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May 7, 2015

Secretary Cathy Stepp
Wisconsin Department of Natural Resources
101 S. Webster Street, P.O. Box 7921
Madison, WI 53707-7921

Re: DNR's Water Level Determination for Lake Koshkonong

Dear Secretary Stepp:

We are writing on behalf of the Rock-Koshkonong Lake District ("RKLD"), the Lake Koshkonong Recreation Association and the Rock River-Koshkonong Association. As you know, the Wisconsin Supreme Court determined in July 2013 that DNR improperly denied the District's 2003 petition to amend the operating order for the Indianford Dam. In brief, the agency's determination conflicted with statutory water level standards because it failed to consider the economic impacts of the lowered water resulting from repairs to the dam and failed to distinguish between Public Trust wetlands (below Lake Koshkonong's ordinary high water mark) and private wetlands (above that boundary).

District officials and residents are deeply troubled by the erroneous and wasteful process the Department has followed in its response to the petition the District filed more than a decade ago and (especially) following the Court's decision almost two years ago. The purpose of this letter is to urge your immediate action.

On February 28, 2014, the Rock County Circuit Court ordered the Department to "reconsider RKLD's water level petition dated April 21, 2003, consistent with the Wisconsin Supreme Court's decision and the order of this Court, and to determine whether to amend or vacate the Department's water level order 3-SC-2003-3100LR dated April 15, 2005." As you know, the Department has established an express policy setting a 120-day time limit for decisions on water level orders under Section NR 300.04(4)(b). Considering the specific directives of Wisconsin

WHEELER, VAN SICKLE & ANDERSON, S.C. • 25 W. Main Street, Suite 801 • Madison, WI 53703-3398

GODFREY & KAHN, S.C. • 780 N. Water Street • Milwaukee, WI 53202-3590

Supreme Court and the Circuit Court, it is outrageous that the Department has so completely failed to discharge its responsibilities in a timely fashion and in accordance with applicable law. In a recent meeting with Deputy Bruhn and Water Division Administrator Rasmussen, it became clear to Lake District representatives that the Department still has no developed plan to appropriately implement the Court's remand order.

Our concerns were triggered when the Department took preliminary steps earlier this year to take up review the District's 2003 petition. In a February 16 Press Release, *without consultation with the dam owner or other parties* to the litigation, the Department announced a proposal that utterly fails to meet its legal duty under the Court's order. (A copy of the Release is enclosed for your convenience.)

The Press Release clearly demonstrates DNR's continuing refusal to accept the Supreme Court's decision. *The entire point of the District's 2003 petition* was not to increase the water levels of Lake Koshkonong but to maintain water levels as they existed from the 1960s through the early part of this century. The District's petition aimed to prevent a reduction in summer water levels as a result of extensive repairs to the dam that significantly increased its capacity to pass water downstream. Without an increase in the ordered water level, that increased discharge would lower the water levels actually experienced by property owners and lake users.

The Department's Press Release not only mischaracterizes the petition as one to raise the water level; it also ignores the undisputed fact that natural forces result in levels well above those ordered by DNR much of the time. (As a practical matter, the water level chiefly limits water depth during the low water boating season in late summer. For much of the year, rainfall and snowmelt in the Rock River Basin cause lake levels well above the ordered maximum.)

Worse, the Department's Press Release continues to wholly ignore the significant **damage caused by a reduction in the water levels** of the lake. This deep misunderstanding is starkly shown headline of the February 16 Press Release: "DNR seeks area resident and business comment on **impacts of higher water levels** for Lake Koshkonong" and its text, which includes these statements:

- "A recent Wisconsin Supreme Court decision directs the Department of Natural Resources to examine the **economic impacts of higher Lake Koshkonong water levels** on area residents and businesses."
- "At the direction of the Supreme Court, the department is specifically seeking comment from shore land owners, businesses, clubs and others focused on any physical, social or **economic impacts higher lake levels** may have on their property or business."

What about *lower water levels*? The Department simply refuses to recognize that economic damage resulting from *low water levels* has driven this long saga. But the Supreme Court has made it clear the agency cannot continue to ignore that significant public concern. As the Supreme Court observed: "It is inconsistent for the DNR to [consider impacts of higher water levels, but] . . . refuse to consider economic impacts from lower water levels under the current order." *RKLD v. DNR*, 2013 WI 74 at ¶143, note 43.

The Department's plan ignores the Court's directives and flouts fundamental requirements for administrative decision making. Under s. 31.02(1), Stats., the Department is charged to set water levels, considering economic and other interests. But the Department now claims it lacks the wherewithal to actually evaluate the economic impact of water levels, stating in the February Press Release that:

- *"As natural resources managers we can predict water level impacts to wetlands, fisheries and shoreline vegetation and we understand how water flows in the geographic area that feeds the Rock River and Lake Koshkonong but we are less certain about the **economic impacts of higher water levels** on landowners and businesses. That is why we are asking folks to send us their comments and opinions."*

In other words, the Department will assign its professional staff to produce even more analysis of environmental impacts of *high water levels*. But it will make no effort to produce a credible analysis of the economic impacts of *low water levels* caused by the dam repairs. Instead, it will seek "comments and opinions" from "folks" as its sole effort to fulfil its statutory duty to consider the economic effects of its water level order. This is outrageous.

The District and the Associations have prepared the enclosed memorandum which clearly explains the actions required for the Department to comply with the Supreme Court Order. We believe these actions would support approval of the changes to the water level order as proposed in the District's 2003 petition.

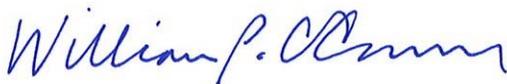
A copy of this letter is being sent to Attorney General Schimel with a separate request that he exercise his statutory authority to settle the District's claims. In addition, *unless the District's petition is granted by Friday May 29th, the firms representing the District and the Associations have been directed to pursue appropriate legal remedies*. We hope your prompt action granting the 2003 petition will make that unnecessary.

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After so many years of intentionally ignoring the dictates of State law, it is about time for the agency to conclude this sordid episode. We urge you to grant the District's petition to reduce the continuing damage to property values, business activity and the tax base.

Very truly yours,

WHEELER, VAN SICKLE
& ANDERSON, S.C.
Attorneys for Rock-Koshkonong Lake District



William P. O'Connor

GODFREY & KAHN, S.C.
*Attorneys for Lake Koshkonong
Recreational Association, Inc. and
Rock River-Koshkonong Association, Inc.*



Arthur J. Harrington

Enclosures

Cc: Governor Scott Walker
Attorney General Brad Schimel
Assistant Attorney General Delanie Breuer