

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

ROCK COUNTY

ROCK-KOSHKONONG LAKE DISTRICT,
ROCK RIVER-KOSHKONONG ASSOCIATION, INC. and
LAKE KOSHKONONG RECREATIONAL ASSOCIATION, INC.,

Petitioners,

Case No. 06-CV-1846

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent,

LAKE KOSHKONONG WETLAND ASSOCIATION, INC.
and THIEBEAU HUNTING CLUB,

Intervening Respondents.

RESPONDENT DEPARTMENT OF NATURAL RESOURCES' BRIEF IN
OPPOSITION TO PETITION FOR REVIEW

The Department of Natural Resources by its attorneys, Attorney General J.B. Van Hollen and Assistant Attorney General JoAnne F. Kloppenburg, submits this brief in opposition to the petition for review.

STATEMENT OF THE CASE

In a decision dated December 1, 2006, Administrative Law Judge William S. Coleman, Jr., issued a decision affirming Department of Natural Resources Order 3-SC-2003-28-3100LR. Findings of Fact, Conclusions of Law, and Order dated December 1, 2006 (referred to in this brief as Order):31. The Order governs the operation of the

Indianford Dam on the Rock River and sets water levels for Lake Koshkonong, which is a natural widening of the Rock River approximately 6 miles upstream from the dam. Order:1, 7-8. The Order followed a petition to raise the water levels prescribed in a 1991 order, the preparation of a draft Environmental Assessment, the submission of public comments and the holding of a public hearing on the draft Environmental Assessment, the preparation of a final Environmental Assessment, the issuance of a water level order that maintained the 1991 order's levels for the summer and raised somewhat the levels for the winter, and a 10-day contested case hearing on the new water level order. Order:1, 4-7.

Petitioners then filed this action and submitted their brief seeking reversal of the Order and remand to the Department of Natural Resources to consider speculative secondary economic impacts on property values and taxes and business incomes, to exclude from consideration non-speculative impacts on wetlands in and adjacent to the lake, and to weigh differently the impacts on public and riparian rights.

The Department submits this brief asking the Court to dismiss the petition and to affirm the Department's Order.

ARGUMENT

Petitioners construct a house of cards that crumbles under the weight of the law and the facts. As a matter of law, the Legislature's authorization to the Department to issue water level orders "in the interest of public rights in navigable waters or to promote safety and protect life, health and property" (Wis. Stat. § 31.02(1)), includes the

consideration of impacts on wetland areas in and adjacent to the navigable waters, excludes non-physical economic impacts on property, and defers to the Department's weighing of the various impacts if it is reasonably supported by substantial evidence. As a matter of fact, the relatively greater protections afforded by the Department's Order over petitioners' proposal to the lake and wetland environment and to the fish, wildlife and vegetation in that environment, and the comparatively negligible difference in impact between the Department's Order and petitioners' proposal on public access, establish that the Department properly exercised its authority in issuing its Order.

I. PETITIONERS DO NOT DISPUTE THE DEPARTMENT'S 120 FINDINGS OF FACT.

The facts are those set forth in paragraphs 1-120 of the Order.

In brief but important summary, the facts are as follows:

1. Rock River and Lake Koshkonong (Order:¶¶8-15). Lake Koshkonong is a gently sloping, shallow lake with an average depth of 5 feet. It has 27 miles of shoreline, of which 10 miles is developed, primarily for residential use, and 12.3 miles is undeveloped wetland. Its surface area is 10,460 acres, and the wetlands along its shores cover 3,080-4,000 acres.

2. Indianford Dam (Order:¶¶16-28). The dam was built in the 1850s, reconstructed in 1917 raising water levels to 775.08 msl, and ordered in 1919 to be kept at 775.64 msl in response to riparian property owners' complaints about high water. In 1991, after 9 years of litigation and negotiation, the parties agreed to an order setting water levels for the lake. In 2003, petitioners asked for the levels to be raised (Order:¶4):

Lake Levels		1991 Order	Petition	Petition Increase	2006 Order	Order Increase
May – October	Target	776.20'	776.8'	7.2"	776.20'	
	Maximum	776.33'	777'	8"	776.33'	
	Minimum	776.10'	776.4'	3.6"	776.1'	
November – April	Target	N/A	N/A	N/A	775.75'	
	Maximum	775.77'	777'	14.8"	776'	2.8"
	Minimum	775'	776.4'	16.8"	775.5'	6"

Order:¶4; Exhibit DNR 12 (copy attached to this brief).

3. Historic Water Levels on Lake Koshkonong, and Water Level Modeling (Order:¶¶29-35). Water levels on Lake Koshkonong rose from 1932 to 2003, due in part to faulty operation and maintenance of the dam, and in summer have been above the DNR Order's target level every year but 2 since 1965. Petitioners' proposal would also yield higher water levels than the DNR Order for most of the year.

4. Wetland Complexes (Order:¶¶36-41). Over the years, higher water has caused a shift in the water quality in the lake from a clear-water plant dominant condition to a degraded turbid algae-dominant water condition, and has caused the erosion of wetland shoreline and the loss of wetlands. The wetlands around the lake include submerged aquatic beds, which provide habitat for fish and wildlife and promote better water quality, marshes with high levels of species diversity, regionally rare floodplain forests, and meadows and shrub zones of high quality for plant distribution.

5. Effects of Water Levels (Order:¶¶42-119).

Water Quality (Order:¶¶42-58). Compared to the Department's Order, petitioners' proposed higher water levels would further degrade the lake's water quality, accelerate the loss of wetlands and of important wildlife and fishery habitat, cause the loss of

wetlands in areas of special natural resources interest, and reduce the system's capacity to slow flood and storm water and to filter nutrients, sediment and other pollutants from entering the lake and flowing downstream.

Ordinary High Water Mark (Order:¶¶59-62). The ordinary high water mark may decrease with compliance with the Department's Order and may increase under petitioners' proposal.

Erosion Protection from Riprap Structures (Order:¶¶63-64). At the higher levels sought by petitioners, the existing riprap structures that protect 38% of the wetland shoreline would be less effective and more quickly degraded, and fortifying these structures would be very expensive and likely ineffective.

Wildlife (Order:¶¶65-68). Past higher water levels have caused, and continued higher water levels will cause, adverse impacts on turtles and other herptiles and birds including rare threatened and special concern species and migratory waterfowl.

Winter Draw Down (Order:¶¶69-85). The winter draw down in the Department's Order will prevent erosion, improve water quality by driving out carp, not harm submerged aquatic vegetation or affect the abundance of fish populations in the lake or river, impair ice fishing but enhance open water fishing, limit boat access to boat ramps on the Rock River where fishing is generally better than on the lake in winter, make marsh areas less accessible for waterfowl hunting. The elimination of a winter draw down proposed by petitioners will cause the loss of fish spawning habitat, worsen water quality by allowing carp to remain in shallow marshes, result in damage to existing riprap

structures. The benefits to hibernating herptiles of petitioners' no winter drawdown proposal, will be outweighed by the herptile habitat that the proposal would destroy.

Agricultural Drainage (Order:¶¶86-91). Petitioners' proposed higher water levels will impede drainage of farmland served by drain 24, and impede drainage of farmland served by drain 39 and other drains northwest of the lake and near the Rock River east of Fort Atkinson more than under the Department's Order, and will require more maintenance of drain tiles.

Public Access (Order:¶¶92-99). No comments related to a need for better public access to the lake were made during the public hearing and public comment period on the draft Environmental Assessment, petitioners' survey found 81% of respondents believing there was adequate public access and 5% saying the most negative aspect of the lake was not enough public access, compared with 29% identifying as the most negative aspect too much boat traffic or too large boats and motors and 54% saying worsening water quality. The 5 no-fee public boat ramps and one fee-based public boat ramp on the lake are difficult for most recreational boats to use in summer under both the Department's Order and petitioners' proposed order, except in flood events. There are a number of public and private boat access points on the Rock River, from less than one to over 6 miles from the lake, all usable for any recreational boats suitable for Lake Koshkonong.

Riparian Access (Order:¶¶100-105). All of Lake Koshkonong has a very flat gradient from the water's edge, with some of the flattest areas near residential riparian properties, and owners of these properties are almost all in favor of petitioners' proposal, for many of them could shorten their piers to reach the same water depth under the

Department's Order, and they could maintain boat lifts and shore stations closer to shore and in deeper water.

Natural Scenic Beauty (Order:¶¶106-107). The fuller pool levels that may exist under petitioners' proposal are more appealing than exposed lakebed to many riparian owners and recreational users, while many users find natural scenic beauty in the wetlands that would be lost under petitioners' proposal.

Swimming/Bathing (Order:¶¶108-109). Petitioners' proposed levels would move the little swimming that is done closer to the shoreline, along with the boat traffic (Order:¶115).

Navigability—Boating, Fishing, Recreation, Public Safety (Order:¶¶110-119). Petitioners' proposed levels would expand the surface area of the 10,460-acre lake (Order:¶10) by 44-63 acres, not counting additional wetland and shoreline loss from water, wave and ice action, and "would not alter the lake's morphology as a shallow lake or the navigational limitations that inhere in such bodies of water" (Order:¶117), or decrease shallow depths in the lake. Most boats suitable for use on the lake can access most of the surface area of the lake, and commonly sized recreational and public safety watercraft can travel the length of the lake in 10-15 minutes under both the Department's Order and petitioners' proposed levels. Petitioners' proposed levels would mitigate existing navigational hazards in the lake, as can careful boating practices. "The navigational depth of the lake and marshes at the summer and winter levels specified in the DNR's 2005 order provides reasonably sufficient access to recreational boaters,

sailboats, fishing boats, waterfowl hunters, and rescue and safety watercraft to the lake, including the shallower water nearer the shoreline" (Order:¶119).

6. Section 31.02(1) Standard (Order:¶120). "The net negative effects of the proposed higher water levels far outweigh the enhancements to navigation and access. Allowing increased water levels as proposed by the District would be inconsistent with the interest of public rights in Lake Koshkonong and the Rock River, and would not serve to protect life, health or property. Public safety may be marginally promoted with increased water levels, but the water levels specified in the DNR's 2005 order do not pose undue risks to public safety."

Petitioners do not in their brief dispute any of the findings of fact. Rather, petitioners argue that as a matter of law, the facts should exclude impacts on wetlands in and adjacent to the lake and include potential impacts on property values and taxes and business incomes, and that as a result the ultimate balancing, which here established "by a preponderance of the evidence that the [modest] enhancement to access and navigation from increased water levels would be far outweighed by the substantial negative environmental impacts caused by the higher water" (Order:30), and that "due consideration to all relevant factors and interests" (*Id.*) supports the Department's Order, would come out differently.

As shown below, petitioners' argument has no legal merit.

II. THE DEPARTMENT'S ORDER IS DUE GREAT WEIGHT DEFERENCE.

Petitioners challenge the Department's interpreting Wis. Stat. § 31.02(1) to include impacts on wetlands on and adjacent to the lake and to exclude speculative secondary economic impacts on property values and taxes and business incomes, and they challenge the Department's weighing of the relevant factors under Wis. Stat. § 31.02(1). These challenges are all reviewed under the great weight deference standard.

- A. The Court reviews the ALJ's decision as the Department's, based on the record of the administrative proceedings.

The standard of review is prescribed by Wis. Stat. § 227.57. Here, where the Department of Natural Resources adopted the ALJ's decision as its own, the court reviews the ALJ's determination as the Department's decision. *Hilton v. DNR*, 2006 WI 84, ¶14, 293 Wis. 2d 1, 717 N.W.2d 166; *Borsellino v. DNR*, 2000 WI App 27, ¶¶5-7, 232 Wis. 2d 430, 606 N.W.2d 255 (Ct. App. 1999); *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 147-49, 588 N.W.2d 667 (Ct. App. 1998), *review denied*, 225 Wis. 2d 489, 594 N.W.2d 383 (1999). The court must affirm the Department's decision unless it finds specific grounds stated in Wis. Stat. § 227.57 for not affirming it. Wis. Stat. § 227.57(2).

Review is limited to the administrative record before the court. Wis. Stat. § 227.57(1); *State Public Intervenor v. DNR*, 171 Wis. 2d 243, 249-50, 490 N.W.2d 770 (Ct. App. 1992).

- B. The Department's interpretation and application of Wis. Stat. § 31.02(1) are due great weight deference, because the Department is charged by the legislature with administering the statute and the Department has done so for decades for dams and water bodies around the state, and its interpretation is based on its technical and legislatively delegated expertise and specialized knowledge; therefore the Department's interpretation and application of Wis. Stat. § 31.02(1) are to be upheld if they are reasonable.

The Department's conclusions of law interpreting and applying Wis. Stat. § 31.02(1) are entitled to great weight deference, the highest degree of deference. Great weight deference is due an agency decision where: "(1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute"). *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶16, 292 Wis. 2d 549, 717 N.W.2d 184; *Hilton*, 293 Wis. 2d 1, ¶15 ("the correct test [for great weight deference] is whether the agency "has experience in interpreting [the] particular statutory scheme" at issue" (citation omitted); *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶¶38-41, 282 Wis. 2d 250, 700 N.W.2d 768 (great weight deference due agency with expertise and experience in interpreting the particular statutory scheme at issue, and with primary responsibility for determination of fact and policy). *See also ABKA v. DNR*, 2002 WI 106, ¶30, 255 Wis. 2d 486, 648 N.W.2d 854, cited by petitioners (an agency's interpretation of statutes and conclusions of law are due a certain amount of deference depending on whether the issues are one of first impression, etc.).

As explained below, here the legislature has charged the Department with administration of Wis. Stat. § 31.02, the Department does have expertise in balancing the factors of § 31.02, the Department's interpretation of public rights is long-standing, and the Department's decision to exclude socioeconomic impacts and to consider wetland impacts has been applied with uniformity since the earliest public trust cases and at least 1972 when *Just v. Marinette*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) was decided. Therefore, the Department's interpretation of Wis. Stat. § 31.02 is entitled to great weight deference.

Here, the Legislature delegated to the Department's predecessors since 1915, and to the Department itself since 1967, the administration of this statute governing dams and lake levels. Wis. Stat. § 1596(2) of Chapter 69m, The Water Powers Act (1915); Laws of Wisconsin 1917, Chapter 474 section 3 renumbering § 1596(2) as Wis. Stat. 31.02; Laws of Wisconsin 1967, Chapter 75, sections 2 and 25 (establishing the Department). The Department has issued water level orders for dams around the state. *See Lake Altoona Lake Rehabilitation and Protection District v. DNR*, Eau Claire County Case No. 06CV745 (Memorandum Decision issued August 23, 2007) (copy attached), for an example of one of the most recent water level orders issued by the Department. The Department has set out its interpretation of Wis. Stat. § 31.02(1) in Chapter 130 of its Water Regulation Handbook, Record Exhibit RKLD 139, consistent with the Order it issued here and with the arguments set forth in this brief.

More generally, the Department (or its predecessors) has also since at least the early 1900s determined what "public rights in navigable waters" embrace in its administration of

a host of statutory provisions, most notably in chapter 30, and has balanced public and private rights in navigable waters as the legislature's delegee for administration of the public trust. See Wis. Stat. § 281.11 ("The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private"); *Borsellino*, 232 Wis. 2d 430, ¶6, ¶17 ("the DNR has technical expertise in regulating . . . waterways," and "the regulation and enforcement of this public trust rests with the legislature and the DNR"); *Sea View*, 223 Wis. 2d at 148-49, 157 ("[t]he DNR has technical expertise in environmental matters, . . . which includes the regulation of . . . waterways," and noting DNR's central authority as delegated by the legislature to administer and enforce both chapter 30 and the public trust doctrine); *Hixon v. PSC*, 32 Wis. 2d 608, 620, 629, 146 N.W.2d 577 (1966) (the weighing of relevant factors is a policy function that lies peculiarly within the province of the Public Service Commission, now the Department);¹ *State v. Bleck*, 114 Wis. 2d 454, 466, 338 N.W.2d 492 (1983).²

Most generally, "[t]he legislature has delegated to the DNR the duty of enforcing the state's environmental laws." *Hilton*, 293 Wis. 2d 1, ¶20.

As noted in the cases cited above, the Department brings its specialized expertise and technical knowledge to bear on its balancing of public and private rights in navigable waters

¹ "The PSC previously had the duties to enforce environmental laws relating to navigable waters now assigned to the DNR." *Hilton*, 293 Wis. 2d 1, ¶21 n.11.

² While some of the waterway statutes that the Department administers refer to the public interest in navigable waters, see, e.g., Wis. Stat. § 30.12(3m)(c)2. and pre-2003 Wisconsin Act 118 Wis. Stat. § 30.12(2), the courts "interpret 'the public interest' and 'the public rights in navigable waters' to be synonymous as both terms derive from the public trust doctrine." *Sea View*, 223 Wis. 2d at 153-54 n.12.

in many contexts. *See, e.g., Hilton*, 293 Wis. 2d 1, ¶¶21-22. Here, the Department has done so several times over the last 100 years with respect to this dam and lake alone, showing both its longstanding exercise of its expertise and its consistency. The Department issued the last lake level order for this dam in 1991, and in response to the petition to modify that order, the Department has affirmed its 1991 balancing of rights and interests, with some modification only of the winter drawdown after hearing public comments reflecting current conditions. Order: ¶¶4-7. Its most recent Order, which slightly modifies the 1991 order, is evidence of the historical and consistent application of the Department's expertise and specialized knowledge to setting lake levels in the interest of public rights in navigable waters, and to promote safety and to protect life, health and property.

In balancing public and private rights in navigable waters, the Department's legal conclusions and its value and policy determinations are due the highest level of deference. *See Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 732, 556 N.W.2d 791 (Ct. App. 1996). The court must have compelling reasons for reversal where the agency's final conclusion is based on a highly discretionary determination that rests on its finding as to what is necessary and convenient, or reasonable, in the interest of public rights and under the public trust doctrine. *See Hixon*, 32 Wis. 2d at 630.

Under great weight deference, the court upholds the Department's conclusions if they are reasonable, "even if an equally reasonable or more reasonable interpretation is offered." *Hilton*, 293 Wis. 2d 1, ¶¶17. If there is any reasonable basis in the record for the agency's determination, a reviewing court should not disturb it. *Hixon*, 32 Wis. 2d at 629.

Petitioners' position that the court owes no deference to the Department's decision here is contrary to the law. Under *Racine Harley-Davidson*, a court only accords no deference if "(1) the issue is one of first impression; (2) the agency has no experience or expertise in deciding the legal issue presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance." *Racine Harley-Davidson*, 292 Wis. 2d 549, ¶ 19. None of those circumstances applies here.

- C. The Department's factual findings are to be upheld if they are reasonably supported by the evidence.

The Department's factual findings are entitled to substantial deference under the substantial evidence test. *Hilton*, 293 Wis. 2d 1, ¶16; Wis. Stat. § 227.57(6). Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Sterlingworth*, 205 Wis. 2d at 727; *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987). "Substantial evidence does not mean a preponderance of the evidence.' Instead, the test is whether, after considering all the evidence of record, reasonable minds could arrive at the same conclusion." *Hilton*, 293 Wis. 2d 1, ¶16 (citation omitted).

The reviewing court is not permitted to pass on credibility or to reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is substantial evidence to sustain it. *Village of Menomonee Falls*, 140 Wis. 2d at 594. The court may not substitute its judgment for that of the ALJ as to the weight of the evidence. Wis. Stat. § 227.57(6).

III. THE DEPARTMENT REASONABLY INTERPRETED ITS AUTHORITY UNDER WIS. STAT. § 31.02(1) TO INCLUDE CONSIDERATION OF IMPACTS ON WETLANDS ON AND ADJACENT TO LAKE KOSHKONONG.

Petitioners argue that the Department's authority under Wis. Stat. § 31.02(1) to set water levels in the interest of public rights in navigable waters does not extend to protection of wetlands in or adjacent to the lake. The applicable law establishes the exact opposite.

A. Longstanding case law establishes that public rights in navigable waters include protecting wetlands.

Wisconsin Stat. § 31.02(1) authorizes the Department to set water levels "in the interest of public rights in navigable waters." Public rights in navigable waters derive from the public trust doctrine. *Sea View*, 223 Wis. 2d at 153-54 n.12.

The public trust doctrine emanates from art. IX, § 1 of the Wisconsin Constitution. It protects an array of public rights including, in addition to commercial navigation, a variety of purely recreational and nonpecuniary uses including boating, swimming, fishing, hunting, recreation, and scenic beauty. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, ¶19, 628 N.W.2d 781; *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998); *Hixon*, 32 Wis. 2d at 619; *Muench v. Public Service Comm.*, 261 Wis. 492, 507-08, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The public trust doctrine also protects public rights in the protection and preservation of the state's navigable waters as natural resources for the enjoyment and benefit of its citizens. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 526, 271 N.W.2d 69

(1978); *Just*, 56 Wis. 2d at 16-18; *State ex rel. Chain O'Lakes P. Asso v. Moses.*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972); *Reuter v. Department of Natural Resources*, 43 Wis. 2d 272, 277, 168 N.W.2d 860 (1969); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 382, 548 N.W.2d 528 (1996). The policy of the common and statutory law that recognizes the rights of the public to enjoy navigable waters is to be broadly and beneficently construed. *Muench*, 261 Wis. at 512; *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914). No case has narrowed this array of public rights or the construction of the public trust for impounded, as opposed to natural, navigable waters (Pet. Brief:2-3).

In the seminal public trust case, *Just*, 56 Wis. 2d at 16-19 (a case in the "long line of cases" that petitioners fail to cite, Pet. Brief:16), the court unambiguously acknowledged the connection between wetlands, shorelands and navigable waters for purposes of effectuating the state's public trust obligations:

The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. . . . What makes this case different . . . is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. . . . [S]wamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature. . . . The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. . . . Lands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject to state public trust powers.

The *Just* inclusion of wetland protection in the public rights in navigable waters remains the law today. See *Zealy*, 201 Wis. 2d at 379 n.7 ("*Just* is not limited to cases

involving [the public trust] doctrine, and the case is thus equally applicable to wetland regulations"). *Just* confirms that public rights in wetlands "adjacent to or near navigable waters" are public rights in, not beyond (Pet. Brief:2), navigable waters.

The Attorney General Opinion cited by petitioners is in accord, and builds on *Just* and legislative pronouncements of the state's public trust obligations to support the Department's broad authority to consider wetland impacts as part of its regulatory responsibility to make determinations in the interest of public rights in navigable waters (68 Op. Att'y Gen. 264 at 273):

there appears to be broad non-permit authority in the Department to acquire, preserve, and protect wetlands. In addition, permit programs which are not specifically directed at wetlands but which affect such wetlands directly and indirectly could be administered to as to grant substantial amounts of protection to this portion of the "waters of the state."

For example, . . . chs. 30 and 31, regulating structures and activities in navigable waters could be administered to prevent or at least minimize damage to wetlands by prohibiting or regulating drainage, fills and drawdowns detrimentally affecting wetlands. . . . Finally, there are wetlands which directly affect water quality in connected or *adjacent* navigable waters where water quality standards set for the navigable body could be used to regulate activity in the related wetlands. NR 1.95 is, in itself, a step in this direction.

The legislature has recognized the connection between these public rights and lands adjacent to navigable waters. *See* Wis. Stat. §§ 281.31 and 281.33 (authorizing shoreland zoning and storm water regulation "[t]o aid in the fulfillment of the state's role as trustee of its navigable waters").

Petitioners cite no case that excludes the protection of wetlands on or adjacent to navigable waters from the public rights rubric, or that differentiates the public rights

embraced by the public trust doctrine under chapters 30 versus 31 of the statutes. Indeed, the court in *Muench*, 261 Wis. 492, traced the history of the development of public rights under Wisconsin's Constitution and Wis. Stat. chs. 30 and 31, and the court interpreted public rights as used in all 3 places identically. Petitioners also provide no evidence disputing the value of wetlands to navigable waters. See Wis. Admin. Code §§ NR 1.95(3) and 103.03(1) (setting forth the values and functions of wetlands). Given the undisputed natural connection between wetlands near navigable waters and such incidents of public rights as water quality and clarity, boating, fishing, hunting, and scenic beauty, and the continuing force of the *Just* decision, there is neither scientific nor legal authority for such an exclusion.

- B. Wisconsin statutes and regulations authorize the Department to consider the impacts on wetlands in making regulatory decisions like water level determinations.

The water level statute, Wis. Stat. § 31.02(1), authorizes the Department to set water levels "in the interest of public rights in navigable waters." As noted above, case law expressly includes protection of wetlands within the panorama of public rights in navigable waters. Department regulations, which guide the Department in its consideration of factors that affect public rights, also require the Department to consider impacts on wetlands when it makes regulatory decisions such as setting water levels.

The regulations recognize that the Department, "under existing law, has the responsibility of making and enforcing regulatory and management decisions which, directly or indirectly, affect the quantity and quality of many Wisconsin wetlands." Wis.

Admin. Code § NR 1.95(2). Under Wis. Admin. Code § NR 1.95(1), the Department is to apply its rules "in such a manner as to avoid or minimize the adverse effects on wetlands due to actions over which the department has regulatory or management authority and to maintain, enhance and restore wetlands functions and values." Under Wis. Admin. Code § NR 1.95(2)(b), "Department actions must be consistent with the goal of maintaining, protecting and improving water quality."

Accordingly, "It is in the public interest that department decisions which lead to alteration of or effects on wetlands under its jurisdiction or control are based on the intent to preserve, protect, restore and manage them for the maintenance or enhancement of their values." Wis. Admin. Code § NR 1.95(4)(a). "The state's policy as articulated in its trusteeship of navigable waters and the statutes enacted to further the protection and enhancement of the quality of its waters, creates a presumption against activities which adversely affect those wetlands under department jurisdiction or control." Wis. Admin. Code § NR 1.95(3)(a). These statements of statewide policy were adopted by the Natural Resources Board, and apply to "department decisions" that affect wetlands "under its jurisdiction." Under the case law and OAG cited above, wetlands in and adjacent to navigable waters are plainly within the Department's regulatory jurisdiction.

Under Wis. Admin. Code § NR 103.06, which was promulgated under Wis. Stat. chs. 281 and 283, the water quality standards set forth in Wis. Admin. Code ch. NR 103 "apply to all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands," and "to specific activities which may require authorization . . . and which are subject to the requirements of statute or rules requiring a

department determination concerning effects on water quality or wetlands." As established in the findings of fact here, water level orders affect both water quality and wetlands. At the least, the ch. 103 regulations confirm that the Department's authority to set water levels "in the interest of public rights in navigable waters" requires it to consider effects on all wetlands that may be affected. Whether the ch. 103 regulations require the Department to do more is not before the court in this case.

Here, petitioners erroneously fault the Department for applying Wis. Stat. ch. NR 103 standards (Pet. Brief:2, 19). The Department did not apply NR 103 standards to petitioners' proposal, but did consider the effects of the proposal on wetland functions and values recognized in Wis. Admin. Code § NR 1.95 and ch. NR 103.

In *Houslet v. DNR*, 110 Wis. 2d 280, 281, 329 N.W.2d 219 (Ct. App. 1982), the court held that the Department properly considered the effects on wetlands in determining whether a dredging project was consistent with public rights in navigable waters. In *Houslet*, the court answered positively the question whether the lake area below the ordinary high water mark, to which the state has title, could be wetland as well. While the court then relied in part on Wis. Admin. Code § NR 1.95(4), which authorizes the Department to protect wetlands under its control, that provision also authorizes the Department to protect wetlands under its jurisdiction, and the point was and is that protecting wetlands is part of protecting public rights in navigable waters. Here, regardless whether undisputed wetland areas are below or above the ordinary high water mark, they are still wetlands under Wis. Admin. Code § NR 1.95, and the Department's regulatory public rights in navigable waters

analysis must include consideration of impacts to wetlands under that section and all of the law cited above.

- C. Wisconsin Stat. § 281.92 does not limit the Department's authority to consider the effects on wetlands as part of its consideration of what water levels are in the interest of public rights in navigable waters.

Petitioners argue that Wis. Stat. § 281.92 prohibits the Department from considering effects on wetlands in its efforts to set water levels that are in the interest of public rights in navigable waters. Petitioners misrepresent the reach of this section.

Wisconsin Stat. § 281.92 provides that, "Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31." This section was enacted in 1919, as part of a bill creating sections "providing for supervision and control by the state board of health of water and ice supplies, water purification, sewage and refuse treatment and disposal and the pollution of streams; and for supervision of the maintenance, alteration, extension, construction and operation of systems and works relating thereto." Wisconsin Assembly Bill No. 238, A. (Feb. 18, 1919). Section 2 of this bill created section 1407m—1(12), "Nothing in this act shall be construed to alter, amend, repeal, impair or affect any of the provisions of sections 1797m—1 to 1797m—109 or of chapter 31 of the Wisconsin statutes." In 1923, this section was amended to read, "Nothing in this chapter shall be construed to affect the provisions of sections 1797m—1 to 1797m—109 or of chapter 31 of the statutes." This section, later numbered § 144.12, was renumbered § 281.92 when the omnibus environmental protection chapter 144 was divided by 1995 Wis. Act 227.

Wisconsin Stat. § 31.02 was enacted 4 years earlier than § 281.92, in 1915, as section 1596—2.1. of chapter 69m, "The Water Powers Act." Wis. Stat. § 1596. It provided, "The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters" "Commission" in this section meant the railroad commission of Wisconsin. Section 1596—1. In 1917, this section was renumbered as § 31.02, as part of the newly created "Chapter 31. Water Powers, and Mills and Milldams," and titled, "Powers of the railroad commission." Laws of Wisconsin Chapter 474; Wis. Stat. § 31.02(1) (1917).

So, the law authorizing water regulation by the railroad commission predated the law authorizing water pollution regulation by the state board of health. It can be reasonably inferred that the limiting provision in the latter was enacted to ensure that the state board of health did not intrude in the railroad commission's sphere of transportation regulation, or in the sphere of public utility regulation (in Wis. Stat. ch. 196), and that the state board of health's authority did not expand or restrict the railroad commission's authority over dams or the public service commission's authority over utilities.

Now, the Department of Natural Resources is the authorized agency for both areas, water pollution and dams. Wisconsin Stat. § 281.92 means that the Department's water pollution prevention responsibilities do not expand or restrict its water level responsibilities. In other words, its authority to set water levels is unencumbered by its authority to set water quality standards. Thus, its authority to consider all public rights in

