



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WATER COUNCIL

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STATE OF NEW HAMPSHIRE  
WATER COUNCIL

**Decision & Order**

**Docket No. 01-13 WC**

Appeal of Lake Ashuelot Association.  
In Re: Ashuelot Pond Dam, Washington, NH, DAM # 245.05

**Background**

Ashuelot Pond ("the pond") is a natural waterbody of approximately 390 acres located in Washington, NH. Three dam-controlled ponds feed the Pond. Lake level in the Pond is controlled by the dam at the outlet, which is owned and operated by the Lake Ashuelot Estates Association, Inc. ("LAE"). There are two associations affiliated with the Pond, the LAE and the Ashuelot Pond Association ("APA"), which are comprised of approximately 377 property owners and 50 property owners, respectfully. There are several property owners who are not affiliated with either organization. The LAE members reside primarily on the northeast side of the Pond and the APA members primarily on the southwest side.

On October 16, 1990, 107 petitioners, principally individuals with property interests on the southwest side of the Pond, Petitioned the New Hampshire Department of Environmental Services ("DES"), requesting that the department hold a lake level hearing in accordance with RSA 482:79, regarding the drawdown of the Pond. In their petition, the petitioners claimed that the Pond was being drawn down in September and being refilled late the following spring. They claimed that this practice resulted in the loss of fire protection to the property owners on that side of the Pond, eliminated access to (at the time) 25-cabins and homes that did not have road access and needed to be accessed by water, and may have negatively impacted the quality of the water

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in the Pond as well as the aquatic species that inhabit the Pond. The petitioners also claimed that the previous owners of the dam never lowered the level of the Pond more than three feet; and the petitioners requested that this drawdown limit be established. In July 1991, DES conducted a hearing in accordance with RSA 482:79. On September 13, 1991, DES issued a Notice of Decision ("the Order"). In the Order, DES granted the dam owner an annual drawdown of the Pond to a depth of 3.5 feet to begin no earlier than Columbus Day, with a drawdown below 3.5 feet every fifth year to conduct aquatic weed control, to conduct shorefront improvements, and to inspect and repair the dam.

On June 14, 1999, members of LAE submitted a petition to DES under RSA 482:79 for a lake level investigation of the Pond and a request for the rescission or modification of the Order. LAE claimed that the use and enjoyment of Ashuelot Pond had been adversely impacted by the Order and that LAE and property owners who use the Pond had been injured and harmed as a result. LAE maintains that the Order unduly restricts it by limiting the frequency, depth, and timing of a deep drawdown.

On June 14, 1999, LAE requested that DES rescind the Order.

On June 6, 2001, DES upheld the Order, denying LAE's request.

On July 3, 2001, LAE filed a petition for appeal of the Order, with the New Hampshire Water Council ("the Council").

On August 31, 2001, a pre-hearing conference was held.

On October 25, 2001, a second pre-hearing conference was held.

On August 7, 2002 a third pre-hearing conference was held.

Under the authority of RSA 21-O:7 and RSA 21-O:14, an appeal hearing before the Council was held on Wednesday, October 9, 2002 beginning at approximately 10:00 a.m. at the DES offices in Concord. The hearing was conducted in accordance with RSA 541-A:31-38 and the Council's procedural rules, NH CODE ADMIN. RULES Env-WC 200. At the hearing, the Council heard testimony and received evidence relative to this appeal of the *Notice of Decision on Determination of Lake Level* issued by DES on June 6, 2001. At the hearing, testimony was presented by witnesses for LAE as well as DES. LAE's presentation focused mainly on an chronic aquatic plant problem caused by the aquatic plant known as Bladderwort. One witness offering lengthy testimony for LAE was Professor KC Hayes. Professor Hayes is a Professor of Biology (Nutrition) at Brandeis University of Waltham MA. Professor Hayes' testimony primarily focused on three (3) computer models and his own theory regarding control of the spread of Bladderwort. Professor Hayes offered testimony that in his opinion the current drawdown schedule of the pond is not adequate to control aquatic weeds in the pond. Professor Hays offered opinions that Bladderwort is best controlled by exposing its roots through deep drawdown of the pond, which would allow for freezing and drying of the plants root system. In his opinion a deep drawdown earlier in the year, and more often than currently scheduled, would be more effective in controlling the growth and spread of Bladderwort. DES offered testimony from, among other witnesses, Amy Smagula and Jody Connor of the DES Limnology Center. Amy Smagula is a Biologist who specializes in Exotic Aquatic Plants. Jodi Connor is Director of the Limnology Center. Among other points, Ms. Smagula testified that DES is currently in its second year of a five year study to determine the effects of deep drawdown, shallow drawdown, their optimal frequency, and their effect on plant life in the pond. Mr. Connor testified that Bladderwort does not have a root system, but rather is a floating aquatic plant. As such Mr. Connor did not agree with the theory that the most effective means of controlling the growth and spread of Bladderwort in the pond was through freezing and drying of the root system since Bladderwort is not a rooting plant. Mr. Connor testified that deep or shallow drawdown of the pond is not an effective method of controlling the growth and spread of Bladderwort.

**Discussion & Conclusion**

On Wednesday, November 13, 2003 members of the New Hampshire Water Council deliberated testimony and evidence presented at the October 9, 2002 appeal hearing. Upon conclusion of deliberations the Council voted unanimously to deny this appeal for the following reasons:

1. Pursuant to N.H. Code Admin. R. Env-WC 201.16, the Appellant bears the burden of proving by a preponderance of the evidence that the 2001 Decision by the New Hampshire Department of Environmental Services is either contrary to statute or rules, or is arbitrary and capricious. The appellants fail to do so.
2. The Department of Environmental Service's 2001 Decision to allow for a five-year deep drawdown cycle is both reasonable and lawful. The 2001 Decision strikes a reasonable balance between the interest of the public at large, and Lake Ashuelot Estates' interests and desires relative to the frequency and depth of deep drawdowns on the Pond.
3. Lake Ashuelot Estates failed to prove, by a preponderance of the evidence, that the Department of Environmental Service's 2001 Decision, which denied Lake Ashuelot Estate's request to rescind the five-year drawdown schedule, is either contrary to law or arbitrary and capricious.
4. Lake Ashuelot Estates failed to prove, by a preponderance of the evidence, that the Department of Environmental Service's 2001 Decision, which denied Lake Ashuelot Estate's request to rescind or modify the 1991 Order to allow for annual drawdowns earlier than Columbus Day, is either contrary to law or arbitrary and capricious.
5. Lake Ashuelot Estates failed to prove, by a preponderance of the evidence, that the Department of Environmental Service's 2001 Decision, which provides that additional

deep drawdowns may occur with prior approval from the Department of Environmental Services as necessary for the implementation of the Department of Environmental Services' study of the Pond, is either contrary to law or arbitrary and capricious.

6. Although Professor KC Hayes' presentation was impressive, his testimony was based on computer models and theory and lacked sufficient facts to prove that a different drawdown cycle of the pond would be an effective way of controlling Bladderwort.
7. DES, through its witnesses, proved to the Council by supportable facts that DES is working with due diligence and speed to solve the problems at the pond.
8. The Council agreed that the most prudent course of action was to let DES continue with its study and to let DES determine the most appropriate ways to solve problems that they may discover as a result of the study.

Based on the reasons listed above, the appeal of Lake Ashuelot Estates is therefore **DENIED**.

Pursuant to Env-WC 203.29(a), any person whose rights might be directly affected by this decision may file a motion for rehearing within 30 days of the date of this decision. The motion must contain the information specified in Env-WC 203.29(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 203.29(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered for the Council by:  on May 6, 2003  
Michael Scalfani, Appeals Clerk