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pro bono publico

June 2, 2006

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Via Email and Regular Mail

Todd Ambs
Water Division Administrator
Department of Natural Resources
101 S Webster Street
Madison WI 53703

Re: Waupaca Country Club Water Diversion Permit # IP-NE-2005-69-0602WL and Shanak Dam Minimum Flow Requirements # FF 68.14.

Dear Mr. Koehnke:

On behalf of Midwest Environmental Advocates, the River Alliance of Wisconsin, Wisconsin Wildlife Federation, Friends of the Tomorrow-Waupaca River, Wisconsin Council of Trout Unlimited, Frank Hornberg Chapter of Trout Unlimited, Central Region of Wisconsin Trout Unlimited, and Fox Valley Chapter of Trout Unlimited, we are writing to request that:

1. The DNR initiate an enforcement action against the Lighting Plant (Shanak) Dam for past and ongoing violations of Chapter 31.
2. The DNR initiate an enforcement action against the Waupaca Country Club (WCC) for past violations of Chapter 30;
3. The DNR charges the full after-the-fact application fees to the WCC; and
4. The DNR modifies the WCC water diversion permit # IP-NE-2005-69-0602WL to include adequate assurances of compliance.

1. The DNR Should Bring an Enforcement Action against the Lighting Plant (Shanak) Dam.

We have found that although the WCC is exacerbating low flow conditions on the Waupaca River, the Shanak Dam is – by many DNR accounts – a significant problem on this river. We request that the DNR brings an

enforcement action against the Shanak Dam for illegally violating minimum flow requirements.

Section 31.34 of the Wisconsin Statutes requires that “any navigable stream shall pass at all times at least 25% of the natural low flow” of the stream, and any person who violates the low flow requirement “shall be fined not less than \$50 nor more than \$1,000.” The 25% low flow of the Waupaca River corresponds to the seven-day low flow that occurs once every ten years, or the Q7, 10. The USGS calculated the Q7, 10 for the Waupaca River at 77 cubic feet per second (cfs).

The Shanak Dam is therefore required to release at least 77 cfs of water. However, according to Scott Koehnke, DNR Water Management Specialist, in January of 2006, he saw the water running below the dam at about 46 cfs, and again in April of 2006, he saw the water running at about 44 or 45 cfs. According to DNR staff, the dam has violated the minimum low flow requirements, yet has not been prosecuted as required under section 31.34 of the Wisconsin Statutes.

The DNR has received numerous complaints from members of the public who have witnessed increased sedimentation and reduced fish populations that correspond to the erratic river flows:

The Department has received many, many complaints over the years regarding the operation of the Shanak Dam (just upstream) by trout anglers, canoeists, environmentalists and concerned citizens.

Email from Scott Koehnke, DNR, September 9, 2004. The Shanak Dam has been violating the state’s minimum low flow requirements to the detriment of public rights. We urge the DNR to bring an enforcement action against the Shanak Dam to deter the dam from future violations of Chapter 31, and increase the consistency of the flows below the dam.

2. The DNR Should Bring an Enforcement Action Against WCC.

We request that the DNR brings an enforcement action against the WCC for past illegal diversions of water from the Waupaca River to irrigate its golf course. According to our conversations with Scott Koehnke, DNR Water Management Specialist, WCC knew in 2001 that it needed to obtain a permit under section 30.18 of the Wisconsin Statutes, prior to diverting any water from the Waupaca River to irrigate its land.

Mr. Koehnke informed us that despite WCC’s knowledge of the legal requirements, it has diverted water from the river throughout the summer months. To make matters worse, Mr. Koehnke said that the WCC even continued to divert water without a permit during an emergency drought order.

DNR Form 3500-053A regarding *Fees for Applications to Alter Lakes, Streams or Wetlands* states that “[p]rojects started or completed without obtaining the appropriate

permits are subject to enforcement actions.” The WCC project was started and completed without obtaining a permit, and is therefore subject to an enforcement action.

Because the WCC is a flagrant violator of the laws of this state that were intended to protect the public trust in our rivers, we urge that the DNR brings an enforcement action against the WCC. DNR Water Management Specialist, Scott Koehnke, in an email dated September 9, 2004, echoed these sentiments when he stated:

The Waupaca CC was knowingly diverting water after having been told by myself in 2002 on site, in a letter from me dated Nov. 2003 and from correspondence from Simon and Ambs – 2004. At what point do we start an enforcement case against the country club? They’ve been told on several occasions to stop diverting and they continue to divert. Why/how do we allow this to continue without enforcement?

Mr. Koehnke then goes on to say:

The peaking that takes place on this section of the Waupaca River is already placing undo stress on the critters and water quality/quantity. The Country Club is exacerbating the stress by unauthorized diversions. . . . I don’t see how the department can ignore the blatant, continued violation of statute regarding the diversion for irrigation. Consistency needs to be addressed here.

The WCC repeatedly illegally placed stress on the water and wildlife quality and quantity, and thereby threatened the public rights protected under section 30.18 of the Wisconsin Statutes. We agree with Mr. Koehnke that consistency be addressed and also that the DNR follows through with an enforcement action to hold an illegal diverter responsible for its actions.

We are concerned that the DNR would set a dangerous precedent if it allowed the illegal diversion of large amounts of water to continue, unchecked, for long periods of time. An email from Mr. Carl Mesman, dated July 11, 2005, speaks for itself:

Can we issue a citation, yes. Should we at this time is another issue. . . . If we had a political atmosphere that was pro protection and pro public rights then it would be much easier. The fact is that we have a climate of private property rights.

The Legislature created section 30.18 to protect public rights in our state’s waters, not private property rights. It is not for a DNR staffer to decide to ignore the clear intent of the legislature in favor of his perception of a small but vocal minority in this state.

Together, the River Alliance of Wisconsin, Friends of the Tomorrow-Waupaca River, the Wisconsin Council of Trout Unlimited (and a variety of its chapters), and the Wisconsin Wildlife Federation represent scores of thousands of members in Wisconsin who are here

to remind the DNR that their job is to protect public rights and the way to do that is to enforce ongoing and knowing violations of our state laws.

2. The WCC Should be Required to Pay the Standard Doubling of the Permit Fees to Obtain an After-the-fact Permit.

The DNR has a practice of issuing “after-the-fact” permits to facilities that have been operating illegally. Violators of Chapter 30 should not be rewarded with permits that simply legalize their former illegal behavior. However, if the DNR does issue an after-the-fact permit, at a minimum it must charge the full permit fee. To do otherwise, cheats the public of the fees that are established and should be uniformly imposed.

DNR Form 3500-053A regarding *Fees for Applications to Alter Lakes, Streams or Wetlands* states that “[a]fter-the-fact applications, for permits or approvals submitted after work has been commenced or completed, require twice the usual fee.”

The WCC applied for a diversion permit many years after it had commenced diverting water from the Waupaca River, but paid only the regular permit fee of \$500. The WCC owes the state an additional \$500. The failure to collect this additional fee is arbitrary, fails to apply the rules in a uniform manner, does nothing to discourage others from undertaking regulated activities without obtaining permits, and cheats the public of the money due to pay for government services.

The DNR must collect the additional fee due to the government.

3. The DNR Should Modify the Water Diversion Permit to Ensure Protections of Public Rights in the Waupaca River.

As we have described above, the WCC has a history of illegally diverting water from the Waupaca River. According to the DNR, the WCC has known since around 2001 that a permit is required to divert water for purposes of irrigation pursuant to section 30.18 of the Wisconsin Statutes, but has diverted water without the required permit, even in times of an emergency drought order.

All permits should have mechanisms in them to increase the likelihood of compliance. However, this is even more critical for permittees that have violated the law. Given the WCC’s history of illegal diversions, the following permit modifications are necessary to ensure the WCC does not continue to violate Wisconsin law and consequently injure public rights.

According to its permit, the WCC may not divert water when the level of the Waupaca River drops below the Public Rights Stage (PRS) set by the DNR at 811.80 feet, Mean Sea Level (MSL). Diversion below the PRS is illegal and would have serious consequences to public rights.

We request that the permit be modified to require an automatic shut-off valve be installed at the WCC pumphouse diversion site. It should not be possible to manually override the system. Currently, the WCC has no mechanism in place to automatically stop water diversion when the level of the Waupaca River drops below the PRS. Installing a mechanism that cannot be overridden to automatically shut-off the system when water levels drop below the PRS will increase the likelihood that the WCC will not illegally divert water below the PRS.

We further request that the permit be modified to require two identifiable markings to indicate when the Waupaca River falls below the PRS. One identifiable marking should be plainly visible at the WCC diversion site. Another identifiable marking should be plainly visible to members of the public and the DNR directly downstream at the bridge crossing near Riverside Park. These markings will serve to inform the WCC staff, DNR and the general public when the river has fallen below the PRS and can no longer be diverted.

Conclusion

Midwest Environmental Advocates, the River Alliance of Wisconsin, Wisconsin Wildlife Federation, Friends of the Tomorrow-Waupaca River, Wisconsin Council of Trout Unlimited, Frank Hornberg Chapter of Trout Unlimited, Central Region of Wisconsin Trout Unlimited, and Fox Valley Chapter of Trout Unlimited urge the DNR to consider and adopt the changes and actions proposed in this letter.

Thank you for your attention to this matter and support for public rights in our rivers. If you have any questions or concerns, do not hesitate to contact Melissa Scanlan at 608-251-5047 ext. 3.

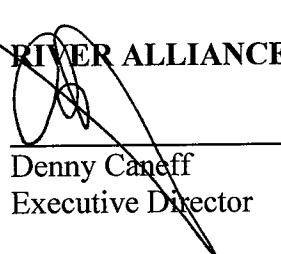
Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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- cc. Edward Witte, Attorney for WCC
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