

MEMORANDUM

TO: Wisconsin Department of Natural Resources

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DATE: May 7, 2015

RE: 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,
Docket No. 3-SC-2003-28-3100LR; *Rock-Koshkonong Lake District v. DNR*,
2013 WI 74

The memorandum addresses the requirements for Wisconsin DNR to reconsider the Rock-Koshkonong Lake District's 2003 petition to modify the order governing operation of the Indianford Dam. The Department's regulatory action must be consistent with the July 13, 2013 decision of the Wisconsin Supreme Court reversing the Department's earlier denial of the District's petition in *Rock-Koshkonong Lake District v. DNR*, 2013 WI 74 (the "Decision"). The District's petition sought an increase of 0.6 feet in the summer maximum water level of Lake Koshkonong in order to maintain the water levels prevailing since the 1960s, following dam repairs in 2002 that increased the dam's capacity to discharge water downstream.

DISCUSSION

I. The Supreme Court Decision requires DNR to consider the economic impact of its water level order, including the impacts of lowered water levels resulting from repairs to the Indianford Dam as part of its mandate to protect property under Wis. Stat. § 31.02(1).

The Decision mandates that on remand, DNR must consider the economic impact of lower summer water levels on the residents, businesses, and tax bases adjacent to and near Lake Koshkonong. The Decision holds that, in its original consideration of RKLD's petition, "DNR rightly considered the direct impact of lower water levels on riparian properties, but wrongly excluded the cumulative economic effect of the lower water levels on these properties." Decision, at ¶ 145. In order for the Department to properly meet its regulatory obligation under sec. 31.01(2) as interpreted by the supreme court, it must consider all of the economic impacts that were supported by the improperly excluded testimony of Dr. Russell Kashian and John Stockham, who testified at the contested case hearing on behalf of the Petitioners.

Stockham, a land use planner and real estate analyst, testified that five towns and three cities are potentially impacted by the water level order. Tr., Contested Case Hearing, at 2901. His testimony detailed the negative impacts to residential property values due to lower water levels, and consequent diminishment of the municipal tax base. He also concluded that lower water levels translate to a loss of substantial lake-related commercial activity for those firms catering to motor boating and other businesses that rely on the Lake for their customer base, including marinas, eating and drinking establishments, lodging and campgrounds. *See* Tr., Contested Case Hearing, at 2912-2921; Ex. 227.

Dr. Kashian, a professor of economics, introduced a comparative study of the rate of appreciation of residential property values which concluded that, since 2002 (when the Indianford Dam was rehabilitated and began to more closely adhere to DNR water levels during

the summer boating season), property values had appreciated at a slower rate than property values on Beaver Dam Lake, a comparable shallow flowage located in south-central Wisconsin. *See* Tr., Contested Case Hearing, pp. 2793-2798; Ex. LKWA-225. *See also* Decision, ¶¶ 37-40.

The supreme court affirmed the admissibility and relevance of the kinds of economic evidence improperly excluded in the original contested case hearing. Decision, at ¶ 145. In particular, the Court expressly approved the type of hedonic analysis underlying Dr. Kashian’s opinion, which undertook to value particular attributes in the “bundle of rights” enjoyed by Lake District property owners. *See id.* at ¶ 129.

Protecting against economic impacts to property values and other related business and taxpayer interests on the Lake is not only a matter of protecting property; it is also a matter of “public concern” and “public welfare.” *See* Decision, at ¶¶ 135-139. “The DNR, the agency currently charged with making a water level determination under § 31.02(1), must protect the same property interests as in 1915 and before—that is, not only land itself, but improvements to land, the community’s interest in the land, and investment in and capital derived from the land.” *Id.* at ¶ 139.

II. DNR must analyze the 2003 Petition under the standards in sec. 31.01(2) as a request to preserve the water levels that existed from 1991 to 2002 and limit its analysis to that time period.

The language of the Decision emphasizes that DNR must analyze the 2003 Petition as a request to preserve the water levels that existed from 1991 to 2002. This historic background against which the water level order must be understood is discussed in detail in the Decision, at ¶¶ 21-27, including a table showing that median summer water levels on Lake Koshkonong have long trended higher than the target levels established in the 1991 Order. The supreme court

found: “In 2002, after the rehabilitation of the Indianford Dam restored full operating capability to the dam’s gates, the water levels on Lake Koshkonong began to reflect more closely the levels set by the 1991 order. As a result, water levels on the lake dropped below recorded levels since the 1930s.” Decision, at ¶ 27.

Evidence excluded from the 2005 contested case hearing demonstrated that failing to grant the Petition to restore historic water levels would cause economic impacts including lost value to these homes, businesses, and/tax revenue. The supreme court concluded: “The DNR erroneously excluded most testimony on the economic impact of *lower water levels* in Lake Koshkonong on the residents, businesses, and tax bases adjacent to and near Lake Koshkonong.” Decision, at ¶ 13. The systematic exclusion of that evidence was compounded by the Department’s decision to accept “competing economic evidence that helped sustain its [2005] water level decision.” *Id.*

In addition to utilizing the correct historic baseline for economic impacts, other affected public interests within the authority of DNR to assess under the standard in sec. 31.01(2) (the “Public Interest Analysis”) must be judged against maintaining the water levels that existed during the 1991-2002 time period, rather than projecting the effects of an increase in water levels on plants, animals and aquatic life. Further, as the DNR Decision itself found, during periods of extreme high flows, the river outlet and dam lack the physical capacity to discharge sufficient water to maintain the lake level below the ordered maximum elevation. Due to these circumstances, water levels on Lake Koshkonong have often exceeded the ordered maximum level, routinely by as much as 2-3 feet. Therefore, in conducting its Public Interest Analysis, the Department must recognize that the dam does not control Lake water levels during predictable portions of the year.

III. DNR must map the ordinary high water mark which existed during the 1991-2002 time period to properly consider public rights in navigable waters affected by the water level order.

The DNR's original decision to deny RKLK's petition for an increase in Lake Koshkonong's summer water level was fundamentally grounded in its Public Interest Analysis. However, "the [DNR's] findings of fact do not explicitly identify how much of the wetlands are publicly owned, or what portion of the wetlands are above the ordinary high water mark." Decision, at ¶ 42.

The location of the OHWM of Lake Koshkonong is essential to the Department's balancing of interests under section 31.02(1), because it delineates the geographic boundary of the set of public interests to be considered, including the right of access for hunting, fishing, and other constitutionally protected activities. Given the importance of the OHWM in determining public access rights, it is unconscionable that the DNR would decline to clarify the geographical area within which those rights may be exercised. In order to adhere to the mandate of the Decision on remand, when balancing the interests under section 31.02(1), DNR must delineate the OHWM of Lake Koshkonong separating public trust lands from private property.

IV. If it chose to contest the economic testimony proffered by the District/Associations, DNR should have engaged qualified experts to perform the economic impacts analysis. The agency cannot simply collect anecdotal comments from "folks" for review by natural resource managers.

DNR has publicly acknowledged that it has no special expertise in economic analysis. *See* Press Release: "DNR seeks area resident and business comment on impacts of higher water levels for Lake Koshkonong" (February 16, 2015). But because the Department is obligated under the Decision to analyze cumulative economic impacts, it was incumbent upon DNR in the exercise of its statutory authority to retain one or more qualified consultants to perform the required analysis. That obligation arose as soon the agency's section 31.02(1) authority was

clarified by the 2013 Supreme Court Decision. The DNR cannot now, at this late date, plead institutional infirmity as a reason to shirk its regulatory obligation.

The DNR's current proposal to evaluate economic impacts substantially reiterates the institutional bias implicit in its original evaluation of the Petition, in two ways. First, the Department has requested comments and announced its intention to study the impact of *higher* water level on public and private interests. *See* Press Release (February 16, 2015). Thus, the Department intends, once again, to proceed under the erroneous premise that the Petition will represent an increase over historic water levels. Again, the Department refuses to acknowledge the supreme court's finding that the maintenance of the 1991 target will actually result in lower summer water levels, to the detriment of a wide range of lake-related activity, with significant consequences for commercial incomes, property values and municipal tax revenues. The DNR's press release communicates either a failure to understand or a refusal to accept the supreme court mandate and the agency's statutory obligation.

Second, the supreme court's decision mandates that the detrimental effects of a lowered water level regime must be quantified and assessed against other impacts. The Department has announced that this mandatory economic analysis will be completed by reviewing comments from "folks." The type of anecdotal comment solicited by the Department will not fulfill its duty to undertake a quantitative analysis of secondary economic impacts of the water level order. As the supreme court noted, "the excluded testimony [of Dr. Kashian and Mr. Stockham] was different from the testimony [individual public comments] that the ALJ accepted." Supreme Court Decision, at ¶ 145 (emphasis in original). The supreme court explicitly rejected the DNR position that it may limit evidence of economic impacts to an assessment of individual comments. "The DNR...wrongly excluded the cumulative economic effect of the lower water

levels on these properties. It is a familiar principle of environmental law that secondary effects are often more substantial than the primary effects of the action.” *Id.* at ¶ 145. The DNR’s latest effort to collect individual comments from affected parties essentially ignores the required evaluation of cumulative economic effects.

CONCLUSION

The Department’s press release demurs that “[a]s natural resource managers...we are less certain about the economic impacts of higher water levels on landowners and businesses. That is why we are asking folks to send us their comments and opinions.” This comment perfectly encapsulates DNR’s recycling of the very same analysis that took place in 2005, when comments were solicited in the public hearing phase of the contested case. The same natural resource managers who acknowledge having no institutional expertise are being tapped to evaluate public comments and to weigh those impacts against impacts to wetlands, habitat, fisheries and other public interests. The press release clearly suggests that the agency has not absorbed and is not prepared to implement the mandate of the supreme court on economic issues.

The Lake District has now submitted Dr. Kashian’s updated hedonic analysis entitled *An Assessment of Lakefront Property Values Based on a Decline in Water Levels: Its Impact on Value and Taxes* (March 23, 2015). This report quantifies the reduction in residential real estate values and lost wealth within the District due to lower lake water levels at over \$70 million between 1997 and 2013. The Kashian Report also appends a report of the Wisconsin Innovation Service Center, a specialty center of the Wisconsin SBDC. The Department is required to consider these studies under the directive of the Supreme Court Decision to consider all relevant evidence of economic impacts. In the absence of other competent evidence of the economic

impacts of lowering the elevation of Lake Koshkonong from historic summer water levels to the target required by the 1991 and 2005 Order, the existing record strongly supports the grant of the Lake District's Petition.