



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Objection of the Tri-County
PowerBoat Alliance to the Slow-No-Wake
Ordinance Number 10-B for the Town of Wolf
River Waters Enacted by the Town of Wolf River
in Winnebago County, Wisconsin

Case No.: IH-09-04

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Oshkosh, Wisconsin on August 6, 2009, Jeffrey D. Boldt, administrative law judge, presiding. The parties jointly requested the opportunity to present written closing arguments and the last was received on August 31, 2009.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. On April 27, 2009, the Town Board of the Town of Wolf River, Winnebago County enacted a slow-no-wake ordinance to regulate boating upon the waters of the Town of Wolf River. The town ordinance, 10-B, extended the slow-no-wake area on the town of Wolf River by .55 of a mile.
2. The Department of Natural Resources received a request for hearing objecting to ordinance number 10-B from Attorney Richard J. Carlson, on behalf of the Tri-County PowerBoat Alliance on March 30, 2009.
3. On June 26, 2009, the Department filed a Request for Hearing with the Division of Hearings and Appeals.
4. The intent of ordinance 10-B is to provide “safe and healthful conditions for the enjoyment of aquatic recreation consistent with public rights and interests, and the capability of the water resources.” (Ex. DNR-B) The ordinance prohibits operation of “a boat faster than slow-no-wake... between the hours of 12:01 a.m. Saturday to 12:00 midnight Sunday and holidays from 12:01 a.m. to 12:00 midnight.” (Id.)

The area extends an existing slow-no-wake area to the following new areas:

- (a) In the cut-off (Government Channel) between the south or Poygan end (GPS Coordinates N44° 10.147', W88° 47.062') and the north or River end (GPS Coordinates N44° 10.771', W88° 48.065').
 - (b) On the Rat River from approximately 100 yards east of Kiesow's Landing (GPS Coordinates N44° 11.393', W88° 46.878') to approximately 100 yards west of Kiesow's Landing (GPS Coordinates N44° 11.423', W88° 46.989').
 - (c) On the Wolf River from Lenz Point (GPS Coordinates N44° 10.416', W88° 48.868') to Page's Slough (GPS Coordinates N44° 10.572', W88° 48.790).
 - (d) On the Wolf River from Naparalla's Ditch (GPS Coordinates N44° 12.615', W88° 49.570') to the north end of the Triangle Farms Campground boat ramp (GPS Coordinates N44° 13.638', W88° 50.440'). (Id.)
5. The ordinance is being challenged by the Tri-County PowerBoat Alliance, a “boating organization” within the meaning of Wis. Stat. § 30.77(3)(20). The PowerBoat Alliance has done much to enhance boating safety on the Wolf River, including providing boater education and navigational aids. The group has supported slow-no-wake measures in other areas of the Wolf River. (Groves) In opposing the slow-no-wake extension, they presented data that

there were no “reportable” accidents in the subject area during the period of 2006 to 2008. (Ex.3) They also noted the width of the river in the area of the new extension and argue that the ordinance is thus not necessary for public safety.

6. The shore line in the area subject to the ordinance 10-B is highly developed and includes numerous cottages, homes, and a campground. Many if not most have pier slips and boating activity is intense on weekends and holidays. The slow-no- wake extension increases boating time between Lake Poygon to Fremont by up to 12 minutes.

7. The area of the river subject to the slow-no- wake extension is more heavily developed than adjacent areas of the river. (Kaderabek, Rutten, Hall.) The Town of Wolf River Chairman, Randal Rutten, testified that he no longer boats on the river because he doesn’t feel safe in his 16-foot boat, which is now smaller in comparison to many others on the river. Rutten attributes this lack of a safe environment to dangers caused by the wake of larger boats. As a volunteer firefighter and first responder, he has seen the results of accidents, including an incident where one boat rode over another, a wake-caused accident, and other accidents in the area. The Town has no budget for increased police presence. (Rutten)

Daniel Rudebeck, who is involved in habitat issues for the Lake Poygon Sportsmen’s Club, testified about a recent incident where four powerboats created a large wake that put himself, his passengers and his pontoon in danger as they attempted to disembark.

Joe Hall, the owner of the Triangle Campground, noted that he had personally witnessed campground dock users sustaining injuries because of high wakes at his dock. These included cuts and bruises, as well as a torn rotator cuff. Similar incidents were described by Don Steege and Warden Knorr.

A preponderance of the credible testimony demonstrated overwhelmingly that the congestion and high rates of speed in the area subject to the slow-no-wake extension creates a likely safety hazard.

8. Warden Jeffrey Knorr testified concerning the safety conditions on the river in the area of the slow-no-wake extension. He has been a warden assigned to the Wolf River for ten years. Warden Knorr testified that the river is approximately 116 yards wide in the widest area subject to the new ordinance, but that the boating channel was at least 10 yards less because of docks, weeds and other shoreline features. Warden Knorr noted that the area of the river in question has significant congestion, problems with speed, and multiple users and uses. Knorr has shared these concerns with municipalities on the river, but he testified that the town has to decide how best to regulate to solve these problems. Warden Knorr showed several video clips, provided in DVD form, as Ex. Q. These clips comprise a video overview of the slow-no-wake zone.

Warden Knorr did not want to express a direct opinion on whether the Town ordinance was needed. However, the video clips he presented provided striking testimony which established that ordinance 10-B was reasonable and necessary in light of the heavy traffic, rapid speeds and multiple user types on the waterway. One boat was going over 53 MPH in this

heavily used and highly developed section of the waterway. Knorr testified of the potential dangers inherent if boats traveling at this rate of speed were to hit a wave or wake produced from another boat. There are also people fishing on small boats and rafts who would be put at risk by the wakes generated at these high rates of speed. Further, Warden Knorr did express an opinion that the area of the Wolf River subject to ordinance 10-B was safer as a result of its passage.

9. The Town of Wolf River did not abuse its discretion nor unreasonably impact public rights in public waters by adopting the weekend and holidays slow-no-wake extension.

DISCUSSION

The Town of Wolf River has made the judgment that the extension of the slow-no-wake ordinance was necessary for public health and safety. There was nothing in the hearing record which established that this was an unreasonable judgment for the Town to have reached. Rather, there was fairly dramatic video evidence which demonstrated the potential safety hazards which the Town cited as its rationale for Ordinance 10-B. Further, on its face, the Ordinance is only in force during weekends and holidays when user conflicts and potential safety hazards are at their peak. This is not a case of the Town just protecting the interests of riparians, as the Tri-County PowerBoat Alliance suggests. The safety of all weekend and holiday users of the extension area of the Wolf River will be enhanced by the Town's reasonable boating regulation as set forth in Ordinance 10-B.

The PowerBoat Alliance may well be correct that some other alternative besides extending the slow-no-wake would address the Town's reasonable safety concerns about the congestion and high rates of speed in this highly developed area of the river. Clearly some other lesser reduction in speed would also reduce the likelihood of a serious accident. However, unlike wetland regulations (See: NR 103, Wisc. Admin.Code), the issue for review in this matter is not whether other alternatives would be practicable, but whether or not the Town had a reasonable basis to conclude that the ordinance was necessary and consistent with Chapter 30, Stats.

The Town established that there were likely safety hazards to waterway users prior to enactment of the Ordinance, and that these safety hazards have been greatly reduced as a result of the Ordinance. Further, the river will now be more available for other uses, including swimming and fishing, during the limited time period subject to the Ordinance. This is entirely consistent with the tradition of the "balancing" of both public and private rights and multiple user types under both Chapter 30 and the Public Trust Doctrine.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear contested cases and issue necessary orders in matters relating to objections to boating regulations under 30.77(3)(dm)2g pursuant to § 227.43.

2. If a local entity or a boating organization objects to an ordinance enacted under par. (a) that applies to a river or stream, or to an ordinance enacted under par. (b), on the grounds

that all or a portion of the ordinance is not necessary for public health, safety, welfare or the public's interest in preserving the state's natural resources, the procedure under subd. 2r. shall apply. See 30.77(3)(dm)2g. The Tri-County PowerBoat Alliance is a local boating organization that entered an objection to the Slow-No-Wake Ordinance Number 10 B for the Town of Wolf River.

3. The ordinance is not “contrary to or inconsistent with” Chapter 30. The objectors did not establish that “the ordinance or any portion of the ordinance is not necessary for public health, safety, welfare or the public's interest in preserving the state's natural resources.”

6. The preponderance of the credible testimony established that the Town of Wolf River ordinance B-10 was reasonable and necessary for the public’s health and safety given the congestion and likely safety hazards at the extension site.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the objection of the Tri-County PowerBoat Alliance to the Slow-No-Wake Ordinance Number 10 B for the Town of Wolf River Waters Enacted by the Town of Wolf River in Winnebago County, Wisconsin, be DENIED and the petition for review DISMISSED.

Dated at Madison, Wisconsin on September 25, 2009.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.