



NEW YORK STATE CANAL CORPORATION
Memorandum

TO: Dr. Nancy Kim
New York State Department of Health

DATE: April 28, 2008

FROM: New York State Canal Corporation

SUBJECT: Hinckley Reservoir Working Group
Dissenting Opinion

The Canal Corporation and Thruway Authority (The Corporation) would like to commend all of the members of the Hinckley Reservoir Working Group for their diligent efforts to bring this important project to fruition. The Corporation would especially like to recognize the staff from the Department of Health, led by Dr. Kim, for their leadership and countless hours of coordination and editing.

The importance of the work accomplished by the Working Group cannot be overstated. Hinckley Reservoir is a resource used by many different entities for many different purposes. Perhaps the most important accomplishment of the Working Group was to bring these entities together for discussion about their individual uses and constraints. It was integral, not only to the Report, but for moving into the future, that everyone understand the view points of all members of the Working Group. The Corporation believes, as a result of this effort, a strong partnership has been developed among the parties that will help us address any challenges in the future. The Corporation recognizes the importance of the other competing interests for the water supply provided by Hinckley Reservoir, especially drinking water, however, the Corporation's legal obligation is the water supply for the Canal System.

It was evident that the members of the Working Group could not come away with all of the issues resolved to their sole benefit. With this understanding, the Corporation approached the project with the objective of a compromise solution that would be best for all involved. As a result, the Corporation supports the Working Group's Findings and Recommendations. It was never the Corporation's intention to assemble a dissenting opinion; however, since other parties have chosen to do so, it was imperative that the Corporation document certain concerns.

The Report does not include the Corporation's analysis of how Hinckley Reservoir could be operated in the absence of compensating flows as a result of MVWA's demolition of the Gray Reservoir Dam upstream of Hinckley Reservoir. The absence of Gray Dam will not endanger the drinking water supply at current withdrawal rates, but will continue to have a detrimental impact on reservoir levels, canal navigation, hydropower generation and fisheries in the time of drought. The Operating Diagram created in 1920 has withstood the test of time, including the drought of record, which occurred in 1964 (although Gray Reservoir was in operation during

1964). It is through the use of this 1920 Operating Diagram and its associated legal and contractual constraints that the Corporation and its predecessors have operated the reservoir for the benefit of all users, and must continue doing so. Improved communications recommended by the Working Group will be very helpful in that regard.

The Corporation fully supports the following Findings and Recommendations:

1. Communications
4. Data Gaps
5. Working Group Data Archive
8. Drought Region IV
9. Planning and Advisory Group

The Corporation supports the following Findings and Recommendations; however, the legal foundation from which MVWA is permitted to withdraw Hinckley Reservoir water is not adequately addressed:

2. Drinking Water Conveyance
6. Low Water Pumping
10. Upstream Storage

Hinckley Reservoir was built in 1915 to provide sufficient water to this highest point of the eastern section of the new Barge Canal and the Corporation is required by law to use it for that purpose. MVWA and the Corporation inherited the obligations contained in the 1917 agreement which settled litigation over rights to the water for the city of Utica and other users. Under that agreement MVWA has a right to pass water through the reservoir, but its right is contingent on it maintaining sufficient water storage reservoirs upstream of Hinckley reservoir to make up for any adverse impact on Hinckley Reservoir water levels. The agreement is not ambiguous concerning this obligation, and in fact states that without this upstream storage, MVWA has no right to draw Hinckley Reservoir water. Furthermore, MVWA's FERC license and water supply permit require compliance with the 1917 Agreement.

In 2002, MVWA dismantled its only upstream reservoir, Gray, and now expects to use the State reservoir for its sole water supply, and also wants to increase the amount of water it can take to the detriment of other purposes (e.g. canal navigation, hydropower generation, and fisheries). The legal and contractual ramifications of this course of action are the subject of pending litigation.

The absence of any upstream compensating reservoir means the impact on Hinckley Reservoir water levels during either drought or flood will be exaggerated. The back-to-back 2006 flood and 2007 drought experienced in the Mohawk Valley coincidentally, represented the extremes in weather conditions experienced at the location since the drought of record, in 1964.

The Report does not fully consider the hydrology of the reservoir. Among the facts not fully explained in the final Report are:

- MVWA has the lowest intakes from the Hinckley Dam, which means that they may still draw water when others cannot. Historically, there has been sufficient water for MVWA's current level of use. At current demand, the Canal System, hydropower companies, and fisheries will be jeopardized before MVWA's customers are affected;
- When the Corporation reduced its withdrawals at the request of the State Emergency Management Office (SEMO) and the Oneida County Department of Health, the discharges from Hinckley Reservoir fell below those required by the 1920 Operating Diagram, and this has resulted in the State and the Corporation being served with a Notice of Intention to File a Claim to pay damages to the downstream hydropower generators for loss of revenues;
- The 1921 Agreement with the hydropower companies also resulted from the settlement of litigation over the water rights, and required that the discharges from Hinckley Reservoir be maintained at the rates set forth in the 1920 Operating Diagram.

While the Report recommendations task the MVWA with correcting some of these issues, the Report does not necessarily recognize the implications surrounding the remedies. The legal, regulatory and contractual issues involved in the low level pumping and drinking water conveyance recommendations are very significant. The Report does not directly consider the key questions of (1) how much water can be provided in the absence of an upstream compensating reservoir, and (2) should the State subsidize a single local water authority, MVWA, that dismantled its own reservoir above Hinckley Reservoir and now wants to take more water to expand its service area.

The Working Group did not address the legal basis from which MVWA is permitted to withdraw Hinckley Reservoir water for MVWA customers, as well as the impacts on Hinckley Reservoir levels from MVWA withdrawals on the rights of other users of that resource. The 1917 Agreement, between the State and (now) the Canal Corporation and the predecessor to MVWA forms the sole basis for MVWA to take water from Hinckley Reservoir. The permission to withdraw water, however, came with obligations to which it agreed. One was that it construct and maintain "a compensating storage reservoir" or reservoirs, the first being at Gray, NY, on the Black Creek, a tributary of the West Canada Creek above Hinckley Reservoir. Issues surrounding the 1917 Agreement are presently being litigated, but there are explicit provisions in the Agreement that establish its intent and are essential for understanding Hinckley Reservoir operations. The 1917 Agreement states:

"The [Water Company] covenants and agrees that it and its successors, grantees and assigns will at all times maintain, or cause to be maintained, a storage reservoir or reservoirs above the State dam at Hinckley, on West Canada Creek or its tributaries; fill the same from time to time from the flood, freshet or excess of the flow of water in said creek or its tributaries over and above the amount of water sufficient to comply with the contracts hereinafter mentioned, and from said reservoir or reservoirs, discharge into, contribute and supply to the natural flow of West Canada Creek, above the aforesaid State dam from time to time, quantities of water sufficient to comply fully with such of the

provisions of the several contracts of the [Water Company] with the [Hydropower Companies].”

MVWA becomes obligated to release water from its upstream compensating reservoir(s) when the flow into Hinckley Reservoir is below 335 cfs. When this low-flow point is reached, the MVWA is required to replace all the water it takes from Hinckley in order to ensure that its withdrawals will not impact the water in the reservoir needed for other users. Without Gray Reservoir, MVWA is unable to meet its contractual obligations and is prohibited from taking water from Hinckley Reservoir. The 1917 Agreement states:

“...And it is further understood and agreed that in the event of the failure of the [Water Company], its successors, grantees or assigns to provide and operate or cause to be provided and operated the storage reservoir or reservoirs as and in the manner in this paragraph provided, it shall have no right or authority or be permitted to take or draw water from the said State reservoir or said creek above Trenton Falls while such failure continues ...”

During the 122 days between June 1, 2007 and September 30, 2007, the calculated Hinckley Reservoir inflow was less than the required 335 cfs for 101 days, or 83 percent of the time. Following its demolition of the Gray Reservoir Dam in 2002, MVWA cannot provide the required low-flow compensation as its agreement required. The consequence of this was dramatically lower Hinckley Reservoir levels throughout the summer of 2007. MVWA’s consultant, Barton and Loguidice indicated in documents supporting their Safe Yield Analysis for Hinckley Reservoir in 2004 that MVWA’s failure to maintain compensating reservoir(s) and the requisite low-flow compensation “demonstrates how detrimental MVWA taking is to reservoir level”.

The Corporation seeks to clarify the following Finding and Recommendation:

3. Use of Other Canal Sources

The Report does not fully explain that most of the Canal System’s 20 other reservoirs are not a realistic supply-alternative to Hinckley and Delta Reservoirs because they are small, remote, and mechanically unusable and/or present their own environmental or contractual limitations. This means that the water contained in them could be very difficult to bring to the needed location at the summit-level of the canal in a timely manner. The local communities at those locations, not consulted for this Report, may very well oppose these drawdowns.

In addition, even those reservoirs which can provide some water could never supply the volume of water that would be needed during drought periods. The only other reservoir that offers any significant relief to help alleviate problems during a drought is Delta Reservoir. In each navigation season, including 2007, Delta Reservoir has been used extensively. The finding on page 63 makes it appear as if the Corporation does not use Delta, but rather exclusively relies on Hinckley. The recommendation on this same page suggests that the Corporation “should consider using ... Delta Reservoir for water needed in the Rome Summit section when the Hinckley Reservoir water levels are below normal or declining.” This is already standard operating procedure, yet it may lead a reader to believe this option has not been used in the past, or worse, that the Corporation had not considered or utilized this resource.

The Corporation would like to comment on the funding issues surrounding the following Finding and Recommendation:

7. Canal Resource Infrastructure Limitations

In general, the Report makes a number of costly recommendations, but does not say how they will be funded. The Corporation's Capital Program is primarily funded using toll revenues from the Thruway Authority. The use of toll revenue to support the Canal System was recently a subject of public debate over the increase in tolls. The Corporation is concerned that Thruway toll payers will now be called upon not only to fund the Canal System, but also to subsidize infrastructure costs of a single local water authority.

The Report suggests that the Corporation should assess and upgrade its infrastructure in Recommendation 7. The recommendation goes on to say that the "long term study should identify capital improvements and funding mechanism for modernizing canal capital facilities and related operational systems." However, the Corporation notes that no funding source for this recommendation is specified in the Report. Furthermore, many of the possible infrastructure improvements may have little or no benefit to the users of Hinckley Reservoir.

Much more work remains to be done. The Corporation is committed to working with all parties in a collaborative fashion.