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September 7, 2006

**SENT VIA E-MAIL & MAIL**

William Coleman, Administrative Law Judge  
Division of Hearings and Appeals  
819 North 6<sup>th</sup> Street, Room 92  
Milwaukee, WI 53203-1685

RE: IN THE MATTER of the Review of the Water Level Decision for  
Lake Koshkonong and the Indianford Dam on the Rock River in Rock County, WI  
Case No. 3-SC-2003-28-3100LR  
Our Clients: LKWA and Thiebeau Hunting Club  
Our File No. 12678.56886

Dear Judge Coleman:

With regard to the above-referenced matter, attached please find the Reply Brief of Lake Koshkonong Wetland Association, Inc., and Thiebeau Hunting Club.

By copy of this letter, we are mailing same to all parties of record. Additionally, we are concurrently sending this letter and attached brief via E-mail to you and to counsel of record, pursuant to the Court's amended scheduling order.

Please advise if there are any questions or concerns. Thank you.

Sincerely,

AXLEY BRYNELSON, LLP

Charles V. Sweeney  
MRO:bjl

cc: Attorney William P. O'Connor  
Attorney Mary Beth Peranteau  
Attorney Michael J. Cain  
Attorney Andrew R. Griggs  
Attorney Arthur J. Harrington  
Attorney Michael E. Grubb  
Mr. Joseph T. Fisher  
Mr. Victor Illichmann  
Mr. Jeff Murley

**BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Review of the Water Level  
Decision for Lake Koshkonong and the  
Indianford Dam on the Rock River in Rock  
County, Wisconsin

Case No.: 3-SC-2003-28-3100LR

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**LAKE KOSHKONONG WETLAND ASSOCIATION, INC.,  
AND THIEBEAU HUNTING CLUB'S  
REPLY BRIEF**

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NOW COME Lake Koshkonong Wetland Association, Inc., and the Thiebeau Hunting Club, by their attorneys, Axley Brynelson, LLP, by Charles V. Sweeney and Mitchell R. Olson, and submit this Reply Brief in support of the Wisconsin DNR's April, 2005 Water Level Order for the Indianford Dam on Lake Koshkonong. This Brief will succinctly address and rebut five contentions within the Petitioners' Brief.

**I. ORDINARY HIGH WATER MARK.**

The Petitioners' Brief expressly acknowledges that, for decades, the water levels of Lake Koshkonong were not wholly controlled by the Indianford Dam. Specifically, during periods of high flows, the river outlet and dam lack the physical ability to discharge sufficient water to maintain the lake level at or below the ordered maximum. From the 1960's until at least 2002, the owners of the dam further exacerbated this problem by failing to maintain and operate the dam as designed and directed. (Petitioners' Brief, P. 4)

As a direct result of these long-established conditions, Petitioners concede that water levels on Lake Koshkonong have often exceeded the DNR's 1982 ordered

maximum. Petitioners admit that Lake Koshkonong water levels exceeded the 1982 Order's maximum (776.33 msl) "routinely" by "as much as 2-3 feet." (Id)

Under this set of conditions, a 2001 study determined that the Ordinary High Water Mark (OHWM) for Lake Koshkonong was more than a foot above the level determined in a 1979 study.

LKWA and THC contend that the evidence demonstrates that there is no such thing as an "ordinary high water mark" on Lake Koshkonong over the past several decades. To the contrary, the 2001 study designates an "unordinary" high water mark. The many years of uncontrolled flows, due to the dam wicket gates not operating at capacity, created an artificial situation. It is not reasonable for Petitioners to rely on that 2001 study, yet they do so extensively.

For example, Petitioners challenge the current levels proposed by DNR on the basis that the 2001 OHWM is unnecessarily over a foot higher than the proposed maximum water level. However, if that OHWM is not "ordinary" and not a reasonable measurement, DNR legitimately can set a maximum that protects the resource and property. There was no evidence that the operating orders need to be changed.

Further, given that the Dam, even if operated properly, cannot control high water events, DNR is justified in setting the maximum one foot below the 2001 OHWM (which is an unordinary mark). This is a unique flowage. The enormous surface area and extremely shallow depth of Lake Koshkonong justify a greater buffer than may be expected on other water bodies. The differential of one foot is not so great as to be unreasonable and contrary to law.

Likewise, Petitioners contend that their proposed water levels will not affect the OHWM. To the extent this is true, it is only because the 2001 OHWM is an unordinary and inflated measurement. The ultimate determination in this case should not arise from an OHWM determined after decades of uncontrolled water. Instead, the decision-maker must rely on scientific observations of the lake levels and the effect on the resource at such levels. DNR presented an adequate case on that basis, and DNR's findings should be affirmed.

Ultimately, the ALJ should recognize that the OHWM is a "moving target." It must be recognized that upon proper operation of the Indianford Dam, over a period of years into the future, the OHWM for this waterbody may go down by a substantial amount. Going forward, the Dam can do a better job of controlling flows, and preventing the extended periods of uncontrolled high flows. Accepting this principle, it follows that the 2001 OHWM should not be the primary basis for the water level order on this waterbody.

## **II. PRESCRIPTIVE FLOWAGE RIGHTS.**

Petitioners argue that the decades of dam malfunction / improper dam operation, in violation of DNR's water level orders, "have expanded the owner's flowage rights." (Petitioners' Brief, P. 29) LKWA and THC have two criticisms of this position.

First, Petitioners acknowledge that the Indianford Dam was operated in violation of the 1982 and 1991 water level orders. Petitioners essentially admit that the 2001 OHWM is an *inflated value*, due to that improper operation, in order to support their prescriptive rights claim. This is contrary to their position, as described above.

In other words, according to Petitioners, the OHWM is accurate and reliable when used to attack the 1 foot “buffer” between the water level maximum and OHWM; however, the OHWM is also an inflated value which fortuitously supports an alleged right to prescriptive rights. Petitioners want it both ways. They cannot have it.

Second, no flowage rights should arise from water levels occurring from a dam that did not operate at full capacity. Since the 1982 DNR water level order, Lake Koshkonong has been subject to a target and maximum levels. The owner/operator of the Dam historically did not spend the money necessary to repair the wicket gates.

### **III. WATER LEVELS.**

It is important to emphasize what water levels the competing parties seek in this case. DNR is not attempting to *lower* water levels. Instead, DNR seeks to maintain basically the same levels as have been ordered since 1982. Lake Koshkonong has been under the 1991 Order through the present date, and DNR seeks to continue the main tenets of that Order. The only variable that has changed, in recent years, is the repair of the Dam and the current enhanced ability to control high flows. The baseline remains constant.

In contrast, Petitioners explicitly DEMAND higher water levels. As set forth in LKWA and THC’s Closing Brief, Petitioners’ proposal will result in a 6 to 8 inch increase in water levels, above the DNR’s proposed order. This is undisputed.

Petitioners have failed to present sufficient justifications to consider such an increase. The bottom line is that Lake Koshkonong is an inherently shallow lake. It always has been. Those who own lakefront real estate, who do business on the Lake, or whose business is associated with this Lake, must have purchased their property/business

with full knowledge of this Lake and its limitations. These parties, whom Petitioners claim to represent, have no reasonable expectation of a water level in excess of the past and current orders established by DNR.

#### **IV. PROPERTY VALUE ANALYSIS.**

The Petitioners also argue that the DNR's water level order will have a negative economic impact on riparian property values. That argument was not supported by any compelling testimony. Petitioners' experts, Kashian and Stockham, employed unreliable analysis to reach their conclusions. Neither Kashian nor Stockham are qualified and licensed appraisers. Dr. Kashian's analysis is smoke and mirrors, nothing more.

In contrast, Mr. Linn Duesterbeck was the only certified appraiser to appear at this Hearing. He has worked in that field for 33 years, appraising thousands of residences. He offered credible testimony, supported by standard and well-recognized appraisal techniques. Mr. Duesterbeck evaluated the actual market in the area and concluded that property values have consistently risen on Lake Koshkonong over time, with no adverse effects from water levels observed. The attacks on Mr. Duesterbeck's testimony are without basis.

#### **V. PETITIONERS' EXPENDITURES.**

All parties interested in this action must question the motives and wisdom of Petitioners' role in these proceedings. RKLD has expended approximately \$550,000.00 of taxpayer funds to contest the DNR's water level order. In order to justify this expenditure, it appears that RKLD seeks to establish increased, but artificial, flowage rights. As argued above, such flowage rights should not be gained by the former dam owners' failure to apply the necessary funds to repair the wicket gates.

It should be noted that this \$550,000 could have been spent in a much different fashion. RKLD could have accomplished untold improvements to navigability, safety, and public access, among other causes, with those funds. Yet RKLD instead insists on creating a deep water lake where nature will never allow, without regard for the cost. This unwavering insistence on higher water levels impedes RKLD's ability to consider the many uses of and improvements to Lake Koshkonong that could ultimately meet RKLD's purported goals.

As emphasized throughout this matter, a reasonable and competent person purchases a boat to fit the lake instead of spending hundreds of thousands of dollars to attempt to raise the water levels by 6 inches.

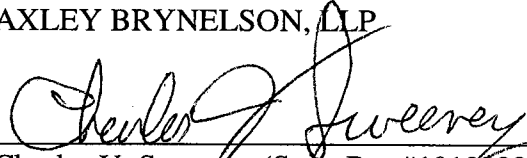
## **VI. CONCLUSION**

The Petitioners' Brief endeavors to criticize the DNR's Order as supported only by "wetland criteria," with no legitimate analysis of any other criteria. However, the record, as presented by DNR, contains a fair and sufficient analysis to satisfy the requirements of sec. 31.02, Stats. Moreover, it is the Petitioners who are guilty of over-emphasis. Petitioners request that the ALJ place "great weight" on navigation and all rights associated therewith. Petitioners' one-sided approach is clearly not superior nor more acceptable than the analysis and decision rendered by DNR in this action.

Based on the arguments set forth by DNR in this action, to which LKWA and THC join, and by LKWA and THC in their Closing Brief and this Reply Brief, LKWA and THC respectfully request that this Administrative Body affirm the DNR's Order, dated April 14, 2005.

Dated this 7th day of September, 2006.

AXLEY BRYNELSON, LLP

A handwritten signature in cursive script, appearing to read "Charles V. Sweeney", is written over a horizontal line.

Charles V. Sweeney (State Bar #1019039)

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