicant' will comply with the various provisions of the Act and appropriate state law requirements." 33 U.S.C. 1341(d). (First emphasis added by O'Connor, second emphasis added by author).[12]

Further on Defendants cite ***Keating v. FERC***, 927 F.2d 616 (D.C. Cir. 1991) where the State of California granted a 401 Certification in 1986 and then sought to revoke the 401 Certification in 1987. The case involved a revocation of a State Certification specifically controlled by specific procedures set forth in 401(a)(3). The case at bar in this matter does not involve revocation of a 401 certification under 401(a). It involves application of existing State law under 401(d).

[12] Justice Thomas' dissent is interesting in his recognition of the enormous power this case devolves upon the states with respect to management of navigable waters. *P.U.D. No. 1 of Jefferson County* makes it clear that *California v. FERC* would have had a different result if it had been a 401(d) case.

There is a significant difference when 401(d) is an issue: In ***Department of Ecology v. P.U.D. No. 1 of Jefferson County v. Dept. of Ecology***, 121 Wn.2d 179, 849 P.2d 646 (1993), affirmed by the U.S. Supreme Court in ***P.U.D. No. 1 of Jefferson County***, supra, the Washington Supreme Court wrote at pages 190-192:

"Congress... intended the phrase 'any other appropriate requirement of State law' to refer broadly to all state water quality-related laws, not just to state water quality standards... Congress recognized a difference between the authority it provided in section 401(a)(1) to 'deny' certification and that which it conferred in section 401(d) to 'condition' certification. It intended that the broader power contained in section 401(d) would allow the states to condition certification on compliance with state law provisions other than water quality standards adopted pursuant to section 303."

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Section 401(d) is not an excuse for state employees to ignore state law. It is a means by which states would apply state law.

FERC has agreed: "Since pursuant to Section 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of the State courts and not the Commission." ***Town of Summerville***, 60 F.E.R.C. 61,291 at p. 61,990 (1992). "We recognize that review of the appropriateness of water quality certification conditions is a matter for State courts to decide." ***Noah Corporation***, 57 F.E.R.C. 61,170 at 61,601 (1991); "Review of the appropriateness of water quality certification conditions is a matter for State courts to decide." ***Central Maine Power Co.,*** 52 F.E.R.C. 61,172 (1990).

The Environmental Protection Agency, the Federal agency vested with authority to administer and implement the Clean Water Act shares this view. Pursuant to its authority to issue discharge permits under the National Pollutant Discharge Elimination system of the CWA the EPA promulgated 40 C.F.R. *Effect of State Certification* Section

124.55(e) "Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." See also ***Roosevelt Campobello Int'l Park Comm'n v. United States Environmental Protection Agency***, 684 F.2d 1041, 1055 (1st Cir. 1982). Because the EPA administers the Clean Water Act the Agency's interpretation of the Act is entitled to special deference. ***Oregon Natural Desert Association v. Thomas,*** 940 F. Supp. 1543, 1540 (D. Or. 1996).

FERC had a change of heart in ***Tunbridge Mills,*** 68 FERC 61,078 (1994). Among the issues was condition P in the Vermont 401 State Water Quality Certification (very similar to Condition W in the matter now before this Court) whereby Vermont retained the right to amend or reopen the certification in the future. FERC said "no," that was going too far. The State of Vermont and American Rivers appealed to the Second Circuit and the Court upheld Vermont's retention of jurisdiction over the 401 Certificate and its conditions. ***American Rivers, Inc. v. F.E.R.C.,*** supra.[13]

Implementation of the gate bay installed in the dam below Lake Seymour is plainly contemplated by Conditions H and W in both the State 401 Water Quality Certification and the FERC Project License 2306-008. Implementation of that gate requires no modification of the Certification or the License. To the extent Defendants have discretion it does not absolve them of compliance with the law. Where the evidence demonstrates substantial increases over and above the "natural and normal" high water levels established by the Supreme Court and significant increases in "the magnitude and duration of shoreline flooding" as referenced in Condition H, and confirmed by

[13] *American Rivers* makes it eminently clear that *California v. FERC* and similar cases would have been decided differently if 401(d) had been an issue and especially if language such as was used in Condition W of the 401 Certificate herein had been used.

Defendants' own hydrologist, the Defendants are duty bound to permit use of the gate to help abate flooding and its consequent damages.[14] If there is a dispute regarding the facts surrounding that issue common sense, the language of the 401 Certificate and Project License, as well as precedent all dictate that those issues should be resolved here in Vermont, not in Washington, D.C.

VI. Whether Plaintiff's Causes of Action are Barred by Sovereign Immunity

A mandamus action, by its very nature, is not barred by sovereign immunity. A complaint in the nature of mandamus seeks the Court's assistance in enjoining "state officers or agencies from acting beyond their constitutional, statutory or jurisdictional powers." ***C.J.S., States, Section 555.*** Mandamus is a long recognized common law cause of action that seeks to enjoin the unauthorized acts of state officers and agencies and/or their compliance with their lawful duties. ***Petition of Robert and Ann Fairchild,*** supra; See also ***Blake v. Betit,*** 129 Vt. 145 at 148, 274 A.2d 481 (1971), ***Miller v. Egan,*** 265 Conn. 301, 828 A.2d 549 (2003).[15]

Defendants claim there is no private analog for this cause of action. That is simply wrong. There have been lawsuits for public nuisance and damages caused by shoreline flooding and erosion brought against those responsible for the oversight and management of dams as long as there have been dams. See ***Perkins v. Vermont Hydro-Electric,*** 106 Vt. 367 (1933); ***Town of Bennington v. Fillmore and Slade,*** 98 Vt. 405 (1925). See also ***C.J.S., Waters, 321-324:*** "Injunctive relief will lie to prevent the

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[14] See Plaintiff's Attachment H, Letter from Jeff Cueto dated June 26, 2009 and Defendants' D, Letter from Jeff Cueto dated December 8, 2009.

[15] Individual homeowners could have, without question, all brought separate, individual actions for "takings" See *Makela v. State,* 124 Vt. 407 at 409, 205 A.2d 813 (1964). But that would not provide the "practical and efficient" resolution offered by mandamus. See *Roy v. Farr,* supra at 37.

continuing invasion of property rights once the inevitability of invasion is established. This is particularly true with regard to flooding of land. Injunctive relief is proper where it is shown that the plaintiff is threatened with repetitious and continuous injury from flooding."

Where government oversight of highways and culverts has resulted in flooding of private property the Vermont Supreme Court has recognized several theories of recovery including "takings" and "negligence." *"A municipality charged with the public duty of maintaining streets has no implied authority to dam up or otherwise obstruct natural water courses."* Therefore, where a town, which had oversight responsibility for culverts, allowed them to become clogged and flood farmers' property *"such damages to private property have always given rise to a right of recovery in this jurisdiction and the defense of sovereign immunity is not available."* ***Sargent v. Town of Cornwall,*** 130 Vt. 323, 292 A. 2d 818 (1972) (Emphasis added). The same has been held true of dikes and dams. Where a county government has failed in its duties to properly maintain a dike with resultant flooding of the plaintiff's lands, a mandamus action to compel adequate maintenance was appropriate. ***Trans-Canada Enterprises v. King County,*** 29 Wash. App. 267, 628 P.2d 493 (1981).

The primary purpose of the common law doctrine of sovereign immunity is to protect the sovereign's treasury. In the case at bar plaintiff does not seek monetary damages. Plaintiff seeks a prospective, injunctive remedy. In the majority of jurisdictions suits which seek a prospective, injunctive remedy are not considered suits against the state. As best as Plaintiff can determine, in Vermont there have been 98 cases addressing the issue of sovereign immunity and none specifically address the issue of a

plaintiff seeking only prospective, injunctive relief, but ***City of Rocky River v. City of Lakewood,*** 2008 WL 5191383 (Court of Appeals, Ohio, 2008) enunciates the general rule. In that case a city that operated a dog park was not immune from a neighboring city's action for an injunction against the operation of the park as an alleged nuisance. Sovereign immunity was said to apply only to actions for "damages."

In the case of escrowed taxes the Vermont Supreme Court has said that, where monetary damages were not at issue, sovereign immunity was not applicable. ***American Trucking Association v. Conway,*** 152 Vt. 363 at 376, 451 A.2d 42 (1982).

When government fails to exercise its authority to abate a public nuisance, whether that authority is discretionary or not is irrelevant. Failure to do so is an abuse of authority and mandamus and common law actions for nuisance are appropriate remedies. See ***Roy v. Farr,*** supra at 36 and 37. See also ***Couture v. Selectmen of Berkshire***, supra at 361: "Where there appears, in some form, an arbitrary abuse of the power vested by law in an administrative officer or board...mandamus may be resorted to in the absence of other adequate legal remedy." ***Roy v. Farr*** is particularly instructive. It involved a public nuisance wherein the plaintiff sought a writ of mandamus (in fact, the public nuisance was related to septic systems). **See Attachment C, Affidavit of Timothy Buzzell, PE, at para. 14.**

Defendants would have this Court subscribe to the theory that their discretion is unbounded. Once given, it is without limit. Thus, despite overwhelming evidence of the damage being done by increased shoreline flooding, despite our laws to protect against those damages, and despite language in the 401 Water Quality Certificate and the Project License plainly indicating an intention to protect against those damages, homeowners on

Lake Seymour are without recourse or remedy in the face of Defendants' administrative discretion. The Defendants would have this Court subscribe to the notion that their discretion is so broad as to leave Plaintiffs subject to the whim and caprice of an arrogant bureaucracy. **Attachment D, Affidavit of Ronald Kolar.** That kind of discretion defies our most fundamental notions about the rule of law.

Defendants' discretion is bounded by law—in this case, by very specific and explicit law and a clear mandate from the Vermont Supreme Court.

Dated at Greensboro, Vermont, this 19TH day of July, 2014.

By _____

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