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June 30, 2006

SENT VIA E-MAIL & MAIL

William Coleman, Administrative Law Judge
Division of Hearings and Appeals
819 North 6th Street, Room 92
Milwaukee, WI 53203-1685

RE: IN THE MATTER of the Review of the Water Level Decision for Lake Koshkonong and the Indianford Dam on the Rock River in Rock County, WI
Case No. 3-SC-2003-28-3100LR
Our Clients: LKWA and Thiebeau Hunting Club
Our File No. 12678.56886

Dear Judge Coleman:

With regard to the above-referenced matter, attached please find the losing Brief-In-Chief of Lake Koshkonong Wetland Association, Inc., and Thiebeau Hunting Club.

By copy of this letter, we are mailing same to all parties of record. Additionally, we are concurrently sending this letter and attached brief via E-mail to you and to counsel of record, pursuant to the Court's amended scheduling order.

Please advise if there are any questions or concerns. Thank you.

Sincerely,

AXLEY BRYNELSON, LLP

Charles V. Sweeney

MRO:bjl

cc: Attorney William P. O'Connor
Attorney Mary Beth Peranteau
Attorney Michael J. Cain
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Mr. Joseph T. Fisher
Mr. Victor Illichmann
Mr. Jeff Murley

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

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

**LAKE KOSHKONONG WETLAND ASSOCIATION, INC.,
AND THIEBEAU HUNTING CLUB'S
CLOSING BRIEF-IN-CHIEF**

NOW COME Lake Koshkonong Wetland Association, Inc., and the Thiebeau Hunting Club, by their attorneys, Axley Brynelson, LLP, by Charles V. Sweeney and Mitchell R. Olson, and submit this Closing Brief-In-Chief in support of the Wisconsin DNR's April, 2005 Water Level Order for the Indianford Dam on Lake Koshkonong.

I. INTRODUCTION

The ultimate issue before this Administrative Body is of great importance to many interest groups, land owners, and members of all user groups (boaters, fishermen, kayakers, etc.) of Lake Koshkonong. The parties to these proceedings have devoted great amounts of time and resources to present their cases at a lengthy and comprehensive hearing. Both lay witnesses and experts have testified to a wide array of facts and opinions. The question now presented is how will this Body address and resolve this dispute?

The Petitioners have challenged the DNR's most recent water level order governing Lake Koshkonong. The DNR proposes a water level regime substantially similar to the prior water level orders in place since 1982. Petitioners, however, seek a target water level and maximum water level 7.2 inches and 8 inches higher than the DNR level, respectively.

In reviewing the DNR's water level order, issued pursuant to Wis. Stats. §31.02, the question presented is whether DNR's order is "in the interest of public rights in navigable waters or to promote safety and protect life, health and property."

The Lake Koshkonong Wetland Association ["LKWA"] and the Thiebeau Hunting Club ["THC"] support the DNR's water level order and agree that said order is in the interests of public rights in navigable waters, promotes safety, and protects life, health and property. The DNR has presented a compelling case, in its Environmental Assessment, at the Hearing in this matter, and in its closing brief, substantiating that the proposed order is consistent with section 31.02, Stats., and supported by the law and evidence of record.

In particular, the DNR order protects the public rights in wetlands. The mission of LKWA “is to protect the existing wetlands on Lake Koshkonong and Rock River and to promote the life of natural plants, fish, birds, and other wildlife in the basin.” This record is replete with evidence of the historical losses of wetlands at Lake Koshkonong, and the perilous status of the remaining high-quality wetlands, including floodplain forests and sedge meadows. Moreover, our administrative code emphasizes that: “Wisconsin has lost almost half of its historic wetland acreage and it is recognized that the protection, management and restoration of wetlands in the state will benefit fish, wildlife, water quality, flood control, biodiversity and natural scenic beauty ... Pursuant to s. NR 1.95, it is the policy of the department to reverse the loss of wetlands in Wisconsin and to encourage and facilitate the protection, management and restoration of wetlands.” NR 353.01.

LKWA and THC presented extensive lay and expert testimony to support the DNR’s water level order and to challenge the proposed increased level requested by Petitioners. This Brief will summarize that testimony, and explain why the DNR’s order should be affirmed based, in part, on the wetland factor.

At the heart of this dispute, we have certain user groups seeking higher water levels in order to provide marginally greater boating access and use, and attendant benefits. At Petitioner’s target level, navigable surface area would only increase 44 acres. Given the Lake’s 10,460 acre size, and its inherently shallow gradient from shore, adding that amount of surface area is not of considerable consequence to boating and recreational use. However, raising the lake level by 6 to 8 inches is likely to have devastating effects on numerous ecological and biological values, including wetlands. The DNR’s order acknowledges these issues, whereas the Petitioner’s proposal fails.

Based on the arguments submitted by DNR, and the arguments that follow herein, the DNR’s order should be approved and adopted as the Final Order governing the operation of Indianford Dam.

II. BURDEN OF PROOF

The DNR has the burden to show, by the greater weight of the credible evidence, that its proposed April 15, 2004, Water Level Order for Lake Koshkonong complies with the statutory standard. NR 2.13. The applicable standard provides that the DNR’s order shall be “**in the interest of public rights in navigable waters or to promote safety and protect life, health and property.**” Wis. Stats. §31.02(1).

This is a Class 1 Contested Case proceeding under Wis. Stats. §227.01. “A Class 1 proceeding is a proceeding in which an agency acts under standards conferring **substantial discretionary authority** upon it.”

III. EFFECTS OF PROPOSED ORDER ON LAKE LEVELS AND OHWM.

LKWA and THC join in the arguments of WDNR on the expected increase in water levels on Lake Koshkonong should the Petitioner's proposed order be implemented. DNR's brief explains in detail the deficiencies of the Montgomery Model and the likely effects on water levels and Ordinary High Water Mark (OHWM) expected to result from Petitioner's proposal. This brief will highlight the main points of contention.

First, we must compare the competing orders. DNR's proposed order calls for a maximum water level of 776.33 feet msl, and a target level of 776.20. In contrast, the Petitioners seek a maximum water level of 777.0 and a target level of 776.80. **The Petitioner's maximum is 8 inches greater, and their target level is 7.2 inches greater.** (Exhibit 803) At Hearing, Petitioners attempted to minimize such increases. However, the undeniable purpose of the Petitioner's case is to raise water levels on Lake Koshkonong. It is obvious that implementation of the Petitioner's Order would have such an effect.

Second, DNR's Ken Johnson testified that implementation of the Petitioner's proposed order would result in a 6-7 inch variation in summertime water levels over the DNR proposed order. He cited testimony of Robert Montgomery acknowledging this fact. (Direct Testimony, 28) (Exh. 805) Mr. Montgomery admitted on cross-examination to at least an increase of .4 to .5 feet increase in water levels.

Moreover, under cross-examination, Petitioner's expert, Mr. Stephen Hjort, admitted that raising the water level to 777 msl would at least affect 63 acres of shoreland via inundation. This Administrative Body is referred to the photographs submitted by Mr. Rick Persson, displaying the effects of water levels on wetlands when water levels approach 777.0 msl. These images speak volumes on the amount of inundation and the effect of the proposed higher water levels. (Exhibits 618-638)

Third, LKWA and THC adopt the position of WDNR on Ordinary High Water Mark. As Ken Johnson testified, until fairly recently in the lifespan of this Dam, the wicket gates were not operational. This produced more "bounce" in flows, and directly impacted the OHWM. It is clear that years of uncontrolled flows by a non-functional Dam resulted in an artificially high OHWM. Moreover, Ken Johnson persuasively challenged Petitioner's argument that its proposed order will not affect OHWM. Petitioner's analysis failed to consider wave "set up," as driven by wind, in combination with higher average water levels. These factors will contribute to an increased OHWM, resulting in loss of property to all riparian owners, and direct impacts on shoreline habitat, as discussed below.

Mr. Scott Storlid also testified on the issue of OHWM. The concern raised is that the OHWM currently recognized is artificially high. If so, then the Petitioners' increased water level standards, which rely on OHWM for support, are further called into question. Mr. Storlid affirmed the testimony of Ken Johnson, commenting: "I would point out once again that these marks where (sic) identified following a number of years of improper operation of the dam and should be viewed with ample skepticism until such time that the dam is operated correctly for a sufficient period of time to verify the OHWM elevation." Mr. Storlid concluded: "when coupled

with the conclusion of the 1982 DNR EA that indicates that operating order water levels above 776.33 msl will adversely impact private property, shoreline stability, and riparian wetlands, any proposal for additional water level increases needs to be carefully evaluated ... It is my professional opinion that DNR had done this in their 1982 and 2004 EAs and the most recent order.” (Exhibit 348)

Thus, the DNR presented sufficient evidence to establish that the Petitioner’s proposal will raise water levels on Lake Koshkonong and raise the ordinary high water mark. Such effects cause great concern to LKWA and THC. The following sections will establish the relevance of wetland habitat to a Section 31.02 water level order, and then elaborate on the negative effects expected from Petitioner’s proposed water level increase.

IV. CONSIDERATION OF WETLAND IMPACTS, PURSUANT TO NR 1.95 AND THE PUBLIC TRUST DOCTRINE, IS ESSENTIAL TO THE DNR’S WATER LEVEL ORDER.

A point of contention at Hearing was whether DNR exceeded its scope of review by considering NR 1.95. Both LKWA and THC contend that DNR must consider NR 1.95. DNR provides a comprehensive discussion of this issue at pages 24-26 of its Closing Brief. LKWA and THC join in that discussion. Again, LKWA and THC will not repeat that argument here, but will highlight several key points.

The ultimate issue is whether DNR’s Order regulating and controlling the level and flow of water on Lake Koshkonong was made “in the interest of public rights in navigable waters or to promote safety and protect life, health and property.” An important sub-issue is what factors may be considered as part of the “public rights” and “safety, life, health, and property” tests. Impact on wetlands certainly qualifies as such a factor.

NR 1.95 sets forth the Policy of the Natural Resources Board with respect to wetlands preservation, protection, restoration and management. DNR “has the responsibility of making and enforcing regulatory and management decisions which, directly or indirectly, affect the quantity and quality of many Wisconsin wetlands.” NR 1.95(2). “Wetlands are known to possess a wide range of natural and human values” including biological functions, watershed functions, recreational, cultural and economic value, scientific study areas. NR 1.95(3). The policy of the Natural Resources Board is “that wetlands shall be preserved, protected, restored and managed to maintain, enhance or restore their values.” NR 1.95(4)(a) Moreover, “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.” Id. “The department shall preserve, protect, restore and manage the state’s wetland communities to be sustainable, diverse and interspersed with healthy aquatic and terrestrial communities.” NR 1.95(4)(d); See also DNR Closing Brief and Exhibit 850.

In addition, “public rights in navigable waters” must include impacts to wetlands, both direct and indirect, under the public trust doctrine. Just v. Marinette County, 56 Wis.2d 7, 17-18 (1972). DNR’s closing brief provides a thorough argument supporting this point.

Thus, DNR is authorized and required, by both NR 1.95 and its public trust enforcement obligations, to consider direct and indirect impacts to wetlands around Lake Koshkonong when setting water level orders under section 31.02, Stats. DNR clearly made such considerations as part of its analysis.

LKWA and THC assert that these wetland impacts are crucial to this water level decision. The mission of LKWA “is to protect the existing wetlands on Lake Koshkonong and Rock River and to promote the life of natural plants, fish, birds, and other wildlife in the basin.” These parties submitted substantial expert testimony at the Hearing on expected wetland impacts in the event the Petitioner’s water level order is adopted. A summary of that testimony follows.

V. SUMMARY OF LKWA EXPERT TESTIMONY ON WETLAND IMPACTS FROM INCREASED WATER LEVELS ON LAKE KOSHKONONG.

LKWA offered expert testimony from Jeff Kraemer, Scott Storlid, and Dr. James Reinartz on the issue of how higher water levels would impact Lake Koshkonong wetlands. It is crucial to recognize the undisputed evidence of historic wetland loss, both at Lake Koshkonong and throughout Wisconsin. Each witness established significant additional risks of harm to and loss of these wetlands, should water levels be raised.

A. JEFF KRAEMER, NATURAL RESOURCES CONSULTING, INC.

Mr. Jeff Kraemer, an Associate Principal Scientist with NRC and a DNR “assured wetland professional,” was involved in five separate studies at Lake Koshkonong, including a literature review, historical aerial photograph review, a wetland plant community assessment, an evaluation of floodplain forest shoreline under proposed water level increases, and a federally threatened plant study.

According to wetland science literature, “the distribution of plants within natural wetland communities are determined primarily by differences in species responses to hydrological conditions.” As a rule, wetland vegetation is highly influenced by water levels, and there are threshold water levels, above which wetland plants cannot tolerate. “Very few emergent plant species can tolerate prolonged and deep inundation, therefore the general trend is that increasing depth and duration of inundation in wetlands beyond tolerance thresholds will lead to decreased plant species diversity and increased open water.” Conversely, periodic drawdowns and fluctuating water levels will lead to an increase in emergent vegetation. (Direct Testimony, 11:4-26)

Mr. Kramer also examined the extent of historic wetland loss on Lake Koshkonong. He directly attributes a decrease in emergent wetland vegetation and diversity to progressive increases in water levels over the past 75 years. An historical aerial photograph review by NRC “revealed clear evidence that substantial emergent vegetation loss has occurred” since 1937 “that compares with the progressive water level increase over the same period.” In particular, the study found that: (1) “more than 61 acres of emergent wetland and floodplain forest have become open water along 2.6 miles of shoreline” within the Carcajou Shooting Club wetland; (2)

“more than 244 acres of emergent wetland have become open water and 33 acres of wetland shoreline have receded to open water” at the Mud Lake study site; (3) “64 acres of emergent wetland was converted to open water” at the Hights Bay study site; and (4) “89 acres of emergent wetland have become open water and 29 acres of wetland shoreline have receded to open water” in the Stinkers Bay study area. This results in a total loss of 520 acres of emergent wetlands to open water condition over the past 50-60 years on Lake Koshkonong, limited only to the four study areas. (Direct Testimony, 12:1-14:11)

With respect to the aerial photo analysis, Mr. Kraemer discredited the challenges raised by RKLD witness Randal Weltzin. Although Weltzin concentrated on the fact that black and white panchromatic film was insufficient to discern types of vegetation, Kraemer responded that his analysis did not look at vegetation type. Rather, the focus was on a delineation of open water areas versus areas with emergent vegetation – easily identifiable on black and white film. Moreover, Mr. Kraemer effectively rebutted Mr. Weltzin’s opinion that the aerial photograph analysis was flawed without “stereoscopic pair analysis.” Because Lake Koshkonong’s shoreline margins are extremely flat, and because open water versus shoreline is easily visible, there was no need for stereoscopic analysis. Mr. Weltzin did not establish any errors in Mr. Kraemer’s findings, but rather, made unfounded criticisms of the techniques employed. Finally, Mr. Kraemer rebuked the challenge raised to his quantitative assessment of shoreline recession. Mr. Kramer explained how each aerial photograph was rectified using Geographic Information System (GIS) programs (LKWA Exhibit 349) (See also LKWA Exhibit 350, pgs. 3-4: “aerial photographs ... show incontrovertible evidence that portions of the Lake Koshkonong shoreline have receded substantially between the 1930s and 40s and 2000” and “also show incontrovertible evidence that portions of marshes in the wetlands surrounding Lake Koshkonong have converted to open water between the 1930s and 40s and 2000.”)

Mr. Kraemer’s finding on wetland loss is additionally supported by the testimony of lay witnesses who have lived on and observed Lake Koshkonong for decades. For example, during the public testimony portion of the Hearing, Mr. John Scullin gave a compelling presentation based on his first-hand observations of Mud Lake over the past 50 years. Mr. Scullin testified to first hand observation of substantial shoreline and vegetation loss, and offered aerial photos to bolster his observations. (John Scullin Written Testimony, Exhibit 1055, and associated Exhibits 1042-1054) Likewise, Mr. Robert Gruennert, associated with the Crescent Bay Hunt Club, described his first-hand observations of wetland and floodplain forests lost on Lake Koshkonong. (Robert Gruennert Written Testimony, Exhibit 1034; See Photos 1025-1033).

Next, NRC conducted a detailed wetland assessment within the major wetland complexes adjacent to Lake Koshkonong in 2005, resulting in a full floristic quality assessment. (LKWA #345) Of note, the “sedge meadows” sampled contained the highest number of species and contained “the highest floristic quality” of the community types studied. These sedge meadows “appear to occur at the extreme upper edge of flooding, and we saw many areas where many or most of the tussock sedge hummocks were dead or damaged, presumably due to the high water in 2004.” (Direct Testimony, 18:21-19:14)

NRC also conducted a study of Floodplain Forested Wetlands. The study examined the correlations between the growth rates of trees, the elevations at which they occur, and recent and historic water levels within the floodplain forests adjacent to Lake Koshkonong. The study found a “strong correlation” between slow growth rates of floodplain species and low elevations. This correlation is “quite conclusive” that adverse impacts will follow from even slight increases in water levels on Lake Koshkonong. Most notably, a large percentage of trees sampled appeared to be at the threshold water level beyond which the trees cannot tolerate before detrimental damage and morbidity results. (Direct Testimony, 22:15-23:26)

Further, the Floodplain Forested Wetlands study examined floodplain soils at water elevations between 777.07 and 776.95 feet msl. Photographs depicting the graphic change in inundation between 776.2 and 777.0 appear at LKWA #331,332. At the survey site, such a water level increase will cause 42.8 acres of current shoreline and wetland to become permanently inundated when water levels are at 777.0. (Direct Testimony, 24:5-22)

In conclusion, Mr. Kraemer testified that the Petitioner’s proposed water level order: (1) has the potential for adverse impacts on threatened and endangered species known to exist in wetlands adjacent to Lake Koshkonong, based on correlations between hydrology and plant occurrence; (2) will affect the most susceptible plant communities – floodplain forests and sedge meadows – due to inundation; and (3) shallow marsh communities will decrease and open areas will increase. (25:3-8)(26:3-31) Mr. Kraemer further concluded that RKLD’s EIR failed to demonstrate that significant adverse impacts to wetland functional values will not result from their proposal. Kraemer cites multiple instances where RKLD admits that higher water may have negative impacts on wetlands. (27:6-28:12)

On cross-examination, Mr. Kraemer clarified that the phenomenon of ‘hemi-marsh’ is a degrading stage where wetland is reverting to lake stage. This change will continue if higher water levels cause additional recession of wetlands. Mr. Kraemer also challenged the notion of upgradient wetland creation. He opined that most upgradient land is already dedicated to agriculture or other uses. The slopes away from the water’s edge are at a greater grade, such that there is not a one for one trade off.

B. SCOTT STORLID, NATURAL RESOURCES CONSULTING, INC.

Mr. Storlid is President and Senior Principal Scientist at Natural Resources Consulting, Inc. His testimony addressed the multiple functional values of wetlands, including: floral diversity, wildlife habitat, fishery habitat, flood/storm water attenuation, water quality protection, shoreline protection, groundwater, and aesthetics/recreation/education. (Direct Testimony, 6:26-7:7)

Mr. Storlid opines that “allowing higher water levels, even slightly higher water levels, on Lake Koshkonong will have significant adverse impacts on wetland functions and values, specifically to emergent marshes, sedge meadows, low prairies and the floodplain forests.” As a basic principal: “Higher sustained water levels lead to the loss of emergent marsh vegetation and certainly to the ultimate destruction of wetland forests.” (Direct Testimony, 12:4-24)

On cross-examination, Mr. Storlid gave compelling testimony going to the heart of this issue. He testified that the Petitioners' proposal to raise water levels to a historically unprecedented level presented "significant risks of unknowns." He described the proposal as a "grand experiment." He cautioned against pursuing such an experiment when the potential impacts on private property and wetlands were so obvious and dangerous.

C. DR. JAMES A. REINARTZ, UW-MILWAUKEE

Dr. Reinartz is the Director of the University of Wisconsin-Milwaukee Field Station, with expertise in wetland plant ecology, wetland hydrology, and wetland restoration. (Direct Testimony, 1) Dr. Reinartz worked with NRC on a wetland assessment at Lake Koshkonong in 2003. (Direct Testimony, 2) That study identified "wetland communities that would be most susceptible to water level increases." (Direct Testimony, 2)

In particular, the two major floodplain forests (Koshkonong Creek and Rock River inlets) of the size and quality observed are "extremely uncommon in southeastern Wisconsin. (Direct Testimony, 3) These floodplain forests are particularly at risk if the lake levels are raised as proposed by Petitioners:

Floodplain forest trees are well adapted to spring flooding. They flourish under natural hydrologic conditions that provide a wide annual variation in water levels including high spring flooding and dry soil conditions late in the same season. They are not, however, tolerant of prolonged periods of inundation or waterlogged soils that cause the soils to become and remain anaerobic. Permanently waterlogged conditions deprive the tree root systems of the oxygen they require for growth. Since floodplain forests rely on fluctuating water levels that allow soil to become oxygenated during late summer drawdowns, they are very susceptible to slight increases in water levels if the water levels have been regulated and stabilized at an artificially high level. (Direct Testimony, 4)

Dr. Reinartz concludes that the floodplain forests are already affected by current water levels which limit the depth of soils in which to root. A further reduction of 0.6 feet in the depth of the rooting zone will cause "considerable mortality" of trees at lower elevations and reduced growing rate and weakening of trees at slightly higher ground – resulting in increased susceptibility to disease and pest damage and higher mortality rates over time. (Direct Testimony, 4)

Dr. Reinartz also observed high quality shallow marsh communities that are susceptible to adverse impacts caused by increasing water levels. He reported the Lake Koshkonong shallow marsh wetlands to contain a "relatively high level of plant species diversity..." He observed a loss of species diversity in those areas with deeper standing water caused either by a shift to cattail monocultures or a shift to open water and less emergent vegetation cover. (Direct Testimony, 4)

In conjunction with NRC, Dr. Reinartz conducted a detailed study of floodplain forest wetlands, looking at Lake Koshkonong water levels and long-term growth rates of trees and the elevations at which they occur. The study found no trees growing at a ground elevation at or below the current target lake level of 776.2 ft, and only one tree growing at an elevation lower than the average August-October lake level since 1972 (776.55 ft.). “This suggests that these tree species are incapable of growing at elevations lower than the average August to October lake level, and that increased late season water levels will cause substantial mortality of trees growing at relatively low elevations.” Moreover, “increasing base flow (late season) water levels by 0.6 feet in Lake Koshkonong is likely to cause substantial mortality of trees over the long term.” (Direct Testimony, 7)

Due to a history of “unnaturally constant late season water levels in the Lake Koshkonong,” there is already a severely restricted rooting zone for plants. Wetland plants will have very little resilience to a 0.6 ft. increase in water levels. (Direct Testimony, 8) Dr. Reinartz concluded that RKLD’s proposed water level order will produce widespread mortality and decline of the dominant trees in the floodplain forest. Uprooting of trees will follow, and shoreline erosion and recession will lead to further loss of wetlands. Moreover, such disturbance will open the wetland communities to colonization by invasive species. (Direct Testimony, 8-9)

In his rebuttal memorandum, Dr. Reinartz challenged certain findings of Robert Montgomery and Dr. Stanley Nichols. Those RKLD experts testified that there would be no difference between the DNR proposal and the RKLD proposal, for flooding events over 777.0 ft. Dr. Nichols then concluded that, because flooding events are the primary influence on wetland communities’ distribution, and flooding events remained constant under either scenario, then there would be no effect on Lake Koshkonong wetland communities. (LKWA Exhibit 350)

Dr. Reinartz responded that “average, non-flood, growing season water levels influence the depth of aerated soil and hence the rooting zone available to wetland plants ... Average growing season water level relative to soil surface has been shown in many studies to have a strong correlation with characteristics of the wetland plant community.” Both duration of flooding *and* average growing season water levels are vital to wetland community characteristics. Dr. Nichols’ emphasis on the former, and mysterious omission of the latter, disregards accepted scientific principles. His conclusion is not supportable. (LKWA Exhibit 350)

Additionally, Dr. Reinartz rebuked the argument of Dr. Stanley Nichols claiming that destruction of the floodplain forest, via increased tree mortality due to flooding damage, was a habitat improvement. Dr. Reinartz highlighted the rare nature of floodplain forests. The loss of these wetland types would result in a decreased diversity of the ecosystem as a whole. “We absolutely do not improve the natural landscape by converting our last remaining examples of floodplain forest to open disturbance communities with a lot of dead standing and tipped-up trees; of this I have a very high degree of professional certainty.” (LKWA Exhibit 350)

VI. REBUTTAL OF STEPHEN J. HJORT TESTIMONY.

The only expert witness offered by Petitioners to address wetland impacts, in a substantive fashion, was Mr. Stephen Hjort. LKWA and THC challenge many of the opinions offered by Mr. Hjort, including the following:

Mr. Hjort testified to having expertise in virtually every area of natural science, biology, and ecology. He testified in detail concerning fish kills and turtle mortality related to water elevations. Yet on cross-examination he admitted to no expertise in aquatic biology.

Mr. Hjort criticized NRC's wetland studies and the sample sites/sizes employed. However, Mr. Hjort only performed one wetland survey/study looking at 4 plots, each 30 feet by 30 feet, for the *entire* Lake Koshkonong watershed.

Mr. Hjort emphasized the values of hemi-marsh conditions on Lake Koshkonong. He suggested that increased water levels will result in a conversion of monoculture, emergent wetlands to hemi-marsh wetlands with greater floristic diversity. However, the same evidence he used to support that position, contradicts his conclusions. Exhibit 128, relied on by Mr. Hjort, illustrates that increased water levels results in a conversion of emergent marsh to lake phase over time, with a hemi-marsh being a *temporary or intermediate* stage. "A newly flooded marsh will remain productive up to an estimated 5 years... after that, a marsh left to its own succession will cycle to open water marsh that is low in productivity." (Exhibit 128) There is no "wetland benefit" from a condition which is a precursor to open water, and ultimate wetland loss. (Exhibit 348)

At page 21 of Mr. Hjort's direct testimony, he states he does not have sufficient information to reach any conclusions about the effect of the Petitioner's water level proposal on floodplain forests. Yet in the Petitioner's EIR, Mr. Hjort writes: "Forested floodplains are not expected to be impacted." (Exhibit 348) Such contradictions raise serious questions about the reliability of Mr. Hjort's testimony.

VII. IMPACTS OF AN INCREASED WATER LEVEL ORDER ON PUBLIC USES OF LAKE KOSHKONONG.

This case was often framed at hearing as a dispute between the right of man to use the Lake versus wetlands, fish, wildlife, and other "non-human" factors. LKWA and THC respond to this position from two perspectives.

First, Petitioners failed to recognize the inherent human values and benefits attendant to the natural environment. Preserving and protecting wetlands provides a host of benefits to humans, including flood control, habitat for fish and game in the interests of fishermen and hunters, groundwater quality and recharge, recreational space, and scientific study areas, to name a few. Wisconsin's public trust doctrine expressly recognizes these wetland values.

Second, Petitioners failed to establish a clear benefit from their proposal to raise water levels on Lake Koshkonong. Petitioners cited a variety of “human uses” that arguably were not served or protected by the DNR’s water level order, including boat access and navigation, piers and boat lifts, and public boat ramps. However, the testimony presented was not compelling.

Petitioners claimed boating access on Lake Koshkonong is woefully inadequate. In response, DNR Warden Cross, Ken Bush, Scott Storlid, and LKWA’s Rick Persson all testified that they regularly navigate on Lake Koshkonong without difficulty. For example, Mr. Storlid testified: “Using my largest boat, the 17.3 foot Alumacraft, I have never had problems launching at the Charlie Bluff Boat landing in Rock County or, in general, navigating the lake ... As with any lake, one needs to be aware of obstructions and limitations and use the lake accordingly.” (Exhibit 348)

Witnesses for RKLD and the Boating Associations also acknowledged their ability to navigate. Mr. Frank Micale, for the Rock Koshkonong Association, discussed an annual “radar run” event where the Lake and its launches support “lots of boats.” This is not a case where boating is impossible or seriously impaired by the DNR operating order. Rather, this is a case of man trying to create a deep waterbody where it can never reasonably exist.

Boating will not change under either order. The bottom line is that Lake Koshkonong will never support the use of certain larger boats, and will be limited during low flow periods. Adding six to eight inches of water will not make an appreciable difference.

Next, Petitioners complain of an inability to install piers of a reasonable length to access Lake Koshkonong at a depth to launch a boat. Again, at certain shallow portions of the Lake, this has been and will always be a problem. Raising the Lake seven inches will not dramatically shorten pier lengths. These owners bought their land with full knowledge of this condition.

Additionally, Petitioners claim that there are inadequate boat ramp access facilities on Lake Koshkonong. However, the testimony listed numerous boat ramps both above, below, and on the Lake. Access at the upper and lower Rock River is clearly sufficient for all categories of boats to gain access. Moreover, certain ramps on Lake Koshkonong, proper, can and are used for launching substantial boats. Although not all access points meet the needs of large boat owners, that is not a reasonable expectation given the natural depth features of this Lake. Moreover, boating and lake access is about more than large power boats. Small fishing boats, canoes, kayaks, windsurfers, jetskiers, and ice fisherman can use the ramps unsuitable for large boats. Petitioners essentially ignored such users in their analysis.

The Hearing Examiner should consider the single-minded approach of the Petitioners. They insist on following the popular trend of larger and more powerful boats. However, they ignore the inherent limitation of this water body. If these boaters wish to use that type of boat, Wisconsin is blessed with many waters, not that distant from Lake Koshkonong, to meet that demand. The State need not modify the depth and flow of all water bodies to suit the needs of a single user group, such as large boat owners. Yet that is basically what Petitioners demand.

Perhaps the best quotation from the Hearing was this: "You should buy a boat to fit the lake, not try to fix the lake to fit the boat." Petitioners ask far too much of Lake Koshkonong. The impacts of their proposal are far too detrimental, and create too many risks to the Lake and its surrounding environs, to even consider adoption of the proposal.

Ultimately, as stated by Ken Johnson, the impact of increased water levels on Lake Koshkonong will be a "preponderance of negative impacts on habitat" and only "marginal impact on navigation." Petitioner's perceived benefit of higher water must be balanced with its concomitant costs. The DNR's EA and proposed Order does account for all such interests, and should be adopted as the final order.

VIII. CONCLUSION

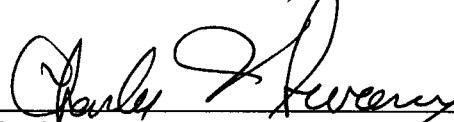
The "mission statement" of the Rock-Koshkonong Lake District is "to protect, preserve and improve the natural resources of Lake Koshkonong and the Rock River for an equal balance of wildlife, habitat and recreation." Their proposed water level order fails to meet the spirit of that mission. Petitioners have emphasized human uses, such as boating and swimming, to the virtual exclusion of habitat and wildlife values. Their only wetland expert, Stephen Hjort, failed to address many of the crucial wetland issues which may arise from a water level increase.

In contrast, the DNR, LKWA, and THC presented ample evidence and expert testimony to meet the DNR's burden of proof. The testimony related to wetlands was particularly compelling and important to the overall analysis. The record demonstrates that DNR has complied with the statutory requirements under section 31.02, Stats. As the Department has acknowledged, it is impossible to please all interest groups when managing a complex and inherently limited resource such as Lake Koshkonong. The Department has nevertheless performed a responsible and legally sufficient review of all interests.

LKWA and THC respectfully request that this Administrative Body affirm the DNR's Order, dated April 14, 2005.

Dated this 30th day of June, 2006.

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