

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 108-4-14 Oscv

Seymour Lake Association,  
Plaintiff,

v.

State of Vermont, Agency of Natural Resources,  
Department of Environmental Conservation,  
Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' REPLY MEMORANDUM OPPOSING  
PLAINTIFF'S MOTION FOR ALTERATION OR AMENDMENT OF THE COURT'S ORDER  
OF MARCH 31, 2015, DISMISSING THE COMPLAINT**

The issue presented by this case is not an environmental issue. It is a basic question concerning the rule of law. Can Defendants continually and willfully disregard their clear, unequivocal obligations under the law as set forth by the Public Service Board pursuant to Vermont statutes and affirmed by the Vermont Supreme Court?

The purpose of a 401 Certification is to certify that a project licensed by the Federal Energy Regulatory Commission will comply with state water laws. The 401 Certification does not, and cannot, change state law or jurisdiction over dams. In point of fact, 10 V.S.A. 1081 vests jurisdiction of this dam with the Public Service Board and, pursuant to 30 V.S.A. 401 and 402, the Public Service Board has adopted very explicit water levels which govern whoever controls the dam, whether it be Citizens Utilities, Great Bay Hydro or the Department of Environmental Conservation.<sup>1</sup> The Defendants don't even have jurisdiction in this matter. State law gives that jurisdiction to the Public Service Board and Defendants have certified to the Federal Energy Regulatory Commission that they and this project will

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<sup>1</sup> Plaintiff has repeatedly noted that there is no federal preemption in this matter, and because this is a project subject to a FERC license and is "incident to" or "related to" the generation of electricity, 10 V.S.A. 1081 vests primary jurisdiction in the Vermont Public Service Board. The Defendants' authority is circumscribed by the mandates of that Board. Defendants have a ministerial duty to adhere to the mandates of that Board. The fact that Defendants have written a letter saying they won't comply is an irrelevant distraction at best and strong evidence in support of Plaintiff's case.

adhere to Vermont State law and the Board's mandates. They are obligated to live up to their certification.

The ongoing “act” complained of herein is Defendants continuing to allow a dam to cause the levels of Lake Seymour to exceed the levels allowed by law. It is Defendants' continual willful disregard and ongoing non-compliance with the law and their ministerial duties that is the “act” which is the basis of the complaint. When public servants don't perform their ministerial duties, no one is obligated to ask them to do so before seeking a writ of mandamus. The fact that Defendants wrote a letter saying they wouldn't comply is not the crux of this matter.

The Defendants have no authority, discretion or jurisdiction that would allow them to manage the dam in such a manner as to knowingly and intentionally cause water levels to exceed those explicitly prescribed by law and the PSB. On the contrary, Defendants have an ongoing ministerial duty to comply with the mandates of the Public Service Board.

The law itself is clear: 30 V.S.A. 401 and 402 prohibit allowing the water levels of Lake Seymour to be raised or lowered by artificial means beyond the natural and normal water levels that are established by the Public Service Board (and subsequently affirmed by the Vermont Supreme Court). When public servants do not perform their lawful ministerial duties mandamus (as simplified by V.R.C.P. 75) is the proper remedy. Original jurisdiction is vested concurrently in the Supreme Court and in the Civil Division of the Superior Court. 4 V.S.A. 31, not the Environmental Court.

The Court's March 31, 2015, decision in the above matter says: 1) The Agency of Natural Resources has made a decision; 2) That decision was not appealed within 30 days; 3) Therefore the Court is without jurisdiction. But the Court's decision is premised on the assumed, but unstated, proposition that the Defendants are somehow empowered to make a decision that violates the law and that exceeds their jurisdiction, and then continue to act in noncompliance with the law after they have certified compliance. The opinion assumes that Plaintiff is appealing from a “decision” stated in a letter

written several years ago. Plaintiff has, to the contrary, asserted that Defendant is engaged in an ongoing and willful disregard of their ministerial duties as set forth explicitly by the government body with jurisdiction over this matter. There is no room for discretion on the part of the Defendants under 10 V.S.A. 1082, 1252 or any other statute.

Defendant's authority to ignore the mandates of the law, could only arise under two conditions:

1) 30 V.S.A. 401 and 402 were repealed; or 2) the law was preempted. Neither condition exists.

Whether Defendants sent letters to Plaintiff or not is not the issue. By continuing to violate the law, and to assert jurisdiction they do not have, Defendants' acts in noncompliance with the law are ongoing.

The Public Service Board had jurisdiction. The Public Service Board exercised its jurisdiction and the Defendants have a ministerial duty to obey the Board's directives as set forth by the Vermont statutes and affirmed by the Vermont Supreme Court. Instead they are engaged in a continuing violation of both the mandates of, and the jurisdiction vested in, the Public Service Board by 30 V.S.A. 401 and 402 and 10 V.S.A. 1081.

It would be duplicative of the Courts' time to have Plaintiff ask the Defendants to stop violating the law again so that Plaintiff can go to the Environmental Court within 30 days and start this process all over again. Either the Defendants have a ministerial duty to adhere to the mandates set forth above and are engaged in an ongoing violation of the law or they aren't. Therefore the Plaintiff would ask this Court to declare whether the Defendants are subject to the mandates of the Public Service Board as promulgated pursuant to 10 V.S.A. 401 and 402 and as affirmed by the Vermont Supreme Court at *In re Water Levels of Lake Seymour*, 117 VT 367, 91 A.2d 813 (1952).

Dated at Greensboro, Vermont, this \_\_\_\_\_ day of May, 2015.

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David F. Kelley

Attorney for Plaintiff