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September 8, 2015

Assistant Deputy Michael L Bruhn  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
Madison, WI 53703

Russ A. Rasmussen  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
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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

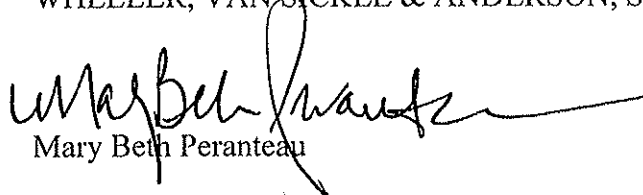
Gentlemen:

Enclosed please find Petitioners' Legal Position Statement in the above-captioned matter.  
Please contact the undersigned if you have any questions.

Thank you.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.

  
Mary Beth Peranteau

Enclosure

cc: Attorney Edwina Kavanaugh  
Attorney Charles Sweeney

**Before The  
State Of Wisconsin  
DEPARTMENT OF NATURAL RESOURCES**

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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

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**POSITION STATEMENT ON  
PETITION FOR MODIFICATION OF  
THE 1991 WATER LEVEL ORDER**

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***INTRODUCTION***

This Statement is filed on behalf of Rock-Koshkonong Lake District (“RKLD”), Lake Koshkonong Recreation Association, Inc. (“LKRA”) and Rock River-Koshkonong Association, Inc. (“RRKA”) (collectively “Petitioners”) in support of the above referenced Petition, originally filed in 2003, under Wis. Stat. § 31.02(1).

The Petitioners sought an increase in summer water levels over the 1991 water level order (“1991 Order”), to address the consequences of the Lake District’s rehabilitation of the Indianford Dam in 2002. The dam fell into general disrepair in the 1960’s until it was rehabilitated in 2002. As a result, since 1965, water levels on Lake Koshkonong have almost always exceeded the target level of 776.20 feet above mean sea level established in the 1991 Order. These pre-2002 historic water levels recorded on Lake Koshkonong are reflected in the attached Exhibit A.

Restoration of the Dam’s full operating capacity resulted in water levels on Lake Koshkonong more closely reflecting the levels required by the 1991 Order. But achieving compliance after more than a decade with the 1991 Order (which was established as a

compromise to resolve protracted litigation between DNR and certain parties challenging the previous water level order), resulted in summer water levels on Lake Koshkonong dropping below recorded levels not seen since the 1930s.

Lower water levels on Lake Koshkonong resulting from restoration of the dam and maintenance of the gates led to severe restrictions on recreational boating and property values. The application requested an increase of 7.2 inches in the target summer water level (May-October), as well an adjustment to the winter drawdown (November through April). On April 15, 2005, DNR issued a proposed Order denying the Petition, maintaining the summer maximum water levels at the levels established in the 1991 Order but raising the winter drawdown minimum approximately 6” from the level established in the 1991 Order. RKLD applied for and was granted a contested case hearing on DNR’s denial of the Petition. After a 10-day evidentiary hearing, the Administrative Law Judge issued a decision on December 1, 2006 affirming the DNR’s denial of the Petition.

The Petitioners sought judicial review of the ALJ’s decision on a number of issues, including the following:

1. Did DNR exceed its authority in making a water level determination under Wis. Stat. §31.02(1) “in the interest of public rights and navigable waters” by considering the impact of water levels on private wetlands that are adjacent to Lake Koshkonong and located above the ordinary high water mark?
2. Did DNR err in making a water level determination under Wis. Stat. §31.02(1) by excluding evidence and refusing to consider the impacts of water levels on residential property values, business income and public revenue?

The Supreme Court in a decision entitled Rock Koshkonong Lake District, et. al. vs. State of Wisconsin Department of Natural Resources, et. al., 336 Wis. 2d 677 (July 16, 2013)

concluded as follows on these issues:

1. The DNR erroneously excluded most testimony on the economic impact of lower water levels in Lake Koshkonong on the residence, businesses and tax basis adjacent to and near Lake Koshkonong. That evidence is relevant to the DNR's decision making under Wis. Stat. §31.02(1)
2. While it properly considered the impacts of Petitioners' proposed water levels on public and private wetlands, DNR erroneously relied on the public trust doctrine for its authority to protect non-navigable land and non-navigable water above the ordinary high water mark.

DNR is now required to reconsider the 2003 Petition in a matter that is consistent with the Wisconsin Supreme Court's mandate. The following sets forth Petitioners' position on the framework for DNR's reconsideration of the 2003 Petition, as established by the ALJ's factual findings and the legal standard under Wis. Stat. § 31.02(1) established by the 2013 decision.

***POSITION STATEMENT***

- I. DNR MUST ANALYZE THE ECONOMIC IMPACTS OF MAINTAINING THE 1991 ORDER AGAINST HISTORICAL WATER LEVELS ON LAKE KOSHKONONG THAT EXISTED PRIOR TO 2002.

The Petition was filed for the specific purpose of maintaining summer water levels generally at the levels that existed prior to the 2002. In 2002, repairs were made to the dam to

make the gates operational. For the first time since the 1960s, the gates began to fully control water levels during the summer months. It is during those months (coinciding with the height of the recreational boating season) when precipitation amounts are low enough for the gates to have functional control of water levels on the lake. As recited in the ALJ's findings and expressly affirmed by the Supreme Court, the water levels on Lake Koshkonong were historically higher than the 1991 Order for at least 40 years prior to the 2002 repair of the gates.<sup>1</sup> On this issue, the ALJ made all of the following relevant factual determinations, none of which have been contested by the parties at any point in this proceeding:

1. Historical records suggest that after the dam ceased to be used for power generation in 1962, the wicket gates fell into disrepair and in the late 1960's were rusted sheet, making that discharge capacity unavailable. The wicket gates were partially rejuvenated in 1978, but remained in various states of partial operability and repair until recent repairs were completed in 2002. Consequently, from much of the time between the late 1960's until about 2002, the hydraulic capacity of the dam and its ability to regulate water levels on the lake was diminished or compromised in varying degrees (Finding of Fact, ¶ 25).
2. During the summer growing months, June through September, flows into the lake are lower than the dams' hydraulic capacity at lake levels 776.3 about 81% of the time, and thus generally the dam is capable of controlling flow and lake levels about 81% of the time during the summer growing season (Finding of Fact ¶ 27).
3. For the period 1932 to 2003, there is a statistically significant upward trend and average water levels on the lake with the average "summer" water levels increasing approximately 1.5'. The water levels on Lake Koshkonong

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<sup>1</sup> Rock County owned and operated the Indianford Dam from December 1965 until December 15, 2004, when the County conveyed the dam to the RKLD and the RKLD continues to own and operate the dam since that time. Therefore the failure to properly maintain and operate the wicket gate was not the fault of RKLD but rather the fault of the predecessor owner, Rock County.

through all seasons have increased from 1932 to 2003 independent of the flows on the Rock River (Finding of Fact ¶ 29).

4. This upward trend in water levels is attributed to at least in part to the occasional non-compliance with applicable operating orders, the diminished operating range of the wicket gates for much of the time from the late 1960's to 2001, and the obstruction of flow to the wicket gates from debris on trash racks (Finding of Fact ¶ 30).
5. The mean water level as measured on the Rock River upstream of the lake during the May through October period has been above DNR's current lake target level of 776.20 every year since 1965, except for two years (Finding of Fact ¶ 31).
6. From at least 1997 through 2001, the diminished hydraulic capacity of the dam due to shortcomings in the operation and maintenance of the dam caused lake levels to be higher than they would have been had all the gates been fully operable and the dam operated in compliance with controlling orders (Finding of Fact ¶ 32).

The fact that historical water levels were higher over the past forty years prior to the repair of the dam in 2002 is cited in several places in the Supreme Court's Decision:

1. The dam fell into general disrepair in the 1960s until it was rebuilt later in 2002. Prior to those repairs, the dam's operation was compromised and it failed to regulate water levels on Lake Koshkonong to conform with the target levels set by the DNR for much of the time between the late 1960's until about 2002. As a result, water levels on Lake Koshkonong since 1965 have almost always exceeded the current target level of 776.20 above mean sea level ("msl") as the following chart from the Decision illustrates (Supreme Court Decision, ¶ 22). (A copy of the chart referenced in the Supreme Court Decision is attached hereto as Exhibit "A").
2. The "statistically significant upward trend in average water levels" on Lake Koshkonong from 1932 to 2003 was partly attributable to the "diminished operating range of the wicket gates" on the dam before its 2002 repairs, as well as debris on the trash racks of the dam that impeded flowage (Supreme Court Decision, ¶ 23).
3. In 2002, after the rehabilitation of the Indianford Dam restored full operating capability to the dam's gates, the water levels on Lake Koshkonong began to reflect more closely the levels set by the 1991 Order. As a result, water levels

on the lake dropped below recorded levels since the 1930s (Supreme Court Decision, ¶ 27).

The relevant point of the factual findings with respect to historical water levels is this: The Petition was filed in 2002 to maintain the historic water levels that have occurred at the lake for at least the past 40 years prior to the proper maintenance of the dam. For all these reasons, the DNR must analyze and weigh the economic impact evidence provided by the Petitioners in this case as well as other factors in Wis. Stat. §31.02(2) against historical water levels that existed on the lake from at least 1965 through 2002 (the “Historical Period”).

This weighing against the Historical Period includes a consideration of all the public interest factors in §31.02(1) as well as evidence of the economic impacts of lower water levels in connection with DNR’s decision.

**II. THE DNR MUST ANALYZE THE PUBLIC INTEREST FACTORS IN §31.02(1) AGAINST PRE-2003 WATER LEVELS WHICH EXISTED ON THE LAKE FOR AT LEAST FORTY YEARS.**

It is anticipated that the DNR will consider a number of factors associated with the Petitioners’ 2003 water level request. These factors will include adverse impacts to the water shed, existing property rights, wetland impacts, etc. all of which are relevant in consideration of the factors identified in Wis. Stat §31.02(1). However, consideration of these factors must be judged in connection with the pre-2003 Historical Period. In particular, the Petitioners are not seeking to increase the water levels over those that existed during the Historical Period. Rather the Petitioner is simply seeking to at least maintain the water levels which existed historically during this 40 year time period.

Accordingly, any analysis of impacts to the environment or property rights must be weighed against the water levels during the Historic Period which the Petitioner’s application is

simply seeking to maintain, and not increase. In particular, any alleged impacts to the environment and existing property rights asserted to result from requested water levels under the Petition must be assessed against the pre-2002 status quo which the Petition is seeking to preserve (the “Environment/Property Rights Assessment”). For example, any alleged impacts to wetlands associated with water level request in the Petition must be assessed against the fact that the Petition is seeking to preserve the same water level related habitats that existed on the Lake for at least forty years immediately prior to the filing of the 2003 Petition. This Environment/Property Rights Assessment must be weighed against a Department determination of the adverse economic impacts caused by lowering the water level from historical levels if the Petition were not granted.

The fact that more than ten years have elapsed since the filing of the 2003 Petition should not change the requirement that the weighing of factors be made with reference to the Historical Period. There are at least two reasons for this conclusion:

1. The Petitioners promptly filed the Petition in 2003 after the gates were repaired in order to have the DNR maintain the pre-2003 historical levels resulting from, among other things, the inoperability of the gates.
2. The passage of time since the 2003 Petition was caused by the DNR’s failure to render a legally defensible decision on the 2003 application of the first instance as reflected by the Supreme Court’s reversal of that decision. The DNR, not the Petitioners, is responsible for this decade passage of time and any weighing decision must take place against the Historical Period and not the time period which has existed since the filing of the 2003 Petition.

III. THE HEDONIC ANALYSIS IN THE KASHIAN REPORT APPROPRIATELY ASSESSES THE FULL RANGE OF ECONOMIC IMPACTS OF THE WATER LEVEL ORDER ON PROPERTY VALUES, COMMERCIAL ACTIVITY AND TAX REVENUES AS CONTEMPLATED BY THE SUPREME COURT DECISION.



The report entitled “An Assessment of Lakefront Property Values Based on a Decline in Water Levels: It’s Impact on Value and Taxes” authored by Petitioners’ experts, Dr. Russell Kashian and Dr. Matthew Winden of the University of Wisconsin-Whitewater utilizes a hedonic analysis in concluding that the maintenance of the 1991 Order under restored Dam operating conditions will result in a significant decrease in property values, commercial activity and tax revenues. This is precisely the kind of economic analysis which the Court held was improperly excluded from evidence by the ALJ. The Court’s approval of the hedonic analysis is reflected in the following portions of its Decision:

1. Dr. Kashian provided testimony on the economic impact of lowering lake water levels. Using various economic methodologies, Dr. Kashian concluded that a reduction in historical water levels on Lake Koshkonong would result in a negative economic impact in two areas: property values and a reduced rate of appreciation of those values, and economic activity in communities surrounding the lake. (Supreme Court Decision, ¶ 32).
2. The economic testimony excluded from the contested case hearing supplemented the testimony of residents and business owners that was admitted into evidence by the Administrative Law Judge. In other words, the excluded testimony was different from the testimony that the Administrative Law Judge accepted. The included testimony concerned physical details such as the length of piers required to make effective use of navigable water, while the excluded expert testimony of John Stockham spoke of the money lost by these businesses with water levels on Lake Koshkonong reduced from the historical levels. The included testimony covered riparian access and enjoyment while the excluded testimony of Stockham and Dr. Kashian explained how property values diminish or increase more slowly relative to comparable lake property because of reduced access. The included testimony spoke to the natural scenic beauty, hunting, fishing, camping and boating on and around Lake Koshkonong, while the excluded testimony showed the overall economic impact that lower water levels would have on communities that depends on water-based recreational activity—not only for commercial activity but also municipal revenues. The DNR rightly considered the direct impact of lower water levels on riparian properties but wrongly excluded the cumulative economic effect of the lower water levels on these properties. (Supreme Court Decision, ¶ 145).

3. DNR erred when it excluded testimony on the economic impacts of lower water levels when making a water level determination under Wis. Stat. §31.02(1). (Supreme Court Decision, ¶ 148).
4. DNR erroneously excluded most testimony on the economic impact of lower water levels in Lake Koshkonong on the residents, businesses and tax basis adjacent to and near Lake Koshkonong. This evidence was relevant to the DNR's decision making under Wis. Stat. §31.02(1). (Supreme Court Decision, ¶ 152).

It is clear from the foregoing discussion that the Court approved the economic analysis used by Dr. Kashian in the record below. The same hedonic analysis that forms the basis of the March 29, 2015 report which supplements the record made in the prior proceedings. In accordance with the Supreme Court dictates, the DNR must consider the economic analysis as relevant in balancing interests under Wis. Stat. §31.02(1).

In particular, the Court recognized that Petitioners' economic analysis focused on adverse property value impacts from lower water levels, as reflected in the following portions of the Supreme Court Decision:

1. The RKL D also presented evidence of economic impacts resulting from, and anticipating, lower water levels on the lake. Land Use Planner and Real Estate analyst John Stockham testified that a reduction in historical water levels on Lake Koshkonong would have adverse effects on property values and commercial activity related to the lake. (Supreme Court Decision, ¶ 37).
2. Dr. Russell Kashian, an Economics Professor at the University of Wisconsin – Whitewater, also provided testimony on behalf of RKL D on the economic impact of lowering a lake's water levels. Using various economic methodologies, Dr. Kashian concluded that a reduction in historical water levels on Lake Koshkonong would result in a negative economic impact in two areas: property values and a reduced rate of appreciation of those values, and economic activity in communities surrounding the lake. (Supreme Court Decision, ¶ 38).
3. Finally, Dr. Kashian testified on the adverse effects that reduced lake water levels would have on economic activity in the local community. (Supreme Court Decision, ¶ 40).

4. Public testimony on the commercial effects of adhering to DNR's 1991 water level Order echoed the RKLK's expert testimony. A campground and marina owner testified to the "huge" economic impact that lake/base tours has on area business and property values as well as the negative impact that lowering water levels would have. (Supreme Court Decision, ¶ 41).

Based on the foregoing, the Department must accept the hedonic analysis prepared by Drs. Kashian and Winden as relevant and admissible probative evidence of adverse economic impacts associated with the lowering of water levels on Lake Koshkonong. While the Department may consider other relevant and reliable economic testimony in its weighing decision, the failure to consider the Kashian/Winden analysis in rendering a decision on the Petition would violate the mandate of the Wisconsin Supreme Court.

IV. DNR MUST MAP THE ORDINARY HIGH WATER MARK TO PROPERLY CONSIDER PUBLIC RIGHTS IN NAVIGABLE WATERS AFFECTED BY THE WATER LEVEL ORDER.

The DNR's order denying RKLK's petition for an increase in Lake Koshkonong's summer water level was fundamentally grounded in its assessment of impacts to wetlands in and adjacent to Lake Koshkonong. However, the Supreme Court's decision confirms that the agency's statutory water level authority is grounded in "public rights *in navigable waters*." It is elementary that DNR must establish the boundary of the navigable water as to which the water level order relates. That boundary provides the basis to assess the range of public rights affected within that boundary. But the ALJ's findings "do not explicitly identify how much of the wetlands are publicly owned, or what portion of the wetlands are above the ordinary high water mark." Decision, at ¶ 42.

One key consideration regarding the OHWM is the impact of a water level on the exercise of public rights in water. RKLD believes the Department improperly restricted its consideration of public rights, giving scant consideration to the geographic area within which citizens may hunt, fish and recreate. This is especially important in the wetland areas surrounding Lake Koshkonong's open water surface which provide excellent waterfowl habitat. Unlike permit proceedings, consideration of the public rights to access and use navigable waters can be evaluated without a precise OHWM. But the general location of the OHWM (determined by familiar means) would permit the agency to consider how a reduced water level would affect public hunting, fishing and other public trust activities.

The OHWM determination is also a necessary prerequisite to findings as to whether environmental and economic impacts to areas located within the existing OHWM are assessed using constitutional public trust attributes (e.g., navigation, public hunting, fishing, the enjoyment of natural scenic beauty, and swimming) and impacts/benefits in the area located above the OHWM are assessed using the safety/protection "police power" principles prescribed by sec. 31.02(1).

The Supreme Court ultimately found that DNR erred in its consideration of wetland interests, holding: "There is no constitutional foundation for [DNR's] public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream." Decision, at ¶ 86. The location of the OHWM of Lake Koshkonong is essential to the Department's balancing of interests under Wis. Stat. § 31.02(1), because it delineates the geographic boundary of the set of "public rights" to be considered, as opposed to private interests under the "protection of property" standard.

Although DNR has not established the elevation and location of the OHWM in any the extensive wetlands complexes adjacent to Lake Koshkonong, it has done so in several representative locations. Wis. Stat. § 30.10(4)(b) declares that the boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters are to be determined in conformity to the common law. Under the common law of Wisconsin, the OHWM within a wetland is to be determined by application of the “transfer method.” *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914) (“Where the shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of the ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below the ordinary high-water mark.”)

Given the importance of the OHWM in determining public access rights, DNR is required to clarify the geographical area within which those rights may be exercised. In order to adhere to the mandate of the Decision on remand, when balancing the interests under section 31.02(1), DNR must delineate the OHWM of Lake Koshkonong separating public trust lands from private property.

### ***CONCLUSION***

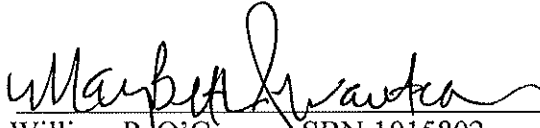
Based upon the foregoing, the DNR must weigh the relevant factors on the request for water levels made by petition against the historic water levels that existed prior to the repair of the dam in 2002. The hedonic analysis utilized by the Petitioners’ experts was specifically approved by the Supreme Court and a failure to consider such testimony as credible would be contrary to the mandate of the Supreme Court Decision. The agency’s analysis must focus on

the impacts of lowering water levels following repairs to the Indianford Dam. This analytical baseline was specifically approved by the Supreme Court. The DNR's weighing of public interest factors under §31.02(2) must be: (1) confined to "navigable waters" based on an OHWM determination; and (2) evaluated against historical water levels that existed on the Lake from at least 1965 through 2002.

Dated this 8th day of September, 2015.

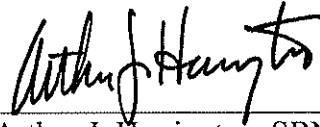
Respectfully submitted,

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Exhibit A

Date	Water Level (ft.)	Date	Water Level (ft.)	Date	Water Level (ft.)
1965	776.60	1978	777.64	1991	776.40
1966	776.25	1979	777.27	1992	776.49
1967	776.28	1980	777.23	1993	779.16
1968	777.01	1981	776.51	1994	776.51
1969	776.90	1982	776.88	1995	777.02
1970	776.36	1983	776.63	1996	777.72
1971	776.31	1984	776.63	1997	776.98
1972	777.23	1985	776.51	1998	776.79
1973	777.86	1986	778.98	1999	777.44
1974	777.61	1987	776.51	2000	777.59
1975	777.15	1988	776.10	2001	777.18
1976	776.49	1989	776.25	2002	776.68
1977	776.11	1990	776.75		