

# CASE STUDIES

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# I. Dam Removal:

Nemahbin Roller Mill Dam (2004-2013)



# Dam History

- 1847 Hawks Mill Dam constructed on the Bark River under authority of 1840 Mill Dam Act
- 250 foot earthen dike created 12-acre millpond, later known as Apfelbacher Pond
- 1947- Zerwekh purchases mill and dam from Apfelbacher and refits to generate electric power
- 1994- DNR inspection report notes multiple issues
- 2003- use of dam for power generation discontinued
- 2004- Margaret Zerwekh files application to abandon dam

## 31.185 Permits to abandon dams.

(1) No owner of any dam may abandon or remove or alter the dam without first obtaining a permit from the department. No person may transfer ownership of a dam or the ownership of the specific piece of land on which a dam is physically located without first obtaining a permit from the department.

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(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health, property, property values, and economic values.

# Permit Application Lists Reasons to Abandon

- Expensive to rebuild and develop adequate facilities for electrical generation
- Expensive to maintain the dam to control washing, wave action, seepage.
- Mill pond acts a settling basin for silt released from upstream dam at Lake Nagawicka.
- State fish hatchery was built upstream one mile, digging out six ponds/30 acres that were “cleaned, poisoned and emptied into the Bark River for 50 years.”

# Permit Application Lists Interests Affected

- Upstream owners will have river frontage, not pond frontage
- Improvements to navigation from dam removal
- Downstream owners “built in an area of developed swamp and marsh land. The developer started his work in the mid 1920's before there were laws.”
- Additional “interests” cited in application:
  - “Fishermen who like to shoot fish in the spring will have to go elsewhere.”
  - “Those persons whose main interest is removing my stoplogs will no longer have this activity to furnish sport for them.”

# Upper Nemahbin LMD Concerns

After issuance of removal order, District received grant funds to develop a plan for controlled drainage of millpond to manage sediment. Concerns:

- Accumulated sediments have historically discharged into Upper Nemahbin
- Delta of sediment formed at mouth of river after dam failure in 1988, covering gravel substrate; additional releases of sediment over the years.
- Loss of habitat; high nutrient content encourages weed growth.
- Navigation and safety hazard.

# 2008 Flood Event and Drawdown of Millpond



- DNR ordered permanent removal of stop logs following 2008 flood event.
- Lake District concerned about risk of dam failure from increased flow from upstream releases at Lake Nagawicka and deteriorating dam structures.
- District's main concern was preventing uncontrolled discharges of sediment.
- City of Delafield commenced but then abandoned condemnation proceedings to take ownership of the dam.

# Litigation by Millpond Owners (2009-2013)



- DNR removal order appealed by mill pond property owners in a contested case hearing. Administrative law judge affirmed validity of removal order.
- Separate litigation brought against Zerwekh and the City of Delafield, claiming a taking of private property based on City's failure to act to take ownership of dam.
- April 2013 – Court of appeals affirms dismissal of property owners' takings claim, no cause of action for damages available.
- September 2013 – roller mill dam removed.

# Outcome of Dam Removal – Restoration?

- Upper Nemahbin LMD active in planning for the removal of the dam
- SEWRPC study provided recommendations, best practices, stream restoration methods.
- Lack of funding limited the method of managing dam removal-did not dredge sediments from basin prior to removal.
- Lake District currently working on dredge project for removal of sediments.



# II. Dam Transfer:

Lawrence Lake Dam (1989-1995)

# Transfer of land where dam exists

**Wis. Stat. s. 710.11:** A person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14(4).

**Wis. Stat. s. 31.14(4):** The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located without complying with sub (2) [*proof of financial ability to maintain*] or (3) [*alternatively, proof of ownership of flowed lands plus dry perimeter, and provision for public access*] is void unless a permit was granted under s. 31.185.



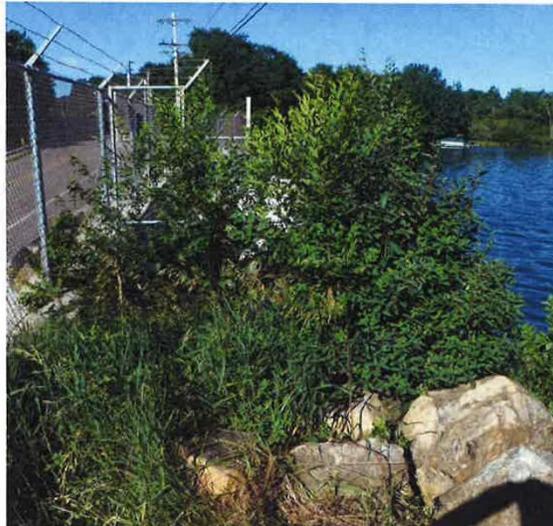
# What is “the property” on which the dam is located?



Dam Face



Downstream Embankment



Right Side, Upstream Embankment



Right Side, Downstream Embankment

# Dam Transfer History

- Lawrence Lake Dam, Village of Westfield, crossed by County Highway A, creating 217-acre impoundment.
- 1986- imminent failure by washout of the embankment causes DNR to order full drawdown of the Lake.
- 1987- Lawrence Lake Protection and Rehabilitation District formed for the purpose of taking ownership of the dam.
- 1987- Pioneer Power & Light and Dahlke family quit claim dam property to Town of Westfield.
- 1988- Town of Westfield reconstructs the dam using federal community development block grant funds.

# Management Agreement

- 1989 – transfer of ownership from Town to Lake District. District enters into Management Agreement with Marquette County, owner of the highway right of way over the dam.
- The parties “desire to maintain their respective interests in the dam property and to provide for the allocation of responsibility for the management of the dam, the highway right of way, the culvert and other elements of the property”
- Agreement allocates responsibility for maintenance of road surface, subsurface, culverts, lawn maintenance, burrowing animals, controlling water level.
- Agreement acknowledged by DNR as part of transfer permit.

# Permits to abandon [or transfer] dams

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(5) As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health, property, property values, and economic values.

# DNR Permit for Transfer to Lake District

October 1989 - permit for transfer issued under Section 30.185, subject to conditions:

1. Must allow free and unlimited inspection by DNR at any time.
2. Dam must be maintained in safe and structurally sound condition.
3. Lake District responsible for maintaining water levels as established by water level order.
4. To protect coldwater fishery, District must utilize bottom draw gate when passing water downstream except during periods of high flow when volume exceeds gate capacity.

1995- DNR and District resolve dam operating issues in connection with permit condition no. 4.

# III. Water Level Order:

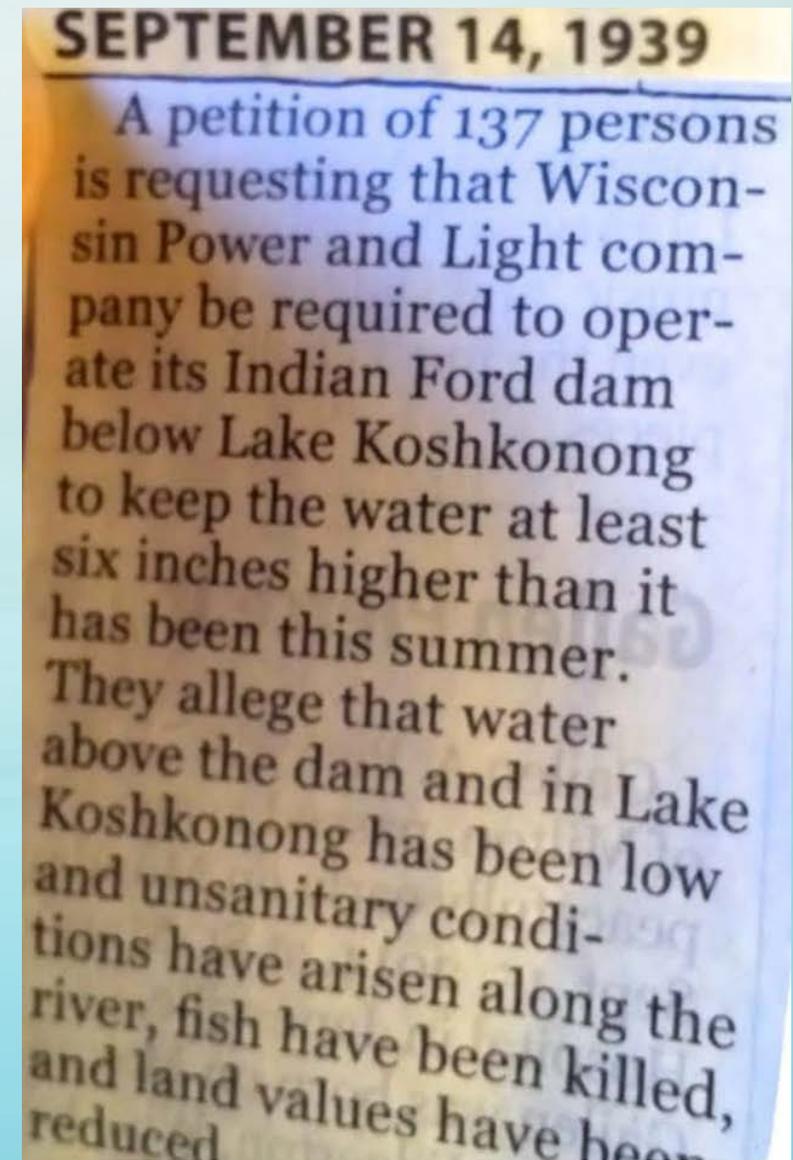
Indianford Dam-Lake Koshkonong (2002-2017)





# Indianford Dam History (1851-1939)

- 1851 Act authorized dam construction on a natural widening of the Rock River, a vast, densely vegetated marsh. Construction and enlargement of dam over the decades created Wisconsin's sixth largest lake.
- Early 20<sup>th</sup> century- Disputes arise between property owners concerning appropriate water level, the beginnings of a century of conflict on that issue.
- 1917- First water level order issued by Public Service Commission (predecessor of DNR) . Modifications to dam raised water level 2 feet. PSC order required operating gates for flood control triggered by specified water elevation.
- 1939- Petition by 137 property owners to modify operating order to increase water level 6 inches. PSC refuses to order increase, citing lack of flowage easements for higher water level.



# Dam History (1964-1991)

- 1930s through early 1960s dam operated to produce maximum power generation, resulting in high water levels and great fluctuation, accelerating shoreline erosion and wetland loss.
- 1964- Dam acquired by Rock County. Power generation ceased, head and wicket gates become inoperable, lowering discharge capacity.
- 1982- DNR issues operating order to reestablish Koshkonong water level, with objective of establishing a stable impoundment.
- 1982 to 1986-challenge to order by property owners brought in Jefferson County Circuit Court.
- 1991- stipulated water level order issued following 1989 court of appeals decision holding that property owners were entitled to administrative contested case hearing on 1982 order.

# Most Recent Chapter (2000-2017)

- 2000- Rock Koshkonong Lake District begins to study potential modification of water level order: review of location of OHWM, effects of winter drawdown.
- 2002- Rock County adopts resolution to transfer Indianford Dam to RKLD.
- 2003- Lake District formally petitions DNR for modification of 1991 water level order.
- 2005- Following EA and public hearing, DNR issues order denying RKLD petition. Order reduces winter drawdown but otherwise 1991 order reaffirmed.
- 2006- Administrative law judge issues findings of fact, conclusions of law and decision affirming 2005 order and denying RKLD petition for increase in summer water level.

## 31.02 Powers and duties of department.

- (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 ...and may by order fix a level for any body of navigable water below which the same shall not be lowered except as provided in this chapter...

\*2015 Wis Act 357 amended this language to add protection of “property values and economic values,” following the Wisconsin Supreme Court decision in *Rock Koshkonong Lake District v. DNR* (2013).

# *“Public Rights in Navigable Water”*

Public rights under the public trust doctrine extend beyond commercial navigation, and include--

- Public access
- Recreational uses
- Wetland functional values
- Water quality
- Wildlife and aquatic habitat
- Natural scenic beauty



# *“Protect Property”*

## Under a narrow interpretation:

- Erosion protection
- Flood protection
- Effect on farm drainage systems

## Under a broader interpretation, includes impacts to:

- Riparian property values
- Commercial revenues
- Municipal tax revenues

# Litigation (2007-2013)

- 2007- RKLD files appeal of ALJ order in Jefferson County Circuit Court. Main claim: DNR consideration of “protect property” was too narrow, failed to consider negative impacts of lower water level on property values, commercial revenues, municipal tax revenue.
- 2008- Jefferson County Circuit Court reviews ALJ order. No trial or independent fact-finding. Affirms ALJ order.
- 2011- Wisconsin Court of Appeals affirms ALJ order.
- 2013- Wisconsin Supreme Court reverses on the scope of “protect property”, holding DNR is required to consider full range of property impacts. Remanded to DNR to decide under correct legal standard.

# Negotiated Water Level Order (2013-2017)

- 2014- Case returned to DNR to consider RKLD petition to raise water level in light of property values and economic impacts as compared to existing water levels under 1991 order.
- 2017- Negotiations between DNR, District and wetland property owners leading to agreement for staged water level increase, with interim study to evaluate impacts of stage one increase.
- Precedent for Koshkonong agreement: Rest Lake chain water level dispute, leading to 2016 Memorandum of Understanding between DNR and dam owner. Dispute related to water level favored by property owners on chain of lakes vs. ensuring sufficient flow for downstream spawning and habitat.

# 2015 Budget Act - Rest Lake Dam

31.02 (4d) The department may not issue, amend, or revise an order... with respect to a dam that, on June 1, 2015, met all of the following conditions unless the appropriate standing committee in each house of the legislature, as determined by each presiding officer, approves the order, amendment, or revision:

(a) The dam regulated the water levels of one or more lakes located in Vilas County.

(b) The dam was located in whole or in part in a city, village, or town with an equalized value exceeding \$500,000,000.

(c) The dam's impoundment area at normal pool elevation exceeded 4,000 acres.

(d) The dam was continuously subject to a lake level order for a period of at least 40 years.

# QUESTIONS?

Photo Credit/Thanks to:  
Upper Nemahbin Lake District  
Lawrence Lake District  
Rock Koshkonong Lake District