

Appeal No. 2008AP1523

Cir. Ct. No. 2006CV1846

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

**ROCK-KOSHKONONG LAKE DISTRICT, ROCK RIVER-
KOSHKONONG ASSOCIATION, INC. AND LAKE
KOSHKONONG RECREATIONAL ASSOCIATION, INC.,**

PETITIONERS-APPELLANTS,

v.

**STATE OF WISCONSIN DEPARTMENT OF NATURAL
RESOURCES,**

RESPONDENT-RESPONDENT,

**LAKE KOSHKONONG WETLAND ASSOCIATION, INC. AND
THIEBEAU HUNTING CLUB,**

INTERVENORS-RESPONDENTS.

FILED

JUL 29, 2010

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Higginbotham, JJ.

WISCONSIN STAT. § 31.02(1) (2007-08)¹ gives the Department of Natural Resources power to regulate water levels on impounded lakes “in the interest of public rights in navigable waters or to promote safety and protect life, health and property.” The primary issue in this case is whether the mandate to

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

“protect property” requires the DNR, in making water level decisions, to consider evidence of the economic effect on property values, business income and public revenues in the surrounding area. We believe this question is of significant statewide concern, given the number of impounded lakes in Wisconsin. We also believe that it remains unresolved by existing case law. We therefore certify this appeal.

FACTS

The Rock-Koshkonong Lake District petitioned the DNR to increase lake levels on Lake Koshkonong. But for minor adjustments, the DNR denied the petition after a contested case hearing, in the process excluding evidence the District offered to prove that raising the water level would economically benefit lake front property owners, lake-related businesses, and local municipalities. The hearing examiner excluded that evidence based on his conclusion that evidence of “secondary or indirect economic impacts” was inadmissible under *Wisconsin’s Environmental Decade, Inc. v. DNR*, 115 Wis. 2d 381, 394-97, 340 N.W.2d 722 (1983). In that case, the supreme court held that the Wisconsin Environmental Policy Act required the DNR to consider the direct, physical environmental impacts of a proposed construction project, but not its socioeconomic impacts, in determining whether to require an environmental impact statement.

On judicial review, the Rock County Circuit Court affirmed the DNR’s decision. The District and other interested parties have appealed.

DISCUSSION

As noted, the certified issue is whether the DNR, under the mandate to protect property set forth in WIS. STAT. § 31.02(1), must consider evidence of

the economic effect of the decision on the surrounding area when determining water levels on impounded lakes.²

The DNR contends that the legislature intended the section's use of the term "protect ... property" to mean protection of property from direct physical impact, not protection of property owners from lesser appreciation of property values, or business owners from lower income, or municipalities from lower tax revenue. In support, it points to the plain dictionary meaning of "protect," as in keeping from harm or injury. It also points out that, unlike here, the legislature has unequivocally instructed the DNR in other contexts to consider the economic impacts of its actions. For example, WIS. STAT. § 30.195(2)(c)2 expressly requires the DNR to consider improvement to the economic value of land when granting or denying permits to alter the course of navigable streams, and WIS. STAT. § 285.01(12) expressly requires it to consider economic impacts in setting air pollution standards. For the DNR, the absence of any such express provision in WIS. STAT. § 31.02(1) is instructive if not definitive. In its view, the section "draws a distinct line between the direct impacts caused by hydrologic changes and the economic implications of those impacts.... To expand the reach of § 31.02(1) to economic implications of these impacts, such as whether a marina nearby may sell more or fewer boats for use in the lake, has no logical stopping point." In short, the DNR argues that its decision properly takes into account the direct physical impact of the current versus the proposed water levels, while

² The appellants also contend that WIS. STAT. § 31.02(1) bars considering the effects of a water level order on private lands located above the ordinary high water mark and that the DNR may not apply the wetland provisions of WIS. ADMIN. CODE § NR 103 to its water level decisions. We believe that these latter two issues can be resolved by existing law.

stopping short of considering the economic effect of current versus proposed levels.

In response, the appellants argue that the legislature clearly intended to protect property values and economic benefits derived from impounded waters, when it first enacted the predecessor to WIS. STAT. § 31.02(1) in 1915. They also cite Wisconsin cases going back to 1897 which, in their view, recognize the relationship between regulating impoundment water levels and the “investment-backed expectations of citizens who invest in waterfront property on impoundments and the need to consider their economic interests.” They also contend that the directive in § 31.02(1) to protect property must mean something other than direct hydrologic impact, such as flooding, because property owners are protected in other ways from such direct impacts. In summary, the appellants argue

[c]orrectly applied, sec. 31.02(1) requires the Department to weigh the extent to which the Department’s order, and resulting lower water levels during the summer boating season, diminishes property values and economic activity in the area. This interpretation is consistent with case law and ... legislative intent. Most importantly, this construction of the statute appropriately recognizes the extent to which economic interests have organized around Koshkonong *as a lake* since the dam was raised in the mid 19th century.

We believe that neither prior case law nor legislative history provide a clear answer to the issue discussed in this certification. We agree with the appellants that the holding of *Wisconsin’s Environmental Decade v. DNR* does not control whether evidence of economic impact is admissible in this case. It does not necessarily follow, in our view, that because the DNR may exclude evidence of economic impact when deciding whether an environmental impact statement is required, it may exclude such evidence when determining

impoundment water levels under a different statutory directive. Consequently, the meaning of “protect ... property” in WIS. STAT. § 31.02(1) as it pertains to land value, business income and tax revenues remains ambiguous.

We recognize that, because this action is a judicial review of an administrative agency decision, the threshold question in interpreting WIS. STAT. § 31.02(1) is whether to give great weight, due weight or no weight to the DNR’s determination that it excludes evidence of economic impacts. See *Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶37, 282 Wis. 2d 250, 700 N.W.2d 768 (citing *Hutson v. Wisconsin Pers. Comm’n*, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212). The reviewing court owes no deference to an agency’s decision that concerns the scope of its own power. *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶¶11-12, 270 Wis. 2d 318, 677 N.W.2d 612.

Here, the DNR contends that the reviewing court owes great weight deference to its interpretation of WIS. STAT. § 31.02(1) to exclude evidence of economic benefit in making water level decisions. The appellants contend that the DNR is owed no deference. We think it apparent that if the DNR can determine water levels for impounded bodies of water without considering evidence of the economic effect of its order on waterfront property values, lake-related business income and area tax revenues, then it has substantially greater authority in the matter. Therefore, great weight deference is not appropriate because the issue appears to be one of the DNR’s authority. A lesser degree of deference, or no deference, means that the ambiguity in § 31.02(1) will not be resolved in the DNR’s favor simply because its construction is reasonable. See *Clean Wis.*, 282 Wis. 2d 250, ¶41.

There are literally hundreds of fully or partially impounded bodies of water in Wisconsin, including many of the largest lakes in the State, subject to water level regulation under this section. We believe that resolving whether the DNR must consider the economic effects of water levels on impounded lakes is of great public importance, and the supreme court is the appropriate forum to decide the issue.

