

Wetlands advocacy groups accept DNR compromise

By Kim McDarison Special to the Union | Posted: Wednesday, August 31, 2016 9:32 am

MILTON — Two wetlands advocacy groups recently approved a Wisconsin Department of Natural Resources proposal allowing the water level of Lake Koshkonong to be raised by 5 inches over a two-year period.

The Lake Koshkonong Wetland Association (LKWA) and the Thibeau Hunt Club were two of six entities, including the DNR, involved in litigation over lake water levels, with another interest, the Rock-Koshkonong Lake District (RKLD), approving the deal in July.

The Rock River-Koshkonong Association and Lake Koshkonong Recreational Association were joint litigants, along with the RKLD, all of whom petitioned in favor of increasing water levels.

After a mid-August closed-session between members of the LKWA and Thibeau Hunt Club with DNR representatives, Charles “Buck” Sweeney, the attorney representing the two groups, said, “The key to this agreement is whether or not these (six) groups can work together.”

Sweeney noted that DNR Secretary Cathy Stepp “did a good job of addressing everyone’s concerns.”

Still, he said, the groups he represented approved the deal “with some trepidation.”

He added: “Hopefully, DNR will make sure the (Indianford) dam is operating properly.”

Since 2003, the lake district had battled the DNR to boost the lake level by 7.2 inches in summer to improve boating and the local economy. However, various hunting clubs and wetland associations wanted to keep the water level where it was at to protect the environment and wildlife.

The compromise approved calls for:

- Raising the summer water level 3 inches starting June 15, 2017. The summer water level will be in effect June 15-Sept. 28 each year.
- The DNR examining wetlands for “dramatic injury” every two years for 10 years starting in 2017. If it finds none, the summer water level would be raised another 2 inches in 2019 for a total of 5 inches.
- The lake district developing a comprehensive plan to protect wetlands, including armoring wetlands and shorelines and possibly dredging parts of the lake. Much of the plan already has been completed.
- The lake district presenting a detailed plan for how it will operate and maintain the Indianford Dam.

Members of the wetlands association and hunt club had questions focusing on the operation of the Indianford Dam, Sweeney said.

Located on the Rock River, the dam is about seven miles downstream from the 10,400-acre lake it impounds. Two wicket gates, used in hydroelectric dams, regulate water flowing through the generator turbine which, in the case of Indianford, are submerged underneath a now defunct powerhouse on the river's west bank.

Constructed in 1880, the powerhouse was operational until 1962, after which time the above-water equipment was removed.

"It is very hard to tell if the wicket gates are operating properly because they are under water; you can't see them," Sweeney said.

He noted that they often clog with debris, which hinders their ability to open and close properly.

Wicket gates, along with six surface-level floodgates, extending from the east Rock River bank, regulate water levels in the lake, and it was the DNR operating order for these gates that was the subject of the litigation, Sweeney said.

Constructed three times, the dam that exists today was built in 1931. From the beginning, it has been credited with changing the nature, surface area and depth of the lake. Naturalist Thure Kumlein, in 1877, described the area as "extensive marshes" with "marshy shores and hundreds of acres of wild rice and grass-like plant."

Wisconsin Power and Light Company acquired the dam in 1929 and, as it was reported at the time, "new wheels and generators were being installed in the power plant."

Rock County took ownership of the dam, the powerhouse and associated real estate in the early 1960s after the Wisconsin Power and Light Company ended operations there, citing, DNR materials state, "a net operating loss at the facility," and by the late 1960s, the gates were described as being "rusted shut, making that discharge capacity unavailable."

During the 1970s, renewed interest was paid to the powerhouse by Wisconsin Electric Power Co. with plans of restoring it to stabilize lake water levels. At that time, a DNR report states, both wicket gates were determined to be in need of repair, with components partially or completely frozen shut.

Plans to repair the units were abandoned in the mid-1970s after Rock County entered into a leasing agreement with Peter Burno, who, hoping to profit from power production, would in exchange act as an agent for the county while bringing restorations to the power-producing components. By the end of the 1970s, "at least one gate was made operational," and in the years that followed was described as being

“generally left open” to provide increased discharge.

The DNR issued an operating order for the dam in 1991, setting seasonal lake water levels.

The RKLD was formed in 1999, and in 2003, it requested a change in the order for both winter and summer levels. In 2004, the DNR amended the operating order, awarding ownership of the dam to the RKLD, and in 2005, a revised water level order was issued, raising the winter water level, but denying changes to the summer level.

Years of litigation followed, culminating in 2013, when the state Supreme Court sent the matter back to DNR to reconsider economic impacts before rendering a final decision. The proposed compromise, DNR officials have stated, is an attempt to end litigation and create an atmosphere in which invested parties can work together.

Sweeney said that with an approved increase of 7.2 inches, as initially requested by the RKLD, the groups he represents believed the wetlands would have been flooded. Silt-based wetlands and shorelines erode easily and soak in moisture, which would make for a larger lake footprint and not necessarily deeper water.

“The wetlands keep the silt in place, preventing (it) from getting into the lake and they have been doing that job for the last 100 years,” he added.

Area farmers, located between Fort Atkinson and the lake, are concerned that as water levels get higher, tile drainage systems in their fields will malfunction, leaving fields too wet to plant or damage roots systems and yields, Sweeney said.

Dennis Kutz, a Fort Atkinson area farmer since 1932 and operator of a drainage tile installation business since 1993, said he finds plans to raise water levels frustrating.

“The DNR and NRCS (Natural Resource Conservation Service, a branch of the USDA) are all on the farmers about phosphorus in the water,” he said. “Between drainage systems and cover crops, we try and do as good a job as possible, but when the river gets high and floods our fields, we have no control over what will end up in the river.”

Kutz explained the pros and cons of tile drainage systems.

“Most of our outlets are put in at a normal water level, so when you raise the lake level, you also raise the water level in the river and that has a negative effect in these drainage systems,” Kutz said. “If the water is higher in the field, then the water can push through to the outlet. Three inches doesn’t sound like much, but when we have heavy rains, the river comes up fast. These tile systems will work to a point with outlets underwater, but they are not nearly as efficient.”

Pump installations, in some cases, help, Kutz said.

“It’s just another expense to the farmer, through electricity or diesel fuel,” he continued. “I’ll just say this: We have never collected crop insurance from the river being too low, and crop insurance comes at a premium.”

Rock River residents southwest of Newville have concerns, too, Sweeney said, noting that between the railroad bridge and dam, residents have problems getting their pontoon boats under the railroad bridge when that section of the river is high.

Among them is George Wellenkotter, who described himself as a lifelong resident of Indianford. A builder of wood duck houses, he is familiar with area wetlands, the river and the community.

“With floodgates, the water goes right through, but (with) wicket gates, the debris just keeps building up from the bottom and then the water doesn’t flow through properly,” he said. “It takes three to four times as long to get that water out, so Indianford to Newville goes under a no-wake restriction,” he said, in an attempt to keep waves created by boats from beating upon the shorelines.

Waves create shoreline erosion, he said.

“With no-wake restrictions, people on the river can’t ski. It takes an hour and 15 minutes to go what should take 20 minutes, because you can’t do more than idle,” Wellenkotter continued. “It harms the businesses in Indianford, the taverns and the bait shops get no business. Why do the people on the lake get preference?”

“If you raise the water, people can go anywhere they want and riparian owners lose their rights,” Sweeney said.

Wisconsin’s Public Trust Doctrine, also known as the “Wet Feet Doctrine,” determines who has access to the property.

“When the land is dry, owners have exclusive rights to use what they own. When the land is wet, owners still own their land, but anybody can use it. It’s not trespassing because the doctrine says if you’ve got wet feet it is available for public use,” Sweeney said.

The tool used by DNR to develop definitions and standards is Wisconsin State Statute 35.93, Chapter N.R. 103: Water Quality Standards for Wetlands, Sweeney said.

Those on both sides of the Lake Koshkonong wetlands debate often cite language within the statute with regard to specific processes and definitions. Confusion stems from specific definitions such as “adverse impacts,” as well as how causal factors are defined.

In other words, Sweeney said, that is how it is determined which of many potential factors acting simultaneously on a dynamic system may have been the exact cause of the specific adverse impacts identified?

Wisconsin Wetlands Association Policy and Conservation Specialist Erin O'Brien said she values any opportunity to educate the public about the functions and values of wetlands, and she supports getting opposing sides to work together for the improvement of public assets, however, "The details are really important."

In 2005, she said, she wrote an amicus brief in support of the DNR's decision not to raise water levels in Lake Koshkonong. The DNR produced a study that same year, she said, and without a new study outlining the effects of water level changes by 3 or 5 inches, she could not scientifically say what the impacts to the area's shorelines and wetlands might be.

"This is a precedent-setting case because what's being proposed could impact a high number of quality wetlands," O'Brien said. "It is important that the science is right and the legal solutions are right, and that the language in the agreement is understandable and enforceable. It is desirable to end the litigation, but it is important that we get it right."