

Memo

To: Senator Robert Hartwell, Chair, Senate Natural Resources Committee
From: Dave Kelley
Date: January 29, 2014
Subject: Senator Galbraith's Question

Thank you very much for taking your Committee's time to hear the concerns shared by many in the Northeast Kingdom about water levels at Lake Seymour.

Condition H of the July 2, 2003, Clyde River Hydroelectric 401 Certification reads in pertinent part: "The design shall also include a gate bay to enable future operation of the gate if the Department determines that the modified dam has significantly increased the magnitude, frequency or duration of shoreline flooding and this impact cannot reasonably be abated."

Senator Galbraith asked if it would violate federal law if the gate was used without a technological finding that the modified dam "significantly increased the magnitude, frequency or duration of shoreline flooding."

The answer is "no" for several reasons.

When we talk about a 401 Water Quality Certification "401" refers to Section 401 of the Clean Water Act. That section, as set forth in the EPA guidance, provides a tool for states to use as a means of assuring compliance with state water quality standards when the federal government issues a permit that would not ordinarily consider water quality issues (such as a FERC hydroelectric permit).¹

In considering the 401 certification the Department of Environmental Conservation and the Water Resources Board are expected to implement Vermont law and Vermont water quality standards promulgated pursuant to Vermont law.

Some brief history: In 1951 the issue of the dam at the outlet of Lake Seymour and the resultant altered water levels was addressed by the Vermont Legislature. The Legislature directed the then Public Service Commission (now Public Service Board) to determine what the normal or natural minimum and maximum water levels of Lake Seymour were.² The Legislature then directed that those levels could not be raised or lowered artificially or by neglect.³ When Citizens Utilities didn't like the result they appealed to the Supreme Court and the Supreme Court affirmed the Commission's determination.⁴

¹ <http://water.epa.gov/lawsregs/guidance/cwa/upload/cwa-401-handbook-2010-interim.pdf> (see page 1)

² 30 V.S.A. 401

³ 30 V.S.A. 402

⁴ *In Re Establishment of Water Levels of Lake Seymour*, 117 Vt. 367; 91 A.2d 813; 1952 Vt. LEXIS 147 (1952).

Those concerns resulted in Vermont law that says water levels at Lake Seymour should not be raised or lowered beyond the “natural” lake levels by “artificial means or by neglect.” Furthermore those natural levels were established by the Commission and the Court as being 6” below the crest and 8” above the crest of the 1928 dam.

When the Agency of Natural Resources and the Water Resources Board issued a 401 Water Quality Certification for reconstruction of the hydroelectric dam at the outlet of Lake Seymour in 2003 they included a requirement that a gate be installed on the dam to be used to “prevent significant flooding.”⁵ The Department and the Board both acknowledged in the Certification that the gate in question was installed because of the significance of this issue to the Seymour Lake Association.⁶

While the Certification says the gate shall not be operated without the prior approval of the Department, the Department does not have discretion to override a Vermont Supreme Court decision.⁷ It must obey the Court’s mandate. Additionally, when the 401 Certification is read in its entirety condition H means that if the modified dam, without using the gates to manage water levels as was done up until 2004, results in increased flooding then the gates can be used.

Finally, it is important to keep in mind that one of the mandates of the Department of Environmental Conservation is “..to further the maintenance of safe and healthful conditions...reduce property loss and damage...”⁸ Any evidence of property damage or diminished water quality that may have been a consequence of high water levels in the last ten years is important.

⁵ Water Quality Certification, Clyde River Hydroelectric Project, as amended, dated July 11, 2003, at p. 15, paragraph 256 and p. 36 Condition H.

⁶ Ibid, p. 15, paragraph 255.

⁷ Ibid, p. 36, Condition H

⁸ 10 V.S.A. 1421