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,

vs.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 06-CV-1846

Code: 30607
Administrative Agency Review

JOINT BRIEF OF PETITIONERS

INTRODUCTION

This is a review under chapter 227, Stats., of Findings of Fact, Conclusions of Law and an Order dated December 1, 2006 (the "Decision") of the Wisconsin Department of Natural Resources ("WDNR" or "Department") regulating water levels on Lake Koshkonong, a 10,460-acre flowage on the Rock River. Petitioners in this case are the Rock-Koshkonong Lake District ("RKLD"), the owner of the Indianford Dam, whose operations are subject to the WDNR Order; and the Rock River Koshkonong Association ("RRKA") and Lake Koshkonong Recreational Association ("LKRA"), two organizations devoted to activities that enhance the Lake as a recreational resource.

At its core, this case is about competing interests in Lake Koshkonong. Boaters and other lake users, and the vast majority of riparian owners on the lake support a management scheme

that protects the value of residential property, the vitality of lake-related economic activity, and Lake Koshkonong's utility for a range of recreational pursuits. A handful of private hunt clubs and other wetland owners support lower water levels to encourage wetland plants that provide waterfowl and other habitat values. WNDR clearly favors the preferences of the latter.

Section 31.02(1), Stats., authorizes the WDNR to regulate and control the level and flow of impounded waters "*in the interest of public rights in navigable waters or to promote safety and protect life, health and property.*" Under the statute, the Legislature has delegated to the agency the task of evaluating the listed interests and establishing a water level regime that addresses competing goals. The Joint Petitioners do not dispute that WDNR has discretion to establish water levels based on its consideration and weighing of the interests listed in sec. 31.02(1), Stats. But the record in this case reveals that the Department: (1) ignored the impacts of its order on substantial, protected property interests, (2) impermissibly expanded consideration of "public rights" to include those beyond the limits of navigable waters, and (3) weighed and considered wetlands using a standard that is wholly inapplicable to the regulation of dams and impounded waters. The agency's actions constitute clear legal error and require that the matter be reversed and remanded to the agency for further proceedings consistent with the standards for water level orders under sec. 31.02(1).

The statutory standards for management of impounded waters are markedly different that those applicable to navigable waters regulated under Chapter 30 of the Statutes. Regulated activities under Chapter 30 are generally subject to a "public interest" test that balances public rights in navigable waters against the exercise of private riparian rights. In contrast, the Legislature's longstanding policy governing the establishment of water levels on impounded waters protects a broader set of public and private interests. The statutory standards for

establishing water levels on impounded waters orders have remained unchanged for more than 90 years.

The Legislature's distinct management policy for impounded waterways is reflected both in the arrangement of the statutes themselves – in which dams and impounded waters are regulated under Chapter 31, rather than under Chapter 30 governing navigable waters – and in the substantive standards it has established for these water bodies. The standards in chapter 31 evidence the Legislature's recognition that sweeping changes result when a flowing stream or river is impounded by the construction of a dam. A dam raises the level of the waters above it. This typically improves navigation and often changes patterns of development on the shores of the flowage. Elevated water levels typically change the distribution and abundance of plant species. It is not possible to simultaneously maximize the areal extent of emergent wetlands and to optimize navigation, economic opportunity and the value of shoreland property.

WDNR erred as a matter of law by establishing a water level and associated operating orders for Lake Koshkonong and the Indianford Dam that does not consider each of the protected interests under sec. 31.02(1) and that considers and weighs concerns not within the ambit of that statute.

First, the Department expanded its consideration of "public rights in navigable waters" to include lands far removed from the boundaries of Lake Koshkonong and the Rock River. This exceeded the agency's authority to consider and protect public rights within the jurisdictional boundaries of the waterways. Second, the agency employed wetland water quality standards promulgated under ch. 281, Stats., to evaluate public rights in navigable waters. This was clear legal error, because Wis. Stat. § 281.92 expressly exempts those standards from ch. 31 determinations. Third, in balancing the statutory factors of sec. 31.02(1) the Department categorically excluded consideration of impacts on property values and interests it labeled as

"secondary economic impacts" of the water level order, thus failing to carry out its statutory mandate to protect property affected by Lake water levels.

These errors reflect the agency's unwavering focus on possible wetland effects, to the exclusion of substantial property interests that have evolved in the decades since Lake Koshkonong was impounded by the Indianford Dam. On the one hand, the Department rejected any and all consideration of the decline in riparian property values and commercial activity associated with its order. On the other, it determined that publicly owned *and privately held* wetlands were the preeminent "public rights in navigable water" requiring protection in this case. In short, WDNR dismissed the private property rights of a majority of stakeholders as a slight and parochial interest, while at the same time glorifying the private property interests of wetland owners as part and parcel of the public policy of the State of Wisconsin. The agency's interpretation of sec. 31.02(1) is unreasonable and entitled to no deference. For the reasons set forth herein, the decision and order should be reversed and remanded for further proceedings.

STATEMENT OF FACTS

The Indianford Dam was constructed on the Rock River outlet of Lake Koshkonong in the mid 1800s, under express authorization of the Wisconsin Territorial Legislature and subsequent state legislation. (Findings of Fact, Conclusions of Law and Order dated December 1, 2006, at ¶ 16) (Petitioners' Appendix, at 5).[1] It was reconstructed and its crest was raised in approximately 1917. (Findings of Fact, ¶¶ 17-18) (P-App. 5-6).

Administrative authority to issue water level orders for impounded waters was originally granted to the state Railroad Commission in 1915,[2] which issued the first administrative order

[1] Excerpts from the record included in Petitioners' Appendix are cited in this brief as "P-App. XX."

[2] Ch. 380 of the Laws of 1915, §3 created Section 1596-2.1, authorizing the regulation of the water levels maintained by dams in the interest of public rights in navigable waters, safety, life, health and property.

governing the operation of the Indianford Dam in 1919. (Findings of Fact, ¶ 19) (P-App. 6). In a 1939 proceeding, the Public Service Commission (as successor to the Railroad Commission as the dam regulatory agency) determined that Wisconsin Power & Light Co. had acquired flowage rights to maintain Lake Koshkonong water levels as they had been during its operation of the Indianford Dam following the 1919 order.[3] (Findings of Fact, ¶ 20) (P-App. 6).

Regulatory authority over dams was transferred from the PSC to the Department of Natural Resources when that agency was created. In the late 1970s, WDNR reviewed the Railroad Commission's 1919 order in response to complaints about the impacts of persistent summer low water conditions on Lake Koshkonong navigation. In 1982, WDNR issued a water level order setting the maximum summer level at 776.33 msl (about 4 inches below the ordinary high water mark determined by the Department in 1979). (Findings of Fact, ¶¶ 23, 59.) (P-App. 6, 14). To accommodate navigation, the 1982 order set a minimum summer level of 775.73 msl, and required the installation of operable six-inch flashboards to maintain that minimum that level during low flow periods. The 1982 order also established lower "winter drawdown" levels from December 1-April 30. (*See* Ex. RKLD-143, at p. 10) (P-App. 36).

Before it was actually implemented, the Department's 1982 order was challenged by a group of private hunt clubs (Thiebeau and Carcajou), individual wetland owners, Rock County and others in Jefferson County Circuit Court. *See Shearer, et al. v. WDNR*, Jefferson County Circuit Court Case No. 82-CV-392. Protracted litigation over the 1982 order ultimately resulted in the negotiation of a stipulation with the wetland owners, the County and other parties, pursuant to which DNR issued a revised order in 1991. (Findings of Fact, ¶ 24) (P-App. 6). The

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The interests to be considered and protected in a water level order have not been materially changed during the last 90 years. *See* Wis. Stat. § 31.02(1).

[3] *Petition to Raise the Normal Elevation of Water Maintained by the Indian Ford Dam in the Rock River, Rock County*, 2-WP-461, November 28, 1939.

1991 order eliminated the 6-inch flashboards required in the 1982 order, but retained the maximum and minimum water levels (including the winter draw down) established in the 1982 order. (*See* Ex. DNR-3).

Water levels on Lake Koshkonong, sometimes referred to as a "wide spot in the Rock River," are only partially managed by the Indianford Dam. Water levels on the lake fluctuate wildly both annually and seasonally, regardless of dam operating parameters imposed by the State, due to the constriction of the Rock River outlet and the vastness of the Rock River watershed. (Findings of Fact, ¶ 13-14) (P-App. 5.) Particularly during periods of extreme high flows, the river outlet and dam lack the physical capacity to discharge sufficient water to maintain the lake level below the ordered maximum level. (Findings of Fact, ¶ 14) (P-App. 5). In the past, these conditions were exacerbated by the failure of the dam operator to properly repair, maintain and operate the dam (especially the wicket gates that dominate its discharge capacity) from the late 1960s through 2002. (Findings of Fact, ¶¶ 25, 30, 32, 60) (P-App. 7-8, 15). Due to these circumstances, water levels on Lake Koshkonong have often exceeded the ordered maximum level, routinely by as much as 2-3 feet. (Findings of Fact, ¶ 31) (P-App. 7). The lake's level has also fallen below the ordered minimum water level for significant periods and has regularly failed to meet the winter draw down requirements established in the 1991 Order. (Findings of Fact, ¶ 69) (P-App. 17).

In 1999, Rock County established the Rock-Koshkonong Lake District ("RKLD" or the "District") pursuant to Chapter 33 of the Wisconsin Statutes to undertake a program of lake protection and rehabilitation on Lake Koshkonong and associated reaches of the Rock River above the Indianford Dam. The Wisconsin Legislature subsequently enacted Wis. Stat. § 30.2025, which authorizes RKLD to implement a Lake Koshkonong Comprehensive Project.

Beginning shortly after its formation, the District undertook extensive lake studies and management initiatives, including water quality monitoring, wetland assessment and protection projects, plant inventories and various studies aimed at the development of management policies to optimize conditions for the wide variety of Lake Koshkonong users and interest holders. (*See* Hjort Prefiled Direct, at 2-3, 7) (P-App. 38-40). In 2003, RKLD entered into agreements with Rock and Jefferson Counties, pursuant to which comprehensive repairs were made to the Indianford Dam. (*See* Ex. RKLD-507). These repairs restored the full operating capability of the dam's gates for the first time in decades, with the result that water levels beginning in about 2002 began to more closely adhere to the (then-applicable) 1991 order, particularly during the summer season. (*See* Findings of Fact, ¶¶ 25-27) (P-App. 7). In late 2004, pursuant to a WDNR permit, Rock County transferred title to the restored Indianford Dam and all associated flowage rights to RKLD. (Findings of Fact, ¶ 22) (P-App. 6).

On April 21, 2003, RKLD petitioned WDNR to amend the then-current operating order for the Indianford Dam issued on April 25, 1991, to raise the summer (May-October) water levels controlled by the dam from a maximum of 776.33 feet mean sea level ("MSL") to 777.0 ft. MSL, and to eliminate the winter drawdown (November-April). (Findings of Fact, ¶ 4). Under the District's proposed water level order, the maximum water level would be established at a point approximately one foot below the OHWM determined in the 2001 DNR/RKLD study. (Findings of Fact, ¶¶ 4, 59) (P-App. 3-4, 14).

In 2003 and 2004, DNR conducted an Environmental Assessment of the District's proposal and issued its proposed water level order. (Findings of Fact, ¶¶ 5-7) (P-App. 4). Based on its Environmental Assessment, WDNR issued a proposed operating order dated April 15, 2005, that denied RKLD's petition, re-established the summer maximum at 776.33 ft. MSL, and

modified the winter drawdown from a minimum of 775.00 ft. MSL to 775.50 ft. MSL. (*See* Ex. DNR-8) (P-App. 41-49).

On May 16, 2005, RKLD, RRKA and LKRA filed a joint petition for a contested case hearing pursuant to Wis. Stat. § 227.42 on the April 15, 2005 operating order and denial of the District's request for amendment. (Decision, at 1) (P-App. 1). A contested case hearing was held before the Division of Hearings and Appeals on March 29-30 and April 3-5 and 10-14, 2006. (*Id.*) RKLD, RRKA and LKWA were certified as parties, and each introduced evidence and filed briefs in the contested case proceedings. (*Id.* at 2).

On December 1, 2006, Administrative Law Judge William S. Coleman, Jr. issued his Decision, denying RKLD's petition for a change in the operating order and affirming the WDNR's April 15, 2005 order in its entirety. WDNR adopted the Decision as that of the agency by operation of Wis. Stat. § 227.46(3)(a) and Wis. Admin. Code § NR 2.155(1). This timely appeal followed.

ARGUMENT

I. THE DEPARTMENT'S INTERPRETATION OF ITS AUTHORITY UNDER WIS. STAT. § 31.02(1) IS NOT ENTITLED TO DEFERENCE.

A. The Standard of Review of Agency Determinations Under Chapter 227, Stats.

The Department is authorized under Wis. Stat. § 31.02(1) to issue water level orders to further three types of interests: (1) public rights in navigable waters, (2) the promotion of safety, and the protection of life and health, and (3) protection of property. This appeal calls upon the Court to review whether the Department considered each of these statutorily protected interests, and whether it substituted other interests not within its delegated authority. The Department's consideration of interests that the Legislature has expressly excluded from consideration is reversible error. The Department's failure to consider interests that it is required to weigh in the

balancing analysis is also reversible error. *See Niagara of Wisconsin Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153 (1978) (the Legislature is trustee of the navigable waters of the State, and the DNR may not substitute its own policy for that of the Legislature); *Wisconsin's Environmental Decade v. PSC*, 81 Wis. 2d 344, 351, 260 N.W.2d 712 (1978) (actions of an agency will not be allowed to prevail when they conflict with the legislative history or intent).

Agency determinations on questions of law, including the interpretation, construction and application of a statute, are reviewed under Wis. Stat. § 227.57(5). *ABKA Ltd. P'ship v. WDNR*, 2002 WI 106, ¶ 30. That section provides:

> The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation under the provision of law.

"Although statutory interpretation is ordinarily a question of law determined independently by a court, a court may accord an agency's interpretation of a statute great weight deference or due weight deference." *Racine Harley-Davidson, Inc. v. Wisconsin Div. of Hearings & Appeals*, 2006 WI 86, ¶ 11.

The Wisconsin Supreme Court has established an analytical framework for determining whether to give "great weight," "due weight" or no deference to an agency's interpretation of a statute. Great weight deference is appropriate where: (1) the statute is one the agency was charged by the Legislature with administering; (2) the interpretation of the agency was one of long-standing; (3) the agency used its expertise or specialized knowledge in deciding the legal question presented; and (4) the agency's interpretation provided uniformity in the application of the statute. *Hilton v. DNR*, 2006 WI 84, ¶ 15. If those four factors are met, the agency decision need only be reasonable to be upheld. *Id.* at ¶ 17. However, "giving deference to the agency interpretation does not mean that the court accepts the agency interpretation without a critical eye. The court itself must always interpret the statute to determine the reasonableness of the

agency interpretation. Only reasonable agency interpretations are given any deference." *Racine Harley-Davidson, supra,* at ¶ 15.

The due weight standard is applied where "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *Clean Wisconsin Inc. v. PSC of Wisconsin,* 2005 WI 93, ¶ 42. "This intermediate standard of review is based on recognition that the Legislature entrusted application of the particular statute to the agency and not on the agency's expertise." *Id.* Under this standard, a court will uphold the agency's action or interpretation if there is no other more reasonable interpretation. *Id.*

"By granting deference to agency interpretations, the court has not abdicated, and should not abdicate, its authority and responsibility to interpret statutes and decide questions of law." *Racine Harley-Davidson, supra,* at ¶ 14. This holding is consistent with Wis. Stat. § 227.57(8), which provides that with respect to an exercise of discretion committed to the agency that:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with any agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

B. The Agency's Interpretation and Application of Wis. Stat. § 31.02(1) is Unreasonable and Not Entitled to Deference

The legislative delegation of authority to the Department under sec. 31.02(1) is broad in scope. Inherent in such decisions are policy and value judgments requiring the balancing of many competing considerations which courts are not authorized or imbued with the requisite expertise to make. *See Clean Wisconsin v. PSCW*, 2005 WI 93, ¶¶ 138-139. Nevertheless, the agency's exercise of discretion under sec. 31.02 is expressly limited by the plain language of Wis. Stat. § 281.92, which declares that nothing in chapter 281 of the Statutes affects decisions

under chapter 31. Among other things, chapter 281 regulates water quality, and sets forth the enabling legislation for the Department's promulgation of wetland water quality regulations. As argued in this brief, sec. 281.92 precludes the agency's consideration of wetland water quality regulations (which are contained in ch. NR 103 of the Administrative Code).

Regardless of the agency's expertise, no deference should be afforded to an interpretation of the statute that is clearly contrary to the limits placed on the agency's delegated exercise of discretion. A water level order premised on wetland water quality standards is erroneous as a matter of law because it violates sec. 281.92, Stats., and is "outside the range of discretion delegated to the agency by law" within the meaning of sec. 227.57(8). Further, the Department's expansive reading of "public rights in navigable waters," which was employed to advance its wetland policy objectives on private property above the ordinary high water mark, unlawfully exceeded the agency's authority under the plain language of sec. 31.02(1).

Finally, sec. 31.02(1) directs the agency to consider the protection of property in establishing water level orders. In this case, the Department concluded that property interests to be weighed and considered under sec. 31.02 do not extend to the economic impacts of low water levels on residential property values and commercial activity around Lake Koshkonong. The Department's unduly narrow interpretation of the scope of property interests to be protected under sec. 31.02(1) is contrary to the Department's own practice – with respect to earlier Koshkonong water level orders and in this very case. The Department's interpretation thus does not provide uniformity in the application of the statute, and is not entitled to great weight deference.

A more reasonable interpretation of the scope of property interests to be protected under sec. 31.02(1) – and one that must prevail under "due weight" deference – is an interpretation that is both consistent with case law and that recognizes the extent to which economic interests have

organized around Koshkonong *as a lake* since it the dam was raised in the mid 19th century. This interpretation requires the Department to weigh the extent to which the Department's order, and resulting lower water levels during the summer boating season, considerably diminishes property values and economic activity in the area.

II. THE DEPARTMENT IMPROPERLY CONSIDERED THE INTEREST OF PUBLIC RIGHTS IN NAVIGABLE WATERS BY INCLUDING PRIVATE WETLANDS BEYOND THE BOUNDS OF NAVIGABLE WATERS.

The Department's analysis and decision in this case is fundamentally grounded in a single one of the interests protected under sec. 31.02(1), namely "public rights in navigable waters." (*See* Kenneth Johnson Prefiled Direct, at 13, lines 4-6) (P-App. 50) ("I conclude that granting the petitioners request would be inconsistent with Public Rights in navigable water. . . . Public rights that will be negatively affected are water quality, fish habitat, wildlife habitat and natural scenic beauty.")[4]

Under Wisconsin law, navigable waters are public waters and are entitled to special protection under the public trust doctrine, Article IX, Section 2 of the Wisconsin Constitution.[5] Under the trust doctrine, the State owns legal title to navigable waters for the benefit of the public and has an affirmative duty to protect that property. *State v. Bleck*, 114 Wis. 2d. The State's interest in navigable waters is primary, and supersedes private property interests in lands

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[4] Mr. Johnson was the WDNR Lower Rock River Basin Supervisor, directed the preparation of the Environmental Assessment and was ultimately responsible for the Department's 2005 order denying the District's petition for a change in water level. (Johnson Prefiled Direct, p. 2, lines 9-15).

[5] Article IX, §1 **Jurisdiction on rivers and lakes; navigable waters.**
Section 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

underlying lakes and streams. *Ashwaubenon v. Public Service Commission*, 22 Wis. 2d 38 (1963).

The determination of navigability (of a stream) or the OHWM of a lake implicates the public trust doctrine and triggers WDNR's jurisdiction under numerous regulatory provisions, particularly under chs. 30 (Navigable Waters, Harbors and Navigation) and 31 (Regulation of Dams and Bridges affecting Navigable Waters). *See State v. Trudeau*, 139 Wis. 2d 91, 102, 408 N.W.2d 337 (1987) ("We have distinguished between state owned lakebed and the uplands capable of private ownership . . . .") Because Wisconsin law attaches such significance to navigable waters, the courts have carefully defined their geographical boundaries. This body of law makes it clear that navigable waters extend to the ordinary high water mark ("OHWM"). *See Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914) (public trust extends "to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks"); *State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987) (public trust duties extend to all navigable waters and lakebed below the OHWM).

The location of the OHWM is essential to the Department's assessment of a water level order's effect on navigable waters, because it delineates the geographic boundary of the "public rights" inquiry. WDNR's administrative rules define "Ordinary high water mark" consistently with supreme court decisions to mean "the point on the bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic." Wis. Admin. Code § NR 115.03(6).

The effects of a water level order on navigable waters, including wetlands located below the OHWM of Lake Koshkonong, are properly within the scope of WDNR's consideration under sec. 31.02(1). But wetlands located above the OHWM are outside the boundaries of "public

rights in navigable waters" under sec. 31.02(1). As the Department's Water Leader Kenneth Johnson acknowledged, the general public has no interest above the OHWM unless it is state land. (*See* Johnson Cross, Tr. at 751) (P-App. 54).

The Department's authority above the OHWM does not extend to ensuring the presence of a particular composition of plant and animal species. While private wetland owners' ecological preferences may dovetail with Department policy, this does make them part of the "public interest." Rather, impacts to those lands under a particular water level regime must be considered with other private property, under the "protection of property" standard. As argued below in Section IV, an *objective* weighing of competing private property interests requires that they be valued objectively – according to the market. For example, the testimony of Charles Kisow, President of the Carcajou Hunting Club, with respect to property values and costs of shoreline protection structures (*see* Tr., 175-177) (P-App. 51-53) is relevant and properly considered in establishing orders under sec. 31.02.

WDNR's evaluation of "the public interest" in this proceeding wholly failed to distinguish between wetlands within the scope navigable waters (where DNR is entitled to consider habitat features) and those located on private property beyond the bounds of navigable waters (where its consideration must be limited to property impacts.) Remarkably, the agency did not even attempt to discern the location of the boundary between the navigable waters of Lake Koshkonong and the private lands of its wetland allies. (*See* Johnson Cross, Tr. at 816-819) (P-App. 55-58).

The Department's conflation of jurisdictional and private wetlands had the practical effect of protecting *all wetlands* as interests in navigable waters under sec. 31.02(1). By lumping together "public" wetlands (within navigable waters) with private wetlands (above the OHWM) the Department evaluated the public interest element of its water level determination in

a manner that was overbroad, biased and inconsistent with its statutory responsibility. Its approach was, however, consistent with the Department's clear policy preference to establish broader, more comprehensive agency authority to protect all wetlands, regardless of the effect on other protected interests under sec. 31.02(1).

The agency's aggressive claims of authority relating to wetlands are starkly shown in a 30-year old Attorney General Opinion concluding that authority to establish a wetland activity permit program cannot be implied from other legislative grants of agency authority. *See* 68 Op. Wis. A.G. 264 (OAG 85-79) (P-App. 164-170). The Attorney General noted the absence of wetland authority in the enumeration of DNR's general water regulatory authority in Section 144.025(2)(a) through (t)[6]. (P-App. 167). Rather, the Legislature has addressed wetlands in specific water regulation programs, including the wetland mapping program under chapter 274, Laws of 1977.[7] The Attorney General concluded that the Legislature's express grants of authority were exclusive of any implied DNR power to regulate wetlands. Recognizing that "any reasonable agency doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such power" the Attorney General rejected the Department's attempt to establish wetland regulation by implication. (P-App. 167, citing *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

The same principles apply in this case. The Legislature has not expressly enumerated wetlands as protected interests under sec. 31.02(1). The Legislature's specific mandate for the Department to consider "public rights in navigable water" under sec. 31.02 is exclusive of any implied authority to consider and apply public trust values in non-navigable wetlands above the OHWM.

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[6] Now renumbered as Wis. Stat. § 281.15

[7] Now codified as Wis. Stat. § 23.32.

The Legislature has not included the aesthetic qualities and habitat values of private wetlands as protected interests to be addressed in establishing an order regulating the water level of an impoundment. The Department may well dispute the Legislature's judgment, but it cannot simply engraft its policy preferences onto the statute. Those policy preferences cannot be applied (as WDNR has applied them here) as a means of supplementing the list of interests protected in a water level proceeding to include consideration of the non-jurisdictional wetlands above the OHWM as "public rights in navigable waters."

WDNR erred by including private wetlands in its consideration of public rights in navigable water. For while "the protection of property" (as defined by the courts) is a proper consideration, nothing in sec. 31.02(1) authorizes the DNR to consider wetland values, habitat and plant diversity associated with private property located above the OHWM. The Department's interpretation of its authority to consider "public rights in navigable waters" is directly contrary to the language of the statute, as well as a long line of cases establishing the OHWM as the geographic boundary of any public rights analysis, and is entitled to no deference.

III. THE DEPARTMENT IMPROPERLY CONSIDERED THE INTEREST OF PUBLIC RIGHTS IN NAVIGABLE WATERS BY APPLYING WIS. ADMIN. CODE Ch. NR 103.

A. The Water Level Order is Overwhelmingly Based on the Department's Consideration of the Functions and Values of Wetlands Under ch. NR 103.

The Decision concludes that, in establishing the Koshkonong water level order, WDNR evaluated RKLD's petition "against the appropriate regulatory standards, including chapter NR 103," and "properly considered the cumulative impacts on the ecosystem that a further increase in lake levels would have." (Decision, at 30, citing Wis. Admin. Code § NR 103.03(d)) (P-App. 30).

Chapter NR 103 of the Administrative Code "sets forth the conditions necessary to protect water quality related functions and values of wetlands including sediment and pollutant attenuation, storm and flood water retention, hydrological cycle maintenance, shoreline protection against erosion, biological diversity and production and human uses such as recreation." Wis. Admin. Code § NR 103.01(3). Ch. NR 103 is intended "serve as a basis for decisions in regulatory, permitting planning or funding activities that impact water quality and which impact wetlands." § NR 103.01(4). Section NR 103.08 establishes that wetland water quality standards are intended to be determinative of departmental regulatory decisions. This rule states: "The department shall review all proposed activities subject to this chapter, and shall determine whether the project proponent has shown, based on the factors in sub. (3), if the activities are in conformance with the provisions of this chapter."

Examples abound in the evidence of the Department's singular focus on wetland functions and values in the establishment of the Koshkonong water level order. The centerpiece of the DNR's Environmental Analysis, and the focus of much testimony at the contested case hearing, was a review of wetland losses since Lake Koshkonong was first impounded in the early 20th century. In its evaluation of project significance, the EA explicitly concluded that "[t]he primary negative effect of this proposal will be the continued and accelerated loss of riparian wetlands." (Ex. DNR-7, at 89) (P-App. 62). The projected loss of wetlands associated with the District's petitioned increase in water levels was evaluated in comparison to historic conditions:

> Most of the original (condition at statehood) aesthetic character and biologic character of the lake has changed as a result of loss of wetlands and submerged plant beds. These changes have resulted from maintenance of higher water levels and the introduction of carp into the system. This proposal will further change the character of the lake and move one more step away from any possible hopes of restoring the past biology, water quality or natural scenic beauty of the lake.

Id. at 92 (P-App. 65). The Department's Decision explicitly assigned blame for the recession and degradation of these communities to rising water levels over time, based on comparison of

the present extent of the wetlands to historic conditions. (Findings of Fact, ¶¶ 40-41) (P-App. 9-10). Accordingly, WDNR concluded, another increase in the water level would result in the further, unacceptable diminishment of wetlands and associated habitat.

The Department's consistent use of historic conditions as a baseline from which to evaluate "cumulative effects" of the District's request for a water level increase can hardly be overstated. The use of pre-impoundment conditions as a baseline automatically leads to a conclusion that no increase in the water level is permissible. Thus, the Department's imposition of ch. NR 103 values in the water level regulatory determination unduly affected the outcome of the balancing analysis under sec. 31.02(1).

Similarly, the Department's hearing witnesses relied extensively on ch. NR 103 concepts for the conclusion that any water level increase was unacceptable. The DNR introduced testimony from all of the resource managers responsible for drafting the EA. Michael Halsted, the local water resources specialist for Lake Koshkonong, specifically testified that his role in evaluating the District's petition was "to help ensure the Department's decision met the standards enumerated in NR 103, Wisconsin Administrative Code." (Halsted Prefiled Direct, at p. 4, lines 22-23 to p. 5, lines 1-2) (P-App. 66-67). Wetland ecologist Patricia Trochlell testified that "[f]or proposals potentially affecting wetlands, the Department must consider whether the proposal complies with NR 103, Wisconsin Administrative Code" and "must make a finding that the requirements of this code are satisfied" by a showing that the criteria under § NR 103.08 are met. (Trochlell Prefiled Direct, at p. 3, lines 1-12) (P-App. 68). She went on to identify the wetland functional values listed in § NR 103.03(1) that she testified the Department must take into consideration by using the criteria in § NR 103.03(2), including "hydrological conditions

necessary to support the biological and physical characteristics naturally present in wetlands specific to . . . water levels and flows."[8] (*Id.* at p. 3, line 25 to p. 4, line 18.) (P-App. 68-69).

Paul Cunningham, a fisheries ecologist who authored significant portions of the Environmental Assessment (Prefiled Direct, at p. 4, lines 15-16) (P-App. 72), testified concerning the loss of wetlands and degraded water quality on Koshkonong associated with higher water levels from the time of impoundment, and explained how the hydrologic cycle of wetlands must be maintained by a water level order that allows drought conditions to occur with regularity. (*See id.*, pp. 11-16) (P-App. 73-78). Richard Kahl, the Department's wetland restoration ecologist, also testified that the Lake was degraded in comparison to pre-impoundment conditions, and concluded: "Water levels management should attempt to emulate the natural drought and high water cycle that affects unimpounded shallow lakes and large marshes." (Kahl Prefiled Direct, at p. 10, lines 2-4) (P-App. 79-80). The testimony of other resource managers substantially echoed this theme. As WDNR research limnologist Paul Garrison testified, "[t]he lake would be much better if the water level were reduced and allowed to more closely mimic natural water level fluctuations." (Garrison Prefiled Direct, at p. 9, lines 16-17) (P-App. 81).

The hearing transcript evidences that the Department's witnesses persistently applied wetland water quality standards from ch. NR 103 of the Code, including the concepts of wetland functions and values, the wetland hydrologic cycle, and a cumulative analysis of water levels, employing pre-impoundment conditions as a baseline. The Decision adopts as findings of fact the testimony regarding the historic extent and character of the wetlands on Lake Koshkonong

[8] During the contested case hearing, Ms. Trochlell introduced DNR Ex. 850 (P-App. 70-71), a memorandum conceding that the Department cannot apply ch. NR 103 to dams regulated under ch. 31, Stats. But this memorandum fails to acknowledge that the proposed order, issued in 2005, was premised on the application of ch. NR 103. Ultimately, that order was affirmed in a Decision that also affirmed the application of ch. NR 103. (Decision, at 30) (P-App. 30). The Department's effort to rehabilitate its water level order based on "public rights in navigable water" generally, and NR 1.95 is thus unavailing.

(Findings of Fact, ¶¶ 36-41) (P-App. 8-10), and relies extensively on testimony concerning wetland impacts in affirming the proposed water level order. (*See* Findings of Fact ¶¶ 44-58; 65-68) (P-App. 11-14; 15-16).

B. The Agency's Application of Ch. NR 103 Standards in Establishing the Water Level Order is Reversible Error.

The Department's application of ch. NR 103 was clearly erroneous because the statutes expressly provide that such water quality standards shall not affect determinations under ch. 31 of the Wisconsin Statutes. The agency's authority to establish wetland water quality standards is set forth in Wis. Stat. § 281.15(2)(b). *See* Wis. Admin. Code § NR 103.01(1). Section 281.15(2)(b) provides in pertinent part: "The department shall promulgate rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof." However, sec. 281.92 states "Nothing in this chapter affects ss. 196.01 to 196.79[9] or ch. 31." Thus, the Legislature expressly limited the rulemaking authority conferred by sec. 281.15, by the proviso that any such rulemaking does not affect ch. 31.

Section 281.92 predates the Legislature's delegation to DNR of rulemaking authority to promulgate water quality standards. The Legislature originally delegated rulemaking authority to the agency to adopt water quality standards in Chapter 614, § 37 of the Laws of 1965 [codified at Wis. Stat. § 144.025(2)(b), and later renumbered sec. 281.15(2)(b)]. The Legislature is presumed to act with full knowledge of existing laws. *State v. Cole*, 2003 WI 112, P17. The exemption from water quality standards for ch. 31 permits and approvals (including dam water level regulation) was unchanged by the Legislature's comprehensive revisions to chapter 144 in 1965, the subsequent renumbering of ch. 144 as ch. 281 in 1995, and has remained intact through

[9] These sections govern the regulation of public utilities.

successive enactments affecting the scope of the Department's regulatory authority. *See* 68 Op. Wis. A.G. 264 (OAG 85-79) ("We must presume that when the Legislature refuses to delegate wetlands management authority, it is well aware of the extent of DNR's powers in this area and simply intends not to grant additional authority.").

It is beyond question that wetlands adjacent to a flowage will be affected by dam operations under a water level order. Nevertheless, the Legislature has specifically excluded wetland regulatory authority from the purview of water level orders. The Legislature could have enacted standards to determine how conflicts between navigation (and other public rights) and wetlands interests should be addressed. Alternatively the Legislature could have granted DNR rulemaking power to address the potential conflicts. Instead, the Legislature has chosen to limit the factors governing the establishment of water level orders to those listed in sec. 31.02(1), Stats., and to preclude DNR from applying its wetland water quality standards to ch. 31 determinations.

Under the unambiguous language of sec. 281.92, Stats., the standards in chapter NR 103 do not inform the consideration of public interests in navigable waters under sec. 31.02, Stats. In this case, however, the testimony underlying the agency's Decision was heavily freighted with standards from ch. NR 103. Indeed, the Decision virtually equates wetland functions and values with "the public interest." An agency's exercise of discretion cannot stand if it erroneously interprets a provision of law. Wis. Stat. § 227.57(5).

The Department's interpretation of the scope of its discretion under sec. 31.02(1) is unreasonable and is entitled to no deference, because it directly conflicts with the plain language of Wis. Stat. § 281.92. The water level order must therefore be remanded to the agency pursuant to sec. 227.57(5), for further consideration under a correct interpretation of the law.

IV. WDNR'S DECISION ERRONEOUSLY EXCLUDED CONSIDERATION OF ECONOMIC IMPACTS TO PROPERTY OF THE WDNR WATER LEVEL ORDER.

A. Economic impacts of the water level order must be considered under Wis. Stat. § 31.02(1). both as a measure of property to be protected and as a component of "public rights in navigable waters."

The State's interest in regulating the level and flow of navigable water under sec. 31.02 is directly connected to property values and local economies. The importance of investment-backed expectations of lakeshore property owners, and the requirement that those economic interests be taken into consideration in a water level proceeding, were recognized early in Wisconsin law. In *Smith v. Youmans*, 96 Wis. 103 (1897), a group of riparian property owners sought to enjoin a dam owner from drawing down or lowering the water level of Lake Beulah in Walworth County. The level in the lake had been maintained for more than forty years since the construction of the dam, with the exception of drawdowns to power a grist mill. *Id.* at 105. This made the lake navigable from the shore and a desirable place for the development of summer cottages and resorts. *Id.* at 106. In reliance on those conditions, the plaintiffs and others purchased property, built summer homes and resorts, and made other valuable improvements. *Id.* The court in *Youmans* held: "It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained." The *Youmans* court concluded: "When a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing." *Id.* at 110.

The *Youmans* decision illustrates the court's early recognition that the raising of a dam substantially alters economic activity organized around the waterbody. Some years after the *Youmans* case was decided, the Wisconsin Legislature enacted the 1915 Water Powers Act, codified in chapter 31 of the Statutes. The Act comprehensively regulated dams on navigable waters, and gave legislative protection to property interests affected by such regulation. The scope of property interests subject to protection in a water level proceeding must be understood in light of *Youmans* and the court's subsequent decisions in chapter 31 cases.

The first case to construe the new Act was *Chippewa & Flambeau Improvement Co.,* 164 Wis. 105, 159 N.W. 739 (1916), in which the Wisconsin Supreme Court concluded that the clause in sec. 31.02 authorizing the Railroad Commission to establish water levels "to promote safety and protect life health and property" included consideration of impacts to riparian property values as well the local resort economy.[10] The court quoted with approval the Commission's finding that:

> The waters [impacted by the Dam owner's proposed minimum and maximum water levels] are among the most famous summer resort and fishing waters in the state of Wisconsin. Large sums of money have been invested by resort owners in resorts along the shores of the lakes and on the islands, and the waters are resorted to by thousands from this and adjoining states during the summer seasons. There are many private homes built along the shores of the lake and large sums of money have been put into these improvements.

Id. at 114. In that case, the court found the mandate in the new act to protect property was controlling, and that the Railroad Commission was "authorized and required, in fixing [water] levels, to take into consideration the rights of riparian property owners on the lakes, the damage done to such property, and the injury to fishing . . ." *Id.* at 115. Notably, the Commission's

[10] The case was decided upon the stipulation of the parties that that the Commission should determine the matter as if it had been brought after the passage of ch. 380, Laws of 1915, which included the present language of sec. 31.02(1), Stats., authorizing the agency (now DNR) to set water levels on impoundments "in the interests of public rights in navigable waters or to promote safety and protect life, health and property . . ." *Id.* at 111.

consideration of local economic impacts was in addition to and separate from its consideration of more limited impacts to property caused by flooding and shoreline erosion. As the Commission observed, "a 10 foot level will not only overflow a large acreage of land bordering the lake, but the level fixed will directly concern the owners of shore property throughout the lakes." *Id.*

In *Flambeau River Lumber Co. v. Railroad Comm. of Wis.*, 204 Wis. 524, 543, 545 (1931), the Supreme Court vacated the Railroad Commission's order establishing the flow of the Flambeau River because the Commission failed to consider the improvement of navigation for commercial purposes. *Id.* at 543. In finding that the Commission failed to consider the improvement of navigation for commercial purposes, the Court stated: "Water should be furnished to make such navigation as there is reasonably practicable in accordance with established practice. So far as we are able to discover, no attempt has been made to make the findings and conclusions necessary to create such a situation." *Id.* at 545. Under the *Flambeau Lumber* case, not only must the agency consider commercial impacts of the water level order, it must expressly make findings and conclusions necessary to ensure that it exercises its power in order to accomplish that purpose.

As the foregoing cases demonstrate, Wisconsin courts have repeatedly concluded that the economic impacts of water level regulation on commercial and riparian property interests are central to such determinations. Without distinguishing this precedent, the Decision concludes that "secondary" economic impacts are beyond the scope of the Department's review in water level order proceedings. The sole supporting citation for this conclusion of law is *Wisconsin's Environmental Decade v. DNR*, 115 Wis.2d 381 (1983), a case decided under Wis. Stat. § 1.11 (the Wisconsin Environmental Policy Act) in the context of a series of permitting decisions under ch. 30, Stats.

The petitioners in *Decade* asserted that the development of a shopping mall near the City of Appleton would detrimentally impact the downtown business district. The hearing examiner, in a hearing on the issuance of water diversion permits under secs. 30.12 and 30.19 Stats., excluded evidence concerning off-site socioeconomic impacts, holding that "[t]he public trust in navigable waters is not to be expanded and diluted to cover downtown preservation." *Id.* at 410. The hearing examiner's ruling on the evidence was upheld on appeal.

The Department's reliance on *Decade* is misplaced, because that case involved WDNR's environmental assessment in connection with water permits issued under ch. 30, Stats., a regulatory scheme that does not incorporate the protection of property standard found in sec. 31.02(1), Stats. *Decade* is also distinguishable on its facts. In that case, the petitioners' economic impacts claims were not causally connected to the specific physical or environmental impacts of DNR's permit decision. The petitioners' concerns were based on the alleged consequence of the broader *land use* being proposed by the shopping mall developer.[11] There was no claim that the loss of downtown business would result from the issuance of ch. 30 permits, which was extent of the agency's jurisdiction in that case. *See id.* at 386. Both the facts and the operative statute distinguish the holding in *Decade* from the present case.

Section 31.02(1) requires the agency to consider property interests when establishing a water level order. The detrimental economic impact of the Department's water level regime, and conversely the benefit to the local economy of the District's proposed levels, is strongly substantiated by the testimony. The record in this proceeding shows that the water level regime (*i.e.*, the Department's specific regulatory determination) *in and of itself* influences economic activity around Lake Koshkonong. The testimony of numerous citizens in the public comment

[11] As the supreme court noted: "These cases do not involve the wisdom of locating the shopping mall near the Town of Grand Chute, Outagamie County. . . . That decision was resolved by local representatives composing the zoning committee . . . which approved the issuance of conditional use permits to the developer." *Decade*, 115 Wis. 2d at 385.

phase of the hearing supports this conclusion. For example, Eric Samuelson, owner of the Lakeland Campground and co-owner of the Rock River Marina, testified:

> The lake and river have a huge, huge economic impact for our area and I think that's overlooked many times. From my experience with the camping resort I can tell you what the impact is with tourism, not only for the resort itself but for the marinas that operate in the area. Not just ours, but the others as well, for the many restaurants and facilities on the water and it extends so far beyond that. The water is bringing people into our area that impact the stores and shops and restaurants in our community. . . . Not only the economic value as far as retail business, but certainly the property values. There's a huge impact on our property values associated with the level of our water. . . .

(Tr. 104-105) (P-App. 82-83). Expert testimony supports the anecdotal observations of members of the public. John Stockham, a land use planner and real estate analyst called by the Petitioners, testified that five towns and three cities are potentially impacted by the water level order. (Stockham Prefiled Direct, Tr. 2901) (P-App. 84). His testimony detailed the negative impacts to residential property values due to lower water levels, and consequent diminishment of the municipal tax base. He also opined that lower water levels translate to a loss of substantial lake-related commercial activity for those firms catering to motor boating and other businesses that rely on the Lake for their customer base, including marinas, eating and drinking establishments, lodging and campgrounds. (*See* Stockham Direct, Tr. 2912-2921; Ex. 227) (P-App. 85-94; 95-125). Dr. Russell Kashian, a professor of economics, introduced a comparative study of the rate of appreciation of residential property values which concluded that, since 2002 (when the Indianford Dam was rehabilitated and began to more closely adhere to DNR water levels during the summer boating season), property values had appreciated at a slower rate than property values on Beaver Dam Lake, a comparable shallow flowage located in south-central Wisconsin. (*See* Tr., pp. 2793-2798; Ex. LKWA-225) (P-App. 126-131; 132-137). The Department categorically struck this evidence from the record, concluding that "[s]econdary or indirect

impacts of a water level determination do not bear on the statutory standard set forth in section 31.02(1). Stats." (Decision, at 28) (P-App. 28).

It is clear that significant economic activity and investment has been organized around the decision to construct the Indianford Dam in the mid-1800s, and subsequent elevation of lake levels decades ago. One measure of the breadth of the interests and economic value of this investment activity is a study performed by the UW-Extension assessing the economic impacts of the *removal* of the Indianford Dam. The study concluded that the removal of the dam and consequent 3-foot lowering of the water level of Lake Koshkonong would negatively impact local property values by roughly $23 million, resulting in a loss of some $470,000 in annual property tax revenues. (*See* Executive Summary, Ex. 207, at i-ii) (P-App. 138-140). There is a direct causal relationship between the physical and environmental impacts of a water level regime and the economic impacts of DNR's action. This is what sets DNR action under sec. 31.02 apart from other DNR regulatory activity, such as that under review in *Decade*. As the court in *Chippewa & Flambeau* recognized, Wisconsin's recreation industry and real estate values are closely connected to the level and flow of Wisconsin's navigable waters. Further, there is no legally cognizable distinction to be made between economic impacts such as flood damage and economic impacts from the diminution in residential property values, when both are a direct result of changes in the water level. Ultimately, the only objective means of considering and protecting the full range of physical impacts to property is to measure such impacts by their economic cost.

B. The Department's interpretation of the scope of property interests to be protected under Wis. Stat. § 31.02(1) is not entitled to deference because its interpretation has not been consistent.

The Department's interpretation of sec. 31.02(1) to exclude consideration of the economic value of impacts to commercial and residential property is inconsistent with the

agency's published guidance and prior practice. WDNR's written policy guidance recognizes the agency's obligation to consider property values and commercial factors in the protection of property under sec. 31.02. Chapter 130 of the WDNR Waterway and Wetland's Handbook[12] entitled "Water Level and Flow" provides the following guidance for water level orders under sec. 31.02, Stats.:

> "The Department... to promote safety and to protect life health and property may regulate and control the level and flow in all navigable waters..."
>
> Under this standard, the department may regulate and control the level and flow of water to:
>
> a. Minimize damage to property resulting from flowing, erosion or ice action...
>
> * * *
>
> f. Minimize economic losses resulting from too much or too little water.

Id. at p. 3 (emphasis in original). The DNR's stated responsibility to "minimize economic losses from too much or too little water" is separately enumerated from its responsibility to "minimize damage to property resulting from flowing, erosion or ice action." This distinction emphasizes the Department's recognition in this guidance that *economic losses* from too much or too little water" are to be considered under sec. 31.02, as a category separate from and in addition to property *damages* that might be caused by high or low water levels.

The Department applied these guidelines in the proceedings that led to the 1982 water level order for Lake Koshkonong, as evidenced by the 1981 environmental assessment of the proposed order. The 1981 assessment found:

> The taverns, marinas, bait dealerships and other commercial establishments will benefit from a stable recreational pool and more reliable navigational access. Residential/recreational property on Lake Koshkonong may become more attractive and valuable as a result. There will be a net benefit to hydropower production. . . .

[12] Available at http://dnr.wi.gov/org/water/fhp/handbook/PDFs/ch130.pdf

(Ex. DNR-817, at 12) (P-App. 142). The 1981 assessement thus explicitly considered the impact of the proposed 1982 order on commercial and residential property interests in the Lake Koshkonong area in terms of their economic worth. In this proceeding, by contrast, these considerable interests were recognized as nothing more than an idiosyncratic personal preference. The Decision affirming the 2005 water level order finds that it was appropriate simply to consider property owners' "diminished utility and enjoyment of their property, which reduces the value of that property *to them*." (Decision, at 29) (emphasis added).

The Department also offered evidence in the contested case hearing that directly contradicts its position that economic impacts of a particular water level are not to be considered. The Department offered economic loss calculations based on the value of board-feet of green ash, to measure the loss in growth of trees in the Carcajou floodplain forest according to one study. (Pyrek Rebuttal, Tr. 1559-1560; Ex. DNR-829) (P-App. 143-144; 145-146). In addition, the Department studied the economic impact of the District's proposed increase in the water level on outlying drainage districts and private drains. (*See* Environmental Assessment, Ex. DNR-7, at 72-73) (P-App. 60-61). State Drainage Engineer David Russell testified that he was contacted for this purpose by Department personnel in the process of their review of the District's proposal. (Russell Cross, Tr. at 1935) (P-App. 156). Mr. Russell testified at the hearing as to the economic impacts of the District's proposal on certain drainage district and private drain outlets. (*See* Tr., 1926-1934; Exs. 704 & 705) (P-App. 147-155; 157-163). On the basis of that testimony, the Decision makes several findings that diminished crop yields would result from the District's proposed water level order. (*See* Findings of Fact, ¶¶ 86-91) (P-App. 19-20).

The Department's interpretation of the scope of "the protection of property" under sec. 31.02(1) to wholly excludes consideration of substantial, quantifiable impacts to commercial interests and property values is not of longstanding and is in conflict with past agency practice and its own published guidance. While deference is due to the Department as the agency to whom water level regulation is delegated, the agency's interpretation in this case is unreasonable. It disregards established case law concerning the scope of property rights affected by an impoundment, and thus fails to ensure a reasonable accommodation of competing interests under the water level order.

CONCLUSION

The Wisconsin Legislature long ago recognized that water level orders governing the operation of dams affect a number of important public and private interests. The Legislature authorized placement of the first dam at Indianford on the Rock River some 150 years ago. Since then, area landowners, citizens and governments have made a vast range of decisions and investments based on the transformation of these lands into a lake. Hundreds of homes and cottages have been constructed on the shores of the flowage. Businesses have been established to cater to the needs of these property owners and the thousands of boaters, anglers and others who use the lake for recreation each year.

Most lake shore owners aim to enjoy the lake using boats. For those users, lower water levels frustrate access to the water, demand extraordinary pier lengths and limit the usable area of the lake during much of the boating season. The restoration of the Indianford Dam by the Rock-Koshkonong Lake District has finally made substantial compliance with WDNR's water level orders possible during the summer boating season. If the WDNR's water level order is affirmed, the value of lakeshore property (and the tax base it supports) will suffer. Lake-related economic activity, from marinas to restaurants, will decline. A handful of wetland owners will

surely welcome the drop in water levels, for it will better secure their private reserves from intrusion by boaters and likely enhance waterfowl production. DNR also favors lowered water levels, because the agency values wetlands far above the quotidian concerns of property and business owners and recreational boaters. But as one member of the public observed:

> There's an awful lot of jobs that are dependent on this particular lake. There's not a lot of industry here. This is very important to this area. And for 20 well off hunters . . . to outweigh the benefits of all the people trying to earn a living off this particular area, it's a rather interesting little unbalance of scale.

(Public Testimony of John Mayer, Tr. at 664.)

In discharging its statutory mandate, DNR wholly ignored critical interests and elevated others to a lofty height. In so doing, the Department departed from its statutory authority and assumed the role of law giver, effectively setting new standards for water level orders and rejecting those established by the Legislature. This unlawful arrogation of authority constitutes clear legal error. It deprived a large majority of the stakeholders in this process of their right to a fair and reasonable assessment of the impacts of the competing water level orders on the interest protected under the law and a decision soberly rendered in light of that assessment. (Janesville lady.)

The Joint Petitioners urge the Court to reverse the Department's December 1, 2006, Findings of Fact, Conclusions of Law and Order and to remand this matter for further proceedings consistent with the requirements of Chapter 31 and the Court's decision.

Dated this 14th day of September, 2007.

Respectfully submitted,

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