

June 1, 2015

Secretary Cathy Stepp  
Department of Natural Resources  
Madison, WI 53707-7921

**Re: Consideration of the Property Rights of Lakefront Homeowners and Businesses  
When Making Water Level Determination – The *Lake Koshkonong* Case**

Dear Secretary Stepp,

Our four organizations are asking the Department, as directed by the Wisconsin Supreme Court, to give substantial weight to the property rights of lakefront homeowners and businesses when making lake water level determinations. Our interest in this matter is not limited to the *Lake Koshkonong* case before you, but extends to a concern that there appears to be a predisposition by DNR staff to discount or ignore Wisconsin citizens' property rights in its decisions.

The Wisconsin Supreme Court in 2013 issued a decision – *Rock-Koshkonong Lake Dist. v. DNR*<sup>i</sup> (Decision) – involving the long-running dispute over water levels in Lake Koshkonong. Three of our organizations participated as *amici* in that case. All of us continue to have a substantial interest in the property rights issue yet to be resolved.

The supreme court, in what has been widely hailed as a landmark opinion, held that the DNR's decision regarding water levels was flawed. Specifically, the court held that the DNR "inappropriately relied on the public trust doctrine for its authority to protect non-navigable water above the ordinary high water mark"<sup>ii</sup> and "erroneously excluded most testimony on the economic impact of lower water levels in Lake Koshkonong on the residents, businesses, and tax bases adjacent to and near Lake Koshkonong."<sup>iii</sup>

This all began a dozen years ago in 2003 when the Rock-Koshkonong Lake District, Rock River- Koshkonong Association, Inc., and Lake Koshkonong Recreational Association, Inc. (collectively, the District) filed a petition with DNR to raise the designated water levels in Lake Koshkonong. DNR rejected the petition, as well as petitioner's testimony on the economic impact of lower water levels in Lake Koshkonong. The supreme court found that this exclusion of petitioner's economic evidence was inconsistent with DNR's acceptance of competing economic evidence that helped sustain its water level decision.<sup>iv</sup>

During the contested case proceeding, the District presented evidence that lower water levels will result in decreased waterfront usage; loss of the ability to use existing piers for boating, swimming, and other water activities; loss of access to the shoreline for boats; and reduced areas of navigability. Reduced usable water access will, over time, have an adverse impact on property values surrounding Lake Koshkonong. Businesses in nearby communities that cater to lake-related activity will suffer from water levels being lowered from their historical levels. In addition, reduced water access and property values will result in a loss of tax base for local taxing jurisdictions.<sup>v</sup>

DNR staff successfully blocked this evidence relating to the effect of water levels on real estate values, business income, and public revenues from consideration in the contested case.

The actions by DNR in this case were not anything akin to balancing competing interests. No, DNR picked sides. DNR included economic evidence that supported its decision, and then, with manifest bias, asserted lakefront homeowners and businesses have no property rights that are relevant to its water level determinations.<sup>vi</sup> The supreme court rejected that wrongful claim and made it clear that “the rights of all riparians must be considered in a water level determination.”<sup>vii</sup>

In response to the court’s directive, DNR requested economic impact information. On March 27, 2015, the District presented DNR with a report entitled *Assessment of Lakefront Property Values Based on Declining Water Levels: Its Impact on Value and Taxes*.<sup>viii</sup> Key findings in the report include:

On average, homeowners lost between \$20,226.29 and \$95,177.77 in property value appreciation. This results in an aggregate loss in property value appreciation for waterfront residences on Lake Koshkonong of \$8,353,457. If this study uses the appreciation based on Big Muskego Lake, this lost wealth would rise to over \$39 million.

Furthermore, Lake Koshkonong lost between \$116,948.40 and \$550,317.52 in yearly property tax revenues because of the water level reduction in the lake. These numbers do not, however, include any employment, non-lake front property value or other economic losses of reduced business activity attributable to lowered lake levels and increased water level uncertainty, all of which could be substantial as well. When non-lake property values are added, this loss rises to between \$573,310 and \$1,006,679.

To supplement this report, Wisconsin Innovation Service Center conducted interviews with area businesses. Participants were owners (and one manager) of businesses affected by boating traffic on Lake Koshkonong.<sup>ix</sup> Participants reported that low water levels significantly reduce boating activities on the lake. Restaurants and bars with piers find that larger and heavier boats are reluctant to use the piers, costing them business. During lower water times, the piers, which often extend 200 to 300 feet from shore, may not be usable by any boats. Those interviewed believe that restoring the water levels as they existed for the past half-century would result in more boat traffic, employment opportunities, and tax revenue for the entire community.

With Lake Koshkonong homeowners and businesses now having property rights that must be recognized by DNR, the question of balancing interests becomes pertinent. Relevant to this inquiry are the following excerpts from the *Lake Koshkonong* case that offers a historical perspective:

- It is clear in Wisconsin that the mere fact that one owns property abutting a natural body of water presumptively confers certain rights.<sup>x</sup>
- [E]nterprising towns and flourishing villages have grown up around dams and depend upon the dams for their wealth and prosperity.<sup>xi</sup>

- [T]his court similarly recognized an interest that residential riparian owners acquired in higher lake levels behind a dam maintained over a 40 year period. These higher lake levels led property owners to build summer homes, summer resorts, and make other sundry valuable improvements on lake lots.<sup>xiii</sup>
- [S]hores are beginning to become very valuable and property rights are becoming important.<sup>xiii</sup>

The related finding by the supreme court in this case was that “riparian residential property and lake-based businesses were *prime considerations* for protecting property.”<sup>xiv</sup> (Emphasis added.) In other words, when making lake level determinations, DNR must give *prime consideration* to any adverse property value impacts such decision will have on Lake Koshkonong’s residents and businesses. That is not simply our request; it is the law.

While the economic analysis prepared by the District provides vital quantification of the negative economic implications of lower water levels on Lake Koshkonong, should that not be obvious? Wisconsin residents who are fortunate enough to have lakefront property expect that DNR will not remove that lakefront. Moreover, is a study necessary to explain that marinas and other lakeside businesses are economically damaged when DNR draws down the lake levels?

We respectfully request that you direct your staff to give the economic analysis provided by the District significant weight consistent with the Wisconsin Supreme Court’s decision and the underlying statutory provisions. Based on conversations that others have had with your staff, we are deeply concerned that your staff does not take seriously the Supreme Court’s mandate that the economic interests of riparian property owners must be given significant weight. We also request you consider rendering such a decision as expeditiously as possible. We are now over twelve years beyond the initial petition and close to two years after the Supreme Court rendered its directive to DNR.

Thank you very much for your consideration.



Kurt R. Bauer,  
President and CEO  
Wisconsin Manufacturers & Commerce



Nickolas C. George Jr.  
President  
Midwest Food Processors Association Inc



Edward Lump  
President and CEO  
Wisconsin Restaurant Association



Mike Theo  
President and CEO  
Wisconsin Realtors Association

cc:

Rich Zipperer, Deputy Chief of Staff, Office of Gov. Scott Walker  
Brian Hagedorn, Chief Legal Counsel, Office of Gov. Scott Walker  
Katie Ignatowski, Deputy Legal Counsel, Office of Gov. Scott Walker.  
Delanie Breuer, Assistant Deputy Attorney General, Office of the Attorney General  
Mike Bruhn, Assistant Deputy Secretary – DNR

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<sup>i</sup> 2013 WI 74, 350 Wis.2d 45, 833 N.W.2d 800.

<sup>ii</sup> Decision, ¶ 150.

<sup>iii</sup> Decision, ¶ 152.

<sup>iv</sup> Decision, ¶ 15.

<sup>v</sup> Decision, ¶ 43.

<sup>vi</sup> Decision, ¶ 145

<sup>vii</sup> Decision, ¶ 110.

<sup>viii</sup> Russ Kashian, Ph.D., Matthew Winden, Ph.D. Fiscal and Economic Research Center, University of Wisconsin-Whitewater (March 29 2015).

<sup>ix</sup> Interviews with Business Representatives on the Economic Impact of Lake Koshkonong Water Levels, Wisconsin Innovation Research Center.

<sup>x</sup> Decision, ¶ 108.

<sup>xi</sup> Decision, ¶ 134.

<sup>xii</sup> Decision, ¶ 134.

<sup>xiii</sup> Decision, ¶ 135.

<sup>xiv</sup> Decision, ¶ 136.