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STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 2008AP1523

04-16-2012

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OF WISCONSIN**

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

Petitioners – Appellants – Petitioners,

v.

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent – Respondent,

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

Intervenors – Respondents.

**BRIEF OF INTERVENORS—RESPONDENTS,
LAKE KOSHKONONG WETLAND ASSOCIATION, INC.,
AND THIEBEAU HUNTING CLUB**

**APPEAL FROM A DECISION OF THE COURT OF APPEALS, DISTRICT IV,
DATED JULY 21, 2011, AND
THE JUDGMENT OF THE CIRCUIT COURT FOR ROCK COUNTY,
HONORABLE DANIEL T. DILLON PRESIDING,
CASE NO. 06-CV-1846, DATED MAY 9, 2008**

Charles V. Sweeney
Wisconsin Bar No. 1019039
Mitchell R. Olson
Wisconsin Bar No. 1030756

Attorneys for LKWA & THC
Axley Brynson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
(608) 283-6724
molson@axley.com

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STATEMENT OF ISSUES

- 1. Whether the legal interpretations underlying the Decision and Order of the Wisconsin Department of Natural Resources (DNR) in this case are reviewed under the great weight deference, middle weight deference, or de novo standard of review.**

The Court of Appeals declined to address this issue, reviewing the DNR's Decision and Order *de novo*.

- 2. Whether DNR had the authority to consider the impacts on wetlands in and adjacent to Lake Koshkonong when evaluating a proposed water level order under Wis. Stat. § 31.02(1).**

The Court of Appeals answered “yes,” concluding that DNR may consider all such wetlands as part of its § 31.02(1) analysis.

- 3. Whether DNR had the authority to consider and apply the wetland water quality standards in Wis. Admin. Code Ch. NR 103, when evaluating and setting the water level order for Lake Koshkonong.**

The Court of Appeals answered “yes,” concluding that DNR was authorized to and properly considered Chapter NR 103.

- 4. Whether the Administrative Law Judge properly excluded evidence of certain secondary economic impacts in apply the statutory standard to “protect life, health and property” when setting the water level order for Lake Koshkonong, pursuant to Wis. Stats. § 31.02(1).**

The Court of Appeals answered “yes,” concluding that the reference to “property” in § 31.02(1) refers to the physical characteristics of potentially affected property and not its economic value.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Intervenors-Respondents request oral argument; and believe that publication is appropriate to reinforce DNR's authority and obligation to consider wetland and other water resource impacts in setting water levels for impounded lakes.

INTRODUCTION

Less than one year ago, this Court unanimously affirmed and reinforced DNR's authority and responsibility to protect waters of the state, as the constitutional and statutory trustee of state waters.¹ Additionally, both the Legislature and this Court have long recognized the interrelationship between navigable waters and those other water resources that are integral to the protection of all waters of the state. Wisconsin also has long recognized the critical role of wetlands in the health of our ecology, for its functional values in flood management, filtration of sediments and pollutants that would otherwise enter our lakes and rivers, and of course habitat and sanctuary for a wide variety of flora and fauna, including migratory birds.

Petitioners here ask the Court to ignore that statutory, administrative and jurisprudential history; and to effectively reverse its unanimous decision upholding the Public Trust Doctrine. Specifically, they ask the Court to rule that DNR may not consider affected water resources when setting a water level order. Instead, they urge that DNR should focus on property value, and to establish lake

¹ *Lake Beulah Mgmt. Dist. v. State*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

levels based on competing impacts to real estate values. They reach this conclusion by literally ignoring the applicable law, and effectively rewriting the governing statute.

The Court should reject petitioners' invitation to abandon existing law and rewrite state statutes.

STATEMENT OF THE CASE

This case relates to DNR's establishment of a water level order for Lake Koshkonong, located in Rock and Jefferson Counties, Wisconsin. The relevant facts are fully presented within the Decision issued December 1, 2006. (R.16B:3-25; A.App:3-25) The Decision sets forth 120 separate Findings of Fact over the course of 23 pages. Petitioners make no objection to any of the Decision's factual findings. Rather, they only challenge DNR's construction and application of Wis. Stat. §31.02(1) to those facts.²

² RKLD misstates the testimony when pronouncing that: "[t]he hearing examiner heard uncontroverted testimony from experts retained by the Petitioners concerning the direct impact of Koshkonong water levels on property values and lake-based commercial activity." (Pet. Brief, p. 9) To the contrary, LKWA and THC presented the testimony of Mr. Linn Duesterbeck, whose appraisal testimony completely undercut the premise of RKLD's contention. (R.12: 2732-2787; R.10F: Exh. 360) The Examiner initially heard all such competing testimony before deciding to exclude the evidence from consideration.

Mr. Duesterbeck was the only licensed and trained land appraiser to testify in these proceedings. (R.12: 2732-2787; R.10F:Exh. 360) Mr. Duesterbeck's expert testimony included the following: (1) both residential and commercial property on Lake Koshkonong has increased in value at significant rates over the past 5-10 years; (2) demand for Lake Koshkonong property has dramatically increased; (3) land values have uniformly increased since the 1991 water level order; and (4) "The overwhelming corroborating evidence" shows no adverse effect on market values attributable to the current water level order; Instead, the evidence shows "significant value increases, with short or no marketing periods and an almost total lack of supply" such that the waterfront market is "extremely well and healthy." (R.12: 2732-2787; R.10F: Exh. 360)

DNR's Statement of the Case discusses the factual and procedural history of this case. The Intervenor-Respondents join in DNR's recitation of the facts. Other facts will be discussed in the body of our argument. However, we also highlight certain important contextual facts.

A. Multiple Uses of Lake Koshkonong.

Lake Koshkonong is the sixth largest lake in Wisconsin, in surface area. (R.16B:5; A.App:5) However, it is also a very shallow lake, much of which is less than five feet deep. (R.16B:11; A.App:11) The lake is essentially a wide point in the Rock River flowage; and its water level is largely controlled by the Indianford Dam, located approximately six miles downstream of the lake. (R.16B:4; A.App:4) Regulation of the water level is therefore governed by Wis. Stat. Ch. 31, relating to bridges and dams.

Lake Koshkonong supports a healthy wildlife population, both within the lake and within the many wetland communities surrounding the lake. The lake and surrounding areas are of great importance to many groups, owners, and vacationers for fishing, boating, hunting, bird watching, and other recreational activities. Portions of the lake are developed with residential homes and vacation cottages, and there are several restaurants and other businesses on or near the lake that serve recreational users of the lake.

The parties to this case illustrate the multiple and sometimes competing uses. Petitioners, Rock-Koshkonong Lake District, *et al.* (collectively "RKLD"), represent many of the owners and businesses on or near the lake. They initiated

this proceeding to raise water levels to maximize access to the lake from individual properties.

The Lake Koshkonong Wetland Association, Inc. (“LKWA”), and Thiebeau Hunting Club (“THC”), are interested in sport hunting and fishing, as well as the preservation of the ecology of the lake. LKWA is a charitable organization dedicated to the promotion of the ecological health of the Lake Koshkonong watershed, expressly including the wetlands, water quality, and wildlife supported by watershed. Its members include owners of riparian property on the lake. THC is a hunting club and owner of substantial riparian property on the lake, including extensive and high quality wetlands. (R.18:2) Both LKWA and THC have participated as parties throughout the administrative and court proceedings.

B. Procedural History

RKLD initiated this proceeding by petitioning for an amendment to DNR’s 1991 water level order governing Lake Koshkonong. In response to RKLD’s petition, DNR established a water level regime substantially similar to the prior water level order in place, which was based on a global compromise dating back to 1982. RKLD was not satisfied with this reaffirmation of the existing water level order, and sought a target water level and maximum water level 7.2 inches and 8 inches higher than the historical level, respectively.

The DNR water level determination was subject to a contested case hearing, lasting ten days, in which numerous lay and expert witnesses testified.

The legal and factual issues were extensively briefed. The Administrative Law Judge (“ALJ”) issued his Decision and Order on December 1, 2006, and that became DNR’s final decision. (R.16B; A.App:1-32)

RKLD sought judicial review of that decision. DNR and LKWA/THC prevailed in the Circuit Court, and in the Court of Appeals on a subsequent appeal. *Rock-Koshkonong Lake District v. State*, 2011 WI App 115, 336 Wis.2d 677, 803 N.W.2d 853.

ARGUMENT

I. DNR’S INTERPRETATIONS OF LAW AT ISSUE ARE ENTITLED TO GREAT WEIGHT DEFERENCE.

This appeal seeks judicial review of the Administrative Decision issued on December 1, 2006, pursuant to Wis. Stat. § 227.52. This court’s review “shall be confined to the record.” Wis. Stat. § 227.57(1). When an appeal is taken from a circuit order reviewing an agency decision, this Court reviews the decision of the agency, not the circuit court. *Lake Beulah Mgmt. Dist. v. State*, 2011 WI 54, ¶ 25, 335 Wis. 2d 47, 799 N.W.2d 73. “Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency’s action.” Wis. Stat. § 227.57(2).

The issues in this case relate to DNR’s application of Wis. Stat. § 31.02(1), specifically: a) whether DNR has the authority to consider wetland impacts in setting a lake water level; and b) whether DNR must evaluate and balance

competing economic interests potentially affected by the lake water level. Statutory and other legal interpretation “is ordinarily a question of law determined independently by a court” *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶ 11, 292 Wis. 2d 549, 717 N.W.2d 184.

The Court may accord one of three levels of deference to an agency’s interpretation of a statute: great weight, due weight, or *de novo* review. *See, e.g., Id.; DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 1, ¶ 15, 299 Wis. 2d 1, 727 N.W.2d 311; *RURAL v. PSC*, 2000 WI 129 ¶ 21, 239 Wis. 2d 660, 619 N.W.2d 888. The degree of deference this Court should abide presents a question of law to be reviewed *de novo*. *Lake Beulah*, 2011 WI 54, ¶ 23.

A court gives great weight deference when the agency satisfies four conditions: 1) it is legislatively charged with administering the statute; 2) its interpretation is long-standing; 3) it employed specialized knowledge or expertise in forming the interpretation; and 4) its interpretation will provide uniformity and consistency in the statute’s application. *DaimlerChrysler*, ¶ 16. Under that standard, a court will not substitute its views for that of the agency, and will sustain the agency’s interpretation if it is reasonable, irrespective of whether there is a more reasonable interpretation. *Id.*

The middle, due weight deference standard, applies where “an agency has some experience in the area, but has not yet developed the expertise that would place it in a better position than a court to make judgments regarding the interpretation of the statute.” *Id.*, ¶ 17. *De novo* review applies when the issue is

one of first impression, the agency has no particular expertise, or the agency's position is "so inconsistent that it provides no guidance." *Id.*, ¶ 18.³

The issues raised here relate to a statute administered exclusively by DNR, and which has been administered by DNR and its predecessor agencies for decades. Additionally, DNR has unique expertise relating to the management of state waters; and it has been identified by both the Legislature and this Court as the "trustee" of state waters. *See, e.g.*, cases and statutes cited and quoted in *Lake Beulah*, 2011 WI 54, ¶¶ 32-34. This Court therefore should apply the great weight deference standard to DNR's Decision here.

II. DNR HAD BOTH THE AUTHORITY AND RESPONSIBILITY TO CONSIDER ALL WETLANDS ASSOCIATED WITH LAKE KOSHKONONG WHEN SETTING THE WATER LEVEL UNDER WIS. STAT. § 31.02(1).

Section 31.02(1) provides in pertinent part:

The department, in the interest of public rights in navigable waters and to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained

RKLD takes a narrow view of this statute, contending that it limits DNR's consideration exclusively to the navigable bodies of water, and only to those portions of the water body below the ordinary high water mark ("OHWM"). From this premise, RKLD contends that DNR erred in considering those wetlands above the OHWM for Lake Koshkonong, *i.e.*, that wetlands above the OHWM are not

³ The "due weight" and "no deference" are similar, as the Court will adopt the more reasonable interpretation of an ambiguous statute. *See, e.g., Racine Harley-Davidson*, 2006 WI 86, ¶ 20.

“navigable waters” subject to consideration under §31.02(1). This argument fails on multiple legal and factual grounds.

A. RKLD Ignores DNR’s Constitutional and Statutory Obligation to Protect All Waters of the State, Including Wetlands.

In July 2011, this Court issued its unanimous decision in *Lake Beulah*, 2011 WI 54. The principal issue in that case was whether DNR had the authority or duty to consider potential adverse impacts to Lake Beulah when it approved a high capacity well for the Village of East Troy.⁴ *Id.*, ¶¶ 1-2 and 22.

The Court held in unequivocal terms that DNR has both the authority and “a general duty” to consider whether a high capacity well may harm “waters of the state.” The Court’s conclusion is well summarized at the outset of the decision:

We conclude that, pursuant to Wis. Stat. § 281.12, § 281.34, and § 281.35 (2005-06), along with the legislature’s delegation of the State’s public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state....

We further hold that to comply with this general duty, the DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state. The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit.

Id., ¶¶ 2-3 (footnotes omitted).

The Court’s analysis in its decision, as well as a related statute, is instructive and directly applicable to this case.

⁴ The Court also considered whether the petitioner in that case had properly submitted sufficient evidence to trigger DNR’s duty to consider environmental impacts.

1. Statutory Mandate to Protect Wetlands and Other Waters of the State.

The Court in *Lake Beulah* made clear that DNR's duty is grounded in its obligation to protect "waters of the state," which are defined to include "all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction." *Id.*, ¶ 3, fn. 8, quoting Wis. Stat. § 281.01(18). Thus, the Court recognized the broad scope of DNR's statutory responsibilities.

The Court then cited Wis. Stat. § 281.11, which mandates, *inter alia*, a liberal construction of state statutes in favor of protecting our water resources:

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.... The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency **for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.** To the end that these vital purposes may be accomplished, **this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed** in favor of the policy objectives set forth in this subchapter....

Id., ¶ 35(emphasis added).

2. Public Trust Doctrine.

The Court concluded that DNR's duty to investigate and consider environmental impacts of groundwater on surface waters was also triggered by DNR's responsibilities as trustee of public waters under the Public Trust Doctrine. *Id.*, ¶ 3, fn. 6. The Court engaged in a lengthy discussion of the Public Trust

Doctrine as an essential component of the organic law of the State of Wisconsin, noting that “[t]his Court has long confirmed the ongoing strength and vitality of the State’s duty under the public trust doctrine to protect our valuable water resources.” *Id.*, ¶ 31; *see generally, id.*, ¶¶ 30-34.

The Court’s reliance on the Public Trust Doctrine is significant, because it reinforces the principle that DNR’s primary responsibility is to protect public water resources. ““The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant.”” *Id.*, ¶ 33, quoting *Wis. Env’tl. Decade v. DNR*, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978). DNR’s obligation to consider environmental impacts to water resources is grounded in DNR’s constitutional and statutory duty, as trustee of public resources, to protect state waters. Accordingly, DNR’s consideration of potential impacts to water resources must reflect that paramount duty.

There can be no doubt that the Public Trust Doctrine protects wetlands. As recognized by the Court of Appeals, “[i]t is well established that the public rights protected under the public trust doctrine do not stop at edge of the beds of navigable waters.” (Ct. App. Decision, p. 20) “Public rights in navigable waters” must include impacts to wetlands, both direct and indirect, under the public trust doctrine. *Just v. Marinette County*, 56 Wis.2d 7, 17-18, 201 N.W.2d 761, 768 (1972).

In *Just v. Marinette County*, this Court acknowledged:

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.

Id. at 16-17. The Court acknowledged that wetlands were not “an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights.” *Id.* at 18. Rather, lands adjacent to or near navigable waters exist in a special relationship to the state ... and are subject to the state public trust powers.” *Id.* at 18-19.

3. Other Statutory and Regulatory Authority for DNR Regulation of Wetlands.

Although not relevant to *Lake Beulah*, it is important here that DNR has broad authority to consider all wetland impacts and protect wetland resources under several statutes and administrative rules. DNR has primary responsibility for protection of Wisconsin’s “natural resources” under Wis. Stat. § 23.09, whose purpose is “to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state.” Wis. Stat. § 23.09(1). DNR is required to promulgate water quality standards for all waters of the state, including wetlands, under Wis. Stat. § 281.15; and it has adopted wetland water quality standards in Wis. Admin. Code Ch. NR 103. DNR has wetland designation, mitigation and other protection requirements under Wis. Stat. § 281.37.

Of particular interest, the Legislature amended Wis. Stat. § 281.36 in 2006, to specifically clarify that DNR’s jurisdiction over wetlands extends to “nonfederal” wetlands, *i.e.*, those wetlands that are not connected to a navigable body of water. This statute was passed in response to *Rapanos v. United States*, in which the U.S. Supreme Court held that federal jurisdiction does not extend to those so-called “isolated” wetlands. 547 U.S. 715, 742 (2006). That is, the Wisconsin Legislature has consciously decided that DNR must manage and protect wetlands not associated with navigable waters.

DNR’s broad authority over wetlands is reinforced by long-standing administrative regulations. Section NR 1.95(1) provides, in pertinent part:

The administrative rules regarding wetlands shall be applied 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 wetland functions and values....

The remainder of § NR 1.95 reinforces and more specifically describes DNR’s authority and obligations to protect wetlands. DNR “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). “Wetlands are known to possess a wide range of natural and human values” including biological functions, watershed functions, recreational, cultural and economic value, scientific study areas. Wis. Admin. Code § NR 1.95(3). State policy is “that wetlands shall be preserved, protected, restored and managed to maintain, enhance or restore their values.” Wis. Admin.

code § NR 1.95(4)(a). Moreover, “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.” *Id.* “The department shall preserve, protect, restore and manage the state’s wetland communities to be sustainable, diverse and interspersed with healthy aquatic and terrestrial communities.” Wis. Admin. Code § NR 1.95(4)(d); *see also*, R.10J:Exh. 850.

RKLD wholly ignores *Lake Beulah*, the Public Trust Doctrine, state statutes and state regulations. This overwhelming authority established by legislative, judicial and administrative law contravenes and necessarily defeats RKLD’s argument. Wetlands are subject to consideration by the Department when issuing decisions that may affect wetland communities, without regard to navigability or ownership. DNR properly considered wetlands in its decision making process.

B. Wis. Stat. § 31.02 Does Not Limit DNR’s Jurisdiction to Water Resources above the OHWM.

RKLD also wrongly assumes, *arguendo* and without analysis, that DNR’s jurisdiction under § 31.02 is limited to consideration only of impacts to the portions of a navigable body of water below the OHWM. The OHWM establishes the boundaries of a lake, especially for purposes of ownership of the bed of the lake. *State v. Trudeau*, 139 Wis.2d 91, 103-04, 408 N.W.2d 337 (1987). However, the law cited above makes clear that DNR’s responsibilities extend to

all “waters of the state,” without regard to navigability or OHWM, and without regard to ownership of the water body or its bed.

There is nothing in § 31.02 that expressly or by necessary implication constrains DNR’s jurisdiction when it comes to setting water levels. On the contrary, DNR’s obligations to set water levels are based on “the interests of public rights in navigable waters *or* to promote safety and protect life, health and property” *Id.* (emphasis added).

C. RKLD’s Argument is Contrary to the Facts.

RKLD’s arguments also defy the ecological facts in this case, including the importance of wetlands to the protection of navigable waters. The record is replete with evidence of the historical losses of wetlands at Lake Koshkonong, and the perilous status of the remaining high-quality wetlands, including floodplain forests and sedge meadows. (R.16B:8-11; A.App:8-11) Moreover, Wisconsin’s administrative code emphasizes the critical state of wetlands in Wisconsin:

Wisconsin has lost almost half of its historic wetland acreage and it is recognized that **the protection, management and restoration of wetlands in the state will benefit fish, wildlife, water quality, flood control, biodiversity and natural scenic beauty** ... Pursuant to s. NR 1.95, it is the policy of the department to reverse the loss of wetlands in Wisconsin and **to encourage and facilitate the protection, management and restoration of wetlands.**

Wis. Admin. Code § NR 353.01 (emphasis added).

Further, the record is replete with photographs of wetland habitat, including shallow and deep shoreland marshes and floodplain forests at Lake Koshkonong. (R.10F: Exhibits 330-31; R.12:2178-9) For example, Koshkonong Creek contains 278 acres of shallow marsh and floodplain forest; Krumps Creek contains 335

acres of shallow marsh; Mud lake contains 921 acres of shallow marsh; Koshkonong Wildlife Area contains 921 acres of shallow marsh; Otter Creek contains 334 acres of shallow marsh and floodplain forest, and Thiebeau Marsh contains 494 acres of shallow marsh and other wetland types. (R:16B:9; A.App:9) Those vast and important wetland habitats, as the photos demonstrate, are wet, and many certainly fall at or below the OHWM. The DNR considered these wetlands in reaching its Decision. (R:16B:8-11; A.App:8-11)

Third, RKLD faults the DNR for a claimed failure to survey and distinguish which wetlands fall above the OHWM, and which fall below. RKLD implies that the vast majority of wetlands subject to DNR analysis are above the OHWM. However, RKLD offered no evidence to delineate the elevations of wetlands. (Pet. Brief, p. 10; Ct. App. Decision, p. 22, n.4) RKLD, as petitioner, had the burden of proof, and it utterly failed to sustain that burden. Wis. Admin. Code § NR 2.13(3).

This review is limited to the record. RKLD's argument fails for a lack of proof, on the record, as to exactly what the scope of DNR's wetland analysis entailed. RKLD offered no evidence or argument at the hearing on the nature and location of wetlands vis-à-vis the OHWM. Other evidence, such as that described above, undermine RKLD's arguments. Accordingly, RKLD simply did not prove that DNR's § 31.02(1) analysis specifically depended upon wetland above the OHWM.

III. DNR PROPERLY CONSIDERED AND APPLIED CH. NR 103 WETLAND WATER QUALITY STANDARDS WHEN ISSUING THE WATER LEVEL ORDER.

During the proceeding, RKLD contended that “DNR’s rejection of higher water levels was preordained in part by institutional bias ... in favor of wetland preservation, without due regard to other interests in navigable waters.” (R.16B:30; A.App:30) In response, the Decision concluded that “DNR evaluated the proposed water level increase against the appropriate regulatory standards, including chapter NR 103, Wis. Admin. Code, with a critical eye, but with objectivity and fairness.” (R.16B:30; A.App:30)

RKLD again contends that DNR cannot apply Ch. NR 103 in the course of a water level order review under § 31.02. RKLD embraces and manipulates century-old legislative history, without cognizance of the more recent statutory and regulatory developments, to support its argument. RKLD’s argument should be rejected.

Chapter NR 103 is authorized by Wis. Stats. §281.15(2)(b), which empowers DNR to adopt rules setting wetland water quality standards. In general, the provisions of Chapter NR 103 “shall ... apply to all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands.” Wis. Admin. Code § NR 103.06. Under § NR 103.01(2):

Water quality standards are intended to protect public rights and interest, public health and welfare and the present and prospective uses of **all waters of the state** for public and private water supplies, propagation of fish and other aquatic life

and wild and domestic animals, preservation of natural flora and fauna, domestic and recreational uses, and agricultural, commercial, industrial and other uses.

(emphasis added).

Nevertheless, RKLD contends that Wis. Stat. § 281.92 limits the application of NR 103 to determinations made under § 31.02. The Court of Appeals correctly rejected that argument. (Ct. App. Decision, p. 22-25)

Section 281.92 states: “Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31.” Although Chapter 281 authorized NR 103, for the reasons set forth below, § 281.92 cannot be interpreted to bar the application of NR 103 to actions under Wis. Stat. § 31.02(1).

Under RKLD’s analysis, DNR, the agency charged with protecting wetland water quality, would be forbidden from considering statutes and rules adopted to protect wetland water quality; and DNR would be forced to disregard the Public Trust Doctrine when setting water levels for impoundments. That is, in instances in which a lake would be adversely impacted by damage or destruction of adjacent wetlands, DNR would be hamstrung in effectuating the very purpose of § 31.02. Statutes must be interpreted to avoid such an absurd result. *Watton v. Hegerty*, 2008 WI 74, ¶ 14, 311 Wis. 2d.52, 751 N.W.2d 369.

The Court of Appeals correctly observed that § 281.92 is the “product of an earlier era.” The Court of Appeals concluded:

This statutory history shows that Wis. Stats. §281.92 was originally adopted to demarcate the regulatory spheres of influence of the State Board of Health and the Railroad Commission; the Board of Health’s water purification and water pollution prevention responsibilities were not to affect the authority of the Railroad Commission in dam regulation under Wis. Stat. ch. 31, and the Railroad

Commission's responsibilities were not to affect the authority of the Board of Health in its sphere of regulation. Because these two areas of regulatory responsibility are now both under the DNR's administration, the expansive reading of § 281.92 proposed by the District makes little sense today.

(Ct. App. Decision, p. 24-25) Accordingly, the direction that nothing in ch. 281 "affects" ch. 31 should be interpreted to mean: "nothing in the DNR's water protection responsibilities under ch. 281 and the associated administrative rules expands or restricts its responsibilities to set water levels under Wis. Stat. §31.02(1)." (Ct. App. Decision, p. 23) This result is necessary to reconcile and harmonize DNR's responsibilities under chs. 31 and 281. *Jones v. State*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999) (statutes are to be harmonized when they can reasonably be construed to avoid a conflict). (See Ct. App. Decision, p. 23)

Chapter NR 103 certainly applies to a regulatory decision by DNR affecting wetlands qualifying as and part of "waters of this state." Lake Koshkonong clearly is a water of the state. Marshes, without regard to OHWM, also qualify as waters of this state. Thus, DNR rightfully considered wetland water quality standards when reviewing the water level order.

Even if wetland water quality standards were not directly applicable to water level decisions, it would have been prudent for DNR to consider those standards in evaluating the potential environmental impacts to the lake and other protected resources. Ch. NR 103 identifies the "functional values" of wetlands, to be applied when DNR is evaluating impacts to wetland resources. Wis. Admin. Code § NR 103.03. Those values include storm and flood water storage;

maintenance of stream flow; filtration and storage of sediments and pollutants, protection of shorelines from erosion; habitat; and recreational, cultural, scientific, and aesthetic value. Wis. Admin. Code § NR 103.03(1). In this action, in which DNR's primary focus was on protection of Lake Koshkonong, those functional values served as a yardstick for measuring the importance of connected wetlands to the quality of the lake itself. Had DNR followed RKLD's argument, and turned a blind eye to those functional values, it would have risked unconsidered, detrimental impacts to the lake.

IV. THE ALJ APPROPRIATELY BARRED EVIDENCE OF SECONDARY ECONOMIC IMPACTS.

The ALJ barred "admission of certain evidence relating to the effect of water levels on residential real estate values, business income, and public revenues." (R.16B:28; A.App.28) The ALJ correctly excluded this evidence for at least the following reasons.

A. Protection of Property under § 31.02(1) Means the Physical Impacts to Property.

When setting the water level for an impoundment, DNR is to act "in the interest of public rights in navigable waters or to promote safety and protect life, health and property." Wis. Stat. § 31.02(1).

RKLD contends that DNR refused to consider evidence that attempted to quantify an economic loss resulting from a failure to increase water levels from the DNR's water level order to RKLD's proposed higher level. RKLD argues that DNR's direction to "protect ... property" requires DNR to consider and quantify

the monetary impacts on property values and business income associated with lake ownership or usage.

The terms “protect ... property” are not defined by the statute. However, LKWA and THC agree with the Court of Appeals that this does not render the terms ambiguous. (Ct. App. Decision, p. 14-15) Rather, resort to dictionary definitions of these terms is appropriate. *Xerox Corp. v. DOR*, 2009 WI App 113, ¶ 61, 321 Wis. 2d.181, 772 N.W.2d 677.

“Protect” means “to keep from harm, attack, or injury.” *The American Heritage Dictionary*, Second College Edition, at 995 (1985). “Property” means “a possession; possessions as a whole; something tangible or intangible to which its owner holds title.” *Webster’s II New College Dictionary*, at 887 (1999). (See Ct. App. Decision, p. 15-16)

The Court of Appeals did not limit its inquiry to dictionary definitions: it sought additional clarification from other statutes that identify factors that DNR must account for when making decisions affecting the environment. (Ct. App. Decision, p. 16)

The Court of Appeals appropriately cited *City of New Lisbon v. Harebo*, 224 Wis. 66, 271 N.W. 659 (1937), when construing the phrase “protect property.” There, the Court interpreted § 31.06, Stats. (1935), which, as a prerequisite for obtaining a dam permit, required a showing that the operation or maintenance of the dam “will not endanger life, health or property.” 224 Wis. at 70. The Court examined the meaning of “property” and focused on the “inherent dangers” of

dams, stagnant water's effect on human health, flooding of cities, and havoc and destruction below the dam. *Id.* at 75. The Court noted that “[i]t is not proper to isolate the word “property” and assert that injury to property means normal flowage by the ordinary operation of the dam, since this is the inevitable consequence of building and maintaining a dam.” *Id.* at 75. Thus, the Court considered a strikingly similar statute in a nearly identical context.

The *Harebo* Court limited “not endanger property” to health and property damage beyond expected flowage impacts. This plain meaning analysis does not allow for an expansive analysis of secondary economic impacts. Likewise, the obvious and plain meaning of the term “protect property” in § 31.02(1) is a consideration of whether the water level will cause physical harm or injury to property, e.g. erosion, flooding, damage to piers or boathouses, etc.

It would take an enormous leap to expand the reach of § 31.02(1) from a consideration of whether a proposed water level will keep property from harm or injury, to a consideration of whether a proposed water level will affect the revenue stream of taverns and convenience stores located in the general vicinity of Lake Koshkonong. Moreover, it is inconsistent and perhaps paradoxical that RKLDD would have this Court dramatically expand DNR's role to include real estate and business valuation, at the same time that it is asking the Court to contract DNR's duty to protect natural resources.

B. DNR Does Not Routinely Monetize Property Value Impacts.

Finally, RKLD claims that DNR routinely calculates the value of economic impacts associated with its permitting decisions. (Pet. Brief, p. 30-31) RKLD essentially is asking DNR to place an economic value both on the natural resource and its uses, such as hunting, fishing, boating, bird watching, and wetland flood mitigation; and on secondary economic impacts associated with the resource, such as property values both with frontage and without, property tax revenues arising from certain parcels surrounding the Lake, and income to marinas, restaurants, taverns, campgrounds, convenience stores, and other such businesses in the area.

There is a clear danger in monetizing so many competing interests. Many of the uses are not readily quantifiable in monetary values. Additionally, engaging in such an analysis undermines and distracts from DNR's primary responsibility as set forth in the statutes, *i.e.*, protecting the natural resources of this state. *See e.g.* Wis. Stat. §§ 280.11, 281.11, 281.31, 283.001, 291.001. A real property and business value analysis simply is not contemplated by § 31.02(1), and is far afield from the actual and expected responsibilities and capacities of DNR.

The Court of Appeals recognized this concern when noting “protect property” should not include property values and similar economic factors because “such an interpretation would have no logical stopping point.” (Ct. App. Decision, p. 17) One can imagine the proverbial “can of worms” that would be raised by

this inquiry:

- Where does the analysis logically end between riparian and non-riparian but adjacent property values, or riparian businesses (marinas) versus businesses with less direct links to the Lake (convenience stores)?
- What is the geographical reach of this inquiry? Does it extend to businesses that are removed from the water body but in a primary transportation corridor?
- How does one compare the benefit of a given water level to those on the predominantly leeward side of the lake, which may enjoy higher water levels, versus owners on the windward side, who may suffer greater erosion?
- How does one monetize the aesthetic or recreational value to hikers, boaters, hunters, etc., for comparison with the impact to real estate values?
- Should DNR consider market values at the time of that the order is being considered, or over an expected period of time that the order will remain in place?

All of these questions and more support the Court of Appeals observation that “[t]he District’s interpretation provides no basis for excluding consideration of economic impacts that may be too attenuated to reliably quantify.” (Ct. App. Decision, p. 17)

Ultimately, DNR’s Decision made a reasonable finding that certain economic impacts are so directly relevant that they can and should be considered:

[T]he DNR and the hearing examiner here have considered evidence that comprehends at least one component of these asserted secondary impacts, albeit in a somewhat different form. Access to water is a riparian right that can be affected by changes in water levels. The diminished ease of access experienced by many riparians and their desire for higher water levels, reflects their diminished utility and enjoyment of their property, which doubtless reduces the value of that property to them. This diminished utility and enjoyment of the property, and the expectation that higher water would enhance the utility and

enjoyment of riparian property, has been considered and weighed under the standards of Wis. Stat. §31.02(1).

(R.16B:28-29; A.App:28-29) This limited analysis, focused on discrete, identifiable, and measurable impacts directly related to a water level order, is a reasonable application of the “protect ... property” standard. Thus, the DNR’s exclusion of secondary economic impacts should be affirmed.

CONCLUSION

The reality of this case presents a scenario where RKLD and specific user groups are seeking higher water levels in order to provide marginally greater boating access and use, and attendant benefits. However, at RKLD’s target level, navigable surface area would only increase 44 acres. Given the Lake’s 10,460 acre size, and its inherently shallow gradient from shore, adding that amount of surface area (0.4%) is not of considerable consequence to boating and recreational use. However, raising the lake level by 6 to 8 inches is likely to have devastating effects on numerous ecological and biological values, including wetlands. The DNR’s order acknowledges these issues, whereas RKLD’s proposal ignores them.

(R.16B:25)(A.App:25)

DNR’s Decision simply maintains the status quo water level order that has been in place since 1991. RKLD fails to show any harm from continued operation at that level. Rather, RKLD prefers a higher level which it believes will offer improved access and navigability vis-à-vis the current level. The marginal evidence of improved access, *i.e.*, 6 to 8 inches of depth on a shallow, wide, opening of the Rock River with a maximum depth of 7 feet, is not compelling.

Additionally, at the 2006 Hearing, there was testimony to the effect that increased water levels would exacerbate and accelerate sedimentation of this shallow waterbody. As a matter of common sense, raising the lake level imposes water and wave action on additional uplands, which will erode and wash away, and settle on the lake bed. Given the shallow nature of the lake and lack of slope of adjacent shorelands, the 44-plus acres subject to inundation will cause substantial sedimentation. Ultimately, it is not inconceivable that a raised water level will provide no net gain with the lake bed rising from sedimentation.

RKLD is simply wrong to contend that DNR did not consider all of the protected interests under §31.02(1), Stats. As reflected in the Decision, consideration was made of: wetland complexes, wildlife habitat, fishery habitat, flood and storm water control, natural scenic beauty values, erosion control measures in place, wildlife, fishing interests, agricultural drainage concerns, public access for boaters and other user groups, riparian access, including private piers and boat launches, swimming access, navigability for boats, fishing recreation and public safety, and the utility and enjoyment of riparian owners. (R.16B:8-25, 29-30; A.App:8-25,29-30)

Ultimately, DNR's Decision in this matter reflects careful consideration of the wide range of environmental impacts within DNR's jurisdiction and expertise. After lengthy hearing, an independent ALJ concluded that DNR correctly decided to essentially maintain the status quo on Lake Koshkonong, as being most protective of the affected natural resources. The ALJ also correctly recognized

that RKLD had not met its burden of proof, and that there was compelling evidence that RKLD's proposed increase in water levels would exacerbate and accelerate sedimentation of this shallow water body. In short, DNR's decision reflects consideration of all factors required under Wis. Stat. § 31.02(1); and it appropriately balances potential impacts from different water level regimes.

For these reasons, Lake Koshkonong Wetland Association, Inc., and Thiebeau Hunting Club respectfully request that this Court affirm in all respects the decisions of the DNR, the Rock County Circuit Court, and the Court of Appeals.

Dated this 16th day of April, 2012.

Respectfully submitted,

AXLEY BRYNELSON, LLP

/s/ Mitchell R. Olson

Charles V. Sweeney (Bar No. 1019039)

Mitchell R. Olson (Bar No. 1030756)

*Attorneys for Lake Koshkonong Wetland
Association, Inc., and Thiebeau Hunting Club*

Address:

2 East Mifflin Street, Suite 200

Madison, WI 53703

(608) 283-6724

molson@axley.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 7,062 words.

Dated this 16th day of April, 2012.

/s/ Mitchell R. Olson

Mitchell R. Olson

Wisconsin Bar No. 1030756

Axley Brynelson, LLP

2 East Mifflin Street, Suite 200

Madison, WI 53703

(608) 283-6724

molson@axley.com

ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 16th day of April, 2012.

/s/ Mitchell R. Olson
Mitchell R. Olson
Wisconsin Bar No. 1030756
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
(608) 283-6724
molson@axley.com