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VIA EMAIL TO William.Coleman@doa.state.wi.us
AND U.S. MAIL
William S. Coleman, Jr.
Administrative Law Judge
Division of Hearings and Appeals
819 North 6th St., Room 92
Milwaukee, WI 53203-1685

Re: *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

Dear Judge Coleman:

This letter is submitted on behalf of the Joint Petitioners in response to your October 18, 2006 Order on Supplemental Briefing. In your Order, you invited the parties to address the operation of § NR 103.06(1)(a) to the Department's action in this proceeding.

The Department's rule purports to make wetland water quality standards applicable to actions under ch. 31, Stats. To the extent the Department's rule is an exercise of authority that was not conferred by the legislature, it is a nullity.

Section NR 103.01(1) identifies Wis. Stat. § 281.15(2)(b) as the source of the agency's authority to establish wetland water quality standards. That section provides in pertinent part: "The department shall promulgate rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof." However, sec. 281.92 states "Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31." Thus, the legislature expressly limited the rulemaking authority conferred by sec. 281.15, by the proviso that any such rulemaking does not affect ch. 31.

NR 103.06(1)(a) states, among other things, that ch. NR 103 applies to "permits, reviews, approvals and other actions under ch. 31, Stats." NR 103.08 provides that '[t]he 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, if applied to the Lake Koshkonong water level order, NR 103 would clearly "affect" the regulation of a dam under ch. 31.

An administrative agency cannot exercise its rulemaking authority in contradiction of the will of the legislature as expressed in the statutes. *See* Wis. Stat. §§ 227.10(2) ("no agency may promulgate a rule which conflicts with state law") and 227.11(2)(a) ("a rule is not valid if it exceeds the bounds of correct interpretation"); *Oneida County v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). An administrative rule, even of long duration, may not stand at variance with an unambiguous statute. *Basic Products Corp. v. Wis. Dept. of Taxation*, 19 Wis. 2d 183, 186, 120 N.W.2d 161 (1963). In *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47 (1955), the Wisconsin Supreme Court held:

> The rule-making power does not extend beyond the power to carry into effect the purpose as expressed in the enactment of the legislature. A rule out of harmony with the statute, is a mere nullity.

The intent of sec. 281.92 is unambiguous: it provides that nothing in ch. 281 shall affect ch. 31. Among other things, this means that rules promulgated under ch. 281, Stats., cannot affect the DNR's water level orders under sec. 31.02.[1] Stated alternatively, it is impossible to apply ch. NR 103 to a water level order proceeding without having "something" in ch. 281 – that is, the rulemaking authority delegated under sec. 281.15 – affect regulation under ch. 31. The Department cannot simultaneously comport with the terms of sec. 281.92 and apply rules promulgated under ch. 281 to actions under ch. 31.

The language in sec. 281.92 predated the legislature's delegation of rulemaking authority to promulgate water quality standards, and indeed predated the existence of DNR. Chapter 614, § 37 of the Laws of 1965 (codified at Wis. Stat. § 144.025(2)(b)), constituted the legislature's original delegation of authority to adopt water quality standards. At that time, sec. 144.12, Stats. (1963), provided that "*nothing in this chapter shall be construed to affect the provisions of sections 196.01 to 196.79 or of chapter 31 of the statutes.*" It has been firmly established by case law that the legislature is presumed to act with full knowledge of existing laws. *State v. Cole*, 2003 WI 112, P17. The legislature did not act in a vacuum when it granted water quality rulemaking authority to the Department, but with knowledge that the provisions of ch. 31 (which then, as now, pertained to "regulation of dams and bridges affecting navigable waters") would not be affected by such authority. The exemption in sec. 144.12, Stats. was unchanged by the legislature's comprehensive revisions to ch. 144 in 1965, and has remained intact through successive enactments affecting the scope of the Department's regulatory authority.

The DNR has historically sought to expand its authority to regulate wetlands. In 1979, for example, the Department solicited the opinion of the Attorney General as to whether the

[1] Wis. Stat. § 31.02(2) provides in part that "the construction, operation, maintenance and equipment . . . of dams in navigable waters shall be subject to the supervision of the department and to the orders and regulations of the department *made or promulgated under this chapter*." (emphasis added) This language further supports the conclusion that ch. 31 and ch. 281 represent independent spheres of regulatory authority.

Department had authority to adopt rules to establish a wetlands activity permit program for a broad range of activities that might impair the natural function of wetlands. *See* 68 Op. Wis. A.G. 264 (OAG 85-79). The Attorney General concluded that such authority was neither expressly nor impliedly granted by the legislature, reasoning:

> First, other statutes establishing permit programs enacted to protect the state's water quality suggest that where the Legislature has intended to bestow regulatory authority upon DNR, it has expressly done so. Foremost among these regulatory mechanisms is ch. 147, Stats., Wisconsin Pollutant Discharge Elimination System. . . . [M]ost persuasive, the Legislature's previous rejection of wetlands activity permit legislation negates the existence of an *implied* legislative delegation of such authority to DNR. The Legislature rejected proposed wetlands protection programs in 1973 and 1975. Only the wetlands mapping bill survived the 1977 legislative session. The Legislature's repeated rejection of wetlands activity permit legislation in 1973, 1975 and 1977 speaks for itself. . . . We must presume that when the Legislature refuses to delegate wetlands management authority, it is well aware of the extent of DNR's powers in this area and simply intends *not* to grant additional authority.

Id. (emphasis in original).

Notwithstanding this record of legislative intent, the Department has persisted in its attempts to expand the reach of its regulatory authority over wetlands, as evidenced by § NR 103.06(1)(a). That regulation, and the DNR's initial attempt to apply NR 103 in this case, reflect the will of the agency in defiance of a clear limitation on its delegated authority.

Clearly, wetlands can be affected by dam operating orders. The legislature could have enacted standards to determine how conflicts between navigation (and other public rights) and wetlands interests should be addressed. Alternatively the legislature could have granted DNR rulemaking power to address the potential conflicts. Instead, the legislature has chosen to limit the factors governing the establishment of water level orders to those listed in sec. 31.02 and to preclude DNR from applying its wetland water quality standards to ch. 31 determinations. As the DNR has conceded (DNR Ex. 250; Initial Brief, at 25), the application of its wetland water quality standards to actions under ch. 31 is *ultra vires*. The standards in chapter NR 103 do not inform the consideration of public interests in navigable waters under sec. 31.02, Stats.

Thank you for your consideration.

Respectfully submitted,

WHEELER, VAN SICKLE & ANDERSON, S.C.

/s/ Mary Beth Peranteau
Mary Beth Peranteau

cc: Service List