

ROCK-KOSHKONONG LAKE
DISTRICT,
ROCK RIVER KOSHKONONG
ASSOCIATION, INC., and
LAKE KOSHKONONG
RECREATIONAL ASSOCIATION, INC.,

R E C E I V E D
MAY 12 2008
GODFREY & KAHN S.C.

MEMORANDUM DECISION

Petitioners

vs.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES

Case No. 06 CV 1846

Respondent.

LAKE KOSHKONONG WETLAND
ASSOCIATION, INC. and
THIEBEAU HUNTING CLUB

Intervening Respondents.

This is a judicial review of an administrative agency decision under Wis. Stat. §227.

THE PARTIES

PETITIONERS

1. Rock-Koshkonong Lake District (RKLD) is a Wisconsin public inland lake protection and rehabilitation district created by the Rock County Board of Supervisors pursuant to Wis. Stats. §§33.24 and 33.37 (1). RKLD is the owner of the Indianford Dam.
2. Rock River-Koshkonong Association, Inc. (RRKA) is an association of riparian owners and owners of businesses related to activities in and around Lake Koshkonong and the Rock River.
3. Lake Koshkonong Recreational Association (LKRA) is an association of businesses and individuals who use and rely on Lake Koshkonong and the Rock River for business, recreation and tourism.

RESPONDENT: DNR

4. The Wisconsin Department of Natural Resources.

INTERVENING RESPONDENTS:

5. Lake Koshkonong Wetland Association, Inc (LKWA) is an organization dedicated to the promotion of the ecological health of the Lake Koshkonong Watershed.
6. Thiebeau Hunting Club (THC) is a Wisconsin corporation doing business as a hunting club. It owns property on Lake on Lake Koshkonong.

SUMMARY OF LEGAL PROCEEDINGS

7. Lake Koshkonong is a navigable water body located on the Rock River in Rock, Jefferson and Dane counties in the State of Wisconsin, upstream of the Indianford Dam. The dam is subject to a DNR operating order pursuant to Wis. Stat. ch. 31.
8. On April 21, 2003, RKLD petitioned DNR to amend the operating order for the dam issued on April 25, 1991, to raise the summer (May-October) water level controlled by the dam from a maximum of 776.33 feet mean sea level (“MSL”) to 777.0 ft. MSL, and to eliminate the winter drawdown (November-April).
9. On April 15, 2005, DNR issued a proposed operating order for the Indianford Dam pursuant to Wis. Stat. §31.02 maintaining the summer maximum at 776.33 ft MSL, and modifying the winter drawdown from a minimum of 775.00 ft MSL to 775.50 ft MSL.
10. On May 16, 2005, Petitioners filed for a contested case hearing pursuant to Wis. Stat. §227.42 on the April 15, 2005 operating order. A hearing was held before the Division of Hearings and Appeals on March 29-30 and April 3-5, and 10-14, 2006. Petitioners each introduced evidence and filed briefs.
11. On December 1, 2006, Administrative Law Judge William S. Coleman, Jr. issued Findings of Fact, Conclusions of Law and an Order (the “Decision”), denying the petition for a change in the operation order and affirming the DNR’s April 15, 2005 order in its entirety.
12. The Findings of Fact, Conclusions of Law and Order is an administrative decision under Wis. Stat. §227.52, subject to judicial review.

ISSUES

13. Chapter 31.02 of the Wisconsin Statutes reads:

CHAPTER 31 REGULATION OF DAMS AND BRIDGES AFFECTING NAVIGABLE WATERS

31.02 Powers and duties of department.

(1) The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained and which will affect the level and flow of navigable waters; and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

14. Petitioners claim the Decision is in error in not giving priority to the wetlands provisions of Chapter NR 103 over Chapter 31 as to dam operating orders; and in failing to consider specific economic impacts on residential property values, business income and public revenues in establishing the water level, inconsistent with prior agency practice. Petitioners also claim the decision is in error for failure to properly consider modeling evidence submitted by Petitioners on the effect of the requested water levels changes.

RELIEF REQUESTED BY PETITIONERS

15. Petitioners ask the Court to reverse the December 1, 2006 Decision and grant their petition to change the water levels for the Indianford Dam; or in the alternative, to remand the case for further proceedings.

STANDARD AND SCOPE OF REVIEW

16. Judicial review of an administrative agency decision is governed by Wis. Stat. §227. The reviewing court does not retry the case and is confined to the record that has been filed. The court must affirm the agency's action unless it finds a ground for setting aside, modifying, remanding, or ordering other agency action. Wis. Stat. §227.57(2).
17. The court may not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. Wis. Stat. §227.57(6). The test under sub. (6) is whether, taking into account all of the evidence in the record, reasonable minds could arrive at the same conclusion as the agency. The findings of an administrative agency do not need to reflect a preponderance of the evidence so long as the agency's conclusions are reasonable. If the factual findings of the administrative body are reasonable, they will be upheld. *Kitten v.*

DWD, 2002 WI 54, 252 Wis.2d 561, 569. On review, due weight must be accorded the experience, technical competence, and specialized knowledge of the agency as well as the discretionary authority conferred upon it. §227.57(10).

18. A different standard of review for agency decisions is applied for questions of law and questions of fact. As to questions of law, there are three distinct levels of deference applied to an administrative agency's interpretation of a statute. They are "great weight", "due weight" and "de novo review". "Great weight" deference is appropriate when the agency has been charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provided uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995), at page 660.
19. If the court were to determine that the great weight level of deference is the appropriate standard of review to be applied by the court reviewing the administrative agency's interpretation of a statute, the agency's interpretation must then be merely reasonable for it to be sustained. *Harnischfeger*, supra, page 661. The burden of proof to show that an agency's interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation. *Harnischfeger*, supra, page 661. An interpretation is unreasonable if it directly contravenes the words of the statute, it is clearly contrary to legislative intent or it is without rational basis. *Harnischfeger*, supra, page 662.

DISCUSSION

20. *"Lake Koshkonong was created by the construction of a dam on the Rock River at Indianford, a location several miles downriver from the present lake, in 1851. Lake Koshkonong is both large and shallow, and disputes over its water levels — particularly complaints by riparian property owners that their lands were being lost to high waters — have been ongoing ever since."* See *State ex rel. Att'y Gen. v. Norcross*, 132 Wis. 534, 112 N.W. 40 (1907), quoted in *Shearer v. DNR*, 151 Wis.2d 153 (Ct. App. 1989) at page 156. *"In 1982, the department, on its own motion and without public hearing, issued an order establishing seasonal water levels for Lake Koshkonong and directing Rock County to make certain improvements to the Indianford Dam. The order was promulgated under sec. 31.02(1), Stats., which authorizes the department, "in the interest of public rights in navigable waters or to promote safety and protect life, health and property [to] regulate and control the level and flow of water in all navigable waters."* *Shearer*, supra, page 156 .
21. For reasons not germane to this case, *Shearer* was remanded by the Court of Appeals to the trial court, and at that point the parties reached an agreement on the water level to be maintained by the dam. An operating order was entered based on

the agreement, and the case was dismissed. It is this 1991 water level operating order that the petitioners seek to have modified. They do not challenge the validity of the existing order; but ask the DNR to enter a new one based on allegations of their petition.

22. The petitioners contend that for at least 12 years after the 1991 operating order, the actual water level never followed the order. The Administrative Law Judge concluded that the actual, historic water level has nearly always been higher since the agreement was reached (Decision, findings 29, 30, 31) than it was supposed to have been. The Administrative Law Judge attributed this at least in part to the fact that the dam for various reasons for years was not functioning properly, and was not releasing sufficient water from the lake. Now that the dam has been repaired, petitioners fear water levels in the lake will for the first time be reduced to the level of the 1991 order, which will impact their recreational lake usage and property values.
23. Petitioners argue that this is not a problem in the spring, when there is ample, if not too much water, for the dam to retain the water level maximum. The concerns occur during the summer months. In July and August, when the water level naturally is down, petitioners believe the repaired dam will be capable of maintaining the water level to a level where petitioners argue it has not been for decades. When that happens, they believe the restored dam, under the same order that has been in place since 1991, is going to significantly change what for a generation has become the water level expectation of people who have property on or near the lake.
24. The hearing on this case extended over many days. Numerous lay and expert witnesses testified. The ALJ wrote a detailed decision. The decision excluded from evidence the testimony of valuation experts who disagreed on their forecasts of the economic losses from the operating order with a fully functional dam; gave no weight to petitioners' modeling evidence as to what the water level would be with a properly functioning dam; and refused to consider petitioners' prescriptive rights claim. (Decision, p.29)

Discussion of Prescriptive Flowage Rights.

25. The prescriptive flowage rights issue presents a question which was not reached on the merits by the Decision. Because it epitomizes the concerns that underly the petitioners' entire case, the court will address prescriptive rights as part of this decision both as a starting point in the analysis, and in order to provide as complete a decision as possible for appellate review.
26. The Administrative Law Judge rejected the District's claim that it had a prescriptive right to maintain the flowage at the present, higher, ordinary high water mark (OHWM) both because it was raised too late in the proceedings, (in fact for the first time in a post-hearing brief) and because it could not overcome

the DNR's regulatory authority, anyway. The court deduces that the prescriptive rights claim is that because the operating order has been ignored, and a higher water level for 12 years has been open and obviously existed without objection, that the current higher water level has been established "by prescription". The weakness of the argument is that under Wisconsin law, where the public always owns the water, there appears to be no such thing as prescriptive rights to a water level.

27. Under s.31.02 Stats., and the public trust doctrine which the statute codifies, the public is the owner of the water. The water level is always subject to the action of the agency as the public trustee. The DNR acts with statutory authority, and must make its decisions based on a determination of the public interest under today's circumstances. As long as the decision is within the public interest, the court must affirm it. Wisconsin law does not permit water levels to be modified under prescriptive rights circumstances, however unfortunate it is that people may have been lulled into a false sense of security into believing that change would never occur under the operating order. Legally it makes no difference that past, higher water levels were as a result of lax enforcement, or a malfunctioning dam. What matters is whether the lake level set in the DNR's latest decision is within the current public interest.
28. This brings the court to the core issues of this petition for judicial review: Whether there is a reasonable basis for the DNR decision setting the water level on the lake or whether the objections raised by Petitioners meet their burden of proof to require the court to set the operating order aside, or remand it for further consideration by the agency.

Discussion of the Wetland Water Quality, NR 103 Argument

29. Petitioners contend the decision should be reversed because the Administrative Law Judge erred in not finding that Chapter NR 103 of the Wisconsin Administrative Code applies to dam operating orders under Chapter 31 of the Wisconsin Statutes. NR103 sets water quality standards for wetlands. Petitioners argue that since the Administrative Law Judge's decision is, in part, based upon a discussion of wetland complexes (para 36 and following) and concern for wetlands, that the different procedure of NR 103 should have been used, and the DNR's authority to set the water level by dams under Chapter 31, should not apply where wetlands are involved. The court disagrees with the "NR 103 comes first" argument.
30. Under 31.02, the DNR, in the interest of public rights in navigable waters or to promote safety and protect life, health and property has the responsibility to regulate and control the level and flow of water in all navigable waters involving dams. When the DNR orders a water level change, all kinds of public interests may be affected, wetlands included. The mosaic of public interests can also include public access, erosion, wildlife, drainage, swimming, bathing, agriculture,

boating, fishing, navigation, the ability to use shoreland property: Literally all other interests imaginable that could be included in public rights in navigable waters which could be negatively or positively affected by an impoundment. There is evidence in the record, going both ways considered by the Administrative Law Judge, that by raising or lowering a dam, all these kinds of things listed can be adversely or positively affected. Some people gain access; some lose. Some fishing gets better; some fishing gets worse. Some wetland areas are benefitted, some not; some shorelands are improved; some not, and so on. But considering wetlands is part of the obviously intended scope of a Chapter 31.02 Stats. analysis.

31. The Court agrees with the DNR that the impact on wetlands can and must be considered with all of these other factors under the public rights rubric of 31.02. Had the legislature wished to have wetlands quality standards considered separately from an impoundment water level proceeding in Chapter 31.02, it could have so specified in the legislation. Respondent's argument that DNR has previously included wetlands in these decisions was unrefuted. The DNR, in a public rights review under chapter 31, is not obliged to side track the procedure under NR-103, and in the interest of a single, complete, administrative law and judicial proceeding it does not make much sense to do so.

Discussion of the Specific Economic Impact Argument

32. The petitioner argues that the Administrative Law Judge violated the "promote safety and protect life, health and property" provision of Wis. Stat. §31.02 by refusing to consider specific economic impacts on residential property values, business income and public revenues in establishing the water levels, inconsistent with prior agency practice.
33. The Decision, in paragraph 120 analyzes the balancing of public rights, and safety with the protection of life, health and property. **"The net negative effects of the proposed higher water levels far outweigh the enhancements to navigation and access. Allowing increased water levels as proposed by the District would be inconsistent with the interest of public rights in Lake Koshkonong and the Rock River, and would not serve to protect life, health or property."**
34. The ALJ states at least one component, access to water, of the asserted property rights of the petitioners was considered in the decision in what is referred to as "a somewhat different form." (Secondary Economic Impact, page 28) The decision discusses secondary economic impacts on pages 28-9, although it finds such impacts are outside the scope of a section 31.02(1) water level determination under *Wisconsin Environmental Decade, Inc. v. DNR*, 115 Wis. 2d 381 (1983).
35. The "somewhat different form" considered is the loss of use of property to the riparian owners, although without ascribing to or considering the specific

monetary value of each loss, which petitioners argue the decision should have done.

36. As to the loss of use of property by riparian owners, the Decision, states under Secondary Economic Impacts at page 28: "**Access to water is a riparian right that can be affected by changes in water levels. The diminished ease of access experienced by many riparians and their desire for higher water levels reflects their diminished utility and enjoyment of their property, which doubtless reduces the value of that property to them. This diminished utility and enjoyment of the property, and the expectation that higher water would enhance the utility and enjoyment of riparian property, has been considered and weighed under the standards of Wis. Stat. s. 31.02(1).**"
37. Petitioners take the position that the Department failed to discharge its responsibility to consider property concerns when it undertook to do its balancing like this, and that the ALJ committed legal error in determining not to receive in evidence valuation and other economic evidence. The DNR argues that if the water is no longer there, that impacts the primary rights of access and navigation, and the ALJ did weigh the water level impact on those rights. The DNR contends that the ALJ considered what he should have considered, the physical impacts caused by the proposed water level, and that there was no error to exclude the evidence of the three economic experts in valuation; the land planner, the economics professor, and the licensed appraiser. From the point of view of the petitioners, this was hair splitting that considered economic impacts on property if they were favorable to the Department's policy deference and excluded them if they were unfavorable.
38. In support of this argument, Petitioners point out that testimony about the loss of value in the number of board feet of green ash was solicited by the Department as was testimony about corn acreage that could be affected by high water, but testimony as to the impact on the value of the property of people who own the businesses and residential property on the shores was excluded by the ALJ because they were characterized as secondary economic impacts.
39. The DNR's argument is that economic issues are only relevant if there is inundation, and the green ash and corn acreage were flooded. The Court finds this point difficult to accept. Nor does the court find all that persuasive the argument that the holding in the *Wisconsin Environmental Decade* case should exclude this evidence. Under Wisconsin law the trier of fact is not bound by any expert's opinion and is to determine the weight it deserves. The trier of fact may accept some, all or none of an expert's opinion.
40. Although based on projections and assumptions, this expert testimony was not inadmissible on the grounds of speculation. Economic expert testimony in particular is based on assumptions and projections. The court therefore does not agree with the evidentiary rulings that allowed the property loss testimony on

