

Possible appeal for lake district

By Jason Francis
Reporter Staff

The state Department of Natural Resources said no. A hearing examiner with the Wisconsin Department of Administration's Division of Hearings and Appeals said no.

Now the Rock-Koshkonong Lake District must consider if it should continue its three-year-long quest to have summer water levels raised on Lake Koshkonong by 7.2 inches and have the winter drawdown eliminated.

Following the decision by Administrative Law Judge William S. Coleman to uphold the DNR's decision on the matter, one possible next step for the lake district would be an appeal to circuit court.

"Obviously we are disappointed," said lake district board member Frank Micale about Coleman's decision.

Within the 30 day period during which an appeal can be filed, the board will be meeting and discussing the move with legal counsel before a decision is made, said Micale.

"We don't know what our next step will be. We may decide to appeal if it appears to be advantageous."

Both Micale and Bill O'Connor, attorney for the district, said they figured the district was faced with an uphill battle with one state agency reviewing the findings of another — as opposed to the court system making a determination.

"The state agencies have a leg up in these types of battles," said O'Connor.

In a DNR press release, Ken Johnson, water leader for the agency's South Central Region, said he hopes the decision puts the matter to rest and that the groups involved will put their differences aside and "work together on improving the lake's water quality."

"Like so many issues involving the use of public waterways, the Department must perform a balancing act between what's best for the wildlife and fisheries resources, habitat and recreation," Johnson said regarding the lake level issue.

The DNR ruling came in April 2005. The district and two other lake-related associations appealed the decision to the hearing examiner, who released a 32-page ruling on Dec. 1.

"The preponderance of convincing evidence showed that the positive ecological benefits from the proposed increased water levels are slight in comparison to the profound substantial negative effects," Coleman wrote in his decision.

"The DNR has established by a preponderance of the evidence that the enhancement to access and navigation from increased water levels would be far outweighed by the substantial negative environmental impacts caused by higher water."

In his decision, Coleman noted that the lake is classified as an impaired water body under the federal Clean Water Act, with listed the impairments as eutrophication, sedimentation and loss of habitat.

"Increased water levels during the open water seasons will cause more sedimentation as a result of accelerated erosion and habitat loss from the destruction of riparian wetlands," Coleman wrote.

The erosion of wetlands will likely continue at the DNR target levels, but would be accelerated if levels were raised, he added.

Higher levels would "lead to continued loss of floodplain forest and marsh surrounding Koshkonong Creek, and conversion of these parts of the forest to open water," Coleman wrote, which would continue to "inremen-

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tally diminish and degrade the existing habitat" for amphibians and reptiles. The additional wetland loss would also "result in the loss of important wildlife and fishery habitat, including habitat for rare species."

Coleman's decision included a few positives that would occur if summer water levels were increased, including that they would allow "recreational watercraft and public safety watercraft to traverse Lake Koshkonong waters closer to the shoreline."

Public safety and rescue watercraft are not always able to reach shallow draft boats located in shallow waters, and on occasion this has impeded emergency operations, wrote Coleman, though the problems would not be entirely solved even with the district's proposed water levels.

Higher depths would also "allow many riparian owners to maintain shorter piers to reach depths of two to three feet," wrote Coleman.

The lake has approximately 27 miles of shoreline, with about ten acres designated as developed predominately for residential use with some commercial uses as well. Approximately 12.4 shoreline miles are considered undeveloped wetland.

Increasing lake levels as proposed by the district would expand the surface area of the lake by approximately 63 acres, according to Coleman.

In April 2003, the lake district and the Rock River Koshkonong Association (RRKA) proposed the depth increases to the DNR to address boat safety issues, increase the navigable area of the lake and allow some piers to be shortened.

But according to the DNR's environmental assessment (EA) regarding the district's request, many negative impacts would likely occur if water levels were raised, including reduced aerial coverage and diversity of the emergent aquatic plant community, increased wave erosion on unprotected wetland shorelines, more roughfish access to shallow marshes and reduced emergent aquatic life.

A draft of the EA was released by the DNR in December 2004. After a public hearing the following month on the document that drew about 150 citizens, the EA was certified and the DNR denied the lake district's request for higher summer levels and elimination of the winter drawdown. The DNR did, however, decide to allow levels from November through April - referred to as the 'winter' levels - to increase by six inches.

The district, Lake Koshkonong Recreation Association and RRKA all contested the full decision, including the latter two groups with a joint petition.

With Coleman presiding, hearings on the appeal were held in late March and early April. The proceedings highlighted about 600 exhibits and five sets of briefs. The final brief was filed in late September. The Lake Koshkonong Wetland Association supported the DNR's ruling during the proceedings.

Several hundred-thousand dollars in expenses have been incurred by the lake district due to both legal fees and the costs of studies and assessments of the lake.

In July, during the lake district's annual meeting, district members voted overwhelmingly to approve a plan to double their own special assessments in 2006 from \$50 to \$100. The move was made to help fund the legal battle with the DNR. Most of the \$400,000 raised by the assessments will be used to cover legal bills.

The district has funded professional studies concluding that higher levels

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would not harm the local ecology of the 10,400-acre lake. Coleman, however, determined some of the district's evidence to be flawed.

"Much of the evidence presented by the district positing ecological benefits or minimal impacts from higher water levels was largely discredited by persuasive controverting evidence," he wrote.

Micale said the district's evidence should not have been discounted.

"The DNR didn't do the research on these issues," he said.

The DNR instead went "by the book," he said. The problem with that is Lake Koshkonong is vastly dissimilar to a regular Wisconsin lake, he added, in that it is very large.

"The DNR, a lot of times with their policies with Lake Koshkonong, are putting a square peg in a round hole," Micale said.

"It's a different breed of cat. It's not the same as other lakes."

Citing past precedent and state statute, Coleman did not consider the positive economic impacts of higher water levels in his decision. Instead, he sustained the DNR's assertion that "evidence relating to the effect of water levels on residential real estate values, business income, and public revenue" was not relevant to the case.

Micale accused Coleman of flip-flopping on the issue. Early during the hearings, Coleman overruled a DNR objection about the admittance of evidence regarding the economic impact of a deeper lake, said Micale, leaving the district to present a boatload of information that was later deemed irrelevant by Coleman.

"How can an operating order (regarding lake depths) not have an effect on property values?" asked Micale, who is also president of RRKA.

Coleman put economic issues aside and "put the value of wetlands above that," Micale said.

"The wetlands are valuable and we have done our part to protect them," he said. "We're not anti-wetlands by any means, but at the same time, you've got to look at the people who use the water for recreation."

Coleman did write that he considered the possible diminished utility and enjoyment of shoreline property due to low water depths.

He also determined that the lake district failed to prove its allegation that the DNR's decision on the lake levels was "preordained" at least in part by institutional or personal bias by DNR personnel.

Located mostly in Jefferson County, Lake Koshkonong has a surface area of 16.3 square miles. Parts of the lake are also found in Rock and Dane counties. Found six miles upstream of the Indianford Dam, the lake is a natural widening of the Rock River. The dam, which was owned by Rock County until it was transferred to the lake district in late 2004, controls water levels on the lake.

By pursuing higher depths for the lake, Micale said the lake district board has simply been proceeding according to the will of a large majority of lake district members.

"We're following the mandate that's been given to us by our constituency," Micale said.

O'Connor believes Coleman erred on two major fronts in his decision: that he did not weigh economic factors and that he applied "wetlands standards that should not have been applied."

Two to three days of testimony about the impact of lake levels on property values and other economic issues were ignored, O'Connor said.

"I think these are very significant legal issues," he said. "There are very legitimate questions to be raised."