

**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Review of the Water Level
Decision for Lake Koshkonong and the
Indianford Dam on the Rock River in Rock
County, Wisconsin

Case No. 3-SC-2003-28-
3100LR

**JOINT PETITIONERS'
SURREPLY BRIEF**

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INTRODUCTION

The Department's Reply Brief highlights one of the fundamental legal issues in this case:

Which property interests are protected under the mandate of Wis. Stat. § 31.02(1), directing that water level orders “protect life, health and property”?

The Department claims that this protection extends only to “direct physical impacts to real or personal property” (Reply Brief, at 5), although the statute includes no such limiting language. The Joint Petitioners contend that DNR is required to consider and weigh all legally recognized property interests as a part of the “balancing of interests” mandated under the statute. These property interests clearly include a dam owner's legal interest in flowage rights and every riparian property owner's interest in the use and market value of his property.

As the 1938 Attorney General opinion cited by DNR notes, “[t]he essence of regulation is adjustment according to circumstances.” 1938 Op. A.G. 424, 428. If (as the Department contends) a “balance of interests” was struck in its previous orders, that balance has been fundamentally altered in recent decades. Since the time DNR made an analysis of hydraulic modeling of Lake Koshkonong in connection with its 1982 water level proceeding, the proposed flashboards were eliminated, the water level benchmark was moved from the dam gage to a new lake gage at Newville¹, the dam was restored to its full hydraulic capacity and the OHWM was re-determined at a level 1.4 feet higher than DNR's 1979 survey had previously located it.

DNR mischaracterizes the Petitioners' property based arguments as “seeking the manipulation of water levels” for the “personal gain of land owners.” (Reply Brief at page 6.) The Petitioners ask nothing more than a water level order that recognizes the significant changes in circumstances since the Department's 1982-1991 orders were issued and gives due consideration to the protected interests under s. 31.02(1).

LKWA's Reply Brief highlights another critical point: The reinstatement of the 1991 water levels in the 2005 order does not maintain the *status quo*. It *lowers the lake levels* experienced in recent decades. As many lake users testified, water levels under the order have already fallen since the operating capacity of the

¹ DNR has acknowledged that the lake level at the Newville gage is some 3.5 inches above the dam. Thus when enforcement of the water level order was transferred to the Newville gage, it had effect of reducing the maximum water level by that amount.

dam gates was restored. Hydraulic modeling by Montgomery Associates concludes that users will experience lower water levels for an average of 50% of the summer season due to the dam repairs. (Montgomery Direct, pp. 20; Ex. RKLD-113 and RKLD-116). Several of DNR's witnesses acknowledged the predictable lowering of water levels as a result of the dam repairs, including its OHWM expert Dale Simon and Water Resource Specialist Michael Halsted. This fact is well understood by the LKWA, whose Reply Brief emphasizes the expected lowering of the OHWM as a result of the dam repairs under DNR's proposed order.

ARGUMENT

I. DNR'S CRITIQUE OF PETITIONERS' HYDRAULIC MODELING IS AN INADEQUATE BASIS TO ANALYZE THE IMPACTS OF THE RESPECTIVE WATER LEVEL REGIMES.

The Department – not the District – is charged to assess the effects of its dam management orders on water levels and bears the burden of proving that it has done so. The Department agrees that a reasonable assessment of the impacts of a water level order must begin with an accurate projection of the water levels it will produce. (Reply Brief, at 2.) In connection with its 1982 operating order, the Department modeled eleven “operating strategies” for the Indianford Dam (each assuming the installation of 6-inch flashboards and a different combination of gate opening set points) and established regulatory levels based on the gage located at the dam. As its 1982 Environmental Assessment states: “The application of streamflow modeling in the development of operating orders for dams should produce a more logical approach to the problem Better water level management should benefit the environment as well as public & private property.” (Ex. DNR-817, at 6.)

Although the “state of the art” of hydraulic modeling has been substantially advanced since DNR's 1982 proceedings, the agency made no effort to model the hydraulic effects of its own proposed order (or the District's proposal) in this proceeding. It is disturbing that the agency concluded that it could establish orders for Indianford Dam gate operations without a quantitative analysis of the hydraulic consequences of the competing gate operation proposals, especially in view of the extent of staff resources it has devoted to this proceeding.

At the hearing, DNR's ecological experts based their opinions solely on the numerical difference between the “target water levels” proposed in the respective orders, even though the agency has consistently recognized that the Dam's capacity to maintain the summer maximum is limited and that levels above the ordered maximum elevation will be common on either order. In effect, DNR has

based its entire "public rights" case on presumed impacts of water levels by reducing a highly complex subject to mere sloganeering ("Any increase in water levels is bad, no matter when or how long it occurs or how it affects public safety, navigation or property.")

Without an analysis of its own, DNR is reduced to criticizing *the only hydraulic model* developed for this proceeding. This misplaced effort is not sufficient to meet the Department's burden of proof. Moreover, the Department's criticism of the hydraulic model prepared by Montgomery does not stand up to scrutiny. The Montgomery analysis was carefully developed, based on the best available information, to consider and balance all of the protected interests under § 31.02(1) in view of the circumstances now prevailing.

The Montgomery model was based on HEC-RAS, the accepted and widely used hydraulic modeling software. That software was "calibrated" with data relating to the size and shape of the basin, the discharge capacity of the dam gates and other necessary information. Montgomery's original analysis required use of estimated discharge capacity for some of the dam gates, because the gates had been inoperable for decades and so their capacity could not be determine directly. The original analysis, based on this best available evidence, DNR dismisses as "severely flawed and inaccurate." (Reply Brief at 14.) After the wicket gates were finally reconstructed by Rock County, a field study definitively established the capacities of the gates and Montgomery "re-calibrated" the model to reflect actual (rather than estimated) gate capacity.

DNR's Reply Brief does not identify *any defects* in the data used in the revised model, except that: (1) the model analysis did not include the period November to April (when navigational use is at its nadir) and (2) the specific set points for gate opening and closing that were programmed into the revised HEC-RAS model. The former objection is not central to the ALJ's decision in this proceeding. But the import of the gate operation assumptions is critical.

In order to calibrate the HEC-RAS software, the modeler must establish set points at which each of the dam's discharge gates will be opened or closed, wholly or in part. Because DNR elected not to model the consequences of its order on the repaired dam *at all*, it had no need to determine appropriate set points. Nor did DNR recommend specific set points or even provide general guidance to assist Montgomery's modeling effort.

Montgomery reasonably determined the modeled gate opening scenario to (1) be consistent with the District's proposed order; (2) restore the water level decrease that would occur if there was no change in the DNR operating order; (3) provide a modest increase in water levels through much of the boating season

when water levels are low, (4) eliminate water levels that would encroach above the OHWM to the extent possible, and (5) limit the increase in water levels to avoid potential ecological effects. (Montgomery Cross & Ex. 502, p. 27.) The gate operating scenario modeled by Montgomery represents a “middle range” of possible operating scenarios that could be conducted under the proposed order. Specifically, the modeled scenario includes gate opening/closing elevations ranging from 776.4 msl to 776.9 msl, spanning a range above and below the proposed target lake level of 776.8. Far from having “serious flaws,” or being an attempt to compare “apples to oranges,” this gate scenario represents the District’s extensive consideration of the hydraulic, ecological and navigational interests on Lake Koshkonong.

DNR criticizes these “assumptions,” not because fixing gate operation set points is beyond the scope of a water level order, but because agency staff does not consider the gate operation approach used in the model consistent with the “intent” it attributes to the dam owner.² It is frankly disgraceful that DNR would presume that the District, a public entity, would intentionally operate the dam in violation of the operating orders. The ALJ has ample authority to mandate gate opening and closing set points necessary to ensure a proper balancing of the interests protected under sec. 31.02(1) (and in fact prescribes gate opening and closing set points in the current order, Ex. DNR4), and the Department has ample power to enforce compliance with those requirements.

In any event, criticism of the Montgomery analysis is no substitute for the Department’s obligation to establish an evidentiary basis for a proposed order that considers the repairs to the dam’s discharge capacity, the relocation of the water level benchmark from the dam to the lake, the elimination of the 6-inch flashboards and the re-determination of the OHWM at least 1.4 feet above that determined when it last modeled the system in 1982. The Petitioners are at a loss to explain how the DNR can discharge its statutory duty to “protect property” or establish a water level order that serves the interests of navigation and other public rights without developing and using a fundamental tool (a hydraulic model) that addresses the Lake Koshkonong’s situation as it exists now.

II. THE DISTRICT’S ACQUIRED FLOWAGE RIGHTS ARE PROPERTY INTERESTS TO BE CONSIDERED IN ESTABLISHING A WATER LEVEL ORDER.

² (As DNR’s Reply Brief puts it: “As pointed out by Mr. Johnson’s and Ms. Josheff’s testimony, the bottom line is that the District intends to raise the water level at least 7.2 inches as often as possible”)

A. The Increase in the OHWM Between 1979-2002 Resulted in the Accrual of Recognized Property Interests, Regardless of the Cause of that Increase.

DNR acknowledges that increased water levels over the past two decades are reflected in the elevated OHWM determined in 2001. (Reply Brief, at 13.) The Department recognizes that inoperable dam gates were a probable cause of the lake's present OHWM level. But whether it is due to the impaired capacity of the dam, lack of enforcement of the operating order, increased development in the watershed, precipitation cycles or a combination of these factors – the established OHWM cannot be dismissed by assigning blame for “how it got that way.”

LKWA apparently believes that the OHWM determined by RKL and DNR should be ignored as “an *unordinary* and inflated measurement” that resulted from the former dam owner’s “failing to maintain and operate the dam as designed and directed.” (LKWA Reply Brief, at 1-2.) Similarly, LKWA asserts: “No flowage rights should arise from water levels occurring from a dam that did not operate at full capacity due to Rock County’s failure to spend money necessary to repair the wicket gates.” (LKWA Reply Brief, at 4.) Both of these positions are flat wrong as a matter of law.

The OHWM is not a finding about what *ought* to be. It is a physical *fact* – an elevation on the shoreline marking the upper limit of regularly occurring water levels. *See, e.g., State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 176, 176 N.W.2d 118 (1962) (citing *Diana Shooting Club* definition as “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.”) According to the DNR’s witness Dale Simon, this requires the sufficiently continuous presence and action of water over a period of at least twenty years. But the *reasons why* the OHWM is where it is are entirely irrelevant.

LKWA’s view that prescriptive rights should not arise from misoperation of the dam also reflects a basic misunderstanding of the law of prescriptive rights and adverse prescription. By their nature, these doctrines provide for the creation of legal rights by persons who use or occupy lands of another *without* the legal right to do so. A flowage right is acquired when a dam owner maintains water levels that inundate lands that are neither owned by the dam owner nor subject to existing flowage rights. Numerous reported cases recognize that flowage rights may arise by prescription. *See, e.g., Charnley v. Shawano Water Power & River Impr. Co.*, 109 Wis. 563, 85 N.W. 507, 568-69 (1901) (“that one may obtain a prescriptive right of flowage under proper conditions cannot be disputed. It is a right which must have been claimed and maintained in hostility to the right of the

person against whom it is set up.”); *Chippewa & Flambeau Improvement Co. v. Railroad Commission of Wisconsin*, 164 Wis. 105, 159 N.W. 739 (1916); *Burkman v. New Lisbon*, 246 Wis. 547, 19 N.W.2d 311 (1945). Adverse rights accrue (and are lost to their rightful owner) even where the property is taken by one who “avows himself to be a wrongdoer.” *Illinois Steel Company v. Budzisz*, 119 Wis. 580, 97 N. W. 166 (1903).

The record in this case demonstrates that the water level of Lake Koshkonong was maintained well above the level of the OHWM determined by DNR in 1979 for well over 20 years. This had the effect of re-establishing the water level and of establishing a prescriptive right in the dam owner to continue to flow lands up to that level. This right does not defeat the State’s regulatory authority to set a water level order below the level of the dam owner’s flowage rights. But it is a property interest that the Department is required to consider and protect in such a proceeding.

B. The Department Erred in Failing to Balance the District’s Flowage Rights with Other Interests Required to be Considered Under Sec. 31.02(1), Stats.

The DNR’s reply brief characterizes as “a novel theory” the Joint Petitioner’s argument that it holds flowage rights acquired by deed and prescription. The Department does not explain what makes this assertion novel, but the record shows conclusively that the District owns flowage rights. First, flowage rights appurtenant to the Indianford Dam were established by prescription by the District’s predecessor in title (Wisconsin Power & Light Co.) and expressly acknowledged in the 1939 PSC Order in a water level proceeding. *See Petition to Raise the Normal Elevation of Water Maintained by the Indian Ford Dam in the Rock River, Rock County*, 21 PSCW Reports 705, 712 (November 28, 1939) (“The fact that the Wisconsin Power and Light Company, owner of the dam, and its predecessors have maintained the spillway at elevation 11.44 feet for more than 20 years and have operated the flood gates in the dam as required by the commission during this period gives the present owner a prescriptive right to continue to maintain said dam at said height and operate the same pursuant to the order of the commission.”) Second, the District obtained flowage rights by deed under the 2005 Warranty Deed from Rock County to RKLD which transfers “all flowage rights” appurtenant to the Indianford Dam (Ex. RKLD-506). Despite this, DNR denied any knowledge of the dam owner’s flowage rights and made no effort to investigate these during the months of agency analysis of the Lake Koshkonong water level orders.

The Joint Petitioners agree with the conclusion of the 1938 Attorney General Opinion cited by the Department that a dam owner’s flowage rights are

not protected against a regulatory order setting a lower water level. The Petitioner's prescriptive rights argument was made in the context of the argument that the Department selectively focused on wetlands and wetland interests to the detriment of many other important and valuable interests in navigable waters. One of the bases for the Department's order was its finding that the District's requested increase could result in a taking of riparian property. The Department proceeded as though the rights of wetland owners were the only property interests warranting consideration in its order. It did not make even the most cursory analysis of the counterpart flowage rights of the dam owner, some of which were established as a matter of public record.

The Lake District freely acknowledges that its prescriptive rights do not defeat the State's regulatory power to establish a maximum level below a dam owner's deeded and prescriptive flowage rights. But that does not relieve the Department of its statutory duty to protect the District's property interests as a part of the balancing of interests required when it establishes a water level order under § 32.02(1) to protect property.

III. PETITIONERS' EVIDENCE OF ECONOMIC IMPACTS WAS CREDIBLE AND RELEVANT TO THE INTERESTS THAT MUST BE BALANCED UNDER WIS. STAT. § 31.02(1).

A. Economic Impacts Must be Considered Under the Public Interest and as Property Rights to be Protected Under Sec. 31.02(1), Stats.

The Department of Natural Resources disputes the relevance of evidence of the economic impacts of its water level order on owners of riparian and other affected property. It contends it has no duty to consider these impacts either as an aspect of "public rights in navigable water" or as a private property interest to be protected. The Department claims that commercial interests should not be considered because it is not the Department's regulatory role to "manipulate public water levels for private gain." This position allows the Department to minimize the substantial negative impacts in property affected by its order since the repairs to the Indianford Dam were completed in 2002.

DNR repeatedly mischaracterizes the public and private interests cited by Joint Petitioners as unworthy of protection because they "try to build 'wealth' by seeking the manipulation of public water levels for their personal gain." (DNR Reply Brief at 6); or for "potential economic benefit." (*Id.* at 4). But the Petitioners' position is and always has simply been that DNR must *consider* the commercial and economic impacts of their actions under s. 31.02. In denying that Wisconsin case law requires consideration of commercial and economic impacts

in the administration of public rights in navigable waters, DNR ignores a wealth of case law on this point; and instead relies on a single statement in dicta from *Wisconsin's Environmental Decade v DNR*, 115 Wis. 2d 381 (1983), a case with no application to the present facts.

In the Joint Petitioners' Closing Brief (at pp. 22-23), the Petitioners point out that commercial considerations underlie the public trust doctrine. For example, in *Flambeau River Lumber Co. v. Railroad Comm. of Wis.*, 204 Wis. 524, 543, 545 (1931), the Supreme Court vacated the Railroad Commission's order establishing the flow of the Flambeau River because the Commission failed to consider the improvement of navigation for commercial purposes. *Id.* at 543. The court found that the improvement of navigation for commercial purposes was the purpose of ch. 31, which empowered the Commission to regulate water levels and flows of the river. *Id.* In finding that the Commission failed to consider the improvement of navigation for commercial purposes, the Court stated, "Water should be furnished to make such navigation as there is reasonably practicable in accordance with established practice. So far as we are able to discover, no attempt has been made to make the findings and conclusions necessary to create such a situation." *Id.* at 545. Under the *Flambeau Lumber* case, not only must the agency consider commercial impacts of the water level order, it must expressly make findings and conclusions necessary to ensure that it exercises its power in order to accomplish that purpose.

In *Chippewa & Flambeau Improvement Co. v. Railroad Commission of Wisconsin*, 164 Wis. 105, 159 N.W. 739 (1916), the Wisconsin Supreme Court upheld the decision of the Railroad Commission construing what is now sec. 31.02, Stats. to include consideration of impacts to riparian property values as well as impacts to the local recreation economy. DNR argues (Reply Brief, at 8) that the economic interests considered in *Chippewa & Flambeau* were limited to "direct physical impacts to the riparian property along the shore and the associated navigation, resource and public rights issues." But a careful reading of the case discloses that the Commission's consideration of local economic impacts was in addition to and separate from its consideration of more limited impacts to property caused by flooding and shoreline erosion. The Commission stated, "a 10 foot level will *not only* overflow a large acreage of land bordering the lake, but the level fixed will directly concern the owners of shore property *throughout* the lakes." *Id.* (emphasis added). This distinction by the Commission eliminates any potential confusion about the broad scope of the property interests considered in promulgating its water level order.

In the 1938 opinion cited by the Department (DNR reply brief, at 10) in connection with a later Rest Lake water level controversy, the Attorney General

concluded that the local resort economy was a component of public rights in navigable water:

It is the duty of the commission [under Wis. Stat. § 31.02] to protect the public right of navigation in these waters; and hunting and fishing are incidents of the right of navigation or are independent rights in themselves. In this case, moreover, the public interest in fishing is unusually important because it is one of the bases of the great summer resort business in the vicinity of Rest Lake and the Manitowish waters. So it is proper to consider this interest in regulating the water levels.

1938 Op. Atty. Gen. 424, 428.

The Department is not required to regulate water levels to maximize economic gain, but it is required to give due weight and value to accrued property rights in the balancing of interests under sec. 31.02(1), Stats. In addition to the District's flowage rights, the case law supports the conclusion that riparian property owners' reliance on and investment in water level conditions over a long period of time create an equitable property interest that must be weighed in the balance under sec. 31.02(1). *See Smith v. Youmans*, 96 Wis. 103, 109 (1897) ("It has long been settled that the artificial state of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained.")

Petitioners seek to protect the value of their existing property against lower water conditions. The diminution in property values, commercial receipts and tax revenues associated with lower water levels described by Professor Kashian and Mr. Stockham are simply economic measures of an equitable property interest that has accrued based on higher water levels over the statutory prescriptive rights period. Thus, even assuming that DNR's distinction between "protection" and "improvement" has some merit, the evidence offered by Petitioners clearly relates to the protection of a property interest as well as the public interest in the continued vitality of the local recreational economy.

B. The Department's Criticism of Petitioners' Expert Economic Opinions is Misplaced.

DNR attempts to discredit the Joint Petitioners' expert witness opinions related to the deteriorating economic conditions created by lower water levels. DNR's attempts not only fail to discredit these witnesses, but serve to support their testimony.

1. Mr. Stockham

DNR attempts to discredit the testimony of the Petitioners' witness, John Stockham, with regard to the adverse impacts to the quality of life that result from lower water levels. DNR asserts that Mr. Stockham's testimony is discredited because he interjected his personal opinions concerning the preference of lakefront property owners and the Lake Koshkonong community. (DNR Reply Brief at 8.) The Department also asserts that Mr. Stockham should have relied more heavily on surveys of these preferences conducted in the past. DNR's attempted refutation of Mr. Stockham's testimony are without merit.

First, Mr. Stockham is an expert witness in the field of land use and urban planning. In his profession, he is often called on by local governments to make judgments regarding consumer preferences, and he is competent to render his expert opinion on these preference in this case. Further, Mr. Stockham provided support for his judgment regarding consumer preference in this case, noting that development has occurred around Lake Koshkongong that is consistent with his judgment regarding the public's valuation of the Lake as an important amenity.

Second, Mr. Stockham explained on cross examination that the surveys conducted by DNR, purporting to reveal that Lake Koshkonong users are generally satisfied with conditions on the lake, are unscientific and unreliable for several reasons. These surveys had an unacceptably low response rate. Also, the responders to these surveys have a strong disincentive to voicing their true concerns about access. Namely, private riparians know that if they express concerns about public access, then they are more likely to trigger a response by the government that would lead to increased public lake use and dilute their personal enjoyment of resource. (*See* Ex. 227 and accompanying oral testimony.)

2. Prof. Kashian

DNR makes several attempts to discredit Prof. Kashian's "hypothesis" that a reduction in lake water levels has adverse impacts to lakefront property. As an initial matter, it is important to note that DNR here attempts to refute the common sense notion that the premium for living near a lake will diminish when the quality of the lake diminishes. It requires no expert to establish that the premium paid for lakefront property is directly related to the quality of the lake fronting the property. Prof. Kashian's testimony attempts to quantify that relationship.

Oblivious to the obvious, DNR asserts that there is no basis for Prof. Kashian's testimony. The Department blatantly ignores Prof. Kashian's pre-filed direct testimony (at pp. 6-12), in which he explained the several effects that a

reduction in water level has on the value of riparian property and cited a wealth of scholarly analysis documenting each of these effects. The effects of a decline in water levels cited by Prof. Kashian are an increase in the distance from home to shore, a decrease in shoreline frontage, the decrease in water level itself, and consumers' subjective assessments of property value regardless of those effects. *Id.* DNR has cited no scholarly analyses nor advanced any logic that might refute the adverse effects that a reduction in water level has on property value, and indeed there are none contained in the record.

In its reply brief, DNR attempts to impeach Prof. Kashian's opinion by referring to "water level issues that were occurring on Beaver Dam Lake during the time he was reviewing property values." (specifically, a .20-foot lowering of the water level of Beaver Dam Lake occurring after August, 2004). (Reply Brief, at 9). DNR asserts that these "water level issues" were not taken into account by Prof. Kashian in his analysis, and that "these facts refute Prof. Kashian's conclusions and his primary hypothesis that 'a reduction in water level... will result in a lowering of the property value.'" *Id.*

In fact, the slight lowering of Beaver Dam Lake in 2004 tends to support Dr. Kashian's conclusion. The thrust of Prof. Kashian's analysis was to compare a lake with changed water level conditions to a similar lake with constant water level conditions. Prof. Kashian compared the appreciation of shoreline at Lake Koshkonong, where water level conditions were changed as a result of the repairs to the Indianford Dam, to the appreciation of shoreline at Beaver Dam Lake, which did not experience a similar change. In 2002, Lake Koshkonong experienced water level declines that were not experienced at Beaver Dam Lake. Prof. Kashian's hedonic analysis revealed that appreciation of shoreline value suffered at Lake Koshkonong after this event. Similarly, after 2004 Beaver Dam Lake experienced a water level decline that was not experienced at Lake Koshkonong. And, as expected, appreciation of shoreline values began to suffer at Beaver Dam Lake following that event. *See* Exhibits 208 and 209. Thus, the experiences at Beaver Dam Lake as well as Lake Koshkonong support Prof. Kashian's opinion about the direct relationship between lake water levels and the value of property surrounding the lakes.

Finally, assuming *arguendo* that the water level issues at Beaver Dam Lake identified by DNR did impact Prof. Kashian's analysis, the potential impact of the water level issues at Beaver Dam Lake would have been to mask the full effect of the impact of the changes in water levels at Lake Koshkonong. In other words, the adverse impacts to shoreline appreciation experienced at Lake Koshkonong were severe enough to be detected even relative to a lake that also experienced changed water level conditions. All told, DNR's inference that Prof. Kashian's conclusions and hypothesis are refuted by DNR's citation to the "water level issues" at Beaver

Dam lake is wholly without merit. And DNR's lack of understanding of the mechanic as well as the magnitude of these impacts speaks to DNR's failure to properly consider these issues as required by Sec 31.02.

CONCLUSION

There is no mathematical formula by which the Department is required to balance the multiple interests involved in establishing the Lake Koshkonong water level order. Moreover, the Joint Petitioners fully recognize that neither the District nor lake users have an absolute property right that trumps the Department's responsibility to weigh all of the statutory factors under sec. 31.02(1), Stats. But the DNR's consideration and weighing of those statutory factors was clearly deficient. The Department in its post-hearing briefs has maintained a dismissive posture toward the substantial, valuable public interests and private rights that have accrued to riparians and lake users based on the water levels maintained by the Indianford Dam over the past several decades. As detailed in the Joint Petitioner's brief-in-chief, the Department also downplayed or disregarded significant navigation, access and safety interests. The Joint Petitioners request that the Administrative Law Judge craft an order that remedies these deficiencies in the Department's analysis.

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Respectfully submitted,

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