



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Application of the Racine  
County Drainage District to Modify the Order  
Setting Water Levels or Flows on Wind Lake,  
Town of Norway, Racine County

Case No. IP-SE-2006-52-0684

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMIT AND ORDER**

The Racine County Drainage District, 500 College Avenue, Racine, Wisconsin, 53430, filed an application with the Department of Natural Resources (Department) on October 20, 2006, to modify the order setting water levels or flows on Wind Lake. The proposed project is located in the NW ¼ of Section 16, Township 4 North, Range 20 East, Town of Norway, Racine County. The applicant originally proposed to re-instate the 1-2 foot winter drawdown that occurred on Wind Lake from 1977 until 2002 for the purposes of flood control.

The Department issued Notice of Complete Application, Notice of Public Information Hearing and Notice of Public Comment Period for Environmental Assessment. The Department completed an Environmental Assessment and held a public information hearing. On October 22, 2008, the Department issued Findings of Fact and Order which denied the permit application.

On November 21, 2008, the Department received a request for contested case hearing from Attorney John W. Knuteson, on behalf of the Racine County Board of Drainage Commissioners. By letter dated December 8, 2008, the Department granted a contested case hearing pursuant to Wis. Stat. § 227.42.

On January 22, 2009, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources. A telephone prehearing conference was held on February 13, 2009. The parties agreed to a briefing schedule on a Motion for Summary Judgment by the Drainage District. The last brief was received on April 20, 2009. On May 6, 2009, the Division issued a Ruling Denying the Motion for Summary Judgment. A hearing was set for August 31, 2009. The parties requested an adjournment to pursue a stipulated settlement.

A telephone prehearing conference was held on September 30, 2009. The parties indicated that they were close to a Stipulated Settlement. On October 16, 2009, the parties completed the Stipulated Settlement. All parties except Mr. Humpfrey agreed to the Stipulation. Accordingly, pursuant to NR 2.13 (2)(d) and the September 30, 2009 prehearing Order, the

burden of proof shifted to Mr. Humpfrey to establish why the proposed Order did not meet the legal standards described below in the Conclusions of Law.

Pursuant to due notice and the agreement of the parties, hearing in this matter was held on October 23, 2009. Testimony was taken from Humpfrey, as well as Drainage District and DNR witnesses by telephone by the agreement of the parties.

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

Department of Natural Resources, by

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Racine County Drainage District, by

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Wind Lake Management District, by

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#### ADOPTED FINDINGS OF FACT

1. The Racine County Drainage District (the District), 500 College Ave, Racine, Wisconsin, 53430, filed an application with the Department on 10/10/2006, under section 31.02(1), Wisconsin Statutes, to modify the order setting water levels or flows on Wind Lake,

located in the in the NW ¼ of Section 16, Township 4 North, Range 20 East, Town of Norway, Racine County.

2. Wind Lake is navigable in fact at the project site and drains into the Wind Lake Canal which is a historically navigable waterbody located within the Norway-Dover Drainage District.

3. The project will be consistent with the public interest in the navigable waters, for the following reasons:

Wind Lake had a winter drawdown of 2 feet from 1977 until 2000 and 1 foot from 2000 until 2002. Beginning in 1999, the Lake District applied to eliminate the drawdown due to inadequate navigational depths, shoreline erosion, and adverse impacts to fish and hibernating herptiles.

Since the denial of the initial operational order and subsequent appeal of the decision, the applicant the Wind Lake Management District and the Department have been negotiating an operational order which is sufficient for all parties in protecting the public interests and rights in Wind Lake and Wind Lake Canal.

4. Wind Lake and the Wind Lake Canal are navigable in fact at the location of the dam.

5. The levels prescribed in the order will protect the public interests in fish and game habitat and for recreational uses. The order will result in the gradual lowering and raising of the water levels

6. The water is a warm water fishery. The proposed water level will not result in significant adverse effects on this resource upon compliance with the conditions in the order.

7. The waterway is not listed as a trout stream in Department of Natural Resources Publication 6-3600(80).

8. The proposed project will result in impacts to the shoreland-wetlands along Wind Lake. Although the impacts are not anticipated to be substantial, the changes in water levels may result in changes to the wetlands' hydrology and subsequent changes in the wetland boundaries. One of the goals in eliminating the winter drawdown was to eliminate the perceived impacts of the winter drawdown on aquatic species and herptiles, which rely on the wetlands to complete their life cycle. Since 2002 the science and knowledge of these species' life cycle have advanced. As such the Department's Wildlife Biologists and Fisheries Biologists have re-evaluated the impacts of a winter drawdown on the Wind Lake's species, and have determined that operation of the dam, in compliance with this order, should not result in significant adverse impacts to the aquatic species or herptiles inhabiting this ecosystem.

9. The project will conform to the standards in Chapters 31.02, Wisconsin Statutes.

10. The proposed project will not adversely affect water quality and will not increase water pollution in Wind Lake or cause environmental pollution as defined in Subsection 283.01, Wisconsin Statutes.

11. The Department has evaluated the proposed project in light of the Wisconsin Environmental Policy Act (Section 1.11, Wisconsin Statutes) and has determined that the grant or denial of the permit would not be a major state action significantly affecting the quality of the human environment. The Department completed an Environmental Assessment and held a public hearing for the initial proposal on September 10, 2008.

#### ADDITIONAL FINDINGS

12. Mr. Humpfrey expressed numerous concerns related to erosion impacts from drawdown flow velocity, drainage canal integrity, colonization by invasive plant species including Eurasian water milfoil (EWM), weakening of ice in winter and potential impacts on endangered or threatened species including Blanding's turtle. All of Humpfrey's concerns were specifically addressed by expert witnesses presented by the Department and the Drainage District.

13. Racine County Drainage District Commissioner Alan Jasperson testified that the District is concerned about flood damage to agricultural properties since the winter drawdown was rescinded in 2002. The winter drawdown is effective, according to Jasperson, because runoff in agricultural areas is more likely to cause flooding when the ground is frozen. The District would prefer a drawdown of greater than six inches, but has agreed to the Stipulation as compromise. (The compromise agreement also involves placement of some gauges and allowing the District to undertake joint operation of the dam with the Wind lake Management District.)

The canal handled both the one foot and two foot drawdowns of previous years without any significant erosion problems. Jasperson testified District engineers had calculated the flow capacity of the canal at 173 cubic feet per second, or approximately 108 million gallons per day. (Id.) This is more than ten times greater than the expected flows cited by Humpfrey in his objection. Further, the District has recently cleaned out debris and accumulated sediment and trimmed trees to prevent further accumulation of debris in the drainage canal. Neither dam safety engineer Sturtevant, nor Commissioner Jasperson had any concerns about the integrity of the drainage canal as a result of the six-inch winter drawdown.

Further, the District stated that it would not object to an additional permit condition which required the *submission* of district specifications to DATCP under Wis. Stat. § 48.20, prior to the 2010 drawdown. Further, they have agreed to provide a copy to the area DNR Water Management Specialist for her review prior to the drawdown. Obviously, neither the drainage district nor the DNR have any ability to impact the timing of whether and when such plans are approved by that agency. This condition is responsive to Mr. Humpfrey's concerns about the integrity of the drainage canals, even though he did *not* establish that the proposed order in any way posed a threat to such canals.

14. DNR Dam Safety Engineer William Sturtevant provided expert testimony that reinforced many of Jasperson's conclusions and which addressed several of Mr. Humpfrey's concerns. Sturtevant testified that the dam could safely handle the drawdown without causing detrimental changes as a result of flow velocity downstream. Further, the existing dam-controlled water level is three to four feet higher than natural lake conditions on Wind Lake.

Sturtevant also opined that driving on the ice on Wind Lake is always an inherently dangerous activity given expected ice depths of 12 to 18 inches. The drawdown is unlikely to significantly impact ice depths, but the increased flows in winter months could lead to some ice patches being less stable. (Sturtevant) **Sturtevant urged the County or other enforcing governmental units to ban driving on the ice on Wind Lake, whether or not the drawdown is approved.** The Division does not have any authority in this regard but agrees that Sturtevant made a compelling safety case for such a ban.

15. Marty Johnson, DNR Wildlife Biologist, testified that he had strong concerns about detrimental impacts to frogs, turtles and other hibernating herpetiles if the drawdown was undertaken this year, given the lateness in the season. Both frogs (including bull and leopard frogs) and turtles (including the threatened Blandings turtle) hibernate in the lake and would become exposed by a drawdown and risk death if the drawdown is undertaken after they have gotten into their hibernation preparation mode. Hibernation is a process that takes place over a period of several days. Johnson testified that the proposed October 1<sup>st</sup> in the stipulation would be protective of herpetiles under most ordinary seasonal conditions. Further, the earlier two-foot drawdowns, which led to a die-off of herpetiles, were done rapidly and in late December while the proposed drawdowns under the stipulation will take place slowly (for up to 15 days) and before October 1<sup>st</sup>. The water temperature at the last reading in late October was 48 degrees Fahrenheit. (Johnson) However, Mr. Johnson strongly opposed allowing the drawdown to occur in the 2009 season given the late date and the likelihood that many frogs and turtles are already well into the hibernation process. His expert testimony on this point was not rebutted by a witness for any other party.

16. DNR Area Water Management Specialist Heidi Kennedy testified that the six inch drawdown would not have a detrimental impact upon the public waters of Wind Lake or its biological resources. The drawdown will not detrimentally impact the propagation of invasive plant species on Wind Lake. Kennedy testified that she consulted with Craig Helker, a DNR expert on aquatic plants on Wind Lake and in the southeast area of the state. One benefit of the winter drawdown would be a likely die-off of EWM plants fully exposed to frozen conditions and not protected by the ice cover. (Kennedy; Ex. 7-a) While most native aquatic plant species are hardy enough to survive winter exposure, many invasive plants are not and perish from winter exposure. (Id.)

## DISCUSSION

As a self-described non-expert "concerned citizen," Mr. Humpfrey expressed numerous concerns about the proposed drawdown compromise. The original petition was for a one foot to two foot winter drawdown, and the compromise Stipulation (attached as Ex. 2) agreed to by all

parties except Humpfrey is for a six inch winter drawdown. Humpfrey listed his concerns in his October 16, 2009, written objection and his testimony. In general, his concerns related to erosion impacts from drawdown flow velocity, drainage canal integrity, colonization by invasive plant species including Eurasian water milfoil (EWM), and potential impacts on endangered or threatened species including Blanding's turtle. All of Humpfrey's concerns were specifically addressed by expert witnesses presented by the Department and the Drainage District.

There are two minor changes to the Stipulation in light of the testimony at hearing. First, the Order is clarified to make it clear that the drawdown will begin in October, 2010. This is a reasonable and necessary amendment in light of the testimony of Mr. Johnson relating to potential detrimental and even catastrophic impacts upon herpetiles if they were to become exposed after having already commenced the hibernation process. Second, although there was no showing on this record that there was any problem with the ability of the drainage canal to handle expected drawdown flow, the District has agreed to *submit* its district specifications to DATCP (with a copy to DNR) under sec.48.20, Stats., prior to the 2010 drawdown. Obviously, neither the District nor the ALJ have any control as to whether or not DACTP approves the same.

#### CONCLUSIONS OF LAW

1. The Department has authority under Wis. Stat. § 31.02(1) and the foregoing Findings of Fact, to issue an order approving the permit requested. The Division of Hearings and Appeals has authority to review such orders pursuant to §227.43(1)(b), Stats. The conditions in the Order set forth below are reasonable and necessary to protect the public interest in navigable waters.

2. The Department has complied with Wis. Stat. § 1.11. The Department determined that the grant or denial of the permit would not be a major state action significantly affecting the quality of the human environment. The Department completed an Environmental Assessment and held a public hearing for the initial proposal on September 10, 2008.

#### ORDER

IT IS THEREFORE ORDERED THAT the application of the Racine County Drainage District under Section 31.02(1), Wisconsin Statutes, to modify an order setting water levels or flows on Wind Lake, located in the in the NW ¼ of Section 16, Township 4 North, Range 20 East, Town of Norway, Racine County, be, and the same is hereby approved subject to the following conditions:

1. The normal water level is established at 95.15 feet (PCS datum). The normal water level should be maintained to the maximum extent practicable by the reasonable and proper operation of the Wind Lake Dam.

2. Although there is no established maximum or minimum water level, operation of the dam should be consistent with keeping water levels within 0.3 feet above or below the normal water elevation. To achieve this result the operator should begin operating the gates on the dam when water levels reach 0.2 feet above or below the spillway.
3. Operation of the gates, in compliance with this order, shall be based upon water levels measured relative to the benchmark located at the dam. Readings from the stream gauges, at the dam, upstream and/or downstream of the dam, shall not control any decision to operate the gates but should be used to derive a relationship between the benchmark readings and expected water levels.
4. Beginning on October 1<sup>st</sup> of each year, the water levels should be lowered to 94.65 feet (PSC datum), as measured relative to the benchmark located at the dam. The drawdown of the lake shall be completed by October 15<sup>th</sup> of each year and be accomplished in such a manner so as to avoid impacts to herptile species.
5. Beginning on March 1<sup>st</sup> of each year, the water levels must be raised to 95.15 feet (PSC datum), as measured relative to the benchmark located at the dam. Raising of the water levels shall be completed by March 15<sup>th</sup> of each year and shall be accomplished in such a manner so as to reduce impacts to northern pike spawning.
6. The drawdown shall commence no sooner than October, 2010.
7. Prior to the October, 2010, drawdown, the Drainage District shall submit specifications in accordance with the requirements of Wis. Admin. Code DATCP § 48.20.

Dated at Madison, Wisconsin on November 16, 2009.

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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.