

WHEELER, VAN SICKLE & ANDERSON, S.C.
a Wisconsin Service Corporation

NILES BERMAN
JEFFREY L. LANDSMAN
THOMAS J. ZAREMBA*
STUART G. MONDSCHNEIN†
COURT COMMISSIONER
WILLIAM PRAY O'CONNOR
DENIS R. VOGEL**
RHEA A. MYERS
JANET L. KELLY
MARY BETH PERANTEAU
JOSHUA A. GILDEA
ROBERT ZEINEMANN

* ALSO ADMITTED IN MICHIGAN

**ALSO ADMITTED IN MINNESOTA

† Certified Civil Trial Advocate, National Board of Trial Advocacy

ATTORNEYS AT LAW

SUITE 801

25 WEST MAIN STREET

MADISON, WISCONSIN 53703-3398

TELEPHONE (608) 255-7277

FACSIMILE (608) 255-6006

EMAIL: wheeler@wheelerlaw.com

OF COUNSEL

CHARLES S. VAN SICKLE
NORMAN C. ANDERSON

FLOYD E. WHEELER
(1905 - 1995)

December 15, 2006

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL

Brian Christianson, Chair
Rock Koshkonong Lake District
374 E. Samuelsen Drive
Edgerton, WI 53534

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*
Case No. 3-SC-2003-28-3100LR

Dear Brian:

I am writing in response to your request for a written assessment of the potential merits of an appeal of the Administrative Law Judge's Decision in the Rock-Koshkonong water level proceedings. As we have discussed in greater detail by telephone, the Administrative Law Judge's decision could be appealed to the circuit court. In conducting such appeal, the circuit court would review the evidence presented at the contested case hearing, the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order and the arguments of the parties. As you know, the ALJ's decision includes extensive and detailed findings of fact (set out in 120 numbered paragraphs). Although we do not agree with many of those factual conclusions, the standard of review applicable to a circuit court review of an agency decision makes it unlikely that the ALJ's decision could be overturned on the basis of these factual findings.

In contrast to the ALJ's detailed factual findings, the decision devotes relatively little attention to the legal issues that are at the foundation of this proceeding. All of the parties and the Administrative Law Judge agreed that Section 31.02(1) of the Wisconsin Statutes governs DNR's Indianford Dam water level order authority. That section empowers DNR to establish water level orders "in the interest of public rights and navigable waters or to promote safety and protect life, health and property." Although all parties accepted that statutory standard, the ALJ interpreted the protection of property interests under Section 31.02(1) very narrowly. Specifically, the hearing examiner excluded from his consideration of protected property interests, extensive testimony and

Brian Christianson, Chair

December 15, 2006

Page 2

evidence relating to the economic impacts of DNR's proposed water level order on public revenues, property values and business activity.

In addition, the hearing examiner failed to address the Joint Petitioners' arguments that the wetland standards established as DNR administrative rules in ch. NR103 are not applicable to water level proceedings. As the Joint Petitioners pointed out in their briefs, the chapter of the Wisconsin Statutes that authorizes DNR to promulgate those standards expressly excludes proceedings involving the regulation of dams from their application.

We were greatly disappointed that the hearing examiner failed to address the NR103 argument *at all* and gave only superficial analysis to the significant question concerning the scope of property rights that are protected in water level proceedings.

We have considered it an honor to represent the Rock-Koshkonong Lake District for these past several years and we are proud of the work we have done to assist the District in ensuring the restoration and transfer of the Indianford Dam, supporting wetland restoration and working to establish a water level order that reasonably balances the competing interests of boaters, shore owners, and owners of recreational wetlands. We are troubled that the significant investments made by the District and its taxpayers have not resulted in a reasoned ruling on the two critical legal issues discussed above. For that reason, our firm is prepared to appeal the ALJ's determination on these issues to the circuit court without additional attorneys' fees to the District. Such an appeal would be limited to these legal issues, which we believe factor importantly in the ALJ's affirmance of DNR's water level order.

If the District Board of Commissioners wishes to accept our offer, please notify me promptly because a notice of appeal would need to be filed before the end of this month. Please note that our firm's offer to raise these legal issues in an appeal of the ALJ's decision is limited to Circuit Court review and does not extend to filing fees and other out-of-pocket expenses incurred in the circuit court proceeding.

Thank you again for the District confidence in our firm.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.

/s/ William P. O'Connor

William P. O'Connor

WPO/lac