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MANAGER
Scott Johnstone

Testimony of Scott Johnstone, General Manager of Morrisville Water & Light

Presented to the Senate Natural Resources Committee

Regarding S213

February 2, 2024

My name is Scott Johnstone, and I am both the General Manager of Morrisville Water and Light and the Manager of the Village of Morrisville, a duly chartered municipality of the State of Vermont. During my testimony I will recall information from a time when I was Deputy Secretary and then Secretary of the Vermont Agency of Natural Resources. As such, I will share that I held these positions as a part of the Dean Administration from 1998 through the end of 2002. I appreciate this opportunity to share MWL's thoughts related to the liability provisions of S213.

MWL operates three utilities, water, wastewater, and electricity. For the electric utility our service territory includes all of Morrisville and parts of six surrounding communities. We are members of the Vermont Public Power Supply Authority, VPPSA, and are aware that quite a number of the municipalities that make up VPPSA's membership are also electric generation dam owners. Having spoken with VPPSA and many of the members with dams, I will share that the comments herein generally comport with the concerns of VPPSA and her members. That said, at a specific level, I speak only for MWL.

MWL has proudly been generating local, renewable, hydroelectric energy since its founding in 1895. Today, MWL operates three separate hydro facilities including Cady's Falls, Morrisville, and Green River. The first two of these are run of river dams on the Lamoille River and the latter is a high hazard dam that creates the Green River Reservoir, creating the home for the same named state park. Green River is currently allowed certain drawdown limits based on the time of year.

All three dams operate under a license from the Federal Energy Regulatory Commission, FERC, and water quality permits (401) from the Agency of Natural Resources. Each also is under the jurisdiction of

the Public Utilities Commission as it relates to certain generation matters. As a high hazard dam, Green River also is required to perform a “Part 12 D” safety inspection every few years.

While we have concerns about the strict liability language in S213, let us begin by speaking about that which we surely all agree. Everyone desires safe dams that are well cared for, invested in, and regularly inspected. In taking these actions both physical and property damage is protected. With over 125 years of safe operation of our dams, I believe, MWL has demonstrated the commitment necessary to be good stewards of our facilities and of the public good.

It is helpful, I expect, to begin with one other fact that helps lay the groundwork for a useful discussion of liability. All dams, regardless of type and construction materials, leak. They are actually designed to do so in a controlled manner which then helps to assure the safety of a dam. This is why, in part, it is so important to have regular eyes on facilities as part of everyday operations and then also to have outside inspections for dam safety. For if a dam begins to leak in manners other than designed for, it can become a catastrophic matter.

MWL has three broad categories of concern regarding the inclusion of strict liability, as proposed in S213. Each is discussed below:

Where Authority Meets Liability:

Both FERC and ANR prescribe many things in license and or permits they issue that a licensee shall and or shall not do. For instance, in its 2016 WQ permit, ANR provided no provision for MWL to drawdown the green river reservoir for any reason (flood, breach, nothing). Thus, with a strict liability measure MWL is held to account where we have no authority to act. This appears to us untenable. Further, the allowed winter drawdown in the 401 is very small which does not account for ice jamming and back up which can place the earthen dike portion of reservoir in jeopardy. However, these risks appear not to have been considered and, if occurred resulting in a breach, would constitute a strict liability on MWL and the Village. These examples are a couple, not to relitigate the permit, but rather to illuminate how we, and others would become strictly liable for outcomes we have no authority to manage. As it is, due to the permit requirements we are unlikely to own the green river reservoir dam in the future. A condition such as this would simply assure that fate.

Uninsurable

While an engineer by training, I know it's difficult today to gain access even to general liability insurance for dams. I have grave doubts that we could secure a strict liability insurance policy at any price once this new standard was put in place. While perhaps other, secondary, insurance markets may offer it, it will be extremely expensive, and those sorts of policies typically have very narrow application.

Further, as a municipal government, the backstop for any liability not covered by insurance is our local property taxpayer. Though our electric system serves many customers across multiple towns, only those living in Morrisville hold this obligation. One would expect that, given this new risk, those citizens would seek to have us remove all three generation stations due to this new level of risk. It is possible such a new burden could even impact our ability to attain insurance on other assets (wastewater and water) as the potential risk of damage awards would far exceed our total net assets as a municipality. In short, the Village of Morrisville, and others like us, would likely go into bankruptcy if a major, strict liability award was at hand.

In a community with a population of around 2,200, this risk would simply be too high a burden to bear.

Unnecessary for Certain Dams

For high hazard, federally licensed dams, there is a regular safety inspection as well as regular reporting to FERC. We happen to be performing our 9th Part 12D inspection process in 2024 for green river reservoir dam this year, which is a very detailed inspection, with improvement recommendations that FERC monitors carefully. Additionally, the state is currently performing a comprehensive study of this same dam as part of consideration of it becoming a state-owned facility. We all are eagerly looking forward to seeing this report by the year's end and we hope the legislature is as well.

For all FERC licensed dams there are regular visits and inspections as well as emergency inspections. For example, FERC inspectors visited each of our dams within 10 days of last summer's floods and made recommendations of improvements and repairs to make as a result of the floods. Since then, MWL has been working collaboratively with both FERC and FEMA to make all recommended repairs – even though our dams all survived a 4-foot overtopping without incident, which speaks to how well they were built and are maintained.

As I close, let me offer our suggested change to S213 and then an anecdote that may be of interest.

As to modification, we ask you to remove section 1091 from the bill and perhaps instead focus on assuring all dams are well maintained and inspected as a way to assure the public good and safety. After all, not having failures and damage is the goal we all seek. It strikes me that the ANR is uniquely situated to develop and regulate inspections and condition of all dams in Vermont, though they will surely require more staff to accomplish such a task.

If focusing on assuring we don't have unnecessary incidents occur due to poor maintenance is insufficient, then I simply ask that an inquiry into how the insurance industry is likely to react to any change in the level of liability is necessary. I can think of many ways to modify the language currently in S213 to make it more acceptable; however, I do not know if any edit I may offer would result in becoming uninsurable and or at what cost.

Now to share an anecdote to perhaps help pull this all together. On my second day as Secretary of ANR I found myself holding a press conference on top of Waterbury dam to share the unfortunate news that ANR was initiating a drawdown to make emergency repairs. This drawdown was to last years. Needing to tell the people and businesses of the Waterbury area that their reservoir was not to be available for some considerable time, and understanding the impact of that, was among the hardest things I've done in my professional career. As noted previously, all dams leak – it's how they leak that matters. Having noticed, through vigilant inspections, that the exit of the leaks at Waterbury had moved closer to the toe of the dam, we began to investigate, ultimately drilling a grid of holes in the dam to see what we could learn. We found, by good fortune, that the dam had voids in it that were many times larger than this committee room. That said, there was as good a likelihood that we should not have found those voids, as the grid was necessarily pretty large, and that dam could have failed. Now of course, if we had not found anything we'd of developed and begun phase 2 and 3 and 4 until we found the problem, but we may not have found it in time. With strict liability, in such a case, for Waterbury the taxpayers of the State of Vermont, would have been liable for every damage that occurred from Waterbury to Lake Champlain – a number measuring surely in the 100's of millions of dollars.

This intends to demonstrate the great care and concern necessary to truly steward these dams. They play a vital role in our energy system, and, like so much infrastructure, carry risk. Because our hydroelectric dam owners understand exactly what is at risk, our track record of finding problems before catastrophe is exemplary. However, the very best of dam owners could, despite every best

effort, find themselves with a major problem. Addressing how to assist those who are impacted is, of course, a good and important discussion. From MWL's perspective, the infrastructure laden world we live in carries risk, quite frequently on businesses, people, and government. It is part of the price of having the infrastructure in the first place. This is why we recommend a clear focus on making sure all dams are, at an appropriate level, inspected and cared for by the entity that owns it and leave the liability issues as they are today.

Thank you for your time.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Scott Johnstone". The signature is fluid and cursive, with the first name "Scott" and last name "Johnstone" clearly legible.

Scott Johnstone, P.E., General Manager