

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6828

Investigation into Possible Alterations at)
Green Mountain Power Corporation's)
West Danville Dam)

Order entered: 3/19/2004

ORDER APPROVING
GMP'S INTERIM OPERATING AND MONITORING PLAN

I. BACKGROUND

_____ In this Proposal for Decision, I recommend that the Public Service Board ("Board") approve Green Mountain Power Corporation's ("GMP") Interim Operating and Monitoring Plan ("Plan") as filed with the Board on October 9, 2003. The Board's Order of September 9, 2003, required GMP to submit, by October 10, 2003, "proposed detailed plans for monitoring and operating the Dam to minimize flooding until the dam has been reconstructed."¹ GMP's proposed Plan fulfills these requirements.

II. FINDINGS

1. The proposed Plan's stated priority is the interests of the shoreline property owners. Plan at 1.
2. The proposed Plan would continue the current practice of automatically tracking and responding to water levels through the deflation and inflation of the rubber dam bladder to control the water level in Joe's Pond ("the Pond"). Plan at 3.
3. The proposed Plan would require GMP to monitor weather conditions and, when significant rainfall events are forecast for the region, to draw down the Pond level in anticipation of the forecast inflow into the Pond. Plan at 4.

1. Docket No. 6826, Order of 9/9/03 at 12.

4. Under the proposed Plan, the amount of drawdown prior to anticipated significant rainfall will be the difference between the reservoir's maximum discharge capacity and the forecast inflow from the basin in the coming 24-hour period. Plan at 4.

5. This proposed drawdown procedure, in anticipation of significant inflow into the Pond, will minimize the risk of flooding to shoreline property owners. Plan at 4.

III. DISCUSSION

On October 23, 2003, the Agency of Natural Resources ("ANR") filed comments opposing the proposed Plan. Subsequent comments were filed by GMP, responding to ANR's comments, on October 29, 2003, and ANR, commenting on GMP's October 29, 2003 response, on November 10, 2003.

ANR questions the feasibility of utilizing drawdowns to manage water levels in the Pond. Additionally, ANR is concerned with the potential impact of these drawdowns on the wetlands and wildlife dependent on the Pond.

ANR's comments highlight an inherent uncertainty in the proposed Plan, that is, the use of weather predictions to determine the appropriate drawdown to prevent flooding. In utilizing such a mechanism, it is possible that there will be a drawdown in anticipation of a significant rain event that either does not occur at all, or is less significant than anticipated. However, in such a scenario, GMP would cease generation and keep the rubber bladder inflated until the Pond level returns to the target elevation. While the proposed Plan contains an element of uncertainty, it is impossible to remove all uncertainty from any plan that necessarily involves precipitation patterns. Furthermore, the proposed Plan seems to be the most likely method of minimizing flooding along shoreline property.

The Board's Order of September 9, 2003, required GMP to propose a plan that would minimize flooding. The Plan proposed by GMP has done just that, and explicitly states that mitigation of flooding is the number one priority of the proposed Plan. ANR's comments appear to assume that ecological concerns, rather than the mitigation of flooding, should be the number one priority of the proposed Plan. I disagree with ANR. GMP's proposed Plan has as its primary focus the protection of shoreline owners' property, as required by the Board's September 9, Order.

ANR states that the Order of September 9, 2003 "provides some near-term relief through the required bonding."² While the Board required a bond from GMP to ensure protection for the shoreline property owners, it is likely that these property owners would prefer that damage not be done to their property in the first place. This proposed Plan would be the most effective measure to reduce the chance of flooding along the Joe's Pond shoreline, and therefore I recommend approval of GMP's proposed Plan.

IV. CONCLUSION

The Board's Order of September 9, 2003, required GMP to propose a plan that would reduce the possibility of flooding along the shoreline of Joe's Pond. For the reasons stated above, the interim Operating and Monitoring Plan proposed by GMP is the most effective means of achieving that goal. Therefore, I recommend that the Board approve GMP's proposed Plan.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the above findings of fact and conclusions of law to the Board.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 11th day of March, 2004.

s/Ed McNamara

Edward McNamara
Hearing Officer

2. Letter of October 23, 2003, from Warren T. Coleman, Esq., to Peter B. Meyer.

V. BOARD DISCUSSION

On March 5, 2004, the Department filed a letter stating that it had no comments on the Proposal for Decision ("PFD"). ANR submitted comments on March 8, 2004, opposing the PFD.³ GMP replied to ANR's comments on March 19, 2004. No other comments were received.

ANR states that the PFD is "contrary to law and impermissible" because it authorizes drawdowns of the Pond. Additionally, ANR contends that "a drawdown of Joes Pond, which would violate the Vermont Wetland Rules and affect the significant wetland complex, can only be authorized by the Agency." We believe that these statements are incorrect, for reasons set out below.

Section 1082(a) of Title 10, in Chapter 43, states that a drawdown can be authorized by the state agency having jurisdiction to do so:

No person shall construct, enlarge, raise, lower, remodel, reconstruct, or otherwise alter any dam, pond or impoundment or other structure which is or will be capable of impounding more than 500,000 cubic feet of water or other liquid after construction or alteration, . . . unless authorized *by the state agency having jurisdiction so to do.*

10 V.S.A. § 1082(a) (emphasis added).

The question, then is what is "the state agency having jurisdiction?" The answer to that question is clear: pursuant to 10 V.S.A. § 1081(a), the Board has authority to exercise the "powers and duties" of Title 10, Chapter 43 "over dams and projects that relate to or are incident to the generation of electric energy for public use. . . ." Thus, the Board has the authority to authorize drawdowns at Joe's Pond.

A separate issue is whether GMP is required to obtain permits from ANR prior to drawing down the Pond because of possible impacts upon wetlands. That matter lies primarily between ANR and GMP and we do not here rule upon the scope of ANR's authority under its statutes. However, we do note that the plain language of the Wetland Rules⁴ appears to

3. ANR referred to the PFD in several instances as "the Board's proposed order." We point out that the PFD is the Hearing Officer's proposed order.

4. Adopted by the Water Resources Board on December 10, 2001.

contradict ANR's legal argument that a drawdown would "violate Vermont's Wetland Rules." Section 6.2(g) of the Wetland Rules provides that an allowed use, not requiring a conditional use determination, is:

[t]he operation of existing hydroelectric facilities in accordance with all applicable requirements established by either federal and state agencies. This use may involve dredging, draining and/or altering the flow into or out of a wetland.

We do not resolve the wetlands question, but do act on our independent statutory authority to appraise the Plan filed by GMP. It is, of course, incumbent upon GMP to ensure that it obtains all other necessary permits, including any that it may need from ANR.

While we have not accepted ANR's jurisdictional argument, we have carefully considered its substantive issues. ANR expresses concern about the ecological impact of drawdowns. While our Order required the Plan to address primarily the flooding issue, we have also seriously considered the impacts of the Plan on both the ecology of the Pond and the power production capability of the dam.⁵

In evaluating the ecological impacts of the Plan, we consider the temporal duration of the Plan and the management practices of the Plan in historic context. The Plan will be in place for only a matter of months, given that the Dam is to be reconstructed this year.⁶ If the Plan were intended to be in place permanently, we might have more significant concerns with the ecological impact. However, we note that drawdowns of the Pond occurred each year for six decades, from 1926 until 1998,⁷ and until 1995, GMP had managed the Pond level, in anticipation of precipitation events, in a similar, albeit informal, manner to GMP's proposed Plan,

5. We contrast this approach with ANR's arguments that appear to minimize the impacts of flooding upon property owners, in particular, ANR's statement that suggests that a bond for any flood damage is sufficient protection for shoreline property owners. *See* page 3 of the Hearing Officer's Proposal for Decision.

6. The record indicates that the purpose of the drawdown is to preclude flooding, primarily during spring high-water and secondarily in rarely-expected major rainfall situations. Also, our Order of September 9, 2003, requires GMP to complete construction of the Dam by November 15, 2004. In order to ensure that GMP does not place the other parties -- or this Board -- at risk of seeing yet another year of delay in correcting the Company's 1995 error, we are requiring GMP to provide the Board notice immediately upon commencement of construction at the Dam, and to file monthly status reports thereafter.

7. Mishalanie pf. at 5-6.

drawing down the Pond in anticipation of significant forecasted rain.⁸ These factors lead us to conclude that, while there may be some ecological impact from the Plan, it is likely to be temporary and no greater than experienced in the past.

Finally, ANR contends that GMP's technical analysis of the need to drawdown the Pond is faulty. Specifically, ANR states: "we don't know whether allowing anticipatory pond drawdowns will in fact prevent significant flooding." ANR asks the Board to require GMP to present "a new analysis that spells out the relationship between the requested drawdowns and the corresponding effect on pond levels such that flooding will in fact be prevented." While ANR raises legitimate concerns over the details of the proposed Plan, the fundamental idea behind the anticipatory drawdowns is sound. As we have noted above, the Plan is temporary and has historic precedent.

For these reasons, we approve GMP's Plan and accept the Hearing Officer's recommendations and conclusions.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings and conclusions of the Hearing Officer are adopted, with the clarifications noted in the Board Discussion.
2. The Interim Operating and Monitoring Plan that was filed by Green Mountain Power Corporation with the Board on October 9, 2003, is approved, but only for the minimum time necessary to allow safe construction work upon the Dam, in accordance with this Board's Order.
3. GMP shall inform the Board immediately upon commencement of construction and file monthly status reports thereafter.

8. Tr. 8/27/03 at 62 (Mishalanie).

Dated at Montpelier, Vermont, this 19th day of March, 2004.

)	
s/Michael H. Dworkin)	PUBLIC SERVICE
)	
s/David C. Coen)	BOARD
)	
s/John D. Burke)	OF VERMONT

OFFICE OF THE CLERK

FILED: March 19, 2004

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)