

**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

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR
CONTESTED CLASS DESIGNATION**

INTRODUCTION

Joint petitioners have moved for a determination that this proceeding is a “class 3” contested case under Wis. Stat. § 227.01(3)(c), rather than a class 1 proceeding as provisionally determined by the hearing examiner. The Department of Natural Resources acknowledges that it has the burden of proof in this proceeding under Wis. Admin. Code § NR 2.13(3)(a). 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. See Reinke v. Personnel Board, 53 Wis. 2d 123, 137-38, 191 N.W.2d 833 (1971). The statute provides that the Department’s water level order must be in the interests of public rights in navigable waters or for the protection of health, safety and property. Wis. Stat. § 32.01(1).

Section 31.02(1) is a delegation of authority to the Department by the legislature that requires the Department to act as trustee of the navigable waters in making water level orders. However, this section does not delegate “substantial discretionary authority” to the Department. Rather, it establishes the specific interests the Department *must* consider and limits its

determination to the interests specified. This limited delegation is very different from the broader authority delegated to administrative agencies in class 1 proceedings under sec. 227.01(3)(a), such as ratemaking, price setting, certification of public convenience and necessity and tax assessments. Accordingly, the hearing examiner should find that this proceeding is a class 3 proceeding.

ARGUMENT

Sec. 31.02(1) grants the Department the authority to “regulate and control the level and flow of water in all navigable waters.” The Department’s authority under this section must be “*in the interest of public rights in navigable waters or to promote safety and protect life, health and property.*”

Wisconsin case law has long established the scope of public rights in navigable waters:

“Historically, the public right in navigable waters was confined solely to purposes of navigation relating to commerce. The term ‘navigation’ has since been broadened to include use of the waters for travel, fishing, recreation and hunting, yet the original purpose remains at the heart of the public right. Other uses of public waters are merely incidents to navigation, mere corollaries to the primary use.”

W.H. Pugh Coal Co. v. State, 157 Wis. 2d 620, 628, 460 N.W.2d 787 (Ct. App. 1990) (citations and quotations omitted). See also Doemel v Jantz, 180 Wis. 225, 229-30, 193 N.W. 393 (1923); Diana Shooting Club v. Husting, 156 Wis. 261, 271-72, 145 N.W. 816 (1914). Later cases have also recognized “natural scenic beauty” as a public trust value. See Muensch v. PSC, 261 Wis. 492, 515, 55 N.W.2d 40 (1952). These cases limit the scope of the Department’s authority under sec. 31.02(1).

The Department’s authority is further governed by the Wisconsin Court of Appeals’ decision in State v. Village of Lake Delton, 93 Wis. 2d 78, 96, 286 N.W.2d 622 (Ct. App. 1979),

in which the court affirmed that “no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis.”

The scope of life, health and property rights to be protected under sec. 31.02(1) has also been defined by the court. In New Lisbon v. Harebo, 224 Wis. 66, 72-73, 271 N.W. 659 (1937), the court construed the protection of those rights simply to require the prevention of direct safety hazards from the construction or maintenance of a dam:

In considering what meaning is to be ascribed to the term "property" as used in sec. 31.06, Stats., consideration must be given to the evident purpose of the entire chapter. We find precisely the same formula in sec. 31.02, which is definitive of the powers of the commission with respect to waters and which states the purposes of committing the level and flow of navigable waters to the regulation of the commission. Aside from a purpose to promote public rights in navigable waters, the objective is to promote safety and protect life, health, and property by preventing the erection of dams that are inherently dangerous in these respects. Thus, a dam which will necessarily produce stagnant water may be detrimental to public health. One that by reason of its location, or manner of construction, or the character of the soil upon which it is built, will be dangerous to life and property in time of flood or freshet, either because it will tend to flood cities or villages or because it is likely to give way and create havoc and destruction below the dam would be within the statutory definition of a dangerous structure. In such cases a finding that the dam would be dangerous to life, health, and property is proper, and we are of the opinion that this is as much as the section can be held to mean. It is not proper to isolate the word "property" and assert that injury to property means normal flowage by the ordinary operation of the dam, since this is the inevitable consequence of building and maintaining a dam.

(emphasis added)

Finally, under established principles of statutory construction, sec. 31.02 must be considered in light of related provisions of chapter 31. See Landis v. Physicians Ins. Co. of Wisconsin, 2001 WI 86, ¶ 80; 245 Wis. 2d 1; 628 N.W.2d 893. Sec. 31.13(2), Stats. governs applications to raise or enlarge an existing dam. Although statute does not directly govern orders

under sec. 31.02, it clearly declares the legislative policy governing actions that elevate water levels. That section provides:

(2) Upon receipt of an application [to raise or enlarge an existing dam], procedure shall be had substantially as required by s. 31.06; and if the department finds that the dam, raised or enlarged or rebuilt, or rebuilt, enlarged and raised in accordance with the application, will not materially obstruct existing navigation or violate other public rights, and will not endanger life, health or property, and that the applicant has complied with s. 31.14 (2) or (3), permission is hereby granted to raise or enlarge or rebuild, or rebuild, enlarge and raise the same in accordance with the application.

This section commands the Department to *grant* applications to raise or enlarge an existing dam, *unless* the Department finds that such action will “materially obstruct existing navigation or violate other public rights,” and as long as the raising of the dam will not endanger life, health or property.

Sec. 31.02(1) does not confer upon the Department unbounded discretion to regulate the level and flow of water. To find otherwise would operate to invalidate the statute as an unconstitutional delegation of legislative authority to the Department. In State ex rel. Humble Oil & Refining Co. v. Wahner, 130 Wis.2d 304, 308 (1964), the Wisconsin Supreme Court invalidated a zoning ordinance on this basis where the only guidance to the zoning agency in interpreting a town zoning code was that the ordinance “shall be held to be the minimum requirements for the promotion of the public health, safety, convenience, prosperity or general welfare.” Id. at 307. The court in Humble Oil concluded that, although that listing of factors might justify the zoning ordinance itself, it was too general to supply the necessary guidelines for administrative action. Id. at 308. See also Menzer v. Elkhart Lake, 51 Wis.2d 70, 83 (Ct.App. 1971) (“the manner of delegation [of authority to regulate navigable waters] as well as the

purpose served by it must be scrutinized. Clear limits as well as definite standards must be provided along with a purpose consistent with advancing the trust.”)

Water level orders are not among the enumerated types of contested cases that are classified as “class 1” proceedings in sec. 227.01(3), Stats. More generally, sec. 31.02(1) does not confer “substantial discretionary authority” on the agency because it does not empower the Department to enact rules establishing additional standards for its orders governing the level and flow of navigable waters. The Department is thus limited to the specific standards laid out in the statute, as informed by a discrete body of case law.

By contrast, the types of proceedings labeled “class 1” in sec. 227.01(3) confer far greater authority on agencies in ratemaking, tax assessment and other administrative decision making. For example, the legislature has empowered the Public Service Commission (“PSCW”) to set “reasonable and just” rates, including the power to promulgate rules which establish factors other than those set forth in the statutes. See Wis. Stat. § 196.03(5m), (6); West Allis v. Public Service Comm’n, 42 Wis. 2d 569, 577, 167 N.W.2d 401 (1969) (Commission in designing rate structure “has wide discretion in determining the factors upon which it may base its precise rate schedule.”) The PSCW’s power to issue a certificate of public convenience and necessity under Wis. Stat. § 196.03 is also highly discretionary. See Clean Wisconsin, Inc. v. PSC, 2005 WI 93, ¶ 11 (“Wisconsin utilities must provide “reasonably adequate service and facilities” to the public. The PSC must determine whether a utility is providing “reasonably adequate service” and may make “any just and reasonable order” to correct the problem.”)

Similarly, the statutes broadly empower the Wisconsin Department of Revenue (“WDOR”) to “have and exercise general supervision over the administration of the assessment and tax laws of the state, over assessors, boards of review, supervisors of equalization, and

assessors of incomes . . . to the end that all assessments of property be made relatively just and equal at full value . . .” Wis. Stat. § 73.03(1). The Department of Revenue is statutorily authorized to publish and distribute a manual of “accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level,” that reflects “advances in the science of assessment, court decisions . . . statistical and other information considered valuable to local assessors by the department.” Wis. Stat. § 703.03(2a).

The broad powers of the PSCW and WDOR, respectively, under the foregoing statutes differ substantially from the DNR’s authority to set water levels based on a defined set of established public trust values. In comparison to the enumerated proceedings in sec. 227.01(3)(a), the Department’s powers under sec. 31.02(1) are not the equivalent of “substantial discretionary authority.”

CONCLUSION

The Department of Natural Resources has the burden of proof in this proceeding to demonstrate by the greater weight of the credible evidence that its proposed order denying Petitioner Rock-Koshkonong Lake District’s request to raise the Lake Koshkonong-Indianford Dam water level, and its modifications to the current water level order, are based exclusively on the standards in sec. 31.02(1), Stats. That section does not confer broad discretion on the Department in the manner of the legislative delegations of authority that are statutorily enumerated “class 1” proceedings. Nor does this contested case a “class 2” proceeding involving the Department’s determination of “whether to impose a sanction or penalty against a party.” Wis. Stat. § 227.01(3)(b). Because this matter does not fit within the definition of a class 1 or a

class 2 hearing, it is by default a class 3 proceeding. See Wis. Stat. § 227.01(3)(c) (“any contested case not included in class 1 or class 2”).

Dated: November 8, 2005.

Respectfully submitted,

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