



in passing, they did not go into any further analysis. (Pet'rs' Br. on the Merits 20; Resp'ts' Br. on the Merits 31.) Therefore, DNR now asks the Court to consider a guiding principle of contract law in its analysis, and to reconsider its final ruling that required DNR to propose a site-specific phosphorus criterion (SSC) for Lac Court Oreilles (LCO).

First, contract law does apply because “[a] stipulation is a contract made in the course of judicial proceedings.” *Johnson v. Owen*, 191 Wis. 2d 344, 349, 528 N.W.2d 511 (Ct. App. 1995). Interpretation of the terms of a stipulation, like the interpretation of the terms of a contract, is a question of law.” *Stone v. Acuity*, 2008 WI 30, ¶ 74, 308 Wis. 2d 558, 747 N.W.2d 149. Courts may consider principles of contract law in interpreting stipulations. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶ 13, 257 Wis. 2d 421, 651 N.W.2d 345.

Second, it is a long-standing principle of contract law that any contract that is contrary to the provisions of any statute is void. *Melchoir v. McCarty*, 31 Wis. 252, 254 (1872). The authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. *Peppertree*, 2002 WI App 207, ¶ 27. A contract that violates the uniform taxation clause of the Wisconsin Constitution is void. *Cornwell v. City of Stevens Point*, 159 Wis. 2d 136, 140-141, 464 N.W.2d 33 (Ct. App. 1990), pet. to review denied. In this case, DNR may propose a phosphorus SSC for LCO only if the SSC complies with the provisions of Wis. Stat. § 281.15(2) and Wis. Admin. Code § NR 102.06(7). It does not, because as discussed below, the science specific to LCO does not support a phosphorus SSC for LCO.

### **A. Applicable Law**

Site-specific criteria for individual lakes may be adopted only in accordance with the law that governs the establishment of such criteria. General authority for adopting any water quality criteria is found in Wis. Stat. § 281.15. Specific to adopting or revising any water quality criteria for any portion of waters of the state, the DNR shall “establish 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)(c), emphasis added.

Relevant to phosphorus, Wisconsin law provides that “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.” Wis. Admin. Code § NR 102.06(7), emphasis added.

Hence, a site-specific criterion must be just that—site-specific. It must be based on and justified by the data from the particular waterbody for which the SSC is being proposed. Without such supporting data, a phosphorus SSC is not warranted under the applicable law.

### **B. Applicable Science.**

In order to justify a phosphorus SSC for LCO, the data specific to LCO must demonstrate that the new criterion will be protective of the designated use, and is no more stringent than is reasonably necessary to attain the designated use. Wis. Stat.

§ 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7). The data do not show that these requirements are met, and therefore DNR cannot propose a phosphorus SSC for LCO that complies with the statute.

To meet the statutory requirements, the LCO data and the analysis of that data must indicate that a phosphorus criterion different than the current one is expected to meet the designated use. The designated uses for LCO are coldwater aquatic life and recreation. (R. 4852.) Although DNR does not dispute that the coldwater fish in LCO are struggling because of low dissolved oxygen, the data do not show that excess phosphorus is the cause. One set of data is particularly compelling: during the years of 1988—1996, total phosphorus in LCO was consistently very low (6–9 ug/L). (R. 4875, 5763.) This number was consistently lower than the 10 ug/L that Petitioners are now proposing as a phosphorus SSC for LCO. Nevertheless, during that same time period, dissolved oxygen was similar to today's levels, and coldwater fish habitat, which is the most sensitive designated use, was insufficient during many of those years. *Id.* This period can be considered a test of what would happen if total phosphorus was lowered, and it indicates that even attaining a concentration of 6—9 ug/L would not achieve the desired outcome of improved dissolved oxygen, or ultimate attainment of designated uses. (R. 5763.) There is more information in DNR's Technical Response dated May 16, 2018, (R. 5762-5765.) that demonstrates that the data do not show that lowering the total phosphorus to 10 ug/L would attain the designated use, but this is one compelling example of the science.

The regulations do not require a 100% degree of certainty that changing the phosphorus SSC would attain the designated use, only a reasonable degree. Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7). However, in this case through analysis of an extensive dataset from LCO, the evidence shows that there is very little correlation between phosphorus and low dissolved oxygen levels, that a lower phosphorus concentration is not expected to improve dissolved oxygen or attain the designated use, and that other factors are likely causing the problems seen in this lake. (R. 4869-4871, 5763.) On each of these counts, the data show that the statutory requirements are not met, and therefore DNR cannot propose a phosphorus SSC for LCO. (R. 5763.)

It would unquestionably be easier for both Petitioners and DNR if the science did show that establishing a lower criterion for total phosphorus were the magic bullet that would improve water quality for LCO, but that is not the case. As discussed in DNR's Technical Support Document, there are several other factors that may outweigh the effects of phosphorus on dissolved oxygen levels. (R. 4869.) Further studies of LCO could establish the true causes of the problem, and the work to improve LCO's water quality could then be focused on the true causes of the problem.

**C. DNR cannot propose a phosphorus SSC for LCO that is in compliance with both the applicable law and the science specific to LCO.**

As noted above, it is a long-standing principle of contract law that any contract that is contrary to the provisions of any statute is void. *Melchoir v. McCarty*, 31 Wis. 252, 254 (1872). The authority to adopt a consent decree comes only from the statute

which the decree is intended to enforce. *Peppertree*, 2002 WI App 207, ¶ 27. The court is free to reject agreed-upon terms as not in furtherance of statutory objectives. *Id.* In this case, to the extent that the Stipulation requires the DNR to propose a phosphorus SSC for LCO, that part of the Stipulation is void and should be rejected by the court. Specifically, setting a more stringent criterion for a substance that is not likely at the root of the problem—and which the historic record shows is not likely to fix the problem even at very low levels—is more stringent than necessary. DNR cannot propose a phosphorus SSC for LCO, and still comply with Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7), as demonstrated by the site-specific data discussed above. Accordingly, DNR asks the Court to reconsider its Order that requires DNR to propose a phosphorus SSC for LCO, to find that the science and law do not justify a phosphorus SSC for LCO, and to find that to the extent that any part of the Stipulation may require DNR to take an action that is not authorized under Wis. Stat. § 281.15(2)(c) and Wis. Admin. Code § NR 102.06(7), that part of the Stipulation is void.

**D. DNR acted in good faith in its efforts to develop a scientifically-supported phosphorus SSC for LCO.**

The duty of good faith and fair dealing is implied in contracts. *Peppertree*, 2002 WI App 207 ¶ 18 fn. 9. The concept of good faith “excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). Some of the types of behavior that have been recognized in judicial decisions as bad faith include “evasion

of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance . . .”. *Id.* at 797.

In this case, DNR acted in good faith. DNR staff began the SSC analysis with the hypothesis that low dissolved oxygen in LCO was indeed caused by high phosphorus levels. (R. 5763.) However, as described in some detail above, this hypothesis turned out not to be supported by the data specific to LCO. *Id.* There was no bad faith in play here; there was good faith in undertaking a thorough analysis of the applicable data. Making a decision that comports with science is not bad faith, whether or not it is a decision with which Petitioners agree.

**II. Respondents did comply with the Stipulation because they took the action that was authorized by Wis. Admin. Code § NR 102.06(7).**

Paragraph 3.a of the Stipulation states that DNR agrees to propose a phosphorus SSC for LCO “as authorized by Wis. Admin. Code § NR 102.06(7).” Pursuant to that paragraph, DNR’s action must be taken in compliance with the cited regulation. As shown above, the data specific to LCO do not support that DNR can establish a phosphorus SSC that is in compliance with Wis. Admin. Code § NR 102.06(7). DNR commenced the path of rule-making for a phosphorus SSC for LCO, until it reached roadblocks showing that the site-specific science does not support such a rule. (R. 4850-4851.) Accordingly, DNR asks the Court to reconsider its finding that DNR did not comply with the Stipulation, to find that DNR made a good faith effort to develop a phosphorus SSC for LCO, and to determine that DNR complied with the Stipulation to the extent that it was able to do so under Wis. Stat. § 281.15(2) and Wis. Admin. Code § NR 102.06(7).

For all the reasons set forth above, DNR requests that the Court grant its Motion for Reconsideration.

Dated this 11th day of April, 2019.

JOSHUA L. KAUL  
Attorney General of Wisconsin

Electronically signed by:  
Lorraine C. Stoltzfus  
LORRAINE C. STOLTZFUS  
Assistant Attorney General  
State Bar #1003676

Attorneys for Respondents Wisconsin  
Department of Natural Resources, et al.

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-9226  
(608) 267-2778 (Fax)  
stoltzfuslc@doj.state.wi.us