

December 30, 2012

VIA EMAIL

Jon Simonsen
Environmental Review Coordinator
107 Sutliff Avenue
Rhineland, WI 54501

Re: Commentary regarding Environmental Analysis and Decision on the Need for an Environmental Impact Statement (EIS) entitled “Evaluation of a New Operating Order for the Rest Lake Dam”

Dear Mr. Simonsen:

Please accept this letter as the comments of the Manitowish Chain Defense Fund regarding the above-referenced Environmental Analysis (EA).

A. Background on the Defense Fund

The Manitowish Chain Defense Fund, LLC (“Defense Fund”) is a limited liability company that was formed after it became known that the DNR was considering changes to the operating order for the Rest Lake Dam. The Defense Fund is managed by four members who are dedicated to protecting and improving the quality of life for all in Manitowish Waters, Wisconsin: (1) the Town Board of the Town of Manitowish Waters, (2) the Manitowish Waters Chamber of Commerce, (3) Manitowish Waters Alliance, Ltd.,¹ and (4) Manitowish Waters Lakes Association, Inc.² The Defense Fund is supported by financial contributions from hundreds of property owners on the Manitowish Chain of Lakes. The sole mission of the Defense Fund is to strengthen the voice of the people by allowing them to pool their resources so

¹ Manitowish Waters Alliance is a corporation formed to preserve and improve the environment and ecology of the area, assist in orderly development and civic improvement, preserve natural resources and beauty, and promote community interest and participation. Members include those who own property or reside in Manitowish Waters or property which abuts the Manitowish Chain. *Town of Manitowish Waters Year 2022 Comprehensive Plan* at 4-13, http://mwtown.org/assets/files/2022_Land_Use_Plan/MW_Year_2022_Comprehensive_Plan.pdf (Cited hereinafter as “*Manitowish Waters Comprehensive Plan*”).

² Manitowish Waters Lakes Association was established in 1992 to maintain, protect, and enhance the quality of the Manitowish Chain and other waters in Manitowish Waters, Wisconsin. The association works with the UW-Extension and the DNR and is a member of the Wisconsin Lakes Association. *Id.*

that they can monitor the DNR's proposals and challenge any proposals that are not in the community's interests.

B. The existing operating order for the Rest Lake Dam has fostered extensive development based upon the reasonable expectation that the operating order would not change.

The water levels on the Manitowish Chain of Lakes (the "Chain") have been controlled by the Rest Lake Dam for 125 years. For the last 100 years, the summer maximum water level has always been set at 8'6" on the dam gauge, and there has always been a winter drawdown.

Because water levels on the Chain have been controlled for over a century, people have relied upon the water levels established by the order. Throughout the dam's existence, the dam has had an extraordinary impact on the local community. Indeed, nearly 100 years ago, the Wisconsin Railroad Commission recognized the Chain as being one of "the most famous summer resort and fishing waters in the state of Wisconsin." *In re Determining the High Water Mark to Be Established on the Rest Lake Reservoir Operated by the Chippewa & Flambeau Improvement Co.*, 16 W.R.C.R. 727, 733 (September 10, 1915). The Commission noted: "Large sums of money have been invested by resort owners in resorts along the shores of the lakes and on the islands, and the waters are resorted to by thousands from this state and adjoining states during the summer season. There are many private homes built along the shores of the lake and large sums of money have been put into these improvements." *Id.* at 733-34.

Over the 97-plus years since the Commission made the above-noted observations, the validity of its observations has only strengthened. As of today:

- The Manitowish Chain features 1,378 private lake lots, 1 marina, 1 motel, 1 bed and breakfast, and 24 cabins and resorts. *EA* at 38.
- "Residential land use in Manitowish Waters is primarily concentrated around the densely developed" Manitowish Chain. *Manitowish Waters Comprehensive Plan* at 8-4. "Most lakeshore areas that are not under public ownership have some residential development occurring along the shoreline or immediate backlot areas." *Id.* The EA recognizes there is dense residential lakeshore development on the Chain. *EA* at 38. The total assessed value of the waterfront homes on the Chain is at least \$418,695,300. *EA* at 45.
- "Most of the residential and commercial land use in Manitowish Waters is based on tourism." *EA* at 38. Although people visit the area for a number of reasons, there is no question that the Chain is the single most important factor that draws people to visit the area. In the busy tourism period, when accommodations and seasonal homes are occupied and seasonal visitors are counted, the total population of the Township rises from 646 to 4,882 persons, a near eight-fold increase. *Manitowish Waters Comprehensive Plan* at 1-13; *EA* at 38-39. "The money spent by tourists is an

important base of the local economy,” with an estimated \$12.2 million in annual expenditures. *EA* at 45.

- “In the Town of Manitowish Waters, the [Chain] has proven to be the main center for human activity, both historically and presently.” *Manitowish Waters Comprehensive Plan* at 5-20. Because the local economy and property tax base is so heavily dependent upon the Chain and its water levels, the Town of Manitowish Waters’ Comprehensive Plan establishes a formal policy of “closely monitor[ing] the ownership and operations of the Rest Lake Dam” for the purpose of preserving “water levels of the [Chain] and resulting property values.” *Id.* at 9-12.

Importantly, although the dam allows artificial water levels to be maintained throughout the year, there is no evidence to suggest that those water levels are causing any harm to the environment. Instead, the evidence shows that because the artificial water levels have existed for so long, they have become a new “natural” condition to which the environment and community have adapted exceedingly well.

Because the existing order has been in place and worked so well for so long, local residents overwhelmingly oppose changes to the order as being unnecessary and unwarranted. Several years ago, the DNR was served with a petition signed by more than 1,000 residents who opposed changes. More recently, 297 out of 298 persons who responded to a Defense Fund survey indicated that they oppose the DNR’s proposed changes.

Simply put, the public opinion is that the DNR should not be trying to “fix” something that isn’t “broken.”

C. The EA is fundamentally flawed for numerous reasons.

Undaunted by public opinion, the DNR has released the EA and announced that it intends to make major changes to the operating order. Under the DNR’s preferred alternative, (1) winter water levels would rise by 30 inches, and (2) summer water levels would fall as many as 18 inches below normal levels on a much more frequent basis.

When the DNR exercises its power to modify operating orders for dams, the DNR is required to act in the interest of public rights in navigable waters and to promote safety, protect life, protect health, and protect property. WIS. STAT. § 31.02(1). The fundamental purpose of an EA is to make a reasonably informed prediction of the effects that a proposal will have on the environment so that the DNR and the public can be assured that the DNR is making informed decisions. Accordingly, when preparing an EA, the DNR must (1) summarize the DNR’s factual investigation, (2) develop, describe, and evaluate alternatives, (3) “inform decision-makers of a proposed action’s effect on the environment,” and (4) provide sufficient evidence that the DNR’s proposed action is justifiable. WIS. ADMIN. CODE § NR 150.02(9). Where an EA does not do these things, it is impossible for the DNR to make reasonably informed decisions.

Here, as explained below, the EA falls far short of these standards in several critical respects. Accordingly, the DNR should revisit the EA before issuing any revised orders for the Rest Lake Dam.

1. The EA fails to explain why changes are necessary.

From the time the DNR first revealed its intentions to modify the operating order several years ago, local residents have repeatedly asked the DNR to explain why changes are necessary in the first place. Given this history, one of the most remarkable and frustrating aspects of the EA is that it fails to provide *any* information regarding the purpose and need for making changes to the operating order. Are any resources being harmed (or threatened with harm) under the existing order? If so, then how? If not, then why are changes necessary? Is the objective to achieve incremental improvements in lake sturgeon habitat? Is it to improve wetland ecology? Is it to “balance” flows above and below the dam? Or, is it simply to justify all the resources the DNR has spent on studying order in the first place? One of the problems with the EA is that it does not provide the DNR’s answer to any of these questions.

If the DNR believes it would be in the public interest to modify the existing order, it is the DNR’s responsibility to explain why that is so rather than force the public to guess. Since the DNR has been studying potential modifications to the existing order for more than 10 years, it should be easy for the DNR to state why changes are necessary. Unless and until the DNR provides an explanation, however, the public will be left in the dark, as it will be impossible for the public to know (1) what issues the DNR is attempting to address, (2) what factors the DNR is considering in addressing those issues, (3) why the DNR believes its proposal will advance the stated objective, and (4) whether the DNR is striking an appropriate balance of all the relevant concerns under the applicable legal standards, so that the benefits of the proposal outweigh the drawbacks.

The EA must be redone for this reason alone.

2. The EA does not adequately identify and quantify the positive and negative impacts of the proposed changes.

If we assume for the sake of discussion that there is a good reason to modify the order, the EA still fails to quantify the positive and negative impacts of the proposals so that the public can determine whether the benefits outweigh the drawbacks. With regard to negative effects, although it is certain that the DNR’s preferred alternative would cause millions of dollars of property damage and significant problems with navigability, the EA glosses over those issues and blithely assumes that, whatever the problems may be, local property owners will be able to deal with them. Likewise, with regard to positive effects, although the EA theorizes that the modifications could benefit downstream fish habitat and wetland ecology (among other things), those theories are not supported by scientific analysis.

a. **The EA grossly understates and glosses over the nature and extent of property damage that will be caused by the DNR's preferred alternative.**

As detailed in the reports from Ecological Resource Partners ("ERP") and the letter previously submitted by James Cagney, the EA grossly understates the property damage that will be caused by the proposed modifications to the order. *See ERP Reports dated 12/19/12, 12/20/12, and 12/21/12 and letter from James Cagney submitted previously.*

1) Piers and shoreline protection structures

At a meeting attended by numerous stakeholders on November 27, 2006, DNR employee Jim Kreitlow stated that his "experience on the Chain is that *everybody's got their piers built out to the five foot contour because then when the water's drawn down to the five foot level they'll be high and dry.*" Thus, the DNR has known for years that (1) the vast majority of property owners on the Chain have constructed permanent piers on their property, (2) piers on the Chain are generally constructed out to the five foot contour, and (3) any pier constructed to the five foot contour would be threatened with ice damage if winter water levels are raised by 30 inches as proposed.

Under these circumstances, and especially given that the DNR has a statutory obligation to "protect property," it is unfathomable that the EA does not quantify the nature and extent of the existing shoreline structures on the Chain, quantify the damage that would be caused to those structures under the alternatives under consideration, or estimate the costs that riparian owners would incur to modify their structures to avoid such damage. Property owners on the Chain are being faced with millions of dollars in property damage, and the DNR either does not realize or is not concerned with how significant those damages will be.

To address this absolute void in the DNR's analysis, the Defense Fund commissioned a shoreline structure survey by ERP. Based upon its work to date, ERP has issued a preliminary report showing that:

- There are 1,226 parcels on the Chain.
- There are 1,022 permanent piers on Chain which are not designed to be removed from the water each year. (The EA identifies zero.)
- There are 173 mobile piers on the Chain which can be removed from the water each year. (The EA identifies zero.)
- There are 65 dry boathouses on the Chain above the OHWM.
- There are 126 wet boathouses on the Chain below the OHWM. (The EA identifies 78.)

- There are 349 concrete seawalls, 379 stone/riprap seawalls, and 64 wood seawalls on the Chain. (The EA identifies zero.) Approximately 790 of the 1,226 parcels on the Chain (65%) have some form of shore protection.

See *Preliminary Analysis of Shoreline Structures, Manitowish Waters Chain of Lakes, Wisconsin*, and EA t 45-47.

In addition to ERP's shoreline structure survey, the Defense Fund surveyed all the property owners on the Chain to determine the value of the shoreline structures noted above. See *Questionnaire Responses and Summary Spreadsheet previously submitted by the Defense Fund*. The Defense Fund has received 297 survey responses to date. Collectively, the respondents:

- Have spent 7,047 years on the Chain, for an average of over 23 years per respondent.
- Represent 75,316 feet of frontage, or nearly ¼ of the total frontage on the Chain.
- Have invested \$2.2 Million in 460 piers. This equates to \$7,400 per respondent and \$4,782 per pier.
- Have invested \$2.8 Million in 318 boat lifts and 45 boathouses.
- Have invested over \$1 Million in nearly 15,000 feet of seawall and nearly 14,000 feet of rock riprap, for a total of over 5.3 miles of hard armoring.

Combined, the above survey results prove beyond a reasonable doubt that the DNR's preferred alternative will result in massive amounts of property damage to existing shoreline structures on the Chain.

2) Erosion

The EA fails to consider that the lakes on the Chain have shorelines that are far more vulnerable to erosion than a typical Wisconsin lake. On the Chain, "the slopes at the shoreline are generally steep and . . . very erodible," as evidenced by the significant percentage of properties that have some form of shoreline protection. *ERP Report, paragraph 8*. Because the Chain's shorelines are so vulnerable, the increased winter water levels proposed by the DNR threaten the Chain with a double whammy. Property owners will face the risk of increased erosion and property loss on any shores that lack shoreline protection. And, property owners who have shoreline protection structures will face the risk of increased and extensive damage to those structures, which could cost tens of millions of dollars to enhance or redo. *ERP Letter Report, paragraph 9*. Either way, the DNR's proposal will result in extensive property damage in the form of erosion.

3) The EA improperly assumes that property damage is a non-issue.

Rather than quantify and address the above concerns head-on, the EA makes blithe assumptions that (1) the DNR's preferred alternatives will not affect property values because the

maximum summer water level would remain the same, and (2) any adverse impacts from ice damage “would be similar to the conditions that occur on the majority of lakes in Wisconsin, including natural lakes and impoundments.”

The DNR’s reliance on these assumptions shows callous disregard for Chain property owners.

As ERP has explained:

The EA discusses that higher proposed water levels in the winter will require “more piers would need to be taken out of the water in the fall. For structures that cannot be moved, it is likely that aeration systems, physical ice deflectors, or other methods would need to be installed to protect against possible ice damage.” However, *the EA does not discuss the cost of the recommended actions.* On other lakes that don’t drawdown in the winter, residents have designed their shore structures to be easily removable. With the history of winter drawdown on the Manitowish Waters Chain most residents have taken advantage of the situation and designed their piers, boat lifts and shore stations to be permanently left out all winter. *Many of these residents will have to completely replace their shore structures.* Based on our analysis there are approximately 1,195 piers and associated structures on the bed of the Chain in the winter. *Cost of a new pier can range from a few thousand dollars to tens of thousands of dollars depending on size and design. On the Manitowish Waters Chain this cost could range from \$2,500,000 to as much as \$20,000,000 depending on pier design.* Cost of structure replacement should be included in the EA.

ERP letter, Paragraph 10 (emphasis added). Furthermore, in reaching its conclusion that ice damage to shoreline structures will be minimal due to low wind energies, the DNR:

assumes that most shoreline damage by ice is from wind movement of the ice. *Ice can also damage shorelines by expansion of the ice sheet, by ice that has frozen into the shore and pulls away as the ice sheet pulls away from the shoreline, or by frost heaving as water within the soil expands and loosens the soil material. Just because a lake has a “low energy” classification based on a wave height index is not a good indicator of potential ice damage.*

Id. (emphasis added). Finally, as Jim Cagney has observed:

[W]hat the DNR fails to acknowledge is that following the implementation of the Public Interest Alternative, the chain will have a combination of existing permanent infrastructure, new removable infrastructure, and a volume of iced out broken infrastructure. *The DNR’s rosy assumption for analysis is that all property owners have the knowledge, resources and ability to retrofit aeration systems and “other methods.”* The DNR should estimate the energy use required to implement aeration systems, and evaluate the effect of the associated noise on the ecosystem and property values. *It is one thing to build a structure with the need to address*

ice damage engineered into the original design. Retrofitting this need is an entirely different proposition, and it is bewildering that the DNR fails to make this distinction. It is assured that many property owners will be unable to do so, or will simply fail to see the need until it is too late. There will be a lot of nails in the water, and this is not reversible as specified on page 77 [of the EA]. The DNR's statement on page 77 that all of this remediation will occur "within months" is solely the product of fertile imagination. *It will be outright havoc, and it is incredible that the DNR thinks this will not affect property values.* What is the aggregate value of all the docks the DNR acknowledges will have to be removed? How many property owners will sell rather than attempt to cope with the new reality? Will there be sufficient new buyers to fill that void? If not - and probably not - property values will decline. That is the most likely scenario.

In summary, all the available evidence shows that the EA (1) significantly undercounts the number of shoreline structures on the Chain, (2) fails to recognize that the vast majority of shoreline structures is permanent, (3) glosses over the nature and extent of property damage that will occur if the DNR's proposal is enacted, and (4) makes no attempt to estimate the cost that affected property owners will incur to protect their structures from ice damage and/or replace them if and when they are damaged.

The DNR cannot possibly strike an appropriate balance that meets the DNR's statutory obligation to protect property when the DNR does not identify the property to be protected or determine what would be needed to protect it. These fundamental flaws in the EA must be corrected.

3. The EA does not even attempt to explain how often or how far summer water levels will fall below historic averages.

In describing the DNR's preferred alternative of "public interest river flow," the EA states:

Water levels on the Chain would be operated close to 8' 6" but would *occasionally* need to be lowered in order to meet *downstream flow needs*. The downstream target flows would be reduced in low water conditions once the lakes reach a specified water level such as 7' 0". Once the Chain reaches that level, the owner of the dam would either need to consult with DNR to determine the required flow or a minimum flow would be specified in the order. Specific ramping rates would also need to be specified as part of the order to avoid quickly changing water levels and flows.

EA at 67 (emphasis added).

As Cagney has noted, although the words "occasionally" and "downstream flow needs" are of critical importance to the proposal, they are so vague that it is impossible for the public to understand the proposal and provide meaningful comment. What "downstream flow needs" is the DNR talking about? How do those "needs" compare to the needs above the dam? How will

the DNR determine if “downstream flow needs” are being met? How “occasionally” will the DNR lower water levels to meet those “downstream flow needs? How often and how far will water on the Chain be lowered below 8’6””? The EA doesn’t say. Instead, the EA proposes that the DNR be given unlimited authority to override specific water levels whenever a “downstream flow need” arises, and leaves it at that.

Because the EA comes nowhere close to explaining the DNR’s proposal, the public is left to guess what it all means. The EA should be revised so that the public is not forced to engage in guesswork and can instead provide meaningful input on the DNR’s proposals.

4. The EA grossly underestimates the adverse impacts to navigation that will be caused by the proposed order.

The EA recognizes that if the Rest Lake dam were removed, water levels on the Chain would drop anywhere between 9.2 and 13.5 feet. *EA* at 11. If that were to happen, the Chain would cease to exist.

Although the Defense Fund understands that no one is suggesting the dam be removed or that water levels be reduced by 9 feet or more, it is critical for the DNR to understand that the collective and overwhelming experience of property owners on the Chain is that even *minor* reductions in summer water levels will cause hugely negative impacts on the Chain’s navigability and the resulting recreational value of the Chain to the community. *See generally the responses to the Defense Fund Questionnaire submitted previously to the DNR*

It is beyond the scope of this letter to summarize all the individual survey responses that have been submitted by the Defense Fund to the DNR. Nevertheless, the survey results clearly indicate that if water levels are lowered in the summer, the Chain will experience a host of serious navigational problems. Some property owners will have difficulty docking boats at their piers and be forced to choose between (1) taking their boats out of the water or (2) extending their piers so that the boats can stay. Others will have their lake access limited by the presence of submerged stumps that make navigation difficult at lower water levels. And, since lake-to-lake navigation becomes difficult at lower water levels, the DNR’s proposed modifications could actually threaten the existence of the Chain as a *chain* depending on how often and how far summer water levels would fall below 8’6”. As Cagney has noted:

The general population of Manitowish Waters has made virtually unlimited comment on the adverse effects of the DNR's proposals, stating substantial problems associated with access to docks at low water in the summer and the destruction of docks at high water in the spring. *The DNR largely ignores all this, and dedicates a page and a half to boat ramp access as though that were the main issue . . . Figure 42 serves to show that boating access is basically no problem at 7', while ignoring everyone's loss of access to their dock.* Again the DNR's bland statement, the public interest and passing inflow alternatives would not be expected to negatively impact property values since the maximum water level would remain the same and there would not be a change to the ordinary high water mark or additional lands flooded, on page 75 is unreasonable. *The new*

situation will be that people's boats will no longer float next their dock. When people attempt to visit friends as they have been doing for 50 years, there might not be place to moor their boat. I'm sure that in 20 years the people will have adjusted to the new norm. But in the interim there will be a significant disruption of the social fabric chain property owners cherish. Places will go up for sale and property values will fall. It is a given.

The EA significantly underestimates the impact that the proposed order would have on navigation in the Chain. The EA needs to be updated to fully account for those impacts.

5. The EA exaggerates the degree to which Xcel Energy has departed from the existing order and the “natural flow regime.”

In making the claim that the existing order should be modified, the EA asserts that Xcel Energy is routinely holding back water in violation of the existing order and discharging only the minimum flow required by the DNR. In almost every respect, however, that is simply not true.

First, the EA suggests Xcel violated the order by maintaining summer water levels in a narrow range between 8'4" and 8'6" in the summer months. However, the existing order does not require water levels to fall anywhere below 8'6" in the summer. Instead, the order gives Xcel the discretion to maintain water levels anywhere between 7'3" and 8'6". If Xcel wants to keep water levels at 8'6" all summer long, there is nothing in the order to prohibit that. (Indeed, maintaining a high water level would appear to be precisely in line with Xcel's interests, since Xcel values the Chain as a reservoir for downstream power generation).

Second, the EA suggests Xcel violated the order by delaying the drawdown until after Colorama occurs. However, the existing order does not require a drawdown to start on September 1 or any other time. Instead, the order gives Xcel the discretion to initiate a drawdown any time between September 1 and the time the ice sheet forms in the early winter, subject only to the limit that Xcel cannot lower the water at a rate of more than 2 inches per day. Thus, Xcel has not violated the order by “delaying” the drawdown to later in the Fall.

Third, the EA suggests Xcel violated an implied condition of the order by failing to pass 40 cfs over the dam at all times. This suggestion is based entirely upon the DNR's interpretation of WIS. STAT. § 31.34. Under that statute, a dam operator is required to “pass at all times at least 25% of the natural low flow of water of such stream, except as otherwise provided by law.” According to the DNR, “natural low flow” is calculated using the Q7, 10 formula, with the most recent calculation having arrived at the 40 cfs figure. But the DNR's position is flawed in at least three respects:

- The statute does not define “natural low flow” with reference to the Q7, 10 formula. That is just an interpretation the DNR has come up with on its own. The DNR's interpretation conflicts with the plain language of the statute since the DNR interprets a statute requiring a dam operator to pass 25% of the “*natural low flow of water of such stream*” to require the operator to pass more than 100% of the actual and existing flows over a dam in drought conditions. A more reasonable interpretation

which avoids absurd results in drought conditions is that a dam operator must pass 25% of *existing inflows* over a dam at any time. Since there are at least two reasonable interpretations of the statute, and since the courts have not yet decided what the statute means, it is an exaggeration for the DNR to claim that Xcel has violated the law simply because it did not pass 40 cfs at all times.

- The statute says a dam operator must pass 25% of the natural low flow “*except as otherwise provided by law.*” Here, the existing order has the force of law, and it does *not* require Xcel to pass 25% of the natural low flow. Thus, the order overrides the statutory requirement.
- Even if the Q7, 10 calculation supplies the correct definition of “25% of the natural low flow,” the DNR itself has calculated three different Q7, 10 figures. In 1975, the DNR said 25% of the natural low flow was 25 cfs. In the summer of 2007, the DNR said it was 50 cfs. Then, months later, the USGS calculated that the Q7, 10 figure is 40 cfs. The DNR can hardly be heard to claim that Xcel has violated the minimum flow requirement when the DNR has not been sure of what that requirement happens to be.

Finally, the DNR suggests Xcel has routinely reduced flows far below the minimum cfs required under the Q7, 10 calculation noted above. But the data dating back to 1973 refutes the DNR’s claim. Indeed, the available data shows that, out of 13,879 days of recorded flows, the flows dropped below 40cfs on only *108 days* overall (0.078% of the time). *ERP Letter Report, Paragraph 2*. Out of those 108 days, 104 days occurred in the droughts of 1976 (56 days) and 2005 (48 days). *Id.* Thus, with the exception of the two most severe droughts of memory, flows have been reduced below 40 cfs on just *4 days* out of 13,879 days (or 0.028% of the time).

For these reasons, Xcel has followed the existing order in virtually every respect, with the only exception being that the Chain has not always reached the 7’3” minimum by April 15 of each year. The data simply do not support the DNR’s conclusion that minimum flows of 40 cfs are routine in the summer months. The EA should be revised so that “deviations” from the order are not exaggerated and the public can make an informed decision about whether operating under the current order is better than the DNR’s proposed alternatives.

6. The EA is based upon an exaggerated claim that the dam is disrupting the “natural flow regime” and therefore overstates the “benefits” of “restoring” the natural flow regime.

Consistent with the prior point, ERP’s analysis of the available data shows that “with the exception of May and October, the current dam operation is following the natural flow regime very closely.” *ERP Report dated 12/20/12* at 5. ERP’s analysis flatly refutes the DNR’s assertion that the natural flow regime has been grossly disrupted by the existing order. Thus, it also flatly refutes the DNR’s generalizations that significant benefits are to be gained by “restoring” the natural flow regime.

7. The EA assumes the preferred alternative will benefit the environment but avoids setting forth a robust scientific analysis to support that assumption.

In many respects, to the extent the EA tries to emphasize the positive effects of a revised order or minimize the negative effects, the EA lacks sufficient scientific analysis to support the conclusions reached. When so many vital community interests are tied up in the dam, it is beyond poor practice for the DNR to suggest sweeping changes to the operating order without having conducted the scientific analyses necessary to determine what the effects of the changes will be. For a complete summary of the EA's deficiencies in this regard, please refer to the complete reports from ERP and Cagney. In brief summary, the deficiencies are:

- The EA is weighted toward benefits of a few target species and does not address impacts to non-target species or the public.
- The EA does not quantify the nature and extent of recreation above and below the dam, such as fishing, boating, sightseeing, and swimming.
- The EA suggests that “the wetland community downstream of the dam has gradually changed from a wetland dominated almost entirely by wet meadows to a wetland dominated with scrub/shrub species in many areas.” *EA at 25*. Putting aside the fact that the EA does not explain why this is necessarily a bad thing, the EA fails to acknowledge that invasion of shrubs into sedge meadows is a problem statewide, and even in wetlands that do not experience water level changes.
- The EA assumes that lake sturgeon were once present above the dam, apparently on the grounds that lake sturgeon have been observed below the dam. Given that there is no record of any kind to support that assumption, it should not be the basis of any decisions.
- Although the EA touts potential benefits for lake sturgeon, the DNR has not conducted detailed assessments such as RHABSIM to determine the potential weighed useable areas of existing or potential habitat. As a result, although the EA suggests there could be incremental gains in downstream spawning habitat for lake sturgeon, the EA fails to quantify the gain so that the public can decide if the incremental gain is worth the costs. If the goal is to provide sufficient flow to support sturgeon spawning, detailed scientific assessments are needed to determine the necessary flows. The DNR should not conduct a huge experiment on sturgeon habitat rehabilitation without (1) fully demonstrating that the experiment is likely to work and (2) fully evaluating the costs of the experiment to the riparian owners on the chain.
- The EA contends that flows of 40 cfs are too low to provide suitable habitat for sturgeon, but fails to specify the optimal flow levels for sturgeon given the slopes, cross-sections and substrates available. In other words, the target flows proposed by the DNR are based on frequency of natural flow rather than the habitat requirements of the downstream resources. Again, if the DNR's goal is to establish flows that support spawning, then the DNR should conduct additional habitat modeling to specifically determine the habitat

gains that can be made rather than make the general assumption that restoring 100% of the natural flows will do the trick.

- Despite 10 years of study, the DNR has not completed a water budget for this Chain.
- Except for the individualized experiences of certain DNR personnel while navigating the chain, the DNR has apparently conducted no studies to determine the nature and extent to which navigability on the chain will be compromised at various water levels.
- Although additional areas for vegetation would be present in the near shore areas if the DNR's preferred alternative is adopted, the DNR has not considered what vegetation will be established at what density. In Cagney's words, "the DNR plays ecological roulette with this vacant niche and never even identifies the possibility that invasives will win the race. Even assuming the DNR's irresponsible assumption is true, the DNR is silent regarding the contribution rock and sandy shores provide for recreation. These properties are highly sought for these values. Again, the DNR's bland statement on page 75 - that there would be no impact to property values - ignores that reality." Because there is significant risk that invasive species could spread into the disturbed areas, the DNR must address that concern and the cost to control AIS in the EA.
- With regard to wetlands, the EA's implied argument is that the existing order is somehow causing ongoing and negative environmental effects. But, as Cagney has noted, "clearly these 1500-plus acres are by now a product of the current operation, and there is nothing still being disrupted. Again it could be different, and better for some life forms, but the DNR does not have free reign to misrepresent plant succession and overstate environmental degradation to support its desire to make a change in the dam operation."

Finally, with respect to virtually all its analyses, the fails to acknowledge Cagney's point that because the existing order and flow regime has been in place for nearly 100 years, the environment affected by the dam has reached a dynamic equilibrium. In Cagney's words, "the DNR is attempting to paint [operation under the existing order] as a new proposal that would entail new environment issues, when in truth the environment is in 'dynamic equilibrium.' . . . Yes it could be different, and it could be better for some life forms [and] worse for others, but this is not an environmental disaster the DNR attempts to portray. The document fails to support the conclusion that there is an emergency ecological need for decisive action." The DNR cannot make sweeping changes to the operating order based upon the anguish of a single fish that may become stranded in the reeds when flows are adjusted under the order. Instead, the DNR should only make changes that are necessitated by population dynamics.

8. The EA fails to give proper weight to the vested interests of the public above the dam and is therefore biased toward downstream resources

Under Wisconsin law, when an artificial water level is maintained for a considerable period of time, it becomes a "natural condition" which vests public rights in navigable waters. *Tiedeman v. Vill. of Middleton*, 25 Wis. 2d 443, 453-54 (1964) (citing *Minehan v. Murphy*, 149 Wis. 14 (1912); *Johnson v. Eimerman*, 140 Wis. 327 (1909); *Village of Pewaukee v. Savoy*, 103

Wis. 271 (1899); and *Smith v. Youmans*, 96 Wis. 103 (1897)). In establishing this principle, the Wisconsin Supreme Court repeatedly emphasized the *value* of investments made by riparian owners in reliance on water levels as being *reflective* of public rights in navigable waters.

Here, there is no question that the local community has made vast investments in reliance on the existing water levels. Consequently, the community has vested rights in the navigable waters and water levels maintained by the dam. To the extent there is evidence to show that proposed modifications would adversely affect property values, that evidence is reflective of the public's vested rights. The DNR should be seeking such evidence and incorporating it into the DNR's analysis.

On several occasions since the DNR began its study of the operating order, the DNR has publicly stated an intention to consider the economic impacts of any modification to the operating order before making modifications. For example, the DNR's Environmental Overview incorporated all the economic information noted above, and the DNR has separately posted a FAQ on its website stating that it has identified "[a] number of . . . socioeconomic issues [that are] affected by current dam operations" in its discussions with affected stakeholders. *WEPA Process FAQ* at 1.

The DNR's consideration of the economic impacts of a modification to the Rest Lake Dam operating order would comport with DNR's written policy guidance calling for DNR to "minimize economic losses resulting from too much or too little water" when setting water level orders for an impounded lake under WIS. STAT. 31.02(1). DNR *Waterway and Wetlands Handbook*, Chapter 130 at 3, <http://dnr.wi.gov/org/water/fhp/handbook/PDFs/ch130.pdf>. It would also be consistent with DNR's obligation to evaluate the effects of its decisions under Ch. NR 150. In a case now pending before the Wisconsin Supreme Court, however, the DNR has advanced the extreme argument that it is *never* required to consider the economic impacts of modifications to operating orders when it makes such decisions. In other words, the DNR apparently believes that if the DNR modifies the operating order for the Rest Lake Dam, the DNR can completely ignore the reality that (1) summertime water levels on the Manitowish Chain have been consistent for nearly 100 years, (2) the entire local economy and property tax base of Manitowish Waters have been developed in reliance on those summertime water levels, and (3) if the DNR should order that summertime water levels be lowered on the Manitowish Chain, it could have devastating effects on the economy, tax base, and greater community.

The DNR should revise the EA to demonstrate clearly that the DNR has identified and is considering all the likely economic impacts in making its decision.

D. Conclusion

For the reasons noted above, the Defense Fund and its supporters request that the EA be withdrawn, revisited, and revised before the DNR takes any further action to modify the operating order for the Rest Lake Dam.

Very truly yours,

By:

Duffy Dillon

E-Mail: ddillon@brennansteil.com

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