STATE OF WISCONSIN
SUPREME COURT

APPEAL NO. 08-AP-1523

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

Petitioners-Appellants,

v.

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Respondent,

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

Intervenors-Respondents.

PETITION AND APPENDIX FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV DATED JULY 21, 2011

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STATEMENT OF ISSUES FOR REVIEW

I. Did the Wisconsin Department of Natural Resources ("DNR") erroneously construe its mandate to "protect property" in setting water levels under sec. 31.02(1), Stats. by ignoring economic effects on property interests including residential property values, business incomes and public revenues?

Ruling on an issue of first impression, the court of appeals answered "*no.*" The court of appeals affirmed DNR's evidentiary ruling which categorically struck all such economic evidence from the record. Contrasting sec. 31.02(1) with modern pollution control statutes, the court of appeals reasoned that if the Legislature had intended economic impacts to be considered in the protection of property, it would have identified those considerations explicitly. In concluding that lake-dependent economic interests are not within the scope of property to be protected in setting water level orders, the court of appeals failed to consider the legislative history and context in which that delegation of authority was made almost a century ago, and excluded the interests of a majority of stakeholders from consideration in establishing water level orders.

II. Did DNR exceed its delegated authority to protect "public rights in navigable waters" under Wis. Stat. § 31.02(1), by considering effects of the water level order on private wetlands located above the ordinary high water mark?

The court of appeals answered "*no*." Citing *Just v. Marinette County*, 56 Wis. 2d 7, 16-17, 201 N.W.2d 761 (1972), the court below found it "well established" that public rights protected by the public trust doctrine do not stop at the water's edge. The court's reasoning raises important questions concerning the scope of the agency's implied authority where (unlike *Just*) the Legislature has expressly declined to grant the agency comprehensive regulatory authority over wetlands. The court's interpretation of the scope of the agency's

statutory authority elevates private lands to the status of public trust assets, contrary to Wisconsin law.

III. Did WDNR exceed its delegated authority by applying Chapter NR 103 of the Wisconsin Administrative Code to a water level proceeding under Chapter 31 of the Statutes?

The court of appeals answered "*no*," despite the fact that sec. 281.94 of the Statutes expressly carves out ch. 31 regulation of dams and impoundments from the reach of agency regulations enacted under the authority of Chapter 281, including the wetland water quality standards of ch. NR 103 of the Code. The court below justified this departure from accepted canons of statutory construction by concluding that sec. 281.94 was merely intended to preserve the jurisdictional separation of powers between the Board of Health and the Railroad Commission, disregarding that the statute was not repealed when those agencies' water regulatory functions were later combined in DNR.

IV. What level of deference, if any, should be accorded DNR's interpretation and application of Wis. Stat. § 31.02(1)?

The court of appeals deemed it unnecessary to rule on this issue, and affirmed the WDNR's conclusions of law under a *de novo* standard of review, giving no deference to the agency's conclusions of law. The court also employed the *de novo* standard of review as a basis to disregard early agency decisions under the 1915 Water Powers Act which constitute contemporaneous interpretations of the Legislature's intended delegation of authority in what is now sec. 31.02(1), Stats.

CRITERIA IN SUPPORT OF PETITION FOR REVIEW

This petition presents compelling reasons under Wis. Stat. § 809.62(1r) for the grant of *certiorari* review. Sec. 31.02(1), Stats., is a 1915 legislative delegation of administrative authority to regulate water levels on impounded lakes. Since its enactment almost a century ago, this Court has had no occasion to rule on the scope of interests identified in the statute that the agency must consider in making water level orders. As the court of appeals noted in its certification of the case for bypass review:

> There are literally hundreds of fully or partially impounded bodies of water in Wisconsin, including many of the largest lakes in the State, subject to water level regulation under [sec. 31.02(1), Stats.] We believe that resolving whether the DNR must consider the economic effects of water levels on impounded lakes is of great public importance, and the supreme court is the appropriate forum to decide the issue.

Certification by the Wisconsin Court of Appeals dated July 29, 2010, at p. 6 (P. App. 56). [1]

DNR's interpretation of the factors to be weighed in establishing a water level order under sec. 31.02(1), Stats. excludes any consideration of riparian property values and lake-based economic activity affected by the order. While such evidence should not be dispositive of DNR's decision, it is entitled to due weight.

The placement of the Indianford Dam some 150 years ago transformed Lake Koshkonong and its vast adjacent marshlands. Since that time, extensive commercial and residential development around the lake has given rise to a local economy dependent on recreational use of the lake, including waterfront homes and cottages, restaurants, marinas and similar businesses. In issuing a water level order under

[1] References to page numbers in Petitioners' Appendix are cited herein as "P. App. XX"

sec. 31.02(1), Stats., DNR categorically rejected evidence that property values, commercial incomes and tax revenues would be adversely impacted by DNR's water level order. At the same time, the Department broadly construed the phrase "public rights in navigable water" under the statute to extend to the protection of private wetlands beyond the long-accepted boundary of public trust waters. The DNR expanded the reach of the public trust such that it elevated the private property interests of wetland owners to the status of State trust waters, preferring these private rights to those of other riparian property owners.

The court of appeals affirmed the agency interpretation as if the relevant considerations were no different than those pertaining to navigable waters generally. But DNR's effort to establish a water level to preserve attributes of the pre-dam ecology contradicts the physics of dam construction. It simply is not possible to simultaneously impound a water body and optimize the extent of associated wetlands. The agency's construction of its authority, affirmed in a published case, would make the placement of new dams in this State virtually impossible, and would confound future efforts to re-regulate water levels on existing impoundments for economically beneficial reasons, including the development of hydropower. The DNR has deemed these substantial economic interests wholly unworthy of consideration in managing water levels on impoundment lakes and flowages, and the court of appeals concurs. The decision below will be highly detrimental to the pursuit and preservation of beneficial economic activity on lakes and flowages throughout the State of Wisconsin whose levels are affected by dams.

1. A DECISION BY THE SUPREME COURT WILL ESTABLISH THE SCOPE OF DNR'S AUTHORITY IN ISSUING WATER LEVEL ORDERS UNDER WIS. STAT. § 31.02(1), AN ISSUE OF LAW HAVING SIGNIFICANT STATEWIDE IMPACT.

There are no cases directly construing the scope of the Department's mandate to "protect . . . property" under sec. 31.02(1) in establishing a water level order for impounded

waters. The supreme court should accept *certiorari* review because this primary issue is a novel one, the resolution of which will have statewide impact based on the sheer number of impounded lakes and flowages in Wisconsin subject to regulation by DNR under sec. 31.02(1). There are over 5,000 lakes in the State whose water levels are affected by the existence and operation of dams.[2] The need to establish or revisit a water level order on any of these lakes may be occasioned by natural changes in hydrology, changing land use patterns, the promotion of recreation-based activity as an economic stimulus, or state policies favoring the development of hydroelectric power as a renewable resource. Despite these important societal interests, DNR has taken an extreme position which systematically bars consideration of the impact of water level regulation on property values, commercial incomes, municipal tax receipts, and other economic concerns. This issue merits review because the court of appeals' decision creates a significant precedent with statewide implications.

2. THIS CASE PRESENTS A REAL AND SIGNIFICANT QUESTION CONCERNING THE SCOPE OF THE PUBLIC TRUST DOCTRINE UNDER ARTICLE IX, SEC.1 OF THE WISCONSIN CONSTITUTION.

The DNR's balancing of "public rights in navigable waters" against other interests to be considered under sec. 31.02(1) in establishing a water level order for impounded waters implicates the scope of the public trust doctrine because the Department included wetlands beyond the boundaries of navigable waters as public trust resources. In exercising its duty as public trustee, the Department placed substantial weight on the maintenance of a particular wetland environment, although the lands in question are above the ordinary high water mark, in private ownership. The Department's decision improperly expanded private wetland interests beyond the scope of the public trust doctrine, while dismissing the private property rights of a majority of

[2] For a detailed spreadsheet of statewide dam data see DNR's Dam Safety Section webpage at http://dnr.wi.gov/org/water/wm/dsfm/dams/datacentral.html (updated as of December 2010).

stakeholders as a slight and parochial interest. The Court should accept review of this case to consider the DNR's unprecedented expansion of the public trust doctrine in the absence of a clear legislative delegation of authority.

3. A DECISION BY THE SUPREME COURT WILL DETERMINE A SIGNIFICANT ISSUE OF ADMINISTRATIVE LAW CONCERNING THE AGENCY'S AUTHORITY TO ISSUE WATER LEVEL ORDERS BASED ON THE APPLICATION OF WETLAND WATER QUALITY RULES THAT ARE INTENDED TO DRIVE REGULATORY DECISIONMAKING.

The issue of whether the Department's wetland water quality rules in Wis. Admin. Code ch. NR103 apply to proceedings under Chapter 31 is purely a question of law of the type likely to recur unless resolved by the supreme court. Wetlands are characteristically found on the fringes of impounded waters, and will invariably be impacted by changes in hydrology. Section NR 103.01(4) of the Code provides that the regulations in ch. NR 103 are intended "serve as a basis for decisions in regulatory, permitting planning or funding activities that impact water quality and which impact wetlands." Because the wetland water quality rules in ch. NR 103 are intended to be determinative of agency action, the question of whether those rules apply to water level orders will shape the outcome of such decisions in all cases.

4. A DECISION BY THE SUPREME COURT WILL HELP DEVELOP AND CLARIFY THE LAW RELATED TO THE STANDARD OF REVIEW OF ADMINISTRATIVE DECISIONS.

The DNR's conclusions with respect to the broad categories of evidence that should be considered or excluded in establishing a water level order under sec. 31.02(1) are determinations shaping the extent of the agency's delegated authority. The trial court concluded that the agency's legal conclusions were entitled to great weight deference. R.21:10

(P. App. 49). The court of appeals declined to decide whether the agency's interpretation of its statutory authority is entitled to any level of deference, although affirming the agency in all respects. Decision, at 13 (P. App. 70). Significantly however, the court of appeals cited the *de novo* standard of review as a reason to disregard early agency decisions under the Water Powers Act that are highly relevant to the legislative intent behind sec. 31.02(1). This case presents an opportunity for the Court to clarify whether the *de novo* standard of review requires courts to discount the agency's historical exercise of its statutory authority in construing legislative intent.

STATEMENT OF THE CASE

Petitioners seek review of a water level order issued by DNR governing the operation of Indianford Dam, affecting Lake Koshkonong and portions of the Rock River. Section 31.02(1), Stats., authorizes DNR to issue orders setting minimum and maximum levels for impounded waters and identifies the interests to be considered in water level proceedings, which include public rights in navigable water, as well as life, health, safety and property. In affirming the DNR's construction of its authority under sec. 31.02(1), the court of appeals disregarded the context, statutory history and early decisions interpreting the scope of the agency's authority. The court of appeals also ignored fundamental canons of statutory construction in deciding that DNR's wetland water quality rules promulgated under ch. 281, Stats. are applicable in ch. 31 proceedings.

A. Procedural History

On April 21, 2003, the Rock Koshkonong Lake District ("RKLD") petitioned DNR pursuant to Section 31.02(1) of the Wisconsin Statutes to amend the then-current operating orders for the Indianford Dam on the Rock River, affecting water levels on Lake Koshkonong.

The Department issued its proposed water level order on April 15, 2005. The proposed order denied RKLD's petition, re-established the summer maximum contained in

the 1991 order at 776.33 ft. MSL, and reduced the minimum water level of the winter drawdown by one-half a foot, from 775.00 ft. MSL to 775.50 ft. MSL. R.10B: Ex 8 (P. App. 1-7).

On May 16, 2005, RKLD, together with two local recreational associations, the Rock River Koshkonong Association and the Lake Koshkonong Recreational Association (collectively the "Joint Petitioners") filed a joint petition for a contested case hearing on the denial of their water level petition, pursuant to Wis. Stat. § 227.42. R.16B:1 (P. App. 8).

On December 1, 2006, Administrative Law Judge William S. Coleman, Jr. issued Findings of Fact, Conclusions of Law and an Order denying RKLD's petition for a change in the operating order and affirming the WDNR's April 15, 2005 order in its entirety. (R.16B; P. App. 8-38). 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).

On December 29, 2006, Appellants filed a petition for judicial review of the agency determination in the Rock County Circuit Court, the Honorable Daniel P. Dillon presiding. The circuit court issued its memorandum decision on May 12, 2008. *See* R.21 (P. App. 40-50**).**

The Joint Petitioners filed a timely notice of appeal of the circuit court's final order on June 13, 2008. On July 29, 2010, the court of appeals certified the appeal to the supreme court. (P. App. 51-56.) Certification was denied by order dated September 21, 2010. The court of appeals ultimately filed its decision affirming the DNR's water level order on July 21, 2011. (P. App. 58-82.)

B. Statement of Facts

The Indianford Dam was constructed on the Rock River outlet of Lake Koshkonong in the mid 1800s, under authorization of the Wisconsin Territorial Legislature and subsequent state legislation. R.16B, Findings of Fact, Conclusions of Law and Order dated December 1, 2006, at ¶

16 (P. App.). It was reconstructed and its crest was raised in approximately 1917. *Id.* at ¶¶ 17-18 (P-App. 12-13).

Lake Koshkonong is among Wisconsin's largest inland lakes. *Id.* at ¶ 10 (P. App. 12). In the 150 years since the construction of the Indianford Dam, extensive portions of its shores have become developed with residences, roads, parks, businesses and a host of other development characterizing human settlement. Still, much of the lake's shore remains vegetated with cattails and other wetland plants that provide habitat to waterfowl and other wildlife. *See id.* at ¶¶ 37, 39 (P. App. 15-16). Today, thousands of people live or make their livelihoods on or near the lake's shores and thousands more congregate on its waters to pursue recreational activities like fishing, boating and hunting.

In 1999, Rock County established the Rock-Koshkonong Lake 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. In 2003, RKLD entered into agreements with Rock and Jefferson Counties, pursuant to which comprehensive repairs were made to the Indianford Dam. 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 water level order, particularly during the summer season. R.16B, ¶¶ 25-27 (P-App. 14). In late 2004, pursuant to a WDNR permit, Rock County transferred title to the restored Indianford Dam and all associated flowage rights to RKLD. R.16B, ¶ 22 (P-App. 13).

RKLD petitioned DNR to amend the prevailing water level order, 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). R.16B, ¶ 4 (P. App. 10-11). Under the District's proposed water level order, the maximum water level would be established at a point approximately one foot below the ordinary high water mark ("OHWM") of Lake Koshkonong, as determined by a 2001 DNR/RKLD study. *See* R.16B, ¶¶ 4, 59 (P. App. 10-11, 59).

On April 15, 2005, DNR issued a proposed operating order 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* R.10B, Ex. 8 (P. App. 1-7).

On December 1, 2006, after a contested case hearing, Administrative Law Judge William S. Coleman, Jr. issued findings of fact, conclusions of law and an order affirming the DNR's order in its entirety. The ALJ concluded that:

> The DNR evaluated the proposed water level increase against the appropriate regulatory standards, including chapter NR 103, Wis. Admin. Code. … The evidence fails to establish ... that the DNR did not give due consideration to all relevant factors and interests. The DNR reasonably exercised its regulatory authority under section 31.02(1), Stats., in the issuance of its 2005 decision and order."

R.16B:30 (P. App. 37). The hearing examiner's Findings of Fact, Conclusions of Law and Order became the decision of the agency pursuant to Wis. Stat. § 227.46(3)(a) and Wis. Admin. Code § NR 2.155(1).

In reaching that decision, the DNR found inadmissible extensive testimony regarding the economic impacts of the water level order – including the effect of water levels on residential real estate values, business income, and public revenues. That evidence was excluded as "outside the scope of sec. 31.02(1)." R.16B:28-29 (P. App. 35-36).

The DNR's decision also relied on extensive findings of fact concerning the effect of RKLD's proposed water level on "wetland complexes" in and adjacent to Lake Koshkonong, including those owned by the Thiebeau Hunt Club, Carcajou Shooting Club, and Crescent Bay Hunt Club. *See* R.16B:8-14 (P. App. 15-21). The findings failed to distinguish between navigable waters (below the ordinary high water mark) and wetlands located on privately owned uplands. The decision contains no findings with respect to the

location of the OHWM delineating the boundary of public rights in the wetlands adjacent to Lake Koshkonong.

ARGUMENT

I. WHETHER WIS. STAT. § 31.02(1) REQUIRES DNR TO ESTABLISH A WATER LEVEL ORDER THAT PROTECTS RESIDENTIAL PROPERTY VALUES, BUSINESS INCOME AND PUBLIC REVENUES IS A MATTER OF STATEWIDE SIGNIFICANCE.

Section 31.02(1) delegates to WDNR authority to "regulate the level and flow of water in all navigable waters" by making a water level order "*in the interest of public rights in navigable waters, or to promote safety and protect life, health and property*. . . ."

In issuing its order under the statute, DNR's decision in this case excluded consideration of any evidence of the effects of water levels on residential real estate values, business income and public revenues offered at the contested case hearing, finding that "[s]econdary or indirect economic impacts of a water level determination do not bear on the statutory standard set forth in section 31.02(1), Stats. ... R.16B:29 (P. App. 29). In DNR's view, the property that must be accorded protection when establishing a water level order under sec. 31.02(1) is limited to observable, physical damage from too much or too little water, such as flooding or erosion.

The court of appeals analyzed the legislative intent behind the "protect property" clause of sec. 31.02 by distinguishing it from modern statutes in which the Legislature specifically empowers DNR to consider economic impact. The court concluded that because the legislature didn't explicitly define "protect property" to include property *values*, there is no support for such an interpretation. This analysis is misguided, because the language of the statute has remained unchanged for almost a century. The original delegation of authority under the Water Powers Act of 1915 has never been amended.

The history of the statute and context of its passage clearly contradict DNR's cramped interpretation. Administrative authority to establish minimum and maximum water levels for new and existing dams was first enacted in the Water Powers Act, Chapter 380 of the Laws of 1915, creating Section 1596-2.1. In the *Rest Lake* case,[3] one of the first agency decisions under the Water Powers Act, a dam owner's petition for the Commission to adopt minimum and maximum water levels was opposed by property owners based on alleged injury to property, fishing and navigation in the several lakes affected by the Rest Lake dam. *See* 16 W.R.C.R. at 731-32. In that case, the Commission found that "where the property to be so affected includes the most valuable property in the community, is large in acreage, and not shown to be subject to overflow, the protection of such property is a matter of more than private interest and becomes a matter affecting the public welfare." *Id.* at 736.

In *Chippewa & Flambeau Improvement Co.,* 164 Wis. 105, 159 N.W. 739 (1916), the Wisconsin Supreme Court affirmed the Commission's decision, concluding that the clause in sec. 31.02 authorizing the agency 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. 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.

[3] *In re Determining the High Water Mark to be Established on the Rest Lake Reservoir Operated by the Chippewa & Flambeau Improvement Company*, 16 W.R.C.R. 727 (September 10, 1915).

Id. at 114. The court found 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.

As the court in *Chippewa & Flambeau* recognized, 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. But there are no cases expressly interpreting the scope of the agency's mandate in sec. 31.02(1) in terms of protecting property values and the value of lake-centered economic activity. The record amply reflects 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. Review by this Court is necessary because the court of appeals failed to consider the statutory history or the significance of excluding that evidence in establishing water levels on impounded lakes.

The court of appeals also affirmed DNR's interpretation of the "protect property" standard on the basis that there would be no rational limit to the type of economic impact evidence the Department would need to consider. The conclusion that the DNR is empowered to disregard economic impacts in establishing or modifying a water level order should not be so lightly reached. The court of appeals' reasoning ignores that administrative law judges routinely make decisions concerning the weight and credibility of evidence during hearings. Further, this is precisely the type of evidence the agency is required to gather and analyze in a proposed rulemaking under sec. 227.137(3)(intro.) (proposed rule requires report containing "information on the economic effect of the proposed rule on specific businesses, business sectors, . . . local government units, and the state's economy as a whole.")

It is a matter of statewide importance whether the Department (as affirmed by the court of appeals in a published case), properly considered the "protect property" standard identified in the statute. The agency's ability to

wholly disregard impacts of a water level order on residential and commercial interests organized around a lake results in a host important societal interests giving way to the preferences of water quality managers. The Department's interpretation of sec. 31.02 to preclude evidence of economic impacts in establishing a water level order is of immense concern to any citizen of this state who owns property or runs a business on an impounded waterway.

II. REVIEW IS NECESSARY TO CLARIFY THE REACH OF THE PUBLIC TRUST DOCTRINE WITH RESPECT TO NON-NAVIGABLE WETLANDS.

Section 31.02(1) directs WDNR to consider "the public interest in navigable waters" among the factors to be weighed in establishing a water level order. Wisconsin law affords special protection to navigable waters under the public trust doctrine, Article IX, Section 1 of the Wisconsin Constitution.[4] 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 determination of navigability (of a stream) or the ordinary high water mark ("OHWM") of a lake implicates the public trust doctrine and triggers DNR's jurisdiction under numerous regulatory provisions, particularly under ch. 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

[4] 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.

owned lakebed and the uplands capable of private ownership . . . .")

The issuance of the water level order in this case was an exercise of the Department's delegated authority under sec. 31.02(1) to protect "public rights in navigable waters." But the Department's concept of its public trust duties extended to the consideration of impacts of the water level on non-navigable wetlands located above the ordinary high water mark of the lake.[5] Numerous cases recognize the limit of navigability as the 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 Department's decision imbued non-navigable wetlands with a public trust dimension, while excluding consideration of the impact of the water level on other private lands as irrelevant. Whether the public trust doctrine may be stretched, accordion-like, to encompass privately owned upland property on the basis that it impacts public rights in navigable water is a question that has substantial implications for the scope of the DNR's implied regulatory authority. There is nothing in the language of sec. 31.02(1) to support the Department's inclusion of private wetlands in the calculus of "public rights <u>in navigable waters</u>."

The Department's failure to distinguish between jurisdictional and private wetlands had the practical effect of defining *all wetlands* as public interests in navigable waters under sec. 31.02(1). This approach is consistent with the Department's clear policy preference to establish broader,

[5] DNR'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).

more comprehensive agency authority to protect all wetlands. But the Legislature has not enumerated wetlands as protected interests under sec. 31.02(1). The Legislature is the trustee of the State's navigable waters, and the DNR may not substitute its own policy for that of the Legislature. *Niagara of Wisconsin Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153 (1978). Without legislative authority, the agency may consider non-jurisdictional wetlands as "property" under sec. 31.02(1), just as it must consider riparian lands developed for residential, commercial or other purposes. But it may not blur the line between property and "public rights in navigable waters" on the basis of a "special relationship" to navigable waters. Rather, all property interests should be accorded the same importance, and the impact of water level orders on uplands must be considered using the same economic yardstick.

This case is appropriate for *certiorari* review to consider whether the Department has implied authority to regulate water levels in order to ensure the presence of a particular composition of plant and animal species, or to preserve particular aesthetic qualities and habitat values in privately owned, non-navigable wetlands. Whether the public trust contemplates this geographical reach is a compelling issue of state constitutional law as well as question of the agency's delegated authority.

III. ***CERTIORARI* REVIEW IS NECESSARY TO CLARIFY THE EXTENT OF DNR'S BROAD REGULATORY AUTHORITY UNDER WETLAND RULES, WHERE THE APPLICATION OF THOSE RULES HAS BEEN EXPRESSLY LIMITED BY THE LEGISLATURE.**

The court of appeals affirmed DNR's water level order in all respects, including the finding that RKLD's petition to increase water levels on Lake Koshkonong was evaluated "against the appropriate regulatory standards, including chapter NR 103," and that the agency "properly considered the cumulative impacts on the ecosystem that a further increase in lake levels would have." R.16B: 30, citing Wis.

Admin. Code § NR 103.03(d) (P-App. 37). The "cumulative impacts" analysis, which was at the core of the agency's rejection of RKLD's petition to increase the water level on Lake Koshkonong, comes directly from ch. NR 103.

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). Section NR 103.01(4) provides that these regulations are 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 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." Thus, *conformity with ch. NR 103 wetland water quality standards is determinative of departmental regulatory decision*s.

The evidence in support of the Koshkonong water level order is laden with references to the standards in ch. NR 103. The decision itself notes that the standards in ch. NR 103 were "appropriately considered." R.16B:30 (P. App. 37). 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).

Section 281.15(2)(b) is cited in the Code as the exclusive source of the agency's authority to establish wetland water quality standards . *See* Wis. Admin. Code § NR 103.01(1). But that delegation of rulemaking authority is limited and confined by sec. 281.92, which states: "Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31." There are no cases deciding the question of whether the Department may apply rules promulgated under ch. 281 to a proceeding under ch. 31. This question involves the interpretation of a statute and is therefore purely a question of law. This issue is

likely to recur because proceedings under ch. 31 to construct and maintain dams will invariably have consequences for wetlands adjacent to impounded waters. The issue is particularly in need of review because the Department's wetland water quality standards are broadly written, their application involves substantial agency discretion, and the analysis under those rules is intended to drive regulatory decision-making.

Sec. 281.92, Stats., reflects the Legislature's determination that water quality standards under ch. 281 should not be applied to limit the development of dams, or impact Department orders regarding their operation. The court of appeals' discussion of that issue is superficial and ignores commonly accepted canons of statutory construction. As this Court has stated, "any reasonable agency doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such power. *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971). Consistent with this well-established principle, the Legislature recently amended chapter 227 of the Statutes to emphasize that an administrative agency rule is invalid "if the rule exceeds the bounds of correct interpretation [of the purpose of the statute]." 2011 Wis. Act 21, § 2 (amending and renumbering Wis. Stat. § 227(2)(a).

The Court should take review of this case because the agency's application of NR 103 wetland water quality standards in a water level proceeding (particularly in the absence of any countervailing consideration of economic impacts on residential and lake-related commercial activity) is in direct conflict with principles of agency law, as reflected in the decisions of this court and chapter 227 of the Statutes.

IV. THIS CASE PROVIDES AN OPPORTUNITY FOR THE COURT TO CLARIFY THE STANDARD OF REVIEW OF THE DNR'S INTERPRETATION OF ITS STATUTORY AUTHORITY.

DNR's interpretation of sec. 31.02(1), Stats. implicates the extent of its own jurisdiction. As the court of appeals noted:

> We think it apparent that if the DNR can determine water levels for impounded bodies of water without considering evidence of the economic effect of its order on waterfront property values, lake-related business income and area tax revenues, then it has substantially greater authority in the matter.

Certification of the Wisconsin Court of Appeals dated July 29, 2010, at p. 5 (P. App. 55) (Certification was denied by Order dated September 21, 2010.) This Court has consistently ruled that an agency's conclusions of law with respect to the scope of its own jurisdiction are entitled to no deference. *See Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶¶ 11-13. In addition, the legal conclusion as to whether "public rights in navigable waters" allows DNR to consider non-navigable wetlands implicates the public trust doctrine in Wis. Const., Art. IX, sec. 1. Courts do not defer to an agency's conclusions on issues of constitutional magnitude. *See Dunn County v. WERC*, 2006 WI App 120, P7.

Despite controlling precedent on the issue, the court of appeals ultimately declined to rule on the appropriate level of deference to accord the agency's interpretation of sec. 31.02(1), stating:

> [W]e need not decide which level of deference is appropriate. Even applying de novo review, we conclude Wis. Stat. § 31.02(1) does not require the DNR to consider the economic effects proposed water levels have on residential property values, business incomes and tax revenues; the DNR is permitted to consider impacts its water level order has on wetlands adjacent to navigable waters; and the DNR did not exceed the scope of its authority by applying water quality standards set forth in Wis. Admin. Code § NR 103 in making its water level order.

Decision, at 13 (P. App. 70). The court's employment of the least deferential standard of agency review was then used as a

basis to disregard early administrative decisions of the Railroad Commission, DNR's predecessor agency, which support a far broader reading of the agency's statutory mandate to "protect property." *See* Decision, at 18-19 (P. App. 75-76) ("[B]ecause we give no deference to the DNR's interpretation of § 31.02(10 and have concluded the statute is unambiguous, we need not address the agency's administrative decisions and materials or consider extrinsic sources of interpretation, such as legislative history.") This case presents an opportunity to clarify whether the *de novo* standard of review allows or requires a reviewing court to disregard the agency's contemporaneous construction of its newly delegated authority at the time the legislation was enacted (as opposed to the agency order on review) as a source of legislative intent.

CONCLUSION

This case raises fundamental questions about the management of Wisconsin's water resources and their role in the economic future of the State. It also presents important issues concerning the power of an administrative agency to construe its statutory grant of power and to select which public and private interests are worthy of consideration when the contours of public waters are modified by human intervention.

These issues have not been addressed by this Court in the century since the Legislature first granted an administrative agency the power to permit and regulate dams. A decision of the supreme court is necessary to ensure that these powers are exercised in a manner consistent with the Legislature's delegation and with the rights of both private property owners and the public's interest in State waters.

Dated: August 22, 2011.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 6,321 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12). 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 opposing parties.

Dated: August 22, 2011.

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