Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Review of the Water Level Decision for Lake Koshkonong and the Indianford Dam on the Rock River in Rock County, Wisconsin	Case No. 3-SC-2003-28-3100LR

RESPONSE OF THE DEPARTMENT OF NATURAL RESOURCES TO PETITIONERS' MOTION FOR CONTESTED CASE DESIGNATION

INTRODUCTION

The Joint Petitioners (Petitioners) in this matter have submitted a Motion requesting that the proceeding here be labeled a "Class 3" proceeding rather than a "Class 1" proceeding under Chapter 227, Stats., and NR 2.11, Wisconsin Administrative Code. Their Motion and Brief also contain assertions relative to the burden of proof in this matter, the purpose of the hearing, and the scope of the terms "public rights in navigable water" and "protection of health, safety and property".

The Department hereby responds to the issues raised by Petitioners. For the reasons outlined herein, the Administrative Law Judge should sustain the original designation of this proceeding as a Class 1 proceeding. This type of decision is clearly, and has long been recognized as, the type of proceeding "in which an agency acts under standards conferring substantial discretionary authority upon it."[1]

The Petitioners, in an attempt to support their premise of a "limited delegation"[2] of authority, have asserted a very narrow interpretation of the terms "public rights" and "protect life, health and property..."[3]. While these issues do not need to be addressed in detail at this stage of the proceeding, the law is clear that the scope of these standards, and thus the breadth of the "substantial discretionary authority", are far greater than is suggested in their Motion and arguments.

[1] Subsection 227.01(3), Stats.
[2] Petitioner's Brief, p. 2
[3] The standards under which we are proceeding enunciated in Sub. 222.01(3), Stats.

ARGUMENT

Scope of Hearing and Burden of Proof

The Petitioners, as the outset of their Motion, assert that "The Department's burden is to show, by the greater weight of the credible evidence, that its proposed order denying the Rock Koshkonong Lake District's petition to raise the water level and modifying the existing water level order complies with the statutory standard."[4] They cite, in support of this proposition, Reinke v. Personnel Board.[5] Their assertion is neither correct nor supported by the case on which they rely.

Petitioners' articulation of the scope of the hearing is not correct. The scope of the hearing in this matter, and the Department's burden, is to show that the Department's water level order meets the standards enunciated in Section 31.02, Stats, which are whether the order is "in the interest of public rights in navigable waters" and "protects safety and …life, health and property." The fact that the Petitioners filed a petition with the Department, and the facts which they assert support that petition, are factual issues that are reasonably within the purview of the Administrative Law Judge. The Department, in issuing the revised water level order under s. 31.02(1), Stats., did not "deny" their petition, but, rather, incorporated portions of it relating to the winter drawdown and, in its discretion under Section 31.02(1), Stats., did not incorporate other portions of their original petition.

The Petitioners in this case had, prior to this proceeding, filed a request for a contested case hearing under Section 227.42, Stats., on the original petition they filed with the Department to consider changes in water levels on Lake Koshkonong. The Department denied that request for a contested case hearing on March 9, 2005, advising them that once the Department took a formal action on this matter, "we will issue a proposed order with an opportunity for any person(s) whose substantial interests are impacted to request a public hearing before the order takes effect."[6] The Department's denial of their request for a contested case hearing on that petition was not appealed.

The hearing in which we are currently involved is not a contested case hearing on the original petition filed by the Petitioners in this matter requesting that the Department consider modifying the water level orders on Lake Koshkonong. In view of the broad range of interests on virtually every lake and stream in the State, from persons wanting higher water for motorized navigation to persons wanting lower water to protect wetlands and associated hunting or passive recreational activities, the Department would be involved in an endless parade of contested case

[4] Petitioner's Motion, p. 1
[5] 53 Wis. 2d 123(1971)
[6] See the attached decision of March 9, 2005.

hearings relating to competing water level petitions if we were to hold a contested case hearing on every request for water level changes we received. The statutes contemplate a different process, namely this class 1 hearing on the proposed water level order issued by the Department.

The hearing that we are currently involved in relates solely to the Department's revised water level order in this matter and whether that order has properly considered the broad scope of issues subsumed by the standards in Section 31.02, Stats. While the issues include those of most importance to the Petitioners, there are a broad range of additional issues that are not reflected in their petition or their brief which must also be considered by the Department and the Administrative Law Judge in this proceeding.

The Reinke case cited by Petitioners[7] deals with a hearing relating to the discharge of an employee, which is clearly a different type of hearing from the one involved in the instant case. It appears that it is cited primarily for the issue of the burden of proof, which Petitioners' articulate as the "Department's burden is to show, by the greater weight of the credible evidence....".[8] The burden articulated by the Court in Reinke is different from that formulated in the Petitioners' brief. The Reinke court stated:

> The function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence.[9]

The Department agrees that this is the appropriate burden of proof, but reiterates that this burden does not relate to the Petitioners' original petition requesting that we review water levels, but, rather, only relates to whether the Department's Order in this matter complies with the standards in Section 31.02(1), Stats.

Scope of the "Public Rights" and "Protect life, health and Property Standards"

The Petitioners assert that Section 31.02(1), Stats., provides a "limited delegation [which] is very different from the broader authority delegated to administrative agencies in class 1 proceedings...such as ratemaking, price setting, certification of public convenience and necessity and tax assessments."[10] The Petitioners then discuss, in support of this premise, two lines of cases on pages 2 & 3 of their brief. Their assertion is not supported by the cases that they cite, and is refuted by the line of cases that have consistently upheld the legislature's broad delegation to the Department to apply the "public rights" and "public interest" standards in its administration of chapters 30 and 31.

Petitioners quote language from the W.H. Pugh case and others which relate to the issue of "navigation relating to commerce" and assert that, "These cases limit the scope of the

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[7] Petitioner's Brief, p. 1
[8] Id
[9] Reinke, at pp. 138-139(emphasis added)
[10] Petitioner's Brief at p. 2

Department's authority under s. 31.02(1)."[11] They also quote language from State v. Village of Lake Delton, another case that focuses on issues relating to physical navigation. The motorized boat navigation issues that are of primary concern to Petitioners are clearly appropriate for consideration in this proceeding. The Petitioners' brief and the cases they cite do not, however, address the broad range of additional issues that are embraced by the term "in the interest of public rights in navigable waters" which are to be considered under Section 31.02(1), Stats.

The Wisconsin courts have consistently and repeatedly articulated a much broader range of issues that are to be considered under the terms "public rights" and public interest" as they relate to Wisconsin's public trust navigable waters. The range of issues to be considered has evolved over time and include fishing (Willow River v. Wade, 1898)[12]; hunting(Diana Shooting Club, 1914)[13]; "sailing, rowing, canoeing, bathing, fishing, hunting, skating and other public purposes" (Nekoosa Edwards Paper Co., 1930)[14]; right to clean, unpolluted water (Reuter, 1969)[15]; consideration of wetlands and near shore lands (Just v. Marinette, 1972)[16] ; wildlife habitat, (Village of Men. Falls v. DNR, Ct. App., 1987)[17]; and habitat, including aquatic plants (Sterlingworth v. DNR , Ct. App.1996).[18] See also R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, ¶19, 628 N.W.2d 781; Gillen v. City of Neenah, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998).

The narrow formulation suggested by Petitioners of what is within the purview of the term "in the interest of public rights in navigable waters" is clearly incorrect. Rather than this being a "limited delegation", the delegation here is clearly consistent with the broader but well defined public trust authority that continues to be consistently recognized by the Wisconsin courts.

The delegation of authority here is clearly not a delegation of "unbounded discretion" which the Petitioners assert is an "unconstitutional delegation of legislative authority to the Department."[19] The delegation of authority here, to determine what water levels should be set "in the interest of public rights in navigable waters" under Section 31.02, Stats., is consistent with the standard delegations under many of the provisions of Chapters 30 and 31, Stats. The Wisconsin courts, in the cases cited above, have routinely upheld the delegation of authority to, and recognized the responsibilityof, the Department to make determinations necessary to protect "public rights" and the "public interest" in navigable waters." See ABKA Ltd. Partnership v. WDNR, 2002 WI *, ¶12, 255 Wis. 2d 486, 648 N.W.2d 654 (the legislature has delegated to DNR the broad authority to regulate under the public trust doctrine); Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2dd 518, 529-30, 536, 271 N.W.2d 69 (1978) (DNR is "central unit of state government" charged

[11] Id at p. 2
[12] 100 Wis. 86(1898)
[13] 156 Wis 261(1914)
[14] 201 Wis 40 (1930)
[15] 43 Wis 2d 272(1969)
[16] 56 Wis 2d 7(1972)
[17] 140 Wis 2d 579(Ct. App. 1987)
[18] 205 Wis 2d 710(Ct. App. 1996)
[19] Petitioner Brief at p. 4

with administering the public trust, which covers all public uses); Klingeisen v. DNR, 163 Wis. 2d 921, 929-31, 472 N.W.2d 603 (Ct. App. 1991) "The state has delegated its trustee duties to the DNR."). In Hixon v. PSC, [20], the Court, in upholding the PSC's decision that a project was "detrimental to the public interest" in navigable waters, noted that the PSC (which is the predecessor to DNR in both Chapter 30 and 31 regulations) had "carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources."

The Petitioners have also addressed the other portion of the Legislative directive in Subsection 31.02, Stats., i.e., "to promote safety and protect life, health and property." They cite New Lisbon v. Harebo, a 1937 case, for the assertion that the Supreme Court has narrowly "construed the protection of those rights simply to require the prevention of direct safety hazards for the construction or maintenance of a dam:....".[21]

The New Lisbon decision does not deal directly with the issues of modifying water levels on an existing dam. The case involves the controversy over a proposal to build a new dam under Sections 31.05 and 31.06, Stats. and the eminent domain disputes relating to that construction. The quote provided by the Petitioners relates to the courts consideration of "what meaning is to be ascribed to the term "property" as used in Sec. 31.06, Stats....".[22] While there is clearly some language discussing the terms "promote safety and protect life, health and property" as they are contained is Subsection 31.02, Stats., it is of limited use here for a number of reasons. The court was focusing on issues relating to the eminent domain property disputes before it and the application under Sections 31.05 and 31.06, Stats. The Court did not address any issues relating to reviewing water levels at an existing dam and flowage.

The Petitioners also cite language from Section 31.13, Stats., to support a narrow interpretation of the "life, health and property" standards. While arguably of some interest, the language from Section 31.13, Stats., which relates to the raising or enlarging of existing dams, does not apply here. That is an entirely different type of proceeding and does not contemplate the same broad balancing of interests contained in Section 31.02, Stats.

The best source that we are aware of to describe the breadth of issues considered by the Public Service Commission under the terms of Section 31.02, Stats., is the Wisconsin Law Review article entitled "Wisconsin Law of Waters" written by Adolph Kanneberg, Chief Counsel of the Public Service Commission, in 1946. In that article, Mr. Kanneberg describes, with some specificity, the types of issues considered by the Public Service Commission when establishing water levels under Section 31.02, Stats.
Mr. Kanneberg stated:

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[20] 32 Wis 2d 608(1966)
[21] Petitioner's Brief at p. 3
[22] Petitioner's brief at p. 3

> The purpose of establishing water levels may be, among others: to protect the public water supply in the interest of public health; to protect highways and bridges; to protect shorelines; to protect agricultural lands; to aid navigation; to protect and conserve hunting and fishing grounds; to protect spawning grounds; to equalize the outflow for the watering of stock; and for numerous other purposes.... at p. 366

These are consistent with the breadth of issues normally considered by the Department today, as the successor to the Public Service Commission's responsibilities under this statute.

Mr. Kanneberg, as a person knowledgeable about the continued evolution of the public trust concepts, also discussed at some length the terms used in Section 31.02, Stats. He noted:

> The phrases "in the interest of public rights in navigable water" or "so as to conserve and protect all public rights in navigable waters...occur many times in the Water Power Law....
> The fact, as will appear from a reading of the law, that many of the provisions of the Water Power Law are couched in general terms make the law a vital living force which grows and expands with the needs of the people. We do not mean to imply that the commission may read into the law something which is not there, but rather that the law may be interpreted in the light of present-day knowledge, practices, and customs, and this process of adapting the rules of law pertaining to waters to the needs of the people is still going on. at p. 364

The cases cited above reflect the evolving common law relating to the navigable waters protected under the public trust doctrine. Consistent with the observation of Mr. Kanneberg in 1946, the Department has, appropriately, incorporated these changes into its daily administration of its responsibilities under the statutes relating to our navigable waters. See, for example, Just v. Marinette, 56 Wis 2d 7(1972), (noting the evolution of public trust regulation as more informed and sophisticated understanding has developed regarding the critical interrelationships of property in the vicinity of navigable waters). The court in Just, stated:

> Swamps and wetlands were once considered wasteland, undesirable and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetland serve a vital role in nature, are part of the balance of nature and are essential to the purity of waters in our lakes and streams....
> The active public trust duty of the State of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty. at pp. 17 & 18

Under the formulation of the public trust law as it has evolved, the Department of Natural Resources asserts that the scope of the tests in Subsection 31.02, Stats., is very broad, and requires a consideration of the full range of public rights that have been recognized by the

Courts. These same considerations apply to the consideration of property interests of both riparians and of those who are potentially impacted by changes in water levels, such as hunters, fishers, and drainage districts.

This water level order review proceeding conforms to the types of proceedings that Petitioners assert are considered "class 1" under Section 227.01(3), Stats.[23] The Petitioners note that the delegation to the PSC to set "reasonable and just" rates is appropriately the type of proceeding to be considered a "class 1" proceeding. The delegation to DNR (as PSC's successor) to set water levels is similarly appropriately a "class 1" proceeding.

In 1950, the Public Service Commission requested an opinion from the Attorney General relating to the status of decisions under Section 31.02, Stats.[24] The Attorney General noted that "your commission has issued many orders under sec. 31.02, Stats, which orders fix the level of navigable water." The opinion cites the decision standards in Section 31.02, Stats., at that time, which is identical to today's language, i.e., "in the interest of public rights in navigable waters or to promote safety and protect life, health and property....". The classification of hearings under Section 227.01, Stats., did not exist at that time, but the question for the Attorney General was whether this type of decision is a "rule" under Chapter 227, Stats. The Attorney general stated: "In my opinion orders determining water levels are more nearly analogous to the orders which you issue in valuing hydroelectric plants or other utilities for rate purposes or in issuing permits to common carriers over a named route than they are to "rules"....".[25]

That characterization by the Attorney General in 1950 of the process establishing water level orders equates the process of establishing water levels under S. 31.02, Stats., to valuation for "rate purposes." The description of the process outlined by the Chief Counsel of the PSC in 1946 shows clearly the breadth of issues that the PSC considered as it administered the statutes relating to water levels. The law as it exists today, with the same statutory standards in place, requires the Department to evaluate these standards utilizing our expertise and exercising "substantial discretion" to balance the competing interests. All of these facts conclusively support the determination that the establishment of water levels orders under Section 31.02, Stats., is the type of proceeding appropriately classified as "Class 1" under Section 227.01, Stats. This is precisely the type of proceeding contemplated by the Legislature as "a proceeding in which an agency acts under standards conferring substantial discretionary authority upon it." Because of the critical public trust issues involved in these cases, and because of the broad spectrum of competing interests that are normally involved in every water level dispute, this is both the most legally appropriate and administratively practical formulation of these proceedings.

The Department respectfully requests that you affirm the original determination that this is a Class 1 proceeding.

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[23] Petitioner's Brief, p. 5
[24] 39 OAG 608 (1950)
[25] Id at p. 610

Copies of this document have been provided to all persons on the attached Service List. It will also be sent electronically on the date indicated below to those persons on the electronic list for this docket.

Dated this 14th day of November, 2005

Wisconsin Department of Natural Resources

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Cc: Service List
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March 9, 2005

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SUBJECT: Petition for Contested Case Hearing Relating to the Petition Requesting a Revised Lake Koshkonong-Indianford Dam Water Level Order

Gentlemen:

We received and reviewed your request on behalf of Rock-Koshkonong Lake District, the Lake Koshkonong Recreation Association, the Rock River-Koshkonong Association and two individual owners for a contested case hearing relating to the petition they filed with the Department of Natural Resources requesting a change in water level order for Lake Koshkonong and the Indian ford Dam. Your hearing petition was submitted pursuant to Section 227.42, Stats.

The Department is in the process of reviewing the petition that your clients filed pursuant to Section 31.02, Stats., requesting modifications in the water level regime on Lake Koshkonong. As you are aware, we have recently completed a draft Environmental Assessment (EA) relating to the potential impacts of water level changes on Lake Koshkonong and the surrounding environment. A public informational hearing was held on that EA and the Department is preparing its final EA at this time.

The Department will then complete its review of your petition and the existing order and take formal action to issue an order, under Section 31.02, Stats., to establish levels in the "interest of public rights in navigable waters or to promote safety and protect life, health and property….". At this point, we have not taken formal action on this matter.

We are mindful of your concern that members of your organizations and other citizens have a right to a contested case hearing to review any proposed order which might affect their property and use of this public resource "before the action is taken." When the Department completes its analysis in this matter, considering the input that we have received in your submission and through the EA process, we will issue a proposed order with an opportunity for any person(s) whose substantial interests are impacted to request a public hearing before the order takes effect. If we receive such requests for hearing which meet the statutory standards under Section 227.42, Stats, the proposed order will not take effect until the contested case hearing process is completed and a final order is issued.

As you know, the summer and winter water level issues on Lake Koshkonong have long been the subject of broadly diverse and intensely held opinions. We are aware of that range of opinions concerning whether the water levels should be higher or lower and of our responsibility, under Section 31.02, Stats., to "control the level and flow of

water in all navigable waters" "in the interest of public rights in navigable waters or to promote safety and protect life health and property....". We have not completed our review of the issues in this case and the balancing that we must do under this statute. It is our hope that all parties, including your clients, will be satisfied with our proposed order after we complete our review. If parties are unhappy with any part of our proposed order, there will be an opportunity for a contested case hearing before any revised order goes into effect. In the interim, the previously existing water level order will be in place on the Lake Koshkonong system and the "status quo" will be maintained.

In accordance with the above, we have determined that you have not met the requirements of Section 227.42, Stats., and we are denying your request for hearing in this matter. You have not met the requirements of subsection 227.42(1) (a), Stats., since there is not evidence of "agency action or inaction" which "injures or threaten[s] with injury" the substantial interest of any person. The Department is taking action to respond to your petition at this time. We are in the midst of completing the WEPA and public interest review portions of that process. Until we have issued a proposed order, it is premature to speculate what, if any, injury any person has suffered or will potentially suffer.

You have also not met the requirements of subsection 227.42(1) (b), Stats., since we believe the legislative intent evidenced in Sections 31.02, Stats., is that the Department has both the authority and responsibility to balance the competing interests on any body of navigable water. As we indicated above, we are mindful that any person who disagrees with a proposed order or who believes that their rights will be impacted by the proposed order should have an opportunity for administrative review before a revised order goes into effect. Our process under Chapter 31, Stats., accomplishes that objective

If you have any questions concerning these issues, please contact Attorney Michael Cain of our staff at (608) 266-2177.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes establish time periods within which request to review Department decisions must be filed.

For judicial review of a decision pursuant to ss. 227.52 and 227.53, Stats., you have thirty days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review should name the Department as the respondent.

Sincerely,

William H. Smith
Deputy Secretary

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