



Tuesday, February 28, 2012

## High court to hear lake-level case

### Rock-Koshkonong district 'to finish what we started'

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EDGERTON - The Wisconsin Supreme Court has agreed to hear property owners' challenge of the state Department of Natural Resources' refusal to raise the level of Lake Koshkonong.

Lake Koshkonong is a shallow lake and, according to a District 4 Court of Appeals ruling in July 2011, it should remain at established depths. It has maximum depth of about seven feet and an average depth of about five feet. From the shoreline, water depths of only one to two feet can extend hundreds of feet into the lake.

The Rock-Koshkonong Lake District and associated lake-user organizations have a longstanding request to boost the depth of the state's sixth-largest lake during the summer, as well as to eliminate the winter drawdown. The high court recently agreed to review the appeal of the appellate court's decision.

"The state Supreme Court accepts only one of every 10 cases, so their granting our appeal speaks to the statewide significance of this dispute," Rock-Koshkonong Lake District Chairperson Brian Christianson said. "This ratifies our opinion that the DNR ignored facts and misapplied their authority."

At issue is the DNR's operating order that keeps Lake Koshkonong at what Christianson called an "artificially low level."

"Our request to amend the DNR orders will improve safety, navigation, fishing and wetland restoration on Lake Koshkonong and the Rock River," he said.

Even before the lake district acquired the Indianford Dam from Rock County in 2004, it has wanted to boost Lake Koshkonong's depth. The dam and rainfall amounts control the depth, but the DNR regulates the dam's operations.

In 2003, the district petitioned the DNR to re-establish the lake's maximum summer level set in 1991 and eliminate the winter drawdown. The district wanted the DNR to consider the impact that a higher lake level would have on members' property values, as it would increase the recreational value of their property and revenue to businesses associated with the lake.

The DNR conducted an Environmental Assessment and concluded in 2005 that the lake level should not increase.

Christianson said that Mother Nature is to blame when the lake reaches high levels and recent flood conditions, but the DNR is to blame when the lake drops to low levels.

"Mother Nature has been winning lately and some have forgotten 2004 through 2007, when RKLD was prohibited from closing the dam gates at Indianford to stem the draining of the lake," he said. "We simply want an amended order that stabilizes lake levels and eliminates the winter drawdown."

The lake district appealed the decision to an administrative law judge, who upheld the DNR a year later. The findings in his decision were not contested by the district as it appealed the adverse ruling to Rock County Circuit Judge Daniel Dillon.

Dillon ruled in favor of the DNR. In July 2011, in upholding Judge Dillon's earlier ruling, the District 4 Court of Appeals concluded that the DNR is not required "to consider the economic effects of its water level determinations on residential property values, business income and tax revenue," Judge Paul Higginbotham wrote in the 25-page opinion.

Instead, the appeals court interpreted state statutes to give the DNR the authority to establish water levels for impounded lakes based on the public's interest in promoting safety and protecting life, health and property.

Christianson said state Department of Revenue projections show that the assessed property value within the lake district is more than \$500 million.

Similar to Judge Dillon, the appeals court adopted the administrative law judge's finding, which said that higher water levels would:

- Likely increase sedimentation in the lake, which has been determined to be an impaired water body under Clean Water Act due to excessive phosphorus and sediments and loss of wildlife habitat.
- Cause a loss of wetland habitat, which would continue the loss of reptile and amphibian and bird populations.
- Accelerate erosion of wetlands, which likely would lead to further loss of submerged aquatic vegetation due to decreased water clarity.
- Reduce the ability to slow floodwater and stormwater and to filter sediments and other pollutants, resulting in increased pollutants downstream.
- Increase overtopping of riprap material that protects 38 percent of the lake's wetland shoreline, which would degrade the riprap quicker.

The administrative law judge also concluded that eliminating the winter drawdown would have negative effects as it reduces erosion and damage to riprap from ice.

He noted that it also causes fish, including carp, to leave shallow marshes, which improves water quality. The drawdown preserves fish spawning habitat, but impairs ice fishing conditions and makes marsh areas less accessible for waterfowl hunting.

Higher water levels also would slow drainage of some Jefferson County farmlands, delaying planting and lowering crop yields, it was noted.

A survey of lake users conducted by the district in 2000 showed that public access was adequate and most concerns were with worsening water quality. While launching conditions for 18-foot V-hull boats were poor at DNR summer water levels, conditions were only marginally better at levels the district requested, according to the survey.

A vast majority of property owners surveyed by the district said higher water levels would increase their boating and swimming pleasure, allow them to shorten their piers, some by 100 feet or more. and increase access for rescue personnel.

However, the appeals court was not persuaded by the district's economic benefits argument, stating that it had "no logical stopping point.

"If the DNR were required to consider revenues of businesses directly linked to lake recreational activities, like marinas and bait shops, would it also be required to consider revenues of businesses with less-direct links to use of navigable waters such as gas stations and convenience stores?," Higginbotham asked in the written opinion.

At its annual meeting in August 2011, the property taxpayers supported a budget for 2012 that included legal fees should the case advance to the high court.

"Government can be a bull sometimes," Christianson said. "Individual property owners usually give up fighting with the DNR because the legal fees climb too high. Our homeowners within the RKLD voted to finish what we started."

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