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CIRCUIT COURT
DANE COUNTY, WI
2016CV001564

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

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JAMES COORS, et al.,

Petitioners,

v.

Case No. 16-CV-1564

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, et al.,

Respondents.

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PETITIONERS' REPLY BRIEF

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Respondents Department of Natural Resources ("DNR") and the Natural Resources Board ("Board") do not dispute that Lac Courte Oreilles and its storied fishery are in trouble, impaired despite achieving the 15 ug/L phosphorus standard that currently applies to the lake, or that lowering phosphorus in Lac Courte Oreilles may address the lake's low dissolved oxygen levels. Still, Respondents claim there is nothing for the Court to do in this case, because they have already determined that Petitioners' request for a lower, site-specific phosphorus standard in Lac Courte Oreilles is not legally or scientifically justified. (Resp. Br. at 16-21.) Respondents' arguments assume what they have not proved: that these legal and scientific determinations were correct.

As Petitioners James Coors, Courte Oreilles Lake Association, and Lac Courte Oreilles Band of the Lake Superior Chippewa ("Petitioners") have shown in their initial brief and reinforce in this reply, Respondents erred when they rejected a more protective phosphorus criteria for Lac Courte Oreilles in 2016 and 2018, relying in part on a scientific analysis that is not as extensive as Respondents make it out to be. Respondents also ask the Court to overlook their failure to follow the parties' Stipulation in this case, as well as the inadequacies in the 2011 rulemaking process that set the deficient 15 mg/L phosphorus standard for two-story fishery lakes. It should not. The Court should grant this Petition, reverse the DNR's denial of the rulemaking petition to set site-specific phosphorus criteria, and remand for a corrected decision based on a correct interpretation of statute—one that assures compliance with the lake's designated uses.

## FACTS

Petitioners rely on the statement of facts in their initial brief, and address Respondents' additional facts as appropriate in their argument, below.

ARGUMENT

For the reasons below and in Petitioners' initial brief, the Court should find 1) Respondents violated the parties' 2017 Stipulation, 2) improperly denied the Petition for site-specific rulemaking—twice, and 3) the 15 mg/L standard for phosphorus in NR 102 is not sufficiently protective under Wisconsin law.

I. RESPONDENTS VIOLATED THE STIPULATION AND ORDER.

Respondents do not contend that they developed an SSC for Lac Courte Oreilles (Resp. Br. at 37-39), their primary obligation under the parties' 2017 Stipulation and subsequent Court order (*see* Stip., ¶¶ 3.a, 3.e.; 4/4/17; Order, 4/5/17 ("[t]he parties are ordered to comply with the provisions of the Stipulation"). Rather, they say that DNR "went as far as it could to legally comply with the Stipulation" and did not "apply an excessively narrow interpretation of its authority" in declining to propose an SSC in 2018. (Resp. Br. at 38.)

The legal and factual merits of the DNR's position on the SSC—the "why" of Respondents' failure to comply with the Stipulation and Court's order—is a different issue. *See* Section II.C., *infra*. For now, it is sufficient to note the Respondents did not develop an SSC, as contracted in the Stipulation. Respondents' argument that they did not abuse their discretion or "maliciously enter into the Stipulation simply as a delay tactic" are also irrelevant to whether they violated it. The DNR's mindset is not at issue under the applicable standard of review because the terms of the Stipulation are plain: Respondents were to "develop a proposed SSC for Lac Courte Oreilles" and, what is more, do so "as expeditiously as practicable." (Stip., ¶ 3.e.; *see also id.* ¶ 3.a.) In any case, Petitioners have not accused Respondents of being "malice-filled" or abusing their power. (Resp. Br. at 16-

17.)[1] Rather, the facts of this case indicate an agency that has been too hesitant to exercise its statutory mandate to protect surface waters, based on legal interpretations that are not consistent with this mandate.

For these reasons, the Court should *not* find, as Respondents have requested, that the DNR complied with the Stipulation. (Resp. Br. at 38-39.)[2] To the extent it is relevant, the Court should also reject the argument that Respondents complied "to the extent legally possible," since Respondents would have been following the law by setting an SSC, not violating it. *See* Section II.C., *infra*. The Court should find that DNR violated the Stipulation and enforce its Order directing the parties to comply with the Stipulation.

## II. RESPONDENTS IMPROPERLY DENIED THE PETITION FOR SITE-SPECIFIC RULEMAKING.

The Court should find that DNR improperly denied the 2016 Petition for Site-Specific Rulemaking, both in its 2016 and 2018 denials.

### A. *This Issue is Not Moot.*

As an initial matter, Respondents argue that whether they properly denied the 2016 rulemaking petition for a site-specific criteria is moot. (Resp. Br. at 24-25.) Their logic is circular--essentially, that the Court cannot review or remand the denial because Respondents already decided to deny the petition. (*See id.*) This ignores the fact that the propriety of Respondents' 2016 and 2018 denials is the central issue in this case.

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[1] Since Respondents brought it up, and to be frank, Petitioners have had concerns for many years that Respondents are overall too influenced by the cranberry industry, which has a significant presence on Lac Courte Oreilles and which contributes over 500 pounds of phosphorus to it every year. (R.1001.) But these concerns are far short of believing the Respondents are "malice-filled." The parties have worked cooperatively on many projects over the years, even if they disagree about Petitioners' current effort to improve water quality in the lake.

[2] Petitioners note Respondents have evidently abandoned their position that their compliance with the Stipulation renders the issues in this case moot. (*See* Mot. for Court-Conducted Mediation, 8/24/18.)

If the Court finds the Respondents made errors in discretion, fact, or law in denying the Petition, Wis. Stat. § 227.57(4)-(8) **permits** and, in some cases, **requires** the Court to remand the decision back to the agency for further action. Unlike the cases Respondents cite, there are merits issues to be decided and relief to grant. *See Wisconsin's Envtl. Decade, Inc. v. PSC*, 79 Wis. 2d 161, 171, 255 N.W.2d 917 (1977) ("a motion to dismiss for mootness . . . does not request a determination on the merits"). To the extent Respondents claim the Stipulation and initiation of rulemaking moots the 2016 petition for judicial review, they are wrong: Petitioners did not dispose of or dismiss any claims because Respondents did not finish the rulemaking process or hold up their end of the bargain. Similarly, Petitioners reject any inference that through the Stipulation, they "stayed" the "2016 Petition for Rulemaking." (*See* Resp. Br. at 25.) The Stipulation only stayed the Court's decision on the issues raised in the petition for judicial review, not the request for rulemaking itself. (Stip., 4/4/17, at 2.) As for Respondents' decision in 2018 to again reject the requested SSC rulemaking, Respondents identify no barrier to remand beyond their decision denying the petition—which, again, is the main decision being challenged in this case, and which Petitioners specifically challenged in the 2018 petition for judicial review which has been consolidated with this case. The case is not moot.

Even were Respondents somehow correct about mootness, case law establishes that courts may decide controversies that are moot where the issues concerned are of "great public importance," "likely to arise again and should be resolved by the court to avoid uncertainty," or "capable and likely of repetition yet evade[] review because the appellate process usually cannot be completed." *State* ex rel. *La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983). *Wisconsin's Environmental Decade* is particularly on

point. 79 Wis. 2d 161, 340 N.W.2d 460 (1977). There, the court applied a mootness exception to a Wis. Stat. ch. 227 judicial review of a Public Service Commission order that was superseded by a modified order. *See id*. at 173, 255 N.W.2d 924-25. The court concluded that the case concerned "environmental issues of public importance" that "will defy review" if not resolved by the court. *Id*. The environmental issues in this case, relating to DNR's recent authority to set site-specific phosphorus criteria and the procedures for doing so, are likewise of public importance and should be decided on their merits.

The Court should reject Respondents' argument that this issue is moot.

B. *The 2016 Denial Was Improper*.

The DNR's cursory, non-substantive denial of the 2016 rulemaking petition was procedurally flawed and relied on errors of law and discretion.

1. <u>The Board Should have Granted or Denied the Petition</u>.

Respondents contend then-Director of DNR's Water Quality Bureau Susan Sylvester had authority to independently deny the rulemaking petition, without involvement of the Board. (Resp. Br. at 25-28.) It first contends that Wis. Stat. § 15.05(1)(b) does not apply to the DNR, because the DNR secretary is appointed. Petitioners agree that the first sentence of Wis. Stat. § 15.05(1)(b), regarding the *manner of selection* of the DNR secretary, does not apply to the DNR. However, the second sentence remains applicable because DNR is still governed by a board with ultimate policy-making authority, even if the secretary is selected by the governor. This interpretation is confirmed by Wis. Stat. § 15.34, which states that the DNR is created "**under the direction and supervision of the natural resources board**." Wis. Stat. § 15.34(1) (emphasis added); *see also In re Jeremiah C.*, 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193 (confirming the "statutory construction doctrine of *in pari*

*materia* requires a court to read, apply, and construe statutes relating to the same subject matter together," "in a manner that harmonizes them in order to give each full force and effect"). The division of power between the secretary and Board in Wis. Stat. § 15.05(1)(b) makes sense in this context: the secretary's duties are administrative, while the board's duties are "regulatory, advisory and policy-making." Respondents do not address Wis. Stat. § 15.34, and their interpretation of Wis. Stat. § 15.05(1) should be rejected.

Petitioners have not conceded that the DNR properly denied the 2016 petition for rulemaking. (Resp. Br. at 26.) They did assert that the agency, through Ms. Sylvester, *improperly* denied the petition, because the Board was not involved in this decisionmaking. That Ms. Sylvester put her denial on DNR stationary and used her title in the denial letter (Resp. Br. at 26-27) does not cure this fundamental problem. Respondents seize on the cover letter Petitioners filed with the petition to Ms. Sylvester's attention as another supposed concession, but as Petitioners' initial brief explained and the record reflects, they only did so because they had been in prior communication with her about the matter. (R.2701.) The petition itself was addressed to the Department of Natural Resources and served on the agency via the Secretary's office. (R.2705; *see also* Wis. Stat. § 227.12(3).) Petitioners had no dispute "communicat[ing]" about the petition or denial with Ms. Sylvester (Resp. Br. at 27), but they expected the decision to grant or deny the petition to be made by the Board.

Finally, Petitioners' interpretation does not contravene or neutralize Wis. Stat. § 227.12(3), as Respondents claim. (Resp. Br. at 27-28.) Petitioners agree that Wis. Stat. § 227.12 provides that an "agency" shall grant or deny a petition for rulemaking in writing. Yet Wis. Stat. §§ 15.34 and 15.05(1)(b) clarify that, consistent with its regulatory, advisory,

and policy-making authority, "agency" decisions on rulemaking are made by the Board, not agency staff. Indeed, the Board makes the decision on whether to initiate rulemaking in other contexts, as this case demonstrates. *E.g.*, R.4492-4497, Doc.#145 (showing Board approval needed for Lac Courte Oreilles SSC rulemaking request in 2017); *see also* Stip. ¶ 3.d. (noting Board must approve scope statement to initiate rulemaking under Wis. Stat. § 227.135(2); Wis. Stat. § 227.135(2) (providing "the body with policy-making powers" over the rule must approve the scope statement and "[n]o state employee or official may perform any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the statement of scope of the proposed rule until the governor and the individual or body with policy-making powers" approves the scope statement). Respondents have not explained why agency staff could make the same decision here.[3]

Respondents' decision failed to follow the law and was an erroneous exercise of discretion, and should be reversed and remanded. Wis. Stat. § 227.57(4), (5), (8).

2. <u>The DNR Improperly Deferred a Decision on the Petition</u>.

Respondents next contend they could deny the 2016 rulemaking for any reason at all—including its rationale here to deny any petitions for SSCs indefinitely, pending other rulemaking—as a matter that is "entirely discretionary." (Resp. Br. at 29).[4]

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[3] This problem was also on display in the 2018 rejection of Petitioners' request for site-specific criteria, where—even though the Board had voted to initiate rulemaking—Petitioners were notified by email from a Department of Justice attorney that the request was denied. (R.4838, Doc.#156.) While this was in part due to the present litigation, it is unclear whether the Board was notified of the decision, much less participated in it.

[4] Respondents include the DNR's rationale for denying the petition for emergency rulemaking, *see* Resp. Br. at 29, but the emergency rulemaking is no longer at issue in this case with the dismissal of issue 5 in the 2016 petition. The permanent rulemaking denial is at issue, and was the denial that relied on the overall rulemaking effort regarding SSCs. (R.3042.)

Discretion is not a free pass to any outcome:

> [d]iscretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

*Reidinger v. Optometry Examining Bd.*, 81 Wis. 2d 292, 297, 260 N.W.2d 270, 273 (1977). Moreover, contrary to DNR's argument that there are not "any criteria or considerations for denying a petition for rulemaking" (Resp's Br. at 29), Wis. Admin. Code § NR 102.06(7) *does* provide clear considerations and criteria for DNR, which are whether the petitioner has provided "site-specific data and analysis using scientifically defensible methods and sound scientific rationale" to justify the SSC. These, indisputably, are merits-based considerations and criteria, and DNR must demonstrate it acted on them. In this case, it did not.

The reasoning DNR provided for denying a permanent LCO SSC had no basis in the merits of Petitioners' petition, or the facts of record at the time. "As for permanent rules," it explained, "the Department is already engaged in a permanent rule making effort that we expect will result in a streamlined process for developing site specific phosphorus criteria… [and] [a]ccordingly… the department will 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. 3042-3043.) At the time, it anticipated the WT-17-12 rule package would take at least two years more, *id.*, which has long since passed (*see* Pet'rs Br. at 30 fn. 15-16). The reasoning that a future rulemaking *might* provide a new SSC process that Petitioners *might* be able to utilize at a future date to protect Lac Courte Oreilles was not a meaningful exercise of discretion on the merits of the Petitioners' SSC petition before DNR. It does not demonstrate that DNR exercised discretion according to the considerations and criteria of § NR 102.06(7).

Respondents refer to an SSC rulemaking they are in the process of conducting for the Wisconsin River Basin (Resp. Br. at 30) but it is unclear why. They appear to suggest they did not effectively repeal NR 102.06(7) because they are "currently developing phosphorus SSCs for three reservoirs in the Wisconsin River Basin." (Resp. Br. at 30, citing R.3042-3043.) This makes the denial of Petitioners' 2016 request for site-specific rulemaking even more inexplicable—the DNR was happy to deny the petition pending a larger rulemaking process to avoid "inconsistent development of site-specific criteria" in Petitioners' case, but it allowed other SSC rulemaking to proceed despite the larger rulemaking effort remaining incomplete. (Resp. Br. at 30.) Regardless, DNR has made the open declaration that it "will not be reviewing *or making approval decisions*" of SSCs until WT-17-12 is complete. (R. 3042-3043.) Presumably, if three Wisconsin River Basin reservoir SSCs are in fact being developed currently, they will not be approved as WT-17-12 is not even near completion.

This only reinforces Petitioners' position that § NR 102.06(7) currently has no effect and is de facto repealed. DNR makes no substantive argument against this, simply pointing to the "fact" that the rule still appears on the books. (Resp's Br. at 30 & n.1.) That point, as undeveloped as it is, does not counter DNR's express words that it would no longer consider or approve any SSC rulemaking petitions. (R. 3042-3043.) DNR may not effectively repeal a rule outside the specific procedures of Wis. Stat. §§ 227.114 through .21. Allowing DNR to do so here would open the door to *any* agency denying rulemaking by merely stating it preferred to try to promulgate something else at a later time. This is not the law under Wis. Stat. § 227.12 and Wis. Admin. Code § NR 102.06, and DNR's decision must be reversed. Wis. Stat. §§ 227.57(4), (5), (8).

C. *The 2018 Denial Was Improper.*

Lac Courte Oreilles is not achieving its designated uses, including its coldwater fishery, ***despite attaining*** the 15 ug/L phosphorus standard, and despite a strong body of science connecting phosphorus levels to low dissolved oxygen levels. Through its legal and scientific analyses, DNR essentially required Petitioners to rule out any other possible cause of impairment before it would set an SSC for phosphorus. The DNR did not correctly apply the law in rejecting Petitioners' request for a lower phosphorus standard, which affected its scientific analyses and discretion. The decision should be reversed and remanded. Wis. Stat. § 227.57(5), (7), (8).

1. The DNR Reads the Applicable Statutes Too Narrowly.

The DNR admits that, as it interpreted the statutory framework, "there is little discretion afforded to DNR based on the narrow confines" of statutes and rules "regarding the development of a SSC." (Resp. Br. at 36-37 (emphasis added).) Respondents' brief breezes past its broad obligations in Wis. Stat. § 281.15(1) to err on the side of protecting the public interest and water quality, returning repeatedly to Wis. Stat. 281.15(2)(c). (Resp. Br. at 33-34.) But even this provision is not as onerous as Respondents make it out to be.

Wis. Stat. § 281.15(2)(c) states that "[i]n adopting or revising any water quality criteria for the waters of the state," the DNR 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." Wis. Stat. § 281.15(2). This again reflects the priorities in Wis. Stat. § 281.15(1): DNR has leeway in assessing the stringency of a criteria, based on the Legislature's use of the words "reasonably necessary" as a modifier to the phrase "no more stringent than." However, the statute is clear that whatever criteria DNR selects must

**assure attainment** of the designated use for the water bodies in question. It does not mandate that DNR set a standard that "strives for" attainment, that is "likely to" achieve attainment, or even that will accomplish attainment "in most cases." DNR must promulgate a criterion that will assure—i.e., guarantee—attainment. *See* MERRIAM WEBSTER DICTIONARY (11th ed. 2004) (defining "assure" as "to make certain the coming or attainment of; guarantee"). Wis. Admin. Code § NR 102.06(7) does not—and could not—alter this analysis. In fact, because Respondents contend 15 ug/L is protective of the lake's designated uses, there can be no dispute that an even lower standard of 10 ug/L would also be protective.

In this case, the Respondents flipped the script: they wished to "assure" the SSC would not be too stringent, while accepting a lake water condition that they viewed as reasonably close to achieving Lac Courte Oreilles' designated uses. (R.5758, Doc.#210.) This is reflected in the 2018 TSD, where DNR omitted any mention of what was "reasonably" necessary, and used a three-pronged rubric that is not reflected in the statutes and rules:

> In order to establish a more-stringent phosphorus SSC, we must demonstrate 1) the designated uses are **not protected** by the statewide phosphorus criterion, 2) a **clear link** between phosphorus concentrations and protection of these designated uses, and 3) **that scientific evidence demonstrates that a more-stringent phosphorus concentration is necessary to protect the designated uses**.

(R.4842, Doc. #156 (emphasis added); *see also id.* R.4851-4852, Doc.#157.) Based on this rubric, DNR rejected the idea that "a phosphorus SSC should be established if phosphorus contributes to any amount of oxygen depletion," and that "a higher bar is required." (R.5762.) In contrast, the DNR permitted an EPA-recommended statistical analysis to

suffice to set the 15 ug/L to begin with, even though contrary evidence suggested the standard should be lower. *See* Section III.A., *infra*.

Based on Wis. Stat. §§ 281.15(1) and (2), the DNR must set standards that are more protective to "assure compliance" with designated uses, and not set standards that permit impairment based on concerns that they are too stringent, or before every other possible source of impairment has been ruled out.

2. <u>The DNR's Scientific Analysis Was Correspondingly Narrow</u>.

Reflecting its excessively narrow interpretation of law, the DNR did not correctly deploy its scientific and analysis techniques in assessing Petitioners' site-specific criteria request. The DNR cites Wis. Stat. § 281.15(2)(e) to claim it appropriately developed a technical support document "which identifies the scientific data utilized, the margin of safety applied and any facts and interpretations of those data applied in deriving water quality criteria," and that it "employ[ed] reasonable statistical techniques, where appropriate, in interpreting the relevant water quality data." (Resp. Br. at 33-34.) But the TSD reveals DNR relying on one, highly-demanding statistical test that did not link phosphorus to the impairment, to the exclusion of other scientifically-defensible evidence that did show such a link.

The linchpin of Respondents' scientific claim that they could not set a SSC for Lac Courte Oreilles is that DNR could not correlate hypolimnetic oxygen demand ("HOD")—essentially, oxygen consumption in the lower levels of the lake—to phosphorus concentrations. (Resp. Br. at 10.) However, DNR used only a single statistical test to evaluate whether such a correlation existed, which simply evaluated the existence of a linear relationship between a given year's mean summer phosphorus levels and the same year's

estimated HOD. (R.4871-4879; *see also* R.5883.) Yet DNR acknowledges HOD is impacted by several potential demands in the lake, including degradation of organic matter in the water column and degradation of organic matter in the sediment. (*See* R.4869.) Organic matter in the water column is usually a combination of factors like algae growth and external loading, but organic matter in the sediment is an accumulation of these factors over time. (R.5750-5751, Doc.#209.) By testing for HOD dependence just on summer mean phosphorus, DNR did not factor in the long-term impact of organic matter that has settled into the lake bed. (*Id.*) It also used a stringent test to determine what constituted a statistically significant correlation. (R.5750, Doc. #209.) Even using this statistical method, DNR found a correlation between HOD and phosphorus in Lac Courte Oreilles' East Basin but dismissed it for anecdotal reasons. (R.4876.)

Meanwhile, DNR discounted the well-known and scientifically defensible relationship between phosphorus and HOD as established in the scientific literature. (R.5747 & n.1-5, R.5751.) This includes the Minnesota Pollution Control Agency ("MPCA") lake nutrient criteria development document that DNR heavily relied on to set phosphorus levels in its 2011 rulemaking and its 2010 technical support document for that rulemaking. (R.4042, 4045 (citing literature), Doc.#129.) Summarizing the literature, the MPCA concludes, "[a]real and volumetric measures of hypolimnetic oxygen depletion **vary directly** with total phosphorus concentrations as modified by lake morphometry (Walker 1979 & 1985b)." (R.4045, Doc. #129 (emphasis added).) Also, a model commonly used by DNR to establish TMDLs (total maximum daily loads) for surface water bodies recognizes the relationship between phosphorus and HOD. (R.5752, Doc. #209.) This model applies the same equation as cited by Limnotech and the Tribe's scientific experts (Chapra and

Canale, 1991), but DNR dismissed it based on its flawed statistical test of correlation. (R.5751; R.4879 (Doc. #158); R.4880 (Doc.) The DNR dismissed this entire body of scientifically sound work in favor of its one, simple statistical test for a relationship between year-to-year phosphorus and HOD.

As for Musky Bay, the DNR focused on what it viewed as positive chlorophyll *a* and aquatic plant conditions. (R.4893, Doc.#158.) However, phosphorus in the sediment of Musky Bay has increased significantly since the 1970s, and due to its higher concentrations of phosphorus, is a contributor of phosphorus to the rest of the lake. (R.5752, Doc.#209.) The DNR also cited the lower phosphorus trends in the bay without considering that these trends may have been due to one cranberry grower installing closed loop system that addressed part of their discharges to the Musky Bay. (*Id.*) The DNR's overall reliance on chlorophyll *a* and aquatic plants was also questionable in this environment, where it found draft statewide metrics for these considerations met in the lake, yet the lake was still impaired. (R.5749, Doc. #209.) Notably, the DNR's response brief did not defend its use of draft rules to evaluate the SSC, even though these rules are not promulgated as law. (*See* Pets' Initial Br. at 36.)

These are just some of the flaws that Petitioners' scientific consultants and staff, including Ph.Ds. and engineers, identified with the 2018 Technical Support Document. (*See* R.5746-5756, Doc.##209-210.) In all, the TSD went out of its way to explain all possible sources of oxygen consumption except phosphorus and concluded that these sources must be fully investigated before anything further could be done. (R.5753, Doc.#210.) This approach is inconsistent with Wis. Stat. § 281.15(1) and (2).

3. <u>The DNR Should Have Granted the 2016 Petition for Site-Specific Rulemaking, and Set a Lower Phosphorus Standard that Assures Compliance</u>.

In this case, all parties agree that Lac Courte Oreilles is not attaining its designated uses, even while maintaining phosphorus concentrations below the statewide criterion of 15 ug/L. (*See* R.5746-5747, Doc.#209 (citing points of agreement in the parties' scientific analyses).) Phosphorus concentrations in Lac Courte Oreilles have increased over time, and HOD has increased over time. (R.57485750, Doc.#209.) The severity of fish kills has increased in LCO as a result of reduced oxygen concentrations. (R.4240, Doc.##101-102.) A reduction in phosphorus will have a positive impact on reducing HOD and move the lake towards attainment. (R.2759-2760.)

Under these circumstances, it is not just reasonably necessary, but absolutely necessary to establish a SSC for Lac Courte Oreilles at a level lower than 15 ug/l, and lower than existing phosphorus concentrations in the lake. Sound scientific rationale—contained in the scientific report attached to the 2016 petition for site-specific rulemaking—explains that 10 ug/L is a target for Lac Courte Oreilles that is no more stringent than reasonably necessary to assure achievement of the lake's designated uses. (*Id*.)

These should not be controversial principles. The DNR itself acknowledges that in its 2010 technical support document that the existing criterion of "15 ug/L is higher than the 10 ug/L associated with classic oligotrophic lakes" (R.3970, Doc.#127) and Lac Courte Oreilles is categorized by DNR as oligotrophic (R.5885, Doc.#215). The Minnesota Pollution Control Agency document DNR so heavily relies upon acknowledges <u>on page 54</u> that "[f]or typical lakes, total phosphorus concentrations above 10-15 ug/L will usually result in the depletion of hypolimnetic oxygen concentrations." (R.4045, Doc.#129.) The

MPCA also cites a study from British Columbia that found a range of total phosphorus concentrations between 5-15 ug/L was proposed for the protection of salmonid (coldwater) fisheries, which includes cisco and lake whitefish. (*Id.*) Likewise, MPCA stated that "It was noted that oxygen depletions generally began to occur when TP concentrations exceeded 10 ug/L, which is often used as an upper boundary for oligotrophy (Nurnberg, 1996)." (*Id.*)

Achieving 10 ug/L in LCO is reasonably achievable as demonstrated by these resources and the draft TMDL prepared by LimnoTech and the Tribe's Conservation Department. (R.971.) The Court should reverse and remand the Respondents' decision to reject the site-specific criterion, with directions to set a phosphorus criterion that **assures attainment** of the lake's designated uses.

## III. THE 15 mg/L STANDARD FOR PHOSPHORUS IN TWO-STORY FISHERY LAKES IS INSUFFICIENTLY PROTECTIVE UNDER WISCONSIN LAW.

If the Court does not reverse and remand the DNR's decision to reject the petition for site-specific rulemaking, it should evaluate the DNR's default 15 ug/L phosphorus standard for two-story fishery lakes.

### A. *Wis. Admin. Code § NR 102.06(4)(b)1 exceeds the legislative mandate of Wis. Stat. § 281.15 because DNR misapplied the "supporting" evidence it relied on, promulgating a rule that directly conflicts with the statutory language.*

Wisconsin's statewide 15 ug/l total phosphorus water quality standard for two-story fishery lakes exceeds the scope of DNR's authority under Wis. Stat. § 281.15 because the evidence DNR cited in support of the standard does not, in fact, support it. DNR understood the 15 ug/l standard would not protect the public interest or the designated uses of these lakes, and yet chose to punt the issue to future, hypothetical rulemakings that may take place in the future under the site-specific criteria rule. This logic defies the mandate of Wis. Stat. § 281.15(2)(c), and the 15 g/l statewide criteria must be stricken.

The directive of Wis. Stat. § 281.15(1) is clear: "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 … In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest." In order to do that, the Legislature further provided "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." § 281.15(2)(c).

Petitioners challenge the minimal, contradictory evidence and lack of rational scientific analysis DNR used to reach its 15 ug/l statewide criterion. DNR's approach to setting the 15 ug/l standard, as explained in its 2010 Technical Support Document, was overly simplistic. DNR argues it followed a methodology recommended in the EPA guidelines, which is to use a mean concentration of reference lake sites plus one standard deviation, and that that method produced the 15 ug/l number. (Resp's Br. at 46; R. 3970.) But from there, DNR's justification for promulgating 15 ug/l disintegrates. Turning from method to the criterion itself, DNR explains that 15 ug/l exceeds **both** "the 10 ug/l associated with classic oligotrophic lakes [in the Carlson Trophic Status Index] and the 12 ug/l promulgated by the Minnesota Pollution Control Agency" and "would seem to result in a concentration too high to support a lake trout fishery." (*Id.*) A single figure from the Minnesota report is included, demonstrating that indeed, 15 ug/l would be too high for a lake trout fishery. (R. 3971.)

That is all. The only two pieces of scientific evidence DNR analyzed to determine whether its methodology produced a justifiable criterion both answered "no." DNR did not cite to any other studies or data suggesting 15 ug/l would suffice in Wisconsin. It simply

followed a process, conceded the resulting criterion would be too high, and concluded that "[g]iven 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 entire section is ten sentences. (*Id.*)

To be clear, it is not Petitioners who claim the Minnesota report or the Carlson Trophic Status Index should be persuasive and relied upon to determine Wisconsin's statewide phosphorus for two-story fishery lakes—it is Respondents. Likewise, it is not Petitioners who suggest that whether Wisconsin's criterion is too high to support lake trout fisheries is relevant in determining a statewide criterion for two-story fishery lakes—it is Respondents.[5] And it is not Petitioners who conclude that all of this evidence creates an "apparent conflict" in promulgating 15 ug/l as the statewide standard—it is Respondents.

Respondents' arguments, then, that Petitioners have failed to demonstrate how the Minnesota report, Carlson Trophic Status Index, or lake trout fishery data are relevant to Wisconsin's statewide criterion, are twisted. *See* Resp.'s Br. at 46 ("Petitioners fail[] to paint the whole picture for the court…Very few two-story fisheries in Wisconsin have lake trout;" "Petitioners imply that DNR's final criterion is not in line with the Carlson Trophic Status Index…[but] fail to explain how the state's applicable statewide phosphorus criterion is in line with this index…") and 47 ("[T]he 12 ug/l criterion in Minnesota's code only applies to lakes that support naturally reproducing lake trout…Petitioners did not submit any data or analysis on other two story lakes with lake trout in the state."). It is not Petitioners' task to

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[5] Respondent also implies, without explanation, that it is somehow relevant that Lac Courte Oreilles itself does not support lake trout. (Resp.'s Br. at 46, 49.) This has no bearing on whether the statewide criterion DNR promulgated in 2011, which applies to Lac Courte Oreilles, lake trout fishery lakes, and *all* two-story fishery lakes, exceeds its statutory authority. Petitioners address concerns specific to Lac Courte Oreilles in section II.C., *supra*.

explain or justify why DNR cited the evidence it did as reliable and relevant to Wisconsin's rulemaking process for two-story lakes; it is Petitioners' task to inform the courts when DNR errs in its interpretation and application of that evidence and, in so doing, produces a rule that exceeds its statutory authority.[6] Wis. Stat. § 227.40(4)(a).

Respondent takes issue with Petitioners' quotation of DNR's conclusion that 15 ug/l "would seem to result in a concentration *too high* to support a lake trout fishery," R. 3070, asserting that with this statement, DNR is merely conceding 15 ug/l "may be on the high end" (Resp's Br. at 45). Setting aside the linguistic gymnastics DNR's assertion requires, its record citation to the Minnesota report does not prove its point. There, the Minnesota report finds that "[a] review of TP…data for the lakes that afford optimal habitat for lake trout… suggests that summer-mean TP is generally <u><15 mg/L</u> [i.e. but not including] and typically in the 8-10 ug/L range." (R. 4051.) While it later describes 15 ug/L as an "upper threshold," in context the discussion does not contemplate 15 ug/L as *included* in the acceptable range; the range is *less than* 15. (R. 4052.)

Respondents also misinterpret Petitioners' critique of DNR's methodology, arguing that the different characteristics of various water bodies (i.e. rivers and streams versus lakes and reservoirs) call for different methodologies. (Resp.'s Br. at 47.) This misses the point. Petitioners do not argue that all water bodies should be treated the same; they critique the short shrift DNR gives two-story lakes in the face of contrary available evidence, namely the Minnesota report, in comparison to the weight that same source of evidence is given in

[6] DNR also argues it acted within its statutory authority in promulgating the 15 ug/l phosphorus criteria for two-story fisheries "by the fact that it was ultimately promulgated and is now valid law." (Resp. Br. at 43-44.) The promulgation of a rule is not definitive proof of its validity; rather, it creates only a rebuttable presumption. Wis. Stat. § 227.20(3); *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 2015 WI 63, ¶ 66, 363 Wis. 2d 430, 451, 867 N.W.2d 364, 374.

DNR's analysis of shallow lakes, deep-drainage lakes, and deep reservoirs. (Pet'rs Br. at 44.) In those cases, DNR closely adheres to the Minnesota report's analysis and conclusions. It does not do the same for two-story fishery lakes and does not explain why, simply noting that the Minnesota report is in "apparent conflict" with the 15 ug/l standard DNR seemed to have already determined it would promulgate for two-story fishery lakes. (R. 3970.)

In sum, the legislative mandate of Wis. Stat. § 281.15(2)(c) requires DNR to set a phosphorus water quality standard for two-story lakes that "*assure[s] attainment* of the designated use for the water bodies in question" (emphasis added). Based on its own analysis contained in the 2010 Technical Support Document, 15 ug/l does not assure attainment of the designated uses of two-story fishery lakes, and the criterion must be stricken.

B. *Wis. Admin. Code § NR 102.06(4)(b)1 violates the public trust doctrine because it is not sufficient to protect the public use, and DNR knew this when it promulgated it.*

"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." *Wisconsin's Envtl. Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis.2d 518, 533, 271 N.W.2d 69, 76 (1978). The public uses which are protected by the public trust doctrine include fishing and recreation. *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 118, 81 N.W.2d 69, 76 (1978). It is beyond serious dispute that two-story fishery lakes subject to the 15 ug/l phosphorus standard, such as Lac Courte Oreilles, provide fishing opportunities to the public, and DNR has not found otherwise. The public trust doctrine, therefore, protects these uses for the public benefit.

DNR argues that in its rulemaking process, it concluded 15 ug/l was "an adequate level of protection to maintain Wisconsin's coldwater fisheries (providing for SSC exceptions when needed)." (Resp's Br. at 48.) That was **not** DNR's conclusion. Instead,

DNR concluded 15 ug/l was "too high" and therefore **not** an adequate level of protection for at least one subcategory of Wisconsin's two-story fisheries—lake trout fisheries. It further concluded that adequate protection of Wisconsin's two-story fishery lakes could be left to the SSC rulemaking process at a later time. Although DNR repeatedly attempts to trivialize the number of lake trout fisheries in Wisconsin (Resp's Br. at 46, 49)—a number that is not in the record—the fact remains that at least one subcategory of two-story fishery lakes that is excluded from protection under the 15 ug/l standard. And notably, DNR does not and cannot argue that lake trout fisheries may be excluded from protection under a statewide total phosphorus merely because they are low in number.

The purpose of § NR 102.06(7), the site-specific criteria rule DNR so relies upon, is to modify a water quality criterion for "a *specific* surface water segment or waterbody," not to compensate for an entire category of waterbodies left without sufficiently protective water quality standards after DNR's statewide standards are implemented. In short, DNR treats the existence of the SSC rulemaking process as an exemption from its statutory obligation under Wis. Stat. § 281.15. That is not the purpose of SSC rulemaking.[7] Furthermore, as this case has shown, getting an SSC established for a particular lake is neither a speedy nor simple process, further undermining the ability of the SSC process to compensate for the inadequate statewide standard.

Lastly, DNR argues that Petitioners' challenge to the statewide 15 ug/l total phosphorus standard for two-story fishery lakes will leave these lakes, including LCO, without any total phosphorus water quality standard whatsoever. (Resp's Br. at 50.) While

[7] DNR's assurance that SSC rulemaking will compensate for the deficiencies of any statewide standard is particularly ironic where, as here, it has declined to implement such an SSC for Lac Courte Oreilles despite volumes of evidence proving the 15 ug/l statewide standard is not sufficiently protective of the lake. *See* Section II.C., *supra*.

Petitioners appreciate DNR's concern, the Clean Water Act (CWA) ensures the concerns are temporary. Section 303 of the CWA requires all states, including Wisconsin, to adopt water quality standards applicable to intrastate waters like two-story fishery lakes. 33 U.S.C. § 1313. When a state revises or adopts a new standard, as would be the case if 15 ug/l is stricken, the new standard must be submitted to the EPA Administrator. 33 U.S.C. § 1313(c)(2)(A). DNR acknowledges this. (Resp's Br. at 49 ("[R]emoval of that statewide criterion would again have to be reviewed and approved by EPA to determine whether the absence of a statewide applicable phosphorus criteria for two-story fisheries is consistent with the Clean Water Act.").)

However, the CWA's oversight does not end there. If the new standard is not consistent with the CWA, the Administrator must notify the state within 90 days, specifying the changes required. 33 U.S.C. § 1313(c)(3). If the state does not adopt those changes within 90 days, the Administrator steps in to promulgate the standard herself. *Id*. In sum, invalidation of the statewide 15 ug/l total phosphorus standard will not leave Wisconsin's two-story fishery lakes standard-less and vulnerable—the CWA provides a backstop. The DNR is also free to set a new, more protective statewide standard for two-story fishery lakes than the 15 ug/L standard challenged here, or the absence of a standard, and present those changes to the EPA through a future rulemaking.[8]

[8] Respondents make an undeveloped argument that Petitioners should petition to EPA for a different criterion for Lac Courte Oreilles. (Resp. Br. at 19.) The availability of a different process, even if Petitioners were inclined to use it, does not absolve Respondents of their responsibility to set standards that assure designated uses are protected.

## CONCLUSION

The saying goes that the definition of insanity is doing the same thing over and over and expecting different results. That is an exaggerated version of the situation here: despite Lac Courte Oreilles' current impairment, and strong, scientifically defensible evidence that phosphorus is impairing Lac Courte Oreilles at current levels, which are currently just below 15 ug/L, Respondents maintain that a 15 ug/L standard is the appropriate standard for the lake. The Court should find the Respondents violated the April 2017 Stipulation and Order, improperly denied the 2016 Petition for Site-Specific Rulemaking in 2016 and 2018, or alternatively, set the statewide phosphorus standard too high for two-story fisheries to begin with. It should reverse the denial of the rulemaking petition and remand it to DNR to set a lower, more protective SSC for Lac Courte Oreilles.

Dated this 21st day of December, 2018.

PINES BACH LLP

*Electronically Signed by: Christa O. Westerberg*

____________________________________
Christa O. Westerberg, SBN 1040530
122 W. Washington Avenue, Suite 900
Madison, WI 53701
(608)251-0101 (ph.)
(608)251-2883 (fax)
cwesterberg@pinesbach.com

LAW OFFICE OF SIVERTSON AND BARRETTE, P.A.
Alf E. Sivertson
1465 Arcade Street
Saint Paul, MN 55106
(651)778-0575
alf.sivertson@sivbar.com

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS

*Electronically signed by: Dyllan Linehan*
Dyllan Linehan, SBN 1104751
13394 W. Trepania Road
Hayward, Wisconsin 54843
(715) 634-7423
(715) 634-8934 (Fax)
Dyllan.Linehan@lco-nsn.gov