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January 5, 2015

Penelope Carrier
Vermont Superior Court
Orleans Unit-Civil Division
247 Main Street
Newport, VT 05855

Re: Seymour Lake Association v. State of Vermont acting by and through its Agency of Natural Resources and Department of Environmental Conservation
Docket No. 108-4-14 Oscv

Dear Ms. Carrier,

I am enclosing with this cover letter Plaintiff's Memorandum of Law Regarding Jurisdiction and Response to Defendants' Supplemental Memorandum in Support of Motion to Dismiss.

As always, I appreciate your assistance.

Sincerely,

David F. Kelley
Davidkelley05602@gmail.com
802 249 8262
802 586 2588

cc: Jon Alexander and Justin Kolber

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 Memorandum of Law Regarding Jurisdiction and Response to Defendant's Supplemental Memorandum in Support of Its Motion to Dismiss

Introduction

There are four reasons why mandamus, which by statute belongs in the Civil Division, is the appropriate remedy in the matter before this Court: 1. Vermont law gives Plaintiff a clear and certain right, irrespective of any "decision" of the Defendants; 2. There is no adequate recourse except mandamus; 3. Even if it were relevant, Defendants have not rendered anything that could be characterized as a "final decision," and; 4. The statutory mandates of 30 V.S.A. 401 and 402 are still the governing law.

There are no complex scientific questions at issue here. There is a Vermont Statute and a Vermont Supreme Court decision that govern; these are embraced by the federal Clean Water Act, the 401 Certification and the FERC license referenced herein, which, at Condition W, "returns jurisdiction of this matter to the Secretary of ANR..."

1. Plaintiff Has a Clear and Certain Right to the Action Sought

After power companies blasted below the outlet of Lake Seymour to create a dam, the State of Vermont enacted a law directing that the water levels be managed within fixed high and low margins that were determined by law to be the "natural and normal" water levels of the lake. By refusing to comply with that statutory mandate, the Agency of Natural Resources and the Department of Environmental Conservation are violating a lawful duty. Any Vermonter, not just the Plaintiff, can bring a mandamus petition under these circumstances because these are public waters and the law's mandate is crystal clear. No rule making or discretion was given to the Agency by the legislature beyond those margins. When Defendants fail to obey the clear mandates of State law, neither Plaintiff nor any other citizen is obliged to go to them and beg them to comply, especially for six long years. It is why the doctrine of mandamus and V.R.C.P. 75 were adopted.

The law is clear and unequivocal. The "normal and natural" high and low water levels were established by the Public Service Board as required by 30 V.S.A. 401 and specifically confirmed by the Vermont Supreme Court. "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*** (emphasis added). The language of the General Assembly and the Vermont Supreme Court is mandatory. It could not be more clear. Mandamus is appropriate.

Any Vermont citizen could bring this cause of action. They would not have to be a member of the Seymour Lake Association. They would not have needed to engage in a six year dialogue with the Defendants.

This case is not about a "decision" of the Agency of Natural Resources or the Department of Environmental Conservation. Notwithstanding any "decisions" the Defendants may or may not have made (and as will be noted below, the Defendants have not rendered anything that could be construed as a "decision" under Vermont law), it is about the Defendants' legal and ministerial duties under the law of the State of Vermont. There is a specific Vermont law regarding management of the water levels of Lake Seymour. By the artificial means of the new 2004 dam, the water levels of Lake Seymour have become significantly higher than the maximum "natural and normal" levels established by statute and the Vermont Supreme Court. Defendants' refusal to allow use of a gate, that for over half a century was the means of correcting this problem, is causing substantial increases in flooding and is a violation of their ministerial duty to comply with the law. It is an abuse of their authority. The statute's mandate is clear: "shall not." It is not discretionary.

The Defendants cannot "decide" to break the law. If the Vermont General Assembly adopts a statute, and that statute is affirmed by the Vermont Supreme Court, it is not within the "discretion" of either the Agency of Natural Resources or the Department of Environmental Conservation to obey or disobey that law. They have a duty to comply with the law. The Defendants have never been vested with the power, authority or discretion to modify or repeal acts of Vermont's General Assembly or decisions of the Vermont Supreme Court.

This case does not seek to "appeal" an agency decision, but rather to "mandate" compliance with clear, well established Vermont law. As such, it is in the nature of mandamus. As the Vermont Supreme Court pointed out in ***Petition of Robert and Ann***

Fairchild, 159 Vt. 125, 616 A.2d 228 (1992), "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. ***Garzo v. Stowe Board of Adjustment,*** 144 Vt. 298, 299-300, 476 A.2d 125, 126 (1984)" Furthermore, "The Civil Division shall have...(3) original jurisdiction concurrent with the Supreme Court, of proceedings in ... mandamus..." ***4 V.S.A. 31(3).***

Where a public agency has authority over a dam and refuses to take necessary steps to ameliorate undue flooding, then mandamus is an appropriate remedy and action, even when there is no statute whatsoever, to say nothing of a statute as explicit as exists in the matter before this Court. ***Trans-Canada Enterprises v. King County,*** 29 Wash. App. 267, 628 P.2d 493 (1981).

3. Mandamus Is the Appropriate Remedy—Even the Common Law Tort of Nuisance is Inadequate

Plaintiff's complaint of nuisance and nuisance per se are civil common law tort actions plainly within the jurisdiction of the Civil Division. ***4 V.S.A. 31(1).***

At this juncture, the Court must "assume that all factual allegations pleaded in the complaint are true" and "accept as true all reasonable inferences that may be derived from plaintiff's pleadings..." ***Mahoney v. Tara, LLC,*** 2011 VT 3 at 7. The following allegations are assumed to be proven and true and plainly constitute a public nuisance:

a. From 1921 until 2004 a gate was used at the dam below Lake Seymour to maintain "natural and normal" water levels. ***Complaint,*** para. 4-11.

b. The dam was rebuilt in 2004. 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 degradation and damage to the shore lands of Lake Seymour. ***Complaint,*** para. 18.

c. 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. ***Complaint,*** para. 20.

d. 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 of the loss of trees, bushes, flowers and buffers, to erosion exposing the root system of mature trees and the loss of beaches. ***Complaint,*** para. 21.

e. 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 diminishing Plaintiff's and public's use and enjoyment of Lake Seymour. ***Complaint,*** para. 22.

f. By allowing the water levels of Lake Seymour to rise significantly above "natural and normal" levels established pursuant to 30 V.S.A. 401, the Defendants are in clear violation of the prohibitions and mandates of 30 V.S.A. 402.

g. The result of the Defendants' violation of Vermont's Supreme Court decision ***In re: Water Levels of Lake Seymour,*** 117 Vt. 367, 91 A.2d 813 (1952) and 10 V.S.A. 401 and 402 and Defendants' continuing and ongoing failure to allow maintenance of the

"natural and normal" water levels established by the Public Service Board pursuant to 30 V.S.A. 401 and explicitly confirmed by the Vermont Supreme Court has contributed to and been a proximate cause of substantial increased flooding and consequential 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. ***Complaint,*** para. 24.

Even without 30 V.S.A. 401 and 402 or ***In re: Water Levels of Lake Seymour,*** supra, the Defendants would not have "discretion" to allow the degradation of Vermont water quality. ***Vermont Water Quality Standards, Section 1-03 Anti-Degradation Policy.*** As noted above in ***Trans-Canada Enterprises v. King County, supra,*** Defendants' behavior in allowing substantial increases in flooding is reason enough to grant mandamus.

As was noted in Plaintiff's original Memo in Opposition to Defendants Motion to Dismiss:

> *"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).

In ***Roy v.Farr*** (at 37) the Court went on to say, "To require plaintiffs to bring a petition to abate a nuisance which affects the public health would cause him to bear all of the expense and delay which are involved in personal litigation." The Court said that

under these circumstances, where an injunction is sought, that even a nuisance action is an inadequate remedy because of the delay and the expense.

At footnote 3 of Defendants' memo dated December 22, 2014, they suggest that Plaintiffs have other avenues of recourse. First, they suggest that Plaintiffs might petition FERC. It would be curious, indeed, to petition FERC to enforce a Vermont State law regarding Vermont water quality when FERC has waived jurisdiction "during the life of the license" with respect to water quality. ***See Attachment B to Plaintiff's Response to Defendants' Motion to Dismiss, Condition W.***

Defendants also suggest Plaintiffs might go back to see Defendants with more data. Defendants have all the data they need to know the law is being violated. Mr. Cueto, formerly the Department of Environmental Conservation's chief hydrologist, acknowledges as much in his letter of June 26, 2009 to Ronald Kolar. ***See Attachment H to Plaintiff's Response to Defendants' Motion to Dismiss, Cueto letter dated June 26, 2009, page 3, para. 2. See also Attachment D to Defendants' Motion to Dismiss, Cueto Letter dated December 8, 2009, page 1, paragraph 4;*** "As explained in my June letter, the peak lake levels are now higher than they were historically."

3. There Is No Administrative Decision

Defendants cite to 10 V.S.A.§ 8504. which reads, "Within 30 days of the date of the act or decision, any person aggrieved by an act or decision of the ***Secretary, the Natural Resources Board, or a District Commission*** under the provisions of law listed in

section 8503 of this title, or any party by right, may appeal to the Environmental Division..." (emphasis added).[1]

There was no decision of the "Secretary, the Natural Resources Board or a District Commission." On the contrary, the documents referred to by Defendants as "decisions" are as follows:

a) A letter from Jeff Cueto, the Department of Environmental Conservation's "chief hydrologist" (Motion to Dismiss Attachment D--the December 8, 2009, letter from Cueto to Kolar). Mr. Cueto does not copy the Secretary, Deputy Secretary, Commissioner or Deputy Commissioner, much less give any indication he is acting as the Secretary's "duly authorized representative." Mr. Cueto ends his letter with, "Feel free to contact me or Mr. Fitzgerald if you have any questions." In fact, Mr. Cueto, indicated to Mr. Kolar that he was writing the letter merely to record his position before retiring from the Department later that month. The intent was to facilitate ongoing conversations between the Agency and SLA. ***Attachment A, Second Affidavit of Ronald Kolar.*** Furthermore, the December 8, 2009, Cueto letter concerning use of the gate is referring only to a request that the gate be allowed to be used to offset the consequences of extreme rainfall events. The data will show that extreme rainfall events are not the primary issue. The primary issue is spring runoff and winter ice build up (see page 2 of the letter, next to last paragraph). The letter doesn't even address the key issue.[2]

1 At 10 V.S.A. 8002 "Secretary" is defined as "The Secretary of Natural Resources or the Secretary's duly authorized representative."

2 In Vermont the test of finality is "whether an order makes final disposition...of all matters that could or should be settled at the time and in the proceeding..." then before the board or agency. ***Re Petition By Central Vermont Railway,*** 148 Vt. 177, 530 A.2d 579 (1987).

Finally, the sheer volume of correspondence between SLA and Defendants is strong evidence of the lack of any decision or finality. ***See Attachment A, Second Affidavit of Ron Kolar.***

b) The so-called August 2012 "decision" is an unsigned series of notes dated August 20, 2012, entitled "SLA/ANR/Great Bay Seymour Lake Water Level Management Meeting" (Motion to Dismiss, Attachment E). These are unsigned notes from a meeting. That these notes could be characterized as a "decision" strains credulity.

c) The letter from Pete LaFlamme to Timothy Buzzell dated May 24, 2013 (see Motion to Dismiss, Attachment F) is equally interesting. Mr. Laflamme is not the Secretary. Again, Mr. Laflamme does not even copy the Secretary, Deputy Secretary, Commissioner or Deputy Commissioner. Most importantly, this letter ends with the following language: "Please contact me if you would like to discuss these issues in more detail." It is hard to imagine how that could be interpreted as a final decision with a thirty day right to appeal.

This behavior in no way comports with the requirements of the Vermont Administrative Procedures Act. There was not, in any of these documents, so much as a simple statement of the issues. ***See 3 V.S.A. 809-812.***

Plaintiff has been engaged in a good faith, informal, six year dialogue with Defendants concerning an issue that was resolved by the Vermont Supreme Court in 1952. The documents cited by Defendants as "decisions" involve nothing like the kind of finality found in the case law cited by Defendants. For example, in the first case cited by Defendants, ***Phillips Constr. Servs., Inc. v. Town of Ferrisburg,*** 154 Vt. 483, 580 A.2d

50 (1990) the Court writes, "The application was approved on March 9, and the permit noted that pursuant to 24 V.S.A. 4464(a), interested persons had fifteen days to appeal the administrator's decision." The Plaintiff took three and half months to appeal when the decision explicitly said they had fifteen days. The permit was issued and Plaintiff's appeal was out of time, plain and simple.[3]

The case at hand has witnessed an ongoing six year dialogue between the parties, while the dam in question has not functioned as represented or intended. The language of the 401 Certificate at paragraph 252 makes it clear the design was intended to maintain the "natural and normal" water levels mandated by State statute and the Vermont Supreme Court. It has not done so and Defendants have negligently and willfully refused to allow the use of a gate to correct this problem. They have, instead, persisted in allowing the new dam to substantially and significantly increase flooding of the shore lands of Lake Seymour with accompanying erosion and damage to buffers and water quality contrary to the intent and representations of the 401 Certification and their authority and ministerial duties pursuant to Vermont's clear and unequivocal law.

It cannot possibly be that a state hydrologist or a director of watershed management have been imbued with the power to repeal the laws of the Vermont General Assembly and reverse the Vermont Supreme Court, without even informing the Agency Secretary, especially in a manner so slipshod as to have the final words of the dialogue be, "Please contact me if you would like to discuss these issues in more detail."

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3 In cases such as ***Levy v. Town of St. Albans***, 152 Vt. 139, 564 A.2d 1361 (1989) cited by Defendants, there was a statutory mandate that the decision of the zoning board is final and not contestable if a direct appeal is not taken. Of course, the statutory mandate was controlling. In this matter now before the Court there is, likewise, a statutory mandate----that the water levels of Lake Seymour be maintained within the recognized "natural and normal" levels.

4. The Statutory Mandates of 30 V.S.A. 401 and 402 and In Re Water Levels of Lake Seymour Are the Governing Law

At our hearing on December 11, 2014, the Court queried attorney Kolber about the relevance of the existing statute, referring to 30 V.S.A.401and 402. Attorney Kolber hesitated, and then answered, that the statute was an "older" statute. The Vermont Constitution precedes 30 V.S.A. 401 and 402 by more than a century and a half. It is even "older." It is still very good law.

The Federal Power Act was put in place in 1920. The Vermont Statutes relative to water levels in Lake Seymour, 10 V.S.A. 401-403, were put in place in 1951. ***In re: Water Levels of Lake Seymour,*** was decided in 1952. There has been no suggestion of any conflict and no pre-emption for more than half a century.

The Clean Water Act became law in 1972. Rather than conflict with various State water laws, the Clean Water Act embraced those laws such as 30 V.S.A. 401-403. As the Vermont Attorney General's office pointed out in their brief in ***P.U.D. No. 1 of Jefferson County v. State of Washington,*** 511 U.S. 700, 114 S. Ct. 1900 (1994), "If Section 401(d) [of the Clean Water Act] is to be given purpose, it must extend to state laws beyond water quality standards...**Congress...plainly chose to authorize states to assure compliance with 'any other appropriate state laws through Section 401(d).'"** (emphasis added).

Justice O'Connor, who wrote the ***P.U.D. No. 1*** decision agreed (at 1908): 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.'"** (emphasis added). The Clean Water Act called for the application of State laws. It did not give the Vermont Agency of Natural Resources or its Department of Environmental Conservation the power or authority to repeal the laws of

the Vermont Legislature or to reverse the decisions of the Vermont Supreme Court. On the contrary, it urges their application, and it seems ironic that the Vermont Attorney General's office would successfully urge that understanding in the ***S.D. Warren*** case and urge just the opposite understanding in this case.

It is clear from a close reading of the 401 Certification in this matter that adherence to State law was the intent. Based on the design criteria presented by the applicants hydrologists and engineers, and the water level forecasts in their analysis, Paragraph 252 of the 401 Certification stated plainly: "The applicant's proposal results in conditions closer to natural conditions for Seymour Lake…the dam design is intended to maintain high levels that mimic natural conditions." That was the intent. That was the understanding. That is not what happened. Condition B anticipated "true run of river" conditions. Again, that is not what has happened and the water quality and shore lands have been significantly degraded and as a result the public and private property owners have suffered diminished water quality and diminished use and enjoyment of these public waters.

If the Court subscribes to the position of the Defendants, the Court is not only saying the Defendants have the authority to repeal Vermont statutes but also reverse Vermont Supreme Court decisions. The Court would also saying, if it subscribes to Defendants' position, that if the Defendants send out unsigned meeting notes or a letter that says "call us if you'd like to discuss this in more detail" and continue to act so as to allow substantially increased flooding, ongoing pollution of Vermont's waters, the destruction of Vermont's shore lands, the erosion of beaches, risks to the health and safety of the public and diminished quality and use of our beaches and waters, and if

some interested party does not challenge that "decision" within thirty days then the Defendants can continue these abuses in perpetuity.

Plaintiff would submit that no legislator or judge ever could have intended such a result. The Defendants, pursuant to the conditions of the 401 Certificate and the license, have the authority to cause the conditions complained of herein to be eliminated or removed. Their failure to do so is a violation of the plain mandates of State law and an abuse of their authority and constitutes a public nuisance and a nuisance per se. By virtue of 3 V.S.A. 31 this Court has jurisdiction.

Conclusion

The Vermont statutes establishing "natural and normal" water levels at Lake Seymour that were enacted in 1951 and confirmed by the Vermont Supreme Court in1952 are good law. The mandates of those statutes have not been in conflict with any federal law since they were adopted. On the contrary, they were embraced by the Clean Water Act in 1972. The design of the 2004 replacement dam contemplated compliance with the "natural and normal" water levels fixed by that law. However, the reality is that the new dam has not functioned according to the design criteria or as predicted by the engineers.[4] The result has been a substantial increase in flooding with all of its accompanying damage. The Defendants have asserted control over the use of a gate which for more than half a century was used to minimize these damages but they refuse to allow the gate to be used. They are violating a clear and unequivocal mandate of

4. For example, the design was predicated on the lake level rising to 16.8 inches above the high pin during a 100 year flood event. In 2011 it rose over 26 inches above the high pin. In 2014, a fairly normal year, it rose over 17 inches above the high pin. For more detail concerning this flooding and the original design criteria, see ***Attachment C to Plaintiff's Response to Defendant's Motion to Dismiss, Affidavit of Timothy Buzzell.***.

Vermont's General Assembly and the Vermont Supreme Court. Mandamus is appropriate. Jurisdiction rests with this Court.

Dated at Greensboro, Vermont, this 27th day of December, 2014.

By _____
David F. Kelley
Attorney for Plaintiff

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.

Second Affidavit of Ronald Kolar

Now comes Ronald Kolar, PE, and being duly deposed and sworn, does hereby testify as follows:

1. In 2009, I was the chair of the Seymour Lake Association Dam Committee (hereinafter "SLA"). In that capacity, I was SLA's primary liaison with the Defendants.

2. In late 2009, Jeffrey Cueto, the chief hydrologist in the Department of Environmental Conservation, called me to alert me that he'd be putting together a written summary of the SLA/ANR situation prior to his (Cueto's) retirement at the end of Dec. 2009.

3. Mr. Cueto said his letter would be for the use of myself, Brian Fitzgerald, and others. Cueto said the information he was putting in his December 2009 letter was so SLA and his ~~immediate~~ rek replacements and others rek Brian Fitzgerald, could "move forward."

4. In my communication with Brian Fitzgerald subsequent to 2009, Brian Fitzgerald consistently asked for more time to analyze, study, vacation, office move, etc.

5. At no time and under no circumstances did Mr. Cueto even intimate that his letter of December 2009 represented in any way a final decision by the Agency.

6. See attached letters, emails, and notes.

7. Brian Fitzgerald's request of me was to the effect of "please bear with me, I've come into this cold, and I need more time."

Dated at Morgan in the State of Vermont this 31st day of December, 2014.

Ronald Kolar

Ronald Kolar, PE

Subscribed and sworn to before me this 31st day of December, 2014.

TammyLee Morin

Notary Public 2-10-15