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CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

DANE COUNTY

JAMES COORS, et al.,

Petitioners,

Case No. 16-CV-1564

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

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Petitioners James Coors, Courte Oreilles Lakes Association, Inc., and the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians (“the Tribe”, collectively, “Petitioners,”) submit this brief as the culmination of a two-year legal battle to improve water quality in Lac Courte Oreilles in Sawyer County, Wisconsin. After witnessing years of decline, Petitioners in 2016 filed a rulemaking petition with Respondents Department of Natural Resources (“DNR”) and the agency’s rulemaking body, the Natural Resources Board (“Board”) to lower the phosphorus limit in Lac Courte Oreilles from the default 15 micrograms per liter (ug/L) to 10 ug/L. The petition was supported by an extensive scientific analysis demonstrating, *inter alia*, that the 15 ug/L limit was not protective and the lower site-specific criteria (“SSC”) was necessary. Respondents denied the petition—not on its merits, but because they wanted to finish another rulemaking first, which they then estimated would take two years. The parties negotiated and entered into a Stipulation, filed with this Court and approved by Court order, where DNR finally agreed to propose an SSC. But the DNR reneged on its promise earlier this year, claiming the SSC was not scientifically supported.

The Court should find 1) that the DNR violated the Stipulation and Order, 2) that the DNR’s 2016 and 2018 decisions to reject the SSC rulemaking petition for Lac Courte Oreilles were flawed, and 3) alternatively, that the rule establishing the 15 ug/L standard for two-story fishery lakes is insufficiently protective and inconsistent with statute.¹ This matter

¹ These issues are narrowed from all the claims presented in the 2016 and 2018 petitions for judicial review, some of which are no longer relevant given intervening events or the passage of time and give the Petitioners’ voluntary dismissal of Claim 5 from the 2016 petition. Linking the issues for review here with the claims in the petition, the issues are:

- I. Whether DNR Violated the Stipulation.

should be remanded to the agency to finally propose an SSC consistent with the Petitioners' research and that is protective of Lac Courte Oreilles.

FACTS

Lac Courte Oreilles and Its Fishery

Lac Courte Oreilles is a 5,039 acre lake in Sawyer County and the eighth-largest natural lake in Wisconsin. (R.2715)² It is a multi-lobed lake with three main basins and several bays:

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- II. Whether the DNR Improperly Denied COLA's Petition for Site-Specific Rulemaking to Lower the 15 mg/L Phosphorus Standard Applicable to Lac Courte Oreilles. (2016 Petition, First and Second Claim; 2018 Petition)
 - III. Whether the 15 mg/L Phosphorus Standard for Two-Story Fishery Lakes in NR 102.06(4)(b)1. Is Unlawful. (2016 Petition, Fourth Claim).

² Petitioners cite the record of decision as R.____. If a document number is available, Petitioners cite it as Doc.#__. Portions of the record have been filed on three separate occasions. Bates ranges for each section of the record and their filing dates are as follows:

Bates 000001-003557 – August 10, 2016
Bates 003558-003839 – March 14, 2017
Bates 003840-005889 – October 9, 2018

Additionally, Petitioners' brief includes an attachment, which corrects an incomplete copy of a document in the record at R.4473. Respondents do not object to this inclusion.

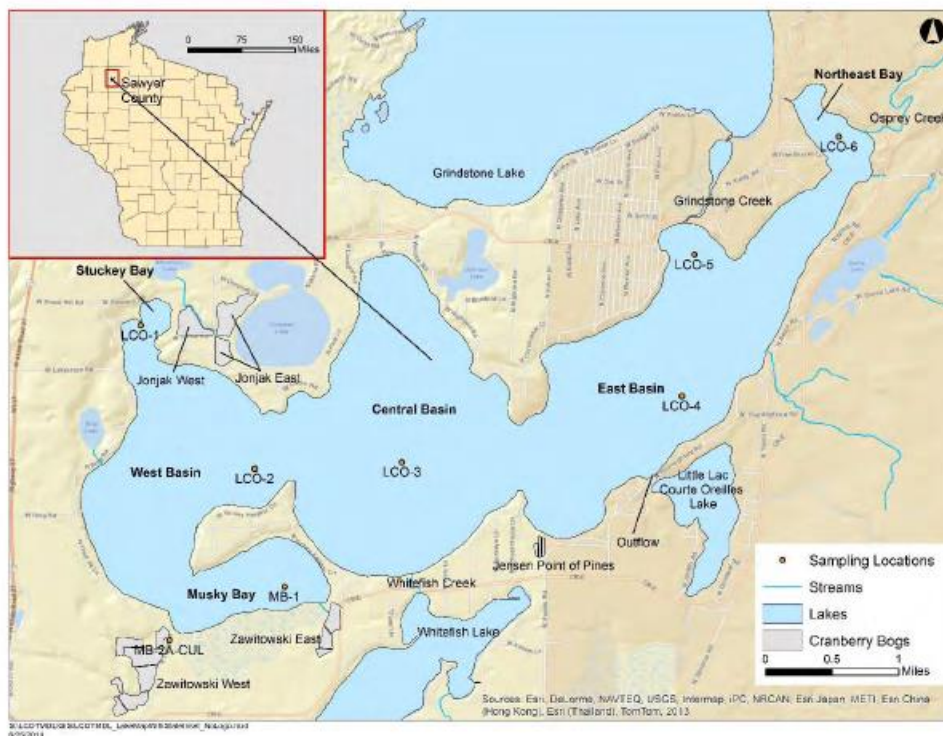


Figure 1. Location of Lac Courte Oreilles

(R.980.) Musky Bay is the largest of the lake’s bays and is a critical location for muskellunge spawning. (R.2742.)

The eastern third of Lac Courte Oreilles is located within the Tribe’s reservation boundaries, while the remainder is located within the 1837 Treaty Territory that reserves and protects the Tribe’s fishing, gathering, and hunting rights. (R.2705.) The lake has significant cultural, subsistence harvest, and ecological significance to the Tribe and its 7,600 members, providing a safe, low-mercury supply of fish for consumption compared to other inland lakes, and being an historical location for wild rice beds. (R.2719.) The Tribe also benefits from the significant tourism dollars the lake and its environment attracts. (*Id.*)

Lac Courte Oreilles is a two-story fishery lake, meaning it can support warm water game species like walleye, bass, muskellunge, and northern pike in its warm “top story,” and cold water species like cisco and whitefish in its deeper and cooler “second story.”

(R.2737.) It is one of only five inland two-story lakes in Wisconsin that supports both cisco and whitefish, members of the Salmonidae family along with trout and salmon. (R.2715, 2729, 2737.) Abundant cisco and whitefish populations are prey for trophy game fish, and a muskie from Lac Courte Oreilles was once the world record holder. (R.2737, 2742.)

Cisco and whitefish require not just cold water, but water that is sufficiently oxygenated. (R.2739-40.) Such water is only present in a narrow band within the lake known as the oxythermal layer:

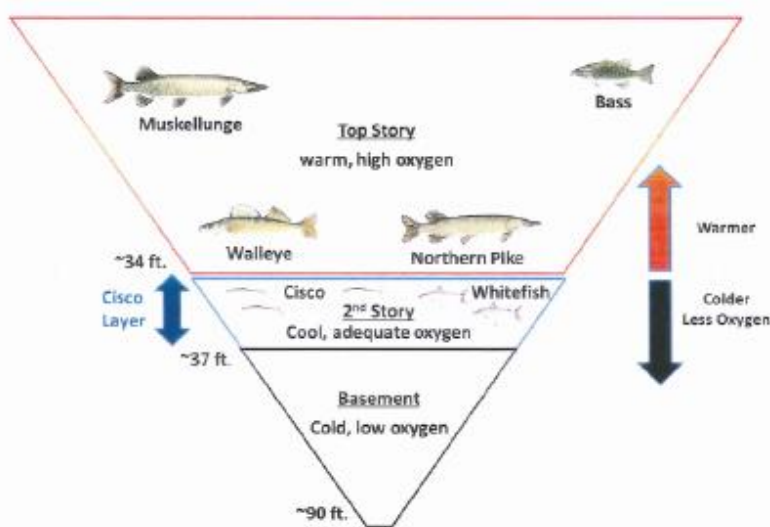


Figure 10. Typical two-story fishery in LCO, late summer.

(R.2738.) Muskies also need sufficient dissolved oxygen in the shallow bays, such as Musky Bay, where muskies spawn, eggs incubate, and larvae live for their first weeks. (R.2742.)

Pollution Threats to Lac Courte Oreilles

Lac Courte Oreilles has been plagued by rising phosphorus levels, as early as the 1930s and particularly since the 1980s. (R.2751-2752.) Sediment cores and other data indicate excessive plant and algae growth over the last 25 years, during which time nutrient inputs to Musky Bay have also increased. (R.2752.) Excess phosphorus spurs aquatic plant growth; when plants die, the process of decomposition consumes oxygen in the water,

lowering dissolved oxygen levels. (R.981.) This organic matter also is deposited and accumulates in lake sediment, where it is detrimental to fish spawning and habitat. (R.981.)

Petitioners have evaluated the sources of the excess phosphorus. The Lac Courte Oreilles watershed is largely forested, making polluted surface water runoff less of a concern. (R.2721.) However, there are five cranberry bogs on the lake: two on Musky Bay, two on Stuckey bay, and one in the central basin. Of the 5,178 estimated pounds of phosphorus that enters the lake each year, 592 pounds is from the bogs, which use phosphorus as fertilizer. (R.1001). An estimated 40-50% of the phosphorus entering Musky Bay comes from two of these bogs. (R.2372.) Other sources of phosphorus to the lake include atmospheric deposition, direct drainage runoff, and three creek tributaries that drain into LCO. (R.1001.) Compared to these other sources, the cranberry operations are the most controllable source. (*Id.*) Petitioners' scientific experts recommended bringing their loads to zero. (*Id.*) In fact, one grower has already installed closed discharge systems on a bog on the east side of Musky Bay, meaning his discharge is contained in holding ponds and does not enter the lake. (R.2369.) Yet the DNR has taken the position that the bogs do not need discharge permits because they are not "point sources" of pollution subject to regulation under the Clean Water Act. (R.3, R.2393.) Petitioners disagree with this position, which makes phosphorus discharges essentially unregulated from cranberry bogs.

The DNR enacted comprehensive phosphorus standards for Wisconsin water bodies in 2013. The current phosphorus standard for most of Lac Courte Oreilles is the statewide standard applicable to all two-story fishery lakes—15 mg/L of phosphorus. (R.2730.) The DNR applies a different phosphorus standard for a portion of the lake called Musky Bay, which DNR considers a "drainage lake" and to which the statewide standard of 40 ug/L

applies. R.2731; Wis. Admin. Code § NR 102.06(4)(b)3. Lac Courte Oreilles and Musky Bay currently “attain” these standards, with phosphorus levels of 13.68 ug/L in the lake’s West Basin, 12.32 ug/L in the Central Basin, 12.10 ug/L in the East Basin, and 29.53 ug/L in Musky Bay. (R.4842, 4847, Doc.#156),

Despite attaining currently applicable standards, the fishery and recreational uses of the lake are suffering (R.2737-2748). Due to warmer temperatures and less oxygenated waters in Lac Courte Oreilles, whitefish are seldom seen in the lake, and the abundance of cisco has declined. (R.2739-40.) Die-offs of these species occur when low oxygen in colder layers drives them to warmer waters. (*Id.*) Without cisco and whitefish, the game fish are smaller and fewer. (R.2737.) Mean dissolved oxygen levels in Musky Bay, where muskies spawn, have also declined, and the musky population in the lake has declined precipitously. There are only an estimated 297 adult muskies in Lac Courte Oreilles, just 20-30% of the target number for the lake. (R.2716, 2737.) The population currently is maintained through stocking, since there is no longer any natural reproduction in Musky Bay. (R.4797.) The trophy walleye and musky populations are also threatened by insufficient forage fish, like cisco. (R.2716.) Algal mats, which are a manifestation of excess phosphorus concentrations in Musky Bay, as well as nuisance algae and invasive plants, impair use of Musky Bay and other areas of the lake for fishing, boating, and swimming. (R.2745-2748.)

Efforts to Improve Lake Water Quality

Over the years, Petitioners and others have made significant efforts to protect and improve water quality in Lac Courte Oreilles, as well as control phosphorus discharges from the cranberry farms on the lake. These efforts have included:

- Jointly filing suit with the State of Wisconsin against one cranberry grower, William Zawistowski, to cease nuisance discharges of pollution in Musky Bay. The circuit

court agreed that the grower was discharging phosphorus at levels that impaired the lake and caused excessive aquatic plant growth, but because it interpreted the law to require these conditions to be present-year round, it ruled in favor of the defendant. *State v. Zawistowski*, Sawyer Co. Case No. 04-CV-75. (R.1602-1637.)³

- Petitioning for DNR and EPA to formally list Musky Bay on its proposed list of officially “impaired” waters for impairment of recreational use due to elevated total phosphorus. In 2012, it did. (R.979.)
- Designing and installing shoreland buffers on properties to reduce runoff around the lakes, and working with Sawyer County to install and replace all failed septic systems on the lake, both of which are sources of phosphorus. (R.2783.)
- Obtaining yearly grant funding from the DNR to control/mitigate invasive aquatic plants such as curly leaf pondweed control, to mitigate the phosphorus release/algal bloom and dissolved oxygen slump when the plants die, and to improve navigation in Musky Bay. (R.2745.)
- In 2015, asking DNR to reevaluate its 1982 “Cooperative Agreement” with the Wisconsin Cranberry Growers Association as a means to control phosphorus discharge and install additional closed systems, similar to an agreement entered into by the State of Massachusetts with the Cape Cod Cranberry Grower’s Association (R.2367-70.)
- Reaching out to cranberry growers and the Wisconsin Cranberry Growers Association to help find grant funding to install closed systems on the lake’s remaining four cranberry bogs. (R.2783-84.)

In 2014, in response to Musky Bay being designated as an impaired water,

Petitioners prepared a draft Total Maximum Daily Load (“TMDL”) document for Lac Court Oreilles document based on a 10 ug/L site-specific phosphorus standard. (R.970.)

A TMDL is a regulatory device under the Clean Water Act that sets a total maximum loading amount, or pollution “budget,” for a particular pollutant and identifies steps to reduce the pollutant load to that amount. It first requires a finding that a pollutant is

³ Despite finding no current nuisance, the court warned: “while this decision carries with it an inference that Zawistowski did not know his operation was causing harm, because the harm caused is not yet unreasonable, Zawistowski can no longer hide behind a veil of self-imposed ignorance to the effects his cranberry operation is having on Musky Bay. His actions are beginning to interfere with a protected right, and the public is not without the ability to intervene, should the interference reach unreasonable levels. While Zawistowski may continue his operations as is, he does so at his own risk.” (R.1637.)

exceeding a set standard before the TMDL can be implemented.⁴ The DNR rejected the TMDL request in 2015 because it said the 10 ug/L SSC was not established in rule.

(R.2466.)

Based on this denial, and the still-declining fishery and recreational condition of Lac Courte Oreilles, Petitioners took steps to establish the 10 ug/L phosphorus standard in rule.

The 2016 Petition for Site-Specific Rulemaking

On March 30, 2016, COLA and the Tribe filed a joint petition for rulemaking with DNR under Wis. Stat. § 227.12(1) and Wis. Admin. Code § NR 102.06(7) (“2016 Petition”). (R.2705.) The 2016 Petition requested that DNR promulgate an interim emergency rule and permanent rule that modifies the current total phosphorus criterion for Lac Courte Oreilles of 15 mg/L and Musky Bay of 40 mg/L to a lake-wide average of 10 mg/L. (*Id.*) As grounds for the request, the 2016 Petition stated that scientifically defensible methods and sound scientific rationale demonstrated that the 10 mg/L standard was necessary to restore and protect the highest attainable aquatic life and recreational uses for the lake, and protect the “exceptional spiritual, cultural and subsistence importance of LCO to the Tribe.” (R.2705.) The Petition was supported by and incorporated an extensive report by COLA and the Tribe’s scientific consultants presenting the scientific basis for a lower phosphorus standard, and explaining why the current 15 and 40 mg/L standards that applied to the Lake were insufficiently protective of the designated uses. (R.2707.)

Specifically, the scientific report used years of monitoring data collected by the Tribe’s Conservation Department, scientific literature, and other tools to develop a method

⁴ See Wisconsin Department of Natural Resources, Total Maximum Daily Loads (TMDLs), *available at* <https://dnr.wi.gov/topic/tmdls/>

that connected low dissolved oxygen levels in the lake to total phosphorus concentrations in the water column. (R.2759-2760.) The result of this effort projected significant improvements in dissolved oxygen in the lake's west basin when it achieved 8 ug/L total phosphorus, in the central basin at 9 ug/L, and in the east basin at 6 ug/L. (R.2760.)

It concluded:

Based on these results, reducing total phosphorus concentrations to between 6-8 ug/L would lead to significant improvement in cisco and whitefish habitat. However, more modest reductions to 10/ug/L result in meaningful improvements which could mean the difference between sustaining a coldwater fishery or losing it. Reducing phosphorus from existing concentrations to 10 ug/L in the West Basin results in a 19% increase in habitat volume. Also, climate change impacts are anticipated to lead to additional stress on the coldwater habitat. . . Therefore, efforts to hold-the-line and reverse the trend become critically important.

(R.2760.) The report also rejected the DNR's long treatment of Musky Bay as a separate water body, since, *inter alia*, the length of its interface with the West Basin is large (1,980 feet) and hydrodynamic modeling shows water from the bay mixes with the rest of the lake. (R.2725-2726, 2731.) The report thus recommended the 10 ug/L SSC apply to Musky Bay, along with the rest of the lake. (R.2767.)

On May 11, 2016, DNR's then-Director of its Water Quality Bureau, Susan Sylvester, sent Petitioners a letter notifying them that the DNR was denying the Petition for an SSC for Lac Courte Oreilles and Musky Bay. (R.3042.) The letter stated that Petitioners had not met the criteria for emergency rules since DNR viewed the primary source of pollution to the lake as non-point source pollution, and that the petition for permanent rulemaking was denied because DNR was in the process of promulgating a procedural rule for handling SSC requests, known as Rule Package WT-17-12. (*Id.*) Said the letter, "the department will not be reviewing or making approval decisions on individual [SSC] requests until the process for Rule package WT-17-12 is completed. This will likely take two more

years.” (*Id.* at 3042-43.) No determination was made on the merits of the petition. (*See id.*) Rule Package WT-17-12 has been subject to several delays, and still has not been promulgated. (R.5638-5685, Doc.#102; *see also* Section III.B., *infra.*)

Pursuant to the notice of appeal rights in Ms. Sylvester’s letter and Wis. Stat. §§ 227.40, .52-57, and 806.04, Petitioners filed a court action on June 10, 2016. (Pet for Jud. Rev., 6/10/16.) It alleged five causes of action: 1) that Sylvester lacked authority to deny the rulemaking petition, 2) that the DNR’s decision to deny the petition for permanent rulemaking was legally erroneous, outside the agency’s discretion, and arbitrary and capricious, 3) that the delay in promulgating Rule Package WT-17-12 was arbitrary and capricious, 4) that the 15 mg/L phosphorus standard for two-story fishery lakes and 40 mg/L phosphorus standard for shallow seepage lakes under NR 102 was unlawful, and 5) the DNR was wrong to conclude that the source of phosphorus into Lac Courte Oreilles was non-point, because the cranberry operations were in fact point sources of pollutants. (*Id.*) The Wisconsin State Cranberry Growers Association moved to intervene in the case on the fifth cause of action, a motion that was granted. (Order, 9/19/16.)⁵

The Parties’ Stipulation

After working for months towards informal resolution, the parties reached a Stipulation for Partial Stay and Partial Dismissal⁶ (Stp., 4/4/17.) Evidently recognizing that its “not right now” rationale for denying the petition for a site-specific phosphorus criteria was legally perilous, the DNR agreed to initiate the rulemaking process and “*propose*

⁵ The Growers Association was later dismissed as a party when Claim 5 was dismissed. (Order, 4/30/18.)

⁶ As part of the Stipulation, Petitioners dismissed the declaratory judgment portion of Claim 5 without prejudice. (Stip. ¶ 9.) Petitioners later dismissed the remaining portion of Claim 5. (Order, 4/30/18.)

a phosphorus SSC for Lac Courte Oreilles,” including Musky Bay. (Stip., 4/4/17, ¶ 3.a (emphasis added).) The Stipulation also recognized the data and research Petitioners had supplied indicating an SSC of 10 ug/L is appropriate. (*Id.* ¶ 3.e.)

The Stipulation set forth agreed-upon steps for establishing the SSC, generally tracking the steps for rulemaking in Wis. Stat. ch. 227, subch. II., including:

- Submitting a scope statement for the development of the proposed phosphorus SSC to the Governor by May 15, 2017
- Submitting the scope statement to the Legislative Reference Bureau for publication in the Wisconsin Administrative Register
- Submitting the published scope statement to the Natural Resources Board for approval
- Developing the proposed phosphorus SSC

(*Id.* ¶ 3.) Respondents also committed to “meet[ing] with Petitioners within 30 days of calculating the proposed SSC for Lac Courte Oreilles,” and at that meeting discussing the status of the overall rulemaking effort and dismissing remaining claims under Paragraph 9 of the Stipulation. (*Id.* ¶ 3.g.) After that, DNR agreed to “move through the remaining rulemaking process as expeditiously as possible,” which could be tracked on the Wisconsin Legislature’s administrative rules website. (*Id.* ¶ 3.h.)

The Court approved the terms of the Stipulation through Order, and stayed the case “pending completion of the steps outlined in subparagraph 3.a. through 3.g. of the Stipulation.” (Order, 4/5/18.) It further directed, “[t]he parties are ordered to comply with the provisions of the Stipulation.” (*Id.* (emphasis added).)

The DNR Does Not Propose an SSC

Respondents achieved many of the steps in the Stipulation, such as obtaining approval of a scope statement from the Natural Resources Board and Governor to initiate

the rulemaking process to set the SSC. (R.5771, Doc.#114; R.4479, Doc#32.) However, the process came to a screeching halt when it came time for Respondents to actually propose the SSC. With no advance notice to Petitioners, the Respondents determined that setting an SSC for Lac Courte Oreilles was not scientifically justified, as DNR interpreted its authority. (R.4838-5636, Doc#156.) As explained in its “Technical Support Document,” the DNR agreed the coldwater fishery was impaired by an insufficient oxythermal layer, but would not agree that phosphorus was the cause. (*Id.* at 4844.) It further determined that reducing the phosphorus criteria below 15 ug/L would “probably not reduce the negative impacts to the oxythermal layer. (*Id.* at 4845.) As for Musky Bay, the DNR would not recommend changing the current 40 ug/L standard, and even recommend removing Musky Bay from the state’s list of phosphorus-impaired waters, since invasive plant populations had declined based on prior treatment. (R.4848.) The DNR recommended further research into the cause of oxygen depletion in the lake and its impact on the lake fishery, as well as the relationship between invasive curly-leaf pondweed and nutrient (i.e. phosphorus) impairment. (*Id.* at 4845, 4847.) Petitioners submitted a scientific analysis of the DNR’s document, rebutting many of its claims. (R.5686-5689, Doc.#202; *see also* R.5746-5753, Doc.##209-210.)

The parties met to discuss the issue, and Respondents informed Petitioners they intended to take no further action on the rulemaking to develop an SSC for Lac Courte Oreilles. (R.5757, Doc.#210.) Petitioners filed a second petition challenging Respondents’ decision not to set an SSC for Lac Courte Oreilles. Pet. for Judicial Rev., Case No. 18-CV-758 (“2018 Petition”)

Procedural History

After a few more attempts to resolve the matter (*see* 16-CV-1564 status conference notes, 4/5/18, 6/11/18) the parties were at impasse about the rulemaking process they had agreed to and what could be done to protect the lake. The parties agreed the 2016 and 2018 Petitions should be consolidated, that an April 16, 2018, stay on the 2018 Petition should be lifted, that the Respondents should file the remaining record of decision, and that briefing “on the merits” should commence. (Order, 7/19/18.) Respondents then filed a motion for “court conducted mediation” based on Paragraph 8 of the Stipulation and sought to stay the briefing schedule. (Mot. to Stay Order, 8/24/18; Mot. to Initiate Court-Conducted Dispute Resolution, 8/24/18.) The Court denied the motions and determined that issues about whether the Stipulation was violated could be briefed with the merits. (Order, 10/8/18, Dkt. 92.)⁷

The Current State of the Lake

Since the 2016 Petition was originally filed, the situation on Lac Courte Oreilles has become increasingly dire. In the Fall of 2016, there was a large fish kill on the lake—the largest ever recorded—that killed hundreds of cisco and whitefish over a period of 26 days. (R.4240, Doc.##101-102.) According to a report jointly prepared by Courte Oreilles Lakes Association and Lac Courte Oreille Band of the Lake Superior Chippewa, the fish lacked habitat with the needed combination of sufficient oxygen and cool temperatures. (*Id.* at 4244.) The report noted that phosphorus levels in the lake were higher than normal during this time, and connected the low oxygen levels to the higher phosphorus. (*Id.*)

⁷ The Court also stated that since the issues would be briefed together, the parties may exceed the usual page limit.

This year, the DNR proposed adding Lac Courte Oreilles to its list of impaired waters due to low levels of dissolved oxygen and its impact on the coldwater fishery.⁸ (R.5701, Doc.#107; *see also* Dkt. 203.) The EPA has accepted his listing. (R.5772, 5797, Doc.##201, 212.) While the DNR labeled the source of the impairment “unknown pollutant,” Petitioners strongly believe—based on the work of their retained scientists—that the cause of the low dissolved oxygen is high levels of phosphorus in the lake. (R.4589-4592, Doc.#106.) Along with the impairment listing, DNR rated the “TMDL Priority”—a measure that would fix or at least study the impairment—as “low.” (R.5797, Doc.#212.)

REGULATORY BACKGROUND

Wisconsin’s Authority to Protect Water Quality

Wisconsin’s Legislature has recognized that “[c]ontinued pollution of the waters of the state has aroused widespread public concern,” and “endangers public health and threatens the general welfare.” Wis. Stat. § 281.11. It has hence directed that a “comprehensive action program be directed at all present and potential sources of water pollution . . . to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.” *Id.* The DNR is the primary agency implementing this program, Wis. Stat. § 281.12(1).

The Legislature’s directive to protect water quality has roots in two larger sources of authority. First, under Article IX Section 1 of the Wisconsin Constitution, the “public trust doctrine,” Wisconsin’s lakes belong to the public and are held in trust for it by the State. This doctrine predates Wisconsin statehood, borne of the Northwest Ordinance of 1787 and

⁸ *See* https://dnr.wi.gov/topic/ImpairedWaters/2018IR_IWLlist.html

incorporated into the state constitution in 1848. Wisconsin courts have safeguarded the public trust doctrine for more than 100 years, repeatedly and unanimously upholding it as a “fundamental tenet of our constitution,” and declaring:

The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should enure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein.

Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816, 820 (1914). The public trust duty is affirmative, and includes “[p]reventing pollution and protecting the quality of the waters of the state.” *Wisconsin's Env'tl. Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 533, 271 N.W.2d 69, 76 (1978) (emphasis added).

Second, Wisconsin conducts many of its regulatory activities pursuant to its delegated authority to administer portions of the federal Clean Water Act (CWA) in Wisconsin, *see Andersen v. DNR*, 2011 WI 19, ¶¶ 33-40, 332 Wis. 2d 41, 796 N.W.2d 1. Section 303 of the CWA requires all states, including Wisconsin, to adopt water quality standards applicable to intrastate waters like Lac Courte Oreilles. 33 U.S.C. § 1313. Such standards must comply with the water quality standards of CWA, as implemented by EPA at 40 C.F.R. 131 Subpart B. They must be approved by the EPA and are subject to periodic EPA review for compliance with the CWA. 33 U.S.C. § 1313(a), (c).

As to portions of the lake in the Tribe's ceded territory, the Treaty of 1837 recognizes that the right to hunt, fish, and gather includes a right to habitat protection, because the most fundamental prerequisite to exercising the right to harvest natural resources is the existence of natural resources to be taken. (R.2705.) In the implementation of this right,

Lac Courte Oreilles v. State of Wisconsin (LCO VI) establishes that the State does not have the unfettered discretion to exercise its management prerogatives to the detriment of the tribes' treaty reserved rights. 707 S. Supp. 1034 (W.D.Wis. 1989).

Water Quality Standards Must Protect the Public Interest

Foundational to Wisconsin's pollution-reduction efforts is setting water quality standards for various water bodies or types of water bodies in the state. Wis. Stat. § 281.15 directs:

The department shall promulgate rules setting standards of water quality to be applicable to the waters of the state, recognizing that different standards may be required for different waters or portions thereof. Water quality standards shall consist of the designated uses of the waters or portions thereof and the water quality criteria for those waters based upon the designated use. ***Water quality standards shall protect the public interest, which include the protection of the public health and welfare and the present and prospective future use of such waters*** for public and private water systems, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agricultural, commercial, industrial and other legitimate uses. ***In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest.***

Wis. Stat. § 281.15(1) (emphasis added).

The directive of Wis. Stat. § 281.15(1) was created as part of the foundational legislation in 1965 consolidating the natural resource conservation efforts of the State's various boards and commissions into a single agency—the DNR. 1965 Wisconsin Chapter 614. The version of Wis. Stat. § 281.15(1) first proposed was two brief sentences granting DNR the authority to adopt water quality standards but making no mention of the public interest or how to address water use conflicts. *See* Drafting file for 1965 c. 614, Wis. Legis. Reference Bureau, Madison, Wis.

In response, then-Lieutenant Governor Patrick Lucey addressed the Senate Conservation Committee, pleading “[t]his is not the time for halfway measures,” nor “to accept compromise,” going on to explain:

It is disconcerting to find that the words 'public interest' are not used anywhere in this section [now 281.15(1)]. Under the present language of the bill one portion of a river might be deemed suitable for industrial waste, while another part of the same river might be reserved for fishing and recreation. Part of that river would in effect be turned into an "industrial sewer." This is not a wholesome situation. It is the situation that exists now, and ... [i]t seems to me that the whole purpose of passing this new legislation--a purpose on which we all agree--is defeated by the language of this section.

Our citizens are truly alarmed about the problem of water pollution. This is one of those occasions when rank and file citizens are out in front of their elected representatives. Wisconsin is ripe for an all out frontal attack on this problem.

Statement of the Lt. Governor Patrick J. Lucey before the Senate Conservation Committee on Senate Bill 620 s. Relating to Water Pollution Control.⁹ Sometime thereafter, the proposed language was revised to require DNR not only to promulgate water quality standards to "protect the public interest" generally, but to resolve potential conflicts in favor of the public interest "in all cases."¹⁰

The DNR's Implementing Regulations Require Protection of Fishing and Other Designated Uses

To implement Wis. Stat. § 281.15, water quality standards are made up of designated uses of surface waters and criteria for meeting those uses, both contained in Wis. Admin. Code § NR 102.04. Designated uses include fish and aquatic life use, recreational use, public health and welfare use, and wildlife use. Within the fish and aquatic life use category are subcategories, ranging from cold water communities "capable of supporting a community of cold water fish and other aquatic life, or serving as a spawning area for cold water fish species," to warm water fish communities, to degraded or limited aquatic life categories. *Id.* § NR 102.04(3). Criteria include specified levels of dissolved oxygen, pH,

⁹ Available in drafting file for 1965 c. 614, Wis. Legis. Reference Bureau, Madison, Wis.

¹⁰ See note 9, *supra*.

and temperature. *Id.* § NR 102.04(4). The aquatic life designated use for Lac Courte Oreilles is coldwater (stratified two-story fishery) and the aquatic life designated use of Musky Bay is a warm water fishery. R.4843 (Doc.#156.) The recreational use for Lac Courte Oreilles is stratified (deep) drainage lake, and Musky Bay is an unstratified (shallow) drainage lake. (*Id.*)

NR 102.06 contains phosphorus criteria for waters of the state. In relevant part, NR 102.06(4) states:

(4) RESERVOIRS AND LAKES. Except as provided in sub. (1), *to protect fish and aquatic life uses established in s. NR 102.04 (3) and recreational uses established in s. NR 102.04 (5)*, total phosphorus criteria are established for reservoirs and lakes, as follows:

• • • •

b) For the following lakes that do not exhibit unidirectional flow, the following total phosphorus criteria are established:

- 1. For stratified, two-story fishery lakes, 15 ug/L.**
- 2. For lakes that are both drainage and stratified lakes, 30 ug/L.**
- 3. For lakes that are drainage lakes, but are not stratified lakes, 40 ug/L.**
- 4. For lakes that are both seepage and stratified lakes, 20 ug/L.**
- 5. For lakes that are seepage lakes, but are not stratified lakes, 40 ug/L.**

Id. (emphasis added). Lac Courte Oreilles' main body, as a two-story fishery lake, is subject to a phosphorus standard of 15 ug/L. Musky Bay, classified by DNR as a separate drainage lake, is subject to a 40 ug/L standard. R.4842 (Doc.#156.)

However, NR 102.06(7) goes on to say:

(7) SITE-SPECIFIC CRITERIA. A criterion contained within this section may be modified by rule for a specific surface water segment or waterbody. A site-specific criterion may be adopted in place of the generally applicable criteria in this section where site-specific data and analysis using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody.

Id. (emphasis added). The notes to the rule explain that “[r]eservoirs, *two-story fishery lakes* and water bodies with high natural background phosphorus concentrations *are the most appropriate water bodies for site-specific criteria.*” *Id.*, Note (emphasis added).

Finally, NR 102 separately and specifically identifies a principle called “anti-degradation,” meaning “[n]o waters of the state shall be lowered in quality” except under certain, limited circumstances. NR 102.05(1)(a). The purpose of this policy is to “prevent water quality from sliding backwards and becoming poorer without cause, especially when reasonable control measures are available’.” (R.2733 (quoting WDNR, 2013).) However, for certain waters, such as “outstanding resource waters” (“ORWs”), quality may not be lowered at all. NR 102.10(2). These waters, inter alia, provide outstanding recreational opportunities and support valuable fisheries. (R.2733 (citing WDNR, 2013).) Less than 1% of Wisconsin’s lakes are designated as ORWs. (*Id.*) Lac Courte Oreilles is such an ORW. *Id.* § 102.10(1m)(a)17.

ARGUMENT

Petitioners have repeatedly appealed to the DNR to help save Lac Courte Oreilles and its storied fishery. At times, the DNR has agreed—only to pull back, as it did in this case when it failed to propose a phosphorus SSC for the lake, as it promised in the Stipulation. The Court should find that DNR violated the stipulation, and further, that it erred in 2016 and 2018 when it denied Petitioners’ request to set a site-specific criteria for phosphorus in Lac Courte Oreilles. The Court should remand this matter to DNR to propose a protective SSC for Lac Courte Oreilles, consistent with Petitioners’ request. Alternatively, the Court should determine that the 15 mg/L phosphorus standard for two-story fishery lakes in NR 102 is invalid.

I. THE DNR VIOLATED THE STIPULATION.

The DNR has claimed the issue of whether it violated the Stipulation is a threshold issue, such that if the Court finds it did not violate the Stipulation, “the remaining

controversies . . . will likely be moot.” (Mot. to Stay, 8/24/18, at 2.) The DNR indisputably violated the Stipulation, and this matter is not moot. The Court should enforce its Order approving the Stipulation.

A. *Standard of Review.*

The interpretation of a stipulation between parties is a question of law, which a court reviews de novo. *Rose v. Rose*, 2017 WI App 7, ¶ 34, 373 Wis. 2d 310, 895 N.W.2d 104. Because a stipulation is a contract made in the course of judicial proceedings, the canons of contract interpretation apply. *Johnson by Kennedy v. Owen*, 191 Wis. 2d 344, 349, 528 N.W.2d 511, 514 (Ct. App. 1995). Like a court would for a contract, it must look at the language of the stipulation and, if there is no ambiguity, apply its plain meaning. *Perkins v. BOS-MRS Enterprises, Inc.*, 2009 WI App 174, ¶ 10, 322 Wis. 2d 574, 776 N.W.2d 288.

B. *The DNR Failed to Propose an SSC, Violating the Stipulation.*

The Stipulation agreed to by the parties clearly required the Respondents to propose a phosphorus SSC for Lac Courte Oreilles through a rulemaking process. Stip., ¶¶ 3.a.-3.g. This understanding is reinforced throughout the Stipulation. For example: “***DNR agrees to propose a phosphorus SSC for Lac Courte Oreilles***, inclusive of the East, Central, and West Basins and Stuckey Bay, Musky Bay, Chicago Bay, Brubaker Bay, Anchor Bay, and Northeast Bay, as authorized by Wis. Admin. Code § NR 102.06(7),” Stip. ¶ 3.a (emphasis added); *see also id.* ¶ 3.e. (“If the [Natural Resources] Board approves the scope statement, ***DNR agrees to develop a proposed SSC for Lac Courte Oreilles as expeditiously as possible.***”) (emphasis added).

There is no scenario envisioned in the Stipulation where the Respondents do not propose a new SSC for Lac Courte Oreilles. Everything in the Stipulation points to this

outcome. *See generally* Stip. The entire purpose of the Stipulation was to resolve Petitioners' claims that DNR improperly denied their petition for an SSC rulemaking, and the Stipulation stayed judicial resolution precisely so DNR could develop the SSC. *Id.* at 2, 7; R.4472-73 (Doc.#145). Even the parties' anticipated disputes under the Stipulation relate to scenarios other than failure to set an SSC, such as disputes about the number the DNR chose for the SSC, the timing surrounding the SSC, and other procedural issues. *Id.* ¶¶ 3.d., 4. This further indicates the process under the Stipulation was intended to result in a new proposed SSC. Otherwise, Petitioners would never have agreed to the Stipulation and wasted another year before this matter could be resolved.

In fact, the DNR took many early steps that laid the groundwork for proposing an SSC, such as drafting and submitting a scope statement to the Governor and Board for approval, and publishing the scope statement in the administrative register. R.4471-4498 (Doc.#145.) It is thus not an exaggeration to say Petitioners were absolutely gob smacked when the Department of Justice later notified them that the "DNR has determined that a more stringent site specific phosphorus criterion cannot be scientifically justified as necessary to protect the designated uses in Lac Courte Oreilles." R.4838 (Doc.#156). Petitioners submitted a rebuttal to the DNR's claimed scientific rationale, R.5686-5692 (Doc.##202-203), and requested a meeting with DNR under Paragraph 8 to discuss the matter based on DNR's failure to propose an SSC as required by Paragraph 3(e). (Mot. for Court-Conducted Mediation, ¶ 3, 8/24/18).¹¹ Informal efforts to resolve the dispute were not successful.

¹¹ A copy of this letter is not in the record but Petitioners do not disagree with the characterization in the Respondents' motion.

Regardless of the reasons why Respondents claim an SSC is not justified, there is no credible argument that they complied with the clear language of the Stipulation.

Respondents stipulated, over and over, that they would propose a phosphorus SSC for Lac Courte Oreilles, and they did not. In particular, the DNR did not comply with Paragraphs 3.a. and 3.e., where it agreed to develop an SSC for Lac Courte Oreilles. (Stip., ¶ 3.) This does not mean the case is moot, as Respondents have claimed. Petitioners understand DNR's argument to rely on its supposed compliance with the Stipulation, but as the foregoing has demonstrated, DNR clearly did not comply. If anything, the Court should enforce its Order approving the Stipulation requiring the parties to comply with it. (Order, 4/5/17.) There was certainly no bar to the parties agreeing, as they did in July 2018, that they were at impasse and that briefing "on the merits" should commence. (Order, 7/19/18.)

Based on the Respondents' non-compliance with the Stipulation, the Court should enforce its April 5, 2017, Order, and direct DNR to propose an SSC for Lac Courte Oreilles.

II. THE DNR IMPROPERLY DENIED PETITIONERS' REQUEST FOR SITE-SPECIFIC RULEMAKING.

A. *Standard of Review.*

Issue II reviews an administrative agency decision under Wis. Stat. §§ 227.52 and .53. Whether the agency's decision suffered from material errors in procedure, an erroneous interpretation of law, errors of fact, and actions outside the agency's discretion—are reviewable under Wis. Stat. § 227.57(4), (5), (7), and (8).

Where, as here, a petitioner asserts errors of facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action

within the agency's responsibility. Wis. Stat. § 227.57(7). Because the Department held no contested case hearing, the Court need not apply the substantial evidence test in its review of the facts. *Id.*; *R.W. Docks & Slips v. Dep't of Nat. Res.*, 145 Wis. 2d 854, 861, 429 N.W.2d 86, 88 (Ct. App. 1988).

The court must reverse or remand any agency action if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency, *id.* § 227.57(8), or remand if it finds that either the fairness of the proceedings or correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure, *id.* § 227.57(4). Acting on a misinterpretation of statute is an erroneous exercise of discretion. *Bosco v. Labor & Indus. Review Comm'n*, 2003 WI App 219, ¶ 29, 267 Wis. 2d 293, 307, 671 N.W.2d 331, 338, *aff'd*, 2004 WI 77, ¶ 29, 272 Wis. 2d 586, 681 N.W.2d 157. If the agency erroneously interpreted or applied the law, the court must set aside the action, modify the action, or remand the action for further proceedings by applying the correct interpretation of law. Wis. Stat. § 227.57(5).

The Court reviews of questions of law *de novo*, as courts no longer afford deference to agency legal interpretations following the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 582, 914 N.W.2d 21, 63. In ending the doctrine of judicial deference to agency decisions, the court found that deference intruded on the judiciary's function and violated the separation of powers, and raised fairness concerns in cases where the agency is a party. *Id.* ¶ 63. Although *Tetra Tech* did conclude that courts may still consider with due weight the experience, technical

competence, and specialized knowledge of the agency when these factors are present, this is a matter of persuasion, not deference. *Id.* ¶ 78.¹²

Further, no deference is or has ever been afforded to agency decisions that concern the scope of the agency's own power or its statutory authority. *Wis. Bell, Inc. v. PSC*, 2004 WI App 8, ¶ 38, 269 Wis. 2d 409, 675 N.W.2d 242 (“we give no deference to the Commission’s determination of its own authority”), *aff’d*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301, *reconsid. denied*, 2005 WI 134, 282 Wis.2d 724, 700 N.W.2d 276; *Wis. Envtl. Decade, Inc. v. PSC*, 81 Wis.2d 344, 351, 260 N.W.2d 712 (1978). Courts also owe no deference to agency interpretations that contradict the clear meaning of a statute. *Seider v. O’Connell*, 2000 WI 76, ¶ 69, 236 Wis. 2d 211, 612 N.W.2d 659. Additionally, if the court determines the agency has insufficiently explained its decision or the basis for its decision, the court affords no deference and should remand the case to the agency. *Wis. Ass’n of Manf. & Commerce, Inc. v. Pub. Serv. Comm’n of Wis.*, 100 Wis. 2d 300, 309-10, 301 N.W.2d 247 (1981).

The Court should review the legal issues in this case *de novo*.

B. *The DNR Improperly Denied Petitioners’ Request for Site-Specific Phosphorus Rulemaking for Lac Courte Oreilles.*

The DNR erred when it rejected Petitioners’ request for rulemaking, first when Ms. Sylvester denied the SSC rulemaking petition in 2016, and second in the DNR’s 2018 technical support document decision.

¹² Even older cases applying due weight deference recognized there ‘there is little difference between due weight deference and no deference, since both situations require [the court] to construe the statute . . . based on judicial expertise in statutory construction’” *Operton v. LIRC*, 2017 WI 46, ¶ 22, 375 Wis. 2d 1, 894 N.W.2d 426, 431 (quoting *County of Dane v. LIRC*, 2009 WI 9, ¶ 19, 315 Wis. 2d 293, 759 N.W.2d 571).

1. The DNR's 2016 Denial Was Procedurally Flawed, and Suffered from Errors in Law, Discretion, and was Arbitrary and Capricious.

a. **The DNR Employee Who Rejected the 2016 Rulemaking Petition Lacked Authority to do so.**

The decision to deny the Petition suffered from a material error in procedure and must be remanded. Wis. Stat. § 227.54(7); 2016 Pet. at 7-8.

Administrative agency rulemaking follows strict and specific procedures in Wisconsin. Wis. Stat. ch. 227, sub. II. These procedures include submitting a scope statement to the governor for approval, holding public hearings, conducting economic and other analyses, notifying the legislature, and filing and publication requirements. *Id.* “Agency” is defined, for purposes of Wis. Stat. ch. 227, as a “board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer.” Wis. Stat. § 227.01(1). This definition confirms that no individual employee can bind the agency through rulemaking decisions.

The DNR follows additional procedures for rulemaking, by virtue of the fact that the agency is supervised by the seven-member Natural Resources Board. Wis. Stat. § 15.34(2). The Board sets policy for the agency, including approving all rulemaking. *See* Wis. Stat. § 15.05(1)(b).¹³ Although the DNR has a Secretary, his or her duties are administrative, while the Board’s duties are “regulatory, advisory and policy-making.” *Id.*

While an agency may itself initiate a rulemaking, Wis. Stat. § 227.12 also permits “a municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in a rule” to “petition an agency requesting it to promulgate a rule.” Wis. Stat. § 227.12(1). The petition must

¹³ *See also* <https://dnr.wi.gov/about/nrb/>

identify the substance or nature of the rulemaking requested, the reason for the request and the petitioners' interest, and a reference to the agency's authority to promulgate the rule. *Id.* § 227.12(2). “[W]ithin a reasonable period of time after the receipt of a petition under this section, *an agency* shall either deny the petition in writing or proceed with the requested rule making. If *the agency* denies the petition, it shall promptly notify the petitioner of the denial, including a brief statement of the reason for the denial.” *Id.* § 227.12(3) (emphasis added). If it decides to proceed with the rulemaking, the agency must follow the procedures in Wis. Stat. ch. 227, subch. II. *Id.*

In this case, Petitioners submitted their Petition for site-specific rulemaking “TO THE DEPARTMENT OF NATURAL RESOURCES” (R.2705) by delivery to the Secretary's office (R.2701). The petition was signed by COLA's president, vice-president, and three board members, as well as the Council Chairman for the Tribe. (R.2706.) It contained all the information required by Wis. Stat. § 227.12(2). Because they had been in previous correspondence about the matter to Ms. Sylvester, they included a cover letter to her attention. (R.2701.) Several DNR employees received a courtesy copy by email. (R.2772.)

Despite the fact that this was a formal rulemaking petition under Wis. Stat. § 227.12, there is no indication in the record that the Board reviewed the petition or was even made aware of it. There is certainly no indication they approved the denial. Instead, it was handled internally by Ms. Sylvester and other DNR staff, without involvement of the Board. (*E.g.*, R.3038.) The denial itself does not mention the Board, was signed by Ms. Sylvester, and was copied to a number of DNR staff and an employee of the EPA. (R.3042-3043.)

“It is axiomatic that because the legislature creates administrative agencies as part of the executive branch, such agencies have only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates. *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Nat. Res.*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 334–35, 677 N.W.2d 612, 620. Where there is any doubt, that doubt should be “resolved against the existence of [agency] authority.” *Debeck v. Wisconsin Dep't of Natural Res.*, 172 Wis.2d 382, 387, 493 N.W.2d 234, 237 (Ct. App. 1992) (citing *Trojan v. Board of Regents of Univ. of Wis. Sys.*, 128 Wis.2d 270, 277, 382 N.W.2d 75, 78 (Ct. App. 1985)).

In this case, the DNR, through its employee Ms. Sylvester, acted *ultra vires* and outside of its authority when it denied the Petition. Only the agency, acting through the Board, can make rulemaking and other regulatory decisions. Wis. Stat. §§ 15.05(1)(b), 227.01(1). Decisions of staff, from the DNR Secretary downward, are only administrative. *Id.* As a member of the staff, Ms. Sylvester lacked authority to unilaterally deny the Petition. This makes sense: the Petition invoked a number of policy considerations of which the Board would naturally be aware and involved in: water quality standards for a large northern lake, fishery concerns, tribal relations, lake association relations, one of the first if not the first petition for site-specific criteria under NR 102.06(7), and rulemaking generally. These are all issues that are grist for the Board’s mill, not agency staff. Wis. Stat. §§ 15.05(1)(b), .34(2).

Because the DNR improperly denied the Petition, without involvement of or approval of the Board, “the fairness of the proceedings or the correctness of the action” was “impaired by a material error in procedure or failure to follow prescribed procedure.” Wis. Stat. § 227.54(4). The Court should remand the Petition for further action. *Id.*

b. The Denial Based on Future Rulemaking was Legally Erroneous, an Abuse of Discretion, and Arbitrary and Capricious.

Next, Respondents' denial of the SSC petition in the Sylvester Letter was unsupported by law, arbitrary and capricious, and outside the agency's discretion. It should be reversed and remanded. Wis. Stat. § 227.57(5), (8).

The DNR denied Petitioners' 2016 petition for a permanent SSC for Lac Courte Oreilles on the grounds that the agency "[would] not be reviewing or making approval decisions on individual Site Specific Criteria (SSC) requests until the process for Rule package WT-17-12 is completed." (R. 3042.) Based on DNR's best estimate at the time, the rulemaking process would "likely take two more years." (*Id.*) The letter claimed that proceeding on Petitioners' SSC petition while proceeding on a potential rulemaking still years out "would be impractical and could lead to inconsistency in the development of site specific criteria." (*Id.*) The denial makes not a single reference to the merits of the petition. (*Id.*) In sum, the DNR frames the denial as a mere procedural decision to "streamline" its SSC rulemaking process. To date, well over two years later, proposed rule WT-17-12 still languishes in the very initial stages of rule promulgation.¹⁴

At first glance, DNR's denial may appear to be a simple discretionary decision to reorder the agency's priorities and allocate its resources. In reality, however, it is an unauthorized repeal of a promulgated rule, Wis. Admin. Code § NR 102.06(7), beyond the bounds of the statutorily-imposed repeal process. Its effect is to deprive Wisconsin of *any* site-specific criterion rule for an indeterminate length of time, and perhaps forever because

¹⁴ See "Proposed permanent natural resources rules," Wisconsin DNR at <https://dnr.wi.gov/news/input/proposedpermanent.html>, last checked 11/3/18.

the promulgation of a new site-specific criterion rule is, at this point, speculative. Repeals of statute or rules by implication are not favored in the law, and may only be accomplished—if at all—by the Legislature. *See Motola v. LIRC*, 219 Wis. 2d 588, ¶ 28, 580 N.W.2d 297 (1998) (citing *Kozich v. Employe Trust Funds Bd.*, 203 Wis. 2d 363, 375-76, 553 N.W.2d 830 (Ct. App. 1996)).

First, the DNR's decision not to stop reviewing or approving any petitions for site-specific criteria is a de facto repeal of Wis. Stat. § 227.12 and NR 102.06(7), which provides

A criterion contained within this section may be modified by rule for a specific surface water segment or waterbody. A site-specific criterion may be adopted in place of the generally applicable criteria in this section where site-specific data and analysis using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody.

By deciding to no longer implement the rule, it was effectively removed from the books: no petition for SSC will be entertained, according to DNR, regardless of its merits. (R. 3042.)

But a rule may only be repealed by following the specific procedures of Wis. Stat.

§§ 227.114 through .21, which, *inter alia*, require a multitude of steps and approvals

including notice and public hearing, legislative review, and approval by the governor.

DNR engaged in none of these. Instead, it simply declared in a single letter to Petitioners that § NR 102.06(7) would not have any effect.

Second, DNR's denial of Petitioners' SSC petition was arbitrary and capricious because it is based on the future promulgation of a "substitute" rule which both does not exist now, and may never. DNR reasoned that it could refuse to implement NR 102.06(7) because it was at least attempting to develop a new rule package for setting site-specific criteria, WT-17-12, which might take effect two years later at the earliest. (R. 3042.) Yet even at the time DNR made that statement, WT-17-12 had already been bogged down in

the rulemaking process for more than four years, and making little headway. (R.228.) In May 2016, it remained at just Step 6 of the 27 steps required for DNR rule promulgation. (*Id.*)¹⁵ Almost three years later, WT-17-12 has not progressed, still at the “External Advisory Committee” stage. (See R.5638, Doc.#199.)¹⁶

Moreover, whether Respondents actually complete the 27 steps is speculative. The process requires a rule to receive no fewer than 13 independent approvals, requests, or signatures by individuals and bodies from the Natural Resources Board to the Governor to the Joint Committee for Review of Administrative Rules prior to adoption.¹⁷ If approval is denied at any single point, the rule either dies or starts over. There is no guarantee it will ever complete the process. This case makes that abundantly clear, as even DNR’s forecast of when the rule would be promulgated—two years from May 2016—has come and gone.

An agency’s action or inaction is arbitrary and capricious where it “lacks a rational basis and is the result of an unconsidered, willful or irrational choice.” *Wis. Prof’l Police Ass’n v. Pub. Serv. Comm’n of Wis.*, 205 Wis. 2d 60, 74, 555 N.W.2d 179, 186 (Ct. App. 1996). DNR’s denial of Petitioners’ petition based on a decision to stop reviewing or approving *any* SSC request under § NR 102.06(7), regardless of merit, has no rational basis and is an unconsidered, willful and irrational choice in light of the fact that WT-17-12 may never be promulgated. Under this reasoning, an agency could deny *any* Wis. Stat. § 227.12 petition for rulemaking by simply explaining that it intended to promulgate a different rule at some

¹⁵ The flow chart is available at <https://dnr.wi.gov/news/input/documents/rules/AdminRuleProcedure.pdf>.

¹⁶ See Wisconsin DNR, “Proposed permanent natural resources rules,” at <https://dnr.wi.gov/news/input/proposedpermanent.html> (last viewed 11/3/2018).

¹⁷ See note 15, *supra*.

point in the future. This makes no logical sense, and would leave administrative agencies free to pick and choose which rules to implement in their current state. DNR's reasoning cannot stand.

Moreover, DNR's denial is outside the range of discretion it enjoys under NR 102.06(7). That subsection proscribes the limits of SSC petition review to whether or not the petitioner has provided "site-specific data and analysis using scientifically defensible methods and sound scientific rationale [to] demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody." *Id.* It provides no other grounds for DNR to consider—not DNR's own internal policy or preference, nor its intentions to promulgate similar or related regulations in the future.

DNR's denial was inconsistent with Wis. Stat. § 227.12 and NR 102.06, outside the law and the bounds of its discretion, and must be reversed. Wis. Stat. § 227.57(5), (8).

2. The DNR's 2018 Technical Support Document Was Based on an Erroneous Interpretation of Law and Exercise of Discretion, and Issues of Fact Demand Remand.

The DNR's second denial of the rulemaking petition, this time based on its determination that setting the SSC was not scientifically justified, is also flawed and should be reversed and remanded. Wis. Stat. § 227.57(5), (6), and (8).

As noted above, DNR must set water quality standards in a matter that protects the public interest, including rights to fishing and recreation. Wis. Stat. § 281.15(1); *see also id.* (2). NR 102.06 sets these standards for phosphorus in various kinds of water bodies, but it explicitly recognizes that these criteria are not one-size-fits-all, especially for two-story fishery lakes. NR 102.06(7), *Note.* Hence, "[a] site-specific criterion may be adopted in place of the generally applicable criteria in this section where site-specific data and analysis

using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody.” NR 102.06(7).

The 2016 Petition met these criteria. It showed that the fishery and recreational uses of Lac Courte Oreilles and Musky Bay were impaired despite “attaining” the applicable 15 ug/L and 40 ug/L phosphorus standards, and that excessive phosphorus reducing dissolved oxygen in the water column was the likely culprit. (R.2737-2758.) It also explained why the 10 mg/L standard would be protective of the lake. (R.2759-2764.)¹⁸ It did so using twenty years of site-specific monitoring data collected by the Tribe’s Conservation Department (R.2718) and other site-specific data, published scientific literature (R.2769-2771), and sound scientific methods (*e.g.*, R.2759-2764).

A review of DNR’s Technical Support Document and other records shows that the agency interpreted its legal authority to set site-specific criteria so narrowly that it was impossible for Petitioners—or anyone—to meet the standard in NR 102.06(7). In response to the statement by Petitioners’ consultant, Limnotech, that “we can be certain that a reduction in phosphorus concentrations will have a positive impact on the oxythermal layer and resulting support of designated uses,” DNR responded:

DNR does not disagree that limited phosphorus in [Lac Courte Oreilles] could be beneficial to the lake but, as addressed above, the statutes and rules that authorize DNR to establish a phosphorus SSC require a more robust, science-driven demonstration. Indeed, the law requires DNR to determine that the proposed phosphorus SSC *will be protective* of the designated use *but not more stringent than necessary* to assure attainment.

¹⁸ Later, as the parties were attempting to resolve disputes about the Stipulation, Petitioners’ scientific consultants used a different yet also scientifically defensible method to show the SSC should be set at a maximum of 11.6 ug/L. R.5754-5756 (Doc.#210). The DNR also rejected this proposal. R.5757 (Doc.#210).

(R.5758, Doc.#210 (emphasis added).) In other words, DNR required Petitioners to hit a regulatory sweet spot: showing that a different criterion *definitely would be* protective of the designated uses, but *definitely would not be* too stringent. The technical support document (“TSD”) echoed this interpretation. (R.4842, Doc.#156 (requiring a “clear link” between phosphorus and protection of designated uses).)

To reach this conclusion, DNR focused almost exclusively on Wis. Stat. § 281.15(2) which provides that DNR shall “[e]stablish criteria which are no more stringent than reasonably necessary to assure attainment of the designated use for the water body.” (*E.g.*, R.5758, Doc.#210.) In doing so, it ignored Wis. Stat. § 281.15(1), which requires that water quality standards be set so as to protect the public interest. (*Id.*) There is no doubt that the public interest in Lac Courte Oreilles is suffering due to impairment of the coldwater fishery and recreational opportunities. Even DNR admitted these impairments, the connection between phosphorus and low dissolved oxygen, and the resulting impacts on coldwater fish. (R.4842-44, Doc.#156; R.5687, Doc.#202.) Where there is any doubt, the agency must resolve the issue in favor of protecting the public interest, as Lt. Governor Lucey demanded when the statute was originally enacted. Reading Wis. Stat. §§ 281.15(1) and (2) together, standards that protect designated uses—like the 10 ug/L site-specific standard proposed by Petitioners—are “reasonably necessary” because they protect the public interest. *See Winebow, Inc. v. Capitol-Husting Co., Inc.*, 2018 WI 60, ¶ 30, 381 Wis. 2d 732, 914 N.W.2d 732 (noting sections of statutes relating to the same subject matter must be construed in *pari materia*).

In requiring Petitioners to show a “just right” water quality standard, the DNR held Petitioners to a higher standard than it held itself in setting the general, 15 ug/L standard for

two-story fishery lakes in the first place. As explained in Section III.B., the DNR acknowledged this standard may not be protective of fisheries and that other resources suggested a lower standard, but it selected this standard for NR 102 anyway. This “fudged” approach does not meet the requirement of Wis. Stat. § 281.15 to set standards in a way that protects the public interest and designated uses. The DNR claimed it could not accept Petitioners’ SSC “if the science merely indicates that a reduction in phosphorus would be a ‘step in the right direction’” (R.5760, Doc.#210), but it was satisfied to adopt an unprotective standard unless and until someone submitted exacting data refuting this standard.

Disturbingly, the DNR’s interpretation of Wis. Stat. § 281.15 and NR 102.06 will permit phosphorus levels to continue increasing in the lake. Mean phosphorus levels are currently between 12.10-13.68 ug/L in the lake’s main basins and 29.53 in Musky Bay. (R.4842, 4847, Doc.#156). Levels can continue to rise before they will exceed 15 ug/L and 40 ug/L, but even if they do, this does not assure a response from the DNR. The DNR’s current assessment approach (“WisCALM”) requires that for a water body to be formally “impaired” (a prerequisite for a TMDL), the lower 90th percentile of the confidence interval around the mean must exceed the phosphorus criterion. (R.5747.) This means a 50% increase in total phosphorus over existing levels, such that phosphorus levels would need to average more than 22.5 ug/L. (*Id.*) This is a high bar for determining impairment and taking needed steps to restore and protect the resource, especially since the lake is an Outstanding Resource Water, where water quality “shall not” be lowered, NR 102.10(2). DNR’s approach will permit Lac Courte Oreilles to continue to deteriorate up to and after lake water quality reaches 15 ug/L of phosphorus.

The DNR's scientific analysis also suffered from tunnel vision, doing everything possible to avoid the conclusion that excessive phosphorus may be a problem in Lac Courte Oreilles. Despite many points of agreement with Petitioners, and the well-accepted scientific understanding that changes in phosphorus loading and in-lake phosphorus concentrations will impact algae growth and oxygen consumption, the DNR claimed it was prevented from concluding that phosphorus was causing low dissolved oxygen in the lake. (R.5747-5748, Doc.#209.) These included no statistically significant trends of chlorophyll *a*, hypolimnetic oxygen demand (HOD) or decreasing oxythermal layer thickness (OLT), no statistically significant correlation between these factors and phosphorus, and the DNR's theory that reduced substances in sediment were consuming oxygen. (*Id.*) Among other things, it ignored total phosphorus trends over time, used data that are inappropriate for a large lake system like Lac Courte Oreilles, and discounted the possibility that the source of phosphorus in sediment was decayed algae. (R.5747-5753, Doc.##209-210.) DNR also discounted Petitioners' use of an empirical model (Chapra and Canale, 1991) because correlations derived from multiple lakes may not be applicable to Lac Courte Oreilles, despite the DNR's own use of such models to make lake-specific predictions in other contexts, such as designing TMDLs. (R.5751-5752, Doc.#209.) As Petitioners' consultants concluded, "[i]t is clear from the TSD that WDNR appears to explain all possible aspects of oxygen consumption in LCO *except* for those processes linked to decomposition of algal matter," which would be caused by increased phosphorus. (R.5753, Doc.#210.)

In doing so, the DNR relied on a scientific framework contained in unpromulgated, unenacted draft rules, and that focused on such factors as specified levels of chlorophyll *a* and aquatic plants. (R.4843, Doc.#156 ("DNR used the following biological metrics to

evaluate whether the statewide phosphorus criterion is protective of [designated uses in Lac Courte Oreilles]. *These metrics and related thresholds are currently included in proposed rule packages WT-23-13 and WY-25-13*"); *see also id.* at 4847 (same analysis for Musky Bay).) Yet these considerations are not law and have not been accepted as a correct analysis for evaluating SSC requests, and it was an error of law and discretion for DNR to rely on them. *See Dane County v. DHSS*, 79 Wis. 2d 323, 331, 255 N.W.2d 539, 544 (1977) (permitting challenge to agency reliance on unpromulgated rule). Nor does the DNR's draft methodology defeat the already-promulgated requirement in NR 102.06(7) that such requests must be based on "scientifically defensible methods and sound scientific rationale"—without specifying any particular method. Put another way, NR 102.06(7) permits SSCs to be based on a range of scientific methods and analyses, so long as they are sound and defensible. It does not require one method, or confine consideration to the limited set of issues the DNR's draft rule package deems relevant.

Finally, with its 2018 denial, Respondents made the same error that it did in 2016: it permitted DNR staff to reject the rulemaking petition, and not the agency's rulemaking body, the Natural Resources Board. *See* Section II.A.1.a., *supra*. In this case, the error was even more egregious because the NRB had already approved the scope statement to initiate rulemaking. It did not approve the TSD or any other document rejecting the petition for site-specific rulemaking, however, and its decision was outside its legal authority and discretion. Wis. Stat. § 227.57(8).

Between the DNR's excessively narrow interpretation of its authority, and its discretionary and fact-based flaws, the Court should remand this matter back to DNR to

accept Petitioners' proposed SSC, or to reconsider the matter based on a proper legal, discretionary, and factual framework. Wis. Stat. § 227.57(5), (6), and (8).

III. THE 15 MG/L STANDARD FOR PHOSPHORUS IN NR 102.06(4)(b)1. IS UNLAWFUL BECAUSE IT CONFLICTS WITH WIS. STAT. § 281.15(1) AND (2)(B), EXCEEDING THE SCOPE OF DNR'S STATUTORY AUTHORITY, AND WITH THE PUBLIC TRUST DOCTRINE.

If the Court does not reverse the DNR's decision on the SSC for Lac Courte Oreilles, it should determine that the 15 ug/L phosphorus standard generally applicable to two-story fishery lakes in NR 102.06(4)(b)1. conflicts with the level of protection required by statute and is therefore invalid. Had the DNR set a lower phosphorus criteria for two-story lakes to begin with, there would have been no need for Petitioners to submit an individual rulemaking for Lac Courte Oreilles.

A. *Standard of Review*

Issue III is a request under Wis. Stat. § 227.40 for declaratory judgment declaring § NR 102.06(4)(b)1. invalid. The court must declare a rule invalid "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures." Wis. Stat. § 227.40(4)(a). Here, Petitioners argue that § NR 102.06(4)(b)1. exceeds the Department's statutory authority at Wis. Stat. § 281.15, a matter which is reviewed de novo. *Wisconsin Citizens Concerned for Cranes & Doves*, 270 Wis. 2d 318, ¶ 13. Whether a rule violates the state constitution is a question of law subject to de novo judicial review without deference to the agency. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 582, 914 N.W.2d 21, 63.

Although at one time the agency enjoyed a presumption that facts existed in favor of the rule, the Wisconsin Supreme Court overturned that presumption, calling it a "rubber-

stamping of agency decisions” making judicial review a “superfluous... ritual.” *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 383, 401 N.W.2d 805, 811 (1987). As a matter of legal interpretation, Petitioners bear no burden in a challenge to the statutory authority for rule promulgation. *Wisconsin Citizens Concerned for Cranes & Doves*, 270 Wis.2d 318, ¶ 10.

B. *Wis. Admin. Code § NR 102.06(4)(b)1 must be declared invalid because it exceeds the scope of DNR's statutory authority.*

“An agency charged with administering a law may not substitute its own policy for that of the legislature.” *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis.2d 32, 48, 268 N.W.2d 153, 160 (1978). Wisconsin courts must declare an administrative rule invalid if it exceeds the statutory authority granted to the agency by statute. Wis. Stat. § 227.40(4)(a). As the courts have warned, “[o]ur first duty is to the legislature, not the agency. A rule out of harmony with the statute is a mere nullity.” *Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 226, 612 N.W.2d 659, 666.

A rule exceeds its statutory authority if it conflicts with the express statutory language or legislative intent. *Seider*, 2000 WI 76, ¶ 72. With the enactment of 2011 Wisconsin Act 21, the Wisconsin legislature made clear that no agency may implement a standard unless that standard is “*explicitly* permitted by statute,” eliminating potential administrative rulemaking under the banner of implied statutory authority. Wis. Stat. § 227.10(2m) (emphasis added). Instead, the language of the enabling statute must be strictly construed. *Wisconsin Citizens*, 2004 WI 40, ¶ 14.

In promulgating Wis. Admin. Code § NR 102.06(4)1, the rule at issue here, the DNR exceeded its statutory authority because it relied on “supporting” evidence that directly conflicts with the statutory language. The rule sets the total phosphorus water

quality standard at 15 ug/L for stratified two-story fishery lakes in Wisconsin. The DNR derived the authority for promulgating the rule from Wis. Stat. § 281.15, in which the legislature mandated that its water quality standards protect the public interest, including “present and prospective future use of such waters for . . . propagation of fish and aquatic life and wildlife,” and “domestic and recreational purposes.” Wis. Stat. § 281.15(1); *see also* Clearinghouse Rule 10-035, Wis. Admin. Reg. No. 659, Nov. 2010. Section 281.15(2)(c) further requires that

[i]n adopting or revising any water quality criteria for the waters of the state of any designated portion thereof, the department shall . . . [e]stablish criteria which are no more stringent than reasonably necessary to *assure attainment of the designated use* for the water bodies in question.”

Id. (emphasis added).

These Wisconsin statutes were enacted in order to bring Wisconsin into compliance with 40 C.F.R. § 131.11, a federal regulation implementing the Clean Water Act, which requires:

States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. *For waters with multiple use designations, the criteria shall support the most sensitive use.*

40 C.F.R. § 131.11(a)(1). In order to “assure attainment” of the fish and aquatic life designated use for surface waters, water quality standards must ensure, *inter alia*, that “[u]nauthorized concentrations of substances are not permitted that alone or in combination with other materials present are toxic to fish or other aquatic life.” NR 102.04(4)(d).

The DNR promulgated a total phosphorus water quality standard of 15 ug/L for stratified two-story fishery lakes like Lac Courte Oreilles at § NR 102.06(4)1 “to protect fish and aquatic life uses . . . and recreational uses.” NR 102.06(4). This standard was included in a larger 2010 rulemaking, where DNR promulgated “as part of a comprehensive strategy to

address one of the greatest remaining sources of water pollution in Wisconsin – excess nutrients, particularly phosphorus.” (R.3859.) The rule established a suite of total phosphorus standards corresponding to various water body type, from shallow drainage lakes to deep reservoirs. (Clearinghouse Rule 10-035 (Nov. 2010).) In many ways, the final rule was a culmination of several years of effort on the part of DNR water specialists.

However, by the DNR’s own admission while promulgating the rule, the standard of 15 ug/l total phosphorus for two-story fishery lakes was different, and the standard arrived at *does not protect fish and wildlife uses and recreational uses* as required. This is clear on the face of the DNR’s record in support of the standard.

The record in this case minimally reflects how DNR arrived at a standard of 15 ug/L. Some number of pre-settlement settlement sediment cores revealed a median total phosphorus value of 10 ug/l. (R.3841, 3846.) The DNR contemplates 15 ug/l as an absolute maximum to maintain dissolved oxygen at or above the 6 mg/l required by cold water fish species. (R. 3847.) Yet, at the same time, DNR acknowledges that these types of lakes are particularly difficult because they vary greatly in morphology, with the volume of water in the hypolimnium affecting the amount of phosphorus tolerable. (R.3847.) DNR ultimately defers the discussion of an appropriate number to future site-specific criteria rule development, with little other analysis.

The DNR produced a technical support document (“the TSD”) for all of the NR 102.06 total phosphorus water quality standards, which identifies the “scientific data utilized, the margin of safety applied and any facts and interpretations of those data applied in deriving the water quality criteria.” Wis. Stat. § 281.15(2)(e). In the section dedicated to explaining the 15 ug/l standard for stratified two-story fishery lakes, the DNR writes:

The Department recognizes that the concentration of 15 ug/1 is higher than the 10 ug/1 associated with classic oligotrophic lakes and the 12 ug/1 promulgated by the Minnesota Pollution Control Agency. Also, the concentration would seem to result in a concentration too high to support a lake trout fishery as depicted on Figure 3 below.

Given the apparent conflict and the relatively small number of these lakes, 2-story lakes may be candidates for site-specific criteria development.

(R.3970-71, Doc.##127-128.)

That paragraph is disturbing—and, ultimately, renders the rule unlawful—for three reasons.

First, the last sentence of DNR’s paragraph discussion of the 15 ug/1 standard concedes that the standard alone will not assure attainment of designated uses, and instead separate rules would have to be developed: “Given the apparent conflict and the relatively small number of these lakes, 2-story lakes may be candidates for site-specific criteria development.” (R.3970.) The DNR throws up its hands and punts a total phosphorus water quality standard for two-story fishery lakes that will *actually* assure attainment of designated uses to a future, case-by-case rulemaking process that is entirely speculative at best, and non-functional in practice, as described in section II *supra*.

This laissez-faire attitude toward the total phosphorus water quality standard for two-story fishery lakes flies in the face of the legislative mandate at Wis. Stat. § 281.15. The DNR must promulgate water quality standards based on water body type that assure attainment of designated uses; anything less is not within the scope of the agency’s statutory authority. Wis. Stat. § 281.15(1). Furthermore, “[i]n all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest.” *Id.* By openly acknowledging it set a deficient standard, the rule conflicts

with the statute and would need further rulemaking in order to *not* conflict with its legislative mandate. The rule must be invalidated.

Second, the DNR openly admits that the 15 ug/l standard is not supported by the available evidence and does not establish a criterion that “assures attainment” of the designated uses. The designated uses of two-story fishery lakes include both supporting fish and wildlife uses and recreational uses. § NR 102.06(4). The adopted standard of 15 ug/l total phosphorus, in the DNR’s own words, “result[s] in a concentration too high to support a lake trout fishery.” (R.3970-71, Doc.##127-128.) This admission alone should be enough to invalidate the standard for conflict with Wis. Stat. § 281.15.

But the DNR further expounds on the inadequacy of 15 ug/l. It first claims to have settled on the number “based on the mean total phosphorus concentration of reference lakes plus one standard deviation.” (*Id.*) As a preliminary matter, that means that 84% of the two-story fishery lakes in Wisconsin with total phosphorus data available to DNR measured phosphorus concentrations *below* 15 ug/l.

Then, DNR admits that *all* of the other evidence which it considered and cited in this section of the TSD concludes 15 ug/l is too high to support the designated uses. (*Id.*) These sources of evidence are: (1) a 2005 report by the Minnesota Pollution Control Agency which serves as the technical basis for Minnesota’s 12 ug/l total phosphorus standard for similar lakes (R.3980, Doc.#128) (hereinafter, “the 2005 MPCA Report”); (2) the Carlson Trophic

Status Index, which classifies the natural trophic status of lake types¹⁹; and (3) the EPA's Nutrient Criteria Technical Guidance Manual for lakes and reservoirs.²⁰ (R.2730.)

In the course of concluding that a total phosphorus concentration of no more than 12 ug/l was necessary to assure fish and aquatic life use, the 2005 MPCA Report conducted an extensive literature review. That literature review had indicated 15 ug/l was an absolute upper bound for two-story fishery lakes based on work in British Columbia, Canada, back in 1986, but that more recent work in 1993 had found a range of 6 to 12 ug/l to relate to peak abundance of cisco, whitefish, and lake trout in these lakes, and that a 1996 study found that just 10 ug/l was the limit. (R.4037.) Based on all of this, Minnesota set its total phosphorus standard for two-story fishery lakes at 12 ug/l. (R.2730.) Despite having clearly reviewed this report and its underlying studies, the DNR ignored it without explanation, instead choosing a much higher total phosphorus standard.

Next, DNR references the "10 ug/l associated with classic oligotrophic lakes" standard derived from the Carlson Trophic Status Index, one of the most commonly used systems to describe the trophic status of lakes, i.e. their classification in terms of the amount of biological activity they can sustain. (R.3964, Doc.#127.) This, too, DNR ignores without reason, simply acknowledging that the promulgated 15 ug/l standard exceeds it. (*Id.*)

DNR then claims to consider and rely on the EPA Nutrient Criteria Technical Guidance Manual in setting the 15 ug/l standard for two-story fishery lakes. But the EPA Manual, too, reaches a lower standard. (R.2730.) EPA concludes that a standard of 10 to

¹⁹ R.E. Carlson, A trophic state index for lakes, *J. Limnology and Oceanography* 22(2):361, available at <https://www.nrc.gov/docs/ML0427/ML042790430.pdf>.

²⁰ EPA Nutrient Criteria Technical Guidance Manual: Lakes and Reservoirs, First. Ed., available at <https://www.epa.gov/nutrient-policy-data/criteria-development-guidance-lakes-and-reservoirs>

12 ug/l is appropriate based on the 25th percentile of reference lakes in the northern lakes and forests ecoregion which encompasses most of Wisconsin (including, for example, Lac Court Oreilles). (*Id.*) Again, this is well below 15 ug/l.

In short, DNR laid out three external sources of evidence to support a much lower standard, acknowledged that a 15 ug/l standard is unsupported by that evidence, and then promulgated it anyway, all while knowing that at least 84% of the two-story fishery reference lakes with available data in Wisconsin record concentrations of total phosphorus lower than 15 ug/l. (R.2730.) The standard is unreasoned and unsound.

Third, the DNR's methodology in setting the 15 ug/l total phosphorus standard for two-story fishery lakes is inconsistent with its methodology in adopting standards for other lake types, rivers, and streams within the same TSD. For example, the DNR sets a total phosphorus standard of 40 ug/l for shallow lakes (drainage, seepage, and reservoirs) by adopting exclusively the analysis and conclusions reached for these shallow lakes in the 2005 MPCA Report. (R.3971-3974, Doc.#128.) The same can be said of DNR's standard for deep-drainage lakes and deep reservoirs: the standard adopted tracks the analysis and conclusions of Minnesota. (R.3967-3970, Doc.#127.) This inconsistency demonstrates that DNR's justification for adopting a standard *higher* than what was supported by the very sources of evidence it cites was arbitrary.

In sum, the 15 ug/l total phosphorus water quality rule for two-story fishery lakes at NR 102.06(4)(b)1 directly conflicts with Wis. Stat. § 281.15(1) and (2)(c), and DNR's factual record only supports this. As a result, the rule exceeds DNR's statutory authority and must be declared invalid.

C. *The Rule Should Be Declared Invalid Because it Violates the Public Trust Doctrine.*

Alternatively, NR 102.06(4)(b)1 is unlawful because it falls short of protecting water quality in two-story fishery lakes like Lac Courte Oreilles, violating the public trust doctrine founded in Article IX Section 1 of the Wisconsin Constitution. If an administrative rule violates constitutional provisions, it must be declared invalid. Wis. Stat. § 227.40(4)(a).

It is firmly established that the public trust is “for public purposes,” including not just navigation but “*all* public uses of water... including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty.” *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957) (emphasis added). Thus, water quality falls squarely within the public trust doctrine. *See Wisconsin's Envtl. Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 533, 271 N.W.2d 69, 76 (1978) (“Preventing pollution and protecting the quality of the waters of the state are... part of the state's affirmative duty under the public trust doctrine.”); *see also Just v. Marinette Cty.*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 768 (1972) (“The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters.”). The Natural Resources Board has recognized these principles in its own rules. *E.g.*, Wis. Admin. Code § NR 1.01(6) (“*Wisconsin law enunciates a trust doctrine which secures the right of all Wisconsin citizens to quality, non-polluted waters and holds that waters are the common property of all citizens. Fish management programs will vigorously uphold the doctrine that citizens have a right to use in common the waters of the state and these waters shall be maintained free of pollution.*”) (emphasis added).

Here, DNR knowingly adopted a total phosphorus water quality standard for two-story fishery lakes that falls short of protecting lake water quality for the public benefit. The

record demonstrates that DNR understood 15 ug/1 total phosphorus could be a “maximum” tolerable level for cold water fish species, but that it did not account for wide variations in morphology that render such a limit inadequate in some percentage of two-story cold water fishery lakes. (R.3847.) Furthermore, in its TSD supporting the standard, DNR cited and relied on a Minnesota study concluding 15 ug/1 total phosphorus would *not* support lake trout in these lakes. (R.3970.) Ignoring that same study, which settled on a lower standard to preserve cold water fisheries, DNR concluded that site-specific criteria could address the rule’s deficiencies at a later time. (*Id.*)

The public trust doctrine does not allow DNR to promulgate a rule it knows to be insufficient to protect water quality for public uses such as fishing and recreation. This is particularly true where available evidence indicated a more appropriate standard. The DNR, as mandated by the legislature to promulgate water quality standards applicable to public trust waters, “has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose.” *Priewe v. Wisconsin State Land & Improvement Co.*, 103 Wis. 537, 79 N.W. 780, 781 (1899). It may not turn a blind eye to available evidence and implement a standard it knows will not protect the Wisconsin waters held in trust for public use. For these reasons, NR 102.06(4)(b)1 should be invalidated as violating Article IV, § 1 of the Wisconsin Constitution.

CONCLUSION

For the reasons set forth above, the Court should determine that DNR violated the Stipulation and associate court Order, reverse and remand DNR’s decisions to reject a site-

specific criteria for Lac Courte Oreilles and remand the matter to the DNR to propose an SSC consistent with Petitioners' requests or in a manner that will protect Lac Courte Oreilles, or, in the alternative, determine that the 15 ug/L phosphorus standard for two-story fishery lakes in NR 102.06(4)(b)1. is unlawful.

Dated this 5th day of November, 2018.

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