STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 108-4-14 Wncv

Seymour Lake Association,
Plaintiff

v.

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

STATE OF VERMONT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

The State of Vermont submits the following Reply Memorandum in support of its Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Introduction

In its July 19th Response to Defendants' Motion to Dismiss ("SLA Response"), Plaintiff Seymour Lake Association ("SLA") argues that to grant the State's Motion to Dismiss would be to endorse the notion that the State's "discretion is unbounded" in declining SLA's demand that it order the owner of a privately-owned dam to manipulate, through the use of a dam gate, the water levels of Lake Seymour. SLA Response at 25. Nothing could be farther from the truth.

The State's position is simple. First, if SLA wishes to eliminate the State's discretionary authority to determine whether or not dam gate operations are warranted, then it must commence a proceeding before the Federal Energy

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Regulatory Commission to amend or abrogate the condition in the federal hydropower permit applicable to the Lake Seymour dam that gives the State the discretion to make this determination. Second, if SLA instead wishes to challenge the State's alleged abuse of that discretion in deciding to not order dam gate operations, then it must appeal the State's decision to the Superior Court's Environmental Division, rather than seek mandamus or injunctive relief in the Superior Court's Civil Division.

I. SLA's Affidavits Must be Disregarded in Deciding the State's Motion to Dismiss

In its Response, SLA suggests that the State's Motion to Dismiss should be converted to one for summary judgment for presenting "material outside of the pleadings," SLA Response at 2 n.1, specifically, "[r]eferences to substantial communications from SLA to Defendants . . . water level data" and "comments made by Plaintiff's attorney to a State Senator . . . ." *Id.* The referenced "communications" are partially reflected in (1) the State's December 9, 2009 letter to SLA, attached as **Exhibit D** to the State's Motion to Dismiss, that "determine[d], under Condition H, that [Lake Seymour dam] gate operations are unnecessary" and that therefore "[t]he gate operator shall not be installed;" (2) a handout, **Ex. E**, prepared by the State and distributed to SLA members at an August 2012 meeting reiterating the State's decision to not order dam gate operations; (3) and another letter from the State to SLA dated May 24, 2013, **Ex. F**, again "conclud[ing] that a significant increase [in Lake Seymour's shoreline flooding] has not occurred and installation and operation of a gate is not warranted."

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For purposes of the State's Motion to Dismiss, none of these communications are offered for the truth of their content, including the "water level data" referenced therein, nor to controvert any well-pleaded, non-conclusory factual allegations of SLA's Complaint. Rather, the State's **Exhibits D-F** are submitted as documentary evidence that the State, through its Agency of Natural Resources ("ANR"), previously rendered an appealable "act or decision," per 10 V.S.A. §§ 8503, 8504, declining to order the Lake Seymour dam's private owner to install and operate a dam gate to artificially manipulate the water levels of Lake Seymour -- the very relief that SLA seeks from the State in this lawsuit by way of injunction and writ of mandamus.

As discussed in its Motion to Dismiss, SLA's exclusive means in state court for challenging the State's decision regarding Lake Seymour dam gate operations and its alleged non-compliance with Condition H of the State's Section 401 Certification incorporated into the Federal Energy Regulatory Commission's ("FERC") license for the Clyde River Hydroelectric Project ("Project") is not a petition for writ of mandamus or a nuisance injunction claim in the Superior Court's Civil Division, but an appeal to the Superior Court's Environmental Division. *See* 10 V.S.A. § 8504 (providing in pertinent part that "any person aggrieved by an act or decision of the secretary [of ANR] . . . under the provisions of law listed in section

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8503[1] . . . may appeal to the environmental division . . . ."); *see also Northeast Res. Recovery Ass'n v. State*, No. 595-9-13 Wncv, 2013 WL 7346946, at *4 (Vt. Super. Ct. Oct. 10, 2013) (holding that ANR's entry into contract with alternative electronic waste recycling vendor constituted "act or decision" of ANR Secretary for purposes of 10 V.S.A. § 8503 that rejected vendor should have been appealed to Environmental Division and which also precluded Civil Division subject matter jurisdiction).

Thus, in determining whether subject matter jurisdiction over this action lies here in the Superior Court's Civil Division or in its Environmental Division, the Court may consider the State's **Exhibits D-F**, evidencing its "act or decision" appealable to the Environmental Division, without converting the State's Motion to Dismiss to one for summary judgment. *See Conley v. Crisafulli*, 2010 VT 38 ¶ 3, 188 Vt. 11, 14, 999 A.3d 677, 679 (under Rule 12(b)(1), the Superior Court "may consider evidence outside the pleadings in resolving a motion to dismiss for lack of subject matter jurisdiction" and its factual findings are reviewed for clear error).[2]

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[1] 10 V.S.A. § 8503 (providing in pertinent part that "[t]his chapter [220- Consolidated Environmental Appeals] shall govern all appeals of an act or decision of the [ANR] secretary . . . under the following authorities . . . (1) . . . (C) [10 V.S.A.] chapter 41 (regulation of stream flow) . . . (d) [10 V.S.A.] chapter 43 (dams) . . . (E) [10 V.S.A.] chapter 47 (water pollution control) . . . (O) [10 V.S.A.] chapter 37 (wetlands protection and water resources management) . . . (2) 29 V.S.A. chapter 11 (management of lakes and ponds) . . . .").

[2] The legislative testimony of SLA's counsel in support of a proposed bill directing the State to exercise its discretion to require Lake Seymour dam gate operations, discussed at page 27 of the State's Motion to Dismiss, is a matter of which the Court may take judicial notice without converting a Rule 12(b)(6) motion to a Rule 56 summary judgment motion. *See In re Tariff Filing of Cent. Vt. Pub. Serv. Corp.*, 172 Vt. 14, 37, 769 A.2d 668, 685 (2001) (taking judicial notice of various proposals to the Legislature).

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In contrast, SLA has improperly attached to its Response the Affidavits of Timothy Buzzell (**SLA Attach. C**), Ronald Kolar (**SLA Attach. D**) and Charles Nichols (**SLA Attach. F**), as well as what is apparently a legal opinion memorandum from SLA's counsel to his client. **SLA Attach. G**. SLA does not offer these documents for any purposes relevant to assessing this Court's subject matter jurisdiction, nor do they constitute the limited kinds of material extrinsic to a complaint that a trial court may consider in deciding a Rule 12(b)(6) motion. *See Kaplan v. Morgan Stanley & Co.*, 2009 VT 78 ¶ 10 n.4, 186 Vt. 605, 609 n.4, 987 A.2d 258, 264 n.4 (noting that documents relied upon by the complaint, matters subject to judicial notice and matters of public record may be considered without converting a Rule 12(b)(6) motion to a Rule 56 motion for summary judgment). Instead, SLA relies upon this affidavit testimony, as well as its counsel's prior legal advice, for the substantive truth of the matters asserted within these documents. *See* SLA Response at 7-8, 11-12 (citing Buzzell, Kolar and Nichols Affidavits to bolster Complaint allegations of increased dam-related shoreline flooding). Accordingly, this Court should disregard **SLA Attachments C, D, F and G** for purposes of deciding the State's Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim.

II. SLA's Requested Manipulation of Lake Seymour Water Levels is a Federally Preempted Attempt to Eliminate the State's Discretionary Authority Over Dam Gate Operations and Alter a FERC Hydropower License

SLA argues that federal preemption has no role in this case. Not so. SLA spends much effort defending the State's right to insert its water quality standards

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and conditions into a FERC hydropower license as part of the federal Clean Water Act ("CWA") Section 401 Certification process. That is not in dispute here. Without question, Vermont, like all states, has broad authority under Section 401. However, once a state exercises that authority, issues its Section 401 certification and FERC incorporates it into a federal hydropower license, the state loses authority to change those incorporated water quality conditions, such SLA demands here.

SLA first argues that the U.S. Supreme Court in *P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) somehow overruled *California v. F.E.R.C.*, 495 U.S. 490 (1990), or that *California* is no longer good law. In fact, *P.U.D. No. 1* does nothing to rebut the clear framework set forth by Congress regarding the FPA and CWA section 401.[3]

First, *P.U.D. No. 1* simply held that states can impose their own water quality standards in the Section 401 Certification process: "[a] State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard." 511 U.S. at 701. Again, this point is not in dispute here. Next, the court correctly noted that such state conditions then become part of federal law: "[t]he limitations included in the certification become a condition on any federal license." *Id.* at 708. Most importantly, the court

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[3] SLA also expends significant briefing on the case of *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006), another case not relevant here. *S.D. Warren* held only that a dam discharge triggers a state 401 Certification. That was the entire issue: "[t]he dispute turns on the meaning of the word 'discharge,' the key to the state certification requirement under § 401." *Id.* at 375. The case did not involve a party attempting to override or modify 401 conditions after adoption into a federal license.

distinguished *California v. FERC*, and explained why Washington state was *not* preempted from imposing its own state standards (unlike California):

> In *California v. FERC*, we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether.

Id. at 722 (emphasis added). There was no conflict in *P.U.D. No. 1* because the FERC license had not yet been issued. SLA even acknowledges this fact, *see* SLA Response at 20, but ignores its significance. However, the timing of the FERC license is the critical piece in this entire framework.

A. Once FERC Issues Its License Adopting the State 401 Certification, the State's "Broad Authority" to Impose New or Conflicting Water Quality Conditions Ceases

SLA argues, at page 14 of its Response, that it "defies common sense to suggest" that Congress delegated oversight responsibility for Vermont's waters to FERC. The State made no such suggestion. Of course Vermont's waters are managed by the State. But, under the CWA, once FERC incorporates a state's 401 Certification and related state water quality conditions into a federal hydropower license, the state no longer has the "broad authority" to impose new conditions or standards that would conflict with the federal license, even those that originally derive from state's 401 Certification. *P.U.D. No. 1*, 511 U.S. at 722 (no conflict until FERC acts on license). As the court in *Karuk* explained:

> State water quality certification authority over FERC licensed hydroelectric projects *is broad substantively but subject to relatively narrow procedural limitations governing how and when that authority may be exercised.* The

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> state has broad authority to deny or condition certification based on federal or state water quality requirements. But the state only has an opportunity to deny or condition certification in connection with the FERC licensing process, which occurs only when the original license is issued, the project is relicensed, or the licensee applies for a FERC license amendment. And the state must exercise that authority through the certification process.

Karuk Tribe v. Calif. Reg'l Water Quality Control Bd., 183 Cal. App. 4th 330, 359 (Cal. 2010) (emphasis added).

SLA's Response focuses almost exclusively on the broad substantive powers of states.[4] SLA does not acknowledge the "relatively narrow procedural limitations" of when that authority may be exercised. *Id.* In this case, requiring the State to order the owner of the current Lake Seymour dam to use a gate to artificially maintain lake levels set by the Public Service Board in 1951 within an absolute range of 14 inches, regardless of the severity or cause of shoreline flooding, is relief that unavoidably conflicts with the Section 401 Certification applicable to the Lake Seymour dam (now part of the Project's FERC license and controlling federal law) directing that the new dam be operated in a "run of river" mode allowing for natural water level fluctuations and providing that gate operations only be utilized if, in the State's judgment and discretion, such operations are necessary to abate a significant increase in shoreline flooding actually caused by the new dam. The crucial point here is that Vermont has already exercised its broad authority during FERC's licensing of the Project. Neither the State, nor this Court, may now impose a conflicting set of water quality standards simply because SLA requests it.

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[4] Again, this point is not in dispute. For that reason, nearly all of the cases cited by SLA (including *amicus* briefs filed by the Attorney General's Office) are irrelevant, since they all stand for the same proposition: that states have broad Section 401 authority over the substance of water quality conditions.

Lastly, SLA cites cases suggesting that "the appropriateness of water quality certification conditions is a matter for state courts to decide." SLA Response at 21. That principle applies to challenges of state conditions at the time they are made and before the FERC license is issued. *See Roosevelt Campobello Int'l Park Comm'n v. United States Envtl. Prot. Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982). Here, SLA had that opportunity and did just that. SLA challenged the appropriateness of Vermont's Section 401 Certification in the state courts, and then resolved the litigation via settlement agreement. That same agreement also set forth Condition H, which is now adopted into the FERC license. Further, SLA is not claiming that the State exceeded its authority in issuing the Section 401 Certification, which was the issue in *Town of Summerville*, 60 F.E.R.C. 61,291 (1992), *Noah Corp.*, 57 F.E.R.C. 61,170 (1991), and *Central Main Power Co.*, 52 F.E.R.C. 61,172 (1990). SLA's ultimate contention is that, after expressly litigating and agreeing to Condition H, SLA no longer wants it to apply. That is not a review of the "appropriateness of a state water quality certification."

B. SLA's Demand to Apply the 1951 Water Levels Is Not a "Modification" Authorized By Law

SLA next argues, at page18 of its Response, that imposing the 1951 water levels is at most a "modification" allowed under Condition W of the Section 401 Certification. SLA cites an *amicus* brief filed by the Vermont Attorney General's Office for the proposition that states can "amend (or 're-open') the certification when appropriate." SLA Response at 19. However, that statement was referring to the following condition in the *American Rivers* case: "The Department is reserving the

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right to add and alter terms and conditions as appropriate to carry out its responsibilities during the life of the project with respect to water quality." *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 103 n. 1 (2d Cir. 1997). Similarly, in this case, Condition W is a standard reservation clause; it merely states that the State may "add and alter the terms and conditions of this amended Certification, when authorized by law and as appropriate to carry out its responsibilities." (emphasis added).

First, the State is not "authorized by law" to impose a conflicting standard -- that would be preempted by the FPA. And imposing the mandatory water levels requested by SLA does conflict with the Section 401 Certification. The Section 401 Certification requires Lake Seymour to be a run-of-river dam. *See* State's **Ex. B**, Project 401 Cert. ¶ 252 ("[T]he dam design is intended to maintain high levels that mimic natural conditions"). SLA argues that the "natural" water level was decided by the Public Service Commission in 1951. At that time, the Commission determined that Lake Seymour's water level should, by dam gate operations, be maintained at no higher than six inches above and no lower than eight inches below the crest of "the present Citizen Utilities Company dam."

In addition to the fact that these water levels refer to a dam that no longer exists, the 1951 water levels conflict with the Section 401 Certification's requirement for Lake Seymour to be a run-of-river dam. The 1951 water levels also conflict with the language of Condition H, which does not require mandatory gate manipulation to maintain a set water level. Condition H instead contemplates a gate mechanism only if the State determines that the new dam built in 2004 had

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caused flooding on Lake Seymour to significantly increase in duration, magnitude and frequency and that this flooding could not be reasonably abated through other means. However, the State specifically found that the new dam caused no such increase in flooding. Thus, to impose mandatory gate operation using the 1951 water levels creates an impossible conflict with Lake Seymour's FERC license.

Next, SLA argues, at page 20 of its Response, that *Keating v. F.E.R.C.*, 927 F.2d 616 (D.C. Cir. 1991) is inapplicable because *Keating* involved a Section 401 revocation and SLA is not asking for a revocation under CWA 401(a)(3). However, Section 401(a)(3) is not limited only to revocations. It is the "exclusive process" to revoke, alter, or otherwise modify or change the substance of a 401(d) certification: "Section 401(a)(3) of the CWA sets out the exclusive manner in which state certifications may be modified and makes clear that process is to be initiated by the federal licensing or permitting agency, not the state." *In re Cent. Vt. Pub. Serv. Corp.*, 1994 WL 708786, at *6; 69 FERC P 62110, 64221 (Project No. 2489-001 – Nov. 4, 1994) (emphasis added). Therefore, any request to revise a Section 401(d) certification must follow the provisions of Section 401(a)(3).

Lastly, SLA's demand for the 1951 water levels is indeed a substantive change to the Section 401 Certification. SLA suggests, at page 22 of its Response, that installing the gate is merely "implementing" Condition H and not modifying it, and that it merely involves "application of existing State law under 401(d)." *see* SLA Response at 20. However, the purportedly "existing" state law of 1951 conflicts with Condition H, which does not require a gate and certainly does not require water levels to be absolutely maintained within a set range regardless of shoreline

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flooding or its causes. Certainly, the State has discretion to make changes to implement Condition H, but SLA is not asking for that kind of discretionary implementation. SLA wants to remove the State's discretion and force the Public Service Commission's interpretation of 1951 water levels to apply instead. Applying a new state water standard at this time is not allowed under the FPA framework. SLA had (and has) other paths of recourse.

III. The State's Discretionary Decision Declining to Order Dam Gate Operations is Appealable Only to the Environmental Division

Even if this Court finds that the FPA does not preempt SLA's action because SLA merely seeks to enforce the State's compliance with the terms of Condition H of the Section 401 Certification, rather than abrogate or alter it, this Court lacks subject matter jurisdiction over what is, in essence, a belated appeal of an ANR "act or decision" that may only be heard by the Environmental Division per10 V.S.A. §§ 8503, 8504. SLA acknowledges, at page 9 of its Response, that Condition H is a discretionary provision and creates only a "consultation process" between SLA and ANR. SLA engaged in that process, ANR made its determination that dam gate operations were not warranted, and ANR repeatedly and unequivocally communicated that decision to SLA, beginning in December 2009. *See* State's **Ex. D**. ANR's decision was appealable at the time, but SLA chose to forego that right of appeal.

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SLA's Response fails to adequately respond to this point. SLA first argues that its case is seeking a writ of mandamus. However, SLA is not eligible for relief

in the nature of mandamus the availability of an adequate legal remedy in the form of an Environmental Division appeal that SLA failed to pursue:

> Although the formal writ of mandamus was abolished by V.R.C.P. 81(b), relief in the form of mandamus is available under V.R.C.P. 75. A court can issue a writ of mandamus, however, only under certain circumstances: (1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official's judgment or discretion; and (3) there must be no other adequate remedy at law.

Petition of Fairchild, 159 Vt. 12, 130, 616 A.2d 228, 231 (1992). "Relief under Rule 75, however, is not available when the legislature has established a direct route of appeal." *Bd. of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Relations Bd.*, 162 Vt. 571, 577, 649 A.2d 784, 788 (1994). Therefore, when a litigant has "failed to resort to the statutory procedure [for appeal], the extraordinary remedies of mandamus, prohibition or certiorari are not available to her." *In re LaFreniere*, 126 Vt. 204, 206, 227 A.2d 301, 302 (1967); *see also Phillips Constr. Servs., Inc. v. Town of Ferrisburg*, 154 Vt. 483, 485, 580 A.2d 50, 51 (1990) (holding that plaintiff who failed to timely avail itself of exclusive statutory appeal remedy to challenge zoning board action could not obtain mandamus relief).

In this case, SLA seeks a writ of mandamus to compel the State to order the private owner of the Lake Seymour dam to operate a dam gate to manipulate Lake Seymour water levels. However, first, SLA can point to no statute or regulation that expressly commands state officers, as a "ministerial" duty, to require private dam owners to conduct gate operations at all times regardless of circumstances. On the contrary, Condition H of the State's 401 Certification, which now has the

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preemptive force of federal law by virtue of its incorporation into the Project FERC license, allows the State to require dam gate operations at certain times only "if the Department [of Environmental Conservation] determines," based on two years of data collection, that shoreline flooding caused by the new dam warrants such operations. Attempting to compel the exercise of such judgment and discretion through a writ of mandamus is patently inappropriate and unworkable, particularly where the State, rather than simply refusing or neglecting to make any decision, has repeatedly provided SLA with reasoned written explanations, *see* State **Exs. D-F**, of its decision to not require dam gate operations.

Second, mandamus is not available to SLA because it had an adequate legal remedy, in the form of a direct appeal to the Environmental Division, to challenge ANR's decision to not require dam gate operations. Such an appeal, if successful, could have afforded SLA the very same relief – compelled dam gate operations and water level manipulation -- that it is seeking by way of mandamus in this action.

SLA claims, at page 9 of its Response, that SLA had no "avenue of appeal" to the Environmental Division since ANR's decision declining to order dam gate operation did not arise out of a "contested case" under the Vermont Administrative Procedure Act. However, an appealable "act or decision" of ANR under of 10 V.S.A. §§ 8503, 8504 need not arise out of a "contested case":

> [T]he court finds nothing in the statute requiring that something must be written and formal to be an "act or decision." Nor have the parties pointed to any law suggesting that the terms "act" and "decision" have anything other than their obvious meanings. *See, e.g., Town of Bennington v. Hanson- Walbridge Funeral Home, Inc.*, 139 Vt. 288, 292-93 (1981) ("A 'decision' has been defined as 'a determination or result arrived at after consideration.'").

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Northeast Res. Recovery Ass'n v. State, 2013 WL 7346946, at *4 (noting that Vermont Supreme Court has never endorsed notion that appealable "act or decision" must arise from "contested case"). In *Northeast Resource Recovery*, the Washington Superior Court (Judge Toor presiding) found that ANR's decision to award a recycling contract was an "act or decision" subject to the exclusive Environmental Division appeals procedure of 10 V.S.A. §§ 8503, 8504, thereby divesting the Civil Division of subject matter jurisdiction.

SLA also suggests that there was never any definitive "act or decision" of ANR that was subject to appeal, but that SLA merely engaged in "a seven or eight year 'consultation process'" with the State. SLA Response at 9. However, a review of ANR's letters to SLA of December 9, 2009, State's **Ex. D**, and May 24, 2013, as well as its handout memorandum to SLA members dated August 20, 2012, State's **Ex. E**, indicate nothing tentative, interim or conditional about its final decision that, based on collected data, dam gate operations were not warranted and would not be required.

IV. SLA May Not Sue the State to Enjoin an Alleged Nuisance Arising Out of a Privately-Owned Dam

In its Response, SLA represents that "Plaintiffs," presumably SLA and its members, "are not seeking any monetary damages" against the State. SLA Response at 4. In light of this representation, SLA is correct, *see* SLA Response at 25, that the doctrine of sovereign immunity would not bar SLA's claims for Public Nuisance and Nuisance Per Se seeking only to enjoin dam gate operations. *See*

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Lyndonville Sav. Bank v. Sec'y of Vt. Agency of Natural Res., no. 141-3-99 Wncv, 1999 WL 34841342, at *5 (Vt. Super. Ct. June 4, 1999).

However, SLA's nuisance claims still fail as a matter of law. First, SLA has failed to establish the existence of any legal duty owed to it by the State to regulate a dam privately owned by a third party in such a way as to avoid flooding allegedly caused by that dam. All of the decisions cited by SLA at pages 23 and 24 of its Response concerned damage caused by dams, road culverts and other property that was actually owned and operated by the defendants in those cases, whether they were government entities or private actors. Here, SLA alleges that "the dam belong[s] to Great Bay Hydro Corporation . . . ." Compl. at 8. The State's only connection to the Lake Seymour dam is as a regulating authority. However, as discussed in the State's Motion at pages 20-28, the manner in which the State interprets and applies its regulatory standards to private parties is an inherently governmental function that is simply not analogous to a private party's affirmative creation of a nuisance through the use of its own property. SLA has cited no authority to the contrary.

Second, SLA representation that it only seeks injunctive relief to abate the alleged nuisance confirms that its tort theory against the State is entirely duplicative of its equally improper request for a writ of mandamus.

* * *

For the reasons set forth above and in the Motion to Dismiss, Plaintiff's Complaint should be dismissed.

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Dated: August 7, 2014

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