

STATE OF NEW HAMPSHIRE
WATER COUNCIL

Decision & Order
on
Notice of Appeal

Docket No. 09-34 WC

Appeal of Ashuelot Pond Association

In Re: August 28, 2009 Notice of Decision on Determination of Lake Level, Ashuelot Pond Dam,
Washington, New Hampshire, Dam # 245.05

Background

On September 9, 2009, the Ashuelot Pond Association (“APA”, or “Appellant”) filed Notice of Appeal of August 28, 2009, Notice of Decision on Determination of Lake Level for Ashuelot Pond Dam, Washington, New Hampshire, Dam # 245.05 (“Appeal”), issued by the New Hampshire Department of Environmental Services (“NHDES”).

On October 15, 2009, the Lake Ashuelot Estates Association filed a Motion to Intervene.

On October 29, 2009, the Ashuelot Pond Dam Village District filed a Motion to Intervene.

On November 17, 2009, the New Hampshire Water Council (“Water Council”) moved to accept the Appeal. Councilor Rawnsley was assigned as Presiding Officer.

On November 17, 2009, the Water Council moved to deny Lake Ashuelot Estate’s Motion to Intervene. A Decision and Order was issued on June 6, 2011.

On November 17, 2009, the Water Council moved to accept Ashuelot Pond Dam Village District's Motion to Intervene. A Decision and Order was issued on June 6, 2011.

On March 29, 2010, a Prehearing Conference was held at the NHDES offices in Concord, New Hampshire by the Presiding Officer, Chris Rawnsley. Present for the Appellant were James Plumridge, Mary Ann Turner, and Ed Davis. Present for the Ashuelot Pond Dam Village District ("Intervenor") were Robert Thompson and Bob Lamey. Present for the Department were Kerry Barnsley and James Gallagher. A Pre-Hearing Order was issued upon conclusion of the conference. A Supplemental Pre-Hearing Order was issued by the Council on May 27, 2011.

On May 11, 2011, an appearance was filed by Jarrett Duncan on behalf of McLane, Graf, Raulerson, & Middleton, P.A., representing the Appellant.

On May 23, 2011, Intervenor filed Intervenor's Exhibits.

On May 27, 2011, NHDES filed its Witness List and Exhibits.

On May 31, 2011, Appellant filed a Motion to Continue Hearing, a Motion to Amend Witness List, and a Motion to Amend Exhibit List with Exhibits.

On June 1, 2011, Intervenor filed an Objection to Appellant's Motion to Continue Hearing.

On June 2, 2011, the Water Council moved to accept Appellant's Motion to Continue Hearing, setting the hearing date for July 13, 2011.

A hearing was held before the Water Council on July 13, 2011 at the NHDES offices in Concord, New Hampshire. The hearing was concluded and the record closed the same day. All Party's Exhibits were moved into the record without objection.

Findings of Fact

Based upon careful review of the record, pre-hearing submissions by the parties, and the evidence and arguments at hearing, the Water Council finds the following facts:

Ashuelot Pond is a natural water body of approximately 390 acres located in Washington, New Hampshire. The level of Ashuelot Pond is controlled by a dam at its outlet, currently owned and operated by the Ashuelot Pond Dam Village District, a duly constituted political subdivision of the State of New Hampshire.

On October 16, 1990, 107 persons petitioned NHDES to conduct a lake level hearing pursuant to RSA 482:79. The stated interest of the petitioners was depth, timing, and duration of drawdown of Ashuelot Pond.

On July 12, 1991, after providing proper notice, NHDES held a public hearing regarding the petition and the conditions affecting use and enjoyment of Ashuelot Pond.

On September 13, 1991, NHDES issued a Notice of Decision on Determination of Lake Level for Ashuelot Pond Dam, Washington, New Hampshire (“1991 Notice of Decision”). In relevant part the 1991 Notice of Decision established parameters for drawdown of Ashuelot Pond, including:

- Annual drawdown may begin no earlier than Columbus Day.
- The annual drawdown may not exceed two feet below the elevation of the overflow spillway prior to November 1.
- The total depth of the annual drawdown may not exceed 3.5 feet below the elevation of the overflow spillway.
- Drawdowns greater than 3.5 feet may be conducted once every five years for the purpose of dam repairs, aquatic weed control, and maintenance of shorefront improvements. Such deep drawdowns may begin prior to Columbus Day if sufficient and proper notice is provided.

- Ashuelot Pond should be returned to normal operating level prior to June 1.
- Emergency drawdowns may be permitted if sufficient and proper notice is provided.

On June 14, 1999, NHDES received a petition from Lake Ashuelot Estates, an association of property owners and at that time the owner and operator of Ashuelot Pond Dam (“LAE”), which requested a second lake level investigation and rescission of the 1991 Notice of Decision as unduly restrictive in limiting the depth, timing, and frequency of deep drawdowns.

In July of 2000 NHDES conducted an additional public hearing in response to LAE’s 1999 petition.

On June 6, 2001, NHDES issued a Notice of Decision on Determination of Lake Level for Ashuelot Pond, Washington, New Hampshire (“2001 Notice of Decision”), which denied LAE’s request for rescission of the 1991 Notice of Decision. The 2001 Notice of Decision also provided that NHDES, in conjunction with LAE, APA, and other interested parties, would conduct a 4-year, detailed study of Ashuelot Pond, and provided that additional deep drawdowns could be performed as part of the study.

On July 3, 2001, LAE appealed the 2001 Notice of Decision. The Water Council issued a denial of the appeal on May 6, 2003.

The study specified in the 2001 Notice of Decision was conducted between 2001 and 2005, and NHDES issued a report titled *Draft Final Report, Ashuelot Pond, Washington, Drawdown Study*, dated Spring, 2008.

On August 24, 2008, NHDES held a public meeting in Washington, New Hampshire, to present the findings of the report and to gather public comment. NHDES established a January 2009 deadline for additional public comment.

On August 28, 2009, NHDES issued a Notice of Decision on Determination of Lake Level, Ashuelot Pond Dam, Washington, New Hampshire, Dam # 245.05 (“2009 Notice of Determination”). The 2009 Notice of Decision reaffirmed the operating parameters established in the 1991 Notice of Decision, excepting that control of aquatic weeds was removed as a basis for deep drawdowns and excluded by definition as an emergency condition.

Ashuelot Pond Dam is more than 135 years old.

Periodic inspection of the upstream dam face is necessary and desirable for public safety.

Ashuelot Pond has a drainage area of approximately 25 square miles, and in addition receives discharge from four upstream dam-controlled lakes, including Sand Pond in Marlow, Long Pond in Lempster, and May Pond and Millen Lake in Washington.

Drawdowns are conducted on Sand Pond and Millen Lake at or near Columbus Day, and on May Pond in November.

Stream-flow in the Ashuelot River watershed is variable depending upon meteorological conditions, and is typically greater in October and November than in September.

Either singly or together the stream-flow and/or releases from upstream dams can exceed the capacity of the discharge gates at the Ashuelot Pond Dam.

Conclusions

By its Rules the Water Council presumes that the decision(s) of NHDES under appeal are lawful and reasonable. The Appellant bears the burden of proof in establishing, by a preponderance of the

evidence, that the decision(s) under appeal is contrary to statute or rule, or is arbitrary and capricious (see Env-WC 204.14).

Based upon careful review of the record, pre-hearing submissions by the parties, and the evidence and arguments at hearing, the Water Council understands Appellant's fundamental assertion to be that in issuing the 2009 Notice of Decision, NHDES did not adequately assess or balance the public benefit and private interests affected by operations of the Ashuelot Pond Dam, as required pursuant to RSA 482:79. Appellant does not contest the deep drawdowns themselves as necessary measures for public safety, but asserts that the timing of the deep drawdowns does not balance public benefit and private interest. Appellant bases this assertion upon its contention that the record contains no clear or concise written assessment or balancing of interests, or even an indication of balancing, and that to the extent that there is evidence of such an assessment in the record, NHDES improperly relied upon balancing considerations arrived at in support of Decisions made prior to the 2009 Notice of Decision.

RSA 482:79 grants substantial discretion to NHDES in investigation of lake levels, stating

“If... the department shall be of the opinion that such management and control is lawful, but that changes in the manner of the exercise of the right of management and control would be of benefit to others without undue injury to the owner of the outlet, it shall direct such changes as in its opinion would be of benefit to the public and private interests concerned.” (Emphasis added.)

RSA 482:79 provides no further direction to NHDES regarding the manner in which it is to develop its opinions or exercise its judgment regarding lake level determination. The Council agrees with Appellant that the language of RSA 482:79 requires that a balancing and assessment underpin NHDES opinions, but concludes that the form and nature of such balancing and assessment is a matter for NHDES' discretion unless otherwise defined or limited by rule.

In this regard, for Appellant to meet its burden it must establish by a preponderance of the evidence that NHDES did not undertake balancing and assessment of public benefit and private interest, or that

the balancing and assessment was so cursory, superficial, or improper that reliance upon it would be unreasonable, arbitrary, or capricious. The Water Council concludes that Appellant has not met its burden in establishing that NHDES did not perform an adequate assessment and balancing of public benefit and private interests. The Water Council's review of the record reveals that NHDES, both over the long history of its involvement with the Ashuelot Pond Dam, and in its most recent Decision, has exercised adequate diligence in seeking public input, presenting study findings to the public, and in assessing and balancing public benefit and private interests, and has adequately documented that balancing in its Decisions, including the 2009 Notice of Decision.

Appellant's assertion that NHDES improperly relied upon balancing assessments performed for Decisions prior to the 2009 Notice of Decision, specifically the 1991 Notice of Decision, is not persuasive. The 1991 Notice of Decision determined, among other things, that deep drawdowns infringed upon the ability of those who must use the spillway or boats to access their property. NHDES reviewed, affirmed, and adopted the 1991 Notice of Decision, including the balancing embodied therein, with minor revision, in the 2009 Notice of Decision. The Water Council concludes that this decision is within NHDES' discretion.

Moreover, moving beyond the question of the record containing adequate indication of an assessment or balancing of public benefit and private interest, the Water Council finds the balancing embodied in the 2009 Notice of Decision to be reasonable and appropriate. Regarding private interest, NHDES found that deep drawdowns infringed upon the ability of those who must use the spillway or boats to access their property. Regarding public benefit, NHDES found that periodic deep drawdowns were necessary for public safety. Significantly, NHDES, exercising its professional judgment, found that meteorological and hydrologic considerations made the imposition of a fixed starting date for deep drawdowns inappropriate and unreasonable. In this light, allowing deep drawdowns no more frequently than every five years and imposing a 30-day prior notification requirement, including to NHDES and the public, for starting deep drawdowns prior to Columbus Day seems to the Water Council to strike a reasonable and well-supported balance of interests. The decision allows affected

members of the public to file complaints and allowing NHDES to receive and consider such complaints in advance of the start of a deep drawdown.

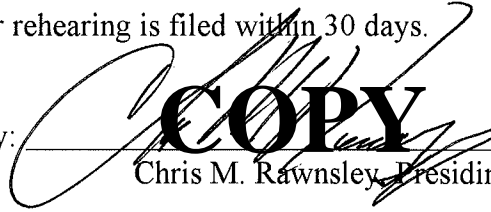
Order

The Appeal is hereby **DENIED**.

Reconsideration

Pursuant to Env-WC 204.16(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 204.16(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 204.16(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered by the Council by:


COPY

September 14, 2011

Chris M. Rawnsley, Presiding Officer