

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 Surrebuttal in Response to Defendants' Motion to Dismiss**

As the Court knows, with a motion to dismiss for failure to state a claim, the Court must "accept as true all reasonable inferences that may be derived from plaintiff's pleadings."<sup>1</sup> Plaintiff has alleged that Defendants refusal to allow the use of a gate at the Seymour Lake dam has caused significant increases in shore land flooding, damage to water quality and erosion, all in violation of the anti-degradation policy of the Clean Water Act, the anti-degradation policy of the Vermont Water Quality Standards, the Vermont Statutes and a Vermont Supreme Court decision and that Defendants' actions are the cause of an ongoing public nuisance and nuisance per se.<sup>2</sup>

Defendants, whose clear duty it is to protect Vermont's water quality, do not have discretion to violate the anti-degradation policy of the Clean Water Act or the Vermont Water Quality Standards, Vermont statutes or a Vermont Supreme Court decision.

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<sup>1</sup> See Plaintiff's Response to Defendants' Motion to Dismiss, p. 8.

<sup>2</sup> Complaint, paragraphs 18-23.

Whether the Defendants made a “decision” or did not make a “decision” is not what this case is about----this is not an appeal of the Defendant’s “decision.” Defendants have a duty to abide by the law. Plaintiffs have a right to seek compliance with that duty.

Plaintiffs are not seeking to change or impose new or conflicting water quality conditions upon a 401 Certification or License. On the contrary, Plaintiff’s complaint relates to Defendants’ administration of the Certification and its conditions, and compliance with their legal duties. Even if Plaintiffs sought modification, Defendants want to have their cake and eat it too. They disclaim any authority after the license is issued, but at condition W they retain “Continuing Jurisdiction,” to “add and alter the terms and conditions...during the license period.” and *American Rivers* says they can..<sup>3</sup>

The dam at issue has not functioned as designed or planned and its design, along with Defendants’ refusal to allow the gate to be used to abate flooding, has resulted in a significant increase in the duration and magnitude of shore land flooding, together with its accompanying damages. Defendants note on page 10 of their Reply, the new dam was intended to allow a “true run of river” operation and that the design was intended to “mimic natural conditions.”

Condition H of the 401 Certification must be read together with Condition B. Condition B states that the dam should function with “no utilization of head pond storage” and “outflow from the lake is intended to be equal to inflow on an instantaneous basis.” The substantial increase in flooding is evidence that “true run of river” is not happening and therefore Condition H and the gate should be used to abate the flooding to the extent reasonably possible.

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<sup>3</sup> Plaintiffs Reply to Defendants’ Motion to Dismiss, pp. 18-19

Whether the dam was built in 1948 or rebuilt in 2004, isn't relevant. Vermont law and the relevant Supreme Court decision refer to the "natural and normal" high and low water levels as marked by pins designating the natural fluctuations prior to any dam being built. These pins are embedded in bedrock on the lake bottom, and have no relation to the old or new dam or their respective spillways. The Defendants' failure to respect those natural and normal water levels, either by intent or "neglect," as established by statute and the Vermont Supreme Court, is causing substantial damage.<sup>4</sup> Those levels are established by "other appropriate state laws" embraced by Section 401(d) of the Clean Water Act.

Defendants insist there is no cause of action for public nuisance because they don't own the dam. Nuisance is a common law tort. The issue isn't ownership. The issue is duty and causation. A gate has been used in the dam to abate flooding at Lake Seymour for almost 100 years. For the last ten years the Defendants have used their claimed authority to forbid its use despite significantly increased flooding. The Defendants, not the owner, Great Bay Hydro, are the cause of the nuisance. The owner has never refused to allow the gate to be used to abate shore land flooding or to maintain natural and normal water levels. It is preposterous to claim Defendants don't have a duty to protect water quality and shore lands.<sup>5</sup> That's their job.

Dated at Greensboro, Vermont, this 12<sup>th</sup> day of August, 2014.

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<sup>4</sup> In violation of 30 V.S.A. 402.

<sup>5</sup> Plaintiff's Response to Defendants' Motion to Dismiss, p. 10.

