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October 26, 2007

Clerk of Court
Rock County Circuit Court
51 S Main St, 2nd Floor, Branch 4
Janesville, WI 53545

RE: Rock-Koshkonong Lake District, et al., v. Wisconsin Department of Natural Resources
Rock County Case No. 06 CV 1846
Our Clients: LKWA and Thiebeau Hunting Club
Our File No. 12678.56886

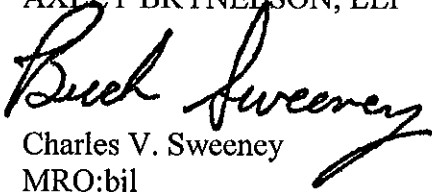
Dear Mr. Mielke:

Enclosed for filing in the above-captioned action, please find the Intervening Respondents' Brief in Opposition to Petition for Review.

By copy of this letter, we are serving same on all parties of record. Thank you.

Sincerely,

AXLEY BRYNELSON, LLP


Charles V. Sweeney
MRO:bjl

Enclosure

cc (via E-mail): Attorney Arthur J. Harrington
Attorney Joanne Kloppenburg
Attorney William P. O'Connor

Attorney Mary Beth Peranteau
Attorney Douglas M. Poland

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

Petitioners,

Case No.: 06 CV 1846

Case Code: 30607

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

LAKE KOSHKONONG WETLAND ASSOCIATION, INC.,

and

THIEBEAU HUNTING CLUB,

Intervening Respondents.

**INTERVENING RESPONDENTS', LAKE KOSHKONONG WETLAND
ASSOCIATION, INC., AND THIEBEAU HUNTING CLUB,
BRIEF IN OPPOSITION TO PETITION FOR REVIEW**

NOW COME the Intervening Respondents, Lake Koshkonong Wetland Association, Inc., and Thiebeau Hunting Club, by their attorneys, Axley Brynelson, LLP, by Charles V. Sweeney and Mitchell R. Olson, and submit this Brief in Opposition to the Petitioners' Joint Brief seeking review of the Decision of the Division of Hearings and Appeals, William S. Coleman, Jr., Administrative Law Judge, dated December 1, 2006.

INTRODUCTION

The Intervening Respondents, Lake Koshkonong Wetland Association, Inc. [LKWA], and Thiebeau Hunting Club [THC], have participated in this Administrative Review action since its inception. LKWA is a Wisconsin non-stock, 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 said Watershed. THC is a Wisconsin Corporation, which does business as a hunting club and is the owner of substantial real property fronting on Lake Koshkonong. Said property relies on the water levels of Lake Koshkonong to support the ecological health of the extensive and high quality wetlands existing on said property.

The Petitioners have challenged the DNR's most recent water level order governing Lake Koshkonong. In response to that petition, DNR has established a water level regime substantially similar to the prior water level orders in place, based on a global compromise, since 1982. Petitioners, however, seek a target water level and maximum water level 7.2 inches and 8 inches higher than the DNR level, respectively.

In reviewing the DNR's water level order, issued pursuant to Wis. Stats. §31.02, the question presented is whether DNR's order is "in the interest of public rights in navigable waters or to promote safety and protect life, health and property."

The ultimate issue before WDNR, and now subject to judicial review, is of great importance to many interest groups, land owners, and members of all user groups (boaters, fishermen, kayakers, etc.) of Lake Koshkonong. The parties to these proceedings have devoted great amounts of time and resources to present their cases at a lengthy and comprehensive

hearing. Both lay witnesses and experts have testified to a wide array of facts and opinions. At this point, however, there appears to be no dispute by Petitioners as to the facts. (See below)

The Lake Koshkonong Wetland Association and the Thiebeau Hunting Club support the DNR's water level order and agree that said order is in the interests of public rights in navigable waters, promotes safety, and protects life, health and property. The DNR has presented a compelling case, in its Environmental Assessment, at the Hearing in this matter, and in its Closing Brief, substantiating that the proposed order is consistent with section 31.02, Stats., and supported by the law and evidence of record. The ALJ's Decision affirming that Order is likewise compelling.

In particular, the DNR order protects the public rights in wetlands. The mission of LKWA "is to protect the existing wetlands on Lake Koshkonong and Rock River and to promote the life of natural plants, fish, birds, and other wildlife in the basin." This 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. Moreover, our administrative code emphasizes that: "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." NR 353.01.

Based on the record, the arguments of WDNR, and the arguments stated herein, LKWA and THC request the Court affirm the December 1, 2006, Decision of ALJ William S. Coleman, Jr., in Case No. 3-SC-2003-28-3100LR.

ARGUMENT

LKWA and THC support the DNR's Water Level Order and the December 1, 2006 Decision affirming same. LKWA and THC concur, unless stated otherwise herein, with the positions asserted by DNR in these proceedings. LKWA and THC will specifically address issues, raised by Petitioners, which implicate LKWA and THC interests.

I. STANDARD OF REVIEW

This Petition seeks judicial review of the Administrative Decision issued by Administrative Law Judge, William S. Coleman, on December 1, 2006, pursuant to Wis. Stats. §227.52. The circuit court's review "shall be confined to the record." Wis. Stats. §227.57(1). "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. Stats. §227.57(2).

Considering the relief options provided in section 227.57(3)-(9), it is clear that the Petitioners do not challenge any procedural issues or findings of fact at the Administrative Contested Case Hearing level. Instead, the Petition addresses *agency interpretation of law*. Pursuant to sec. 227.57(5), "[t]he 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 of the provision of law."

When reviewing the agency action, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Wis. Stats. §227.57(10). The particular level of deference ranges from "great weight deference" to "de novo" review. The three levels of

deference to conclusions of law and statutory interpretation in agency decisions are as follows: First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review is a mid-level standard that provides if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The third level of review is de novo and is applied when the case is clearly one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. Kelley Co., Inc. v. Marquardt, 172 Wis.2d 234, 244-246, 493 N.W.2d 68, 73-74 (Wis. 1992).

In this instance, LKWA and THC assert that the agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, such that great weight deference should apply. However, LKWA and THC join the standard of review requested, and the supporting argument, as presented by DNR. Moreover, regardless of the standard of review employed, the Decision affirming the DNR water level order must be also be affirmed at the Circuit Court level.

II. RESPONSE TO STATEMENT OF FACTS

A. NO FINDINGS OF FACT IN DISPUTE

The Department, through the ALJ's December 1, 2006 Decision, sets forth 120 separate findings of fact over the course of 23 pages. Other than the final finding (no. 120), which is in the nature of a mixed finding of fact / conclusion of law, the Petitioners make no objection to any of the Department's factual findings. Instead, Petitioners only challenge the Department's construction and application of sec. 31.02(1), Stats.

B. REBUTTAL AS TO SPECIFIC FACTUAL ALLEGATION

The Petitioners correctly note that the DNR's 1982 water level order spawned an extended period of litigation. All interested parties ultimately negotiated a stipulated water level order which DNR adopted in 1991. (Findings of Fact, ¶23-24) The water levels adopted by the 1991 order closely mirror the water level order adopted by DNR on April 15, 2005, in response to the Petition of RKLD, et al. (Findings of Fact, ¶4,7) Thus, DNR's current order is the product of a negotiated stipulation at which all parties were present, and to which all parties consented.

At this juncture, LKWA and THC, which generally represent wetland, wildlife, hunting, and ecological interests, remain committed to the original compromised water level. It is RKLD, and associated recreational user groups, primarily boaters, who now want to revisit the agreement they signed off on 15 years ago. As a matter of public policy and equity, the request to undo a well-established, mutually-agreeable, and globally-compromised water level order, should be viewed with great skepticism.

If the Petitioners are not satisfied with their original compromise, it is just as likely that the current petition will not remedy their concerns. Lake Koshkonong is a shallow lake, with a maximum depth of seven feet, and average depth of 5 feet. (Findings of Fact, ¶11) Raising the water level by 7 or 8 inches, during the May-October period, will not change the shallow nature of the Lake. Petitioners are likely to continue to ask for higher water levels over time. Such a trend to higher water levels has already had a dramatic effect on the Lake Koshkonong environment, and further increases will magnify those negative effects. (Findings of Fact, ¶ 29-31, 36-91) Under these circumstances, continued enforcement of the 1991 compromised Order,

as embodied by the 2005 Order (which was affirmed by the Decision before this Court), is a reasonable result supported by fact and law.

III. WDNR'S CONSIDERATION OF ALL WETLANDS ASSOCIATED WITH LAKE KOSHKONONG WAS WITHIN THE SCOPE OF ITS AUTHORITY.

Petitioners contend that DNR erred in considering those wetlands both below and above the ordinary high water mark set for Lake Koshkonong. Specifically, they argue that wetlands above the OHWM are not “navigable waters” subject to sec. 31.02(1), Stats, consideration. This argument fails on several grounds.

First, Petitioners conveniently locate this argument in advance of the following discussion of NR 103. As set forth below, NR 103 requires DNR, when making regulatory decisions, to consider impacts on wetlands and water quality. NR 103 allows consideration of all wetlands related to a project, not just those below the OHWM. Accordingly, if the Court accepts the argument that NR 103 is applicable, then all wetlands were legitimately considered by DNR. (See part IV, below)

Second, DNR had authority to review all wetland impacts pursuant to NR 1.95 (See DNR Closing Brief at 24-26) Petitioners ignore this authority. In fact, Petitioners do not appear to challenge the applicability of NR 1.95.

The ultimate issue here is whether DNR's Order regulating and controlling the level and flow of water on Lake Koshkonong was made “in the interest of public rights in navigable waters or to promote safety and protect life, health and property.” An important sub-issue is what factors may be considered as part of the “public rights” and “safety, life, health, and property” tests. Impact on wetlands certainly qualifies as such a factor.

NR 1.95 sets forth the Policy of the Natural Resources Board with respect to wetlands preservation, protection, restoration and management. 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.” 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. NR 1.95(3). The policy of the Natural Resources Board is “that wetlands shall be preserved, protected, restored and managed to maintain, enhance or restore their values.” 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.” NR 1.95(4)(d); See also DNR Closing Brief and Exhibit 850.

In addition, “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 (1972). DNR’s Closing Brief provides a thorough argument supporting this point.

Thus, DNR is authorized and required, by both NR 1.95 and its public trust enforcement obligations, to consider direct and indirect impacts to wetlands around Lake Koshkonong when setting water level orders under section 31.02, Stats. The impacts are not limited to wetlands below the OHWM. DNR clearly made such considerations as part of its analysis.

Third, Petitioners fault the DNR for a claimed failure to survey and distinguish what wetlands fall above the OHWM. Petitioners imply that the vast majority of wetlands are above the OHWM. However, Petitioners also offer no evidence to delineate the elevations of wetlands. This review is limited to the record. Petitioners' argument fails for a lack of proof, on the record, as to exactly what the scope of DNR's wetland analysis entailed. They cannot prove that DNR's sec. 31.02(1) analysis considered any wetlands beyond the scope of that statute.

Fourth, the record is replete with photographs of wetland habitat, including shallow and deep shoreland marsh, and floodplain forests. (Exhibits 330, 331; Jeff Kraemer @ p. 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. (Findings of Fact, ¶39) Those vast and important wetland habitats, as the photos demonstrate, are wet, and many certainly fall at or below the OHWM. Petitioners have no evidence to the contrary. Such deep and shallow marsh habitats could not exist if they were above the OHWM. Thus, significant wetland acreage within the Lake Koshkonong basin, appears at or below the OHWM, such that DNR had ample justification to consider the proposed increased water level order's impact on those wetlands.

Thus, DNR had legal grounds to consider all wetland impacts. Moreover, even if such review was limited, DNR's analysis accounted for vast acreage of wetlands that were, by their characteristics, below OHWM, and subject to sec. 31.02(1). The cited error is without merit.

IV. **WDNR'S CONSIDERATION OF NR 103 WAS WITHIN THE SCOPE OF ITS AUTHORITY.**

The Decision specifically addressed the ongoing complaint of Petitioners that "DNR's rejection of higher water levels preordained in part by institutional bias ... in favor of wetland preservation, without due regard to other interests in navigable waters." (Decision, p. 30) In response, the ALJ 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." (Decision, p. 30)

Petitioners err in the contention that DNR cannot apply NR 103 in the course of a water level order review under sec. 31.02, Stats. During the Briefing before the ALJ, DNR submitted a "Supplemental Brief of the Department of Natural Resources" specifically addressing the basis to apply NR 103. (See DNR Supplemental Brief 10/27/06). LKWA and THC adopted that Brief's position before the ALJ (Axley letter to ALJ Coleman, 10/27/06), and continue to adopt that position before this Court.

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.**" NR 103.06. "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 floral and fauna, domestic and recreational uses, and agricultural, commercial, industrial and other uses." NR 103.01(2). "Waters of the state" is defined to include "all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems, and other surface and ground water, natural or artificial, public or private, within the state...." NR 103.02(4).

In this instance, based on the DNR position that NR 103 is not limited by sec. 281.92, Stats., NR 103 certainly applies to a regulatory decision by DNR affecting wetlands within waters of this State. Lake Koshkonong, as a river, lake, impounded reservoir, and/or watercourse, clearly is a water of the state. Thus, DNR rightfully accounted for wetland water quality standards when reviewing the water level order.

V. WDNR'S OBJECTION TO EVIDENCE OF SECONDARY ECONOMIC IMPACTS TO PROPERTY WAS PROPER; ALTERNATIVELY, THE RECORD SUPPORTS A FINDING THAT NO NEGATIVE ECONOMIC IMPACTS ARISE FROM THE CURRENT WATER LEVEL ORDER.

First, the Petitioners' lengthy discussion of the Smith v. Youmans case, from 1897, appears to be a last-ditch effort to resurrect the Petitioners claim of "prescriptive water rights." The Petitioners' Brief submitted to the Division of Hearings and Appeals contained extensive argument claiming that the proposed water level increase was supported by past water levels, which level became a property right by prescription. (Joint Petitioners' Post-Hearing Brief 8/14/06 @ p. 27-32) The Administrative Decision directly addressed and rejected that claim. The Decision noted: (1) Petitioners' admitted that such prescriptive right would not defeat the State's authority to set a water level below flowage rights; and (2) Petitioners failed to raise that claim before or during the contested case hearing, such that the record is inadequate to address the claim, and DNR was not required to address such a claim. (Decision, p. 29)

Moreover, the Youmans case addressed a situation where a dam operator sought to lower established water levels, which levels had spawned real estate development and investment. 96 Wis. 103 (1897). Here, DNR is not seeking to *lower*, or even substantially modify, the water level order in place since 1991. The Youmans case is limited to a statement of adverse rights gained via prescription, and has no application to the issue of the scope of economic impacts to be addressed by DNR under sec. 31.02, Stats.

Second, the Administrative Decision sustained a DNR objection “to admission of certain evidence relating to the effect of water levels on residential real estate values, business income, and public revenues.” (Decision, p. 28) LKWA and THC adopt the DNR’s objection, as stated at the Administrative Hearing, and before this Court.

Third, to the extent the Court considers such secondary economic impacts, LKWA and THC direct the Court to the Hearing testimony of Mr. Linn Duesterbeck. (See Pre-Filed Testimony and Record, p. 2732-2787) Mr. Duesterbeck was the only licensed and trained land appraiser to testify in these proceedings. (Duesterbeck Pre-Filed Testimony, p. 1) 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.” (See Duesterbeck Pre-Filed Testimony, p. 3-5)

Thus, to the extent that such secondary economic impacts are relevant, the Petitioners misstate the testimony when pronouncing that “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.” Mr. Duesterbeck’s appraisal testimony completely undercuts the premise of Petitioners’ contention.

In conclusion, the DNR's position on economic impacts should be affirmed. In the alternative, upon review of such impacts, the record is sufficient to demonstrate that the proposed water level order accounts for and is within the scope of sec. 31.02, Stats.

CONCLUSION

At the heart of this dispute, we have certain user groups seeking higher water levels in order to provide marginally greater boating access and use, and attendant benefits. At Petitioner'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 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 the Petitioner's proposal fails.

Petitioners reiterate their theme that a "majority" of "lake users" support their proposal. They claim their management scheme protects economic values. They claim a small minority of hunt clubs and wetland owners are the only parties who desire "lower water levels" to encourage wetlands. They further claim that DNR has a bias in favor of the wetland owners. The Decision in this matter specifically rejects these contentions, finding that the DNR gave "due consideration to all relevant factors and interests." (Decision, p. 30)

Petitioners are simply wrong when they contend that DNR did not consider all of the protected interests under sec. 31.02(1). As reflected in the ALJ's Decision, consideration was made of: wetland complexes, wildlife habitat, fishery habitat, flood and stormwater 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,

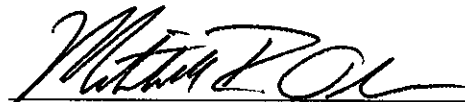
including private piers and boat launches, swimming access, navigability for boats, fishing recreation and public safety, and the utility and enjoyment of riparian owners. (See Decision)

There was an adequate assessment and balance of the impact of increasing water levels on competing rights in navigable waters. The “great weight” and “vast preponderance” of the evidence supported a conclusion that the DNR’s order was in the public rights and promoted safety and protected life, health and property. (Decision, p. 29) Ultimately, increasing lake levels to the Petitioners’ level “would have profound and lasting negative effects on much of the property and ecological resources abutting the lake and its tributaries.” (Decision, p. 29) That finding is clearly supported by the record. That finding is reasonable and is entitled to deference by this Court.

Based on the arguments submitted by DNR, to which LKWA and THC join, and the arguments stated herein, the DNR’s order, as affirmed by the ALJ’s Decision of December 1, 2006, should be approved and adopted as the Final Order governing the operation of Indianford Dam.

Dated this 26th day of October, 2007.

AXLEY BRYNELSON, LLP



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