



**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, WI

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

**SUPPLEMENTAL BRIEF OF THE
DEPARTMENT OF NATURAL RESOURCES**

Introduction

This brief is being submitted by the Department in response to the **Order on Supplemental Briefing** which was issued on October 18, 2006. In that order, you cited Wisconsin Administrative Code Section NR 103.06(1)(a), which provides, in part, that, “Activities subject to the requirements of this chapter include...[permits, reviews, approvals and other actions under chs. 23 and 26 to 31, Stats.” You have invited further argument “respecting the operation of this provision to the Department’s action under review in these proceedings.”

The Department addressed related issues at the hearing and in its **Closing Brief**, submitted on June 16, 2006, in this matter. Specifically, on pages 24 – 26, the Department discussed these issues when discussing the **Consideration of Wetland Impacts**. The Department asserted, in its previous arguments, that there are numerous statutory and rule provisions which make the consideration of wetland impacts a necessary and appropriate consideration under Section 31.02, Stats. These include:

- water quality and habitat issues associated with the wetlands involved in this case are clearly major issues that need to be considered as part of the “interest of public rights in navigable waters” test under Section 31.02, Stats.;
- the Department has articulated a Policy, under NR 1.95, Wisconsin Administrative Code, to assure that all Department decisions consider the impacts on the State’s wetland resources. NR. 1.95 is a general policy of the Natural Resources Board which predates NR 103 and is not adopted pursuant to Chapter 281, Stats.

In that brief, on page 26, and at the hearing, the Department “concede[d] that the provisions of NR 103 are not applicable”. This concession was made, in part, on the basis that it is not, in the Department’s opinion, necessary to apply the water quality standards of NR 103 directly to this action to allow a complete consideration of the critical wetland issues since they can be fully

considered under the statutory provisions of Section 31.02, Stats. The concession was also made based on the Department's historic reading of the language in Section 281.92, Stats., which states, in its entirety:

“Limitation. Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31.”

Argument

In response to your invitation to specifically address the language in NR 103, we have undertaken further review of this issue. As you astutely observed, the **“Applicability”** provisions of NR 103.06(1) expressly provide that:

“Activities subject to the requirements of this chapter include, but are not limited to:
(a) Permits, reviews, approvals and other actions under chs. 23 and 26 to 31, Stats.

This language explicitly provides, therefore, that NR 103 is, after August 1, 1991, applicable to “activities...which are subject to the requirements of statutes or rules requiring a department determination concerning effects on water quality or wetlands.” NR 103.06(1). As we have previously pointed out in our arguments and briefs, the setting of water levels clearly requires review of the impacts on wetlands and water quality as part of the “interest of public rights in navigable waters” analysis under Section 31.02, Stats.

The Wisconsin Supreme Court, in Reuter v. DNR, 43 Wis. 2d 272(1968), held that it was necessary to consider impacts on water quality under the “public interest” test as it relates to navigable waters. The Court noted, in footnote 8 “Furthermore, the relation of marshes to water quality of a body of water is a relatively elementary ecological fact that presumably would be within the technical expertise of the [DNR].” The language of the Court in Just v. Marinette, 56 Wis. 2d 7(1972), making these same connections between impacts on wetlands and public rights was cited in our **Closing Brief** at pages 24 & 25.

After reviewing the rule provisions and case law, it is apparent that the “department... determination” (NR 103.06) required in the instant case requires consideration of “effects on water quality and wetlands” under both the “interest of public rights” standard of Section 31.02, Stats., and, by its express terms, NR 103.06(1)(a).

We have returned to take a more detailed look at the history of Section 281.92, Stats., to provide further insight into this issue.

Section 281.92 was originally adopted in 1919. The legislative history of s. 281.92 indicates that the legislature did not intend to preclude the application of Chapter 281 to ch. 31. The original language in Section 281.92 read, “Nothing in this act shall be construed to alter, amend, repeal, impair, or affect any of the provisions of ... chapter 31 of the Wisconsin statutes” (1919). In 1923, pursuant to c.448, s.27, the legislature changed the language to, “Nothing in this chapter shall be construed to affect the provisions of section 196.01 to 196.79 or of chapter 31 of Wisconsin statutes.” There are no drafting records prior to 1927, but it is clear from the 1919 language that s.281.92 was not meant to be construed as altering, amending, repealing or limiting

the application of the Chapter 281 provisions to ch. 31. The Legislature, in 1923, cleaned up repetitive language of the section, but it does not appear there was any intent to change it substantively. The language was subsequently changed twice, in 1979 and finally in 1995. In 1995, the language was changed from “Nothing is this *subchapter* affects ss. 196.01 to 196.79 or ch. 31” to “Nothing in this *chapter* affects ss. 196.01 to 196.79 or ch. 31.” Additionally, the 1995 comments to Act 227 explain, “the special committee explicitly intends that this bill will make no substantive changes in the environmental regulatory statutes.”

In view of the history outlined above, it is clear that the Department has conceded too much relative to the applicability of Chapter NR 103 water quality standards to this decision under Chapter 31, Stats. Contrary to the Department’s previous reading of Section 281.92, Stats., it was not the intention of the Legislature in 1919 to preclude the application of Chapter 281, Stats., to Chapter 31. Rather, the history indicates that the language was intended by the Legislature as a savings clause to assure that it was clear that they did not intend to “alter, amend, repeal, impair or affect” Chapter 31.

The Department’s previous reading of Section 281.92, Stats., would suggest there is some ambiguity in the language of this provision. In cases of ambiguity, the reviewing court examines the context, subject matter, history, object to be accomplished and effect of competing interpretations to determine legislative intent. State v. Speer, 176 Wis. 2d 1101(1993)

In this case, the Legislature has articulated, in Section 281.11, Stats., its intent to make the DNR “the central unit of state government to protect, maintain and improve the quality and management of the waters of the state”. The Legislature further provides in s. 281.11: “To the end that these vital purposes may be accomplished, this subchapter and all rules...promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter.”

The Wisconsin Supreme Court has previously reviewed statutes containing the formulation “Nothing in this chapter affects...” as used in Section 281.92, Stats. In Lees v. ILHR Department, 49 Wis. 2d 491(1970) held that the service of a summons is not a condition precedent necessary to the subject matter jurisdiction of the court because §262.04(1) states, “Nothing in this chapter affects the subject matter jurisdiction of any court of this state,” where §262.04 (2), §262.06 and §262.07 requires a service of a summons for the court to have personal jurisdiction of the defendant’s person. 49 Wis.2d 491, 497.

In light of the above, the Department submits that, in addition to the consideration of wetland impacts under Section 31.02, Stats., the provisions of NR 103, Wisconsin Administrative Code, should also be directly applied in your consideration of the wetland issues in this matter.

Dated this 27th day of October, 2006.

Wisconsin Department of Natural Resources

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