

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

ROCK COUNTY

ROCK-KOSHKONONG LAKE DISTRICT,
ROCK RIVER-KOSHKONONG ASSOCIATION, INC. and
LAKE KOSHKONONG RECREATIONAL ASSOCIATION, INC.,

Petitioners,

Case No. 06-CV-1846

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent,

LAKE KOSHKONONG WETLAND ASSOCIATION, INC.
and THIEBEAU HUNTING CLUB,

Intervening Respondents.

RESPONDENT DEPARTMENT OF NATURAL RESOURCES' BRIEF IN
OPPOSITION TO PETITION FOR REVIEW

The Department of Natural Resources by its attorneys, Attorney General J.B. Van Hollen and Assistant Attorney General JoAnne F. Kloppenburg, submits this brief in opposition to the petition for review.

STATEMENT OF THE CASE

In a decision dated December 1, 2006, Administrative Law Judge William S. Coleman, Jr., issued a decision affirming Department of Natural Resources Order 3-SC-2003-28-3100LR. Findings of Fact, Conclusions of Law, and Order dated December 1, 2006 (referred to in this brief as Order):31. The Order governs the operation of the

Indianford Dam on the Rock River and sets water levels for Lake Koshkonong, which is a natural widening of the Rock River approximately 6 miles upstream from the dam. Order:1, 7-8. The Order followed a petition to raise the water levels prescribed in a 1991 order, the preparation of a draft Environmental Assessment, the submission of public comments and the holding of a public hearing on the draft Environmental Assessment, the preparation of a final Environmental Assessment, the issuance of a water level order that maintained the 1991 order's levels for the summer and raised somewhat the levels for the winter, and a 10-day contested case hearing on the new water level order. Order:1, 4-7.

Petitioners then filed this action and submitted their brief seeking reversal of the Order and remand to the Department of Natural Resources to consider speculative secondary economic impacts on property values and taxes and business incomes, to exclude from consideration non-speculative impacts on wetlands in and adjacent to the lake, and to weigh differently the impacts on public and riparian rights.

The Department submits this brief asking the Court to dismiss the petition and to affirm the Department's Order.

ARGUMENT

Petitioners construct a house of cards that crumbles under the weight of the law and the facts. As a matter of law, the Legislature's authorization to the Department to issue water level orders "in the interest of public rights in navigable waters or to promote safety and protect life, health and property" (Wis. Stat. § 31.02(1)), includes the

consideration of impacts on wetland areas in and adjacent to the navigable waters, excludes non-physical economic impacts on property, and defers to the Department's weighing of the various impacts if it is reasonably supported by substantial evidence. As a matter of fact, the relatively greater protections afforded by the Department's Order over petitioners' proposal to the lake and wetland environment and to the fish, wildlife and vegetation in that environment, and the comparatively negligible difference in impact between the Department's Order and petitioners' proposal on public access, establish that the Department properly exercised its authority in issuing its Order.

I. PETITIONERS DO NOT DISPUTE THE DEPARTMENT'S 120 FINDINGS OF FACT.

The facts are those set forth in paragraphs 1-120 of the Order.

In brief but important summary, the facts are as follows:

1. Rock River and Lake Koshkonong (Order:¶¶8-15). Lake Koshkonong is a gently sloping, shallow lake with an average depth of 5 feet. It has 27 miles of shoreline, of which 10 miles is developed, primarily for residential use, and 12.3 miles is undeveloped wetland. Its surface area is 10,460 acres, and the wetlands along its shores cover 3,080-4,000 acres.

2. Indianford Dam (Order:¶¶16-28). The dam was built in the 1850s, reconstructed in 1917 raising water levels to 775.08 msl, and ordered in 1919 to be kept at 775.64 msl in response to riparian property owners' complaints about high water. In 1991, after 9 years of litigation and negotiation, the parties agreed to an order setting water levels for the lake. In 2003, petitioners asked for the levels to be raised (Order:¶4):

Lake Levels		1991 Order	Petition	Petition Increase	2006 Order	Order Increase
May – October	Target	776.20'	776.8'	7.2"	776.20'	
	Maximum	776.33'	777'	8"	776.33'	
	Minimum	776.10'	776.4'	3.6"	776.1'	
November – April	Target	N/A	N/A	N/A	775.75'	
	Maximum	775.77'	777'	14.8"	776'	2.8"
	Minimum	775'	776.4'	16.8"	775.5'	6"

Order:¶4; Exhibit DNR 12 (copy attached to this brief).

3. Historic Water Levels on Lake Koshkonong, and Water Level Modeling (Order:¶¶29-35). Water levels on Lake Koshkonong rose from 1932 to 2003, due in part to faulty operation and maintenance of the dam, and in summer have been above the DNR Order's target level every year but 2 since 1965. Petitioners' proposal would also yield higher water levels than the DNR Order for most of the year.

4. Wetland Complexes (Order:¶¶36-41). Over the years, higher water has caused a shift in the water quality in the lake from a clear-water plant dominant condition to a degraded turbid algae-dominant water condition, and has caused the erosion of wetland shoreline and the loss of wetlands. The wetlands around the lake include submerged aquatic beds, which provide habitat for fish and wildlife and promote better water quality, marshes with high levels of species diversity, regionally rare floodplain forests, and meadows and shrub zones of high quality for plant distribution.

5. Effects of Water Levels (Order:¶¶42-119).

Water Quality (Order:¶¶42-58). Compared to the Department's Order, petitioners' proposed higher water levels would further degrade the lake's water quality, accelerate the loss of wetlands and of important wildlife and fishery habitat, cause the loss of

wetlands in areas of special natural resources interest, and reduce the system's capacity to slow flood and storm water and to filter nutrients, sediment and other pollutants from entering the lake and flowing downstream.

Ordinary High Water Mark (Order:¶¶59-62). The ordinary high water mark may decrease with compliance with the Department's Order and may increase under petitioners' proposal.

Erosion Protection from Riprap Structures (Order:¶¶63-64). At the higher levels sought by petitioners, the existing riprap structures that protect 38% of the wetland shoreline would be less effective and more quickly degraded, and fortifying these structures would be very expensive and likely ineffective.

Wildlife (Order:¶¶65-68). Past higher water levels have caused, and continued higher water levels will cause, adverse impacts on turtles and other herptiles and birds including rare threatened and special concern species and migratory waterfowl.

Winter Draw Down (Order:¶¶69-85). The winter draw down in the Department's Order will prevent erosion, improve water quality by driving out carp, not harm submerged aquatic vegetation or affect the abundance of fish populations in the lake or river, impair ice fishing but enhance open water fishing, limit boat access to boat ramps on the Rock River where fishing is generally better than on the lake in winter, make marsh areas less accessible for waterfowl hunting. The elimination of a winter draw down proposed by petitioners will cause the loss of fish spawning habitat, worsen water quality by allowing carp to remain in shallow marshes, result in damage to existing riprap

structures. The benefits to hibernating herptiles of petitioners' no winter drawdown proposal, will be outweighed by the herptile habitat that the proposal would destroy.

Agricultural Drainage (Order:¶¶86-91). Petitioners' proposed higher water levels will impede drainage of farmland served by drain 24, and impede drainage of farmland served by drain 39 and other drains northwest of the lake and near the Rock River east of Fort Atkinson more than under the Department's Order, and will require more maintenance of drain tiles.

Public Access (Order:¶¶92-99). No comments related to a need for better public access to the lake were made during the public hearing and public comment period on the draft Environmental Assessment, petitioners' survey found 81% of respondents believing there was adequate public access and 5% saying the most negative aspect of the lake was not enough public access, compared with 29% identifying as the most negative aspect too much boat traffic or too large boats and motors and 54% saying worsening water quality. The 5 no-fee public boat ramps and one fee-based public boat ramp on the lake are difficult for most recreational boats to use in summer under both the Department's Order and petitioners' proposed order, except in flood events. There are a number of public and private boat access points on the Rock River, from less than one to over 6 miles from the lake, all usable for any recreational boats suitable for Lake Koshkonong.

Riparian Access (Order:¶¶100-105). All of Lake Koshkonong has a very flat gradient from the water's edge, with some of the flattest areas near residential riparian properties, and owners of these properties are almost all in favor of petitioners' proposal, for many of them could shorten their piers to reach the same water depth under the

Department's Order, and they could maintain boat lifts and shore stations closer to shore and in deeper water.

Natural Scenic Beauty (Order:¶¶106-107). The fuller pool levels that may exist under petitioners' proposal are more appealing than exposed lakebed to many riparian owners and recreational users, while many users find natural scenic beauty in the wetlands that would be lost under petitioners' proposal.

Swimming/Bathing (Order:¶¶108-109). Petitioners' proposed levels would move the little swimming that is done closer to the shoreline, along with the boat traffic (Order:¶115).

Navigability—Boating, Fishing, Recreation, Public Safety (Order:¶¶110-119). Petitioners' proposed levels would expand the surface area of the 10,460-acre lake (Order:¶10) by 44-63 acres, not counting additional wetland and shoreline loss from water, wave and ice action, and "would not alter the lake's morphology as a shallow lake or the navigational limitations that inhere in such bodies of water" (Order:¶117), or decrease shallow depths in the lake. Most boats suitable for use on the lake can access most of the surface area of the lake, and commonly sized recreational and public safety watercraft can travel the length of the lake in 10-15 minutes under both the Department's Order and petitioners' proposed levels. Petitioners' proposed levels would mitigate existing navigational hazards in the lake, as can careful boating practices. "The navigational depth of the lake and marshes at the summer and winter levels specified in the DNR's 2005 order provides reasonably sufficient access to recreational boaters,

sailboats, fishing boats, waterfowl hunters, and rescue and safety watercraft to the lake, including the shallower water nearer the shoreline" (Order:¶119).

6. Section 31.02(1) Standard (Order:¶120). "The net negative effects of the proposed higher water levels far outweigh the enhancements to navigation and access. Allowing increased water levels as proposed by the District would be inconsistent with the interest of public rights in Lake Koshkonong and the Rock River, and would not serve to protect life, health or property. Public safety may be marginally promoted with increased water levels, but the water levels specified in the DNR's 2005 order do not pose undue risks to public safety."

Petitioners do not in their brief dispute any of the findings of fact. Rather, petitioners argue that as a matter of law, the facts should exclude impacts on wetlands in and adjacent to the lake and include potential impacts on property values and taxes and business incomes, and that as a result the ultimate balancing, which here established "by a preponderance of the evidence that the [modest] enhancement to access and navigation from increased water levels would be far outweighed by the substantial negative environmental impacts caused by the higher water" (Order:30), and that "due consideration to all relevant factors and interests" (*Id.*) supports the Department's Order, would come out differently.

As shown below, petitioners' argument has no legal merit.

II. THE DEPARTMENT'S ORDER IS DUE GREAT WEIGHT DEFERENCE.

Petitioners challenge the Department's interpreting Wis. Stat. § 31.02(1) to include impacts on wetlands on and adjacent to the lake and to exclude speculative secondary economic impacts on property values and taxes and business incomes, and they challenge the Department's weighing of the relevant factors under Wis. Stat. § 31.02(1). These challenges are all reviewed under the great weight deference standard.

- A. The Court reviews the ALJ's decision as the Department's, based on the record of the administrative proceedings.

The standard of review is prescribed by Wis. Stat. § 227.57. Here, where the Department of Natural Resources adopted the ALJ's decision as its own, the court reviews the ALJ's determination as the Department's decision. *Hilton v. DNR*, 2006 WI 84, ¶14, 293 Wis. 2d 1, 717 N.W.2d 166; *Borsellino v. DNR*, 2000 WI App 27, ¶¶5-7, 232 Wis. 2d 430, 606 N.W.2d 255 (Ct. App. 1999); *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 147-49, 588 N.W.2d 667 (Ct. App. 1998), *review denied*, 225 Wis. 2d 489, 594 N.W.2d 383 (1999). The court must affirm the Department's decision unless it finds specific grounds stated in Wis. Stat. § 227.57 for not affirming it. Wis. Stat. § 227.57(2).

Review is limited to the administrative record before the court. Wis. Stat. § 227.57(1); *State Public Intervenor v. DNR*, 171 Wis. 2d 243, 249-50, 490 N.W.2d 770 (Ct. App. 1992).

- B. The Department's interpretation and application of Wis. Stat. § 31.02(1) are due great weight deference, because the Department is charged by the legislature with administering the statute and the Department has done so for decades for dams and water bodies around the state, and its interpretation is based on its technical and legislatively delegated expertise and specialized knowledge; therefore the Department's interpretation and application of Wis. Stat. § 31.02(1) are to be upheld if they are reasonable.

The Department's conclusions of law interpreting and applying Wis. Stat. § 31.02(1) are entitled to great weight deference, the highest degree of deference. Great weight deference is due an agency decision where: "(1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute"). *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶16, 292 Wis. 2d 549, 717 N.W.2d 184; *Hilton*, 293 Wis. 2d 1, ¶15 ("the correct test [for great weight deference] is whether the agency "has experience in interpreting [the] particular statutory scheme" at issue" (citation omitted); *Clean Wisconsin, Inc. v. PSC*, 2005 WI 93, ¶¶38-41, 282 Wis. 2d 250, 700 N.W.2d 768 (great weight deference due agency with expertise and experience in interpreting the particular statutory scheme at issue, and with primary responsibility for determination of fact and policy). *See also ABKA v. DNR*, 2002 WI 106, ¶30, 255 Wis. 2d 486, 648 N.W.2d 854, cited by petitioners (an agency's interpretation of statutes and conclusions of law are due a certain amount of deference depending on whether the issues are one of first impression, etc.).

As explained below, here the legislature has charged the Department with administration of Wis. Stat. § 31.02, the Department does have expertise in balancing the factors of § 31.02, the Department's interpretation of public rights is long-standing, and the Department's decision to exclude socioeconomic impacts and to consider wetland impacts has been applied with uniformity since the earliest public trust cases and at least 1972 when *Just v. Marinette*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) was decided. Therefore, the Department's interpretation of Wis. Stat. § 31.02 is entitled to great weight deference.

Here, the Legislature delegated to the Department's predecessors since 1915, and to the Department itself since 1967, the administration of this statute governing dams and lake levels. Wis. Stat. § 1596(2) of Chapter 69m, The Water Powers Act (1915); Laws of Wisconsin 1917, Chapter 474 section 3 renumbering § 1596(2) as Wis. Stat. 31.02; Laws of Wisconsin 1967, Chapter 75, sections 2 and 25 (establishing the Department). The Department has issued water level orders for dams around the state. *See Lake Altoona Lake Rehabilitation and Protection District v. DNR*, Eau Claire County Case No. 06CV745 (Memorandum Decision issued August 23, 2007) (copy attached), for an example of one of the most recent water level orders issued by the Department. The Department has set out its interpretation of Wis. Stat. § 31.02(1) in Chapter 130 of its Water Regulation Handbook, Record Exhibit RKLD 139, consistent with the Order it issued here and with the arguments set forth in this brief.

More generally, the Department (or its predecessors) has also since at least the early 1900s determined what "public rights in navigable waters" embrace in its administration of

a host of statutory provisions, most notably in chapter 30, and has balanced public and private rights in navigable waters as the legislature's delegee for administration of the public trust. *See* Wis. Stat. § 281.11 ("The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private"); *Borsellino*, 232 Wis. 2d 430, ¶6, ¶17 ("the DNR has technical expertise in regulating . . . waterways," and "the regulation and enforcement of this public trust rests with the legislature and the DNR"); *Sea View*, 223 Wis. 2d at 148-49, 157 ("[t]he DNR has technical expertise in environmental matters, . . . which includes the regulation of . . . waterways," and noting DNR's central authority as delegated by the legislature to administer and enforce both chapter 30 and the public trust doctrine); *Hixon v. PSC*, 32 Wis. 2d 608, 620, 629, 146 N.W.2d 577 (1966) (the weighing of relevant factors is a policy function that lies peculiarly within the province of the Public Service Commission, now the Department);¹ *State v. Bleck*, 114 Wis. 2d 454, 466, 338 N.W.2d 492 (1983).²

Most generally, "[t]he legislature has delegated to the DNR the duty of enforcing the state's environmental laws." *Hilton*, 293 Wis. 2d 1, ¶20.

As noted in the cases cited above, the Department brings its specialized expertise and technical knowledge to bear on its balancing of public and private rights in navigable waters

¹ "The PSC previously had the duties to enforce environmental laws relating to navigable waters now assigned to the DNR." *Hilton*, 293 Wis. 2d 1, ¶21 n.11.

² While some of the waterway statutes that the Department administers refer to the public interest in navigable waters, *see, e.g.*, Wis. Stat. § 30.12(3m)(c)2. and pre-2003 Wisconsin Act 118 Wis. Stat. § 30.12(2), the courts "interpret 'the public interest' and 'the public rights in navigable waters' to be synonymous as both terms derive from the public trust doctrine." *Sea View*, 223 Wis. 2d at 153-54 n.12.

in many contexts. *See, e.g., Hilton*, 293 Wis. 2d 1, ¶¶21-22. Here, the Department has done so several times over the last 100 years with respect to this dam and lake alone, showing both its longstanding exercise of its expertise and its consistency. The Department issued the last lake level order for this dam in 1991, and in response to the petition to modify that order, the Department has affirmed its 1991 balancing of rights and interests, with some modification only of the winter drawdown after hearing public comments reflecting current conditions. Order: ¶¶4-7. Its most recent Order, which slightly modifies the 1991 order, is evidence of the historical and consistent application of the Department's expertise and specialized knowledge to setting lake levels in the interest of public rights in navigable waters, and to promote safety and to protect life, health and property.

In balancing public and private rights in navigable waters, the Department's legal conclusions and its value and policy determinations are due the highest level of deference. *See Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 732, 556 N.W.2d 791 (Ct. App. 1996). The court must have compelling reasons for reversal where the agency's final conclusion is based on a highly discretionary determination that rests on its finding as to what is necessary and convenient, or reasonable, in the interest of public rights and under the public trust doctrine. *See Hixon*, 32 Wis. 2d at 630.

Under great weight deference, the court upholds the Department's conclusions if they are reasonable, "even if an equally reasonable or more reasonable interpretation is offered." *Hilton*, 293 Wis. 2d 1, ¶17. If there is any reasonable basis in the record for the agency's determination, a reviewing court should not disturb it. *Hixon*, 32 Wis. 2d at 629.

Petitioners' position that the court owes no deference to the Department's decision here is contrary to the law. Under *Racine Harley-Davidson*, a court only accords no deference if "(1) the issue is one of first impression; (2) the agency has no experience or expertise in deciding the legal issue presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance." *Racine Harley-Davidson*, 292 Wis. 2d 549, ¶ 19. None of those circumstances applies here.

- C. The Department's factual findings are to be upheld if they are reasonably supported by the evidence.

The Department's factual findings are entitled to substantial deference under the substantial evidence test. *Hilton*, 293 Wis. 2d 1, ¶16; Wis. Stat. § 227.57(6). Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Sterlingworth*, 205 Wis. 2d at 727; *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987). "Substantial evidence does not mean a preponderance of the evidence.' Instead, the test is whether, after considering all the evidence of record, reasonable minds could arrive at the same conclusion." *Hilton*, 293 Wis. 2d 1, ¶16 (citation omitted).

The reviewing court is not permitted to pass on credibility or to reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is substantial evidence to sustain it. *Village of Menomonee Falls*, 140 Wis. 2d at 594. The court may not substitute its judgment for that of the ALJ as to the weight of the evidence. Wis. Stat. § 227.57(6).

III. THE DEPARTMENT REASONABLY INTERPRETED ITS AUTHORITY UNDER WIS. STAT. § 31.02(1) TO INCLUDE CONSIDERATION OF IMPACTS ON WETLANDS ON AND ADJACENT TO LAKE KOSHKONONG.

Petitioners argue that the Department's authority under Wis. Stat. § 31.02(1) to set water levels in the interest of public rights in navigable waters does not extend to protection of wetlands in or adjacent to the lake. The applicable law establishes the exact opposite.

A. Longstanding case law establishes that public rights in navigable waters include protecting wetlands.

Wisconsin Stat. § 31.02(1) authorizes the Department to set water levels "in the interest of public rights in navigable waters." Public rights in navigable waters derive from the public trust doctrine. *Sea View*, 223 Wis. 2d at 153-54 n.12.

The public trust doctrine emanates from art. IX, § 1 of the Wisconsin Constitution. It protects an array of public rights including, in addition to commercial navigation, a variety of purely recreational and nonpecuniary uses including boating, swimming, fishing, hunting, recreation, and scenic beauty. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, ¶19, 628 N.W.2d 781; *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998); *Hixon*, 32 Wis. 2d at 619; *Muench v. Public Service Comm.*, 261 Wis. 492, 507-08, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The public trust doctrine also protects public rights in the protection and preservation of the state's navigable waters as natural resources for the enjoyment and benefit of its citizens. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 526, 271 N.W.2d 69

(1978); *Just*, 56 Wis. 2d at 16-18; *State ex rel. Chain O'Lakes P. Asso v. Moses.*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972); *Reuter v. Department of Natural Resources*, 43 Wis. 2d 272, 277, 168 N.W.2d 860 (1969); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 382, 548 N.W.2d 528 (1996). The policy of the common and statutory law that recognizes the rights of the public to enjoy navigable waters is to be broadly and beneficently construed. *Muench*, 261 Wis. at 512; *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914). No case has narrowed this array of public rights or the construction of the public trust for impounded, as opposed to natural, navigable waters (Pet. Brief:2-3).

In the seminal public trust case, *Just*, 56 Wis. 2d at 16-19 (a case in the "long line of cases" that petitioners fail to cite, Pet. Brief:16), the court unambiguously acknowledged the connection between wetlands, shorelands and navigable waters for purposes of effectuating the state's public trust obligations:

The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. . . . What makes this case different . . . is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. . . . [S]wamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature. . . . The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. . . . Lands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject to state public trust powers.

The *Just* inclusion of wetland protection in the public rights in navigable waters remains the law today. See *Zealy*, 201 Wis. 2d at 379 n.7 ("*Just* is not limited to cases

involving [the public trust] doctrine, and the case is thus equally applicable to wetland regulations"). *Just* confirms that public rights in wetlands "adjacent to or near navigable waters" are public rights in, not beyond (Pet. Brief:2), navigable waters.

The Attorney General Opinion cited by petitioners is in accord, and builds on *Just* and legislative pronouncements of the state's public trust obligations to support the Department's broad authority to consider wetland impacts as part of its regulatory responsibility to make determinations in the interest of public rights in navigable waters (68 Op. Att'y Gen. 264 at 273):

there appears to be broad non-permit authority in the Department to acquire, preserve, and protect wetlands. In addition, permit programs which are not specifically directed at wetlands but which affect such wetlands directly and indirectly could be administered to as to grant substantial amounts of protection to this portion of the "waters of the state."

For example, . . . chs. 30 and 31, regulating structures and activities in navigable waters could be administered to prevent or at least minimize damage to wetlands by prohibiting or regulating drainage, fills and drawdowns detrimentally affecting wetlands. . . . Finally, there are wetlands which directly affect water quality in connected or *adjacent* navigable waters where water quality standards set for the navigable body could be used to regulate activity in the related wetlands. NR 1.95 is, in itself, a step in this direction.

The legislature has recognized the connection between these public rights and lands adjacent to navigable waters. *See* Wis. Stat. §§ 281.31 and 281.33 (authorizing shoreland zoning and storm water regulation "[t]o aid in the fulfillment of the state's role as trustee of its navigable waters").

Petitioners cite no case that excludes the protection of wetlands on or adjacent to navigable waters from the public rights rubric, or that differentiates the public rights

embraced by the public trust doctrine under chapters 30 versus 31 of the statutes. Indeed, the court in *Muench*, 261 Wis. 492, traced the history of the development of public rights under Wisconsin's Constitution and Wis. Stat. chs. 30 and 31, and the court interpreted public rights as used in all 3 places identically. Petitioners also provide no evidence disputing the value of wetlands to navigable waters. See Wis. Admin. Code §§ NR 1.95(3) and 103.03(1) (setting forth the values and functions of wetlands). Given the undisputed natural connection between wetlands near navigable waters and such incidents of public rights as water quality and clarity, boating, fishing, hunting, and scenic beauty, and the continuing force of the *Just* decision, there is neither scientific nor legal authority for such an exclusion.

- B. Wisconsin statutes and regulations authorize the Department to consider the impacts on wetlands in making regulatory decisions like water level determinations.

The water level statute, Wis. Stat. § 31.02(1), authorizes the Department to set water levels "in the interest of public rights in navigable waters." As noted above, case law expressly includes protection of wetlands within the panorama of public rights in navigable waters. Department regulations, which guide the Department in its consideration of factors that affect public rights, also require the Department to consider impacts on wetlands when it makes regulatory decisions such as setting water levels.

The regulations recognize that the Department, "under existing law, has the responsibility of making and enforcing regulatory and management decisions which, directly or indirectly, affect the quantity and quality of many Wisconsin wetlands." Wis.

Admin. Code § NR 1.95(2). Under Wis. Admin. Code § NR 1.95(1), the Department is to apply its rules "in such a manner as to avoid or minimize the adverse effects on wetlands due to actions over which the department has regulatory or management authority and to maintain, enhance and restore wetlands functions and values." Under Wis. Admin. Code § NR 1.95(2)(b), "Department actions must be consistent with the goal of maintaining, protecting and improving water quality."

Accordingly, "It is in the public interest that department decisions which lead to alteration of or effects on wetlands under its jurisdiction or control are based on the intent to preserve, protect, restore and manage them for the maintenance or enhancement of their values." Wis. Admin. Code § NR 1.95(4)(a). "The state's policy as articulated in its trusteeship of navigable waters and the statutes enacted to further the protection and enhancement of the quality of its waters, creates a presumption against activities which adversely affect those wetlands under department jurisdiction or control." Wis. Admin. Code § NR 1.95(3)(a). These statements of statewide policy were adopted by the Natural Resources Board, and apply to "department decisions" that affect wetlands "under its jurisdiction." Under the case law and OAG cited above, wetlands in and adjacent to navigable waters are plainly within the Department's regulatory jurisdiction.

Under Wis. Admin. Code § NR 103.06, which was promulgated under Wis. Stat. chs. 281 and 283, the water quality standards set forth in Wis. Admin. Code ch. NR 103 "apply to all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands," and "to specific activities which may require authorization . . . and which are subject to the requirements of statute or rules requiring a

department determination concerning effects on water quality or wetlands." As established in the findings of fact here, water level orders affect both water quality and wetlands. At the least, the ch. 103 regulations confirm that the Department's authority to set water levels "in the interest of public rights in navigable waters" requires it to consider effects on all wetlands that may be affected. Whether the ch. 103 regulations require the Department to do more is not before the court in this case.

Here, petitioners erroneously fault the Department for applying Wis. Stat. ch. NR 103 standards (Pet. Brief:2, 19). The Department did not apply NR 103 standards to petitioners' proposal, but did consider the effects of the proposal on wetland functions and values recognized in Wis. Admin. Code § NR 1.95 and ch. NR 103.

In *Houslet v. DNR*, 110 Wis. 2d 280, 281, 329 N.W.2d 219 (Ct. App. 1982), the court held that the Department properly considered the effects on wetlands in determining whether a dredging project was consistent with public rights in navigable waters. In *Houslet*, the court answered positively the question whether the lake area below the ordinary high water mark, to which the state has title, could be wetland as well. While the court then relied in part on Wis. Admin. Code § NR 1.95(4), which authorizes the Department to protect wetlands under its control, that provision also authorizes the Department to protect wetlands under its jurisdiction, and the point was and is that protecting wetlands is part of protecting public rights in navigable waters. Here, regardless whether undisputed wetland areas are below or above the ordinary high water mark, they are still wetlands under Wis. Admin. Code § NR 1.95, and the Department's regulatory public rights in navigable waters

analysis must include consideration of impacts to wetlands under that section and all of the law cited above.

- C. Wisconsin Stat. § 281.92 does not limit the Department's authority to consider the effects on wetlands as part of its consideration of what water levels are in the interest of public rights in navigable waters.

Petitioners argue that Wis. Stat. § 281.92 prohibits the Department from considering effects on wetlands in its efforts to set water levels that are in the interest of public rights in navigable waters. Petitioners misrepresent the reach of this section.

Wisconsin Stat. § 281.92 provides that, "Nothing in this chapter affects ss. 196.01 to 196.79 or ch. 31." This section was enacted in 1919, as part of a bill creating sections "providing for supervision and control by the state board of health of water and ice supplies, water purification, sewage and refuse treatment and disposal and the pollution of streams; and for supervision of the maintenance, alteration, extension, construction and operation of systems and works relating thereto." Wisconsin Assembly Bill No. 238, A. (Feb. 18, 1919). Section 2 of this bill created section 1407m—1(12), "Nothing in this act shall be construed to alter, amend, repeal, impair or affect any of the provisions of sections 1797m—1 to 1797m—109 or of chapter 31 of the Wisconsin statutes." In 1923, this section was amended to read, "Nothing in this chapter shall be construed to affect the provisions of sections 1797m—1 to 1797m—109 or of chapter 31 of the statutes." This section, later numbered § 144.12, was renumbered § 281.92 when the omnibus environmental protection chapter 144 was divided by 1995 Wis. Act 227.

Wisconsin Stat. § 31.02 was enacted 4 years earlier than § 281.92, in 1915, as section 1596—2.1. of chapter 69m, "The Water Powers Act." Wis. Stat. § 1596. It provided, "The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters" "Commission" in this section meant the railroad commission of Wisconsin. Section 1596—1. In 1917, this section was renumbered as § 31.02, as part of the newly created "Chapter 31. Water Powers, and Mills and Milldams," and titled, "Powers of the railroad commission." Laws of Wisconsin Chapter 474; Wis. Stat. § 31.02(1) (1917).

So, the law authorizing water regulation by the railroad commission predated the law authorizing water pollution regulation by the state board of health. It can be reasonably inferred that the limiting provision in the latter was enacted to ensure that the state board of health did not intrude in the railroad commission's sphere of transportation regulation, or in the sphere of public utility regulation (in Wis. Stat. ch. 196), and that the state board of health's authority did not expand or restrict the railroad commission's authority over dams or the public service commission's authority over utilities.

Now, the Department of Natural Resources is the authorized agency for both areas, water pollution and dams. Wisconsin Stat. § 281.92 means that the Department's water pollution prevention responsibilities do not expand or restrict its water level responsibilities. In other words, its authority to set water levels is unencumbered by its authority to set water quality standards. Thus, its authority to consider all public rights in

setting water levels on navigable waters is not affected by its authority to protect the waters of the state from pollution.

Nor does Wis. Stat. § 281.92 render inoperative the regulations that guide the Department in its public rights analysis and that authorize or require it to protect wetlands. While both Wis. Admin. Code § NR 1.95 and ch. NR 103 cite Wis. Stat. ch. 281, they also cite Wis. Stat. §§ 1.11, 23.09, 29.011, and 283.001 for their provenance.

To construe Wis. Stat. § 281.92 as petitioners do to forbid the Department from considering public rights that relate to wetlands would be to violate the constitutional public trust doctrine and the common law cited above, and would conflict with the Department's broad statutory and regulatory authority also cited above. *See Beard v. Lee Enterprises, Inc.*, 225 Wis. 2d 1, 15, 591 N.W.2d 156 (1999) ("Apparently conflicting provisions of law should be construed so as to harmonize them and thus give effect to the leading idea behind the law"); *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results"). Here, the court should interpret all of these different statutory and regulatory provisions so as to harmonize them, not to fracture them.

Nor is petitioners' position supported by *Niagara of Wisconsin Paper Corp. v. DNR*, 84 Wis. 2d 32, 268 N.W.2d 153 (1978). In that case, the court ruled that the

Department did not have the power to act under Wis. Stat. § 147.021 so as to nullify the legislative purpose underlying the enactment of that very same statute by setting standards exceeding federal standards, which the statute expressly forbid. The court also focused on the unfairness inherent in including a 1-year standard in a 5-year permit. 84 Wis. 2d at 49. "The due process aspect of this case is crucial. If this were simply a balancing of the DNR's . . . policy versus the apparent but not well-defined legislative policy . . . it could be possible to agree with DNR's [interpretation]." 84 Wis. 2d at 49.

The court concluded by saying that it was necessary to look at the interplay of the statutes to see if the Department had the authority it exercised. 84 Wis. 2d at 53-54. Here, the only reasonable interpretation of the interplay of the statutes and the regulations is that impacts on wetlands is one of the factors the Department must consider in setting water levels in the interest of public rights in navigable waters.

D. The Department properly considered effects on all wetlands affected, both in and adjacent to Lake Koshkonong.

Petitioners argue that the Department erroneously considered impacts on wetlands that are not part of the lake. The record does not establish how much of the shoreline wetland areas considered by the Department are above and below the ordinary high water mark, or, in other words, how much of the wetland areas are in the lake and adjacent to the lake. However, that is a distinction without a difference under the public rights analysis prescribed by the statute.

In *M&I Marshall Bank v. Town of Somers*, 141 Wis. 2d 271, 288, 414 N.W.2d 824 (1987), the court noted that "a parcel of land which consists of continuing wetland

which is partly within and partly outside a shoreland area should be treated as if the entire wetland was located within a shoreland area. There would be little value to the wetland within the shoreland if the part of the wetland outside the shoreland area was allowed to be altered." Similarly, here, there would be little value to wetlands in the lake, below the ordinary high water mark, if the parts of the wetlands adjacent to the lake above the ordinary high water mark were allowed to be harmed.

In Wis. Admin. Code § NR 1.95(1), cited above, the legislature directs the Department when it considers a proposal "over which the department has regulatory . . . authority" to "avoid or minimize the adverse effects on wetlands." This directive does not limit the Department's consideration to wetlands only within proposal boundaries, but extends to all wetlands that could be affected by the proposal. So, here, the Department properly considered all wetlands that could be affected by the proposal and order setting water levels for the lake, not just wetlands in the lake.

Petitioners' reference to lands far from the lake (Pet. Brief:3) may also refer to the Department's consideration of impacts on farmlands served by drains. If so, the argument is misplaced, because consideration of flooding of farmlands implicates the protection of property part of the statutory mandate, not the public rights analysis.

- E. The Department properly followed its Handbook when it considered impacts on wetlands.

Chapter 130 of the Department's Handbook, Record Exhibit RKL D 139, expressly provides for the consideration of impacts on wetlands in setting water levels, and its

interpretation of Wis. Stat. § 31.02(1) to provide for such consideration is consistent with the law as set out above.

IV. THE DEPARTMENT REASONABLY INTERPRETED ITS AUTHORITY UNDER WIS. STAT. § 31.02(1) TO EXCLUDE CONSIDERATION OF PROJECTED ECONOMIC IMPACTS ON PROPERTY VALUES AND TAXES AND BUSINESSES.

Wisconsin Stat. § 31.02(1) also authorizes the Department to set water levels "to promote safety and protect life, health and property." So, here, the Department considered whether water levels will affect safety on the lake (Order:¶¶110-119), erode or flood or otherwise harm shoreland property adjacent to the lake (Order:¶¶63-64, 71-72, 76), affect riparian piers (Order:¶¶100-105), or flood farmlands draining into the lake (Order:¶¶86-91). According to petitioners, this is not enough. In addition to protecting property and property rights from these direct physical impacts, petitioners argue that "protecting property" also includes safeguarding economic incidents of property such as property values, property taxes, and business incomes. The law is to the contrary.

First, the statute itself says "protect property." "Protect" means "[t]o keep from harm, attack, or injury." *The American Heritage Dictionary*, Second College Edition 1985 at 995. There is a second economic meaning, which applies to using tariffs to help domestic industry against imports. *Id.* It is only the first meaning—guarding against harm or injury—that can reasonably apply here. Consistent with the ordinary meaning of "protect," the Department can, and did, determine whether lake levels will harm or injure property.

This interpretation, that "protect life, health and property" relates only to direct physical impacts on property, is reflected in Chapter 130 of the Department's Handbook, Record Exhibit RKLD 139. The Handbook at 2 states that to protect life, health and property, the Department "may regulate and control water level and flow to: . . . (f) Minimize economic losses resulting from too much or too little water." To assess whether such losses exist, the Handbook at 3 provides that the Department should consider:

- a. Existing sewage systems.
- b. Pollution sources.
- c. Ice and water erosion potential.
- d. Flooding potential and easement requirements.
- e. Flow requirements to maintain water quality.
- f. Off-shore slopes (beaches, riparian usage, navigation hazards, etc.).
- g. Dam structural and hydraulic adequacy if levels are raised.
- h. Agricultural or irrigation diversions and other downstream beneficial users of water (industrial users, sewage treatment plants, hydro power generators, etc.).

These items are the types of direct physical impacts that are reasonably contemplated under the statute and which have been used to administer the statute. They do not include considerations of gain or loss of wealth or value and income.

Second, the legislature knows how to word its directives when it intends to include economic factors like property values and taxes and business incomes. For example, one of the standards the Department must consider for permitting changing of streams is whether the proposed change "will improve the economic or aesthetic value of the applicant's land." Wis. Stat. § 30.195(2)(c)2. For another example, one of the air pollution standards is "best available control technology," which requires that the

Department take "into account energy, economic and environmental impacts and other costs related to the source." Wis. Stat. § 285.01(12). No such language about economic value appears in Wis. Stat. § 31.02(1).

Here, the legislature expanded the reach of the Department's inquiry beyond "the interest of public rights in navigable waters" to include not economic considerations but protection of "life, health and property." Just as the "public rights" part of the Department's inquiry pursuant to the public trust in navigable waters does not extend to socioeconomic impacts, *see Wisconsin's Environmental Decade v. DNR*, 115 Wis. 2d 381, 410, 340 N.W.2d 722 (1983), so there is nothing in "protect life, health and property" that extends to socioeconomic factors like property values and taxes and business incomes. Just as "protect health" does not embrace consideration of health insurance premiums, so "protect property" does not embrace consideration of property values or taxes or business profits. Nor is there anything in the primary objects of "protect life, health and property" that extends to secondary concerns such as property values and taxes and business incomes.

Third, the cases on which petitioners rely confirm that the Department properly limited its inquiry and balancing to exclude socioeconomic impacts.

The first case cited by petitioners is a private action over rights to a certain lake level maintained by easement and prescription, decided based on those rights and not on economics. In *Smith v. Youmans*, 96 Wis. 103, 70 N.W.1115 (1897), the defendants had for over 40 years an easement to keep and maintain a dam so as to keep the lake at a level over 6 feet above its natural level, and the plaintiffs and others had developed residential

and resort properties around the resulting 900-acre lake in that 40-year period. The court found that lowering the level by over 4 feet, as the defendants had recently done, severely impaired the plaintiffs' rights of access to and enjoyment of the lake. 70 N.W. at 1116-7. While the court noted the economic investments in and values of the riparian lands, 70 N.W. at 1117, those economic factors were incidental to the legal rights obtained by the plaintiffs by prescription and easement, and it was because of those legal rights that plaintiffs won their injunction (70 N.W. at 1117-1118):

. . . their acts had ripened into an easement by prescription. The relative relations and interests of the parties which have thus originated, grown up, and become fixed by prescription, would seem to impose upon the parties reciprocal rights and duties, at least to the extent that . . . each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created between them, and that they are equitably bound to deal fairly, reasonably, and justly with each other in respect thereto. . . . [S]o long as the defendants retain and insist upon their easement . . . [t]hey are certainly bound to exercise their rights in a fair and reasonable manner, and as they had been accustomed to do, and not capriciously or wantonly, so as to prejudice the existing rights and interest of the plaintiffs as riparian owners.

The *Youmans* case concerns easements and prescriptive rights and reasonable use, not the regulatory setting of water levels based on "investment-backed expectations of lakeshore property owners" (Pet. Brief:22).

In the second case cited by petitioners, *Chippewa and Flambeau Improvement Co. v. RR Comm. of Wis.*, 164 Wis. 105, 159 N.W. 739 (1916), while the Commission had noted the riparian owners' large investments in property, 164 Wis. at 114, the court

confirmed that Wis. Stat. § 31.02(1) means that the Department cannot set a water level that "imperils life, health, and property." 164 Wis. at 118 (emphasis added). The court, reviewing the Commission's water level order under Wis. Stat. § 31.02(1), affirmed the order, which had considered the "damage done to [riparian] property." 164 Wis. at 115. The court used words like "injury" to property and "imperils" property, 164 Wis. at 116, 117, 118, which connote physical harm to physical property, not economic harm to property values or taxes or business. The large investment was merely indicative of the importance of the physical harm. There is no way that the decision in this case can stand for the proposition that "economic impacts of water level regulation on commercial and riparian property interests are central to such determinations" (Pet. Brief:24).

Nor does the decision in the third case cited by petitioners, *Flambeau River Lumber Co. v. Gettle*, 204 Wis. 524, 236 N.W.671 (1931). In that case, the court focused not on the general lake level statute, Wis. Stat. § 31.02(1), but on the specific legislative grant, which was made in part to improve navigation, especially for driving logs, and in part to establish a uniform flow, for generating power. 204 Wis. at 529-32, 543. The problem with the water level order was that it accomplished the second purpose at the expense of the first, and the court required that the water level order be reset to better accomplish both purposes. 204 Wis. at 543-546. The court's decision was driven by specific language in the grant, not by the authority given in Wis. Stat. § 31.02(1).

Petitioners cited below another case in support of their economic argument, but that case also did not turn on economic concerns. In *State v. Village of Lake Delton*, 93 Wis. 2d 78, 105, 286 N.W.2d 622 (Ct. App. 1978), the court held that the public trust

analysis requires a balancing and accommodation of competing public uses. The court recognized the economic benefits from the challenged use (water ski shows), 93 Wis. 2d at 89, and noted that protecting economic interests is a valid purpose of the ordinance, 93 Wis. 2d at 93 n.10, but the court's public trust analysis and decision turned on the balancing of the use itself and other uses of the water. 93 Wis. 2d at 91, 96, 105 (public trust "for the enhancement of these public rights to use the waters for commercial and recreational purposes;" "no single public interest in the use of navigable waters . . . is absolute;" "safe and orderly accommodation of competing uses"). The court relied on older cases that balanced commercial uses (navigation for commerce) against other public uses. 93 Wis. 2d at 94, 95-96. The property values and taxes and business incomes that petitioners argue the Department must consider are not navigation for commerce, and are not uses to be balanced under the public rights analysis.

In sum, there are no cases that stand for the proposition that potential economic benefit is a public right in navigable waters to be protected under the public trust doctrine or Wis. Stat. § 31.02.

Finally, the socioeconomic impacts proffered by petitioners are truly secondary and speculative. While lake levels certainly directly affect private riparian access (one of the qualified and subordinate riparian rights, *R.W. Docks & Slips v. State*, 2001 WI 73, ¶¶21-22, 244 Wis. 2d 497, 628 N.W.2d 781) in terms of length of piers needed to reach navigable water, their effects on property values and business profits are both less certain and more attenuated.

The connection between water levels and the statutorily prescribed factors of public rights in navigable waters and protection of safety, life, health and property is clear, strong and supported by the legislative intent, statutory construction, consistent agency application, and case law. The connection between water levels and socioeconomic factors is attenuated and speculative, and represents a plainly unintended extension of the Department's authority and expertise.

V. THE DEPARTMENT REASONABLY WEIGHED AND BALANCED COMPETING RIGHTS, INTERESTS AND PROTECTIONS.

The legislature has expressly delegated to the Department the balancing of conflicting public and private rights in furtherance of the public trust. *Borsellino*, 232 Wis. 2d 430, ¶¶17-20 (the Department fulfills its duties as trustee and furthers the public trust in balancing public and private rights). The undisputed findings of fact establish that the Department reasonably concluded that the Order "is necessary to protect the public rights in navigable water and reasonably balances and accommodates public and private rights, the promotion of safety, and the protection of life, health, and property." Order:31 ¶3.

The Department considered and weighed the riparian owners' "diminished utility and enjoyment of the property, and the expectation that higher water would enhance the utility and enjoyment of riparian property." Order:29. The Department considered that the "vast preponderance of the evidence establishes that increasing lake levels to a year round target of 776.80 would have profound and lasting negative effects on much of the

property and ecological resources abutting the lake and its tributaries" and that the "preponderance of convincing evidence showed that the positive ecological benefits from the proposed increased water levels are slight in comparison to the profound substantial negative effects." Order:29-30. The Department considered that the "preponderance of the evidence established that increasing water levels as proposed would only modestly enhance navigability and access to this shallow lake" and that the "preponderance of the evidence [established] that the enhancement to access and navigation from increased water levels would be far outweighed by the substantial negative environmental impacts caused by the higher water." Order:30.

Petitioners fault the Department for paying too much attention to wetlands. The Order belies their protest, inasmuch as it addresses in detail and seriousness all the factors relevant to the statutory directive: historic levels, modeling, wetlands, water quality, ordinary high water mark, erosion control structures, agricultural drainage, wildlife, winter drawdown, public access, riparian access, natural scenic beauty, swimming/bathing, navigation including boating, fishing, recreation, public safety.

That much of the Department's testimony focused on environmental and resource impacts is not surprising since the Department is also the state agency charged by law with maintaining and protecting our natural resources. *See Hilton*, 293 Wis. 2d 1, ¶20. By law, the Department must set water levels that "avoid or minimize the adverse effects on wetlands," that are "consistent with the goal of maintaining, protecting and improving water quality," that "provide for the protection, development and use of forests, fish and game, lakes streams, plant life, flowers and other outdoor resources of the state," that

protect and maintain "habitat capable of supporting aquatic species." Wis. Admin. Code §§ NR 1.95(1), 1.95(2)(b), 1.95(2)(d), 1.02(2). The Wisconsin Legislature gave the Department these multiple responsibilities, as it also directed the Department to serve all "public rights in navigable waters or to promote safety and protect life, health and property." Wis. Stat. § 31.02(1). The record, and the undisputed factual findings, establish that the Department heard testimony on all the other relevant factors and, most importantly, considered all relevant interests, public and private.

The Department also properly considered "the cumulative impacts on the ecosystem that a further increase in lake levels would have." Order:30; *see Hilton*, 293 Wis. 2d 1, ¶28 and n. 14, citing *Hixon*, 32 Wis. 2d at 631-32 and quoting *Sterlingworth*, 205 Wis. 2d at 721 (with respect to direct and indirect ecological impacts, "the consideration of 'cumulative impact' must be taken into account").

Lastly, the Department had just 9 years earlier balanced all interests in the 1991 order, and then in 2006 altered that balance to mitigate the winter drawdown in response to public concerns. The findings of fact contain no evidence, and petitioners proffer none, to show that the balance need otherwise be redrawn. "The DNR reasonably concluded that navigational and access issues had been appropriately balanced and accommodated under the 1991 operating order, and that an increase in water levels under the present conditions would upset this balance in favor of navigational and access interests at the substantial expense of other public rights in the waters." Order:30.

In short, the undisputed evidence in the record establishes that the Department did the impossible (Pet. Brief:3) by minimizing adverse impacts and maximizing beneficial

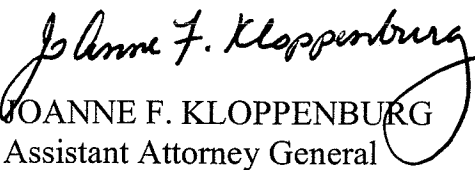
impacts on wetlands, navigation, and all other legally recognizable incidents of public rights in the interest of those public rights and to protect safety, life, health and property, just as the statute requires.

CONCLUSION

For all the reasons stated above, the Department asks that the court affirm its December 1, 2006, Order setting water levels for Lake Koshkonong.

Dated this 24th day of October, 2007.

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Lake Koshkonong Water Level Comparison

	WDNR's Order ^{1,2} (12/14/04)	RKLD's Petition ¹	RKLD Petition Increase	WDNR's Revised Order ^{1,3} (4/15/05)	Increase Above 12/14/04 Order
Summer (May 1 – October 15)					
Target level	776.20	776.80	0.6' (7.2")	776.20	0
Maximum level when all Gates must be open	776.33	777.0	0.67' (8")	776.33	0
When all gates are closed	776.10	776.4	0.3' (3.6")	776.10	0
Winter (Nov. 1 - April 30)					
Maximum level	775.77	777.0	1.23' (14.8")	776.0	0.23' (2.8")
Target level	N/A	N/A	N/A	775.75	N/A
Minimum level	775.00	776.4	1.4' (16.8")	775.50	0.5' (6")

¹ feet MSL

² Water levels the same as in 04/25/91 levels order (2004 order due to minor changes that reflects RKLD's dam ownership and Ft. Atkinson gage)

³ Summer water levels the same as the 1991 and 2004 levels orders

LAKE ALTOONA LAKE REHABILITATION
AND PROTECTION DISTRICT,

Petitioner,

vs.

MEMORANDUM DECISION

Case No. 06CV745

STATE OF WISCONSIN, DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

and

DON FAWCETT,

and

CYNTHIA ZIEBELL,

Additional Respondents in their
Capacities as Parties to the
Contested Case Hearing.

This is a judicial review of an administrative agency decision under Wis. Stat. §227.

BACKGROUND

For over 50 years, Lake Altoona has had a 2-foot "winter drawdown" which lowered the level of the lake during the wintertime 2 feet below its summertime level. State of Wisconsin Department of Natural Resources (DNR) water level Order 2-WP-758, dated July 15, 2005, reduced the winter drawdown to a maximum of .70 of one foot. It further required the minimum lake levels to be established at 801.00 feet and at maximum elevation of 803.00 feet beginning October 21, 2006.

In August of 2005, the Lake Altoona Lake Rehabilitation and Protection District (hereafter Lake District) filed a petition for a contested case hearing pursuant to Wis. Stat. § 227.42. A hearing took place on August 28, 2006 before Administrative Law Judge Jeffrey D. Boldt. His Findings of

Fact, Conclusions of Law and Order are dated October 25, 2006. He concluded that a clear preponderance of the evidence indicated that the public interest in Lake Altoona would benefit from the proposed .70 of a foot maximum winter drawdown. Accordingly, he affirmed the DNR decision and ordered that the winter drawdown shall not exceed .70 of a foot as of October 31, 2006, and the water level to be maintained in Lake Altoona shall be at minimum elevation of 801.00 feet and at maximum elevation of 803.00 feet, year round.

The Lake District filed a Summons and Petition on November 20, 2006. Respondent DNR filed a Notice of Appearance and Statement of Position on December 13, 2006. The record from the Department of Justice was filed December 21, 2006 and the transcript of the hearing was filed on January 4, 2007. Petitioner's Brief was filed March 9, 2007. The DNR Responding Brief was filed April 9, 2007. Petitioner's Reply Brief was filed April 20, 2007. Upon the untimely death of the Honorable Eric Wahl, this case was assigned to this Court on August 1, 2007.

The Lake District wants to keep the 2-foot winter drawdown for Lake Altoona. It is concerned there will be property damage from "ice push" if the drawdown is reduced or eliminated. The Lake District argues that the decision of the Administrative Law Judge did not properly apply Wis. Stat. §31.02(1). It further argues that the ALJ's findings of fact were not supported by substantial evidence. It suggests that the health of the fishery in Lake Altoona was the only real consideration of the DNR and that the interests of the lakefront property owners and others have not been adequately considered in the DNR decision.

STANDARD OF REVIEW

Judicial review of an administrative agency decision is governed by Wis. Stat. §227. The reviewing court does not retry the case and is confined to the record that has been filed. The court's duty is to examine the record to determine whether the rights of the petitioner have been invaded by an error of the agency. Unless the reviewing court finds a ground for setting aside, modifying, remanding, or ordering other agency action, it must affirm the agency's action. Wis. Stat. §227(2).

The court may not substitute its judgment for that of the agency as to the weight of the evidence as to any disputed fact. Wis. Stat. §227(6). On review, consideration must be given to the expertise of

the agency. Due weight must be accorded the experience, technical competence, and specialized knowledge of the agency as well as the discretionary authority conferred upon it. Wis. Stat. §227(10).

A different standard of review for agency decisions is applied for questions of law and questions of fact. As to questions of law, there are three distinct levels of deference applied to an administrative agency's interpretation of a statute. They are "great weight", "due weight" and "de novo review". "Great weight" deference is appropriate when the agency has been charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995).

The parties in the present case correctly agree that the DNR decision is entitled to "great weight" deference. Once it is determined that the great weight level of deference is the appropriate standard of review to be applied by the court reviewing the administrative agency's interpretation of a statute, the agency's interpretation must then be merely reasonable for it to be sustained.

Harnischfeger, supra.

The burden of proof to show that an agency's interpretation of a statute is unreasonable is on the party seeking to overturn the agency action, and thus, it is not on the agency to justify its interpretation. An agency's interpretation is unreasonable if it directly contravenes the words of the statute, it is clearly contrary to the legislative intent or it is without rational basis. *Harnischfeger, Supra*

With regard to questions of fact, the court is required to set aside or modify the agency order if the agency's action depends on any finding of fact that is not supported by substantial evidence in the record. Wis. Stats. § 227.57(6). The term "not supported by substantial evidence," as used in the statute, is considered synonymous with "unsupported by any evidence." *Dairy Emp. Independent Union at Blochowiak Dairy v. Wisconsin Employment Relations Bd.*, 262 Wis. 280, 55 N.W.2d 3 (1952); *Gateway City Transfer Co. v. Public Service Commission*, 253 Wis 397, 34 N.W.2d 238 (1948).

The substantial evidence standard is satisfied when reasonable minds could arrive at the same conclusion as the agency when taking into account all the evidence in the record. *Wisconsin*

Professional Police Ass'n v. Public Service Com'n of Wisconsin, 205 Wis. 2d 60, 555 N.W.2d 179 (Ct. App. 1996). The substantial evidence standard does not permit the court to overturn an agency's finding even if the finding is against the great weight and clear preponderance of the evidence. *Omernick v. Department of Natural Resources*, 94 Wis. 2d 309, 287 N.W.2d 841 (Ct. App. 1979), decision aff'd, 100 Wis. 2d 234, 301 N.W.2d 437 (1981).

The court will not substitute its judgment for that of the agency. It is the function of the agency to determine the credibility of evidence, and the inferences to be drawn from the facts. It is also for the agency to determine the weight of the evidence. The reviewing court will not usurp this function by weighing the evidence. *Omernick, supra*. This is so even where the court might have decided the question differently had it been before the court for initial determination. *In re International Ass'n of Machinists, Lodge No. 1406, A.F.L.*, 249 Wis. 112, 23 N.W.2d 489, 174 A.L.R. 1267 (1946).

DISCUSSION

The Lake District argues the DNR misapplied or misinterpreted Wis. Stat. §31.02(1). That section provides:

(1) The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters... .

The Lake District's position is that the DNR failed to take into account the multiple public interests identified in the statute (and especially those of riparian property owners on Lake Altoona) when deciding to alter the two foot winter drawdown. The Lake District posits that it is incumbent upon the DNR to *balance* the various public and private interests and that it failed to do so as a matter of law. It suggests that the only real consideration of the DNR in reducing the two foot draw down was the state of the fishery in Lake Altoona and that any other considerations were only incidental.

The DNR agrees that a balancing of public interests, safety, health, and property is required by statute and simply says that it did so. It points out that some of the DNR witnesses testified that it would be best if the drawdown were eliminated completely, as that would be in the best interest of the vegetation and aquatic life of Lake Altoona. At the other end of the spectrum is the Lake District,

which prefers, for reasons of property interests, to keep the drawdown at two feet. The DNR says that a .70 of a foot drawdown is, indeed, a compromise that balances the competing interests.

Clearly, what might benefit some of the interests expressed in the statute may be detrimental to others. The Lake District's interests center around concern that a change in the drawdown might result in ice damage to lakefront property. Other interests considered by the DNR (and discussed in more detail below) include the health of aquatic plant life, invertebrates, and fish, dam safety, water quality, environmental pollution, the wetlands, and greater access to the lake by boaters.

It is clear that the DNR's interpretation of the statute is not unreasonable. There is no evidence that its interpretation directly contravenes legislative intent or that it is not rationally based. The DNR has many years of experience in determining water levels and interpreting the applicable statutes. The determination that the order is necessary to protect the public interest and reasonably balances public and private rights is the very type of conclusion which requires the specialized knowledge and expertise administrative agencies were created to provide.

Next, the Lake District argues that "the record contains insufficient evidence in support of the finding that elimination of the winter drawdown of Lake Altoona will not adversely affect riparian properties." Before addressing the question of "substantial evidence," it would seem there are two flaws in this framing of the issue. One problem, of course, is that the order does not *eliminate* the winter drawdown; instead it reduces it to .70 of a foot. Second, the argument overstates what is required of the DNR. It is not necessary that it be shown the reduction in the winter drawdown "*will not adversely affect* riparian properties". Instead, the more modest question is whether the interests of riparian owners have been identified and considered in a balancing process leading to this decision.

Now, for the question of "substantial evidence". The Lake District really takes two positions with regard to the factual basis for the decision. First, it claims that the DNR completely failed to consider the interests of Lake Altoona lake property owners and others. It notes on several occasions in its briefs that the *only* factual basis upon which the DNR relied in reducing the drawdown was the positive effect on the state of the fishery in Lake Altoona. Alternatively, it argues that evidence leading to the conclusion that there would be minimal property damage as a result of the drawdown reduction

was of dubious value.

In response to the suggestion that an enhanced state of the fishery in Lake Altoona was the *only* factual basis considered for the drawdown, the DNR points to the following evidence presented at the hearing from several expert witnesses:

- DNR systematically, while navigating by boat, viewed the entire shoreline of Lake Altoona to gauge whether reducing the two-foot drawdown would harm the shoreline or property along it. This DNR evaluation showed that, although there are 200 or more residences on Lake Altoona, only 47 structures are near enough to the shoreline to be potentially harmed by reducing the winter drawdown to 0.7 foot. And of those 47 structures, only 7 are cottages or houses. The rest of the 47 structures are boathouses, walls, or smaller miscellaneous structures.
- Although no scientific data was offered to the ALJ supporting a 2 foot winter drawdown, sound science showed that reducing the winter drawdown would benefit aquatic invertebrates, aquatic plants, and the fishery in Lake Altoona.
- Setting the winter drawdown at 0.7 foot will not reduce dam safety or flood control capacity and will not harm water quality.
- Setting the winter drawdown at 0.7 foot will neither increase water pollution nor cause other environmental pollution.
- Setting the winter drawdown at 0.7 foot will not harm any wetlands.
- DNR received a petition with over 500 signatures asking it to end the winter drawdown on Lake Altoona. During the Lake Board's own October, 2004 annual meeting, a majority voted to discontinue the drawdown.

In addition, DNR shoreland regulation and zoning expert, Dan Koich, expressed an opinion going to the heart of the Lake District's concerns. He testified that the potential for additional ice damage to structures due to reducing the winter drawdown to .70 foot will be "minimal". While the Lake District may not agree with the opinion of Mr. Koich, such evidence was available for consideration by the fact finder. All the above evidence belies the suggestion that the state of the

fishery was the *only* thing considered in reducing the winter drawdown.

The Lake District's alternate position is that the administrative law judge relied on faulty data in determining that the change in the drawdown would not adversely affect property owners. It urges that the DNR witnesses were largely unqualified to offer opinions about the likelihood of property damage through ice push, as they were not engineers. It also argues that there was an inadequate foundation for the opinions offered by the DNR witnesses. Essentially, it takes the position that property damage really might occur someday if the drawdown is altered. It says the reason the DNR witnesses saw no evidence of this potential was that they were there at the *wrong time*. There was no evidence of potential ice damage because: 1) the summer and winter lake inspections were accomplished at times when weather conditions were not conducive to showing potential ice damage; 2) the observations were made at a time when the 2-foot drawdown was in place and had been in place for in excess of fifty years; and 3) ice damage is only likely to occur every ten years or so, anyway.

Nobody knows with absolute certainty what the impact of a .70 foot drawdown will be in any given year because the drawdown has not yet occurred. Obviously, there are many variables. Still, expert witnesses are able to offer their opinions about what may happen in the future based upon their training, skill and experience. Several DNR experts did so in the present case. Wis. Stat. §227.57(10) requires that due weight be accorded to the experience, technical competence, and specialized knowledge of those DNR witnesses. The Lake District's argument goes to the credibility of the DNR witnesses and the weight of the evidence. This is for the ALJ to determine. To suggest that the agency's decision is unsupported by any evidence, however, is inaccurate.

CONCLUSION

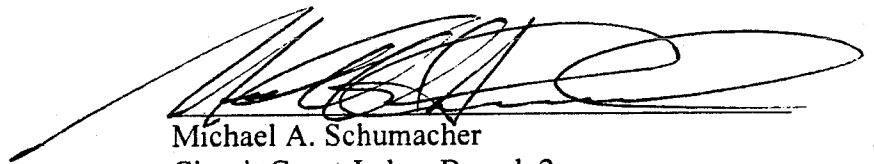
The Lake District has failed to meet its difficult burden of proof to show the agency's statutory interpretation is unreasonable. There is no evidence that its interpretation directly contravenes legislative intent or that it is not rationally based. Competing interests were balanced. When, as in this case, great weight deference is appropriate and the agency's interpretation is not unreasonable, the court must refrain from substituting its interpretation of the statute for the long-standing interpretation of the agency charged with its administration. The court will not do so in the present situation.

There is "substantial evidence" supporting the decision of the ALJ. Based upon the evidence presented, reasonable minds could conclude that .70 of a foot drawdown in Lake Altoona would protect the public interest and reasonably balance the public and private rights. Much of the Lake District's argument goes to the credibility and weight of the evidence, which is for the ALJ to determine, not this court.

Applying the applicable "great weight" deference standard of review owed to the DNR's decision and, in light of the "substantial evidence" in the record, the court finds there is no ground to set aside or modify the agency decision and, accordingly, the decision is affirmed.

Dated this 23 day of August, 2007.

BY THE COURT:



Michael A. Schumacher
Circuit Court Judge, Branch 2

cc: William G. Thiel
P. Phillip Peterson
Don Fawcett
Cynthia Ziebell