

WOPWA Water Rights
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A brief write up of WOPWA's water rights and how they relate to Town's ownership of the dam, for use in discussions with the Town about an early slow drawdown.

Ordinarily, ownership of a dam in New Hampshire gives the dam owner the right to raise and lower the water level as reasonably necessary to meet its needs. The dam owner has no duty to shoreline (littoral) owners or anyone else to maintain the water above the natural water level. As the New Hampshire Supreme Court stated in Fish v. Homestead Woolen Mills, Inc., 134 N.H. 361 (1991), "as against the rights of the public and of littoral owners to enjoy the use of lakefront property, dam owners have the right 'to use as much water, at least down to the natural low-water mark, as is necessary for use at [their] privilege, provided [they] make[] no intentional misuse and cause[] no unnecessary annoyance and damage. . .'" Id. at 364 (quoting Whitcher v. State, 87 N.H. 405, 415 (1935)). Thus, "dam owners have a right to lower a lake's water level down to the natural low-water mark." Fish, 134 N.H. at 366 (citing Whitcher, 87 N.H. at 415).

Here, there is a division of the rights ordinarily held by a dam owner, between the Town and WOPWA. By deed from the former dam owner dated October 24, 1994, the Town owns the dam, which under state law (RSA 482:11-a) requires the Town to maintain and repair it. However, the deed gives the Town the right to raise or lower the level of White Oak Pond only in an emergency to prevent the destruction of the dam or injury to property above and below the dam. The Town's deed is expressly subject to rights granted to WOPWA by a separate deed from the former owner to WOPWA dated September 26, 1994.

By that separate deed dated September 26, 1994, the former dam owner conveyed to WOPWA "all water rights, water privileges and the perpetual right to hold back or to take and draw water from White Oak Pond through the dam and flume or tailpipe into Mill Brook for the purpose of maintaining and managing the waters of White Oak Pond . . ." WOPWA's rights include the right of access to the dam to "lower or raise the level of White Oak Pond pursuant to the rights hereby conveyed." WOPWA thus owns and controls the flow of water above the natural water level. The deed states that WOPWA's rights are subject only to the Town's right to maintain and repair the dam and the Town's right to temporarily raise or lower the water level in an emergency. Thus, WOPWA has the legal right to control all nonemergency drawdowns. WOPWA's ownership of these water rights necessarily gives it the right to impose reasonable conditions on drawdowns needed to permit the Town to repair the dam. In other words, WOPWA's consent, not to be unreasonably withheld, is required for a repair drawdown.

WOPWA's ownership of water rights above the natural level of the pond are superior to the water rights of shoreline owners, as long as WOPWA exercises its rights responsibly so as to cause "no unnecessary annoyance and damage." Fish, 134 N.H. at 364. See also Morrissey v.

Town of Lyme, 162 N.H. 777 (2011) (dismissing nuisance claims of shoreline owners alleging that the town drained water from their "shallow waterfront," thereby converting "submerged wetlands to mud," compromising their "access to water", decreasing the value of their property and "interfering with [their] enjoyment of [their] property": "Taking these allegations of fact in the light most favorable to these four petitioners, we hold that they are insufficient to state a private nuisance claim against the Town").

In short, WOPWA has the legal right to insist that the drawdown of the pond to permit repair of the dam take place in August (and slowly: 1-2 inches a day), which will minimize environmental damage to the pond. Minimizing environmental damage is well within the purpose recited in WOPWA's deed of "maintaining and managing the waters of White Oak Pond."

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