



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

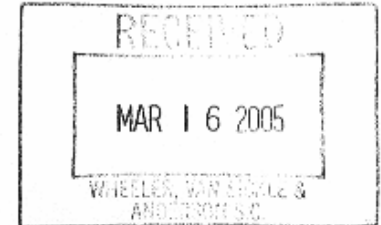
~~Jim Doyle, Governor~~
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March 9, 2005

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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

CC: SCR-Fitchburg
Ken Johnson-SCR-Fitchburg
FH/3
WT/2
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