

VERIFIED PETITION FOR DECLARATORY RULING UNDER WIS. STAT. § 227.41

TO THE DEPARTMENT OF NATURAL RESOURCES:

In the matter of the applicability of Wis. Stats. §§30.10(1), 30.10(4)(b), 30.2035 and 30.22(4m) to certain Lake Koshkonong wetlands

1. A declaratory ruling is requested under Wis. Stat. § 227.41.

Petitioner Rock-Koshkonong Lake District (“RKLD”), by and through its officers and attorneys, hereby petitions the State of Wisconsin Department of Natural Resources for a declaratory ruling and full hearing pursuant to Wis. Stat. § 227.41 to make a finding under **Wis. Stats. §§30.10(1) and (4)(b)** for purposes of determining the applicability of **Wis. Stats. §§30.2035 and 33.22(4m)** to certain lands located on or near the bed of Lake Koshkonong by delineating the location of the lake’s Ordinary High Water Mark (“OHWM”) in the wetlands in the following locations:

- Secs. 26, 27, 33, 34 and 35 Town 5 North, Range 13 East (Town of Koshkonong), Jefferson County
- Secs. 10, 11, 12, and 13, Town 5 North, Range 13 East (Town of Sumner), Jefferson County

Although the Department is authorized to set and charge fees to determine the location of the OHWM under Wis. Stat. § 30.28(1m)(a)1, no such fee is established under ch. NR 300, Wis. Adm. Code. The Petitioner requests that the Department inform its legal counsel as to the amount of any fee established for the Declaratory Ruling sought under this Petition.

2. The above-referenced statutes provide as follows:

Wis. Stat. § 30.10(1) declares all lakes wholly or partly within this state which are navigable in fact to be navigable and public waters and recognizes the rights of all persons therein and thereto.

Wis. Stat. § 30.10(4)(b) declares that the boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters are to be determined in conformity to the common law. Under Wisconsin common law, the boundaries of navigable lakes are bounded by the Ordinary High Water Mark (“OHWM”).

Wis. Stat. § 30.2035 authorizes RKLD to plan and undertake a Lake Koshkonong comprehensive project, including the placement of structures, or fill, or both on the bed of Lake Koshkonong (subject to DNR approval) in order to improve navigation, provide navigation aids, restore or protect wetland habitat or water quality, create, restore, or protect fish and wildlife habitat, enhance the natural aesthetic value or improve the recreational use of the lake.

Wis. Stat. § 33.22(4m) authorizes RKLD to undertake projects to enhance the recreational uses of Lake Koshkonong.

2. The grounds for this Petition are to determine the applicability of the above provisions because of the following state of facts:

Lake Koshkonong is a navigable water body. RKLD is public inland lake district established pursuant to Chapter 33 of the Wisconsin Statute to carry out a program of lake protection and rehabilitation on Lake Koshkonong. The District is an interested party within the meaning of Wis. Stat. §227.41 based on: (i) its status as a body corporate and politic under Wis. Stat. §33.26(3) with the powers of a public inland lake district as set forth in Chapter 33, (ii) as the entity authorized to undertake the Lake Koshkonong Comprehensive Project under Wis. Stat. §33.2035, and (iii) as an entity authorized to undertake projects to enhance recreational uses of Lake Koshkonong under Wis. Stat. § 33.22(4m).

The portions of the wetland complexes in the above-described locations (and other lands) located within the bed of Lake Koshkonong are subject to RKLD’s authority under Section 30.2035 and the Department’s jurisdiction under Section 30.10 and other statutes regulating

navigable waters. The bed of Lake Koshkonong, within these wetlands and elsewhere, is defined include only lands below the OHWM. *See Diana Shooting Club v. Husting*, 156 Wis. 261, 262 (1914).

In the performance of its duties to regulate and protect navigable waters, the Department regularly undertakes to determine the location of the OHWM of navigable lakes and streams, which is the boundary of its navigable waters jurisdiction. The Department “has the authority, as well as the obligation, to determine whether the waters of the state are navigable in fact and, therefore, subject to regulation under ch. 30, STATS.” *Turkow v. DNR*, 216 Wis. 2d 273, 280 (Ct. App. 1998). The Petitioner has been advised by the Department that a petition for a declaratory ruling under Wis. Stat. § 227.41 is the appropriate procedure for a person to obtain a DNR determination as to the location of an OHWM. *See also Zinn v. State*, 112 Wis. 2d 417 (1983) (review of a DNR declaratory ruling as to the location of the OHWM of McConville Lake.)

In 2001, the District and the Department surveyed the elevation of the OHWM in 15 locations around Lake Koshkonong which are reported in a November 2002 report entitled ***Ordinary High Water Mark Study Lake Koshkonong Jefferson County, Wisconsin*** (the “OHWM Report”), a copy of which is attached hereto as Exhibit A. On November 8, 2002, DNR reported its acceptance of the OHWM Report by letter to RKLD Chairman Jim Folk and included in the OWHM Report (Exhibit A). DNR affirmed its concurrence with the OHWMs identified in that report in its 2004 ***Environmental Assessment On the Petition of the Rock-Koshkonong Lake District to Amend Order 3-SD-82-809, Regarding the Indianford Dam and Lake Koshkonong Water Levels*** and in proceedings held in response the District’s 2003 petition referenced in that Environmental Assessment.

Although the 2002 Report established the elevation of the OHWM as it existed in several locations on the shore of Lake Koshkonong in 2001, the Department has not declared the

elevation and location of the OHWM in any the extensive wetlands complexes adjacent to Lake Koshkonong. Under the common law of Wisconsin, the OHWM within a wetland is to be determined by application of the “transfer method.” *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914) (“Where the shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of the ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below the ordinary high-water mark.”) This Petition seeks a declaratory ruling establishing the stage of water elevation constituting the OHWM of Lake Koshkonong within the wetland complexes in the locations referenced in Paragraph 1, above.

3. The reasons for the requested ruling are as follows:

In order for the District to effectively carry out its statutory responsibilities, it is necessary for the Department to clearly establish the boundary of Lake Koshkonong’s bed in the locations described in Paragraph 1. These responsibilities include activities to enhance and restore wetlands and to enhance public recreational opportunities on Lake Koshkonong under various laws and programs

In furtherance of its statutory responsibility under Wis. Stat. §33.2035, RKL D executed a Planning Assistance to States (PAS) Agreement dated February 25, 2010, with the US Army Corps of Engineers and DNR for a Comprehensive Study Planning Project pursuant to Section 22 of the Water Resources Development Act of 1974. The Project resulted in a decision document which serves as the basis for the progressive implementation of projects to enhance navigation, habitat, recreation, water quality and natural scenic beauty of Lake Koshkonong. The District has completed the first of several planned projects under the PAS Agreement, which involved the dredging of material and installation of a breakwall structure to rebuild shoreline and protect a high quality wetland in Mud Lake from being absorbed into Lake Koshkonong.

RKLD is also an eligible applicant and past recipient of DNR lake management grants for the implementation of wetland enhancement or restoration projects pursuant to Wis. Stat. § 281.69(3m). The District has undertaken several activities under this program, described as the Rock Koshkonong Lake District Wetland Protection Project. That Project involves the placement of riprap breakwaters on the bed and shoreline of Lake Koshkonong to protect exposed wetland areas from wind and wave erosion and to aid in the restoration of wetland vegetation.

RKLD intends to continue the phased implementation of projects for the protection and restoration of wetlands under these programs, as well as projects to enhance recreational uses of Lake Koshkonong through the removal of artificial barriers to public access pursuant to its authority under Wis. Stat. § 33.22(4m). These efforts are intended to enhance boating, hunting, fishing and other recreational uses of Lake Koshkonong. These public activities are protected under the Public Trust Doctrine, Article IX, Section 1 of the Wisconsin Constitution (“EMINENT DOMAIN AND PROPERTY OF THE STATE”). Some of these public uses are further safeguarded under Article I, Section 26 (“DECLARATION OF RIGHTS - RIGHT TO FISH, HUNT, TRAP, AND TAKE GAME”). These rights apply within the portion of the extensive Lake Koshkonong wetland complexes located below the OHWM, but do not extend into private uplands located above the OHWM.

By establishing the boundary of the lakebed of Lake Koshkonong in some of the major wetland complexes, the declaration sought by this Petition will enable the District to discharge its responsibilities to plan and implement projects under its Lake Koshkonong Comprehensive Project and to carry out its lake protection and rehabilitation program, including projects to enhance public recreational use and enjoyment of the lake. The location of the OHWM is also necessary for District electors and property owners and members of the public to exercise constitutionally protected rights to hunt, fish and navigate in the navigable waters and lakebed of

Lake Koshkonong (including wetlands) without encroaching on the private property rights of owners of adjacent lands above the OHWM.

3. **Persons other than the Petitioner upon whom it is sought to make the ruling binding:** None.

For the foregoing reasons, RKLD hereby petitions the Department of Natural Resources to issue a declaratory ruling establishing the elevation of the OHWM in the locations set forth above.

Dated at Madison, Wisconsin, this _____ day of March, 2014.

Respectfully submitted,

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By: _____

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VERIFICATION

STATE OF WISCONSIN }
 }
COUNTY OF ROCK }

SS.

The undersigned Brian K. Christianson hereby attests he is the Chair of the Rock-Koshkonong Lake District and that the allegations set forth in this Verified Petition under Wis. Stat. §227.41 are true and correct to the best of his knowledge and belief.

Brian K. Christianson, Chair
Rock-Koshkonong Lake District

Subscribed and sworn to me this
_____ day of March, 2014

Notary Public, State of Wisconsin
My commission expires: _____